CIVITAS evidence submission
2014 Balance of Competences Review: 32 – Subsidiarity & Proportionality

This submission is based on, and quotes heavily from, the 2014 Civitas publication by Dr David G Green, *The Demise of the Free State*

Call for Evidence questions on Subsidiarity, Proportionality, and Article 352 TFEU
12. Scope
1. Are the principles of Subsidiarity and Proportionality effective ways to decide when the EU acts, and how it acts? You may wish to refer to particular examples in your evidence.

Green concludes that no, sovereign nations should be the ultimate arbiters of laws applied within their borders and policies enacted.

13. Interpretation
2. What are your views on how the principles have been interpreted in practice by EU and Member State actors including: the EU courts, the other EU institutions, Member State governments, Member State parliaments, sub-national or regional bodies and civil society?

The study argues that EU courts and other institutions should not have such great power (in principal and practice) over national parliaments, since it is impossible for one nation (or one nation's people) to hold the EU government to account. The Factortame decision, for example, seems antithetical to principles of sovereignty.

14. Application
3. Do you have any observations on how the different actors play their roles? Could they do anything differently to ensure that action takes place at the right level?

Dr Green writes:
"Laszlo Andor, the European Commissioner for Employment and Social Affairs […] attacked the British Government. He said that Mr Cameron's proposals [on EU immigration] were 'an unfortunate over-reaction'. EU rules, he said, applied equally to all 28 member states and had been accepted by the UK. He told the BBC Today programme that the British public had 'not been told all the truth' and that there were existing EU safeguards to prevent 'benefit tourism': 'We would need a more accurate presentation of the reality, not under pressure, not under hysteria, as sometimes happens in the UK. I would insist on presenting the truth, not false assumptions.' The prime minister's suggestions risked 'presenting the UK as a kind

of nasty country in the European Union'.
Presumably he thought his attitude was 'nice', but in truth he revealed a callous disregard for the harmful consequences on the host population of a sudden influx of newcomers. For him, EU doctrine must stand without regard to the effects."

pp.77-78

On the Commission President, Dr Green writes:

"[Barroso] expressed strong hostility to the repatriation of powers of self-government: 'I am for a stronger EU not a weaker EU,' he said. 'It is important we do this exercise in a pragmatic way avoiding what I call theological discussions about competences. Our approach is not an ideological one. It is not about weakening the EU. It is not about giving up on integration or on ever closer union.'

"Under our system, if a member of the executive spoke this way, Parliament would be rightly entitled to have them removed. Mr Andor's accusation that the UK Government's policy on immigration was 'nasty' and driven by xenophobia was typical of the venom often deployed by EU leaders…
Personal vilification was the stock-in-trade of euro supporters, with the BBC playing a particularly dishonourable role."
pp.78-79

Pages 70-71 argue that proportionality is inappropriately applied to employment law in a case balancing the Race Relations Act and the EU Burden of Proof Directive. Dr Green quotes Sir Bob Hepple QC:

"Hepple writes
that under UK law, if the employer fails to give a satisfactory reason for a difference in outcome, 'the tribunal may draw an inference' of guilt. Under EU law, says Hepple, the 'burden of proof shifts to the respondent to prove that there has been no unlawful treatment'.
Hepple thoroughly approves, and recommendation 47 of his report said: 'There should be a statutory reversal of the burden of proof'."

15. Future options and challenges
5. Where might alternative approaches or actions as regards the scope, interpretation and application of the principles of Subsidiarity and Proportionality be beneficial?
7. Which alternative approaches to the scope, interpretation and application of Article 352 might be beneficial?

Dr Green argues that Parliament should amend the 1972 ECA to clarify parliamentary supremacy, effectively solving the questions of subsidiarity and proportionality since the member state's national government would always have the final say:

"Above all, we need to restore parliamentary sovereignty, which means we should restore the authority of the majority of the British people acting through Parliament. We should make explicit the primacy of Parliament by amending the 1972 European Communities Act and declaring our own Supreme Court to be a higher authority than any other court. Henceforward, laws passed by Parliament would be superior to any EU laws. This would amount to a unilateral declaration of independence, but would not imply immediate renegotiation of every law and regulation. We could take our time and go through the numerous unwanted laws one by one. In any event, many regulations governing trade are unavoidable. When we export to any nation, inside the EU or not, it is necessary to accept their regulations. But in such cases the regulations do not need to affect how we govern companies that produce only for the home market.
Some of us will be reluctant to 'break' the law, and it is precisely our loyalty to law that is now being exploited by the EU. But the fact is that many nations have already flouted EU laws, most notably Germany and France when they ignored the budget and debt requirements agreed when the euro was established. Because of their importance to the EU project, nothing was done. We should follow their example and challenge the EU to do its worst."