SCRUTINY

Subsidiarity in the Draft Constitution

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The European principle of subsidiarity is concerned with the functioning of democracy.[1] It seeks to ensure that decisions are taken as close to those affected by the power as is practicable. The Draft Constitution contains some changes designed to strengthen the operation of subsidiarity, in particular a new Protocol which will enable national parliaments to issue 'reasoned opinions' against measures they believe run contrary to the principle. When the number of reasoned opinions passes a threshold, determined by the Protocol, the Commission must re-think its legislative proposal. This article will claim that whilst the changes in the Draft Constitution are a step in the right direction, they do not go far enough. In particular, it will be argued that the basis for the 'reasoned opinions' in the Protocol should not be confined to subsidiarity, and, further, if sufficient national legislatures object the legislative proposal should be withdrawn rather than just reconsidered.

Subsidiarity: The Present Position

Before turning to examine the new subsidiarity provisions in the Draft Constitution it is necessary to outline the manner in which the principle presently operates within the European legal order.[2] This survey has two objectives: first, to allow

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1 See N.W. Barber, 'The Limited Modesty of Subsidiarity' (2005) *European Law Journal*, 308. The present paper assumes much of what is argued for in that article.

2 For a good recent account, see G. de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam', *Harvard Jean Monnet Working Paper*, 7/99.

the provisions in the Draft Constitution to be contrasted with the existing state of subsidiarity, secondly, to highlight some current weaknesses in the protection of subsidiarity that the Draft Constitution might have been expected to engage with. Subsidiarity is defined by Article 5 EC, which states:

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
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> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
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> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

In theory Article 5(2) EC gives litigants a right that can be pleaded before courts; it should be possible to have Community measures struck down for infringing the principle of subsidiarity. During the early 1990s much was written on the proper interpretation of the subsidiarity principle.[3] In particular, a lively debate arose between those who adopted a broad reading of 'exclusive competence',[4] and consequently accorded subsidiarity a narrower role, and those who gave the phrase a more restricted reading and therefore left more space for the operation of the principle.[5] Problems could also arise over when, and, indeed, how, Member States could show the objectives of the proposed action would be 'sufficiently achieved' by domestic measures. The interpretation of Article 5(2) EC has proved of more interest to academics than judges: to date, the ECJ has not made use of the principle.[6]

There are at least two explanations of the ECJ's failure to develop subsidiarity as a legal constraint on Community action. Most charitably, it has been argued that

[3] *See*, in particular, N. Emiliou, 'Subsidiarity: An Effective Barrier Against "The Enterprises of Ambition"' (1992) *European Law Review* 383, and more recently, C. Henkel, 'The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity' (2002) 20 *Berkeley Journal of International Law*, 359.

[4] A. Toth, 'The Principle of Subsidiarity in the Maastricht Treaty' (1992) 29 *Common Market Law Review* 1079, 1080-86.

[5] J. Steiner, 'Subsidiarity Under the Maastricht Treaty', in D. O'Keeffe and P. Twomey, *Legal Issues of the Maastricht Treaty* (Chancery: 1994) pp. 57-58.

[6] Though T.C. Hartley shows the principle could have been relied upon to justify the court's decision in the *Tobacco Advertising* case. *See* T.C. Hartley, *The Foundations of European Community Law* (5th ed., Oxford: 2003), Case C-376/98, *Germany* v. *European Parliament and Council* [2000] ECR I-8419. *See also* the discussion in C-491/01, *R* v. *Secretary of State for Health, ex. p. BAT* [2002] ECR I-11543, para. 177-185.

subsidiarity is inherently unsuited to judicial enforcement.[7] The subsidiarity test requires difficult technical and political assessments to be made.[8] First, the court must reach a judgment about the extent to which the social and economic effects of an activity cross Member States boundaries. Secondly, it must then undertake a political assessment of whether the effects on other States justify action at a Community level: a question which would involve both an assessment of the seriousness of the cross-boarder impact, and, additionally, the extent to which Member States could be relied upon to pursue Community objectives in this area. The first question raises complex technical issues: the court would, probably, be presented with a range of conflicting expert reports purporting to resolve the issue, from the Commission and from the Member States. The second question requires the court to enter an area of political debate in which there are few widely supported principles that the judges could adopt as guides. The balance of regional and central power, in particular, the price that is worth paying for the benefits of local control, is hardly a question a court ought be asked to answer.

The less charitable explanation of the failure of the ECJ to make use of subsidiarity is that the principle runs against the spirit of the court.[9] It might be thought that a court which developed the *Francovich* principle, and which regularly undertakes complicated economic assessments in the area of the economic freedoms, could, if it had wished, have made something of subsidiarity. The ECJ has long regarded itself as the engine of integration; helping to further this goal even when Member States seemed unenthusiastic.[10] The broad ethos of the court is to favour action at the Community level over action at the Member State level.[11] This may be, in part, an attempt to counter-balance the political weakness of the Community structure, which depends on the Member States for financial support and, to a large extent, for the enforcement of Community policies. It has proved difficult for the ECJ to transform itself from a force for integration into a body that can impartially adjudicate between Member States and Community Institutions. In a recent paper

[7] G. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', (1994) 94 *Columbia Law Review* 331, 391; A. G. Toth, 'Is Subsidiarity Justiciable?' (1994) 19 *European Law Review* 268; P. Marquardt, 'Subsidiarity and Sovereignty in the European Union', (1994) 18 *Fordham International Law Journal* 616, 628-631.

[8] N.W. Barber, 'Prelude to the Separation of Powers' (2001) 60 *Cambridge Law Journal* 59.

[9] A difficulty politely raised by several writers. *See* E. Young, 'Protecting Member State Autonomy in the European Union: Some Cautionary Tales From American Federalism' (2002) 77 *New York University Law Review* 1612, 1679.

[10] Bermann, above note 7, 352-354.

[11] *See* generally, J. Weiler, 'The Least Dangerous Branch: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration', in J. Weiler, *The Constitution of Europe* (Cambridge: 1999); M. Lasser, 'Anticipating Three Models of Judicial Control Debate and Legitimacy: The European Court of Justice, the Cour de cassation and The United States Supreme Court', *Jean Monnet Working Paper 1/03*, 38-58.

Bednar, Eskridge and Ferejohn have suggested that this problem is not confined to the ECJ, but is characteristic of many courts operating at a federal level. Federal courts, dependent on the centre for their power and prestige, frequently find it hard to be impartial between the national and regional levels, and favour the centre over the regions.[12] It is unsurprising that the ECJ has had little use for subsidiarity, a principle that purports to protect Member States from the centralisation of power, and it is unlikely that this attitude will change in the near future.

Both of these explanations, the charitable and the uncharitable, are probably correct. The lesson taught by the history of Article 5 EC is that subsidiarity, left in the hands of the ECJ, is unlikely to play a significant part in limiting the law-making powers of Community Institutions. However, subsidiarity has had an existence beyond the confines of Article 5(2) EC. The Protocol on the Application of the Principles of Subsidiarity and Proportionality[13] created various procedural mechanisms to protect subsidiarity. The Commission is required to produce a memorandum accompanying new legislative proposals, justifying them in the context of subsidiarity.[14] The Council and the European Parliament are required to consider the consistency of the legislative proposal with Article 5(2) EC, and, further, to consider the implications of subsidiarity for any amendments they may wish to make.[15] The Commission is also required to produce a yearly report on subsidiarity.[16]

These procedural protections of subsidiarity should not be thought of as alternatives to supervision by the ECJ. Though procedural protections may have some inherent force – by insisting institutions reflect on subsidiarity before acting and by providing standards on which political criticism can be based – to a significant degree their effectiveness will depend on the possibility of judicial enforcement. If the requirement to give a reasoned justification of the measure is to have bite, there must be a chance that the ECJ will strike down legislative initiatives that lack adequate reasons. Here, the difference between the charitable and uncharitable explanations of the failure of the court to enforce Article 5(2) EC becomes important. Testing the adequacy of reasons for decisions is a task which the ECJ is frequently asked to undertake: the institutional difficulties considered earlier are still present but are less severe. The concern remains, however, that the ECJ lacks the will to enforce these procedural requirements.

[12] J. Bednar, W.N. Eskridge and J. Ferejohn, 'A Political Theory of Federalism', in J. Ferejohn, J.N. Rakove and J. Riley (eds), *Constitutional Culture and Democratic Rule* (Cambridge University Press, 2001) pp. 229-233.

[13] Protocol No. 30, 1997, reflecting the 1993 Inter-Institutional Agreement on Procedures for Implementing the Principle of Subsidiarity.

[14] Para. 4.

[15] Para. 11.

[16] Para. 9.

Subsidiarity in the Draft Constitution

The Draft Constitution defines subsidiarity in Article I-9(3). It states:

> 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 intended 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.
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> The Union Institutions shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Constitution. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in the Protocol.

The first part of the provision is very similar to Article 5(2) EC. The only significant difference is the inclusion of the phrase 'at regional and local level'. The revised version of subsidiarity looks similar to that proposed by the Committee of the Regions in 1995.[17] The change is probably cosmetic. The provision could not be used within a Member State; the Scottish Parliament could not assert it against the Westminster Parliament, for example. Its inclusion encourages those litigating before the court to argue that decisions should be left to Member States in the hope that the States will then entrust the question to regional institutions, but this argument could equally well have been advanced under Article 5(2) EC.

It is a shame that the opportunity was not taken to reconsider the reach of subsidiarity, in particular the requirement that subsidiarity not operate in areas in which the Union is given exclusive competence. This restriction might have provided a sensible limitation if the ECJ had adopted a strict approach to subsidiarity, regularly using it to strike down Community acts, but for the reasons outlined in the last section the ECJ has not made use of the principle – and this reticence will probably continue if the Draft Constitution is adopted. Article I-9(3) will remain a directive constitutional principle: it will help define the character of the Union, shape the conduct of the Institutions and provide material for political argument, but will have little direct legal significance.[18] As a directive principle subsidiarity should apply to all areas of Union activity. As Article I-11(1) of the Draft Constitution notes, on some occasions the Union may empower Member States to act in areas

[17] J. Jones, 'The Committee of the Regions, Subsidiarity, and a Warning' (1997) 22 *European Law Review* 312, 313; A. Evans, 'Regional Dimensions to European Governance' (2003) 52 *International and Comparative Law Quarterly* 21, 29-32.

[18] Perhaps Article I-9(3) should be seen as a development of Article 1 TEU, a non-justiciable principle that demands decisions be taken 'as closely as possible to the citizen'. This has been interpreted as imposing a general requirement of subsidiarity. *See* Bermann, above note 7, 338-344, J. Jones, above note 17.

that fall within the Union's exclusive competence. Subsidiarity should encourage the Union to make as much use of this power as practicable. Even in the areas of exclusive competence as many decisions as possible should be left to the Member States, and States should be accorded as much latitude as possible in the manner in which they pursue Union policies.

The second part of the provision refers to the new Draft Protocol on the Application of the Principles of Subsidiarity and Proportionality. This contains the explanatory requirements found in the old Treaty, though this is now confined to the Commission.[19] The express obligation which rested on the European Parliament and Council to consider subsidiarity has been subsumed within the first paragraph of the Protocol, which requires all Institutions must ensure 'constant respect' for the principles of subsidiarity and proportionality.[20] The Protocol also includes an important new mechanism to protect subsidiarity. National parliaments, or the chambers of a national parliament, are entitled to send a 'reasoned opinion' to the Presidents of the European Parliament, Council of Ministers and Commission explaining why they believe a legislative proposal fails to comply with subsidiarity.[21] There is a general obligation on these bodies to take account of the reasoned opinions, but in certain, rather complicated, circumstances the duty of the Commission stretches a little further. Each Member State is allocated two votes. In states with a bicameral system these votes are shared between the chambers, in a unicameral system the single chamber holds both votes. Where institutions holding one third of the votes in the system send reasoned opinions challenging a proposal on the basis of subsidiarity the Commission comes under an obligation to review the proposal. In the area of freedom, security and justice one quarter of the possible votes is sufficient to trigger this process. Having reviewed the proposal, the Commission may maintain, amend or withdraw it, and must give reasons for its decision.

The principal merit of the new procedure is that it empowers institutions with an interest in ensuring subsidiarity works. As we have seen, one of the difficulties with leaving subsidiarity to the ECJ was that the Court lacked the will to make use of the principle. For national parliaments, in contrast, subsidiarity is a weapon they can use to protect their power and position within their domestic constitutions. Allocating the policing of subsidiarity to those bodies with the strongest interest in seeing the principle work is a sensible move.[22] Additionally, national parliaments

[19] Draft Protocol on the Application of the Principles of Subsidiarity and Proportionality, para. 4, 8.

[20] Para. 1.

[21] Para. 5. It is worth noting that the paragraph leaves it to the Member State to decide whether and how to involve regional bodies in this examination.

[22] S. Hug, 'The State That Wasn't There: The Future of EU Institutions and Formal Models' (2003) 4 *European Union Politics* 121, 124-125.

will probably be more willing, and better able, to address the difficult technical and political issues that subsidiarity turns upon.[23] Legislatures frequently encounter similar questions in their law-making and scrutinizing function. Despite these advantages, the process contains a number of weaknesses.

First, the involvement of national parliaments is subject to several restrictions, none of which seem strictly necessary.[24] At present, the provisions are confined to subsidiarity: national parliaments can only act if they believe subsidiarity has been infringed. This limitation seems both unnecessary and undesirable. It is unnecessary as it is difficult to see how it will be enforced. Unless the threshold of one third or a quarter of the votes is reached, the only obligation Union Institutions are under is to consider the representations of national parliaments: would they refuse to do so because the representations were not 'really' about subsidiarity? And, if they did, would the ECJ be prepared to arbitrate, to examine whether the reasoned opinion fell within the scope of the Protocol? The demand that the reasoned opinion relate solely to subsidiarity is virtually unenforceable, and depends for its effectiveness on the restraint of the national parliaments. Furthermore, it is hard to see why confining the mechanism to subsidiarity is thought desirable. Why not allow national parliaments to register an objection based on the grounds of proportionality, breach of human rights or, indeed, on a host of other possible considerations? All of these factors appear as important as subsidiarity, and national parliaments should be entitled to express opinions on them.

Further, the requirement that national parliaments produce a 'reasoned opinion' is difficult to justify. Once again, which body would assess the adequacy of these reasons? Of course, if the only obligation triggered by exercising the process is that the Union Institutions must reflect on the objection, the representations of the national parliaments will have the strength of the reasons they contain: there is a limit to how much re-consideration can be spurred by a simple motion of opposition. But if unreasoned votes of opposition emerged from a significant proportion of the Member States, passing the threshold for triggering review under paragraph 6 of the Protocol, the Commission should be obliged to undertake a review whether or not the opinions of national parliaments were accompanied by reasons.

Secondly, the decision to restrict the process to review can be questioned: if a considerable proportion of Member States' parliaments are opposed to a measure, the Commission should be compelled to withdraw the proposal. There was strong support for such a 'red card' option from within the United Kingdom Parliament, but its case seems not to have been pressed within negotiations.[25] The suggestion also

[23] A point recognised by the Working Group on Subsidiarity: Conclusions of Working Group I on the Principle of Subsidiarity, CONV 286/02, point 5.

[24] *See* further, S. Weatherill, 'Competence Creep and Competence Control' (2005) *Yearbook of European Law* (forthcoming).

[25] Discussed in P. Birkinshaw, 'A Constitution for the European Union – A Letter from Home', (2004) 10 *European Public Law* 57, 72-74.

received the support of a number of participants to the Convention who proposed that a second, higher, threshold be set: if two thirds of national parliaments opposed a proposal the Commission would have been obliged to amend or withdraw the measure.[26] A cynic might speculate that the argument for a veto failed not because of its intrinsic merits, but, despite the rhetoric of the Convention, because few of the participants in the drafting of the Constitution had an incentive to empower national parliaments. The Commission cannot have been enthusiastic about the introduction of another check on law-making within the Union. The European Parliament may have regarded the proposal as threatening its role as the primary legislative scrutiniser of Community rules. The executives of Member States, perhaps, may have worried that the measure would empower their domestic legislatures and allow them to 'leap-frog' their government. The report of the Working Group on National Parliaments makes interesting reading when considered in this context. Whilst emphasising the role that national parliaments could play in bringing the EU closer to its citizens,[27] it asserted that the Draft Constitution should avoid 'interfering in constitutional arrangements on the national level'.[28] The participation of national parliaments in European affairs should, ordinarily, be mediated through the legislatures' control of their governments.[29] The focus of the report consequently centred on increasing the transparency of Europe's decision-making processes, partly in order to facilitate the scrutiny of national executives by their national parliaments. This broad approach is reflected in the Draft Protocol on the Role of National Parliaments in the European Union, which aims to ensure that legislatures will receive at least six weeks' notice of legislative proposals before they are agreed. If the Draft Constitution is enacted, the influence of national parliaments on Union activity will continue to be channelled through their domestic executives: the control national parliaments can exercise over Union activity will be as strong or as weak as the control they can exercise over their domestic governments.

Finally, the six week notice period required by the Draft Constitution may prove too tight for national parliaments. Given the volume of Union legislation, it may be hard for legislatures to identify and debate significant proposals within this time-frame. The problem will be exacerbated if the proposal is sent to a national legislature during a prorogation or an election period.

These limitations on the effectiveness of the processes in the Protocol will seriously restrict its utility: the powers conferred on national parliaments may prove too weak to encourage the legislatures to make frequent use of them. To an extent, the Protocol's significance will depend on the support of the ECJ in

[26] Reactions to the Draft Protocol on the Application of the Principles of Subsidiarity and Proportionality, CONV 610/1/03 REV 1 Annex.

[27] Final Report of Working Group IV on the Role of National Parliaments, CONV 353/02, point 4.

[28] Point 5.

[29] Point 6.

policing the conduct of the Union Institutions. The ECJ must ensure that the 'reasoned opinions' of national parliaments are properly considered, and, when the threshold for Commission review is passed, that adequate explanation is given if the proposal is maintained. Unfortunately, the ECJ's record on subsidiarity suggests that it is unlikely to enforce these duties strictly. Had a veto power been included in the Protocol the importance of the ECJ in the process would have been reduced, though not eliminated.

Conclusion

In 2000 the German Foreign Minister, Joschka Fisher, delivered a lecture calling for radical changes in the Union's political structure; political control must keep pace with the advance of economic integration.[30] One of Fisher's proposals was that a second chamber of the European Parliament be created, with members drawn from national parliaments.[31] This would provide a forum in which the political elites of the Member States could interact; helping to integrate national parliaments into the constitutional structure of the Union, and also helping to forge a Union-wide political community. Fisher's proposal was not adopted in the Draft Constitution, its rejection motivated, perhaps, by a desire to avoid complicating the Union's structures with yet another institution. However, if the suggestions of this article were accepted the Draft Protocol could create a mechanism by which many of the benefits of Fisher's proposals would be achieved without the costs of creating a new body. If national parliaments were able to veto legislative acts of the Union the legislatures would, taken together, constitute a virtual second chamber. National parliaments would be given an incentive to take an interest in Union activity, and would be given an incentive to take note of their companion legislatures in other Member States. The possibility of a veto might even begin to generate the European-wide political community so many writers have wistfully searched for. As they stand, though, the subsidiarity provisions in the Draft Constitution are probably too weak to have any significant impact – but they could form the basis for important reforms in the future.

[30] J. Fisher, 'From Confederacy to Federation – Thoughts on the Finality of European Integration', Humboldt University in Berlin, 12 May 2000.

[31] An idea also popular with British politicians: *see* G. de Búrca and B. de Witte, 'The Delimitation of Powers Between the EU and its Member States', in A. Arnull and D. Wincott, *Accountability and Legitimacy in the European Union* (Oxford University Press: 2002), 206, citing speeches by Tony Blair and Jack Straw.