National Parliaments and Subsidiarity: Think Twice

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Articles EC 5; Draco I-9(3);[1] Protocol on the application of the principles of subsidiarity and proportionality

Democracy and subsidiarity: a change

It is a popular misunderstanding that European citizens' lack of interest in the European Union has to do with the powers of the European Parliament. These powers have been constantly strengthened over the years, but that did not enhance voters' interest in European affairs. Even with the granting of European citizenship and the introduction of the euro, voters did not get interested, as the low turnout at the elections of members of the European Parliament on June 2004 (less than 45%) attests. These elections even saw the rise of anti-European parties in several Member States, like the Independence party (UKIP) in the United Kingdom. These elections, however, dealt more with national issues and the confidence in national governments than with European issues.

The lack of interest can partly be attributed to the lack of transparency in decision-making. The existing legislative procedures are difficult to explain to the average law student, let alone to the ordinary citizen. The decision-making process at the European level is conceived as technical and bureaucratic and this is also part of the problem. This does not help to catch the attention of the mass media, which in its turn does not help to get the citizens involved. One might even take the issue to a more fundamental level: Ralf Dahrendorf, who is not known as a Euro-sceptic, called it an illusion to believe that a European democracy could exist.[2]

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[1] All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

[2] R. Dahrendorf, *Die Krisen der Demokratie,* Ein Gespräch, 2002, p. 12.

European Constitutional Law Review, 1: 68–72, 2005

DOI: 101017/S1574019605000684

The fact is that a citizen of Europe, at the moment, does not feel himself or herself to be a European citizen, but one of France or Germany, or Paris or Hamburg. A reason for this is, of course, the citizen's familiarity with national or local democratic procedures. A European citizen knows the national or local politicians and he/she has the impression that he/she can sometimes, at least, influence decisions made by 'his or her' politicians. There is a strong need for decentralisation as a consequence of the unavoidable globalisation and the accompanying (feeling of) decrease in democratic influence. The same phenomenon plays its role in the European Union. The principle of subsidiarity, which requires that decisions should be taken at the lowest possible level, has been introduced to counter the expansion of (the use of) the powers of the European Union. The principle of subsidiarity thus might help support the citizens' desire for decision-making on a more decentralized level. As such, subsidiarity is necessary for the Union's democratic legitimacy. It is also right to entrust to national parliaments the role of watchdog when it comes to its application, as does the Protocol on the application of the principles of subsidiarity and proportionality that is attached to the European Constitution. Yet, it is difficult, even for these, to make it work.

Subsidiarity and the use of Union competences

When compared to the German or the American federal constitutions, the European Constitution contains a rather complicated system of division of powers between the Member States and the Union. This complicated system of division of powers is a legacy of the Union's history, which the European Constitution essentially has codified.

'*The limits of Union competences are governed by the principle of conferral*', states the first sentence of Article I-9(1), and Article I-9(2) adds that competences not conferred on the Union in the Constitution remain with the Member States. The Articles I-11 through I-18 make it clear that different kinds of competences are conferred on the Union. First, there are the exclusive competences, which are not many. According to Article I-12, within this category fall monetary policy (for those Member States which have adopted the euro), common commercial policy, customs union and the conservation of marine biological resources under the common fisheries policy. In these areas, only the Union may legislate and adopt legally binding acts. Next to exclusive competences, the Constitution contains non-exclusive competences. These are the competences which the Union and the Member States share (Article I-13): the competence of the Union to promote and co-ordinate the economic and employment policies of the Member States (Article I-14), the competence to

define and implement a Common Foreign and Security Policy (Article I-15), and areas in which the Union may take supporting, co-ordinating or complementary action (Article I-16). Finally, there is the flexibility clause (Article I-17), which gives the Union, under certain conditions, the possibility to act if the Constitution has not provided the necessary powers.

In reality, there are only a very few policy areas that do not, at least potentially, fall, directly or indirectly, within the competences of the Union. Article I-9(1) indicates that two principles limit the use of Union competences: proportionality and subsidiarity. The latter is defined in the third paragraph of Article I-9: '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'. This definition makes it clear that the subsidiarity principle governs all non-exclusive competences.

The principle of subsidiarity is not new; it was introduced by the Treaty of Maastricht in 1992. However, until now it has only served as a symbolic principle. The decision-makers in Brussels paid it lip service, but it did not play an essential role as a brake on legislative actions. The courts only reviewed the procedure and the reasoning for policy measures in a very marginal way.[3] Could the courts have done more? Probably not. There is a general feeling amongst legal scholars that we are dealing here with a 'political' principle, i.e., a principle of which the enforcement thereof essentially must be in the hands of political institutions. The role of the courts in enforcing it can only be a limited one.[4]

Subsidiarity and national parliaments

Although the Protocol on the application of the principles of subsidiarity and proportionality ultimately leaves room for judicial interference (Article 7), it clearly recognises the political character of the subsidiarity by attributing a primary supervising role to national parliaments.

[3] Court of Justice, 12 November 1996, C-491/01; Court of Justice, 13 May 1997, C-233/94; Court of Justice, 10 December 2002, C-491/01.

[4] L.A. Geelhoed, 'Een Europawijde Europese Unie: een grondwet zonder staat?', Sociaal-Economische Wetgeving 9 (2003), p. 196; R. Barents, 'Naar een Europese Constitutie? (VI)', Nederlands tijdschrift voor Europees recht 2003, pp. 221-222.; T. Koopmans, 'De Europese Conventie – een tussenstand', Sociaal-Economische Wetgeving 6, (2003), p. 196. It is interesting to compare the role of the European courts in upholding the principle of subsidiarity with the role of the Supreme Court in the United States in protecting the Interstate Commerce Clause at the time of the New Deal under President Franklin Roosevelt, which almost led to a constitutional crisis.

According to the Protocol, the Commission must send its legislative proposals, which should contain a detailed statement making it possible to appraise compliance with the principle of subsidiarity and proportionality, to the Union legislature and to the national parliaments at the same time (Article 3, Article 4). Any national parliament or any chamber of a national parliament of a Member State may, within six weeks of transmission of the Commission's legislative proposal, send their objections in a reasoned opinion to the Presidents of the European Parliaments, the Council of Ministers and the Commission (Article 5). If one third of the national parliaments are of the opinion that the proposal does not comply with the principles, the Commission has to review its proposal (Article 6). A unicameral parliament will have two votes in this sense and a chamber of a bicameral parliament has one vote. After such review, the Commission may decide to maintain, amend or withdraw its proposal. This arrangement can be questioned from different perspectives.

One wonders if this system, which attributes the role of primary watchdog to the national parliaments, is satisfactory. Can the national parliaments, for instance, detach themselves from the content of the legislative proposal and only judge the proposal from the perspective of subsidiarity and vice versa? Can they distance themselves from political opportunism, and is it fair to expect them to do so? Parliaments are filled with politicians. They, logically, will look at their voters when answering questions of subsidiarity. Can they explain to their voters that they are very much against the content of the proposal in question but that they have no objections from the perspective of the principle of subsidiarity? Are we not expecting too much from the national politicians? Besides, in parliaments where coalition parties have to find compromises in order to find a majority in parliament, the question of subsidiarity will be dealt with along the lines of party politics. One has to find a compromise on the issue of a principle within six weeks. That period seems to be too short to understand the merits of the proposal and to discuss it, especially so if, during this period the national parliaments feel the need to consult regional parliaments. These regional parliaments also need time to study, discuss, compromise and decide.

On the other hand, what will the Commission do if one third of the national parliaments have objected to a proposal and it has to reconsider its proposal? It is possible that the Commission will pay more attention to the political background of the objections than to the objections themselves. It is possible that the Commission will start counting the votes, and, if the proposal still has enough support to be adopted, that might decide the subsidiarity issue. The fact that the protocol gives the national parliaments the right to appeal to the Court of Justice (Article 7) will not change that. In other words, the principle of subsidiarity risks remaining one of only procedural and symbolic significance, as is the case now.

A better guarantee for due respect of the subsidiarity would, in my view, have been a requirement of an extra qualified majority (for example, two thirds) within the Council and the European Parliament, in case the national parliaments object on account of subsidiarity. It certainly would make legislation in the European Union much more difficult than it already is but, seen from the perspective of the principle of subsidiarity, that is not the main concern.

However, as things stand now, we must hope that national parliaments will take their role as watchdog seriously and that the Commission, the European Parliament and the Council will take their objections seriously. Then the principle of subsidiarity, as elaborated in the Protocol, might get some teeth and the new European constitution will not be considered as a lost opportunity in this context. And that's essential for the democratic legitimacy of the European Union.

Question for future scholarship and practice

1. Will the national parliaments, using the principle of subsidiarity, be able to reconcile the trends of globalisation and Europeanisation with the needs of local democracy?
2. Will the European citizens show more interest in European affairs if the European legislature reckons better with the principle of subsidiarity?

https://doi.org/10.1017/S1574019605000684 Published online by Cambridge University Press