

## CHAPTER 4 – POLYCENTRIC SUBSIDIARY

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‘Taking back control’ is not only a mantra for Brexiteers these days. Supranational governance is being challenged by politicians and citizens around the EU as overly centralized, coercive and undemocratic. This book is grounded on the belief that the idea of polycentric governance developed half a century ago by Vincent and Elinor Ostrom is a fruitful place to start if we are to address this challenge. Assessing the presence of, and potential for, polycentric governance within the EU means approaching established principles and practices from a new perspective. While the debate on many of these issues is rich, longstanding and interdisciplinary, it has proven difficult to sidestep the ‘free trade area/European federal state’ dichotomy.<sup>1</sup> The polycentric perspective offered here aims to add another voice to theories that advocate a ‘third way’ of understanding EU governance.<sup>2</sup> Such a third way does not reject the EU’s institutional structure – the EU already displays all the attributes of a polycentric system, as well as many of its institutional essentials and prerequisites –<sup>3</sup> but provides a different benchmark against which to assess its functioning. Ultimately the question remains: how do we achieve self-governance in an interdependent world.

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<sup>1</sup> See in this Volume, Introduction by J. Van Zeben and A. Bobić, 1.

<sup>2</sup> See in this Volume, Chapter 1 by J. van Zeben.

<sup>3</sup> See in this Volume, Chapter 2 by J. van Zeben. Obstacles to the full expression of polycentricity in the EU remain, particularly when considering individuals’ access to the processes that are fundamental to self-governance. These obstacles to *inter alia* the enforcement of shared rules, peaceful contestation of the rules, as well as access to justice, information, and learning are detailed in Part II of the Volume. Some of these obstacles can be traced back to the formal rules that govern the EU, others are caused by practical restraints related to resources and information. For a comprehensive summary see Conclusions to this Volume.

Polycentric theory highlights the importance of horizontal relationships within the EU on multiple scales – between states of course, but also between many actors below the states, all the way down to individuals. This is a departure from established EU legal scholarship which focusses primarily, though not exclusively,<sup>4</sup> on vertical relationships: relationships between the EU and its Member States, and between the EU and its citizens. Re-conceptualising the European Union as a polycentric system that explicitly includes vertical and horizontal relationships is not a normatively neutral exercise;<sup>5</sup> Ostrom’s theory of polycentricity is built on strong normative claims regarding the role of individuals, self-governance and the nature of democracy,<sup>6</sup> all of which have long been the subject of intense debate within the EU.<sup>7</sup> Sovereignty is a similarly controversial topic, with most Member States maintaining claims to the last word on competence division (‘Kompetenz-Kompetenz’),<sup>8</sup> notwithstanding the ever-expanding competences of the EU and the Court-declared primacy of EU law.<sup>9</sup>

Ever since the Maastricht Treaty, the EU has apprehended issues of legitimacy and levels of competence under one label: subsidiarity, or the formal injunction in EU law to govern at the lowest level possible. Subsidiarity is meant to police the vertical division of power between the European Union and its Member States, particularly in the many areas of competence that are not exclusive to the EU, where the principle of conferral applies.<sup>10</sup> More generally, EU subsidiarity is meant to achieve efficient and effective government through ‘governance close to the people’,<sup>11</sup> with the appropriate level of government varying along with the scale and scope of the problem to be resolved. Subsidiarity could thus be said to aim at fulfilling two

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<sup>4</sup> On horizontal relationships between MS/ other EU actors, see F. Naert, ‘The new EU economic governance: vertical and horizontal power shifts’ (2014) 2(4) *Journal of Self Governance and Management Economics* 77; R. Csehi, ‘Horizontal coordination in federal political systems – non-centralization in the European Union and Canada compared’ (2017) 24 *Journal of European Public Policy* 562; on horizontal relationships between the courts, see M. Claes and M. de Visser, ‘Are you networked yet? On dialogues in European judicial networks’ (2012) 8(2) *Utrecht Law Review* 100.

<sup>5</sup> Some of these consequences are discussed in this Volume by F. Cheneval, Chapter 3.

<sup>6</sup> See also, in this Volume, Chapter 1 by J. van Zeben.

<sup>7</sup> See e.g. V.A. Schmidt, *Democracy in Europe: The EU and National Politics* (OUP 2006).

<sup>8</sup> S. Weatherill, ‘Competence creep and competence control’ (2004) 23(1) *Yearbook of European Law* 1; G. Beck, ‘The Lisbon judgment of the German Constitutional Court, the primacy of EU law and the problem of *Kompetenz-Kompetenz*: a conflict between right and right in which there is no *Praetor*’ (2011) 17(4) *European Law Journal* 470; M. Kumm, ‘Who is the final arbiter of constitutionality in Europe: Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice’ (1999) 36 *Common Market Law Review* 351; F.C. Mayer, ‘The debate on European powers and competences: seeing trees but not the forest?’ (2003) *Walter Hallstein-Institut für Europäisches Verfassungsrecht Paper 18/03*, available at <<http://www.wi-berlin.eu/documents/whi-paper1803.pdf>>; M. Kumm, ‘The jurisprudence of constitutional conflict: constitutional supremacy in Europe before and after the Constitutional Treaty’ (2005) 11(3) *European Law Journal* 262.

<sup>9</sup> See Chapter 3 by F. Cheneval, in this volume. See also, inter alia, A. Bobić, ‘Constitutional pluralism is not dead: An analysis of interactions between the European Court of Justice and constitutional courts of Member States’ (2017) 18(6) *German Law Journal* 1395; N. McCormick, ‘The Maastricht Urteil: Sovereignty Now’ (1995) 1 *European Law Journal* 259; O. Garner, ‘The borders of European integration on trial in the Member States: Dansk Industri, Miller and Taricco’ (2017) 9(2) *European Journal of Legal Studies* 1.

<sup>10</sup> Article 5(3) TFEU. Member States continue to be the default legislator on all issues, unless detailed otherwise in the EU Treaties. The principle of conferral means that all powers exercised by the EU can be traced back to the Treaties; a doctrine of implied powers would be incompatible with the idea of continued Member State sovereignty. Unsurprisingly, delineating the division of powers in areas of shared competence has proven problematic, despite the presence of the principles of subsidiarity and proportionality. See also F.C. Mayer (n 8).

<sup>11</sup> This is not reflected only in the principle of subsidiarity but also in the common goals of the EU as stated in Article 1 TEU: ‘This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which *decisions are taken as openly as possible and as closely as possible to the citizen*’ (emphasis added).

functions: efficient governance, and legitimate governance, including through accountability, by maintaining the greatest proximity possible between the governed and the governing.

Polycentric governance theory similarly emphasises efficiency, aiming at the highest possible level of social welfare, by matching governance to the scale and scope of the regulatory problem at hand.<sup>12</sup> But it balances this concern for efficiency more explicitly than the EU's subsidiarity frame with a concern for self-governance starting with the individual, and moving up to include all forms of collective action, sub-national entities and ultimately nation states. This interpretation comes to the fore in Ostrom's later work.<sup>13</sup> While, the EU classically traces it back to Roman Catholic Social Theory, for which subsidiarity reflected the 'intrinsic value of social forms like the family, the private school, churches, and labor unions,'<sup>14</sup> this intuition is shared by many in the social world whether Catholic or not.

At first glance, the subsidiarity principle seems to reinforce our perception of the EU as a polycentric system.<sup>15</sup> After all, the EU brings member states together to work out their differences, leaving much political power in national capitals rather than in Brussels. Its single market is managed by agencies across European cities and is predicated on the mutual recognition of national legal and regulatory systems.<sup>16</sup> Judicial and police cooperation, including the single arrest warrant,<sup>17</sup> involves a web of horizontal transfers of sovereignty. And yet, the EU seems to overlook the horizontal dimension of subsidiarity operating at different scales – from individuals and non-state actors to states – and, despite the explicit mention of local and regional governments,<sup>18</sup> provides very limited ways to meaningfully incorporate sub-national entities. Horizontality in our normative debates around levels of governance is simultaneously pervasive and undertheorised; self-governance, sovereignty and democracy tend to be conceived in relation to vertical distribution of power. Instead, polycentric subsidiarity emphasises the relationship between self-governance and horizontal distribution of power.

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<sup>12</sup> V. Ostrom, C. Tiebout and R. Warren, 'The Organization of Government in Metropolitan Areas: A Theoretical Inquiry' (1961) 55 *The American Political Science Review* 831; A. Portuese, 'Principle of Subsidiarity as Principle of Economic Efficiency' (2011) 17 *Columbia Journal of European Law* 231; J. Dewey, *The Public and its Problems* (Henry Holt 1927) 15-16.

<sup>13</sup> See in detail Section II. B.

<sup>14</sup> R. Hittinger, 'Social Pluralism and Subsidiarity in Catholic Social Doctrine' (2002) 16 *Annales Theologici* 385, 388.

<sup>15</sup> The recent restatement of the subsidiarity principle also refers explicitly to local and regional governments.

<sup>16</sup> See inter alia K. Nicolaidis, 'Mutual recognition: Promise and Denial, from Sapiens to Brexit' (2017) 70(1) *Current Legal Problems* 227; K. Nicolaidis, 'The Cassis Legacy: Kir, Banks, Plumbers, Drugs, Criminals and Refugees' in B. Davies and F.G. Nicola (eds.), *European Law Stories: Critical and Contextual Histories of European Jurisprudence* (CUP 2017); K. Nicolaidis, 'Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects' (1996) in *Regulatory Reform and International Market Openness* (Paris: OECD Publications; Reprinted as part of the *Jean Monnet Paper Series*, Cambridge: Harvard Law School, 1997)

<sup>17</sup> See <[https://e-justice.europa.eu/content\\_european\\_arrest\\_warrant-90-en.do](https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do)>; D. Sarmiento, 'European Union: the European Arrest Warrant and the quest for constitutional coherence' (2008) 6(1) *International Journal of Constitutional Law* 171; see also (n 112) below.

<sup>18</sup> Embodied in Art 5(3) TEU: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, *either at central level or at regional and local level*, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level' (emphasis added).

This chapter proposes a reconceptualisation of subsidiarity in the EU context enriched by the insights of polycentricity. In a nutshell, we argue that self-governance can be reconciled with the management of interdependence through horizontal as well as vertical transfers of authority, and question the ways in which the latter is generally privileged above the former. Polycentric subsidiarity calls for two kinds of reconsiderations of EU legal debate. First, on the EU's own terms, it is questionable whether the principle of subsidiarity, as operationalised through the Commission pre-legislative assessments and Court ex-post reviews, indeed results in governance 'close to the people'; its efficiency criterion is so easily satisfied that it has proven hard to find cases where EU action would be less effective or efficient than decentralised action.<sup>19</sup> Second, the EU may pay greater homage to individuals as compared to other state-led organisations,<sup>20</sup> but it is undoubtedly a state-centric organisation. Polycentric subsidiarity enlarges our analytical gaze to systematically include actors other than states as part of the subsidiarity landscape.<sup>21</sup> In short, polycentric governance in the EU requires a multiscale principle of subsidiarity that acknowledges the possibility of horizontal competence sharing, as we are already witnessing in EU practice, between and below the state.

The remainder of the chapter is structured as follows: Section I contrasts the interpretations given to subsidiarity by EU law and practice, as opposed to polycentric theory and suggest ways in which differences between the two may be bridged. Section II lays out the basic building blocks of polycentric subsidiarity. Section III concludes by considering applications and implications of polycentric subsidiarity beyond the EU.

## I. Redefining Subsidiarity

The term 'subsidiarity' can be traced back to the Roman *subsidium*,<sup>22</sup> and its use as a political principle as far as St. Thomas of Aquinas' work in the thirteenth century.<sup>23</sup> In the centuries that followed, the term and principle of subsidiarity developed in multiple directions, both theoretically and normatively.<sup>24</sup> The contrast between two such interpretations, that of EU law and polycentric theory, currently occupy separate analytical spaces. This section sets out their core features and suggests how they may be bridged.

### A. Subsidiarity in the EU: The Principle in Practice

The principle of subsidiarity has been part of the EU's constitutional fabric since the Treaty of

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<sup>19</sup> For an overview of the judicial testing of the subsidiarity principle, and the role of efficiency, see D. Wyatt, 'Could a "Yellow Card" for National Parliaments Strengthen Judicial as well as Political Policing of Subsidiarity?' (2006) 2 Croatian Yearbook of European Law & Policy 1.

<sup>20</sup> On this, see also in this Volume Chapter 6, by A. Bobić.

<sup>21</sup> See in more detail Section I.

<sup>22</sup> P. Donati, 'What Does "Subsidiarity" Mean? The Relational Perspective' (2009) 12 Journal of Markets & Morality 211

<sup>23</sup> Thomas Aquinas, *On the Governance of Rulers (De regimine principu)* (G.B. Phelan trans., University of Toronto Press 1935) 1265-66.

<sup>24</sup> Restrictions of space prevent us from providing a detailed overview of the development of subsidiarity. Useful resources include A. Føllesdal, 'Survey Article: Subsidiarity' (1998) 6(2) Journal of Political Philosophy 190; R. Hittinger (n 14); R.K. Vischer, 'Subsidiarity as a Principle of Governance: Beyond Devolution' (2001) 35 Indiana Law Review 103; A. Portuese (n 12).

Maastricht, which incorporated the principle into the Treaty establishing the European Community.<sup>25</sup> Before this, it had already been applied in EU environmental policy, though not specifically referred to as such.<sup>26</sup> The period between subsidiarity's inclusion in the Maastricht Treaty and its restatement in the Lisbon Treaty (1992 – 2009) was one of significant frustration and uncertainty regarding the status, application and purpose of the principle.<sup>27</sup> Despite the adoption of an additional protocol on the application of the principles of subsidiarity and proportionality with the Treaty of Amsterdam, the Laeken Declaration of 2001 made clear that serious shortcomings still existed.<sup>28</sup> The Lisbon Treaty introduced a rephrased subsidiarity principle and a refreshed Protocol on the application of the principles of subsidiarity and proportionality.<sup>29</sup>

The reframing of subsidiarity within the Lisbon Treaty must be seen in light of other changes to the constitutional fabric of the EU, including the categorisation of competences as 'exclusive', 'shared' and 'supporting',<sup>30</sup> as part of an effort to more clearly delineate the division of competence between the EU and its Member States. All these areas are subject to the principle of proportionality, which leaves EU institutions duty-bound to refrain from actions beyond those 'necessary to achieve the objectives of the Treaties'.<sup>31</sup> The principle of subsidiarity only applies to those areas of competence that are not within the exclusive competence of the EU,<sup>32</sup> which continues to be the majority of policy areas.<sup>33</sup> Important areas of shared competence include the internal market, economic, social and territorial cohesion policy, environment and consumer protection.<sup>34</sup> As Union action has a pre-emptive effect,<sup>35</sup> the principles of subsidiarity and proportionality are considered important backstops to the expansion of Union competence.

Article 5(3) TEU sets out criteria on which to base our decision as to which level of government

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<sup>25</sup> Treaty on European Union, Maastricht 7.02.1992.

<sup>26</sup> See J. van Zeben, 'Operationalizing Subsidiarity: Power-sharing in EU Environmental Law' (2014) 38(2) *Harvard Environmental Law Review* 415

<sup>27</sup> A sample of the rich academic literature on this topic includes R. Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism' (2009) 68 *Cambridge Law Journal* 525. See also K. van Kersbergen and B. Jan Verbeek, 'The Politics of Subsidiarity in the European Union' (1994) 32 *Journal of Common Market Studies* 215; J. Golub, 'Sovereignty and Subsidiarity in EU Environmental Policy' (1996) 44 *Political Studies* 686; D. Benson and A. Jordan, 'Understanding Task Allocation in the European Union: Exploring the Value of Federal Theory' (2008) 15 *Journal of European Public Policy* 78.

<sup>28</sup> Laeken Declaration, available at <[https://www.cvce.eu/content/publication/2002/9/26/a76801d5-4bf0-4483-9000-e6df94b07a55/publishable\\_en.pdf](https://www.cvce.eu/content/publication/2002/9/26/a76801d5-4bf0-4483-9000-e6df94b07a55/publishable_en.pdf)>. Additional procedural standards were introduced in the Edinburgh Guidelines but these were ultimately not included in the Lisbon revisions and are currently found only in the Impact Assessment Guidelines—a source of soft law applicable to the European Commission in executing its legislative duties. European Commission, Impact Assessment Guidelines, Jan. 15, 2009, SEC(2009) 92, available at <<http://perma.cc/3NHF-G4WK>> (part of the European Commission's Smart Regulation agenda)

<sup>29</sup> Article 5(3) TEU & Protocol No 2.

<sup>30</sup> Art. 3, 4 and 6 of the TFEU.

<sup>31</sup> Article 5(4) TEU.

<sup>32</sup> Although there is some controversy as to the categorisation of 'exclusive implied organisational powers' of Union institutions and the possible application of the subsidiarity principle to these powers – see R. Schütze, 'Dual federalism constitutionalised: the emergence of exclusive competences in the EC legal order' (2007) 32 *European Law Review* 3, 5.

<sup>33</sup> Compare Consolidated version of the Treaty on the Functioning of the European Union art. 3(1), Oct. 26, 2012, 2012 O.J. (C326) 55 [hereinafter TFEU] with TFEU art. 4(1) and TFEU art. 4(2).

<sup>34</sup> TFEU art. 4(2).

<sup>35</sup> TFEU art. 2(2) ('Member States shall exercise their competence to the extent that the Union has not exercised its competence')

is better suited to perform certain tasks.<sup>36</sup> This subsidiarity ‘test’ has two steps: first, according to the text of Article 5(3), ‘*the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level*’. In determining whether it is ‘necessary’ for the EU to act, account should be taken not only of national parliamentary reports, but also of the position of regional and local actors.<sup>37</sup> Second, it must be shown that the action, ‘*by reason of the scale or effects of the proposed action, [can] be better achieved at Union level*’.<sup>38</sup> Yet, with the restatement of Article 5(4) TEU and introduction of the ‘early warning system’ in Protocol 2,<sup>39</sup> the concentration of competences at the EU level has dramatically increased with the Eurocrisis.<sup>40</sup> Why?

In a nutshell, the two conditions outlined in art 5(3) aim at achieving the complementary goals of effectiveness and efficiency: the EU shall act only where its involvement, and not that of the Member States, is likely to produce the intended result (effectiveness), and at lower cost (or ‘better’) than Member States acting alone (efficiency). In other words, it is about doing the right thing, the right way. Given the desirability of internalising externalities and pervasive economies of scale in managing interdependence, most state action ought arguably be taken or at least coordinated beyond the state. Moreover, where an action ought to be taken beyond the state, and even if it would be desirable to act at the global level, the EU level can arguably provide a first step where global action is not available.<sup>41</sup>

There are two ways of explaining why this definitional approach has not proven a safeguard against the centralisation of competence. First, one could argue that EU action can be explained by the kind of issues faced by the EU; for every issue with a cross-border dimension, it is easy to show *a priori* that the EU *might* be better placed than individual Member States to regulate it. Second, one could counter that efficiency and effectiveness are too narrowly defined by the interpreters of subsidiarity because the ‘intended results’ (effectiveness) do not include considerations of who governs, who decides who is empowered, and because the relative EU vs member states ‘costs’ do not include the cost of overriding or homogenising the heterogeneous preferences of the Member States, or indeed lower levels of aggregation.<sup>42</sup> If one gives some credence to the second type of argument, then substantial harmonisation in areas with strong variations in preferences, like social protection or agricultural policy is suboptimal.<sup>43</sup> And subsidiarity, as practiced in the EU, is merely a rhetorical fig-leaf which

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<sup>36</sup> These two goals represent two historical normative underpinnings of the subsidiarity principle, see A. Føllesdal, (n 24) 41–46.

<sup>37</sup> Art 2, Protocol No 2. While this is a formal requirement, the extent to which this happens in practice is limited.

<sup>38</sup> Article 5(4) TEU.

<sup>39</sup> Protocol No 2; see also Protocol No 1.

<sup>40</sup> See A. Alesina, I. Angeloni and L. Schuknecht, ‘What Does the European Union Do?’ (2005) 123 *Public Choice* 275 (providing empirical evidence on the expansion of the policy-making role of the European Union in the years between 1971 and 2000); D. Hodson, ‘Policy-Making under Economic and Monetary Union – Crisis, Change and Continuity’ in H. Wallace, M.A Pollack and A.R. Young, *Policy-Making in the European Union* (7<sup>th</sup> Ed., OUP 2014).

<sup>41</sup> See Case C-377/98 *Netherlands v Parliament and Council* (‘*Biological patents*’) [2001] ECR I-07079 (in this case the Netherlands unsuccessfully challenged a directive on biological patents on the basis that international action was forthcoming).

<sup>42</sup> G. Davies, ‘Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time’ (2006) 43 *Common Market Law Review* 63.

<sup>43</sup> *ibid.*

undercuts the Union's aim to regulate as closely as possible to the citizen.<sup>44</sup> The alleged neutrality of the subsidiarity principle as to the preferred level of governance is then also purely theoretical.<sup>45</sup> No wonder that resistance to centralising competences has increased on the part of Member States,<sup>46</sup> and resentment grown among EU citizens.<sup>47</sup>

Neither of the two tangible methods of 'enforcement' of the subsidiarity principle with respect to legislative measures has succeeded in countering such a trend. First, the early warning system introduced in Protocol 2 empowers national parliaments to receive and review EU draft legislative acts,<sup>48</sup> by including 'detailed statements making it possible to appraise the compliance with the principles of subsidiarity and proportionality'.<sup>49</sup> Depending on the amount of reasoned opinions that parliaments submit in response to draft legislation,<sup>50</sup> a draft act may be reviewed, maintained, amended or withdrawn by the Commission. But this 'subsidiarity' check is subject to several limitations: it only applies to certain legislation proper to the exclusion of delegated and implementing acts; and there is no guarantee that objectionable drafts are meaningfully amended or withdrawn. Thus far, the effect of objections on draft legislation has been limited.<sup>51</sup>

The second method of enforcement, at the other end of the legislative process, is through judicial review by the Court of Justice. Early case law of the Court of First Instance shows that it was of the opinion that the principle of subsidiarity was not a general principle of law against which the legality of EU action could be tested, at least until the TEU entered into force.<sup>52</sup> Since then, failure to respect the subsidiarity principle makes the legislative act in question susceptible to an invalidity challenge.<sup>53</sup> In these cases, while taking into account both elements of the test set out in Article 5(3), the Court appears to prioritise the 'better achieved at Union level' element (efficiency),<sup>54</sup> rather than the necessity of Union action in the face of Member State inability to successfully address the relevant regulatory problem (effectiveness). Significantly, very few cases since have argued substantive breach of the subsidiarity principle,

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<sup>44</sup> Art 1 TEU.

<sup>45</sup> See W. Vandenbruwaene, 'The Judicial Enforcement of Subsidiarity: The Quest for an Appropriate Standard' in P. Popelier, A. Mazmnyan and W. Vandenbruwaene, *The Role of Constitutional Courts in a Context of Multilevel Governance* (Intersentia 2012) 144 ('subsidiarity legally understood is a neutral regulative principle').

<sup>46</sup> R. Vilipsauskas, 'Eurozone Crisis and European Integration: Functional Spillover, Political Spillover?' (2013) 35(3) *Journal of European Integration* 361.

<sup>47</sup> See K. Nicolaïdis, 'Mutual recognition: Promise and Denial, from Sapiens to Brexit' (n 16).

<sup>48</sup> Article 12(b) TEU.

<sup>49</sup> Protocol No 2, Art. 5. This assessment should include the proposal 'financial impact' as 'the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens to be minimized.'

<sup>50</sup> There can be individual support (of a specific national parliament or chamber), collective opinions (representing 1/3 of the votes awarded to national parliaments in the Union) and special legislative opinions (simple majority of the votes available).

<sup>51</sup> See, e.g., T. Raunio, 'Destined for Irrelevance? Subsidiarity Control by National Parliaments' (2010) Real Instituto Elcano Working Paper 36/2010 available at <<http://perma.cc/G34K-FZQY>>; but see I. Cooper, 'A 'Virtual Third Chamber' for the European Union? National Parliaments after the Treaty of Lisbon' (2012) 35 *West European Politics* 441; D. Jancic, 'The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue' (2015) 52(4) *Common Market Law Review* 939.

<sup>52</sup> Case T-29/92, *Bouwnijverheid v Commission* [1995] ECR II-00289, paras 330-331.

<sup>53</sup> See Article 263 and 267 TFEU.

<sup>54</sup> See e.g. Case C-58/08 *Vodafone v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-04999, para 78.

and only one successfully.<sup>55</sup> On their part, and arguing before the Court, Member States are more likely to point at procedural shortcomings by EU institutions in the legislative process, such as insufficient reasoned support for the subsidiarity requirement.<sup>56</sup>

The Court's reluctance to provide substantive review of the subsidiarity principle has been heavily criticised, as it is viewed to render judicial review of the principle toothless.<sup>57</sup> Others suggest that the principle of subsidiarity may be better understood as a political principle that plays a role in the legislative process, and that the Court is correct in respecting the democratic progress that precedes adoption of the act.<sup>58</sup> In theory, this is what the early warning system was meant to achieve but as we just saw, it has not done so in practice.

As a result, the EU's interpretation of the principle of subsidiarity meant to restrain the expansion of EU competences has not been able to stop the expansion of EU competence – and has arguably facilitated it, despite pre-legislative and post-legislative controls. This is why, we argue, it needs to be redefined.

## B. Subsidiarity in Polycentric Theory

*The Organization of Government in Metropolitan Areas* was written in response to the widely supported, but often unsubstantiated, claim that 'fragmented' government led to inefficiencies, particularly in the local provision of public services.<sup>59</sup> The assumption was that centralisation (and consequent uniformity) of service provision would automatically lead to economies of scale and scope and was therefore preferable to decentralisation. Ostrom, Tiebout and Warren presented a testable hypothesis of potential diseconomies of scope and scale in the centralised production and/or provision of certain public services, which members of the Ostrom Workshop later verified through empirical studies.<sup>60</sup>

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<sup>55</sup> Case C-376/98 *Tobacco Advertising I* [2000] I-08419.

<sup>56</sup> Case C-426/93, *Germany v Parliament and Council* [1995] I-03723.

<sup>57</sup> See A. Estella, 'The EU Principle of Subsidiarity and Its Critique' (OUP 2002) 156 ('Prudence . . . best summarizes the [European] Court's doctrine on the principle of subsidiarity'); see also R.H. Fallon, 'Judicially Manageable Standards and Constitutional Meaning' (2005) 119 *Harvard Law Review* 1274, 1331 (advocating an activist approach: 'When a constitutional norm is not a judicially manageable standard, it becomes the function of courts to attempt to devise or select one.');

See W. Vandenbruwaene (n 45) (presenting an analysis of the European case-law). See also T. Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2011) 50 (2) *Journal of Common Market Studies* 267; F. Sander, 'Subsidiarity Infringements Before The European Court Of Justice: Futile Interference With Politics Or A Substantial Step Towards EU Federalism?' (2006) 12 *Columbia Journal of European Law* 517.

<sup>58</sup> P. Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 *Journal of Common Market Studies* 72

<sup>59</sup> V. Ostrom, C.M. Tiebout and R. Warren (n 12), 831

<sup>60</sup> See in detail, in this Volume, chapter 1 by J. van Zeben. See also V. Ostrom, 'Polycentricity' (Part 2) reprinted in M. McGinnis (ed.), *Polycentricity and Local Public Economies* (University of Michigan Press 1999) 119-138. These hypotheses were tested by E. Ostrom, 'Size and Performance in a Federal System' (1976) 6 *Publius: The Journal of Federalism* 33; E. Ostrom, 'Why Do We Need Multiple Indicators of Public Service Outputs?' In *National Conference on Nonmetropolitan Community Services Research* (Washington, D.C., US Gov't Printing Office 1977), pp. 277-286; E. Ostrom and G.P. Whitaker, 'Does Local Community Control of Police Make a Difference? Some Preliminary Findings' (1973) 17(1) *American Journal of Political Science* 48; E. Ostrom and G.P. Whitaker, 'Community Control and Governmental Responsiveness: The Case of Police in Black Neighborhoods' in D. Rogers and D. Halley (eds.), *Improving the Quality of Urban Management* (Urban Affairs Annual Reviews No 8 1974); E. Ostrom, R.B. Parks and G.P. Whitaker, 'Defining and Measuring Structural Variations in Interorganizational Arrangements' (1974) 4 *Publius: The Journal of Federalism* 87; E. Ostrom and



In setting out the framework of their ‘polycentric political system’, Ostrom, Tiebout and Warren never explicitly refer to ‘subsidiarity’. Rather they find that the ‘problem’ of municipal governance ‘is to recognise the variety of smaller sets of publics that may exist within its boundaries’. Many of the interests of smaller publics, they argue, ‘might be more properly negotiated within the confines of a smaller political community without requiring the attention of centralised decision-makers concerned with the big system’.<sup>61</sup> Though not always. They emphasise that the people affected will vary for each set of transactions and problems, and that depending on factors such as information, technology and communication, there may be a different optimal scale of public organisation for each public good.<sup>62</sup> Optimally differentiated production and consumption of public goods are thus positioned as the key potential benefit of polycentric governance, and the potential competitive advantage over monocentric governance.

Ostrom, Tiebout, and Warren found that ‘patterns of local autonomy and home rule constitute substantial commitments to a polycentric system’, capable of ‘supplying a variety of public goods with many different scales of organisation and of providing optimal arrangements for the production and consumption of public goods’.<sup>63</sup> Local self-determination could thus be seen as a strong support, if not prerequisite, for polycentric governance.

A year after the publication of *The Organization of Metropolitan Government*, the economist George Stigler issued a resounding defence of the principle of subsidiarity, which echoed Ostrom, Tiebout and Warren’s hypothesis:

‘If we give each government activity *to the smallest governmental unit* which can efficiently perform it, there will be a vast resurgence and revitalization of local government in America. [...] [B]oth public functions and private citizens would benefit from the increased participation of citizens in political life. An eminent and powerful structure of local government is a basic ingredient of a society which seeks to give to the individual the fullest possible freedom and responsibility.’<sup>64</sup>

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R.B. Parks, ‘Neither Gargantua nor the Land of Lilliputs: Conjectures on Mixed Systems of Metropolitan Organization’ in M. McGinnis (ed.), *Polycentricity and Local Public Economies* (University of Michigan Press 1999); W. Blomquist and R.B. Parks, ‘Fiscal, Service, and Political Impacts of Indianapolis-Marion County’s Unigov.’ (1995) 25 *Public: The Journal of Federalism* 37; R.B. Parks and E. Ostrom, ‘Complex Models of Urban Services Systems’ in T.N. Clark (ed.), *Urban Policy Analysis: Directions for Future Research* (Urban Affairs Annual Reviews No 21 1981). The findings tended to support the existence of multiple, smaller, service providers, such as police services. See e.g. ‘In terms of immediate response to citizens’ calls for service, the existence of a *fairly large number* of autonomous, small- to medium-sized police departments is associated with lower victimization rates, faster response, and higher response capability in the neighborhoods served by those agencies’ (E. Ostrom and R.B. Parks in M. McGinnis 1999, 292, emphasis added).

<sup>61</sup> V. Ostrom, C.M. Tiebout and R. Warren (n 12), 837-8

<sup>62</sup> *ibid*, at 836.

<sup>63</sup> *ibid*, 837, 839.

<sup>64</sup> G.J. Stigler, ‘The tenable range of functions of local government’ in E.S. Phelps (ed.) *Private wants and public needs*, edited by, (W.W. Norton 1962) 167-76

Since then, economists have developed numerous ways of mapping governance onto the heterogeneous preferences held at various degrees of aggregation and much has been written on multi-level governance and federalism as a frame for respecting the diversity of preferences in a polity. Indeed, Vincent Ostrom's later work on polycentric theory often returns to the importance of local government, often extrapolating from the municipal level upwards to the federal, as envisioned by Madison and Hamilton in *The Federalist Papers*.<sup>65</sup> This process of positioning higher-level decision-making units as subsidiary to lower ones – a kind of 'inverse subsidiarity' – links polycentric self-governance to the principle of subsidiarity.<sup>66</sup> In other words, the default authority should always be at lower level even while that authority might willingly decide to cooperate with others, possibly at a higher level of governance.<sup>67</sup>

In applying Vincent and Lin Ostrom's theoretical work to polycentric environmental governance, Ostrom scholars have suggested that the principle of subsidiarity may be an appropriate starting point for assigning decision-making rights across the various levels of governance.<sup>68</sup> However, proposing to stimulate polycentric self-governance through 'top-down subsidiarity', rather than allowing local self-governance to function as the foundation of systemic polycentricity and self-governance ('inverse subsidiarity'), risks reversing the exact process that polycentricity is meant to encourage. The possibility or even preference for local governance should not be confused with prescribing the exercise of these powers at a given level, no matter how local or decentralised.

The principle of subsidiarity, as conventionally understood, is a hierarchical and vertical principle. It is meant to counterbalance the powers of dominant decision-units, such as the federal or national level of government, by imposing a preference for governance through local

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<sup>65</sup> V. Ostrom, 'Polycentricity' (Part 1), reprinted in M. McGinnis (ed.), *Polycentricity and Local Public Economies* (University of Michigan Press 1999); see also V. Ostrom, *The Political Theory of the Compound Republic: Designing the American Experiment* (University of Nebraska Press 1971)

<sup>66</sup> See also K. Andersson and E. Ostrom, 'Analyzing decentralized resource regimes from a polycentric perspective' 2008 41 *Policy Sciences* 71.

<sup>67</sup> See for instance, Lin Ostrom's design principles for successful governance of common-pool resources which requires that 'the rights of appropriators to devise their own institutions are not challenged by external government authorities' E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 1990)

<sup>68</sup> I. Reeve, G. R. Marshall and W. Musgrave, *Resource governance and integrated catchment management*. (Institute for Rural Futures 2002); M.B. Lane, G.T. McDonald and T.H. Morrison, 'Decentralisation and environmental management in Australia: A comment on the prescriptions of the Wentworth Group' (2004) 42(1) *Australian Geographical Studies* 103; G.R. Marshall, *Economics for Collaborative Environmental Management: Renegotiating the Commons* (London: Earthscan 2005); G.R. Marshall, 'Nesting, subsidiarity, and community-based environmental governance beyond the local level' (2008) 2(1) *International Journal of the Commons* 75; M. Moran and R. Elvin, 'Coping with complexity: Adaptive governance in desert Australia' (2009) 74 *GeoJournal* 415; W. Steffen, A.A. Burbidge, L. Hughes, R. Kitching, D. Lindenmayer, W. Musgrave, M. Stafford Smith, and P.A. Werner, *Australia's Biodiversity and Climate Change* (Melbourne: CSIRO Publishing 2009); G.R Marshall and D.M. Stafford Smith, 'Natural resources governance for the drylands of the Murray-Darling Basin' (2010) 32 (3) *The Rangeland Journal* 267; R.P. Bixler, 'From community forest management to polycentric governance: Assessing evidence from the bottom up' (2014) 27(2) *Society and Natural Resources* 155; G.R. Marshall, M.J. Coleman, B.M. Sindel, I.J. Reeve, and P.J. Berney, 'Collective action in invasive species control, and prospects for community-based governance: The case of serrated tussock (*Nassella trichotoma*) in New South Wales, Australia' (2016) 56 *Land Use Policy* 100. All references as quoted in G.R. Marshall, 'Polycentricity, subsidiarity and adaptive efficiency', paper presented to the International Workshop on Polycentricity, Ostrom Workshop in Political Theory and Policy Analysis, Indiana University, Bloomington, Indiana, USA, 14-17 December, 2015, available at <[https://www.researchgate.net/profile/Graham\\_Marshall/publication/311405734\\_Polycentricity\\_subsidarity\\_and\\_adaptive\\_efficiency/links/58448c1008ae2d217566d349/Polycentricity-subsidarity-and-adaptive-efficiency.pdf](https://www.researchgate.net/profile/Graham_Marshall/publication/311405734_Polycentricity_subsidarity_and_adaptive_efficiency/links/58448c1008ae2d217566d349/Polycentricity-subsidarity-and-adaptive-efficiency.pdf)>

decision-making units unless such action is evidently inefficient or otherwise undesirable. Vincent Ostrom based much of his views on democracy and governance on the fundamental belief that governing should be left to the people, not to ‘government’.<sup>69</sup> He found that most theories of government had sacrificed this principle in order to make sense of the perceived need for one body that exercises ‘supreme authority’, typically referred to as ‘sovereignty’.<sup>70</sup> Even when federalists state that within federations sovereignty resides with the people who then delegate it to the state or federal level,<sup>71</sup> they largely fail to incorporate the practice of shared sovereignty beyond units of government, to include governance by individuals and collectives.<sup>72</sup> If we are to speak of the sovereign, Vincent Ostrom famously argued, it should always be the Citizen-sovereign.

Under a polycentric view, the concepts of sovereignty, democracy and governance must incorporate references to all relationships in society, vertical as well as horizontal. Most interpretations of American federalism, in Ostrom’s view, prioritised the vertical delegation of sovereignty (from individuals to state and federal government) over the potential horizontal sharing and transfer of sovereignty between individuals or localities.<sup>73</sup> Paradoxically, the very virtues we ascribed to *vertical* fragmentation – especially the prevention of authoritarianism –<sup>74</sup> require *horizontal* connections among the various centres of governance which retain ultimate authority, all the way down to individuals and groups.

It is thus unsurprising that when at the end of his life, Vincent Ostrom turned his gaze to the European Union, he was not impressed. ‘Principles of subsidiarity’, he reminded EU technocrats in 1996, ‘need to be extended to family, neighborhood, and community far beyond the realm of nation-states as contemplated by the Maastricht Accord.’<sup>75</sup> How can the Ostroms’ injunction be resurrected?

### C. Bridging the Gap with Democratic Theory

Ostrom’s polycentricity was developed against the backdrop of US federalism and scholarship, and later applied extensively to natural resource management. To argue as we do that its emphasis on horizontal relationships can be inspiring in the EU context, we need to distinguish between two levels. First, within the scope of subsidiarity as used in EU parlance, that is regarding the vertical division of competence between the Member States and the EU in areas of shared and supportive competence, we can speak of polycentric subsidiarity as a way of

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<sup>69</sup> V. Ostrom, *The Meaning of American Federalism: Constituting a Self-governing Society* (1994) 261

<sup>70</sup> *ibid.*, 94, 96.

<sup>71</sup> *ibid.*, 8 ([Federalism] ‘enables people to break out of the conceptual trap inherent in a theory of sovereignty that presumes there must exist some single center of supreme authority that rules of society.’).

<sup>72</sup> *ibid.*, 89.

<sup>73</sup> Ostrom believes that the interpretation of the founding documents of the United States – including crucially *The Federalist* written by Alexander Hamilton, John Jay and James Madison – has often been mistaken, which has distorted our understanding of federalism. Whereas federalism does indeed foresee a sharing of sovereignty between multiple units of government, Ostrom submits that the writers of the Philadelphia Convention of 1787 aimed to include a role for individuals.

<sup>74</sup> V. Ostrom, ‘Polycentricity’ (Part 1) (n 65) 68

<sup>75</sup> V. Ostrom, ‘Faustian Bargains’ (1996) 7(4) *Constitutional Political Economy* 303, 307.

emphasising horizontal relations as partial substitutes for vertical one.<sup>76</sup> Second, beyond the state, the scope of EU subsidiarity needs to be enlarged in order to take into account the wider range of actors involved in governance. The analogy between these actors and state actors is not fully operative but nevertheless fruitful.

In order to clarify this distinction and drawing on Francis Cheneval in this volume, we find it useful to draw on conceptualisations of the EU as a polity in the making which provide both a descriptive and a normative heuristic, namely demoicratic theory.<sup>77</sup> At the same time, however, there is also room to enrich demoicratic theory with the conceptual lenses provided by polycentric governance theory.

Demoicratic theory was developed under the conviction that the traditional political science categories pertaining to democracy, discussed in the introduction to this volume, needed to be rethought to apply to the EU as a new kind of democracy. As MacCormick so aptly put it:

For this is a new form of political order, a new kind of ‘commonwealth’, which offers the hope of transcending the sovereign state rather than simply replicating it in some new super-state . . . It creates new possibilities of imagining, and thus of subsequently realizing, political order on the basis of a pluralistic rather than a monolithic conception of the exercise of political power and legal authority.<sup>78</sup>

This is what demoicratic theory seeks to do. It was developed to account for the polycentric nature of the EU, not simply in the way the United States does between federated states, but to the extent that a plurality of separate peoples, belonging to separate states, constitute its centres, centres which can only function together through freely chosen modes of mutual recognition.<sup>79</sup> Cheneval refers to the constituent demoi as separate holders of competence-competence: a bundle of powers and immunities against others to alter or cancel their powers.<sup>80</sup> Hence, these separate political bodies can create a multi-purpose multi-level union, to which powers may be delegated, but ultimately a state’s powers cannot be cancelled by others. But – and this is where the normative take comes in – the praxis of polycentric government can be eroded through centralising tendencies over time, as we have seen during the Eurocrisis.

The shared affinity between demoicratic theory and polycentric governance theory lies with their respective emphasis on the horizontal dimension of governance. But demoicracy, as the term indicates is centred on the idea of the people, which is not central to the original polycentric scheme. Nevertheless, while Ostrom’s municipal units are not demoi, the analogy stands.

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<sup>76</sup> This also explains the symbolic nature of the inclusion of regional and local bodies in the Lisbon text of Art 5(3) TEU: while they are now included, they are not the ones who transfer competence to the EU.

<sup>77</sup> F. Cheneval and F. Schimmelfennig, ‘The Case for Demoicracy in the European Union’ (2013) 51(2) *Journal of Common Market Studies* 334; K. Nicolaïdis, ‘European Demoicracy and Its Crisis’ (2013) 51(2) *Journal of Common Market Studies* 51 (2) 351.

<sup>78</sup> N. MacCormick, *Questioning Sovereignty* (OUP Press 1999), 191

<sup>79</sup> K. Nicolaïdis, ‘Our European Demoi-cracy’ in S. Weatherill and K. Nicolaïdis (eds.) *Whose Europe? National Models and Constitution of the European Union* (OUP 2003)

<sup>80</sup> See also, in this Volume, Chapter 3 by F. Cheneval.

Yet, in spite of the non-centrality of the idea of people in original democratic theory, it itself might provide a dual anchor for our polycentric subsidiarity. Recall that if democracy is the rule of *the entire people*, a democracy is a polity ruled by *a plurality of peoples*, who govern together but not as one.<sup>81</sup> In this definition, ‘peoples’ refers both to the *demos* or peoples which have historically constituted states and thus structures of governance within which majorities and minorities can coexist; and ‘peoples’ also refers to the aggregated yet direct expressions of individual citizens expressing their democratic rights, demands and struggles within and across these states but not reducible to these states. In a democracy, in other words, states matter in so far as they are themselves the democratic expression of their people, but not only they matter, as we cannot only count on governments to most faithfully express the preferences of their peoples. If this is the case, democratic theory seeks to conceptualise the ways in which peoples can govern their affairs together most effectively through their respective states but also around them. This is the double agenda set out above regarding the import of polycentric subsidiarity.

In this sense, the difference between democratic theory and theories of multilevel governance (MLG) analysed by Benz is a matter of emphasis as to whether we should care about the precise nature of the polities or ‘jurisdictions’ to be aggregated as well as the nature of the whole. The democratic frame privileges a *specific* level and emphasises the ‘nation statist’ nature of the constituent units and indeed their very unique quality as ‘member states’.<sup>82</sup> Moreover, the democratic frame is not neutral normatively, concerned as it is with whether modes of coordination and aggregation protect the self-determination of separate peoples more or less effectively, while MLG privileges the functional requirements of finding the appropriate scale of governance and identity formation in social communities to ensure supranational policy effectiveness, as with the traditional subsidiarity frame described above.<sup>83</sup> This is not therefore a disagreement over input vs output legitimacy, but one about the normative primacy of the political over the functional.<sup>84</sup> The critical point here is that even while national *demos* remain the dominant political unit where bargains are struck and compulsory solidarities institutionalised, the EU needs to be a space where *demos* can access each other directly politically rather than simply relying on their government to do so.<sup>85</sup>

In this light polycentric subsidiarity needs to be developed on two fronts. In the narrow sense introduced above, it serves to emphasise the way in which shared EU competences can be best exercised either by allowing for the right resources and incentives at the state level, or by encouraging and enforcing horizontal cooperation between states rather than the delegation of authority upwards. And given this, we then must ask what is the minimal delegation upwards

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<sup>81</sup> K. Nicolaïdis, ‘The Idea of European Democracy’ in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (OUP 2012) 254

<sup>82</sup> C. Bickerton, *European Integration: From Nation-states to Member States* (OUP 2012)

<sup>83</sup> A. Benz, ‘Multilevel Governance in the European Union: Loosely-Coupled Arenas of Representation, Participation and Accountability’ in S. Piattoni (ed.), *The European Union* (OUP 2015); T. Conzelmann, ‘A New Mode of Governing? Multi-level Governance between Cooperation and Conflict’ in T. Conzelmann and R. Smith, *Multi-level Governance in the European Union. Taking Stock and Looking Ahead* (Baden-Baden: Nomos 2008) 11; H. Enderlein, S. Wälti, and M. Zürn (eds.), *Handbook on Multi-Level Governance*, (Edward Elgar 2010).

<sup>84</sup> K. Nicolaïdis, ‘Democratic Theory and Europe’s Institutional Architecture in Times of Crisis’ in S. Piattoni (ed.), *The European Union* (OUP 2015), 141.

<sup>85</sup> *ibid.*, at 142

needed in order for such horizontal cooperation to function, under the adjacent principle of equality between Member States set out in Article 4(2) TEU.<sup>86</sup>

In the second broader sense introduced above, polycentric subsidiarity serves to indicate where and how non state actors can be better empowered in their separate or joint act of governance. For ‘demoi-cracy’ to be constructed and entrenched in a way that is stable and sustainable, it needs to be ‘constructed’ as a social reality, so as to lead to a lived version of ‘joint sovereignty’.<sup>87</sup> This is the mission to which polycentric subsidiarity can contribute.

## II. Mapping Polycentric Subsidiarity

How then do we operationalise polycentric subsidiarity? We suggest it has three core characteristics which are both functional and normative.

First, polycentric subsidiarity must maintain and support *self-governance*; second, it must incorporate, and sometimes privilege, *horizontal* relationships; and third, it must allow for the *organic* development of, and changes to, self-governance. These elements are mutually reinforcing and, in many ways, interlinked.

Under each of these categories, we need to identify the different logics pertaining to the various realms in which polycentricity may apply. Polycentric subsidiarity is about individuals, intermediary bodies, cities and regions as well as Member States. Do we observe and advocate congruent patterns at different scales? How different is it to discuss polycentric subsidiarity among states vs the role of individuals in decision making?

### A. Self-governance

The first attribute of polycentric subsidiarity is a bias for self-governance. How should self-governance then be mitigated under conditions of interdependence?

The virtues ascribed to subsidiarity in the European context are very similar to those ascribed to devolution in American federalism.<sup>88</sup> Federalism after all has been about ‘self-determination and accountability, political liberty, flexibility, preservation of identities, diversity and respect for internal division of component states.’<sup>89</sup> Naturally, the aim of ‘diversity and the

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<sup>86</sup> Text 4(2) TEU.

<sup>87</sup> F. Cheneval and K. Nicolaidis, *The Social Construction of Demoicracy in the European Union* (2017) 16(2) *European Journal of Political Theory* 235, 239-240.

<sup>88</sup> As summarised by Justice O’Connor, federalism means to assure a decentralised government that will be more sensitive to the diverse needs of a heterogeneous society, increase opportunity for citizen involvement in democracy, allows for more innovation and experimentation, a more responsive government, and, most importantly, a check on abuses of government power. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (citations omitted). See also K. Nicolaidis and R. Howse, *The Federal Vision: Legitimacy and Levels of Governance* (OUP, 2001)

<sup>89</sup> Gerald L. Neuman, ‘Subsidiarity, Harmonization, and their Values: Convergence and Divergence in Europe and the United States’ (1996) 2 *Columbia Journal of European Law* 573, 574 (quoting G. Bermann, ‘Taking Subsidiarity Seriously: Federalism in the European Community and the United States’ (1994), 94 *Columbia Law Review* 331, 343).

preservation of identities’ carries different weight and meaning in a coalition of sovereign nations, or federal union, as compared to a federal state.<sup>90</sup> Similarly, the relationship between individual citizens and the European Union - and the role of individuals within the ‘democratic’ process of the European Union -<sup>91</sup> is distinct from that of a ‘national’ citizen and its government in the United States.<sup>92</sup> The politics of Brussels appear distant and democratically inaccessible to most European citizens even as they perceive its growing effects on their daily lives.<sup>93</sup> The democratisation challenge has been about bridging this gap through injunctions for the EU both to respect and enhance democracy at the national level, and to explore ways to open up these national practices to transnational logics.<sup>94</sup> Polycentric subsidiarity constitutes an additional tool in this arsenal.

Obviously, self-governance is not synonymous to decentralisation, and more decentralisation does not automatically ensure more or better self-governance.<sup>95</sup> Depending on the scale and nature of the issue, it may be far more effective for individuals to organise at the regional or national level. While in the narrow sense above, self-governance refers to the Member States – as the only decision unit to have competence-competence and legal immunity against the power encroachment by others as per Cheneval – it needs to apply to other actors in different ways. In short, polycentric subsidiarity requires two moves:

- 1) Broadening the definition when applied to Member States – Assigning intrinsic value to self-governance in a polycentric subsidiarity assessment goes beyond the instrumental rationale for decentralisation as a way of increasing democratic legitimacy, or enhancing the likelihood that collective decisions will stick. It implies that the efficiency and economies of scale criteria need to be supplemented, or counter-balanced, with considerations of the intrinsic value of self-governance to reflect the intrinsic worth of closeness and immediacy, even at the cost of (some) efficiency. Short of such a move, the principle of subsidiarity fails to bite – a reason is always found why an action must be taken at a higher level. In the EU context, we have seen that once the case for efficiency and effectiveness is made (*‘the objectives of the proposed action cannot be sufficiently achieved by the Member States’* and *‘can rather, by reason of the scale or effects of the proposed*

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<sup>90</sup> Gerald L. Neuman, *ibid.*, at 575. See also K. Nicolaidis and R. Howse (n 88).

<sup>91</sup> See also M. Bartl, ‘The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit’, (2015) 21(1) *European Law Journal* 23, 23 on the link between the EU’s original functionalist institutional design and its substantive democratic deficit.

<sup>92</sup> The formalisation of public authority beyond the nation-state through an increase of formal laws—the European institutions exercise public power in ways similar to nation states—is *the* ‘post-national’ feature of the European Union that many consider definitive of the EU’s *sui generis* nature. See, e.g., G. Falkner, ‘European Social Policy: Towards Multi-level and Multi-actor Governance’, in R. Eising and B. Kohler-Koch, *The Transformation of Governance in the European Union* (Routledge 1999) 93–94 (referring to the creation of a post-national democracy).

<sup>93</sup> S.A.H. Denters, ‘Participation and democratic accountability: Making a difference for the citizens’ (2017) in C. Schwab, G. Bouckaert & S. Kuhlmann (eds.), *The future of local government in Europe: lessons from research and practice in 31 countries* (Modernisierung des öffentlichen Sektors, No. Sonderband 47, NOMOS 2017)

<sup>94</sup> *ibid.* See also L. Donatelli, ‘APan-European District for the European Elections? The Rise and Fall of the Duff Proposal for the Electoral Reform of the European Parliament’ (2015) Bruges Political Research Paper 44 / 2015.

<sup>95</sup> S.A.H. Denters, ‘Active Local Citizenship: a Resource for EU support?’ (2017 - on file with the author); the 1979 Welsh devolution referendum is an example of a situation where possibility for increased self-governance was rejected, see e.g. <<http://www.bbc.co.uk/news/special/politics97/devolution/wales/briefing/79.shtml>>. For a comparative analysis of the situation in 1979 and 1999, see R.W Jones and B. Lewis, ‘The Welsh Devolution Referendum’ (1999) 19(1) *Politics* 37.

action, be better achieved at Union level’),<sup>96</sup> there is little to counterbalance it. Polycentric subsidiarity sees self-governance, even if less ‘efficient’ in certain respects, as this counterbalance.

- 2) Broadening the definition beyond the state – Where citizen efforts are channelled through existing governmental entities at the local and regional level, they are not meaningfully incorporated in EU subsidiarity assessments: the division of competences below the state remain a matter for the Member States.<sup>97</sup> In the context of polycentric governance, this means that instances of bottom-up, organic, self-governance are almost entirely absent from subsidiarity decisions within the EU; they are only incorporated insofar that their effects are taken into account by national parliaments and/or national representatives in the Council during subsidiarity assessments.<sup>98</sup> In addition to creating a blind spot for instances of organic self-governance, this practice puts pressure on existing relationships, and hard-won compromises<sup>99</sup> between the Member States and their subsidiaries. Tellingly, the pre-Lisbon subsidiarity test included an assessment of the efficiency of the *national* level to achieve a certain goal and the comparative efficiency of the European level to reach the same objective.<sup>100</sup> While this language was not included in the Lisbon Protocol on subsidiarity, the Commission stated that it would continue to apply these guidelines also after the entry into force of the Lisbon Treaty.<sup>101</sup>

The current absence of local and regional government in EU subsidiarity assessments – their *de facto* role in the implementation and enforcement of EU policy is significant<sup>102</sup> is still only half the picture: in order to meaningfully incorporate organic development of self-governance, our focus needs to be expanded to include non-governmental organisations, churches, community groups and other non-state based centres of decision-making.

Of course, problems arise when and if the aims identified through self-governance contradict shared values or the overwhelming interest of others.<sup>103</sup> As we revisit this traditional subsidiarity, we must ask why and by whom self-governance needs to be encroached on. Following Vincent Ostrom’s reasoning, self-governance could only be overridden by another

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<sup>96</sup> Article 5(3) TFEU.

<sup>97</sup> See Case C-359/92 *Germany v Council* (*Product Safety*) [1994] ECR I-03681; R. Schütze, ‘Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism’ (2009) 68 *Cambridge Law Journal* 525.

<sup>98</sup> Some authors believe this problem to be one of principle, rather than of fact, see B.S. Frey and R. Eichenberger, ‘FOCJ: Competitive Governments for Europe’ (1996) 16(3) *International Review of Law and Economics* 315 at 323 (‘Even if subsidiarity were taken seriously, it would not lead to a real federal structure, because many (actual or prospective) members of the European Union are essentially unitary states without federal subunits of significant competence’).

<sup>99</sup> See J.-W. Muller, ‘Should the EU protect Democracy and the Rule of Law inside Member States?’, (2015) 21(2) *European Law Journal* 141; J. Loughlin, *Subnational Democracy in the EU* (OUP 2001).

<sup>100</sup> Protocol No 30 on the Application of the Principles of Subsidiarity and Proportionality, annexed to the Treaty on the European Community (1997), Art. 13, OJ C 321 E, p. 308. Arguably, a third part of the test should consider the cross-border nature of the activity the EU aimed at regulating, see in Case C-58/08 *The Queen v. Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-04999, Opinion of the Advocate General, para. 24. More generally, see <[https://www.ies.be/files/8.16.5\\_European%20Public%20Prosecutor\\_Wieczorek\\_FINAL.pdf](https://www.ies.be/files/8.16.5_European%20Public%20Prosecutor_Wieczorek_FINAL.pdf)>

<sup>101</sup> Report from the Commission on Subsidiarity and Proportionality, 18th Report on Better Law-Making Covering the Year 2010, COM (2011) 344 final (10.06.2011), at 2,

<sup>102</sup> See J. van Zeben, ‘Local Governments as Subjects and Objects of EU Law’, in E. Fahey and S. Bardotszky (eds.), *Subjects and Objects of EU Law* (Edward Elgar 2017).

<sup>103</sup> For shared values in the EU see, in this Volume, Chapter 6 by A. Bobić.



aim, if such an aim is the result of a process of self-governance.<sup>104</sup> This of course raises the question of what EU level self-governance may look like within the broader global context or rule-bound globalisation – a question beyond this chapter.

Most importantly for our purposes here, the question is how should aims resulting from self-governance be balanced with concurrent requirements, in order to deal with actual or potential externalities when they arise, so as to continue to maximise its import? This brings us to the second attribute.

## B. Horizontality

Self-governance, as per Ostrom, embraces many different centres and levels of governance, without presuming a hierarchical relationship between them. Horizontal relationships – between actors at the same level of governance and/or with the same competences – are therefore equally relevant as vertical relationships – between actors with different powers at different levels of governance.<sup>105</sup> While the Treaties explicitly recognise the equality of the Member States *inter se* and *vis-à-vis* the Union (as captured in Article 4 TEU, which describes the relationship as one of ‘full mutual respect’ and ‘equality’)<sup>106</sup> horizontal relations between actors arise in practice under conditions of asymmetric power.

Polycentric conceptualisations of subsidiarity must therefore address the problem of dominance within vertical and horizontal relationships. Dominance can be purposive or structural, it can be the result of political dynamics, and/or a consequence of practical realities, including the ability to provide human capital, goods, information or other resources. Vertical authority can be necessary in order to mitigate horizontal asymmetries of power, and horizontal relations can serve to balance a drift to power centralisation. In the words of Cheneval, ‘[t]he art of doing politics well consists in the way in which a community is able to transform the tension between the vertical exercise of authority and the horizontal recognition of equal status into a functional social equilibrium that produces public goods.’<sup>107</sup>

To a great extent of course, the EU, more than any federal system, does rest on horizontal relations. Polycentric subsidiarity is therefore not an alternative to subsidiarity as understood in the EU but a matter of emphasis. If rule-based societies are to dampen the monopoly of the state, and if transnational relations between them are to avoid a single centre of dominance, they need to perfect horizontal relationships among them, based on a changing mix of mutual respect, mutual trust, and mutual spying. To simplify, privileging horizontal approaches over their centralising/harmonisation alternatives, we can distinguish between three paradigmatic approaches to doing so:

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<sup>104</sup> M. McGinnis and E. Ostrom, ‘Reflections on Vincent Ostrom, Public Administration and Polycentricity’ (2012) 72(1) *Public Administration Review* 15, 20.

<sup>105</sup> On ‘power’ in polycentric systems see also, in this Volume, Chapter 3 (I.A) by F. Cheneval on competence-competence.

<sup>106</sup> Article 4(3) and 4(2) TEU respectively.

<sup>107</sup> See, in this Volume, Chapter 3 by F. Cheneval.

- (1) *Other-regarding domestic/local institutions or habits*: this is of course the cradle of self-governance in an inter-dependent world, where each party would govern itself with personal or institutional empathy, as a result of different degrees of spontaneous adaptation, and different degrees of knowledge of each other.<sup>108</sup> More formally, institutions may be created to internalise externalities at the national or state level even in the absence of compulsion from above (like national fiscal councils under EMU reforms).
- (2) *Horizontal coordination*: in this spirit, the EU spent much of its energy in the 2000s developing the Open Method of Coordination, but much of it has since been abandoned.<sup>109</sup> More generally, horizontal cooperation between intermediary bodies in the EU or between national agencies is one expression of polycentric subsidiarity to the extent that this avoids creating centralised bodies. Efforts to coordinate primary, secondary and tertiary education systems between the Member States, assisted by the EU, through the Bologna Process are an illustration of such coordination.<sup>110</sup>
- (3) *Horizontal transfers of authority/sovereignty*: only in these cases do we see a unit binding itself contractually to other decision units. In some cases, recognising the extraterritorial application of the rules of other countries or entities on one's territory (mutual recognition) is the price to pay for self-governance, as opposed to harmonisation of standards and centralisation of their enforcement. Mutual recognition paradoxically is intended to protect the space for self-governance while making this space one where alternative standards or standards of enforcement may compete. The second guessing of other Member States' standards can lead to conflict in this setting and needs to be managed in complex ways.<sup>111</sup> Outside of the internal market, Member States increasingly, though not indiscriminately, accept the judicial systems of Member States with respect to criminal justice, as evidenced by the European Arrest Warrant.<sup>112</sup> This horizontality extends beyond national governments, with Member State constitutional courts routinely cross-referencing each other's judgments, even though

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<sup>108</sup> K. Nicolaidis, 'My EUtopia - Empathy in a Union of Others' in M. Segers and Y. Albrecht (eds.), *Re:Thinking Europe - Thoughts on Europe: Past, Present and Future* (Amsterdam Univeristy Press 2016).

<sup>109</sup> See, in this Volume, Chapter 12 by S.Garben.

<sup>110</sup> S. Garben, *EU Higher Education Law: The Bologna Process and Harmonization by Stealth* (Kluwer Law International 2011).

<sup>111</sup> See M. Hazelhorst, *Free movement of Civil judgments in the EU and the right to a fair trial* (Springer 2017): 'Mutual recognition can be seen as the practical application of mutual trust: if one Member State trusts another, then it should recognize judicial decisions and other acts of the Member State without second-guessing whether it conforms to its own national standards'.

<sup>112</sup> At first, exceptions were possible in case of systemic flaws: see M. den Heijer, 'Joined Cases C-411 & 493/10, N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, Judgment of the Court' (2012) 49(5) *Common Market Law Review* 1735 (note); Now, exceptions can also be invoked on a case-by-case basis: see G. Anagnostaras, 'Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European Arrest Warrant: *Aranyosi and Caldaru*' (2016) 53(6) *Common Market Law Review* 1675 (note). Recently, the question was raised as to whether the current situation in Poland endangers fair trial and independent judging. The AG has said it could indeed be a valid basis for rejecting Polish decisions if real risk is demonstrated: <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-06/cp180095en.pdf>>.

there is no legal obligation to do so, or formal precedential effect of such foreign judgments.<sup>113</sup>

Clearly then the relationship between vertical and horizontal relations of cooperation or delegation are multifaceted. To simplify there are instances where the two can be considered functional substitutes but where some degree of centralisation is nevertheless necessary as with the standardisation of product requirements; there are areas where horizontal cooperation and delegation can be elected on grounds of the intrinsic value of self-governance, as in the field of education where the EU facilitates processes of coordination between the Member States, and any powers it holds in this area are also on basis of equality with the Member States.<sup>114</sup>

### C. Organic Change

How then is such an emphasis on self-governance to be managed over time? We start from the assumption that in a robust self-governing society, individuals organise around shared interests and goals in ever changing and dynamic ways. Polycentricity stimulates and protects this *organic development* through the institutional essentials and prerequisites of polycentric governance, which are aimed at ensuring access to processes of creation, enforcement and contestation of the shared rules, as well as to essential opportunities for learning, information and paths to justice.<sup>115</sup> According to Ostrom, self-governance refers to individuals' capacity to 'formulate mutually agreed upon rules that they themselves proceed to enforce'.<sup>116</sup> Defined as such, self-governance is inherently social, aimed at achieving a rule-ordered society where rules are not (exclusively) imposed by the state,<sup>117</sup> and where individuals *organically* self-organise based on their needs and preferences.

What then are the different organic trajectories are offer by the various modes of self-governance and horizontal relations outlined above? And for each trajectory, what are some of the questions that arise?

- 1) *Vertical Function*: Each approach may be supported, supplemented, managed or policed in different ways by elements of vertical delegation, e.g. bundles of institutions, rules and standards. The extent of vertical delegation chosen to support horizontal relations ought to be more easily changeable over time, including through formal sunset clauses with respect to EU law, as well as more general multi-stakeholder review processes.
- 2) *Heterogeneous relationships*: the relevant relations may be between centres which are all of the same kind/same level (say states, or cities) or polycentricity may refer to diagonal relations, i.e. relations among different levels/types of centres, such as

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<sup>113</sup> A. Bobić, 'Constitutional pluralism is not dead: An analysis of interactions between the European Court of Justice and constitutional courts of Member States' (2017) 18(6) German Law Journal 1395. Specifically note 117 in that article.

<sup>114</sup> See S. Garben, *EU Higher Education Law: The Bologna Process and Harmonization by Stealth* (Kluwer Law International 2011).

<sup>115</sup> See, in this Volume, chapters 1 and 2 by J. van Zeben

<sup>116</sup> V. Ostrom, *The Meaning of American Federalism* (n 69) 226.

<sup>117</sup> V, Ostrom, *The Meaning of American Federalism* (n 69) 4.

states, regions, non-state actors. Simultaneous homo- vs heterogeneity of levels may reflect the fact that in different countries or regions, the most effective type of actor for a given action changes over time. Organic change implies a better mirroring between such evolutions and formal competences.

- 3) *Temporal differentiation*: Units involved in a relationship may exercise certain functions simultaneously and equally or these functions can be subject to rotation over time. Reasons of expertise and capacity building may dampen the likelihood of rotation, which in turn could be countered by shifts in preferences combined with technological change, which may facilitate access to certain types of expertise or information.
- 4) *Structural differentiation*: Different kinds of cooperation may be universally desired and applied to all equivalent units holding equal powers, or conversely subject to differentiation, e.g. applied to some but not others, in other words may be subject to differentiated integration.<sup>118</sup> As preferences and technologies change over time, the modes of inclusion in various configurations of players should be subject to flexible arrangements. Conceptually, one could bring the idea of differentiation which initially pertains to different ‘clubs of States’ all the way down to the individuals for example, by enabling individuals to provide utility services that had been the prerogative of corporations, such as energy production.<sup>119</sup>
- 5) *Functional differentiation*: the balance of different types of horizontal relations (as outlined in sub-section B) may not apply in the same way for the design of rules/law/standards, their implementation and their enforcement. Directives in every area of EU law illustrate how horizontal agreement between Member States can lead to common standards, which are subsequently implemented and enforced by the Member States – at various levels – incorporating vertical checks on such implementation and enforcement, but also allowing for processes of horizontal learning, competition and cooperation on implementation and enforcement.<sup>120</sup>

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To the extent that subsidiarity applies to relationships between political actors, there are many dimensions along which its design can vary. We suggest that such variance needs to be considered in two steps. First, to the extent that polycentric subsidiarity calls for privileging

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<sup>118</sup> One example of this could be a ‘multi-speed’ Europe. However, in this model, the focus is on the difference in national preferences, which continues to bypass the individual – a classic pitfall of the existing EU narratives. See M. Avbelj, ‘Differentiated Integration—Farewell to the EU 27?’, (2013) 14 German Law Journal 191; J.C. Piris, *The Future of Europe: Towards a 2-speed EU?* (CUP 2012); G. Majone, *Rethinking the Union of Europe Post-Crisis* (CUP 2014); C. Jensen and J. Slapin, ‘Institutional Hokey-Pokey: The Politics of Multi-Speed Integration in Europe’ (2012) 19 *Journal of European Public Policy* 6; M. Dawson and F. De Witte, ‘Self-Determination in the Constitutional Future of the EU’ (2015) 21(3) *European Law Journal* 371, 377.

<sup>119</sup> G. Walker, ‘What are the barriers and incentives for community-owned means of energy production and use?’ (2008) 36(12) *Energy Policy* 4401; L.W. Li, J. Birmele, H. Schaich, W. Konold, ‘Transitioning to Community-owned Renewable Energy: Lessons from Germany’ (2013) 17 *Procedia Environmental Sciences* 719.

<sup>120</sup> See also, in this Volume, Chapter 12 by S.Garben.

horizontal approaches over their centralising/harmonisation alternatives, we can distinguish between three paradigmatic approaches to doing so: first, by creating or reinforcing domestic institutions, and procedures, that are other-regarding; second, through horizontal coordination; and finally, through horizontal transfers of authority and/or sovereignty.

Within a polycentric system, a number of variables will affect these approaches simultaneously, reflecting the dynamic nature of polycentric governance. These variables of organic change interact with each of these approaches and also reflect the complexity of polycentric governance and the high level of information and learning which is necessary to maintain it.<sup>121</sup>

Actors	Relationships	Variables of organic change
<ul style="list-style-type: none"> <li>• Member States</li> <li>• Regional governmental actors</li> <li>• Local authorities</li> <li>• Non-governmental organisations</li> <li>• Individuals</li> </ul>	<ul style="list-style-type: none"> <li>• Vertical</li> <li>• Horizontal               <ul style="list-style-type: none"> <li>○ Other-regarding institutions/processes</li> <li>○ Coordination</li> <li>○ Transfers of authority/sovereignty</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Vertical Function</li> <li>• Heterogeneous centre</li> <li>• Temporal differentiation</li> <li>• Structural Differentiation</li> <li>• Function differentiation (design implementation, enforcement)</li> </ul>

*Table 1: Constituent elements of polycentric subsidiarity*

To illustrate, take the idea of a reformed refugee regime in the EU based on polycentric subsidiarity. This would start with the acknowledgement that refugee management involves fundamental value trade-offs that may be struck differently across states (e.g. the difference in approach to refugee intake between Sweden and Poland; the ways in which different countries balance internal vs border control of people, etc). Countries could coordinate how their policies are designed, while simply be expected to be other-regarding in implementation, and delegate power to the EU to ensure enforcement. There could also be horizontal transfers of authority through mutual recognition pacts as to the status of refugees, or the creation of compensation mechanisms for accepting additional refugees.

These Member State-centric processes would be balanced by the involvement of cities, regions, together with individuals, families and neighbourhoods, that can replicate processes of horizontal coordination, but also involve transfers of authority and create other-regarding institutions that strengthens the implementation and enforcement of the overarching system of refugee management. The inclusion of these actors at all stages of regulation also prevents a mimetic bias, where different levels of governance simply try to copy each other's processes, thereby limiting responsiveness to heterogeneous preferences and conditions among these centres. While the aim of preventing free-riding by individual Member States, calls for an EU wide system of rules and values to ensure that differentiated preferences and abilities are not used to simply justify free riding, the practical translation of shared commitments can be differentiated over time.

<sup>121</sup> See, in this Volume, Chapter 11 by V. Abazi and 12 by S. Garben.

### III. Concluding remarks

This chapter introduced the notion of polycentric subsidiarity as a revised understanding of subsidiarity in the EU. Polycentric subsidiarity supplements the EU's core *vertical* problematic with both a greater emphasis on the horizontal transfers of power between governments as well as between governmental and non-governmental actors, and with a greater emphasis on subsidiarity 'all the way down'. We argue that while the criteria of effectiveness and efficiency need to remain part of the picture, polycentric subsidiarity aims to facilitate the organic development of self-governing collectives and individuals. In order to do so, expanding the species and levels of governance that form part of a subsidiarity assessment is insufficient; polycentric subsidiarity must also include various forms of horizontal transfers of power, and accommodate the dynamic nature of polycentricity by recognising the variables that affect vertical and horizontal power sharing.

As a result, the EU's political and legal ecosystem must resist the temptation of identifying the characteristics of a subsidiarity 'winner' for a given policy, privileging instead process and possible shifts of locus of governance and authority as circumstances and actors change. Actors within the system could then determine the goals of governance regarding a particular issue, and allow for rules, processes and institutions to develop organically. At first glance, this appears to strip the subsidiarity principle as traditionally understood from its prescriptive function by failing to incorporate a preference for a given level of governance. In practice, the kind of imperatives implied by the idea of polycentric subsidiarity can allow all the actors involved to use the worthy principle of subsidiarity as a genuine normative safeguard for self-governance and self-determination in contemporary politics. The EU, embattled as it is by multifaceted calls to 'take back control', needs to head this call.