

# *New Zealand Journal of Public and International Law*



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SPECIAL CONFERENCE ISSUE: NEW THINKING ON SUSTAINABILITY

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THIS ISSUE INCLUDES CONTRIBUTIONS BY

Joshua Aird	Sir Geoffrey Palmer
Klaus Bosselmann	Nicole Rogers
Peter D Burdon	Nathan Ross
Joel Colón-Ríos	Greg Severinsen
Benjamin F Gussen	Linda Sheehan
Catherine J Iorns Magallanes	Gerald Torres
Gay Morgan	

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI

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# ON THE PROBLEM OF SCALE: THE INEXTRICABLE LINK BETWEEN ENVIRONMENTAL AND CONSTITUTIONAL LAWS

***Benjamin Franklen Gussen\****

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*This article argues not only that sustainability cannot occur without subsidiarity, but that subsidiarity guarantees sustainability. In order to respond effectively to ecological crises, decision-making has to devolve to local communities (as a body politic), while constitutionalising local adaptations protects the diversity of ecosystems. In essence, constitutional and environmental laws are inextricably linked. The article employs the complexity paradigm to explain this nexus between subsidiarity and sustainability. The main thesis is that subsidiarity to sustainability is what self-organisation is to emergence. Sustainability is a response to the problem of scale. It is a fitness trait that prevents highly complex systems from collapsing. The nation-state is a highly complex system within which cities function as attractors. Collapse of such systems would ensue if there were strong coupling between attractors (such coupling obtains in cities under legal monism). Only subsidiarity can make this eventuality improbable. Understanding the emergent properties of sustainability and the self-organising properties of subsidiarity entails a shift in policy emphasis towards the latter. The article delivers a historical reconstruction of the concepts of sustainability and subsidiarity to elucidate their interdependence and ends with a sketch of future global governance structures based on a subsidiarity where cities take the lead on sustainability.*

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## I INTRODUCTION

This article argues that sustainability is an emergent property.<sup>1</sup> It hence requires self-organisation for it to emerge (in a highly complex system like the nation-state).<sup>2</sup> It follows that sustainability requires subsidiarity.<sup>3</sup> This simple fact eludes even the seminal Earth Charter, where subsidiarity registers neither directly nor indirectly,<sup>4</sup> and the European Charter of Local Self-Government where there is no mention of neither sustainability nor subsidiarity.<sup>5</sup> A search on LexisNexis New Zealand for case law where subsidiarity and sustainability are discussed simultaneously returns no results. A similar search on Westlaw International (covering Australia, Canada, the US and the EU) returns only six documents, none of which discusses the nexus between the two constructs. Another case in point is the Constitution of the Republic of Ecuador 2008, one of the world's most progressive constitutions on both environmental rights and on local autonomy. While studded with references to sustainability (arts 14, 31, 282, 313, 320, 336, 368, 405, and 411) and subsidiarity (arts 34, 238, 269, 270, and 367), nowhere does the Constitution pronounce the relationship between the two concepts. They are treated as disjointed: one ecological, the other social.<sup>6</sup> A similar limitation can be seen in the 1998 draft World Charter of Local Self-Government.<sup>7</sup>

More promising linkages developed from the 1992 Earth Summit (Rio de Janeiro) and the 2002 Earth Summit on Sustainable Development (Johannesburg), where sustainability was understood to

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- 1 Sustainability is a response mechanism that prevents complexity from leading to collapse. While sustainability is widely seen as a legal principle, it is better understood as an emergent property leading to stability and resulting from self-organisation. Emergence on the other hand relates to the cooperation of unlike components (think of cities interacting with each other) which results in behaviour that cannot be reduced to the sum of their individual *modus operandi*.
  - 2 The ability of a dynamical system to acquire a stable structure without external control. Self-organisation is inductive of emergence.
  - 3 Subsidiarity is a legal, political and social principle that nests authority structures around constituent powers at the local scale. Under complexity theory, subsidiarity translates into self-organisation.
  - 4 For a critical account of the Earth Charter see Benjamin F Gussen "The Marginalisation of Localism in Current Responses to the Ecological Crisis" (2012) 16 NZJEL 167. See also Klaus Bosselmann and J Ronald Engel (eds) *The Earth Charter: A framework for global governance* (KIT Publishers, Amsterdam, 2010).
  - 5 European Charter of Local Self-Government CETS 122 (opened for signature 15 October 1985, entered into force 1 September 1988).
  - 6 Nevertheless, the Constitution of the Republic of Ecuador 2008 is a success story as it embeds subsidiarity as a constitutional principle (together with sustainability).
  - 7 United Nations Centre for Human Settlements, and World Associations of Cities and Local Authorities Coordination "Towards a World Charter of Local Self-Government" (25 May 1998) Global Development Research Center <www.gdrc.org>, pt C.

*emerge* from the interaction of scales leading from the local to the global.<sup>8</sup> Nevertheless, even these initiatives relegate subsidiarity to an administrative instrument for implementing sustainability, largely through local governance programmes set up by national governments, which relates more to decentralisation rather than to a legitimisation of local authority structures.<sup>9</sup> Even some prominent scholars seem to have accepted this general inclination to subsume subsidiarity under an imperial construct of sustainability.<sup>10</sup>

This article ruminates divergently. It would be sophomoric to talk of environmental policies as this would apply a reductionist paradigm to a complex phenomenon, namely, sustainability. This fact is delineated under part 3. What would be expected instead is the co-evolution of variegated sustainabilities not all nicely fitting into international frameworks such as *Agenda 21* or the International Council for Local Environmental Initiatives (ICLEI) Communities 21 initiative.<sup>11</sup> A complex phenomenon cannot be simplified by breaking it into constituent parts, nor can its emergence be planned. Government intervention instead should only furnish the prerequisite (decision-making)

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8 See United Nations Sustainable Development *United Nations Conference on Environment & Development: Agenda 21* (3–14 June 1992) at ch 28; and United Nations Human Settlements Programme *The Habitat Agenda* (13 November 2003).

9 The key difference is one of funding. The administrative model largely limits funding any local initiatives unless sanctioned by a national strategy. Local governments would have neither the revenue nor the legal authority to implement their own initiatives.

10 For example, Klaus Bosselmann discusses the relationship between subsidiarity and sustainability briefly, where subsidiarity would refocus institutions "in accordance with the framework of sustainability"; Klaus Bosselmann *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, Aldershot (England), 2008) at 191. Ute Collier also looks at the nexus between subsidiarity and sustainability, still arguing for subsidiarity as compatible with the basic tenets of sustainability (at least in theory), and as potentially instrumental for strengthening environmental protection (in the EU); Ute Collier "Sustainability, Subsidiarity and Deregulation: New Directions in EU Environmental Policy" (1997) 6(2) *Environmental Politics* 1 at 1. After disjoining subsidiarity and sustainability as belonging to separate environmental and political spheres, Collier argues for an environmental dimension of subsidiarity, but still suggests that subsidiarity "is particularly problematic in the environmental area as a number of member states are unlikely to take environmental action in the absence of EU legislation"; at 3. In the final analysis Collier proposes subsidiarity as only one of three principles to guide EU environmental policy (the other two being sustainable development and deregulation). Similarly, Schleicher-Tappeser and Strati suggest that the principle of subsidiarity is "an essential component of sustainability", where other components include the systemic principles of "diversity", "networking and partnership", and "participation"; Ruggero Schleicher-Tappeser and Filippo Strati "Sustainability – A New Paradigm for Research?" in Mario Catizzone (ed) *From Ecosystem Research to Sustainable Development: Towards a new paradigm for ecosystem research* (European Commission, Luxembourg, Ecosystem Research Report 26, 1999) 49 at 54 and 61–62.

11 In the United States context, see for example Rob Krueger and Julian Agyeman "Sustainability schizophrenia or 'actually existing sustainabilities?' toward a broader understanding of the politics and promise of local sustainability in the US" (2005) 36 *Geoforum* 410.

freedom for sustainability to emerge; the momentum of such sustainabilities is a function of subsidiarity's constitutional weight in a given jurisdiction.

Neither understanding sustainability as a complex phenomenon,<sup>12</sup> nor applying self-organisation to the local sciences are new.<sup>13</sup> The innovation in this article is the argument that sustainability requires re-designing nation-states as confederations of (non-contiguous) charter cities.<sup>14</sup> The

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- 12 See for example Angela Ma Espinosa Salazar *A Complexity Approach to Sustainability: Theory and Application* (Imperial College Press, London, 2011); JA Tainter (1995) "Sustainability of Complex Societies" 27(4) *Futures* 397, JA Tainter *The Collapse of Complex Societies* (Cambridge University Press, Cambridge, 1988), and JA Tainter (2000) "Problem Solving: Complexity, History, Sustainability" 22(1) *Population and Environment* 3; JB Ruhl (1996) "Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State" 45(5) *Duke Law Journal* 849.
  - 13 See for example Klaus Mainzer *Symmetry and Complexity: the Spirit and Beauty of Nonlinear Science* (World Scientific, London, 2005) chapter 6.
  - 14 See EJ Hobsbawm *Nations and Nationalism Since 1780: Programme, Myth, Reality* (2nd ed, Cambridge University Press, Cambridge, 1992). The work by Immanuel Wallerstein on "world-systems" is also relevant here; Immanuel Wallerstein *World-Systems Analysis: An Introduction* (Duke University Press, Durham (NC), 2004); Immanuel Wallerstein *The Modern World-System I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (University of California Press, Oakland, 2011); Immanuel Wallerstein *The Modern World-System II: Mercantilism and the Consolidation of the European World-Economy, 1600–1750* (University of California Press, Oakland, 2011); Immanuel Wallerstein *The Modern World-System III: The Second Era of Great Expansion of the Capitalist World-Economy, 1730s–1840s* (University of California Press, Oakland, 2011); Immanuel Wallerstein *The Modern World-System IV: Centrist Liberalism Triumphant, 1789–1914* (University of California Press, Oakland, 2011); and Janet L Abu-Lughod *Before European Hegemony: The World System AD 1250–1350* (Oxford University Press, Oxford, 1989). See generally Erich Jantsch *Design for Evolution: Self-Organization and Planning in the Life of Human Systems* (George Braziller, New York, 1975); Sean Gould *The Theory of Options: A New Theory of the Evolution of Human Behavior* (Universal Publishers, Boca Raton, 2007); Kenneth E Boulding *The Organizational Revolution: A Study in the Ethics of Economic Organization* (Greenwood Press, Westport (CT), 1984); Margaret S Archer "Social Morphogenesis and the Prospect of Morphogenic Society" in Margaret S Archer (ed) *Social Morphogenesis* (Springer, New York, 2013) 1; Peter Kropotkin *Fields, Factories and Workshops: or Industry Combined with Agriculture and Brain Work with Manual Work* (2nd ed, Thomas Nelson & Sons, London, 1912); Peter Kropotkin *Mutual Aid: A Factor of Evolution* (William Heinemann, London, 1902); Peter Kropotkin *The Essential Kropotkin* (Liveright, New York, 1975); Lewis Mumford *Technics and Civilization* (University of Chicago Press, Chicago, 2010); Lewis Mumford *The Condition of Man* (Harcourt, Brace and Company, New York, 1944); Lewis Mumford *The City in History: Its Origins, Its Transformations, and Its Prospects* (Harcourt, Brace & World, New York, 1961); Lewis Mumford *The Myth of the Machine Volume 1: Technics and Human Development* (Harcourt Brace Jovanovich, New York, 1967); Lewis Mumford *The Myth of the Machine Volume 2: The Pentagon of Power* (Harcourt Brace Jovanovich, New York, 1970); Lewis Mumford *The Transformations of Man* (Harper & Row, New York, 1972); Murray Bookchin *The Ecology of Freedom: The emergence and dissolution of hierarchy* (AK Press, Oakland, 2005); Murray Bookchin *The Limits of the City* (Black Rose Books, Montreal, 1996); and Murray Bookchin *The Rise of Urbanization and the Decline of Citizenship* (Sierra Club Books, San Francisco, 1987). See also Jane Jacobs *Cities and the Wealth of Nations: Principles of Economic Life* (Vintage, New York, 1985); and Jane Jacobs *The Economy of Cities* (Vintage, New York, 1970).

rationale for the nation-state was to manage high levels of complexity that require coordination on a global scale.<sup>15</sup> However, I argue that this rationale is flawed.<sup>16</sup> The organised complexity seen in the global scale requires less correlation between the parts (monism), rather than globalise it through an international response.

This article starts by explaining the nature of emergence and self-organisation, and their interdependence. Next, a historical reconstruction of sustainability is provided to the end of explaining its emergent nature. The second section also interprets subsidiarity as a self-organising principle of complex systems. The third section elaborates on the role of cities<sup>17</sup> as (complex) attractors.<sup>18</sup> The article ends with a sketch for a praxis in favour of small jurisdictional footprints.

## II A PRIMER ON COMPLEXITY THEORY

In this section I will introduce the main constructs of self-organisation and emergence and delineate their interdependence.<sup>19</sup>

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15 Klaus Bosselmann, Ron Engel and Prue Taylor *Governance for Sustainability: Issues, Challenges, Successes* (IUCN, Gland (Switzerland), 2008) at 3.

16 See the analysis in Gussen, above n 4.

17 Densely populated urban areas characterised by cosmopolitan diversity. What distinguishes cities from towns and villages is not the size of their population but their ability to attract all forms of capital. Cities play the role of attractors in political states. In this article, city and city-region are used interchangeably.

18 The area a dynamical system reaches in equilibrium. Attractors represent steady states of typical behaviour. Cities are the prime example of attractors in nation-states. Note that this article emphasises the role of vertical subsidiarity rather than horizontal subsidiarity (the latter stands for more autonomy to the private sector rather than the public one). See Pierpaolo Donati "What Does 'Subsidiarity' Mean? The Relational Perspective" (2009) 12 *Journal of Markets & Morality* 211.

19 Complexity theory is analytical paradigm that moves away from reductionist tendencies and accepts the limitations on our ability to fully control or predict the behaviour of dynamical systems. Complexity is an attribute of dynamical systems that are evolving, that is, systems that are adapting (through self-organisation) to local variations. What is complex is the structure of such systems: a dynamic network of interactions. See generally Tom de Wolf and Tom Holvoet "Emergence Versus Self-Organisation: Different Concepts but Promising When Combined" in Sven A Brueckner and others (eds) *Engineering Self-Organising Systems: Methodologies and Applications* (Springer, New York, 2005) 1. See also Giovanna Di Marzo Serugendo and others (eds) *Engineering Self-Organising Systems : Nature-Inspired Approaches to Software Engineering* (Springer, New York, 2004). Some of the classic works on complexity would also be useful for readers new to the topic; see for example M Mitchell Waldrop *Complexity: The Emerging Science at the Edge of Order and Chaos* (Simon & Schuster, New York, 1992).

Self-organisation has two main characteristics.<sup>20</sup> First, it necessitates freedom from external control; and second, it evolves systems towards robust (internal) structures. These characteristics require:

- (1) many interactions between micro-scale (or lower scale) entities (which is the genesis of the principle of solidarity);
- (2) nonlinearity interactions (in the form of positive and negative feedback loops signifying both competition and cooperation); and
- (3) a balance between competition and cooperation (or exploration and exploitation).

As to emergence, it designates about the appearance of new structures during self-organisation.<sup>21</sup> Emergent properties have four main characteristics.<sup>22</sup> First, they require absence of centralised control; second, they produce evolutionary macro-level (robust and flexible) structures from interactions of entities at the micro-level; third, these macro-level patterns are not reducible to micro-level entities; and fourth, they require a bi-directional link between macro- and micro-levels. In very complex systems (characterised by nonlinearity or the existence of positive and negative feedback inter and intra macro- and micro-levels) such as ecosystems, self-organisation and emergence occur together.<sup>23</sup> In ecological systems (including human societies), the level of complexity makes imposing a structure a priori infeasible: the system needs to self-organise. Moreover, the large number of attractors in such systems (in particular attractors qua cities) imposes a need for emergence. A global structure cannot be assigned. It has to emerge from interactions between these attractors.

I now proceed to examine the relationship between sustainability and complexity.<sup>24</sup> This leads to the following proposition: sustainability (qua sustaining the diversity inherent in ecosystems) is an emergent property.<sup>25</sup> An emergent property is born out of more fundamental properties and yet is

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20 Eric Bonabeau, Marco Dorigo and Guy Theraulaz *Swarm Intelligence: From Natural to Artificial Systems* (Oxford University Press, Oxford, 1999) at 9.

21 Jeffery Goldstein "Emergence as a Construct: History and Issues" (1999) 1 *Emergence* 49.

22 See de Wolf and Holvoet, above n 19.

23 See Julianne D Halley and David A Winkler "Classification of Emergence and its Relation to Self-Organization" (2008) 13(5) *Complexity* 10.

24 For an authoritative introduction see Bosselmann, above n 10.

25 This proposition has already been put forward by others, although no connection was made with subsidiarity. See for example Richard Bawden "Sustainability as Emergence: The Need for Engaged Discourse" in Peter Blaze Corcoran and Arjen EJ Wals (eds) *Higher Education and the Challenge of Sustainability: Problematics, Promise, and Practice* (Springer, New York, 2004) 21; Michael P Weinstein, R Eugene Turner and Carles Ibáñez "The global sustainability transition: it is more than changing light bulbs" (2012) 9(1) *Sustainability: Science, Practice, & Policy* 4; William E Rees "Cities as Dissipative Structures: Global Change and the Vulnerability of Urban Civilization" in Michael P Weinstein and R Eugene Turner (eds) *Sustainability Science: The Emerging Paradigm and the Urban Environment* (Springer, New York, 2012) 244; William E Rees "Human nature, eco-footprints and environmental injustice" (2008) 13 *Local Environment* 685; and Rees

irreducible with respect to these properties.<sup>26</sup> In the case of sustainability, emergence supersedes the interactions at lower levels and by doing so induces qualitative changes from quantitative ones.

Sustainability can be understood as a response to the problem of scale.<sup>27</sup> Figure 1 depicts this problem.



Figure 1: The problem of scale

This understanding is in contrast to sustainability as a legal (enforceable) principle or even as an environmental *grundnorm* (legally binding superior norm).<sup>28</sup> The legal enforceability of sustainability would have to be through the constitutionalisation of another principle: subsidiarity. As recalled by Bosselmann, "environmental law is built around environmental principles that originated partly in law and partly in other disciplines including ethics, science, economics as well as foundational cultural concepts".<sup>29</sup> Bosselmann rightly points out that this hybrid genesis does not negate the need for distinguishing between legal and non-legal norms. This article however argues that the key normative aspect of sustainability is subsidiarity. Sustainability requires a commitment to subsidiarity, rather than directly enforcing sustainability as a global legal principle.

The problem of scale states that there are three steps leading from symmetry to collapse (which is a new, albeit non-identical, phase of symmetry): symmetry breaking, production of scale and increasing complexity.<sup>30</sup> What is essential for this section is the impact of how scale is produced on the tendency of systems to collapse. Strong links that emerge among elements (or subsystems) are

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"What's blocking sustainability? Human nature, cognition, and denial" (2010) 6(2) Sustainability: Science, Practice, & Policy 13.

26 Timothy O'Connor and Hong Yu Wong "Emergent Properties" in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Stanford University, Stanford, 2015, online ed).

27 For a discussion of this model see Benjamin F Gussen "On the problem of scale: Hayek, Kohr, Jacobs and the reinvention of the political state" (2013) 24 Constitutional Political Economy 19.

28 For the current legal understanding of the sustainability principle see for example Rakhyun E Kim and Klaus Bosselmann "International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements" (2013) 2 Transnational Environmental Law 285. See also Richard Shearman "The Meaning and Ethics of Sustainability" (1990) 14 Environmental Management 1; and Simon Dresner *The Principles of Sustainability* (2nd ed, Earthscan, London, 2008).

29 Bosselmann, above n 10, at 46.

30 See Gussen, above n 27. Collapse is the final phase in the life of a dynamical system (such as a nation-state) where it exhibits chaotic behaviour that precedes destruction of the system's structure. Collapse is a function of the level of coupling between attractors (such as cities). The higher the coupling (through harmonised legal systems), the higher is the probability of (system-wide) collapse.



one form of scale production. Such tight coupling in dynamical systems results in chaotic behaviour. However, if systems are coupled neither too tightly nor too loosely they will have complex attractors that enhance their robustness.<sup>31</sup>

Dynamical systems in the physical world are said to be dissipative (operating far from equilibrium). Cities are a prime example of such dissipative structures.<sup>32</sup> These systems require a driving force in order for them to have change. When dissipation and the driving forces balance, the system tends to a steady state of typical behaviour. This subset of possible behaviour is known as an attractor. An attractor is then an area into which the behaviour of a dynamical system settles. Cities can be conceived of as spatial attractors of human population analogous to attractors in dynamical systems.<sup>33</sup> In other words, cities act as gravitational fields that attract capital (in all its forms).<sup>34</sup> Global cities in particular are attractors of power, especially economic power.<sup>35</sup> A system with a high level of complexity will usually have more than one attractor. The interaction (coupling) of these attractors leads to a restoration of the symmetry that was originally lost. Hence, after several stages of symmetry breaking, the symmetry is resurrected by a series of symmetry-creating collisions of chaotic attractors. This symmetry creation destroys the (spatial or temporal) structure gained earlier through symmetry breaking. Complex attractors are especially useful for understanding how collapse can be mitigated, as these attractors are largely immune to cascading damage. Collapse in complex systems is a function of the level of coupling among subsystems or elements. The higher the level of coupling among the elements, the wider the effect of any sudden changes on the system as a whole (hence, collapse is globalised). Of course, with no coupling among elements, there is no system; however, between these extremes, there is a region where a low level of coupling will localise the effects of collapse and provide a robust system.<sup>36</sup>

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- 31 Russ Marion *The Edge of Organization: Chaos and Complexity Theories of Formal Social Systems* (Sage Publications, Thousand Oaks, 1999) at 155–158.
  - 32 Rees "Cities as Dissipative Structures: Global Change and the Vulnerability of Urban Civilization", above n 25.
  - 33 Dimitrios S Dendrinos "Cities as Spatial Chaotic Attractors " in L Douglas Kiel and Euel Elliott (eds) *Chaos Theory in the Social Sciences: Foundations and Applications* (University of Michigan Press, Ann Arbor, 1997).
  - 34 See Peter M Allen *Cities and Regions as Self-Organizing Systems: Models of Complexity* (Routledge, New York, 1997); and Juval Portugali "Self-Organizing Cities" (1997) 29 *Futures* 353.
  - 35 See Saskia Sassen *Cities in a World Economy* (4th ed, Sage Publications, Thousand Oaks, 2011).
  - 36 The work by Mark Granovetter explains further the nature of coupling. See Mark Granovetter "Economic Action and Social Structure: The Problem of Embeddedness" (1985) 91 *American Journal of Sociology* 481; Granovetter "The Strength of Weak Ties: A Network Theory Revisited" (1983) 1 *Sociological Theory* 201; and Mark S Granovetter "The Strength of Weak Ties" (1973) 78 *American Journal of Sociology* 1360.

Based on the above problematisation of scale we can think of sustainability as an emergent fitness trait preventing complexity from leading to collapse. This understanding resonates with a broad consensus on the core attributes of sustainable (economic) development: long-term, out-of-equilibrium dynamics leading to qualitative change intended to avoid irreversible damage to ecosystems and to the sustainable use of (renewable) natural resources.<sup>37</sup> Sustainable (economic) development would then be best understood under the evolutionary paradigm of economic analysis.<sup>38</sup> Under this paradigm, the economy is a bundle of the non-equilibrium processes that emerge from actions of agents whose differences contribute to the change.<sup>39</sup> If we are to accept that sustainable development is closely related to evolutionary processes in the economy, it would be possible for us to see why sustainability is an emergent property. Just like un-sustainability (collapse), it emerges from the interaction of diverse agents. The difference between the two is that in the case of collapse there are no (institutional) constraints on the production of scale. In the case of sustainability, there are legal limits on the scale at which these diverse agents organise.

I now proceed to provide a reconstruction of subsidiarity.<sup>40</sup> The starting point is a brief historical account of the rationale behind subsidiarity.<sup>41</sup>

The principle of subsidiarity has three meta-rules that govern the interaction of different parts of a given system or organisation.<sup>42</sup> The first is a positive version, where "higher levels support lower levels in case of need".<sup>43</sup> This requires the central government to support local communities where they cannot perform the functions of governance. The second meta-rule is that "higher levels must not arrogate functions of lower levels". This is a negative version of the subsidiarity principle, where the central government is prohibited from interfering in the affairs of local government. The third meta-rule derives from the first two and is implied by the hierarchical structure (micro- versus macro-level):

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37 Peter Mulder and Jeroen CJM van den Bergh "Evolutionary Economic Theories of Sustainable Development" (2001) 32 *Growth and Change* 110 at 111.

38 At 115.

39 See the seminal work by Richard R Nelson and Sidney G Winter *An Evolutionary Theory of Economic Change* (Belknap Press, Cambridge, 1982).

40 As with many other political concepts, subsidiarity is a complex construct. For a critical review of this concept see Andreas Føllesdal "Survey Article: Subsidiarity" (1998) 6 *Journal of Political Philosophy* 190.

41 See the Lombardy Region Istituto Regionale di Ricerca della Lombardia (IReR) *Subsidiarity: Brief Anthology* (Regione Lombardia, 2009). See also Alessandro Colombo *Subsidiarity Governance: Theoretical and Empirical Models* (Palgrave Macmillan, New York, 2012).

42 Stefan Gosepath "The Principle of Subsidiarity" in Andreas Føllesdal and Thomas Pogge (eds) *Real World Justice: Grounds, Principles, Human Rights, and Social Institutions* (Springer, Dordrecht, 2005) 157 at 162.

43 Peter J Floriani *Subsidiarity* (Penn Street Productions, Reading (PA), 2012) at 83.

the first and second meta-rules apply to all scales within the system (under subsidiarity there would be a minimum of at least three scales).<sup>44</sup>

We can now see a similarity between self-organisation and subsidiarity. Self-organisation requires:

- (1) interaction of many parts;
- (2) these interactions are nonlinear (that is with feedback loops); and
- (3) that these interactions balance cooperation and competition between the parts.

Cooperation and competition occur between elements forming micro-scale or lower scales of organisations. These elements feedback into higher forms of organisation (at the macro-level) resulting in nonlinear interactions inter- and intra- scales. In this sense, in the context of governance, subsidiarity is self-organisation. The many parts requirement for self-organisation are represented within political states by local communities and the multi-level governance structures that support them. Their interaction is by virtue of belonging to one polity, or to a world-system that facilitates such interaction (for example under globalisation). The nonlinear interaction between these parts exhibit positive feedback loops (cooperation) which correspond to the positive version of subsidiarity (rule of assistance), and negative feedback loops (competition) which correspond to the negative version of subsidiarity (rule of non-interference). The balance between cooperation and competition corresponds to the third meta-rule where the assistance and non-interference rules are allowed to play out through the whole system (polity).

### **III SUBSIDIARITY AND UNIVERSITAS**

Large polities (defined by large territories) need to be redesigned (constitutionally) around the principle of subsidiarity.<sup>45</sup> Subsidiarity would enable a specific type of sovereignty that results in a polycentric commonwealth between independent cities (as envisaged by Baruch Spinoza).<sup>46</sup> When thinking about the micro-scale of self-organisation, cities seem to be a rational option. Cities are the engines of economic growth.<sup>47</sup> Economic development as symmetry breaking occurs at the local (urban) scale: it is embedded in cities and their hinterland.<sup>48</sup> Coupling cities (qua attractors) rigidly

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44 Peter J Floriani *Subsidiarity* (Penn Street Productions, Reading (PA), 2012) at 82–83.

45 This is not the same thing as federalism. See the arguments in Frederick J Lee "Global Institutional Choice" (2010) 85 NYU L Rev 328. See also Yishai Blank "Localism in the New Global Legal Order" (2006) 47 Harv Intl LJ 263; and Robert K Vischer "Subsidiarity as a Principle of Governance: Beyond Devolution" (2001) 35 Ind Law Rev 103.

46 See Benjamin F Gussen "On the problem of scale: Spinozistic sovereignty as the logical foundation of constitutional economics" (2013) 7(1) Journal of Philosophical Economics.

47 Jane Jacobs *The Nature of Economies* (Vintage Books, New York, 2001); and Jacobs *Cities and the Wealth of Nations: Principles of Economic Life* (Vintage Books, New York, 1985).

48 Jacobs *The Nature of Economies*, above n 47, at 63.

(as is the case under current federal systems) could cause instability through scale entanglement.<sup>49</sup> One such example is the state monopoly on legal tender; Jacobs explains the mechanism through which national currencies feedback works in the following terms:<sup>50</sup>

... imagine a group of people who are all properly equipped with diaphragms and lungs but who share only one single brainstem breathing center. ... the breathing center would receive consolidated feedback on the carbon-dioxide level of the whole group without discriminating among the individuals producing it. Everybody's diaphragm would thus be triggered to contract at the same time. But suppose ... some were swimming and diving, and for some reason, such as the breaking of the surf, had no control over the timing of their submersions. Imagine what would happen to them. ... feedback control [is] working perfectly ... but the results would be devastating because of a flaw designed right into the system.

The problem is then one of scale. Currencies are intended as feedback mechanisms on the scale of city-regions, not national or supra-national scales. The rise of the nation-state led to the death of the city, through a transformation throughout history that is recorded as a change in scale.<sup>51</sup> The current powerlessness of cities is a symptom of liberalism. Arthur Schlesinger argues that urbanisation caused the rise in city importance.<sup>52</sup> The fear of the changing nature of the city population led to additional political support for controls by the state. Today, most scholarship on the city as an institution is limited to its internal governmental structure, accepting state control as a given. According to Schlesinger, our current image of cities has become an established part of liberal social thought.<sup>53</sup> Similarly, Gerald Frug finds that the law governing cities derives from "the hostility of liberal political thought to the exercise of power by entities intermediate between, and thus threatening

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49 Where stability is the ability of a dynamical system to remain within the area of an attractor in the face of sudden changes in its environment. Stability suggests immunity to collapse.

50 Jacobs *Cities and the Wealth of Nations: Principles of Economic Life*, above n 47, at 161–162.

51 Mumford *The City in History: Its Origins, Its Transformations, and Its Prospects*, above n 14, at 65 and 347; Mumford *The Condition of Man*, above n 14, at 187, 291, 351 and 356; Mumford *Technics and Civilization*, above n 14, at 190 and 291; Silvio Funtowicz and Jerome R Ravetz "Emergent complex systems" (1994) 26 *Futures* 568 at 571; Kropotkin *The Essential Kropotkin*, above n 14, at 83; Bookchin *The Rise of Urbanization and the Decline of Citizenship*, above n 14, at 145–146; and Kenneth E Boulding *Collected Papers* (University Press of Colorado, Colorado, 1971) vol 2 at 78.

52 Arthur Meier Schlesinger *The Rise of the City 1878–1898* (Ohio State University Press, Columbus, 1999).

53 Attributed to Schlesinger in Gerald E Frug "The City as a Legal Concept" (1980) 93 *Harv L Rev* 1057 at 1120. See Schlesinger, above n 52. See also Gerald E Frug *City Making: Building Communities without Building Walls* (Princeton University Press, Princeton, 1999); Gerald E Frug and David J Barron "International Local Government Law" (2006) 38 *Urb Law* 1; Richard C Schragger "Cities, Economic Development, and the Free Trade Constitution" (2008) 94 *Va L Rev* 1091; Yishai Blank "The City and the World" (2006) 44 *Colum J Transatl L* 875; and Yishai Blank "Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance" (2010) 37 *Fordham Urban Law Journal* 509.

the interests of, the state and the individual".<sup>54</sup> Under liberalism, the idea of real local power conveys "a picture of the strangulation of nationwide businesses by a maze of conflicting local regulations and the frustration of national political objectives by local selfishness and protectionism".<sup>55</sup> Frug asks an important question: why have we chosen to rely on private corporations rather than cities as our principal means of decentralisation? He attributes this in part to the continuing power of liberal ideas, which present the kind of organisations that wield economic power as radically different from cities, a difference summarised by their being private and cities public, and that this difference legitimises the status quo against any genuine transfer of power to cities.<sup>56</sup>

Historically there have been two prominent (and competing) conceptions of the political state: the state as a *societas*<sup>57</sup> and as a *universitas*.<sup>58</sup> These conceptions are dialectical, that is they overlap "over a contourless penumbra of varying breadth".<sup>59</sup> Nevertheless, as will be discussed, there are epochs where one or the other dominates. The tension between *societas* and *universitas* leads to a cyclical process as stylised in Table 1.

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54 Gerald Frug "The City as a Legal Concept", above n 53, at 1059.

55 At 1067.

56 At 1128.

57 In Roman law, *societas* signifies a partnership contract. To come to existence it requires the agreement of the parties and their good faith. When applied to political states it signifies the legal state (*Rechtsstaat*, the state under the rule of law); see Anthony Black (ed) Otto von Gierke *Community in Historical Perspective* (Cambridge University Press, Cambridge, 1990) at 258, n 5 as cited in L. O'Sullivan "Michael Oakeshott on European Political History" (2000) 21 *History of Political Thought* 132 at 142.

58 Michael Oakeshott *On Human Conduct* (Clarendon Press, Oxford, 1975) at 200. In Roman law, *universitas* signified a body corporate created by the state, such as municipalities. When applied to the state itself it signifies common purpose, which puts constitutional limits on the size of the (viable) jurisdiction of such states. There are other topologies which could be used to enrich the analysis of different forms of the state. For example, Hayek's distinction between teleocratic and nomocratic ordering and Habermas' account of system integration and social integration; Martin Loughlin *Foundations of Public Law* (Oxford University Press, Oxford, 2010) at 204. Oakeshott's topology, however, furnishes a historical account that better explains the issues surrounding sovereignty.

59 Nicholas Georgescu-Roegen *The Entropy Law and the Economic Process* (Harvard University Press, Cambridge (Mass), 1971) at 14.

Period	Description
0 – 500 CE	<i>Universitas</i> enforced by a declining Western Roman Empire
500 – 1000 CE	<i>Societas</i> resulting from the spread of Christianity and Islam
1000 – 1500 CE	<i>Universitas</i> through the rise of leagues of European city-states
1500 – 2000 CE	<i>Societas</i> enforcing the Peace of Westphalia in 1648

*Table 1: The oscillation between societas and universitas over the last 2000 years*

The first conception, *societas*, is a civil condition,<sup>60</sup> an individualistic and contractarian form of association where the state is analogous to a partnership.<sup>61</sup> In the Roman private law of obligations, a *societas* is a contract that requires the agreement of the *socii* (the contractors). A state understood as a *societas* is the product of "a formal relationship in terms of rules, not a substantive relationship in terms of common action".<sup>62</sup> Moreover, "what is intrinsic to this mode of association is not the choice to be related but the recognition of understood terms of relationship".<sup>63</sup> *Societas* is seen to represent political relationships under democratic conditions.<sup>64</sup> The unity of a *societas* was the product of cultural homogeneity, rather than unity of purpose as seen under *universitas*.

A *Universitas*, or a corporation,<sup>65</sup> is a corporate body created by the state, such as municipalities, where individuals are associated in "a partnership of persons which is itself a Person".<sup>66</sup> A *universitas* is distinguished from a *societas* in its identification of a common purpose and a substantive end.<sup>67</sup> Extreme cultural diversity negates the possibility of a *universitas*.<sup>68</sup> *Universitas* was advanced by the creation and extension of a central apparatus of ruling which was "totally indifferent to the constitution of a government ... Nor is related to ... sovereignty".<sup>69</sup> A *universitas* is a type of relationship where

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60 JR Archer "Oakeshott on Politics" (1979) 41 The Journal of Politics 150 at 162.

61 O'Sullivan, above n 57, at 141.

62 Oakeshott *On Human Conduct*, above n 58, at 201.

63 At 202.

64 Chantal Mouffe "Democratic Citizenship and the Political Community" in Miami Theory Collective (ed) *Community at Loose Ends* (University of Minnesota Press, Minneapolis, 1991) 70 at 76 and 78.

65 Oakeshott *On Human Conduct*, above n 58, at 200.

66 At 203; although under Roman law the *universitas* itself was not a person. See O'Sullivan, above n 57, at 141.

67 Oakeshott *On Human Conduct*, above n 58, at 205.

68 At 207.

69 At 267.

the common purpose leads to policies of integration as for example in medieval Europe.<sup>70</sup> In contrast to a *societas*, choice is intrinsic to membership of a *universitas*, although not when the state itself is understood as a *universitas*,<sup>71</sup> except where we impose limits on the size of jurisdictional footprints, such as under the sorting model by Charles Tiebout, which negates the compulsory nature of membership in a given state.<sup>72</sup>

In Table 1, I use a 500 year cycle as a stylised indicator from which we can glean the oscillation between *societas* and *universitas*.<sup>73</sup> This is best seen by tracing the local autonomy of European cities for the last 2,000 years, signifying the emergence of *universitas* and the accompanying necessity of limiting jurisdictional footprints.<sup>74</sup> Up to the fifth century, in Western Europe, the collapse of the Roman Empire was accompanied by population and economic decay that resulted in the demise of many towns.<sup>75</sup> The breakdown of central authority provides impetus for a form of *universitas* that continued until the fifth century. From the fifth to the 10th centuries, there was a form of religious *societas* resulting from the spread of Christianity and Islam and their imitation of the Roman conception of social life.<sup>76</sup> We can trace a form of *universitas* developing at the end of the 10th century when local autonomy was granted by charters such as those in Italy, where "Genoa claimed its first charter in 958, Mantua in 1014, Brescia in 1038, and Ferrara in 1055".<sup>77</sup> This trend of local autonomy spread to other parts of Europe and continued until the 16th century, thanks to "the growing success of town governments in managing their finances".<sup>78</sup> By the end of the 15th century, there were around

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70 At 281.

71 O'Sullivan, above n 57, at 144; Archer, above n 60, at 162; and Oakeshott *On Human Conduct*, above n 58, at 157–158.

72 Charles M Tiebout "A Pure Theory of Local Expenditures" (1956) 64 *Journal of Political Economy* 416.

73 History evolves through an *Achsenzeit* (axial or pivotal) cycle, a 500 year cycle in culture where the human mind revolts against large-scale organisation. The axial shift takes place during periods of social disintegration. The word axial is used to suggest a value of centrality leading to convergence. A prime example of the axial cycle is the changes that took place in the 16th century where mechanical organisation was replaced by forms of subsidiarity. See Mumford *The Myth of the Machine Volume 1: Technics and Human Development*, above n 14, at 258 and 261; Mumford *The Transformations of Man*, above n 14, at 57–59, 63, 93 and 156; and Karl Jaspers *The Origin and Goal of History* (Routledge, London, 2011).

74 Peter Clark *European Cities and Towns 400–2000* (Oxford University Press, Oxford, 2009).

75 At 103.

76 O'Sullivan, above n 57, at 142.

77 Clark, above n 74, at 91.

78 At 101.

500 independent political units.<sup>79</sup> The demise of these polities, however, could be traced to the 14th century when "leading cities extended their hinterlands and control over smaller cities. One of the most aggressive, Florence, acquired Arezzo, Pisa, Livorno, and other towns".<sup>80</sup> By the time of the Renaissance and the French Revolution we see the loose city networks, which formed the *universitas* between 1000 and 1500 CE, become consolidated across the continent in forms of nation-building that "saw a general diminution in the local independence of urban communities"<sup>81</sup> through the "widespread interference of the state".<sup>82</sup> This migration of sovereignty to the national level reached its zenith with the signing of the Peace of Westphalia in 1648, which later ushered a new form of *universitas* based on international instruments such as the Universal Declaration of Human Rights of 1948.<sup>83</sup> The last five centuries (1500 to 2000 CE) saw a shift from the Old World structure analogous to the shift from Neolithic villages to the cities of ancient civilisations. The key point is that the shift from villages to cities produced a level of technical complexity analogous to the complexity of modern and post-modern societies. The complexity of modern and post-modern society is only technical; on a cultural level, we are no more complex than earlier societies. Capitalism has not produced a more sophisticated substitute to the societies of medieval Europe.<sup>84</sup> As will be discussed, there are now signs of a new era of *universitas*.

It is possible to interpret sovereignty theories from the 16th century to this day as variations on the theme of power exchange between the dualism of ruler and ruled. From the 16th to the 18th centuries, the individualistic, contractualistic approach dominated.<sup>85</sup> This approach was largely influenced by the *societas* view of the state.<sup>86</sup> However, in the 17th and 18th centuries, as a reaction to the revolutionary tendencies that emanated from earlier theories of sovereignty, the state was now seen as imposed on the people rather than created by their own power. This eliminated the contractarian approach by perceiving the state in its historical context, as a product of tradition and

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79 Joseph A Camillieri "Rethinking Sovereignty in a Shrinking, Fragmented World" in RBJ Walker and Saul H Mendlovitz (eds) *Contending Sovereignities: Redefining Political Community* (Lynne Rienner Publishers, Boulder, 1990) 13 at 14.

80 Clark, above n 74, at 97.

81 At 202.

82 At 208.

83 Some theorists suggest that the effect of the Peace of Westphalia is largely mythical. See Raia Prokhovnik *Sovereignities: Contemporary Theory and Practice* (Palgrave Macmillan, Basingstoke, 2007) at 60. The treaty is still useful for a demarcation of a new era of *universitas*.

84 Mumford *The Transformations of Man*, above n 14, at 3 and 94; and Murray Bookchin *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy*, above n 14, at 216.

85 Oakeshott *On Human Conduct*, above n 58, at 251.

86 CE Merriam *History of the Theory of Sovereignty since Rousseau* (Batoche Books, Kitchener, 2001) at 20.



custom,<sup>87</sup> as a natural evolutionary necessity<sup>88</sup> or as a patrimonial source of authority.<sup>89</sup> Now the state was seen as an organism capable of action beyond that taken by its constituent members. This organic-state tradition is orthogonal to the contractarian approach. In the latter, the state is simply a mechanism that cannot be larger than the sum of its (individual-based) parts. This understanding chimes, for example, with the Roman idea of the state.<sup>90</sup> The mechanistic view negates the possibility of treating the state as a legal person and hence closes the door on the jurisprudential dimension of the state as a *universitas*.<sup>91</sup> Notwithstanding, one point provides a common thread throughout sovereignty's classifications: it is perceived as a *societas* rather than a *universitas*.<sup>92</sup> Sovereignty is largely built on the idea of consensual authority (at least outside times of crisis). *Universitas* on the other hand, as exemplified in empire or global governance, "rests on the quite different premise that legislative consent to law is not so important to the authority of law. ... [under *universitas*] there are no great choices left to make".<sup>93</sup> For sovereignty to arise, a society must have already been established as separate from the state.<sup>94</sup> The existence of *socii* (partners), while a necessary condition, is not enough for sovereignty to emerge. There also needs to be an exchange of power through what came to be known as the social contract.<sup>95</sup>

Given that sovereignty has its origins in *societas*, some argue that in the middle ages, there was no concept of sovereignty as we know it today: the seat of sovereignty was external to the (local) polity.<sup>96</sup> Note however that medieval Europe also adopted a form of the principle of class representation which establishes a constitutional link to sovereignty.<sup>97</sup> Nevertheless, the medieval *universitas* remained the norm until the 16th century when the Italian Renaissance (through the rise of city-states) and the German Reformation (through the drive for political authority over religious matters) started to undermine its dominance. Interestingly, the 16th century is also the historical origin

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87 At 21.

88 At 22.

89 At 22.

90 At 56.

91 Lars Udehn *Methodological Individualism: Background, History and Meaning* (Routledge, New York, 2001) at 100. See Max Weber "Some Categories of Interpretive Sociology" (1981) 22 *The Sociological Quarterly* 151 at 159.

92 Oakeshott *On Human Conduct*, above n 58, at 251–252.

93 Jeremy A Rabkin *Law without Nations? Why Constitutional Government Requires Sovereign States* (Princeton University Press, Princeton, 2005) at 41.

94 FH Hinsley *Sovereignty* (CA Watts & Co, London, 1966) at 32.

95 At 131.

96 Rabkin, above n 93, at 47.

97 CA Beard *The Economic Basis of Politics* (George Allen & Unwin, London, 1935) at 47.

for the modern capitalist world-economy and the origin of the (accelerating) international economic integration,<sup>98</sup> and in this sense, is the genesis of a new form of *societas* (qua economic integration). By the 16th century, the *societas* that existed in Europe, under imperial sovereignty, was transferred to outside the continent where European states governed their imperial possessions as *societas*. As a response, another form of *universitas* came to prominence: federalism, especially as illustrated by the United States of America. Moreover, a tendency towards other forms of a European *universitas* was registered in the 19th and 20th centuries under failed French (Napoleon) and German (Hitler) campaigns. European *societas* seemed to triumph and was the basis on which the whole United Nations system was created. The end result was to spread this western model creating a global *societas* of (nation) states. However, even in the 21st century, we see further attempts towards *universitas*, albeit through a consensual route rather than a direct conflict one, in the form of the European Union.

From this perspective, sovereignty has a scalar anchor. Together with the idea of constitutionality (and its inherent consensual nature), sovereignty is not possible on a global scale. Sovereignty "evolved from a judicial concept focusing on the fight to make laws *domestically* to a political-science definition focusing on power and a state's independence from outside actors".<sup>99</sup> Sovereignty "[implies] a community that can regulate itself without the approval or direction of *higher powers outside* the community".<sup>100</sup> It pertains to a scale above the individual but one which has other scales above it which justifies the need for independence from outside actors. Sovereignty can be at sub-national or national scales but cannot be global. This suggests that the genesis of sovereignty lies in local autonomy from where claims of sovereignty later migrated to the national scale. Sovereignty is therefore the essence of the meso scale: an intermediate scale between the micro-scale of the individual and the macro-scale of the nation-state. At scales beyond the national, sovereignty fractures into a multitude, either through federalism, or the wider principle of subsidiarity.<sup>101</sup>

The state qua *universitas* replaces sovereignty with subsidiarity (or its limited version of federalism).<sup>102</sup> Sovereignty was developed to furnish justification for *who* holds (absolute) supreme power. On the other hand, subsidiarity (federalism) focuses on *how* that supreme power is shared

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98 Immanuel Wallerstein "States? Sovereignty? The dilemma of capitalists in an age of transition" in David A Smith, Dorothy J Solinger, and Steven C Topik (eds) *States and Sovereignty in the Global Economy* (Routledge, London, 1999) 20.

99 Scot Macdonald and Gunnar Nielsson "Linkages Between the Concepts of 'Subsidiarity' and Sovereignty: The New Debate Over Allocation of Authority in the European Union" (paper presented to European Community Studies Association Fourth Biennial Conference, Charlestown, May 1995) at 4 (emphasis added).

100 Rabkin, above n 93, at 51 (emphasis added).

101 At 43.

102 For the similarities and difference between subsidiarity and federalism, see Benjamin F Gussen "Subsidiarity as a Constitutional Principle in New Zealand" (2014) 12 NZJPIL 123.

(divided). The origin of subsidiarity is traced to ancient Greece.<sup>103</sup> However, some suggest it has evolved within federal governmental regimes.<sup>104</sup> Others argue subsidiarity derives from methodological individualism,<sup>105</sup> suggesting a bottom-up legitimisation of authority.<sup>106</sup> Regardless of its origin or rational basis, subsidiarity poses a threat to sovereignty.<sup>107</sup> Subsidiarity "does not reconstitute the sovereign state as the object of its concern. It explicitly contemplates intervention and assistance for the purpose of protecting human dignity."<sup>108</sup> A nexus with human rights means that the principle is neither contractarian nor utilitarian. Furthermore, today the principle does not make any normative claims on the structure of political or economic organisation.<sup>109</sup> The principle remains paradoxical in that it limits the state, but also empowers and justifies it. It reduces the relationship between the national and the local scales to a one-dimensional functional exchange.<sup>110</sup> While sovereignty, even if only implicitly, gives permanence to the national scale, (the strong version of) subsidiarity (unlike federalism) takes away that permanence:<sup>111</sup>

Subsidiarity has updated the concept of decentralization ... No longer must arguments be made for the devolution of power from the nation-state. Instead the nation-state itself must defend its legitimacy against claims from communities demanding greater control over decision making.

The key point is that without proper constitutional constraints there will always be a cyclical dynamic that underlines the tension between *societas* and *universitas*.

There is now a considerable body of literature suggesting the nation-state is obsolete and is no more the optimal unit for organising economic activity.<sup>112</sup> Thanks to the information revolution the

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103 Chantal Millon-Delsol *L'État Subsidaire* (Presses Universitaires de France, Paris, 1992) at 15–27.

104 Macdonald and Nielsson, above n 99, at 7.

105 Paolo G Carozza "Subsidiarity as a Structural Principle of International Human Rights Law" (2003) 97 *The American Journal of International Law* 38 at 42.

106 Macdonald and Nielsson, above n 99, at 5.

107 John Hopkins *Devolution in Context: Regional, Federal and Devolved Government in the European Union* (Cavendish Publishing, London, 2002) at 26.

108 Carozza, above n 105, at 58.

109 At 44.

110 Millon-Delsol, above n 103, at 8.

111 Hopkins, above n 107, at 29.

112 Kenichi Ohmae *The End of the Nation State: The Rise of the Regional Economics* (Simon & Schuster, New York, 1995). See also Jean-Marie Guéhenno *The End of the Nation-State* (University of Minnesota Press, Minneapolis, 1995); Daniel Chernilo *A Social Theory of the Nation-State* (Routledge, London, 2007); and David A Smith, Dorothy J Solinger and Steven C Topik (eds) *States and Sovereignty in the Global Economy* (Routledge, London, 1999).

*glocal*, the intertwining of the global and the local, is taking precedence over the national.<sup>113</sup> This withering of the nation-state is ushering a new form of *universitas* that attacks sovereignty not only from within the (nation) state, but by attacking the state itself. An example at hand is that of Italy with its industrialised north and rural south.<sup>114</sup> Moreover, there is now a decoupling of the democratic process from the bulk of the working population. Governments have become hostage to political parties that represent special interests rather than the majority, the result being the adoption of policies (both at the national and sub-national levels) that make no economic sense.<sup>115</sup> These gyrations are summed up by Gianni De Michelis, a former foreign minister of Italy, as follows:<sup>116</sup>

We are witnessing the explosion of a long-obsolete model of liberal democracy that can no longer accommodate our dynamic, complex societies with their sophisticated electorates of vast diversity and highly differentiated interest.

Today sovereignty is largely seen as declining in the aftermath of increasing global economic integration, which continues to be dominated by one particular modality: globalisation.<sup>117</sup> A new conception of the nation-state has emerged: the state as a network.<sup>118</sup> Some however argue that "[t]he claim that globalisation is undermining sovereignty is exaggerated and historically myopic",<sup>119</sup> adding that "indicators such as regulatory power and macroeconomic autonomy are ahistorical. They refer to state functions that were either never fully performed by sovereign states or only assumed very recently by such states."<sup>120</sup> Notwithstanding, states are no longer able to protect themselves from the negative actions of other states or outside groups.<sup>121</sup> Sovereignty is not the absolute it used to be.

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113 On glocalisation see PS Gopalakrishnan *Glocalization: Thinking Global, Acting Local* (ICFAI University Press, Hyderabad, 2008).

114 Ohmae, above n 112, at 16.

115 At 56.

116 At 60.

117 Camillieri, above n 79, at 38.

118 J Agnew and S Corbridge *Mastering Space: Hegemony, Territory, and International Political Economy* (Routledge, London, 1995) at 89 as cited in Andrew Herod *Scale* (Routledge, London, 2011) at 200.

119 Stephen D Krasner "Globalization and sovereignty" in David A Smith, Dorothy J Solinger, and Steven C Topik (eds) *States and Sovereignty in the Global Economy* (Routledge, London, 1999) 34 at 34.

120 Eric Helleiner "Sovereignty, territoriality and the globalization of finance" in David A Smith, Dorothy J Solinger, and Steven C Topik (eds) *States and Sovereignty in the Global Economy* (Routledge, London, 1999) 138 at 149.

121 Steven Lee "A Puzzle of Sovereignty" in Neil Walker (ed) *Relocating Sovereignty* (Ashgate Dartmouth, Aldershot, 2006) 29 at 29.

It is now relative.<sup>122</sup> There is now imperial sovereignty that "signals the end of the idea of the modern state ... and of a relational sovereignty based on a territorial unit".<sup>123</sup> The link between sovereignty and territoriality is being replaced by arrangements where state jurisdiction is punctured by multi-level governance.<sup>124</sup> The empirical and theoretical developments of the late 20th century have "led to a more fundamental questioning of how national borders themselves have been conceptualized".<sup>125</sup> Similarly, in the European context, one can identify two (proto-glocal) constitutional revolutions since the end of World War II (WWII). The first is resulting in the more visible creation of pan-European institutions. The second is the counter-unitary-state revolution that started in the 1920s, but reached its height in the decades after WWII. This revolution saw the creation of sub-national, meso-scale, democratic institutions: especially regional states that filled the space between the national and the local scales. By the 1990s, even the United Kingdom finally joined this constitutional revolution with the passing of the devolution Acts (The Scotland Act 1998, The Government of Wales Act 1998 and the Northern Ireland Act 1998).<sup>126</sup> There is now evidence in the United Kingdom of the emergence of polycentric states.<sup>127</sup>

Sovereignty is hence targeted by the unravelling of territoriality, which is a constitutive element of the state. A prime example of this is the disappearance of "territorially homogenous and exclusive" currencies that "accompanied the emergence of the 'nation-state'".<sup>128</sup> Notwithstanding, it has to be said that capital mobility is not necessarily behind the fraying of state territoriality. Hence, the introduction of the Euro was also motivated by political calculations outside of already high levels of capital mobility. Moreover, financial globalisation per se does not necessarily pose a challenge to territorial currencies as can be seen in the growth of local currencies.<sup>129</sup>

Others argue that the effect of *universitas* (qua economic integration through the modality of globalisation) on sovereignty is part of a cyclical process indigenous to capital accumulation, where

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122 Michel Foucault *Power* (New Press, New York, 2000) at 324 as cited in Martin Loughlin "Ten Tenets of Sovereignty" in Neil Walker (ed) *Relocating Sovereignty* (Ashgate Dartmouth, Aldershot, 2006) 79 at 107–108. For Foucault's views on sovereignty see Brian CJ Singer and Lorna Weir "Politics and Sovereign Power: Considerations on Foucault" (2006) 9 *European Journal of Social Theory* 443.

123 Loughlin, above n 122, at 108–109.

124 John Allen and Allan Cochrane "Beyond the Territorial Fix: Regional Assemblages, Politics and Power" (2007) 41 *Regional Studies* 1161 as cited in Herod, above n 118, at 201.

125 Herod, above n 118, at 202.

126 Hopkins, above n 107.

127 Kevin Morgan "The Polycentric State: New Spaces of Empowerment and Engagement?" (2007) 41 *Regional Studies* 1237 at 1238.

128 Helleiner, above n 120, at 151–152.

129 At 152.

the pendulum swings between the polar positions of *universitas* and *societas*. This effect of globalisation on sovereignty demonstrates the cyclical processes of production of scale and collapse where there is no constitutional constraint on the growth of the jurisdictional footprint of the state. The last five centuries have seen more emphasis on *societas*, first in the European context and later on globally, through the instruments of international law.<sup>130</sup> However, we now see a shift in emphasis,<sup>131</sup> even though the present wave of economic integration is not novel except for its scale.<sup>132</sup>

In each of the four systemic cycles of accumulation [marked by the migration of economic hegemony on the world stage from Genoa, to the Dutch, to the British and last to the United States] that we can identify in the history of world capitalism from its earliest beginnings in late-medieval Europe to the present, periods characterized by a rapid and stable expansion of world trade and production inevitably ended in a crisis of over-accumulation that ushered in a period of heightened competition, financial expansion, and eventual breakdown of the organizational structures on which the preceding expansion of trade and production had been based. ... these periods of intensifying competition ... [are] the time when the leader of the preceding expansion ... is gradually displaced ... by an emerging new leadership.

After the Hobbesian *Leviathan* (first published in 1651),<sup>133</sup> a sovereign state was conceived of as a territorial jurisdiction: "the territorial limits within which state authority may be exercised on an *exclusive* basis".<sup>134</sup> Today, however, "[e]merging forms of 'complex sovereignty' break down the internal structural coherence of the state".<sup>135</sup> Today's jurisprudence "became the jurisprudence of a fracturing state, characterized by polycentric centers of power".<sup>136</sup> These polycentric centres of power are an extension of the idea of shared sovereignty which could be traced back to ancient Greece.<sup>137</sup> However, this idea did not re-emerge (in the form of federalism) until 1756 when John Locke revived the idea of the Social Contract, paving the way for the rise of federal states as exemplified by the

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130 Giovanni Arrighi "Globalization, state sovereignty, and the "endless" accumulation of capital" in David A Smith, Dorothy J Solinger, and Steven C Topik (eds) *States and Sovereignty in the Global Economy* (Routledge, London, 1999) 53.

131 See Blank, above n 53.

132 Arrighi, above n 130, at 55.

133 Thomas Hobbes *Leviathan* (Cambridge University Press, Cambridge, 1996).

134 Robert Jackson "Sovereignty in World Politics: a Glance at the Conceptual and Historical Landscape" in Neil Walker (ed) *Relocating Sovereignty* (Ashgate Dartmouth, Aldershot, 2006) 3 at 4 (emphasis added).

135 Kanishka Jayasuriya "Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?" in Neil Walker (ed) *Relocating Sovereignty* (Ashgate Dartmouth, Aldershot, 2006) 361 at 367.

136 At 372.

137 Aristotle *The Politics* (Harvard University Press Cambridge, MA, 1967) VII, 1326b, 1-26. For a discussion of the divided nature of Aristotle's sovereignty, see RG Mulgan "Aristotle's Sovereign" (1970) 18(4) *Political Studies* 518.

United States (United States Constitution 1789),<sup>138</sup> and the Swiss Confederation (in the 1848, 1874, and 1999 constitutions).<sup>139</sup> Nevertheless, sovereignty still operated from within the state. Since the signing of the Peace of Westphalia in 1648, and especially in the post-Napoleonic era (after 1815), "a prominent operating principle regulating the size and shape of states has indeed been that *states should be contiguous and non-perforated*".<sup>140</sup> This should be understood in relation to the observation that "the Westphalian State is ... bound symbiotically to the ideology of nationalism".<sup>141</sup> The relationship between sovereignty and territory is captured by the principle of *uti possidetis juris* "according to which existing [state] boundaries are the pre-emptive basis for determining territorial jurisdictions in the absence of mutual agreement ... to do otherwise".<sup>142</sup> In particular, this principle subordinated the principle of self-determination to boundaries decided by colonial powers: juridical-territories trumped sociological-territories.<sup>143</sup>

The modern state ideal is described as that where "a political community would very much seem to be that of a geographically circumscribed area within which exists a more or less fixed political hierarchy, which includes all individuals and all political institutions, and whose physical extension is contiguous and non-perforated".<sup>144</sup> It could be argued that the collapse of the gold standard, the emergence of Keynesian economics and European decolonisation had the combined effect that in the mid-20th century the world increasingly came to be "pictured in the form of separate nation-states, with each state marking the boundary of a distinct economy".<sup>145</sup> The nation-state (since the 18th century) remains the principal territorial unit. Nations result from a process of production of scale that is enforced on a given territory. France is a prime example of this process.<sup>146</sup> Critique of this national scale and the contiguous non-porous nation-state is relatively rare in the (constitutional) political economy literature, notwithstanding the now widely accepted claim that a decentralised political

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138 Merriam, above n 86, at 82–95.

139 See Federal Constitution of the Swiss Confederation 1999, art 3.

140 B Smith "The Cognitive Geometry of War" in P Koller and K Puhl (eds) *Current Issues in Political Philosophy* (Hölder-Pichler-Tempsky, Vienna, 1997) as cited in Peter Kurrild-Klitgaard "Opting-Out: The Constitutional Economics of Exit" (2002) 61 *American Journal of Economics and Sociology* 123 at 146 (emphasis added).

141 Stephen Tierney "Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State" in Neil Walker (ed) *Relocating Sovereignty* (Ashgate Dartmouth, Aldershot, 2006) 239 at 245.

142 Robert Jackson *Sovereignty: The Evolution of an Idea* (Polity Press, Cambridge, 2007) at 110.

143 At 15.

144 Peter Kurrild-Klitgaard (2002) "Opting-Out: The Constitutional Economics of Exit" (2002) 61 *American Journal of Economics and Sociology* 123 at 124.

145 Timothy Mitchell "Fixing the Economy" (1998) 12 *Cultural Studies* 82 at 90.

146 Hopkins, above n 107, at 8.

community would better meet heterogeneous individual preferences.<sup>147</sup> Keeping in mind of course that decentralisation would obtain only under the auspices of the nation-state.

Today, however, the contiguous-and-non-perforated-state principle is being challenged by new conceptions of the state as well as its sovereignty.<sup>148</sup> There is an on-going shift towards seeing the state as constituted on non-contiguous basis. Using the analogy with the idea of a polycentric legal order implying a multiplicity of independent centres of decision-making,<sup>149</sup> there is no extensive evaluation of the need for, or merit of, an analogous polycentric constitutional order.<sup>150</sup> Here the emphasis would be on maximising constitutional options rather than deciding among constraints per se. Instead, the assumption is usually made that "there is a state or a commonwealth, without exploring the question of which domain [a scalar construct] this commonwealth or state should actually occupy, and in relation to what other public bodies".<sup>151</sup>

There are however some attempts in this direction: for example, the work by Bruno Frey and Reiner Eichenberger on what they call functionally overlapping competing jurisdictions.<sup>152</sup> To inhibit the overextension of government, others also suggest separate jurisdictions with some protected powers within a constitutional federation.<sup>153</sup> Where migration is facilitated between such separate jurisdictions, there are tangents with the Tiebout model in relation to sorting individuals according to their preferences.<sup>154</sup> A more promising scholarship is that of Vincent Ostrom.<sup>155</sup> For Ostrom, polycentric "connotes many centers of decision-making which are formally independent of each other

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147 See for example James M Buchanan and Gordon Tullock *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, Ann Arbor, 1962).

148 Kurrild-Klitgaard, above n 144, at 146.

149 Friedrich A Hayek *Law Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge, London, 2012). See also Tom W Bell "Polycentric Law" (1991) 7 *Humane Studies Review* 4.

150 Randy E Barnett *The Structure of Liberty: Justice and the Rule of Law* (Oxford University Press, Oxford, 2000) especially ch 14.

151 Jürgen G Backhaus "Subsidiarity" in Jürgen G Backhaus (ed) *The Elgar Companion to Law and Economics* (2nd ed, Edward Elgar, Cheltenham, 2005) 280 at 281.

152 Bruno S Frey and Reiner Eichenberger *The New Democratic Federalism for Europe: Functional, Overlapping and Competing Jurisdictions* (Edward Elgar Cheltenham, 2004).

153 Ludwig Van den Hauwe "Constitutional economics II" in Jürgen G Backhaus (ed) *The Elgar Companion to Law and Economics* (2nd ed, Edward Elgar, Cheltenham, 2005) 223at 257.

154 Tiebout, above n 72.

155 Richard E Wagner "Self-governance, polycentrism, and federalism: recurring themes in Vincent Ostrom's scholarly oeuvre" (2005) 57 *Journal of Economic Behavior & Organization* 173.



... [but] may be said to function as a 'system'.<sup>156</sup> However, his polycentricity has a strong functional taste largely divorced from the power calculus at the heart of divided sovereignty.

Such non-contiguous states are at the centre of Spinoza's discourse.<sup>157</sup> Because his sovereignty is closer to subsidiarity than to federalism, it is more receptive to city power and city autonomy.<sup>158</sup> The sharing of sovereignty (through subsidiarity) among cities hence finds explicit endorsement in his scholarship.<sup>159</sup> Spinoza separates the constitutional and operational levels of collective decision-making, thus paving the way for the possibility of a shared sovereignty. This is also the approach followed in constitutional economics.<sup>160</sup> For Spinoza, who allied himself with the Dutch republican movement, under subsidiarity, sovereignty is not repugnant to principles of provincial autonomy. Spinozistic sovereignty provides a model:<sup>161</sup>

in which powers are shared between sovereign bodies ... which reaffirm their separateness ... . In federal systems such as in the United States or in Australia, legislative, judicial and executive powers are distributed between federal and different state governments ... [under Spinozistic sovereignty], however, ... 'confederal' powers ... were extremely closely restricted ... Rather than attempting to harmonise differences ... [it upholds] the constructiveness of difference ... .

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156 Vincent Ostrom, Charles M Tiebout and Robert Warren "The Organization of Government in Metropolitan Areas: A Theoretical Inquiry" (1961) 55 *American Political Science Review* 831.

157 Raia Prokhovnik "Spinoza's Conception of Sovereignty" (2001) 27 *History of European Ideas* 289 at 300–301. Refer to Benedict de Spinoza *A theologico-political treatise and a political treatise* (Dover Publications, New York, 1951) at 347–348, 356–357, 370 and 383–384. Note that according to Spinoza's definition of democracy, modern representative democracy would be regarded as a modality of aristocracy, "because our legislative bodies are, like his definition of aristocracy, 'composed of certain chosen persons'": Raia Prokhovnik "From Democracy to Aristocracy: Spinoza, Reason and Politics" (1997) 23 *History of European Ideas* 105 at 107. See also GM Gross "Spinoza and the Federal Polity" (1996) 26 *Publius* 117; Raia Prokhovnik *Spinoza and Republicanism* (Palgrave Macmillan, New York, 2004); Jonathan Havercroft "The Fickle Multitude: Spinoza and the Problem of Global Democracy" (2010) 17 *Constellations* 120; and Etienne Balibar, Ted Stolze and Emilia Giancotti "Spinoza, the Anti-Orwell: The Fear of the Masses" (1989) 2(3) *Rethinking Marxism* 104.

158 Blank, above n 53, at 549.

159 See Gussen, above n 46.

160 Buchanan and Tullock, above n 147, at 298. See Benedict Spinoza *A Treatise on Politics* (Holyoake, London, 1854).

161 Prokhovnik, above n 83, at 228.

It could in fact be argued that:<sup>162</sup>

Spinoza's notion of sovereignty is crucially designed as an instrument to defend the constitutional tradition, and not as an instrument to unify and strengthen the state. Its purpose is to check the development of centralised government, not to promote it.

James Buchanan echoes Spinoza when he explains his idea for European federalism (better understood as subsidiarity) as "diversity among separate co-operative communities, of shared sovereignty, of effective devolution of political authority and, perhaps most importantly, of the *limits on such authority*".<sup>163</sup> Buchanan envisaged that Brussels would be "more like Bern, in the Swiss confederation, than like Paris, in post-Napoleonic France".<sup>164</sup>

#### IV CONCLUSION

This article advocates for shifting focus from sustainability as a legal principle in need of enforcement on a global scale, to the principle of subsidiarity as guarantor of the desired ecological outcomes. Pursuing sustainability on a global scale is futile given its emergent nature. Embedding subsidiarity as a constitutional principle instead is the key to enabling sustainable development. Only this constitutionalisation of subsidiarity on a global scale would break the oscillation between *societas* and *universitas* where *societas* reintroduces a sovereignty that fizzles any efforts towards sustainability.

Subsidiarity, coupled with global governance, would then see cities become *le pouvoir constituant* (the constituent power) of political states world-wide. Subsidiarity prefers cities due to economic (efficiency) as well as moral (equity) reasons, although it does not guarantee any particular legal arrangements. The power of cities under subsidiarity would extend on a continuum from territorial cities, to cities enjoying a legal status close to city-states. However, global governance through international law instruments would ensure a privileged place for cities.

Baruch Spinoza provides a model of how this city subsidiarity works. It is however conceded that "Spinoza's notion of sovereignty could not be 'applied' ... in some easy fashion as a simple solution".<sup>165</sup> Nevertheless, it is hoped that this article would provide the impetus for future research on constitutional designs in the spirit of Spinoza. Such research would see countries with large (territorial) footprints questioned as to their constitutional stability. While not an easy task, it is essential for us to avoid collapse and for sustainability to emerge.

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162 Prokhovnik "Spinoza's Conception of Sovereignty", above n 157, at 297.

163 James M Buchanan "Europe's Constitutional Opportunity" in James M Buchanan and others *Europe's Constitutional Future* (Institute of Economic Affairs, London, 1990) 1 at 3–4.

164 James M Buchanan "An American Perspective on Europe's Constitutional Opportunity" (1991) 10 *Cato Journal* 619 at 629.

165 Prokhovnik, above n 83, at 231.



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