1 Introduction

A principle of subsidiarity concerns how to *establish*, *allocate*, or *use* authority. It states a *rebuttable presumption for the more local unit* – a presumption for more proximate authority. Or so this Element maintains.

'Subsidiarity' has become a popular term in scholarship about international law, not least due to its role in the European Union (EU). Several authors also nominate subsidiarity as a 'structuring principle' for international law, or even for global or planetary governance (Lamy 2012 in Broude 2016: 57). Yet the term 'subsidiarity' is so vague and contested that an essay on it may seem Sisyphean (Van Kersbergen and Verbeek 2007). It is perhaps among the concepts that 'make perfect sense in practice but for which it seems impossible to develop a theory' (Howse and Nicolaïdis 2016: 259). Clarity may even threaten its usefulness: allegedly 'subsidiarity' quelled fears of centralized authority to the EU and the European Court of Human Rights (ECtHR) only due to obfuscation (Lecheler 1993, Marquardt 1994, Fabbrini 2018).

Yet it is premature to conclude that 'subsidiarity' is an essentially contested concept 'which inevitably involves endless disputes about their proper uses' (Gallie 1956: 169). Any such conclusion is provisional. Few have addressed and assessed its philosophical underpinnings, especially outside the EU context. Systematic reflection may at least raise 'the level of quality of arguments in the disputes' (193), reduce obscurity, and strengthen criticisms. Or so this volume seeks to show. Attention to features and justifications of different conceptions of subsidiarity helps us understand where we disagree, what is at stake, what are better accounts, and how and when – if at all – subsidiarity might be of service, in international law and elsewhere.

Critics object that it offers Eurocentric support for unjust institutions ranging from the patriarchal family to colonial empire. Subsidiarity is said to offer only instrumentalist excuses for existing institutions, ignoring any intrinsic value they may have, yet offers no critical standards to assess them. In international law subsidiarity protects sovereign states unduly against interference and obligations, even wicked regimes (Dyzenhaus 2010), and even against collective responses avert human rights tragedies or climate crises. The present reflections do not defend any theory of subsidiarity against these charges. Reflection may identify, strengthen, and assess criticisms of subsidiarity, and perhaps improve our responses.

This Element assumes that a principle of subsidiarity concerns how to *establish*, *allocate*, or *use* authority within a social, political, or legal order, including reviewing the actions of other bodies. Subsidiarity states a rebuttable presumption for the local (Kaufmann 1988, Blichner and Sangolt 1994, Follesdal 1998). It

places the burden of argument with attempts to centralize authority: Tasks or legal powers should rest with the more local unit unless allocating them to a more central unit achieves certain objectives more efficiently or effectively.

Compare subsidiarity principles to some alternatives. We may need no ordering principle among authorities (Bull 1977: 264–769) – witness the plethora of treaties states have used to solve their problems. A *list* may allocate authority over specific issues, as in the EU. A third alternative could be a (rebuttable) preference for *centralized* authority, for instance, as when a constitution leaves unmentioned authority with central authorities. Yet another alternative is the 'all-affected' principle, that those affected by decisions should decide (Dahl 1970: 49, Whelan 1983, Goodin 2007). Some have used 'subsidiarity' in this sense (Held 2004: 374, Barber 2018: 187).

1.1 Overview

Part 1 of these reflections starts with the many versions of subsidiarity and turns to assess which of them may be more normatively justifiable. Part 2 considers how subsidiarity may contribute to justify international law and operate within it. Space limitations require that references to others' contributions replace detailed arguments. Any contributions are philosophical rather than legal. The reflections might at best guide international legal scholars faced with the highly 'ambiguous or obscure' term 'subsidiarity' in treaties, or who ask whether subsidiarity is, or should be, a source of international law in the form of a 'general principle of law'.

The definition of subsidiarity deliberately leaves many issues open, which different *conceptions* of subsidiarity specify differently. *Theories* of subsidiarity offer normative justifications of some of these conceptions: why and when actors might regard a particular conception of subsidiarity as a binding rule so that use of authority consistent with that conception is more legitimate.

Section 2 provides examples, expressions, and justifications of subsidiarity in several cultures and continents. These traditions exhibit *patterns* of behaviour, rules of social or legal *practices*, and use subsidiarity as legal *principles* for institutional design and review. Our main interest is not the patterns of behaviour we may describe in terms of subsidiarity, but rather practices where actors are guided by reference to subsidiarity or similar presumptions (Manning 2011, Waldron 2013). The sketches are not authoritative accounts but rather invitations to 'deparochialize' this topic (Williams 2020). They still challenge views that subsidiarity is only a European tradition serving to protect state immunity.

Section 3 provides a taxonomy of elements that vary among conceptions of subsidiarity: which institutions to have, how to allocate authority among them,

and how they should use it. The theories differ about the objectives of the polity, the domains and roles of local units and central bodies, and who they grant the authority to decide such issues. The variations have striking institutional implications.

Section 4 summarizes six normative justifications for various such conceptions, from Immunity, Non-domination, Freedom, Efficiency, Perfectionist Justice, and Legitimacy. All justify authority by how it protects or furthers various interests of individual persons who are regarded as the ultimate unit of normative concern. The order of presentation roughly reflects the decreasing immunity of local units and increased attention to relations 'below' the state down to persons. The former, more *immunity-preserving* conceptions are less convincing than the later, *person-promoting* conceptions of subsidiarity. Many of the former are European, while the latter more justifiable versions include some also found outside Europe.

Section 5 draws six observations that help respond to the objections mentioned earlier, and which have implications for international law. The different accounts yield widely different conclusions about who should have what sorts of authority. They only contribute more specific conclusions when the ultimate objectives are given. Some theories support distributive obligations across local units, for instance, due to unfair starting points or unfair division of benefits from cooperation. Other accounts perpetuate injustice as we may see it. The more immunity-preserving theories only consider the risk to individuals of domination or tyranny by external bodies, they ignore issues of distributive justice among local units, and they lack 'quality control' concerning how local authorities treat individuals within or outside their borders. The 'person-promoting' conceptions of subsidiarity are less objectionable, but also offer weaker support for subsidiarity.

Part 2 considers contributions of subsidiarity about and within international law.

One central concern is that international law seems to fit better with the less justifiable immunity-preserving conceptions of subsidiarity than with person-promoting conceptions. This may challenge the normative legitimacy of international law. However, person-promoting conceptions may also explain, structure, and perhaps justify many aspects of international law. A second topic is to explore possible contributions of such conceptions of subsidiarity to international law. To present and assess these we consider whether subsidiarity may share the characteristics and provide the services of 'general principles of law' – one source of international law. The aim is only philosophical, to clarify and assess some possible roles of subsidiarity. Legal arguments that subsidiarity is, or should be, such a source of international law are beyond the objectives of this Element.

Section 6 addresses claims that subsidiarity serves, or should serve, as a 'structuring principle' to render international law more ordered and coherent in ways we have reason to value. Some person-promoting conceptions of subsidiarity explain some state-centric *patterns* of international law. They may also serve as a *principle* for attempts to harmonize it, and as a *rule* in the international legal practices of legislators and courts. Person-promoting conceptions of subsidiarity also satisfy several conditions for being a 'general principle' of international law. Subsidiarity may bring cohesion to the international legal system and more coherence between it and domestic legal systems. Some subsidiarity conceptions occur in many national legal systems and are also formed within the international legal system, thus satisfying the pedigree of general principles. Person-promoting conceptions can be transposed to the international legal system and are compatible with its immunity-protecting features, appearances notwithstanding. Of course, these modest conclusions do not suffice to determine whether subsidiarity is, or should be, such a general principle of law.

Sections 7 and 8 explore how subsidiarity may contribute to 'inter-systemic' coherence between international and domestic legal orders. The cases show how more immunity-protecting and more person-promoting conceptions alleviate tensions in drastically different ways.

The immunity-protecting conceptions of subsidiarity fit well with what some scholars now identify as Authoritarian International Law (Ginsburg 2020: 224). Some states use international law to reinforce their own sovereign immunity. They even hollow out the accountability mechanisms of international or regional human rights treaties with independent monitoring bodies. In contrast the person-promoting conceptions of subsidiarity support international expressions of concern through international law, and more independent human rights bodies that hold state powers accountable.

Both versions of subsidiarity require regional human rights institutions to defer to states – but in strikingly divergent ways. We consider the Human Rights Declaration of the Association of Southeast Asian Nations (ASEAN) and the ECtHR with its 'margin of appreciation' doctrine. Considerations of subsidiarity alone do not guide the choice among these alternatives that give strikingly different priority to human rights or sovereignty.

Section 8 explores subsidiarity in the EU, its history and current practice to foster inter-systemic coherence. The conception may be person-promoting, even though it might appear otherwise, due to the human rights constraints on membership in the EU.

Section 9 explores a limit to the usefulness of subsidiarity. It may foster limited 'intra-systemic' coherence among different sectors of international law

but cannot on its own resolve the choice among alternative modes of coherence. One reason is that different treaties have divergent objectives. Subsidiarity in two European legal orders that both protect human rights illustrates this: the EU treaties and its Court of Justice of the EU (CJEU), versus the European Convention on Human Rights (ECHR) and its ECtHR. Subsidiarity arguments may justify both, but do not resolve tensions between these legal orders when they grant primacy of market freedoms *or* of human rights, respectively. So subsidiarity helps only when ultimate objectives are given.

Section 10 draws some modest conclusions. It responds to the objections raised against subsidiarity and then considers how subsidiarity may contribute to international law. More justifiable theories of subsidiarity are not immunity-protecting, so they challenge the current strong presumptions of state immunity and veto. Person-promoting subsidiarity may instead support attempts to give individuals more prominence. Some person-promoting conceptions of subsidiarity may also satisfy several characteristics of general principles of law regarding their sources, and they may contribute some convergence and coherence to international law. However, a principle of subsidiarity alone cannot serve as a 'meta-authority' to resolve intra-systemic conflicts among authorities (Zürn 2018: 37). That would require an authoritative specification and ordering of the objectives of the political or legal order.

PART I HISTORICAL AND SYSTEMATIC ACCOUNTS OF SUBSIDIARITY

2 Traditions of Subsidiarity: Patterns, Practices, Principles

To understand how conceptions of subsidiarity vary we can look for *patterns* of behaviour, parts of *practices*, or more or less explicit *principles* for institutional design and for the exercise of authority across time and space. We find subsidiarity on several continents, in a broad range of religions and philosophies. The examples show that subsidiarity is not only a Western or Eurocentric phenomenon. They all appear to regard human persons and their interests as the ultimate unit of moral concern. Many of them question the state as central and immune from intervention.

Note that when subsidiarity simply describes a pattern of political or legal order the participants need not be aware of any such rules. And even if they are aware of a rule they might not see a reason to comply with it. Some such 'habits' may be relevant for whether subsidiarity is an 'international custom' or a 'general practice accepted as law' (Statute of the International Court of Justice (ICJ) 1946: Art. 38(1). So for our purposes the important cases are *practices*: when a conception of subsidiarity (if not by that name) appears to claim authority that participants regard

as binding when they deliberate about creating, modifying, reviewing, or assessing a practice (Hart 1994, Shapiro 2006, Raz 2017: 140). It is subsidiarity as part of such practices rather than mere descriptions of a pattern that are most relevant for its possible contribution to international law.

2.1 Patterns

We might describe several patterns of social organization in many communities by the term 'subsidiarity', even some that predate written sources. Several practices also have stated rules which express what we may recognize as subsidiarity, often specifying both who has primary responsibility and who may or should act in case those primarily responsible fail. The practices give different actors de facto authority to make decisions. Such patterns appear to concern the *use* of authority only, not as a guide to institutional design. One limitation of some of the patterns is that they only concern two levels of bodies beyond the individual, rather than exhibiting a more general rule to give preference for the more local unit.

The tribal organization of the Māori in what is now New Zealand included family groups (*whanau*) who would work together and collaborate for defence as a clan (*hapū*). The tribe (*iwi)* would in turn operate as a federation among several *hapū* for common defence (Ballara 1998: 19, Gussen 2014).

Several extinct African societies had structures we may describe by subsidiarity. The legal order of Igboland – now in Nigeria – had a preference for more local bodies (Ike and Edozien 2001: Ch. 6, 8). Elements of social and political ordering of the Tiv people in Nigeria also illustrate subsidiarity (Iber 2011: 21), as do the loose confederation of Hausa city-states (Yoo 2009), and the checks and balances of the Yoruba monarchical structure (Lloyd 1971, Usman and Falola 2019). We can use subsidiarity to describe features of pre-fourteenth-century Ganda society, in what later became the kingdom of the Baganda, now part of Uganda. The power structures between the chief (*ssabataka*) and heads of tribes *(mutaka*) were one of primus inter pares. The legitimate tasks of the central unit were limited to promoting the well-being of the lower units, 'aiding them to realize their good and their potential' (Wamala 2004: 436–437). The tribes enjoyed immunity in the sense that the central units should not usurp the responsibilities of the lower units of power. A dissatisfied *mutaka* could even withdraw from the jurisdiction of the *ssabataka* – that is, exercise a right to exit. Then, as now, the possibility of exit gives local units more de facto power to ensure that a central ruler serves their interests. The local units might thus specify and apply what we can describe as arguments of subsidiarity about what should be done by whom.

Nahua (Aztek) culture illustrates multi-level subsidiarity. *Tlaxilacalli* – 'neighbourhoods' – usually submitted to the authority of the sovereign local polity, or *altepetl*, which then scaled up to autonomous mega-provinces (*huei altepetl*) and finally to the entire empire. At each level, submission was traded for autonomy, undercutting any attempt at direct centralizing rule (Johnson 2017: 4, cf. Espejo 2012: 1061). We see a pattern of subsidiarity in the 1428 triple alliance for military purposes among the three city-states (*altepetl*) of Tenochtitlan, Texcoco, and Totoquihuatzin. Each of these ruled over their dependent *altepetl* without interference by the other two (Lockhart 1992, Berdan 2017).

2.2 Confucian Familial Subsidiarity

The Confucian political philosopher Mencius (379–298 BC) laid out a three-step allocation of responsibility for the well-being of the individual (Chan 2003). The roles and responsibilities among members of the family over generations are central components of the freedom of every individual (Sun 2020: 49). In this 'familial' model the family has primary responsibility for those unable to care for themselves, and rulers are regarded as the *parents* of the people (Mencius 2003: 1B.13). Note the commitment to individuals: 'The people are the most crucial and important [element of society], next is the state, least is the king' (Bojun 1980: 328, from Zhao 2015). When the family *could not* assist, the community network *should* provide support. Only when the community was *unable* would what we now may describe as the more centralized body have *an obligation* to aid.

Mencius' conception of subsidiarity constrains central action. Rulers' taxes must not render people unable to perform their duties (Duke Wen of Teng 1: 155). The units' immunity is supplemented by the rulers' *positive* obligation to empower them: Those who cannot sustain themselves should be given help to do so (IB.4). Some of the centre's supportive obligations are listed and justified: In agricultural communities the ruler of the state is responsible for 'Old men without wives, old women without husbands, old people without children, young children without fathers – these four types of people are *the most destitute and have no one to turn to for help*' (IB.5, emphasis added). The *Book of Rites* adds the disabled and the sick to this list (Confucius 200 BC (1885)).

The ruler must also maintain granaries as a last resort for these groups, at pains of regicide (Mencius: King Hui of Liang, part Two, p. 55). The Song dynasty (960–1279) and the Ming dynasty (1368–1644) had such granaries, and officials were punished if they failed these obligations (Huan-Chang 1911, Chan 2012: 88–89). But in general the rulers did not heed Confucius' and Mencius' views (Zhao 2015, 190).

Some argue that aspects of this Confucian tradition still inform the social welfare regimes of some East Asian countries, at least to the extent that the authorities choose to appeal to this heritage to justify their 'residualist' model of low levels of public social protection (Goodman and Peng 1996, Walker and Wong 2005, Kongshøj 2015). This tradition of strong immunity of the lower units may also be one of several factors that explain the relatively weak regional institutions in Asia (cf. Section 7.1).

2.3 Aristotelian Subsidiarity

Aristotle's (384–322 BC) account of the functions of political units illustrates practices of subsidiarity. The tasks of households and villages are to secure individuals' necessities of life. The city-state (*polis*) is a community of such households, clans, and villages, for their protection and fulfilment (Politics: III.9, 1280b).

Observe that the interests of individuals are the ultimate focus of moral and political concern, and that these include the intrinsic value for individuals of the broader society. Aristotle underscores that membership in a *polis* is not only instrumental to human beings, but a component of a full human life. Humanity (*anthropos*) is by nature a 'political animal' (*politikon zoon*). The good life and purpose of humans can only be fully secured and fulfilled in the self-sufficient *polis* (Politics: I.2, 1252b, 1253, 1278b19-20). Some of Aristotle's arguments in defence of the status quo of Greek society have had long-lasting repercussions, some deplorable – such that 'women, slaves, and artisans and traders are all subsidiary instruments for the achievements of the highest happiness of "man"' (Okin 1979 (2013)): ch 4, Smith 1983). This flaw underscores the importance of *who* has the authority to identify both the institutions and the objectives to which subsidiarity applies.

2.4 Subsidiarity in Islam – *Zakat*

Islamic thought expresses subsidiarity as a practice and as a pillar of Islam, concerning *zakat* – obligatory charity or 'alm tax' (Blecher 2020) provided to certain needy persons. The Arabic term 'zakat' means purity, but can also mean justness, integrity, honesty, righteousness, or goodness (Zysow 2012, Wehr and Cowan 2020). These meanings also indicate several of its justifications. *Zakat* secures a more just economic distribution and hence purifies one's own wealth; it expresses the dignity, also of the poor, and aims to secure their independence; and fosters virtue rather than greed among the givers (Qur'an 9: 103, Bonner 2005). *Zakat* supplements the obligations family members have towards each other, to reduce the risk that anyone must beg others for sustenance. Indeed, a husband may

not count such support to his household as his *zakat*. In addition, every able Muslim must provide a proportion of their net wealth – 2.5–20 per cent – to support others in need. Different Islamic law states and different Islamic legal traditions specify the relevant wealth differently.

The categories of need and the form of support are specified and limited, reminiscent of the aforementioned Confucian list:

> The alms are only for the poor and the needy, and those who collect them, and those whose hearts are to be reconciled, and to free the captives and the debtors, and for the cause of Allah, and (for) the wayfarers . . . (Qur'an 9:60, for more elaborate lists cf. Zysow 2012)

The Prophet Mohammad urged individuals to support in accordance with what we may describe as a positive and empowering conception of subsidiarity. According to Abū Da'wūd's collection of prophetic sayings and practices, the Prophet helped a beggar become financially self-sufficient, rather than simply giving him money. The latter would only be appropriate for those *unable* to work (Zysow 2012)

We may regard this as a pattern or even a principle of subsidiarity concerning the *allocation* and *use* of authority: Support those who cannot support themselves and whose next of kin cannot do so, preferably in ways that facilitate their self reliance.

Concerning the allocation of authority, note the contested role of the state when it comes to assess, collect, and distribute *zakat*. *Zakat* may have limited the state's arbitrary power to tax and reduced the risk of corruption (Blecher 2020). The practices illustrate alternative conceptions of subsidiarity regarding whether private or public bodies have primary responsibilities to assess, collect, and distribute the *zakat* (Qur'an 9: 103). In some states the collection or distribution of *zakat*, sometimes tax deductible, is the responsibility of quasi-governmental or civil society organizations or mosques (Zysow 2012). In other states it is the government's responsibility either to manage the whole system or to ensure that *zakat* is managed if Muslims fail to pay.

2.5 An *Ubuntu* Conception of Subsidiarity

The African philosophy of *Ubuntu* applies a conception of subsidiarity that has survived and developed both as a philosophical position and as a legal theory.

The term 'Ubuntu' stems from the Nguni phrase *Umuntu ngumuntu ngabantu*: 'A person is a person through other persons.' *Ubuntu* emphasizes the harmonious relationships between persons as constitutive of the individual and underscores compassion and commitment to one another's growth: 'I am, because we are; and since we are, therefore, I am' (Mbiti 1969: 141), 'One

becomes a moral person insofar as one honours communal relationships' (Eze 2008: 106, Metz 2011: 540, Metz 2021).

The term has been used in strikingly different ways, from a concept of sin to an expression of emancipation, so we should be cognizant of the risks of undue imposition and simplification (Stråth 2023: 56–93). Such cautions notwithstanding, note that Shutte develops an *Ubuntu* version of subsidiarity in support of self-determination of humans and their communities. The task of governments at various levels is to promote harmonious flourishing and community – *ubuntu* – of the constituent parts when needed (Shutte 2001: 379–381). This is yet another example of how the commitment to the individual's good as having fundamental moral worth includes as a constitutive part acting for the sake of others, and without allowing total sacrifice of an individual for the collective (Metz 2007).

While *Ubuntu* is often criticized as too vague, recent contributions lay some such concerns to rest (Ramose 1999, Shutte 2001, Metz 2007, 2011). Gädeke discerns Perfectionist and Relational conceptions of *Ubuntu*. The latter is similar to neo-republican theories in political philosophy and recognizes relationships of sharing and caring (Gädeke 2009: 282–283). How to apply this conception of subsidiarity is contested, for instance, concerning the care and support women should get from their fathers or husbands (Cornell 2012: 329).

Ubuntu was included in the epilogue of the 1993 Interim Constitution of South Africa, but not explicitly in its 1996 Constitution. We arguably see expressions of the *Ubuntu* tradition – and subsidiarity – in the *African Charter on Human and People's Right*s: 'The family shall be the natural unit and basis of society', and the state has 'the duty to assist the family' and to assist all peoples (Art. 18, 20.3).

2.6 The *Haudenosaunee* (Iroquois) League

The confederacy among five (later six) *Haudenosaunee* (Iroquois) nations dates to between the twelfth and fifteenth centuries. Their oral constitution – The Great Law of Peace – specified that each nation elected delegates, or *sachems*, who dealt with internal affairs. The confederacy's Grand Council could not interfere with these affairs internal to each tribe, but could only handle specific matters of common concern such as war, peace, and treaty making. This conception of subsidiarity describes institutional design, and combined immunity for local units with joint authority for specific issues. The *Haudenosaunee* practice of granting the local units immunity apparently influenced Benjamin Franklin's and others' call for a union among the English colonies (Franklin 1904, Colden 1918–1937: l: xv–xxiv, Fenton 1998). The oral tradition used the