

The Political Philosophy of European Subsidiarity

Written by Peter Rinderle

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PETER RINDERLE, MAR 9 2021

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Political philosophy is concerned with a systematic evaluation of the foundations, the forms and ends of those practices and institutions which are called political because they constitute and influence the basic rules of human interaction within and between societies. Its central questions are (Simmons 2008, 1): who has a right to rule a particular community? How is the exercise of power to be conceived? What are the origins, the legitimate means and ends of political authority? What are the foundations and contents of social justice? These questions have received and still receive very different and highly controversial answers. Typically, many political conflicts which arise from different conceptions of how to legitimate and exercise power also appear within political philosophy. One of the main tasks of the discipline is to clarify these conflicts, and possibly, to contribute to their solution.

The principle of subsidiarity grows out of a long tradition of social and political thinking, and is still used in a variety of different national, regional and global settings. In recent times, it has received a prominent place within the European Union (EU). It gives a particular and controversial answer to the question of how to allocate and exercise authority between the centre and the members of a political community. Although there are several competing conceptions of subsidiarity 'with very different implications for the allocation of authority', its core idea consists in shifting the burden of proof to the central agency (Føllesdal 2013, 41; Føllesdal 2014). The right to make obligatory decisions should be allocated to the lower or smaller level of a community, unless there are good reasons to do otherwise. Although subsidiarity is compatible with a high degree of centralisation, its central tenet is the presumption that the best way to organise a community is to give its (individual or collective) members as much power as possible. To assess the idea of subsidiarity from a philosophical perspective, four questions need to be raised and answered: how to understand the term 'subsidiarity'; how to evaluate its key idea; how can the principle be put into practice; and how to understand its institutionalisation by the EU.

Clarifying Concepts

To start with, the conceptual scheme in which the principle of subsidiarity is embedded needs clarification. What do people mean when they advocate an allocation of political authority in line with the principle, and what is the precise content of the underlying idea?

The concept of subsidiarity shares the fate of many political concepts such as 'democracy' or 'justice'. These concepts are essentially contested, and different people hold quite different conceptions of their meanings. However, the contestation and possible vagueness of a concept do not make it necessarily meaningless. One can note, for example, that many people attach a positive value to ideas such as democracy or justice. 'Democracy' is thus often used as the expression of an approval. Yet, the institutions people approve of may have very different shapes. Similarly, the concept of subsidiarity is frequently used to express a judgement of (positive) value although there is no clear meaning attached to it. One of the tasks of political philosophy is to separate questions of meaning and questions of value and show that a particular conception of democracy or subsidiarity is not, by itself, a sufficient reason for valuing these ideas.

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As far as the concept of subsidiarity is concerned, the etymology of the word is of limited help. The term derives from the Latin word 'subsidium' which means 'support', 'assistance' or 'help', in particular by reserve troops used in case of a military necessity (Cahill 2017, 208; Donati 2009, 211). Abstracting from the particular origins of this term, one might say that the term subsidiarity refers to a relationship between two institutions, with one helping or supplementing the other in certain cases of necessity. Subsidiarity thus treats action at a hierarchically higher level as 'subsidiary' to an action at a lower level (Neuman 2013, 361).

How then are we supposed to allocate authority within a multi-level political order? By consulting the history of political thought, we might find some preliminary answers. The idea of subsidiarity – as it is still used in political discourse and practice today – was conceived in the tradition of Catholic social thought and was meant to structure and order the relation between a central authority and the members of a community. Accordingly, individuals and families were conceived as agents with inherent autonomy and dignity. This assumption not only permits the limitation of the legitimate exercise of power, it also allows to derive two duties of political authority and, in the same manner, two varieties of subsidiarity: first, the negative duty not to interfere excessively in the lives of autonomous subjects, and secondly, a positive duty to support them to develop and exercise their capacities of self-determination. Thus, negative subsidiarity prohibits unnecessary action at a higher level, while positive subsidiarity prescribes action at the higher level when political subunits cannot achieve certain ends on their own (Føllesdal 1998, 195).

In this way, the core content of the contested concept of subsidiarity can be identified. In essence, subsidiarity privileges the part over the whole; it accords a certain space for exercising authority to the (individual or collective) members of a community; it introduces certain conditions to the centralisation of power; it distributes the burden of proof to the advantage of the lower level or the smaller units of a community; and it establishes 'a rebuttable presumption' for local decision-making 'unless good reasons exist for shifting it upward' (Jachtenfuchs and Krisch 2016, 6).

Power, however, also means responsibility. By limiting the central authority and empowering local agents, subsidiarity puts an emphasis on the responsibility of individual (or collective) members of a community. They are supposed to take their lives in their own hands. As a consequence, the state or any other central agency is relieved from the task of providing for the welfare of its citizens. In fact, by stressing the responsibility of the smaller unit, the advocates of subsidiarity may sometimes dispense with the solidarity of the whole community for its individual members:

It is not by chance, many argue, that the so-called welfare state was a centralising state, because only at the national level could the interests of the disadvantaged receive sufficient weight to overcome the influence of local elites (Bird and Ebel 2007, 9).

Therefore, the idea of subsidiarity meant to protect and support the autonomy of local agents can create a conflictual relationship with the value of national solidarity and redistribution. Of course, this claim needs empirical confirmation as there are also indications to the contrary. The empowerment of the subunits of a community might be seen as the condition for the possibility of the implementation of social justice. Subsidiarity and solidarity therefore appear, in some cases, in a complementary relationship (see Donati 2009).

Remember, at this stage of the argument, that the main question concerns the allocation and use of political authority. A preliminary answer contains two elements. On the one hand, subsidiarity demands that power is allocated – as far as possible – to the single units of a community. It demands that power is used to further their particular interest in developing and exercising their capacities to self-determination; at least to the extent that this seems possible and expeditious. On the other hand, if there are any good reasons of efficiency speaking in favour of the centralisation of power, then subsidiarity cannot be used to defend a categorical stance on decentralisation. To put it in a nutshell, subsidiarity speaks – in a conditional and pragmatic manner – in favour of decentralisation for the allocation and use of authority. Thus, subsidiarity does not take any categorical or principled stance and cannot be used to justify a decentralised or federal distribution of political power. Indeed, proponents of a centralised world state as well as radical anarchists might defend their ideas with reference to the principle of subsidiarity.

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Interestingly enough, the United States, with a system where vertical as well as horizontal checks and balances of the exercise of power are strongly implemented, 'has not made subsidiarity the measure of federalism' (Bermann 1994, 447). The idea of subsidiarity as developed in the hierarchical context of Catholic Europe 'is designed to soften hierarchy by vesting and protecting the powers of its lower levels'; by contrast, federalism is 'anti-hierarchical, based on covenant-based principles that see the proper political organisation as a matrix with larger and smaller arenas but not higher and lower' (Elazar 2001, 42).

With these findings in mind there are three problems of particular importance. The first of these concerns the units of communities (Føllesdal 1998, 192). Do we speak of the relation of a nation-state with individual citizens? Or do we conceive collective units as families, cities, regions or associations as the smaller entities to which political authority should be allocated (King 2014)? Maybe the 'smaller units' are the member states of a supranational organisation? Clearly, one needs to be aware that the principle of subsidiarity – depending on the unit of agency – can be applied in very different contexts.

A second difficulty has to do with the idea of political power. The concept of 'power' is a far-reaching umbrella which covers a broad variety of different mechanisms, means and measures of how to influence the actions of others. The power to make people act in a certain way, may rely on negative sanctions such as force or punishment, but it can also distribute positive incentives in the form of money or opportunities. Power can focus on a single individual, but may also aim at establishing and enforcing general rules for all members of a society. Hence the standard distinction between the exercise of legislative, executive and judicial powers. Although this categorisation is not without its own difficulties, the interpretation and application of the principle of subsidiarity needs a clear idea of what kind of power we are dealing with. Even if we assume that 'subsidiarity's central function must be its legislative one' (Bermann 1994, 367), different conceptions of subsidiarity might still be applied to the allocation of executive or judicial power (Føllesdal 2013; 2014).

These first two problems are hard enough, but comparatively easy to deal with – as will be shown below when looking at the institutional implementation of subsidiarity. The third problem goes straight to the heart of the matter. Its prime concern is the kind of *reasons* that can be invoked to centralise power. Subsidiarity does not oppose the centralisation of power categorically. Rather the central demand consists in allocating power to the smaller units unless there are good reasons to the contrary.

The obvious problem raised by this condition is the specific nature of these reasons (Jachtenfuchs and Krisch 2016, 7). What kind of consideration should be accepted as a good reason in order to regard the centralisation of power as legitimate? One might think here of very different candidates: maybe a central agency can solve a certain kind of political problem more efficiently; maybe it is necessary to produce a certain kind of public good? This answer, however, immediately raises further questions as regards the standard of 'efficiency' or the desirability of certain 'public goods'. Maybe the centralisation of power is better able to realise an idea of distributive justice or of political self-determination? Yet again, the very idea of justice and democracy are controversial. People do not agree on what these terms mean, and they might disagree on their respective value.

This third difficulty, thus, does not refer to problems of application or implementation only. As it touches on the very core of our idea, it points to a major obstacle of giving subsidiarity a clear and unambiguous meaning. There is always a lingering suspicion that might be invoked by very different people with different ideas in their mind – depending on the reasons for centralisation they accept. In short, subsidiarity might be used as a *passee-partout* for almost any idea on how to allocate and use political power. The principle therefore might well be a double-edged sword which can be used in different contexts for quite opposing aims. Someone might see overwhelming reasons to establish a central government, while someone else might see no reasons whatsoever for establishing political authority. One of the major difficulties for giving a substantive meaning to the principle of subsidiarity consists in answering precisely the question of who is to decide whether or not there are good reasons to centralise power in a given context. Unless there is a solid grasp of the kind of reasons invoked, it is not possible to use subsidiarity for affirming or rejecting any particular proposal. Such a grasp requires a look into the normative foundations of subsidiarity.

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Providing Foundations

The principle of subsidiarity establishes a presumption in favour of an allocation of authority to the smaller unit. Unless there are good reasons to the contrary, authority should be exercised at the most basic level. This presumption shifts the burden of proof to the higher levels of government. Decentralised government, in other words, is regarded as the baseline, and only centralisation stands in need of a particular justification. Is this a good answer to the question of how to allocate power? Are there any arguments for such a presumption? Even though the idea of subsidiarity means that there is not any particular reason for allocating power to the smaller unit, the question suggests itself whether there are any good reasons for postulating such an imperative.

The first and the most popular argument for the principle of subsidiarity is a concern for the liberty of individuals as well as for families and other social associations in the *negative* sense of an absence of external obstacles. By allocating political authority to the local level, subsidiarity may be regarded as a safeguard against tyranny and oppression. Central authorities, this moral argument contends, always develop a tendency of intervening excessively and illegitimately in the affairs of their subjects and thereby restricting their freedom. Distributing power on many shoulders is meant to prevent this development from happening.

A second, genuinely political consideration speaking in favour of the principle is the value of collective freedom in a *positive* sense of self-determination. Central government always develops a tendency of being dominated by experts or elites and thereby alienating its subjects from their own political culture. The establishment of a common political identity as well as the representation of a variety of different interests are much better facilitated by smaller units of government. Local bodies allow for a higher degree of participation, they give a voice to those affected by political decisions and can be regarded as a valuable source of political legitimacy (King 2014, 301–2).

A third argument is popular among political economists who are concerned with the efficient production of goods. Subsidiarity suggests allocating power by making use of efficiency criteria without addressing serious difficulties concerning the specification of the content of efficiency as well as the problem of who is to be the judge in cases of controversies on the best means for achieving it. On the assumption that these problems can be solved in a satisfactory manner, efficiency surely counts as a good argument for subsidiarity.

In addition to moral, political and economic defenses some authors also point to a particular advantage of subsidiarity in cultural matters. The distribution of power to local agents facilitates the development and preservation of cultural identity. Moreover, by fostering the existence of a plurality of cultural identities, subsidiarity makes a contribution to the development and preservation of cultural diversity within a political community (Bermann 1994, 341-2).

Do these considerations establish a good case for the principle of subsidiarity? Although the first, moral argument should be regarded as convincing, it still does not establish a very strong case. It is true, subsidiarity might be a safeguard for the liberty of individuals or other agents, but there could be other and possibly more effective means of protecting these liberties. Subsidiarity establishes only a presumption to allocate political authority to smaller units, but it does not take a principled stance as such to the detriment of other safeguards.

Matters are similar when turning to an assessment of the second, political argument. Subsidiarity might foster the identification of citizens, and it might increase the possibilities of participation as well as the representativeness of democratic institutions at a local level. Yet, subsidiarity only propagates decentralisation on certain conditions and might very well serve to legitimise the allocation of power to a central agency. Therefore, subsidiarity hardly can be regarded as a particularly strong defense of self-determination at the local level. Moreover, participation and representation at a merely local level might not adequately compensate for the deficit of the possibility of participation and representation at a higher, regional, national or global level. In other words, the allocation of power to smaller units might – if, for example, one takes account of conflicts between subsidiarity and solidarity – be regarded as an obstacle to the identification of members with their true community.

At first sight, the economic argument of efficiency (in the production of public goods) seems to make a strong case for subsidiarity. As everyone wants efficiency, efficiency might be regarded as a solid foundation for subsidiarity. And

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even more so, if it can be shown, that not only local public goods, but also global public goods (such as global climate protection or fresh water supplies) might benefit from adequate efforts of cooperation at the local level. Yet, there is a drawback to this consideration. Even if all agree on the value of having more goods, there is usually disagreement on the kinds of good we want more of; for example, thinking of the interests of developing countries, climate protection would also be contested. Furthermore, there is disagreement on the appropriate means for the efficient production of public goods. And in particular on the question, whether central government is able to realise higher efficiency gains than local authorities.

The argument around cultural identity and diversity does not fare much better. On the one hand, the term 'culture' is a notoriously elusive concept. It would be, for example, a capital mistake to assume without further elaboration a close tie between the preservation of cultural identity and the political autonomy of local units. On the other hand, it is far from clear that a particular allocation of power will be of great service to a specific cultural identity. There are good reasons to remain sceptical, in particular given the fact that subsidiarity permits the centralisation of power as soon as the case for a more efficient production of certain goods is convincingly established. Cultural matters, thus, do not always figure highly among subsidiarity considerations.

Two further moral objections against the principle of subsidiarity need to be considered. First, it might be criticised for granting too many liberties to local units in the government of their own affairs. If a particular community is given the authority to govern itself without external intervention or control from a central authority, the danger looms large that the unjust treatment of its own members cannot forcefully be counteracted. Certain conceptions of subsidiarity might thus be regarded as a possible threat to the basic rights of individuals (Føllesdal 1998, 202). Second, distributing political power to smaller units can also be seen as in tension with the moral values of distributive justice and democracy. If power is allocated to smaller units, general considerations about the just distribution of wealth, income or opportunities will necessarily have to be neglected or sacrificed entirely. The same holds true for the value of democracy. While subsidiarity may foster local participation and representation, this will inevitably reduce the possibility of effectively and legitimately influencing processes at some higher, collective level. For example, individual citizens assemble happily in the marketplace of their villages, but leave the more important decisions on national or global matters in the hands of elites and experts.

In short, there are principled reasons for and against the idea of allocating political authority to smaller, local units. The decisive matter, in the end, is a moral question: subsidiarity may protect as well as endanger the liberty of individuals. In protecting successfully the liberty of individuals subsidiarity will do a great service to justice, even if there remains a tension with other elements of justice such as social equality and democratic legitimacy. As far as the principle's foundations are concerned these reveal certain limits to the theoretical and normative perspectives of political philosophy. Indeed, subsidiarity is a phenomenon that cannot be approached solely from the distant perspective of an airplane flying above the often dire, dark and harsh realities of politics. Instead, the analytical 'devil' is hidden in the details of institutional implementation (Berman 1994, 366).

Implementing Institutions

How is the subsidiarity principle made operational in practice? What kind of procedures and mechanisms does it entail? Ultimately, answers to these questions presuppose empirical investigations from a plurality of disciplinary perspectives as presented in the subsequent chapters of this book. They are beyond the reach of a purely philosophical investigation. However, this transition from a theoretical perspective to an empirical, real-world account needs to be accompanied by a set of general remarks.

Subsidiarity expresses the demand to allocate authority – unless there are reasons not to do so – to the smaller unit without specifying in detail the level of units and type of power it refers to. To investigate the institutional and procedural forms that subsidiarity takes in practice, two general questions suggest themselves: what are the units of political agency to which power is allocated, and what particular type of power is under use? As regards the smallest unit of collective agency, there are options on a spectrum ranging from the individual member of a community to the nation-state as a member of an international organisation (or even a world-state). On one end of the spectrum subsidiarity might take the individual as the smallest unit to which a maximum amount of power is allocated. A statist

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conception of subsidiarity, at the other end, might take a collective form of organisation such as the nation state as the smallest unit. Obviously, there are many more candidates for the most significant unit in between these extremes.

What then is the appropriate smallest unit? This depends on the theoretical foundation that is given to the principle. If we think – as has been claimed here – that individual liberties are of a particularly high value, some suspicion as regards statist conceptions of subsidiarity are in place. By contrast, if the principle should serve the protection of cultural identities and group diversity – as there are also good supporting reasons – implementation will prefer a statist or related form of collective conception of subsidiarity (see Cahill 2017). The economic efficiency argument cannot be used for a clear-cut defense of any of these propositions though. The pursuit of efficiency depends on context and circumstances with recent empirical research strongly supporting a polycentric approach best suited to produce certain kinds of public goods under tight budgetary constraints (see Ostrom 2012).

These considerations lead to the tentative conclusion that subsidiarity is to be used at different levels of governance. At the same time, individual liberties should be protected by interfering as little as is necessary. Certain powers need to be allocated to the individual as the smallest unit, but the development of cultural identities must not be forgotten. For that reason, the state or a similar unit on a more collective level such as a regional organisation becomes the appropriate entity for the allocation of certain powers. This multi-layered approach is further supported by considerations of economic efficiency best realised by the cooperation of a variety of political actors found at individual and local, collective and national as well as international and global levels.

Identifying a plurality of different levels or units as the subjects to which power is allocated, similarly assumes a plurality of different types of political power to be distributed. Power comes in many manifestations. It can force and punish, it can exert violence or impose taxes, but it can also produce public goods, distribute money and other resources. To this end, it employs language codes that manipulate or convince people. Without doing justice to these diverse means and mechanisms of political power, the legislative, executive and judicial branches of government need to be distinguished as the obvious context of this dimension of subsidiarity. While subsidiarity proposes the allocation of power to the smallest unit, it does not specify the type of power in question. Hence, it makes sense to acknowledge different conceptions – or varieties – of subsidiarity. One could, for example, assign a legislative power (for reasons of efficiency) to a central, supranational authority and, in the same way, distribute executive power (motivated by a concern for cultural identity) to a smaller, national or regional unit. In fact, the protection of the rights of individuals might be achieved best by reserving elements of judicial power to supranational or global institutions.

Looking at the Relevance

As far as the institutional implementation of the idea of subsidiarity is concerned, the European context is certainly of particular relevance. Subsidiarity is one of the organising principles of a number of traditional nation states with a federal structure, and it also has become an important pillar of supranational organisation. Article 5 (3) of the Treaty on European Union (TEU) states:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at the central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed actions, be better achieved at Union level.

With this principle, ‘member states sought to defend against unwarranted centralisation and domination by Union authorities’ (Føllesdal 2013, 50). This section, therefore, will take a look at the attempt to implement a review procedure to see whether the demands of subsidiarity have been sufficiently respected in legislative activities of the EU. The Early Warning Mechanism (EWM), as further elaborated in chapter three, enables the member states to issue a ‘yellow card’, if they suspect a breach of the subsidiarity principle.

This mechanism was first conceived in the 2002-2003 European Convention and subsequently codified in the 2009 Treaty of Lisbon (Article 12 and Protocol no. 2 on the application of the principles of subsidiarity and proportionality). It makes national parliaments the guardians of subsidiarity by giving them the right to monitor and intervene in

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European law-making. If a sufficient number of so-called 'reasoned opinions' from national parliaments are raised against a particular legislative proposal, the Commission has a duty to respond to these opinions (Cornell and Goldoni 2017; Kiiver 2012).

As far as the practical relevance of the EWM is concerned, one might make three observations. First, it is noteworthy that worries about a centralising bias of European legislation are addressed not by the separate power of the judicial branch, but by the legislative branches of the lower levels, i.e. the national parliaments of the member states (Cooper 2017, 24–5). The EWM thus functions primarily as a political instrument, with all the advantages and disadvantages this includes. Secondly, insofar as the Commission has only a duty to respond to the reasoned opinions of the national parliaments, it can defend a particular proposal without the need for withdrawal. Thus, the right of national parliaments to draw the 'yellow card' might be considered as a relatively weak and ineffective safeguard for the protection of subsidiarity (Cooper 2017, 26). A third observation underscores this second point. So far, since its introduction in 2009, the national parliaments have only shown three 'yellow cards' to a legislative proposal of the European Commission. In two cases, the Commission has upheld the proposals – without addressing the arguments of the reasoned opinions in detail. And in one other case (the Monti II regulation), it has withdrawn the proposal – for reasons, however, of political expediency and not out of a concern for a breach of subsidiarity.

It is, perhaps, too early to evaluate the EWM (see Cooper 2017; Fasone 2013; Føllesdal 2013, 50-5; Jachtenfuchs and Krisch 2016, 12–3; Kiiver 2012, 4). While there are a number of reasons for disappointment, there are also certain considerations that speak for a more optimistic appraisal. It is true, the EWM does not put a 'red card' in the hands of national parliaments. They do not have a genuine veto-right to stop legislation which might be detrimental to their rights. And while one might be sceptical about the real political influence of mere reasoned opinions and arguments, this procedure might still be seen as a valuable element in a deliberative conception of European democracy. The EWM does not only help to stimulate democratic debate between different levels of European governance, it does also help to bring about more coordination and deliberation between the national parliaments of the EU (Fasone 2013, 192–3).

Conclusion

David Miller (2003, 2) has defined political philosophy 'as an investigation into the nature, causes and effects of good and bad government'. If the legitimate or, for that matter, illegitimate exercise of government is distributed at several different levels – and this holds true for the European as well as global context – then political philosophy has to address the question of how we should evaluate this distribution of political competences. The core idea of subsidiarity is to allocate to and exercise political authority at the smallest level of a particular community, unless there are reasons to the contrary.

Certainly, there might be controversies about the conclusiveness of those reasons to the contrary. The general idea of subsidiarity, however, remains intact – government at the lowest level is good government. From this follow several normative perspectives for further thinking. Subsidiarity can help to prevent the exercise of tyrannical power of the central government and protect a sphere of liberty in the smaller units of a community. It can, moreover, render a valuable service to the exercise of political self-determination of those smaller units of a community. With this emphasis on the liberty and self-responsibility of individual as well as collective members of a community, subsidiarity creates a tension with competing values such as equality or social solidarity. The more power is allocated to and exercised at the lower levels of a community, the less power, obviously, is available to remedy political problems which are of common concern for all members of a community.

The institutional implementation of the idea of subsidiarity raises two main questions. First, what levels of government are we referring to, and what are the units of agency to which political authority is allocated? Second, what particular kind of authority are we talking about, and which functions of government are allocated to its different levels? As far as the particular case of the EU is concerned, these questions have – leaving complications aside – a straightforward answer. Subsidiarity applies mainly to the distribution of legislative competence between the EU and its member states. The TEU allocates legislative authority – as far as it is possible and efficient – to the smaller units of the member states. The same treaty has also implemented a formal procedure to review possible violations of the

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subsidiarity principle. Yet, it is contested whether the allocation of authority to the member states is respected in political practice, and it is the subject of intense debate whether the EWM can successfully fulfil its purpose. As it stands, the institutional implementation of subsidiarity in the European context is an important example for the practical relevance of political philosophy. However, the related political practice is equally relevant for the birth and development of theoretical ideas.

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