AN ANALYSIS OF THE PRINCIPLE OF SUBSIDIARITY IN EUROPEAN UNION LAW

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This paper consists of a thorough description of the principle of subsidiarity in accordance with an analytical consideration of its application. Such analysis is proposed with respect to three approaches; a theoretical reflection of the principle, an assessment of its formulation and a review of its implementation within EU Law. It is submitted that the principle is based on a sound premise yet the drafting of the test for subsidiarity leaves a lot to be desired. Finally, that the threat of political outrage, at the misapplication of the principle, ensures that subsidiarity is adhered to and prevents breach of it.

The principle of subsidiarity is an attempt to balance the ‘historic, nationalist, sovereignty-obsessed’ characteristics of individual Member States against the European Union’s integration objectives. It aims to reassure Member States that their right to legislate in areas of shared competence is reserved wherever possible. At the heart of subsidiarity is the premise that decisions are taken as closely to the citizen as possible. In order to evaluate subsidiarity, it is necessary to review the principle on three levels. Firstly, whether the concept is honourable or indeed worthwhile on a theoretical level. Secondly, the incorporation of the principle into the treaty framework will be analysed to assess the extent to which it has been formulated in a coherent, logical manner. Finally, the execution and regulation of the principle will be evaluated in order to establish whether the principle is effectively implemented within the EU.

For Davies, subsidiarity is required to ‘prevent a complete infantilization of national governments’. In order to properly evaluate the principle of subsidiarity it is necessary to assess why this ‘infantilization’ is so undesirable. Berman outlined several factors which support localised decision making. Firstly, he highlighted self-determination and accountability as being particularly important. Decisions taken at national level come under inevitably intense scrutiny by the press and, therefore, by the electorate. This places pressure upon national parliaments to produce well formulated, widely popular policies which they are then able to defend against criticism by the population. Decisions taken at Union level, however, are further

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removed from citizens and the potential for individuals to have any real bearing upon them is significantly reduced. It is therefore considerably easier for citizens to hold national governments to account for their actions than it is to hold EU institutions to account. Secondly, Berman argued, subsidiarity is necessary to promote political liberty and therefore provide a check against tyranny. Indeed, excessive devolution of power to any supranational body is undesirable as democratically elected national governments best represent the wishes of their people and must therefore be given as much control over legislation which affects them as possible. Also advocated by Berman was the potential for national governments to create more flexible laws which are better adapted to their individual State. Whilst some issues will be better dealt with by EU-wide legislation, it is submitted that the EU consists of twenty seven very different member states and their ability to legislate adapting to their own economic, social, political and cultural circumstances wherever possible ought to be valued. For these reasons, subsidiarity’s aims are honourable and the concept is theoretically justifiable and important.

In addition to those factors advocated by Berman, the legitimacy of the EU depends upon its acceptance by citizens as a tolerable legislative body which must be considered in light of its impact upon highly valued constitutional principles such as Parliamentary Sovereignty. It is therefore in the Union’s own interest to preserve its image as a democratic institution. Thus, appearing concerned with the objective of reserving legislative power with individual member states where possible is one way in which the Union can claim to be upholding democratic principles. The conflict between the EU’s desire to legislate centrally in order to carry out its objectives and its desire to be seen as respectful of member states’ autonomy has resulted in a balancing act between these two ‘complex and sometimes contradictory themes.’ The EU’s attempt to consolidate these two conflicting aims into a formula, now set out in Article 5(3) TEU, has been described as a ‘textual failure’. The formulated principle contains two limbs; firstly, it permits Union action ‘only if and in so far as’ the Member States cannot fulfil the objectives ‘sufficiently’. ‘Sufficiently’ is an intrinsically subjective term; the standard to which the Union’s objectives must be fulfilled is therefore uncertain. The second limb, the comparative efficiency test, injects further confusion into the principle by stating that the Union may act if, in doing so, the objective can ‘be better achieved’. This is similarly ‘vague and

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5 ibid.
6 ibid.
11 ibid.
general as the word ‘better’ is again subjective and provides little guidance for interpretation. The two limbs provide a test which is not only vague but ‘bipolar’.

On one hand it declares that EU intervention may not occur unless the action cannot be achieved sufficiently by the member state but, paradoxically, if ‘by reason of the scale or effects of the proposed action’ Union legislation is ‘better’ it may still act. It is therefore unclear what ought to happen in situations in which an objective can be sufficiently achieved by member states but in which Union action would be superior.

Not only is Article 5(3) a failed exercise in semantics, it has also been criticised on other grounds. Estella submits that it is inevitably easier for the EU to demonstrate its competence than it is for twenty seven Member States to do the same due to the increased certainty of proposals coming from one body than from twenty seven individual countries. At the outset, then, the EU is at a considerable advantage. Furthermore, whilst the principle may appear at first glance to attempt to balance the interests of Member States and the Union, it only grants Member States the right to legislate to fulfil Union objectives and thus it ‘assumes that there will be no conflict between the objectives of the different levels.’ This is a significant issue, causing subsidiarity to be criticised as a ‘masking principle’ as, in reality, it serves mainly to regulate the exercise of Member States’ right to implement EU aims. The vagueness within the Article can be attributed to the desire to enable flexibility in each subsidiarity assessment. However, the lack of guidelines and objective criteria with which to make that assessment means that in reality the concept as drafted imposes no absolute or clearly enforceable limit upon the right of the EU to exercise its power in areas of shared competence.

Due to the lack of objective criteria by which to assess compliance with subsidiarity, the Court of Justice of the European Union (CJEU) is ‘understandably reluctant to apply in a robust way a principle which is so heavily political.’ It is for this reason that they have taken a ‘minimalist’ approach to decision making, merely assessing whether procedural subsidiarity has been complied with rather than investigating adherence to substantive subsidiarity. This is clearly seen in the Working Time

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15 ibid.
18 ibid 77.
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Directive Case\(^{21}\) in which the CJEU held that the failure to show that EU legislation was comparatively more effective than national action did not place the Directive\(^{22}\) in breach of subsidiarity. The Court stated that whenever the Council seeks to fulfil an obligation through harmonization this ‘necessarily presupposes [EU]-wide action.’\(^{23}\)

This refusal to examine whether EU action would in reality be more effective has, for Schütze, ‘short-circuited the comparative efficiency test.’\(^{24}\) Emiliou, however, argued on the contrary that engaging in clearly political activity would ‘inevitably destroy the credibility’\(^{25}\) of the Court. Indeed, the CJEU relies upon a reputation of neutrality in order to retain legitimacy; it would be extremely concerning if the court were burdened with making overtly political decisions as this would threaten its image as a politically neutral body. The Court is clearly faced with a difficult dilemma; on the one hand its reluctance to involve itself in intrinsically political issues is understandable, indeed praiseworthy, whilst on the other hand a total disregard to substantive subsidiarity hardly provides a satisfactory outcome. For this reason it is important that clear guidelines are provided to enable the court to annul legislation which breaches the principle without needing to replace the legislature’s discretion with its own.

Regular annulment of legislation by the CJEU would be ‘counterintuitive’\(^{26}\) as it would inject uncertainty both into EU law and into national law. It is vital therefore that post-enactment scrutiny of legislation remains a last-resort based upon well formulated, clear guidelines to avoid wide judicial discretion. The Court’s reluctance to substantively review legislation on grounds of subsidiarity places the main onus of scrutiny upon national parliaments who act as a ‘subsidiarity watchdog’.\(^{27}\) This is an appropriate ‘compensation process’\(^{28}\) as it is national parliaments’ legislative powers which risk being eroded if subsidiarity is not properly complied with. Protocol (no 2) to the Lisbon Treaty\(^{29}\) outlines the mechanisms through which this scrutiny occurs. Article 5 requires that all draft legislative acts ‘shall be justified with regard to the principles of subsidiarity and proportionality’ through a detailed statement.\(^{30}\)


\(^{23}\) Case C-84/94 United Kingdom v Council[1996] ECR I- 5755, para 47.


\(^{26}\) Andrea Biondi, ‘Subsidiarity in the Courtroom’ in Andrea Biondi and Piet Eeckhout with Stefanie Ripley (eds), EU Law after Lisbon (Oxford University Press, 2012) 220.


\(^{30}\) ibid art 5.
indication that ‘qualitative and, wherever possible, quantitative’ factors must be included is praiseworthy as it places a burden upon the drafter to provide vital information enabling national parliaments to effectively scrutinise draft legislation. Articles 6 and 7 of the Protocol are hugely important as they contain a practical mechanism, known as the yellow card system, through which national parliaments can scrutinise draft legislation. Barrett expressed concern that annulment of legislation through this mechanism would be ‘highly exceptional and unusual’; it is true that the high threshold for required review of potential legislation is unlikely to be reached on any regular basis. The issuing of reasoned opinions by a significant number of member states, however, is likely still to have a significant impact upon legislation due to the political pressure this would inevitably exert upon European legislative bodies. Whilst there is no strict legal requirement that Member States’ interests are adhered to, if they were totally disregarded it would ‘be so politically unacceptable as to lead to implosion of the community.’ If nothing else, therefore, the existence of the yellow card system ought to act as a deterrent against legislative proposals which threaten the principle of subsidiarity. For this reason, the right of national parliaments to veto legislation should not be introduced as it would not only make EU legislation hugely inefficient but it is also unnecessary. The political impact of the yellow card system is a more balanced approach as it ensures that widely controversial matters will be avoided (or at least reviewed) in order to prevent Member State outrage, without the threat of individual Member States petulantly blocking attempts at legislation.

In conclusion, the basic premise that decisions should be taken as close to the citizens as possible is a sound one based upon solid reasoning. The EU is a unique institution and Member States’ agreement to give up a part of their valuable sovereignty in certain policy areas, in order to fulfil Union objectives, must be taken very seriously. It is for this reason that establishing the correct balance between reserving the legislative autonomy of individual member states as far as possible, and enabling effective legislation at EU level only where necessary, is so vital. The treaty framework has attempted to outline this balance in a flexible test but the principle is poorly drafted and therefore unclear. This lack of clarity partly explains why the CJEU is so reluctant to substantively review legislation on subsidiarity grounds. Clear guidelines ought to be issued to the CJEU to minimise the necessity for judicial discretion whilst ensuring that, if strictly necessary, the court is able to review legislation on a more substantive basis. The role of national parliaments in pre-enactment scrutiny is far preferable to post-legislative judicial scrutiny. Whilst the mechanisms which regulate pre-enactment scrutiny are by no means watertight, the

31 ibid.
32 ibid, arts 6 -7.
political outrage which would arise from an apparent breach of subsidiarity is likely to be the most powerful deterrent upon the European Union to ensure that the principle of subsidiarity is not breached.