

Subsidiarity and the Global Order

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Abstract: Subsidiarity has been proposed as an answer to the challenges of globalisation and global governance. This chapter addresses some of the strengths and weaknesses of such a principle of subsidiarity for questions of how to allocate and use authority at regional and global levels. The chapter criticises the ‘state centric’ versions of subsidiarity often appealed to for such global settings. In particular, there are several challenges wrought by states that fail to respect their citizens’ human rights, variously interpreted. More defensible versions of subsidiarity do not provide normative legitimacy to the state centric aspects of the global order. Section 1 sketches some of the remarkably different conceptions of subsidiarity as a background to the usages in the European Union, the Catholic Church and as it allegedly appears in international law. The different versions drastically reduce or enlarge the scope of member unit authority. Section 2 considers some implications for the legitimate allocation of authority in our global order which includes many states that routinely violate their citizens’ fundamental human rights. The function of the European Court of Human Rights offers a helpful contrast.

Keywords: Althusius, Catholicism, Liberal Contractualism, sovereignty, European Court of Human Rights, global governance, international law

11.1 Introduction

We increasingly live in a ‘globalised’ world, where our decisions and institutions are interdependent on those of other actors across state and regional borders (Held, 1995, 20).¹ In response, we witness several attempts at governance above the state level, with varying degrees of effectiveness and legitimacy. Among the vexing problems is how to determine *which* decisions are better handled by bodies above the state, and which such bodies can be trusted to exercise such powers - ultimately in the best interest of the individuals affected.

A “principle of subsidiarity” regulates the allocation or use of authority within a political or legal order, especially where authority is dispersed between a centre and member units. The principle holds that the burden of argument lies with attempts to centralise authority. Subsidiarity has been proposed as an answer to these challenges of globalisation and global governance for at least 40 years, since Pope John XXIII’s 1963 Encyclical *Peace on Earth* (John, 1963, 140). Further impetus for subsidiarity came from its inclusion in the 1991

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Maastricht Treaty on European Union. Some have recommended a principle of subsidiarity as an ordering principle for international law more generally (Slaughter, 2000), others claim that it should apply to human rights law in particular (Carozza, 2003). This chapter addresses some of the strengths and weaknesses of a principle of subsidiarity for questions of how to allocate and use authority at regional and global levels. In particular, there are several challenges wrought by states that fail to respect their citizens' human rights, variously interpreted. On this point the Encyclical *Peace on Earth* seems too 'state centric'. It proposes a world wide public authority such as the UN, established with the consent by *all* countries with "its fundamental objective the recognition, respect, safeguarding and promotion of the rights of the human person" (art 139). Yet such authorities above the state should only be established by consent and not constrain the state parties (art 149). In contrast, the European Court of Human Rights arguably does constrain the signatory states, through according them a 'Margin of Appreciation'. Similarly, the Rome Statute of the International Criminal Court (ICC) states a principle of 'Complementarity,' that the ICC can only exercise its jurisdiction of crimes if the State concerned is unable or unwilling to investigate or prosecute the crimes (United Nations 2002) Preamble para 10; Art 1 and 17 1 (a).

This chapter explores subsidiarity in a global context, and criticises the 'state centric' versions of subsidiarity often appealed to for such global settings. More defensible versions of subsidiarity do not provide normative legitimacy to the state centric aspects of the global order.

To illustrate how different conceptions of subsidiarity have profoundly different implications for constitutional and institutional design, section 1 sketches some of the remarkably different conceptions of subsidiarity as a background to the usages in the European Union, the Catholic Church and as it allegedly appears in international law. Each conception rests on contested premises, with different policy tradeoffs. These different conceptions and their conflicting implications are too often overlooked. Their salient differences concern whether they *proscribe* or *prescribe* intervention by central authorities, and whether they place the authority to apply the principle of subsidiarity to the centre or with the member units. This is expanded upon below. The upshot is that the different versions drastically reduce or enlarge the scope of member unit authority. Section 2 considers some implications for the legitimate allocation of authority in our global order which includes many states that routinely violate their citizens' fundamental human rights. The function of the European Court of Human Rights offers a helpful contrast.

11.2 Some Theories of Subsidiarity

Alternative conceptions of subsidiarity have different implications concerning how to allocate authority. They differ as to the objectives of the various polities, the domain and roles of member units - such as states - and they allocate the authority to apply the principle of subsidiarity itself differently. Thus the choice of conception of subsidiarity matters significantly for the institutional configuration of global governance - and in particular concerning the appropriate authority of international institutions vis-à-vis states. The three accounts sketched below draw on insights from Althusius, Catholic Personalism, and recent

Liberal Contractualism, respectively (For further accounts see Follesdal 1998). The latter grants the member units less authority. These accounts may regard subsidiarity as *proscribing* or *prescribing* central intervention, apply subsidiarity to the *allocation* of political powers or to their *exercise*, and *add* or *remove* issues from the sphere of political decision-making altogether. Some of these features reduce the scope of state authority, while some may protect states against intervention.

11.2.1 Liberty: Althusius

Althusius (1557-1630) is often called “the father of federalism.” He developed what may be described as an embryonic theory of subsidiarity based on Orthodox Calvinism. He was “syndic” of the German city of Emden in East Friesland. One of his central political challenges was to maintain Emden’s autonomy, both against its Lutheran provincial Lord and against the Catholic Emperor. He thus argued for the value of communities and associations for both instrumental and intrinsic reasons, in supporting (“subsidia”) individuals’ needs. Political authority, he argued, arises not on the basis of covenants among individuals, but among *associations*. This Althusian subsidiarity lends itself to a strong commitment to the immunity of local units from interference by central authorities.

This interpretation of subsidiarity takes the existing sub-units for granted, for better and worse. That is: the account offers few ways to determine which such local authorities should enjoy immunity, be it how they treat individuals or by other standards of legitimacy. Moreover, on this view the common good of the central political authorities is limited to respecting member units’ immunities and to policies that are beneficial to all of them - Pareto improvements, so to speak, among the member units. This conception of subsidiarity thus only allows the central authority to undertake policies deemed by every sub-unit to be of their own interest compared to their present status quo. Coercive *redistributive* arrangements among individuals or associations, or forceful intervention into ‘domestic affairs’ of a member unit are deemed illegitimate.

Two weaknesses of this account are thus salient for our purposes. Firstly, it fails to deal adequately with sub units – associations or states – that lack normative legitimacy. Secondly, it does not apply to situations that require redistribution or intervention among member units, for example, according to standards of distributive justice or human rights.

11.2.2 Justice: Catholic

The Catholic tradition of subsidiarity merits detailed study. Pope Leo XIII’s 1891 encyclical *Rerum Novarum* discusses a principle of subsidiarity, as part of a complex argument: The encyclical sought simultaneously to protest capitalistic exploitation of the poor, and to constrain socialism so as to protect the Catholic Church. The encyclical argued that the role of the state was to support lower social units, without subsuming them: “Whenever the general interest or any particular class suffers, or is threatened with harm, which can in no other way be met or prevented, the public authority must step in to deal with it” (Leo XIII 1891, para 36). Thus the state should protect workers against the “hardheartedness of employers and the greed of unchecked competition” (ibid para 3). Pope Leo XIII further stated that “it is the

province of the commonwealth to serve the common good. And the more that is done for the benefit of the working classes by the general laws of the country, the less need will there be to seek for special means to relieve them” (ibid para 32).

At the same time the encyclica seeks to protect the family – and the Church: “the State must not absorb the individual or the family: both should be allowed free and untrammelled action so far as is consistent with the common good and the interest of others”(ibid para 33). Pius XI’s 1931 encyclica *Quadragesimo Anno* developed this conception of subsidiarity further, as a defence against fascism’s encroachment upon the Catholic Church.

In comparison with Althusius’ version, this account holds that subsidiarity goes ‘all the way down,’ starting with the individual. This version of subsidiarity requires central intervention when - *but only when* – the subordinate organs cannot act alone to secure the appropriate objectives: “every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them. The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly” (Pius XI 1931, paras 79-80). The function of the state is thus to serve the common interests of individuals, and intervene in other bodies only to further individuals’ autonomy as necessary.

Member units do not enjoy veto rights – nor do they have the authority to interpret and apply the subsidiarity principle: this is sometimes best left to the central body. For instance, this view allows and may require transfers among member units, including individuals, when required for the ‘common good’ - as defined by the authorities. Intervention into member units is legitimate and required when the public good is threatened, such as when a particular class suffers (Leo, 1890 paras 36, 37; Pius XI 1931, para 78). It would also seem consistent with this conception of subsidiarity to permit or even require international intervention when a state violates its standards of legitimacy: the state must comply with natural and divine law to serve the common interest (John XXIII 1961, para 20; Leo 1891; John, 1963, para 77). But this is contested, for example, in the encyclical *Pacem in Terris*.

Some weaknesses of this conception merit mention. Assessment of member units, as well as the proscription and prescription of central action must draw on a normative conception of the social order and its objectives. The Catholic version includes conceptions of the human good as a particular mode of human flourishing. This may either be specified on the basis of a ‘thick’ conception of the good life, or – not necessarily – based on an explicitly theological conception, as willed by God. Some such normative accounts are contested and difficult to combine with respect for other reasonable conceptions of the good life. This account cannot easily settle disagreement on such matters. Consider the ‘social function’ of families, or labour unions. Which constellations should count as families, whether labour cleavages should be embedded, and with what responsibilities, are contested.

11.2.3 A Liberal Contractualist case for subsidiarity

Finally, consider a brief sketch of subsidiarity compatible with Liberal Contractualism of the

kind associated with John Rawls (Rawls, 1971, Rawls, 1999), T.M. Scanlon (Scanlon, 1998) or Brian Barry (Barry, 1989). This position acknowledges a - limited - role for subsidiarity, for reasons tied both to the interests of members of the sub unit and the interests of other members of the larger legal and political order. To accommodate the pluralism among citizens concerning their conception of the good life, the set of interests is limited. Individuals are firstly acknowledged as having an interest in controlling the social institutions that shape values, goals, options and expectations. Such political influence is justified by reference to four important interests. Political power firstly helps protect our interest that the institutions remain *responsive to our best interests* - as we see it. Secondly, such influence, for example, in the form of universal suffrage, helps us *avoid domination* by others. Thirdly, such democratic control helps individuals *maintain legitimate expectations*, by letting all participate in regulating institutional change. Those similarly affected are more likely to comprehend the need and room for change. Thus when individuals share circumstances, beliefs or values, they have a claim to influence institutional change, so as to reduce domination and the breaking of legitimate expectations. Insofar as this holds true of members of sub-units, there is a case for subsidiarity: central authorities should seek to support member units' democratic and informed decision making, and should respect their immunity against influence – as long as the decisions respect the best interests of its members and avoids local domination, for example, by respecting human rights. A fourth interest that may support subsidiarity concerns its role in character formation. Public arguments about subsidiarity may facilitate the socialisation of individuals into the requisite sense of justice and concern for the common good, on such matters as the legitimate status of sub-units, the proper common goal, and the likely effects of sub-unit and centre-unit action.

There are further reasons for subsidiarity stemming from the interests of those in the rest of a legal order. They have a legitimate interest to avoid political power over issues that do not affect them. Such authority would require them to spend resources to determine alternatives and their consequences on affected parties, without any effect on themselves. They may reasonably want to spend such resources on their own other interests, and on those in need. One implication of such accounts is support for granting democratic states a 'Margin of Appreciation' as the European Court of Human Rights does. That is: in determining whether a state complies with its human rights obligations, this margin allows different laws and policies – within a range – to accommodate different natural and social circumstances and in acknowledgment that domestic courts may be better informed about likely effects and alternatives (Letsas, 2006).

There are several weaknesses of this conception of subsidiarity, especially considered as a defence of a state-centric global order. It only provides a limited role and weight for this principle of subsidiarity. Its defence of immunity is limited when vital interests or human rights are at stake, or when the common good includes egalitarian or distributive or redistributive norms. One example is stated in the German Grundgesetz: the federal level is responsible for "the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of any one land"(Grundgesetz für die

Bundesrepublik, 1949, art 71).² Moreover, this account does not single out states as the only relevant sub-units. A further challenge to such contractualist accounts is disagreement about the conception of the person that justifies the substantive interests that ground the various arguments. A further weakness of such liberal contractualist arguments is that they *underdetermine* subsidiarity. *Other* rules for the exercise of political power could serve the same interests. The case for subsidiarity must also be filled out by theories of institutional design in order to identify suitable institutional reforms. Whether sub-units should enjoy veto, votes or only voice is a matter of the likely effects when it comes to protecting human rights and other vital interests, on character formation, and on the likely effects on institutions' likelihood to remain sufficiently responsive to the best interests of citizens.

One result of these brief sketches is that the earlier Althusian account of subsidiarity seems to offer the strongest defence of a state centric global order which respects the immunity of such states from outside intervention. However, this account seems less defensible, due to its fundamental lack of standards of legitimacy for states. The two later versions seem somewhat better justified. They can address the challenges wrought by states that fail to respect their citizens' human rights, variously interpreted. However, it is not clear that they will support non-intervention into such states.

11.3 Conflicting Conclusions

I now consider some of the issues where these different conceptions of subsidiarity yield surprisingly different recommendations. These differences stem from several features: whether the account of subsidiarity places the authority to apply the principle of subsidiarity itself either centrally or with the member units and whether they *proscribe* or *prescribe* intervention by the centre. Consider two main issues: who should have the authority to apply the principle, and which objectives guide the application of subsidiarity: Pareto improvements, human rights, or redistribution across member units? We conclude by illustrating the dilemmas for the European Court of Human Rights, which grants states a 'Margin of Appreciation' justified by subsidiarity.

11.3.1 Who should have the authority to apply the Principle of Subsidiarity?

A central contentious issue is who should be authorised to use the principle of subsidiarity to allocate authority or when making policies? Conceptions that favour centralisation may place these issues with the central authorities, for example, with central legislatures, or with a regional or international court. Other more state centric conceptions may place the assessment of subsidiarity with the member units. There are two main ways to do so: by granting them veto powers. This practice is known from international law among states, and from confederal arrangements. Alternatively, the authority can be placed with a body composed of member unit representatives of some sort.

Consider arguments for placing the authority to apply subsidiarity with the member units, typical of the Althusian tradition, and central to international treaties. Local authorities

² Grundgesetz für die Bundesrepublik, 1949 Art 72.2.3.

are indeed often better equipped to make decisions that maximise local preference satisfaction. This is especially so when local tastes, preferences or religious beliefs, geographical resources or specific risks are clustered within one area. When such subsets have the requisite authority, this allows them to act on those preferences to increase efficiency (Oates, 1972). But which such ‘local public’ goods and hence sub units should be established remains largely a matter of local preferences and circumstances.

Alternative ways to grant member units control is to allow them to check central decisions, or to include them in central decision making. The former is illustrated by the EU’s Lisbon Treaty. It allows a certain number of national parliaments to appeal EU draft legislative acts that these parliaments believe violate subsidiarity (Cooper, 2006, Follesdal, 2006). The latter form of control may include a common judicial body that consists of apex court judges from the member units (see Resnik, et al. 2008: 767). Other examples may be a second legislative chamber typical of ‘interlocking’ federations.

There are potential drawbacks with either allocating authority over subsidiarity decisions with the member units or with the centre. Member units may use their veto to bargain for unfair shares of joint benefits, or ignore externalities of their own decisions (Dahl, 2001, 147-489). Placing authority with central bodies creates risks of undue centralisation well known from federal arrangements – at the risk of their long term stability (Follesdal, 2007; McKay, 2004). A central challenge is to create institutions that prevents undue centralisation, protects minorities against undue majority rule – and at the same time remaining sufficiently flexible to change the allocation of competences in the face of changing social circumstances and new risks (Filippov, et al. 2004).

11.3.2 Objectives: Pareto improvement, Human Rights or just redistribution?

Some of the most striking differences in impact of subsidiarity arise in political orders with different objectives. Here again the three different accounts have drastically different implications.

One concerns how to identify, assess and address externalities – that is, costs wrought outside the borders of one unit. What counts as costs is in part a matter of *which* objectives are recognised as legitimate for the local and central legal orders. Consider cases where one unit creates *competition* by maintaining attractive regulations, for example, lower tax rates and corresponding lower redistributive services to the distraught. Other units may regard such competition as a race to the bottom, insofar as businesses exit and thereby limit taxation opportunities. For these units this may count as a negative externality. But the unit that lowers its tax rate may disagree – for example, if domestic redistribution is not part of its objectives. Whether central action is required is thus in part in the eyes of the beholder. It depends on whether the objectives of the member units include solidarity or other forms of redistribution. A further example of an externality is the plight of those who have nothing to offer on the market. Consider the needs of those who are dependent on public support. Few if any member units will compete to attract them, since there is no gain to be had. They will in practice be immobile, and be more destitute due to their home unit’s reduced tax ability. If their plight

counts, such competition will render their situation worse. Such challenges are clear for the Catholic conception of subsidiarity which draws on distributive conceptions of the objectives of society. Thomas Aquinas held in *Summa theologiae* (II-II, q. 66), that "Man should not consider his material possessions as his own, but as common to all, so as to share them without hesitation when others are in need."

This premise, cited in *Rerum Novarum* (22), is used in a subsidiarity argument to support central redistribution by the state and other bodies, to secure the needs of the poor. The Catholic conception explicitly requires constraints on market exchanges, insisting on the need for public intervention in favour of workers who "have no resources of their own to fall back upon and must chiefly depend upon the assistance of the State. (Leo, 1891, para 37).

The upshot is that it seems necessary to allow international bodies to impose certain norms on states, even contrary to their will, insofar as the global order must satisfy some distributive objectives, - or at least when globalised markets impose extra burdens on some states. Examples include Germany's federal constitution, as mentioned above, which requires central action when necessary to ensure uniformity of living conditions across the member units, by tax transfers if necessary. "Another example is the Treaty of Lisbon in the European Union, which includes among its many objectives "economic, social and territorial *cohesion, and solidarity* among Member States" (*Treaty of Lisbon* ' 2007, Art 3).

A second challenge to all these conceptions of subsidiarity concerns the protection of human rights within the member units. This is often regarded as a model case for central action, for instance insofar as the authorities of the larger order are unlikely to abuse such permissions. Cases in point in the United States include the abolition of slavery and the end of segregation. Yet Althusian arguments seem unable to address such concerns, since they tend to proscribe intervention by the centre. Indeed, it may be relevant to note that the South African practice of *apartheid* and separation into "homelands" were defended precisely by this Althusian tradition of subsidiarity, of "sovereignty in one's social circle" (Kuyper, 1880; de Klerk, 1975, 255-60).

The Catholic conception of subsidiarity is better able to allow or even require interventions in member units for the sake of individuals' interests – including protection of human rights. However, the comprehensive conception of the good found in that particular conception stands in some conflict with several central human rights laid out in treaties or among political philosophers. Examples include freedom of religion extended to non-Catholic faiths, or women's rights in the workplace, rights of lesbians and homosexuals and rights concerning divorce.

But this preparedness to intervene for human rights stands in tension with the encyclica *Pacem in Terris*, which insists that international governance institutions must be based upon "the consent of all nations" (John, 1963, 138). Why is this presumption for state

consent a necessary requirement for legal obligations of states? It is surely open to normative questioning, especially with regard to states whose normative credentials are dubious.

States are recognised as sovereign largely in virtue of satisfying certain aspects of statehood as we know it, specified by international law – that is, by states themselves - concerning population, territory and autonomy. The normative grounds for holding *these* criteria to be exhaustive of legitimate members of the community of states are absent. Why should all states thus identified enjoy such sovereign immunity? Insofar as it is states that *de facto* control territories and populations, effective and sustainable compliance –that is, problem solving - may require states’ consent. State consent still seems insufficient to determine that the authority of an international institution is legitimate. The lack of consent by dictatorships and other normatively worrisome states does not appear to detract from the international institution’s normative legitimacy. This lack of ‘normative quality control’ of states is flawed in the same way as Althusian subsidiarity: Public international law is unable to specify further requirements for which states *should* receive such standing. The state centric versions of subsidiarity - and *Pacem in Terris* - seem at a loss to defend this general presumption, except as a precaution to prevent unjustified interventions.

Several authors have argued that state consent has become less central in international law more generally (Kumm, 2009). I submit that more plausible conceptions of subsidiarity, such as the Catholic or Liberal Contractualist, may welcome this trend – *if* the substantive contents of contemporary international law satisfy the appropriate normative standards.

11.3.3 On the European Court of Human Rights’ Margin of Appreciation

An example that illustrates several of these conflicts among conceptions of subsidiarity is the European Court of Human Rights (ECtHR), which adjudicates the European Convention on Human Rights (Council of 1950). Who should interpret treaties, and how? More state centric conceptions of subsidiarity may grant states much such authority. The risk of tyranny from the centre, and other Althusian claims that local needs are better identified and secured by local authorities, may support a state centric position. Catholic and Liberal Contractualist accounts may question precisely why international institutions should aim to promote the interests of states instead of the interests of individuals. They may be more favourable toward stronger human rights protections against citizens’ own government. From this perspective the challenge is not how to defend this challenge to state sovereignty, but rather: how to set up reliable international human rights authorities that are themselves not likely to be abused. Thus the Catholic and Liberal Contractualist theories will agree with Althusian conception about these real risks of abuse of central authority – but the former insist that other risks are also paramount.

One illustration of how to balance respect for self determination and the risks of abuse by state governments is the practice of the European Court of Human Rights to accord the states a ‘margin of appreciation’ when it comes to determining compliance with the ECHR. This example is particularly relevant since several authors note that this practice is no longer limited to the ECtHR, but is also found in the International Court of Justice. Some argue that

it should be adopted for international law more generally (Shany, 2005). This practice grants states the final authority to determine whether certain policies are in compliance with the ECHR – thus expressing the centrality of states (Bernhardt, 1994). Again, the Althusian and confederal conceptions of subsidiarity will support an expansive margin of appreciation, while the Catholic and Liberal Contractualist accounts will be more concerned to *also* recognise the need to constrain the margin.

In support of the latter view, it makes little sense to insist that subsidiarity requires as few human rights as possible should be adjudicated by the ECtHR, since the objective of the convention and its court is precisely “the maintenance and further realisation of human rights and fundamental freedoms” – by means of the ECtHR. A similar comment can be made with regard to who should demarcate permissible local mores in terms of human rights. In particular, what should be done when there is *doubt* about whether rights have been violated: should the final judgment be with the member unit, that is, the state, or with the ECtHR, which may possibly grant the national judiciary a margin of appreciation – and if so, why? The Margin of Appreciation is a way to respect domestic democratic processes by the ECtHR judges. One reason is epistemic: these judges are “neither equipped to make detailed investigations inside the States nor are they competent to evaluate all the political and social conditions on the national level” (Bernhardt 1994, 309). But how broad should that margin be? For instance, the ECtHR leaves for Italian courts to permit crucifixes, (*Lautsi and others v Italy [GC]* ECHR 2011, Docket 30814/06) but it overruled Norwegian courts to prohibit some religious instruction in Norwegian Schools (*Folgero and others v. Norway*, ECHR 2007 Docket 15472/02). How are we to make sense of this, if at all?

The various accounts will all agree that the rampant value pluralism and variations in natural and social conditions across states globally does counsel a certain leeway concerning how states should best respect and promote various objectives – including human rights. The room for discretion is especially important with several partly conflicting objectives, ranging from conflicts among human rights to conflicts between human rights and other important objectives. The different theories of subsidiarity will disagree more with regard to how and where to draw the limits of such a margin, partly due to different assessments of risks. Liberal Contractualist reasons for *constraining* the margin include firstly, to ensure the objectives of the treaties – in the case of human rights treaties: the protection and promotion of individuals’ human rights against state inaction or worse. The less state centric conceptions of subsidiarity will be concerned to constrain such variations, in order to also secure other vital interests of individuals in addition to their right to self determination. One of the central challenges at the global level is indeed the broad range in domestic values and cultures – also concerning human rights. The appropriate response to all violators of treaties whose defence is simply that the treaty is counter to their own values is hardly leniency (Beitz, 2009).

An implication may be that such margins of appreciation should be broader for democracies – for example, within in the European Union – than for non-democratic states. The assessment of the democratic quality of any given state is no easy task, however – and underscores the risk of according courts and other treaty bodies too much discretion. A

second reason to constrain the margin of appreciation is precisely to reduce the risk of domination by the courts and treaty bodies. Flexibility in interpretation and adjudication by these bodies can be abused. A third reason to maintain a narrow margin is to protect the courts and treaty bodies against confrontations with powerful states (Macdonald, 1993, 123). There is a real risk that the powerful do as they will, and the weak do as they must. Thus the ECtHR may find itself the weak party when confronting a powerful signatory such as the European Union. The risks of abuse of power may be even greater in the global sphere, with weaker treaty bodies.

The upshot is that whilst state-centric conceptions of subsidiarity are likely to favour granting states a broad margin of discretion, those conceptions more favoured by Catholic and Liberal Contractualist accounts are more sceptical – while agreeing that the risk of granting treaty bodies authority is real and merit institutional responses.

11.4 Conclusion

This chapter has sketched some implications of applying a principle of subsidiarity to the global order. In particular, three traditions have been elaborated, to see how they may help address the important questions of which authority should be placed with bodies above the state. I have suggested that the present ‘state centric’ global order is difficult to combine with plausible conceptions of sovereignty. To illustrate this, we have seen that Pope John XXIII’s encyclical *Pacem in Terris*, its many strengths notwithstanding, seems to restrict the legitimate authority of such regional and global bodies unduly. To require that they must be based on the consent of all states seem incompatible with a plausible commitment underlying several conceptions of subsidiarity: that political authority must be justified in terms of the effects on individuals’ best interests, as units of ultimate moral concern in the global order.

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