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*"Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere."*
—*Eleanor Roosevelt*

# Subsidiarity as a Structural Principle of International Human Rights Law

The following is the introduction to an article that appeared in the March 2003 edition of the *American Journal of International Law*.

There is an inherent tension in international human rights law between affirming a universal substantive vision of human dignity and respecting the diversity and freedom of human cultures. Although understanding and securing human rights in international law requires us to grapple with that conflict, classic notions of state sovereignty cannot adequately address the issue. The principle of subsidiarity, instead, gives us a conceptual tool to mediate the polarity of pluralism and the common good in a globalized world and helps us to make sense of international human rights law. I argue that we should regard subsidiarity as a structural principle of international human rights law.

Although the idea of subsidiarity is rooted reaching deep in the history of Western political thought, it has grown visible as a prominent political and legal concept only much more recently. Thanks to the European Union's adoption of subsidiarity as one of its central constitutional principles, in the past decade the term has emerged from the narrower confines of German law and the social philosophy of the Catholic Church. To those outside the field of European law, the word may still have a somewhat awkward, Eurospeak ring to it, like a thin and less-filling analogue to the meatier term "federalism." Nevertheless, the idea is increasingly relevant to a variety of substantive areas of law and governance and is finding a place in the constitutional discourse of many legal systems other than the European Union (EU).

With the adoption of the Charter of Fundamental Rights of the European Union in December 2000, subsidiarity was formally extended for the first time into the arena of human rights. Nevertheless, it remains unclear what the relationship between subsidiarity and human rights will prove to be in the European Union. Until now, the constitutional limitations of the union have constrained the potential intersections between them, and scholars have accorded subsidiarity only passing references in discussions of EU human-rights law. Although the European Court of Justice can be regarded as tacitly addressing some elements of subsidiarity in its fundamental-rights case law, it has never done so explicitly, and in any case the principle has significant dimensions beyond those that can be seen in the court's jurisprudence. Thus, although the union provides one necessary piece of the inquiry, to understand more fully the rich contribution that the concept of subsidiarity can make to international human rights law generally requires looking beyond Europe.

*"Every individual should say the phrase of Louis XIV: 'I am the state.'"*
—*Rudolf Jhering*

I begin, therefore, with a discussion of the theoretical foundations of the principle of subsidiarity generally (part I). The concept is not a rigid or precise one, and it is characterized by internal tensions and inherent paradoxes that need to be identified, especially its combination of intervention with non-interference. When used in its original and most comprehensive sense, subsidiarity has deep affinities at its roots with many of the implicit premises of international human rights norms, including presuppositions about the dignity and freedom of human persons, the importance of their association with others, and the role of the state with respect to smaller social groups as well as individuals.

Going beyond the jurisprudential background to positive law, the constitutional system of the European Union helps to illustrate that subsidiarity (especially when understood as a general principle rather than a technical rule) functions as a conceptual and rhetorical mediator between supranational harmonization and unity, on the one hand, and local pluralism and difference on the other. Part II explores this connection, and the ways it is reflected in EU fundamental rights law. However, my concern here is not to develop the place of subsidiarity in the constitutional structure of the European Union but, instead, to use EU law as a stepping stone to consider the principle's potential place in international human rights law more broadly, in part III.

As in the European Union, in international law subsidiarity can be understood to be a conceptual alternative to the comparatively empty and unhelpful idea of state sovereignty. The principle of subsidiarity provides an analytically descriptive way to make sense of a variety of disparate features of the existing structure of international human rights law, from the interpretive discretion accorded to states, to the relationship of regional and universal systems, while also justifying the necessity of international cooperation, assistance, and intervention. In fact, subsidiarity fits international human-rights law so well that the basic values of the principle can reasonably be regarded as already implicitly present in the structure of international human-rights law. If that is correct, then it is not surprising to find in the development of human-rights law that other doctrines and ideas have arisen that function at least in part as analogues to subsidiarity in addressing the pervasive dialectic between universal human rights norms and legitimate claims to pluralism. The doctrine of the "margin of appreciation," first developed by the European Court of Human Rights, is the most notable example. But a direct comparison of subsidiarity to the existing techniques for accommodating diversity shows that the comprehensiveness and jurisprudential grounding of subsidiarity make it a more powerful concept for understanding and developing international human-rights law.

The principal advantage of subsidiarity as a structural principle of international human-rights law is that it integrates international, domestic, and subnational levels of social order on the basis of a substantive vision of human dignity and freedom, while encouraging and protecting pluralism among them. For those most committed to uniformity and universality in human rights, however, the pluralism that subsidiarity envisions also raises several potential dangers. Philosophically, it might be thought to call into question the senses in which human rights can be considered "fundamental," "universal," and ultimately even "human." Politically, one might reasonably question whether subsidiarity will merely weaken the practical effectiveness of international human-rights law. And, finally, subsidiarity suggests a challenge for the legal values of certainty and consistency that come from uniformity. Part IV continues with a brief consideration of some of these objections to the application of subsidiarity to human rights, concluding that recognizing and applying the principle of subsidiarity should actually strengthen international human rights in both theory and practice. Despite the risks of legal pluralism, the links between subsidiarity and human rights are too important and potentially fruitful to set aside if we are to continue to seek an international law that protects both the dignity of the human person and the diversity of human society.