Subsidiarity, Politics and the Judiciary

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

Since the Maastricht Treaty of 1992, the principle of subsidiarity is to govern the exercise of powers between the European Community and the Member States in areas that do not fall within the exclusive competence of the Community.[2] According to the treaty provision, the principle means that the Community can only take action if and insofar 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. A similar provision is now part of the draft 'European Constitution' 2003; it merely adds that Member State action can be taken at the national, the regional and the local level.[3] Even without this useless supplement, the definition of subsidiarity looks fairly complicated.

During the negotiations preceding the Maastricht Treaty, leading politicians expressed the view that the reference to subsidiarity might clarify the existing relationships between the Community institutions and the national administrations. Some of them, for example Mrs. Thatcher, then British Prime Minister, were confident that the introduction of the principle into the Treaty would put a stop to the process of usurpation of powers by Community institutions they thought to have discovered. Others, like M. Delors, then president of the EC-Commission, believed the principle might provide a workable standard for determining the extent of Community powers in case of doubt. In this theory, the history of Catholic social thought, where the principle found its origin, illus-

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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] See Article 3b EC-treaty as inserted by Article G(5) Treaty on European Union 1992; presently Article 5(2) EC-Treaty.

[3] Article I-9(3) Draft Constitution.

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trates the growing awareness that subsidiarity does not embody a rigid standard but leaves scope for some flexibility. In particular, it would imply the necessity of considering all the relevant circumstances and factual situations before a decision can be taken.[4] However that may be, the treaty now explicitly lays down the principle of subsidiarity as one of the main standards for assessing the regularity of Community action. That may be due to ambiguity rather than to a true consensus among drafters of the new treaty provisions, but the principle was intended to be taken very seriously. Efforts at understanding its meaning, by lawyers and others, started right after the conclusion of the Maastricht Treaty.[5]

Meanwhile, 12 years of experience, including two treaty revisions, did very little to remove the ambiguities. In Community matters, much depends, of course, on the definition of the problem to be solved. It may be true that quality controls of foodstuffs can easier be organized at the national level than Community-wide, but arranging these controls in such a way that they do not constitute an obstacle to intra-Community trade may require Community action. In a comparable way, corporate governance is primarily a matter for national legislation; nevertheless, a common market can only work properly when certain minimum standards have been met. Efforts at establishing a common energy policy, often inspired by difficulties on the oil market, may give rise to long and serious debates, but they usually lead to little more than to some limited emergency measures, for example, on oil supplies.[6] Other examples could be added. As a result, debates about the impact of subsidiarity on the legislative program of the European Union are often conducted in more neutral terms. The concept of subsidiarity is concealed behind a screen of economic and legal technicalities. That may be the reason why the courts have not yet been invited to trace the limits of the concept.

At first sight, the notion of subsidiarity is defined in such a way that it requires political judgement rather than legal analysis. It seems unlikely that a court can determine whether a certain action – say, the introduction of summer time in March – can be 'sufficiently achieved by the Member States' or has, on the contrary, a 'scale' or 'effects' which make that it can 'be better achieved by the Community'. The answer to such questions depends, first, on the purposes of the proposed action, to be fixed by the Commission, the Council and the European Parliament and, secondly, on an assessment as to what can be 'suffi-

[4] See Besselink, Albers and Eijsbouts, Subsidiarity in non-federal contexts (Dutch national report to FIDE, XVIth Congress, I. Le principe de la subsidiarité, Rome 1994, p. 365, in particular ch. I).

[5] Example: Jo Steiner, Subsidiarity under the Maastricht Treaty, in: David O'Keeffe and Patrick Twomey (eds.), Legal issues of the Maastricht Treaty (London 1994), ch. 4.

[6] See Jan Werts, The European Council (Amsterdam 1992), pp. 259-260.

ciently' achieved and what can be 'better' done by Community institutions or by national administration. Courts are not the suitable bodies for deciding what is 'sufficient' and what is 'better' in matters of summer time. There is probably (and I quote from some American case law here) 'a lack of judicially discoverable and manageable standards', and the decision will depend on the appraisal of a great variety of conditions 'which can hardly be said to be within the appropriate range of evidence receivable in a court of justice'.[7] Of course, courts will interfere in procedural questions, for example, when the Council issues a regulation without taking any notice of the argument of the European Parliament that the conditions of the subsidiarity test have not been met. It is also conceivable that the Court of Justice would annul a regulation or a directive established by the legislative institutions of the Union on the ground that no reasonable institution could ever have come to the opinion that the regulation or directive would be compatible with the subsidiarity test.[8] Apart from such cases of obvious disregard of treaty obligations, there is little a court can do.

However, the drafters of the proposed European constitution added a 'protocol' to the text of the constitutional treaty, which is based on other assumptions. This 'protocol concerning the application of the principles of subsidiarity and proportionality' aims at introducing a role for the national parliaments into the decision-making process of the European Union; it does so, as its preamble states, for the purpose of bringing the decision 'as close as possible to the citizens of the Union'. This laudable intention takes shape in an immensely complex procedure. Commission proposals of a regulatory nature are not only submitted to the Council and the European Parliament, but also to the national parliaments of the – now 25 – Member States. When the European Parliament and the Council have fixed their point of view, they are to send it to the national parliaments. Each of these parliaments can then submit a 'reasoned opinion' to the Commission, Council and European Parliament indicating why, in its view, the proposal does not comply with the principle of subsidiarity. The Commission, Council and European Parliament have to take into account the reasoned opinions of the national parliaments. The Commission is obliged to reconsider its proposal if an important group of national parliaments (I skip the details) supports the incompatibility of the proposal with the principle of subsidiarity.[9] In the light of this reconsideration, the Commission can then either maintain, modify, or revoke its initial proposal. The final part of this pro-

[7] See Tim Koopmans, Court and political institutions (Cambridge 2003), ch. 5.1, The political question.

[8] In English law, this is the standard of 'Wednesbury reasonableness', after *Associated Provincial Picture Houses v. Wednedbury* [1948] 1 KB 233. Under Dutch law, it is the definition of arbitrariness ('willekeur') since Hoge Raad 25 February 1949, Ned. Jurispr. 1949, 558, Doetinchem.

[9] Further details in s. 6 of the draft protocol.

cedure is that the Court of Justice has jurisdiction to hear actions of annulment brought by any Member State for violation of the principle of subsidiarity. The Member State in question can also limit its role to 'sending' (an institutional novelty).

I shall put aside, for the moment, the problems connected to the streams of paperwork this system will occasion. I am, however, somewhat apprehensive about the role of the Court of Justice. The purpose as well as the wording of the protocol suggests that the Court will have full jurisdiction to interpret the concept of subsidiarity, in the same way as it usually interprets notions such as 'restriction of competition' or 'agreement between undertakings' when Commission decisions on anti-competitive behaviour are challenged by the business corporations concerned. Some commentators have expressed the opinion that no harm is done, because the Court is well qualified for analysing and interpreting the principle of subsidiarity.[10] I happen to have a quite different view. I rather think the protocol signals the impotence of European politics: on one of the most sensitive policy issues in the life of the European Union, i.e., the boundary line between European and national powers, politics abdicates in favour of the judiciary. And this happens in the very period of increasing complaints by governments and administrations about the growing 'judicialization' of political problems.

My most fundamental objection against the system to be instituted by the protocol is, however, founded on a political rather than on a legal consideration. Leaving the last word on the compatibility of a certain action with subsidiarity to the judiciary means that the subsidiarity issue will be depoliticised: it is not considered as a matter of policy but as a technical and legal problem. If our political leaders really wish to bring European decisions closer to the citizens, as the preamble to the protocol states, they should probably do exactly the opposite. In my opinion, which is shared by many others, the disaffection of large parts of the European citizenry towards the European integration process is mainly based on the lack of perceptible political issues. Thus far, the direct elections of members of the European Parliament did not help to neutralize this. When European problems are further depoliticised, the disaffection will grow, instead of decreasing. In this sense, the draft protocol on subsidiarity may, when adopted, achieve the opposite of what it intended.

[10] Example: Jo Steiner as quoted note 5. In a different sense: Nicholas Emiliou, Subsidiarity: panacea or fig leaf? in: Legal issues of the Maastricht Treaty (quoted note 5), ch. 5.

Question for scholarship and practice

Perhaps, some guidelines could be developed in legal and political literature on the nature and the limits of judicial review, as compared to political decision-making, at the level of the European Union. There is a lot of literature about the role of the judiciary in the European integration process, but little has been written about the boundary line between political and judicial activities. That may, however, well become one of the chief problems of the future.

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