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SUBSIDIARITY: THE WRONG IDEA, IN THE WRONG PLACE, AT THE WRONG TIME

GARETH DAVIES*

1. The competence problem

This is a time when the division of powers between the European Community and its Member States is of increased practical importance. The scope of Community activity is now so broad that few if any areas of national policy are immune from its effects. In order to prevent a complete infantilization of national governments with the inevitable consequent political backlash, there is a pressing need to have a system that defines and contains the legitimate scope of Community power and legislation. Such a system exists of course, in the form of the Court of Justice, and the principles of conferral of powers, subsidiarity, and proportionality, but it does not have the full faith of lawyers or national governments, and their scepticism is absorbed and shared by the broader interested public.¹

What makes an adequate division difficult is the lack of an embracing neutral structure for both Community and Member States. In a typical federal State the constitution contains principles and mechanisms for arbitration of border disputes between the centre and the regions, and both the constitution and the courts that apply it are seen as neutral in these questions. While they may be formally federal, belonging to the centre, their task is clearly to sit between the layers and adjudicate neutrally, and the public perceives them in this light. Where there is a suggestion that the court favours the centre or the regions in an individual case this is attributed to the particular members of the court, not to the constitutional structure.² Constitutions exist precisely to minimize such bias and preserve balance.

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1. Weiler, "A Constitution for Europe", 40 *JCMS* (2002), 563, 571–573; Weatherill, "Better competence monitoring", 30 *EL Rev.* (2005), 23; Weiler, "The European Union belongs to its citizens: Three immodest proposals", 22 *EL Rev.* (1997), 150.

2. See Pernice, "The framework revisited: Constitutional, federal and subsidiarity issues", 2 *Columbia Journal of European Law* (1996), 403.

By contrast, there is no constitution for Europe. The rejected document bore this title, but was in fact a constitution for the European Union. Its only comment on the powers of the Member States, a comment implicit in the current Treaties, is that the Member States continue to have all the competences that they have not transferred to the Union.³

This is quite true, and as a matter of abstract philosophy it may seem that such a laissez-faire description of Member State powers is more in their favour than a more precise and encompassing one. What could be more liberal than allowing the Member States to do anything that is not forbidden? However, competence disputes involve adjudication between competing interests and policies. The powers of the Community are sufficiently vague and open that the question of their limits cannot be meaningfully decided without some consideration of what Member States interests may be touched upon, and what the consequences of the action for the Member States may be.⁴ It may seem that Community powers can be defined independently from Member State ones, but intelligent interpretation requires a look from both sides.

Here the relative silence on the subject of Member State powers works against their interests. Whereas the purposes of the Community and each policy are spelled out at length in the Treaty, to be relied upon by the Court of Justice in decision making, it does not and cannot consider in the same depth the purposes and importance of the Member State policies which may be affected. It is only competent to consider the Treaty, not national constitutions or laws, and as such sits before an unbalanced legal and policy picture. The Treaty position of the Court of Justice encapsulates this. It is listed as one of the Community institutions, entrusted with the tasks of the Community.⁵ As a matter of principle, this would seem to disqualify it from hearing competence cases. The bias is structural.⁶

3. Art. I-11 Constitution; Art. 5 EC.

4. See de Burca, "Reappraising subsidiarity's significance after Amsterdam", Harvard Jean Monnet Working Paper 7/99. Backer, "Harmonization, subsidiarity and cultural difference: An essay on the dynamics of opposition within federative and international legal systems", 4 *Tulsa Journal of Comparative and International Law*, 185; Bernard, "The future of European economic law in the light of the principle of subsidiarity", 33 *CML Rev.*, 633.

5. Art. 7 EC.

6. See Barber, "Subsidiarity in the Draft Constitution", 11 *EPL* (2002), 197; Dehousse, *The European Court of Justice* (Macmillan, 1998) at pp. 72–75. This inherent purposiveness was one reason behind the proposals to the Laeken convention to have a separate constitutional court. See Weiler "A Constitution for Europe" and "The European Union Belongs", *op. cit. supra* note 1. Cf. Bednar, Eskridge and Ferejohn, cited in Barber, who argue that similar problems bedevil most federal courts: Bednar et al., "A political theory of federalism", in Ferejohn, Rakove and Riley (Eds), *Constitutional Culture and Democratic Rule* (Cambridge University Press, 2001), pp. 229–233.

In fact the judges of the Court of Justice no doubt do their best to take a balanced and neutral view, but they are nevertheless faced with a conflict between the constitutional imperative to be neutral between Member States and the Community, and the law which gives shape and existence to their court and their jurisdiction, which is much more one-sided. The legitimacy and appropriateness of the role of the Court and of its decisions on competence questions are made questionable.

Given that the outcomes of competence disputes cannot acquire wide legitimacy through constitutional structure,⁷ as they would in Germany or the United States, the need for substantive law-based legitimacy becomes ever more pressing. A clear definition of Community powers, and clear principles for the use of these, may compensate for defective adjudication mechanisms.⁸ Alas, as every Community lawyer knows, there could hardly be more open-ended and ambiguous competences than those assigned to the Community.⁹ As if the individual policies, notably the legislative competence for the internal market, were not open enough, there is a mop-up clause allowing legislation that may be necessary “in the course of the operation of the common market” to achieve “one of the objectives of the Community”.¹⁰ These objectives include “the raising of the standard of living and quality of life” in the Community.¹¹ What kind of rules might be necessary in operating an international common market? Shared criminal law, at least concerning fraud? Common tax rules? A common contract code? Harmonized education systems to ease migration of persons? A single language? All are arguable. It is an optimist who thinks that the scope of this article is *a priori* determinable with anything like clarity or certainty or objectivity. The Court may, or may not, limit it by case law, but the article itself does not provide a sense that Community competence is contained.¹²

7. Nor through style of argumentation: See 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”, Harvard Jean Monnet Working Paper 1/03.

8. Davies, “The Post-Laeken division of competences”, 28 *EL Rev.* (2003), 686. Cf. Rodriguez Iglesias, “The Court of Justice, principles of EC law, court reform and constitutional adjudication”, 15 *European Business Law Review* (2004), 1115.

9. See Barents, “The internal market unlimited: Some observations on the legal basis of Community legislation”, 30 *CML Rev.*, 85; Dashwood, “The Limits of European Community Powers”, 21 *EL Rev.* (1996), 113; Wyatt, “The growing competence of the European Community”, 16 *European Business Law Review* (2005), 483.

10. Art. 308 EC. See Von Bogdandy and Bast, “The European Union’s vertical order of competences: The current law and proposals for its reform”, 39 *CML Rev.* (2002), 227.

11. Art. 2 EC.

12. Von Bogdandy and Bast, *op. cit. supra* note 10.

And so one comes to the final legal line of defence: the general principles governing the use of Community powers – conferral of powers, proportionality and subsidiarity. Even if Community powers cannot be clearly defined – and there is a good argument that this would be an impossible task, that any precision would bring a huge price in functionality¹³ – perhaps there can be rules for their exercise that will operate in an adequately confining way.

The principle that the Community has only the powers conferred upon it and no others, must be the starting point, and the foundation stone, but it is also the weakest concept in practice; it says that there is what there is. Yet the problem is one of interpretation of what there is, and this is outside the scope of this principle. Proportionality is at the other extreme – a practical principle that is widely used without being particularly associated with competence or with high constitutional politics. In fact in Community law it plays its most dominant role in the assessment of the proportionality of Member State measures which may impact upon Community policies, and its greatest contribution to integration so far has been as a tool to steer and restrict the Member States.¹⁴ It is also associated with judicial activism, because one of its central questions is whether a measure goes beyond what is necessary.¹⁵ This requires judges to consider alternatives, and so involves them in policy-making considerations. Thus proportionality is certainly seen in Community law circles as a powerful tool, but not primarily as a constraint on Community power. One of the contentions of this paper will be that this is misguided – proportionality offers the best hope for a legal solution to competence questions, and its potential here is often underestimated.

However, the primary thesis to be argued below is that subsidiarity, the great white hope for those who would like to see Community competences contained and national powers protected, is ill-suited for this task. The problems and questions that subsidiarity addresses are not the ones that the Community is faced with at the moment or will be faced with in the near future. It is the wrong rule, in the wrong place, at the wrong time.

13. Wouters, “Institutional and constitutional challenges to the European Union – Some reflections in the light of the Treaty of Nice”, 26 *EL Rev.* (2001), 343; Davies, *op. cit. supra* note 8; Eijsbouts, “Classical and Baroque Constitutionalism in the Face of Change”, 37 *CML Rev.*, 213.

14. De Burca, “The Principle of Proportionality and its Application in EC Law”, 13 *YEL* (1993), 105; Jans, “Proportionality revisited”, 27 *LIEI* (2000), 239.

15. See Davies, “Abstractness and concreteness in the preliminary reference procedure” in Nic Shuibhne *Regulating the Internal Market* (Edward Elgar, 2006), also available online from the European Research Papers Archive as “The division of powers between the European Court of Justice and National Courts”.

2. Subsidiarity: The wrong idea

Subsidiarity requires that the Community refrain from action where the goals of that action could be better achieved by the Member States. The Community should act only where “the objectives of the proposed action cannot be achieved sufficiently by the Member States” and “by reason of the scale or effects of the proposed action” the Community could achieve these better.¹⁶ Thus where the Community decides that a goal must be reached, it has to ask itself how much of the work of reaching that goal really needs to be done at Community level, and how much could be left to the Member States. Clearly certain measures and rules may have to be uniform – which means Community action – and some actions are impossible for individual Member States to take – enforcement of multi-national competition tasks for example – but other measures, such as the enforcement of many competition or environmental or safety rules can perfectly well be done by national agencies.¹⁷

This explicit consideration of the appropriate level of action is what makes subsidiarity so attractive, and apparently so appropriate for maintaining the division of powers. Certainly the writers of the constitution thought so: one of the few changes that it brought to the existing state of affairs that had support from almost all sides was the introduction of a subsidiarity review mechanism under which national parliaments would consider all legislative proposals for compatibility with subsidiarity and potentially force a rethink, if not necessarily a revision, by the Commission. A continuation of this process was the possibility for the parliaments to finally take the matter before the Court of Justice, if the Commission did not accept their complaints.¹⁸ Subsidiarity was to be the centrepiece of competence control, and while the constitution may be gone, it continues to play a central role in thinking on this topic.

Alas, this is misguided. Subsidiarity misses the point. Its central flaw is that instead of providing a method to balance between Member State and Community interests, which is what is needed, it assumes the Community

16. Art. 5 EC; Protocol to the Treaty of Amsterdam, on the Application of the Principles of Subsidiarity and Proportionality.

17. Rodger and Wylie, “Taking the Community interest line: Decentralisation and subsidiarity in competition law enforcement”, 18 ECLR (1997), 485; Lenaerts, “The principle of subsidiarity and the environment in the European Union: Keeping the balance of federalism”, (1994) *Fordham International Law Journal*, 846; Farnsworth, “Subsidiarity – A conventional industry defence. is the directive on environmental liability with regard to prevention and remedying of environmental damage justified under the subsidiarity principle?” 13 *European Environmental Law Review* (2004), 176.

18. See Davies, op. cit. *supra* note 8; Barber, op. cit. *supra* note 6; Weatherill, op. cit. *supra* note 1.

goals, privileges their achievement absolutely, and simply asks who should be the one to do the implementing work.¹⁹ Thus subsidiarity may protect the right of Member States to be co-opted by the Community to do its work, but it does not protect their right to do their own work. It gives them a right to employment in Community service, wherever they can show they are up to the task, but it does not give them a voice,²⁰ let alone a seat on the board.

Examples will make this clearer. Let us consider two hypothetical legislative proposals, both of which are imaginable, but would be politically highly controversial. One is for a common contract code, replacing the contract law of the Member States.²¹ The other is for a common high school curriculum, with a common syllabus, and the same methods of streaming and division of pupils.

There is *prima facie* Treaty competence for both measures under Articles 94 and 95 EC. The initial requirement for the use of these articles is that the measure must genuinely contribute to the removal of obstacles to movement or appreciable distortions of competition.²² It is suggested that the existence of different national contract laws and high school systems both manifestly create obstacles to movement. There is no doubt that a single contract system would make it appreciably easier for businesses, particularly small businesses, to make deals with foreign partners, and there is no doubt that the added complication of doing business under a foreign legal code is a motivation to prefer contracts signed at home. As for high schools, there is plenty of legislation assisting in the movement of the families of migrants, because it is recognized that a realistic approach to free movement of workers, citizens, self-employed persons and students requires their families to be able to accompany them.²³ One factor which could appreciably hinder the migration

19. See Emiliou, "Subsidiarity: An effective barrier against the enterprises of ambition?" 17 *EL Rev.* (1992), 383; Bernard, *op. cit. supra* note 4; Backer, *op. cit. supra* note 4.

20. Schilling, "A new dimension of subsidiarity: Subsidiarity as a rule and a principle", 14 *YEL* (1994), 203.

21. See the "Communication on European Contract Law: Joint response of the Commission on European Contract Law and the Study Group on a European Civil Code", 10 *European Review of Private Law* (2002), 183; *Communication by the European Commission on European Contract Law* COM(2001)398 Final; *A More Coherent European Contract Law* COM(2003)68 Final.

22. See Case C-376/98, *Germany v. Parliament and Council (Tobacco Advertising)*, [2000] ECR I-8419, annotated by Usher at 38 *CML Rev.*, (2001), 1519; Weatherill, "The Commission's options for developing EC Consumer Protection and Contract Law: Assessing the constitutional basis", 13 *European Business Law Review* (2002), 497; Weatherill, "Reflections on the EC's competence to develop a European Contract Law", 13 *European Review of Private Law* (2005), 405; Davies, "Can selling arrangements be harmonised?" 30 *EL Rev.* (2005), 370; Barents, *op. cit. supra* note 9; Dashwood, *op. cit. supra* note 9.

23. Directive 2004/38; Case 9/74, *Casagrande*, [1974] ECR 773; Case C-60/00, *Carpenter*, [2002] ECR I-6279.

of a family is the difficulty that children may experience in transitioning between educational systems.

Yet most people would consider these measures to go far too far. Most politicians will take the view that competence for civil law and for education remains with the Member States, and would be outraged were such proposals to be made. It is precisely such a broad use of competences that led to dissatisfaction in the first place, and to the calls for a more powerful role for subsidiarity.²⁴ Education and civil law, cry the opponents, are matters best regulated by the Member States.

Unfortunately, subsidiarity does not provide a convincing reason why these measures should not be taken. Given the goals of the proposed actions – ensuring that children do not experience educational disadvantage when they migrate between different systems, and ensuring that contracting with foreign based partners is as simple and transparent as contracting with domestic ones – can it really be said that these goals can be sufficiently achieved by the Member States?

In the educational case no doubt Member States can do a great deal, by promising extra or special classes, and being flexible in dealing with migrant children, but the fundamental problem of following half of one educational programme and then switching to another will remain, and can only be solved by some kind of harmonization. It could perhaps be framework harmonization, with a degree of discretion and room for choice left to the Member States, but as long as there are significantly different high school systems that will be a significant deterrent to families wishing to move abroad. One might add here, provocatively, that the biggest obstacle to moving abroad is perhaps language, and so the Treaty would provide a *prima facie* basis for harmonization of this. Moreover, it is impossible for Member States to solve this problem on their own at all – as long as there are different languages there will be barriers to movement. Subsidiarity provides no reason not to legislate to make English the language of the EU.

The contract code is perhaps the more politically realistic example, even being advocated by some academics.²⁵ It is also a clear example – like language, it is the simple fact of difference that creates the problem, and only harmonization will remove this. Member States cannot solve this problem on their own.

The word that has been glossed in the above is “sufficiently”. The subsidiarity question is whether Member States can achieve the Community

24. De Burca and De Witte, “The delimitation of powers between the EU and its Member States” in Arnall (Ed.), *Accountability and Legitimacy in the European Union* (OUP, 2002); Weatherill, *op. cit. supra* note 1; Weiler, “A Constitution for Europe” *op. cit. supra* note 1.

25. See note 21 *supra*.

goal “sufficiently”.²⁶ It could be said, at least in the educational case, that while they cannot solve the problem completely, they can at least take measures which we might consider sufficient. This is an important point, but to consider it further it is useful to first analyse exactly what the objection to these measures is.

This objection is best understood in terms of competing policies and interests. It is undeniable that common educational systems and contract laws would further the Community goals in question, but they would also detract hugely from Member State autonomy, and impede national capacity to have and hold an independent educational and legal system. This capacity can be valued in democratic terms – it is good to have systems that are close to the people and reflect their will – and also in cultural ones – schools and laws are the product of history and collective experience and play a role in giving consistency and structure to a country – and in social ones – the people are bound together by the institutions and frameworks which they share, which add to social cohesion. In other words, harmonization is good for certain Community goals, but, in many ways, bad for lots of the things that Member States are legitimately concerned with and wish to protect.²⁷

Moreover, the added value to the Community of the measures seems very small in comparison with the harm to the national interests.²⁸ The extra ease that common education systems would provide is hardly enough to justify the enormous social and cultural cost of harmonization. The same may be said of a common language – the added ease might be very significant, but many would consider the social and cultural cost stratospheric. In the case of a contract code the argument is more balanced, but nevertheless many will take the view that the purely practical difficulties of dealing with foreign law cannot be so great that overcoming them justifies throwing out the enormous cultural history and tradition attached to national laws. This depends on the degree to which legal differences actually impede business – an empirical matter – and the degree to which one feels that legal systems have more than

26. The following discussion could also take place within the question whether Community action is “better”. However, the wording of subsidiarity indicates that factors making Community action “better” are of two sorts; because Member States cannot achieve the objectives sufficiently, or because of scale or effects (See Art. 5 EC). The second of these seems more technocratic and efficiency-oriented, and a less comfortable place for Member State interests – hence the emphasis here on sufficiency. However, everything said in the text above about “sufficiently” could be transplanted to “better” without loss of coherence or force, and indeed in the protocol the two criteria are not clearly separated – see text to note 33 *infra*.

27. See Bermann, “Taking subsidiarity seriously: Federalism in the European Community and the United States”, (1994) *Columbia Law Review*, 331 at 339–344.

28. Van den Bergh, “Subsidiarity as an economic demarcation principle and the emergence of European Private Law”, 5 MJ (1998), 129; De Burca, *op. cit. supra* note 4.

a purely practical value – a rather more difficult thing to establish objectively. Nevertheless, those who would object to a common code would presumably find the balance to fall on the side of local autonomy.

These objections can be summed up in a word – proportionality. The claim is that the Community measure would be disproportionate to its goals. While the legitimate Community goals would be advanced, the cost in Member State interests would be disproportionately large. This is the so called “third element” of proportionality, “true proportionality” as it is sometimes called.²⁹ While the most commonly used elements of proportionality are the first two parts of the test, which ask whether a measure actually contributes to achieving its stated goal and whether it goes further than is necessary to achieve that goal, the third part asks whether, assuming it passes the first two tests, it is also proportional to that goal. The fact that it does its job and no more than its job is not enough. It must also not be a sledgehammer falling on a nut.³⁰

Whether this use of proportionality would be effective before the European Court of Justice is a question which will be returned to below, but the immediate question is whether these proportionality arguments can be brought within the concept of subsidiarity³¹ – is it possible to use them to say that therefore the Member States can achieve the goals of the measure “sufficiently”? Is the impact on national autonomy and policies part of determining what is “sufficient”?³²

A politically sensitive and policy-led court or legislature might be inclined to consider such factors, and “sufficiently” is certainly open enough to bear such a broad interpretation. However, it would be at odds with the wording and purpose of subsidiarity itself. The Protocol on the application of the

29. See Snell, “True proportionality”, 11 *European Business Law Review* (2000), 50; Emiliou, *The Principle of Proportionality in European Law* (Kluwer Law International, 1996); Jans, op. cit. *supra* note 14; De Burca, op. cit. *supra* note 14.

30. The aim of preventing street crime is admirable, and two policemen on every street corner along with ubiquitous cameras may be the only way of achieving this entirely. This may be both effective, and going no further than necessary. Nevertheless, it fails the third part of the test. We can achieve a large proportion of the reduction in crime with significantly less draconian measures, and achieving the goal absolutely is disproportionate.

31. Most writers suggest that subsidiarity and proportionality are linked, but quite distinct. See Emiliou, op. cit. *supra* note 19; Bernard, op. cit. *supra* note 4; Cf. Weatherill, op. cit. *supra* note 1, at 39; De Burca, op. cit. *supra* note 4, at 22. Cf. Bermann, op. cit. *supra* note 27, at 383–384.

32. Kapteyn has argued that the interest in decision-making as close to the citizen as possible should be part of sufficiency, which is very close to this: See Kapteyn in Hellingman (Ed.), *Europa in de Steigers: van Gemeenschap tot Unie* (Deventer, 1993) cited in Gormley (Ed.), Kapteyn and Verloren, *Introduction to the Law of the European Communities*, 3rd ed. (Kluwer Law International, 1998) at p. 142.

principles of proportionality and subsidiarity sets out the following factors in deciding whether Member State action is sufficient or action at Community level is better:³³

- whether the issue has transnational aspects which cannot be satisfactorily regulated by action on Member States;
- whether actions by Member States alone or a lack of action by the Community would conflict with the requirements of the Treaty or would otherwise significantly damage Member State interests;
- whether actions at Community level would produce clear benefits by reason of scale or effects.

The first and third requirements focus on the interests and objectives pursued by the measure – how are its goals most effectively achieved? The second requirement looks at the implications for other Community policies. The only mention of Member State interests is to ask whether these may require Community action. Quite clearly the Member State interests being referred to are not those served by autonomy and local preference. Indeed, the word “otherwise” indicates that Member State interests are here being assimilated with those of the Community.

The alternative, that broader Member State interests are represented within “sufficiently”, requires a straining of language. In the contract case, the Member States can make absolutely no, or at best negligible, impact on the problem. It becomes highly artificial to say that given the cultural importance of law this is nevertheless sufficient. Language teaching may ameliorate the linguistic obstacles to movement, but hardly removes them. To say that free movement is sufficiently achieved by language teaching *because* harmonization would be wrong, is deceptive and inelegant. As well as being in tension with natural language, it preserves a kind of ideological fundamentalism; Community objectives must always be, and always are, sufficiently achieved, even where they are not achieved at all.

3. Functional competences before the Court

The fact that the Community’s competences tend to be defined in terms of objectives to be achieved, rather than areas of activity to be regulated, is at the heart of the mismatch described above.³⁴ Whereas the Member States often look at a measure in terms of its effects on an area of activity – which

33. Protocol to the Treaty of Amsterdam on the Application of the Principles of Subsidiarity and Proportionality, *O.J. 1997, C 340/105*.

34. See De Burca, *op. cit. supra* note 4; Bermann, *op. cit. supra* note 27, at 383–384.

corresponds to the degree to which it invades their powers – the Community, and the Court, assess it primarily in terms of the degree to which it achieves Community goals. There is a failure to agree on the subject of conversation.

In the cases in which subsidiarity has come before the Court of Justice – which concerned attempts to annul Community measures – this is clearly visible.³⁵ In these cases the Court rejects the claim that there is a violation of subsidiarity. The argument seems to follow a repetitive pattern. First, the complainant states that the measure regulates an area, such as health and safety at work,³⁶ public health,³⁷ or food safety,³⁸ which is primarily a Member State competence. They then claim that the ways in which safety or health are advanced by the measure could have been just as well – perhaps better – achieved by the Member States acting alone. Therefore, they conclude, subsidiarity should prevent the Community action.

This argument can be – and has been by commentators³⁹ – extrapolated to areas where subsidiarity has not been considered in judgments, but has been used by later writers to analyse what has occurred. For example, the Court has issued judgments constraining national civil procedure,⁴⁰ and even creating new national causes of action.⁴¹ It has also taken decisions regulating sport⁴² and language.⁴³ Of all these matters it is possible to comment that they are best regulated at national, not Community, level and so subsidiarity is perhaps not being awarded full respect.

These latter cases did not concern the validity of Community measures, but their interpretation and application, or the interpretation and application of the Treaty. The subsidiarity claim would therefore not be that the Community legislator should have acted otherwise, but that the Court should apply subsidiarity to its interpretations.⁴⁴ This is clearly a distinguishable situa-

35. See Case C-154/04, *Alliance for Natural Health*, judgment of 12 July 2005, nyr; Case C-491/01, *British American Tobacco*, [2002] ECR I-11453; Case C-84/94, *UK v. Council (working time directive)*, [1996] ECR I-5755; Case C-377/98, *Netherlands v. Parliament and Council (Biotechnology directive)*, [2001] ECR I-7079.

36. Case C-84/94, *UK v. Council (working time directive)*, [1996] ECR I-5755.

37. Case C-491/01, *British American Tobacco*, [2002] ECR I-11453.

38. Case C-154/04, *Alliance for Natural Health*, cited *supra* note 35.

39. De Burca, *op. cit. supra* note 4; Swaine, “Subsidiarity and self-interest: Federalism at the European Court of Justice”, 41 *Harvard International Law Journal* (2000), 1; Lenaerts and Corthout, “Judicial Review as a Contribution to European Constitutionalism” in Tridimas and Nebbia (Eds.), *European Union Law for the Twenty-First Century, volume 1* (Hart, 2004).

40. E.g. Case 811/79, *Ariete*, [1980] ECR 2545; Case C-224/97, *Ciola*, [1999] ECR I-2517.

41. Case C-6 & 9/90, *Francovich*, [1991] ECR I-5357; Case C-46/93, *Brasserie du Pêcheur*, [1996] ECR I-1029.

42. Case C-415/93, *Bosman*, [1995] ECR I-4921.

43. Case C-379/87, *Groener*, [1989] ECR 3967.

44. See De Burca, *op. cit. supra* note 4, at text to note 53; De Búrca, “The Principle of

tion, and raises the question whether Court judgments fall within the “Community actions” to which Article 5 EC states subsidiarity to apply.⁴⁵ However, in a broader sense the argument seems persuasive: surely if subsidiarity is to meaningfully guide the Community it should also guide the way in which Community law is read. It should be possible to apply subsidiarity to the interpretation of rules.

Yet the substantive argument would fail anyway, as it failed in the annulment cases. The reason is that it asks the wrong question. The goal of the measures or provisions being challenged or interpreted was not exclusively, generally not even primarily, that of regulating the substantive area of law in question. The measures or judgments were not aiming to regulate health, civil procedure, or language as such, not making any claim that these were matters that belonged to the centre. Rather they were pursuing one of the Community’s functional competences – in most cases the aim of removing obstacles to movement or distortions of competition.

In the annulment cases, the aim by which the measures were defined was that of harmonization as such; the removal of the particular problems which may arise through differences between national laws, or national laws restrictive of movement. Of course, health and safety and so on are important, and so the harmonization was done in a way ensuring a high level of protection of this.⁴⁶ Such measures therefore look like health and safety measures. However, defining them in terms of health and safety objectives, as the subsidiarity arguments of the Member States do, is incomplete.

Hence the subsidiarity arguments were rebuffed. The Court points out that the Community objective being pursued by the measures was that of harmonization, which is necessary in order to prevent differences between national laws causing obstacles to movement or distortions of competition. Since it is manifestly the case that Member States acting alone cannot harmonize, there is no subsidiarity criticism to be made.⁴⁷

In the other cases the argument would have been similar, albeit a little more complex. In these, Member States failed to give full effect to Community goals – either the achievement of free movement or the enforcement of Community law rights in national courts. Their only subsidiarity defence would be that they did achieve these “sufficiently”. However, the Member

Subsidiarity and the Court of Justice as an Institutional Actor”, 38 *JCMS* (1998), 214.

45. De Burca, *op. cit. supra* note 4.

46. See Case C-84/94, *UK v. Council (working time directive)*, [1996] ECR I-5755; Case C-491/01, *British American Tobacco*, [2002] ECR I-11453; Case C-376/98, *Germany v. Parliament and Council (Tobacco Advertising)*, [2000] ECR I-8419.

47. See cases in note 35 *supra*. See also A.G. Fennelly in *Tobacco Advertising*, *ibid.*, making this argument at greater length.

States were reluctant to go further in the Community direction because they objected to the interference with their own policies and competences, not because they had a case that Community goals were sufficiently fulfilled according to the terms of those goals. This type of argument, it was suggested above, belongs within proportionality, not subsidiarity.

It seems possible to conclude that subsidiarity has no relevance to those functional competences whose aim is to create the uniformity necessary for an internal market, at least where Community legislation is concerned.⁴⁸ Member States will never be able to achieve the goals pursued by harmonization. Where uniformity is necessary, only the Community will be able to act. Yet this is bizarre! It is precisely the functional competences where subsidiarity is intended to be important. It is the nature of these purpose-defined powers that they cut across other sectoral national competences, as the cases referred to above show. For this reason functional competences are seen as shared competences, and were defined as such in the constitution.⁴⁹ It is within their arena that national and Community powers become inextricably entwined. Subsidiarity is then supposed to ensure that this does not become a smothering of the one by the other. Unfortunately, it seems that once the Community announces that it wishes to pursue one of the objectives which comprise the functional competence, since these competences are defined in terms of creating uniformity, and Member States clearly cannot achieve this alone, subsidiarity no longer applies.

4. Subsidiarity at the Commission

The major day-to-day role of subsidiarity is at the pre-legislative stage.⁵⁰ The Commission is obliged to provide subsidiarity arguments for all its propos-

48. See Toth, "The Principle of Subsidiarity in the Maastricht Treaty", 29 CML Rev., 1079. He argued that because only the Community could take the harmonization measures which its internal market powers envisage, the internal market competences must be seen as exclusive, and so subsidiarity could not apply to these powers. His view was a minority one, and rejected in the constitutional treaty, which placed the internal market within shared competences (Art. I-14) but the above supports him. The real problem is that the line between "exclusive" and "non-exclusive" is impossible to draw coherently; see Davies, op. cit. *supra* note 22; see also Von Bogdandy and Bast on the relationship between exclusive and concurrent powers, op. cit. *supra* note 10 at 242–247.

49. Art. I-14 Constitutional Treaty. See Steiner, "Subsidiarity under the Maastricht Treaty", in O'Keefe and Twomey (Eds.), *Legal Issues of the Maastricht Treaty* (Chancery, 1994); Weatherill, op. cit. *supra* note 1; Davies, op. cit. *supra* note 8; Davies, op. cit. *supra* note 22.

50. Bermann, op. cit. *supra* note 27, at 376–383.

als.⁵¹ It is often argued that this is where a principle as imprecise and political as subsidiarity belongs.⁵² Nevertheless, it suffers the same shortcomings in this context as it does at the Court.

The Commission procedure for applying subsidiarity is set out in its impact assessment guidelines.⁵³ These provide a procedural framework for the preparation of legislative proposals which is intended to safeguard subsidiarity and proportionality. However, familiar problems emerge. Firstly, the problem to be solved, and implicitly the general nature of the desired outcome, is defined before subsidiarity is considered.⁵⁴ Secondly, whether Member States can achieve this outcome sufficiently is considered exclusively in terms of the problem itself and other Community goals.⁵⁵ Thirdly, while at a later stage of the procedure attention is paid to the impact of the measure this is done in a limited way: the emphasis is overwhelmingly on impacts on non-public actors such as consumers and industry, and where the impact on public bodies is – briefly – mentioned, the focus is on economic and functional factors.⁵⁶ National policy and autonomy interests are further marginalized by a consistent emphasis on quantifying impacts whenever possible.⁵⁷ Nowhere in the entire process is there any explicit consideration of national autonomy, nor any weighing of Community against Member State goals, except perhaps for the warning, repeated several times, that impact assessments are “not a substitute for political judgement”.⁵⁸ This may seem an acknowledgment that political factors, such as the effect on national policies, may need to be considered. However, it is also an implicit statement that these factors are not within the legal framework of subsidiarity and proportionality, but rather outside it; since the law does not protect Member State autonomy, we may have to be politically astute.

At least insofar as subsidiarity is concerned, this approach is textually correct. However it reveals the dangers of the principle. While providing a negligibly low threshold for Community action, since Member States simply

51. Protocol to the Treaty of Amsterdam on the Application of the Principles of Subsidiarity and Proportionality, O.J. 1997, C 340/105.

52. See Emiliou, “Subsidiarity: An effective barrier against the enterprises of ambition?”, 17 *EL Rev.* (1992), 383; Toth, “Is subsidiarity justiciable?” (1994) 19 *EL Rev.* 268; Bermann, *op. cit. supra* note 27, at 393–394.

53. Impact Assessment Guidelines, 15 June 2005, SEC(2005)791; Communication from the Commission on Impact Assessment, 5 June 2002, COM(2002)276 Final.

54. Impact Assessment Guidelines, *ibid.*, at 16–18; Communication, *ibid.*, at 6, 12.

55. Guidelines, *ibid.*, at 18.

56. Guidelines at 30–32; Annex to the Guidelines at 33, 35 et seq; Communication at 15–16.

57. Guidelines throughout, especially in the Annex at 22 et seq; Communication at 15–16.

58. Guidelines at 4, 39, 43–44, Annex at 27; Communication at 3, 5, 9, 10.

cannot do at all many of the cross-border things that the Community can do, it seems to promise that a meaningful test has been applied. While ignoring national policies and autonomy completely, it seems to suggest that the impact on these has been carefully weighed. Finally, by occupying the central role in the question of “which level” it marginalizes proportionality considerations. It is notable that while the guidelines state that these also serve to assess proportionality, there is nowhere any discussion of its third element. Proportionality is reduced to the whether the Community goal could be achieved more efficiently. The status of the goal is taboo.

Subsidiarity therefore serves primarily as a masking principle, presenting a centralizing polity in a decentralizing light. It might be unreasonable to suggest that this is deliberate policy, but it does seem to be the effect.

Subsidiarity can also be used to rebut criticism and manipulate debate. It focuses discussion on the achievement of the Community goal, and Member State inability to achieve this sufficiently, to the exclusion of other factors. A Member State argument to the effect that the measure “also has a pretty negative effect on other policies that we may wish to pursue” is easy to meet with a claim of legal irrelevance. That is not to say that it will always be ignored – the subsidiarity compliance arguments attached to Commission proposals often do mention the impact of the measure on national institutions and rules. However, this is a case of *noblesse oblige* – or that political judgement – more than legal right. In any case, the absence of a comfortable place in the legal framework for Member State interests gives them a rhetorical handicap, and ensures that in the debate over levels of action the Community has a head start.

5. The wrong place

Subsidiarity famously derives from Roman Catholic doctrine,⁵⁹ and is also present in German legal thinking, if not always in the hard law.⁶⁰ Its entry into the Community system was encouraged by those who saw it as the appropriate concept to deal with conflicts between levels, a function that it seemed to fulfil in the national and religious spheres.⁶¹ However there are

59. See Barber, “The limited modesty of subsidiarity”, 11 ELJ (2005), 308; Pernice, *op. cit. supra* note 2; Follesdal, “Subsidiarity”, 6:2 *Journal of Political Philosophy* (1998), 231–59.

60. Pernice *op. cit. supra* note 2; Constantinesco, “Who’s Afraid of Subsidiarity?” 11 YEL (1991), 33.

61. For full background see Cass, “The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community”, 29 CML Rev., 1107.

fundamental differences between these contexts and the Community one. An examination of these reveals why Community subsidiarity never could do the work for which it was employed.

Subsidiarity's weakness is that it assumes the primacy of the central goal, and allows no mechanism for questioning whether or not it is desirable, in the light of other interests, to fully pursue this. Thus subsidiarity could be interpreted as a centralizing, or intolerant concept, which sets out to silence and deny the independent objectives of the lower level.⁶² However, this is an implausible interpretation of the intention of those who create and apply it. It is more convincing to say simply that it assumes that there will be no conflict between the objectives of the different levels. It takes as its starting point that all levels are united in wishing to achieve certain goals and that none has any other interests or objectives which conflict with these.⁶³ Indeed, it has been said that "in relation to levels with no common purpose, talk of subsidiarity is nonsense".⁶⁴ Subsidiarity then functions as a principle to do with implementation, determining who should do what to achieve these common goals.⁶⁵ It is not about balancing at all.

This makes perfect sense given its origins. It is hardly likely that the Roman Catholic Church would endorse a principle which allows lower orders to balance their interests in autonomy, free will, and perhaps fun, against the higher order's interest in respect for principles or doctrine. On the contrary, within Church organization the assumption would probably be that the objectives of the Church were not open to discussion, and must, come what may, be achieved. The role of subsidiarity would simply be to ensure that the practical steps to attain these objectives were not taken by the higher levels when they could perfectly well be carried out by the lower ones. How often the choir practices may be left to the priest to decide. Subsidiarity thus allocates functions within a structure that has a clear hierarchy, but common, undisputed goals.

Nevertheless, the Catholic understanding of subsidiarity was general, not just, or even primarily, to do with internal church working, but rather as a principle of social organization, and of the nation.⁶⁶ Yet if the nation is envisaged as a community sharing common goals and purposes, a vision which

62. Barber sees "subsidiarity and national self-determination as rival constitutional principles", Barber *op. cit. supra* note 59, at 323.

63. Bernard, *op. cit. supra* note 4, at 635; Constantinesco, *op. cit. supra* note 60; Barber, *op. cit. supra* note 59.

64. Heraud, *Les principes de federalisme et la federation europeene* (Presses d'Europe, 1965) quoted in Constantinesco, *op. cit. supra* note 60, at 52.

65. Backer, *op. cit. supra* note 4.

66. Barber, *op. cit. supra* note 59.

will have some currency today, and will have had more in the past, subsidiarity as an allocation of functions principle can still work. It is clearly possible, if one takes a somewhat normative perspective, to see the communities and sub-communities that make up society in terms of shared objectives, and to deny the situation in which purposes could be fundamentally at odds with each other; in that case one must be right, and one must be wrong, and this is how the conflict is to be resolved.⁶⁷ The Church's endorsement of subsidiarity in society was not an acknowledgment of the legitimacy of the different goals and interests of the different levels. It was once again about allocation of functions within the common struggle.

What is fundamentally different about the Community is that there are two levels of legitimate law-makers, which have overlapping competences and sometimes conflicting policies and interests.⁶⁸ It is not possible to have any simple rule for which objective should take precedence.⁶⁹ Any fundamentalist approach to Community goals, which does not allow them to be balanced against national interests when necessary, is likely to be so politically unacceptable as to lead to implosion of the Community. Thus in reality both Court and Commission do, in all their actions, consider the effects on Member States. An example is the removal of trade barriers; while the Treaty appears to forbid all restrictions on free movement, the Court in practice only forbids some – the ones that are unjustified.⁷⁰ It tempers the apparently absolute Community rule to protect national interests.

There is a principled argument for this too. The requirement to balance interests can be seen as internal to Community law itself – in the form of proportionality. Such an approach could explain the Court's apparent partial application of the Treaty free movement rules. It would be disproportionate to read and apply them in a more literal or complete way.⁷¹ Proportionality is discussed further below.

67. Ibid.

68. See Bernard, *Multilevel Governance in the European Union* (Kluwer Law International, 2002).

69. Supremacy is not relevant here. The question under consideration is not whether a Community rule should take preference once it is lawfully made, but whether it should, or may, be made at all.

70. See Davies, *op. cit. supra* note 22. See also Mortelmans, "The relationship between the Treaty rules and Community measures for the establishment and functioning of the internal market – towards a concordance rule", 39 CML Rev., 1303–1346.

71. Bermann, *op. cit. supra* note 27, at 401.

6. The wrong time

Subsidiarity is not a useless concept. Allocation of functions in the process of implementing objectives is important, both for democratic and for economic reasons.⁷² There was a period when the Community tended towards over-detailed harmonization, and resisted delegation to the Member States.⁷³ Subsidiarity-led thinking has played a major role in the observable move away from this, to a less controlling legislative style, during the last ten years.⁷⁴

However, these are not the issues of the day. The current competence anxieties are about something else. The point has been reached where Community law and requirements are touching on the most sensitive and traditional national competences – criminal law, the welfare State, taxation and economic policy – as well as on the regulation of almost all aspects of economic and socio-economic activity. The choices that countries can make in these areas are becoming increasingly tightly contained by the consequences and requirements of removing borders. The current problem is in deciding the extent to which the Community may legitimately make demands and legislate in these areas, and the extent to which, even if there is a price in openness or in other aspects of Community goals, Member State autonomy should be respected.

It may well be that this moment will pass. There is a logic to harmonization of criminal law, health and education frameworks, and taxation, certainly in an area without borders and with fair competition. Perhaps with time Member States will accept this, and the objective will no longer be in question. Then subsidiarity will once again be useful as an implementing principle. However, at the moment the debate is more fundamental. As the Laeken declaration indicated, the need is felt to protect the competences of Member States, and their capacity to make and carry out policy.⁷⁵ It is no longer enough just to look from the Community side and ask what the most

72. See Geradin and Esty, "Regulatory Co-Opetition", 3:2 *Journal of International Economic Law* (2000), 235; Van den Bergh, op. cit. *supra* note 28.

73. See Pelkmans, "The new approach to technical harmonization and standardization", 25 *JCMS* (1987), 249; Commission White Paper COM(85)310.

74. See the Commission Report to the European Council "Better Lawmaking 2000" COM(2000) 772 Final; Bermann, op. cit. *supra* note 27; Weatherill, "Why Harmonise?" in Tridimas and Nebbia (Eds.), *European Union Law for the Twenty-First Century, volume 2* (Hart, 2004); Dougan, "Minimum harmonization and the Internal Market", 37 *CML Rev.*, 853; Kurcz, "Harmonisation by Means of Directives – Never Ending Story?" 12 *European Business Law Review* (2001), 287.

75. See *Laeken Declaration – the Future of the European Union* (Conclusions of the European Council meeting in Laeken, 15 Dec. 2001).

efficient way of achieving its goals is. A mechanism for balancing is being sought.

7. Proportionality saves the day?

It has been suggested above that proportionality is the principle which most corresponds to current competence needs. However, for this to work in the context of Community law is not entirely without problems.

One is that the Treaty does not in fact acknowledge “true proportionality”. Proportionality both in Article 5 EC and in the protocol on subsidiarity and proportionality is defined as the principle that Community action shall not go beyond “what is necessary” to achieve its goals. This blatantly incomplete definition of what is a well-known principle is in itself interesting – as if once again an attempt is being made to put Community goals beyond question. However, the Court itself, and all writers on proportionality, accept the fuller, correct definition, consisting of the three parts referred to above.⁷⁶ “True proportionality” however erratically used, is an uncontroversial part of the Community principle now. The inadequacy of the Treaty definition has been remedied.

Additionally, a competence role for proportionality requires national autonomy to be acknowledged as a factor to be weighed in the “true proportionality” scales. On the one hand there is no reason why this should not be the case; the constitution contained a provision concerning respect for national institutions and structures.⁷⁷ It is widely accepted that the desire of Member States to preserve and maintain uniqueness and autonomy is in itself legitimate. On the other hand, until now national freedom has been at most implicit in proportionality assessments. The Court has never said as such that the desire of the Community to achieve full openness must sometimes be balanced against the desire of the Member States to retain some autonomy, although it can be argued that this is the best understanding of the limits to Article 95 EC set in *Titanium Dioxide*⁷⁸ and *Tobacco*.⁷⁹

In the cases discussed above proportionality arguments were generally made alongside the subsidiarity ones.⁸⁰ These tended to be dismissed equally easily, and in an equally consistent way. In these cases the Court did not en-

76. See note 29 *supra*.

77. Art. I-5 Constitutional Treaty.

78. Case C-300/89, *Commission v. Council*, [1991] ECR I-2867.

79. Case C-376/98, *Germany v. Parliament and Council (Tobacco Advertising)*, [2000] ECR I-8419.

80. See cases in note 35 *supra*.

gage in an assessment of true proportionality at all, but simply asked whether the measure went beyond what was necessary to achieve the Community objectives. It assessed the measure entirely from the Community side.

There are two reasons for this. One is the way that arguments were made. As discussed above, the Member States misguidedly placed their arguments concerning the invasion of their territory within subsidiarity. Within proportionality they concentrated on efficiency-related points, about the effectiveness and necessity of the measure. In fact they would have done better – or should have done – if they had reversed this. However, a second, legitimate, reason not to engage in third element proportionality review is the difficult political character of such decisions. Courts do not like substituting their view for that of the legislature in this way, deciding whether one policy is more important than another, and how much so. They may take the view that Member States have had a chance to defend their interests in the Council, and be inclined to respect the outcome of that debate. Third element proportionality review might tend to be marginal.⁸¹

Moreover, considering the value of Member State autonomy and interests would open up a form of argument that would be difficult to contain, and which would allow a great deal of special pleading. One system or law may have great cultural significance in one State, while others regard it as a fairly neutral technical matter. Member States will make culture and history-based arguments for autonomy that may be difficult to critically evaluate.

For this reason true proportionality review, where the Court engages in it, tends not to involve the balancing of Community and national interests against each other. More commonly, Community or national interests in a measure are balanced against the impact on individuals. This is the accepted and uncontroversial role of proportionality, and it has been argued that it should be confined to this role.⁸²

However, a balancing of policy interests is not unknown. In the *Stoke-on-Trent* Sunday trading case, where national measures restricting the sale, and arguably the movement, of goods were concerned, the Court said “Appraising the proportionality of national rules which pursue a legitimate aim under Community law involves weighing the national interest in attaining that aim

81. Tridimas, “Proportionality in Community Law: Searching for the appropriate standard of scrutiny” in Ellis (Ed.), *The Principle of Proportionality in the Laws of Europe* (Hart, 1999). For very similar reasons it has been often doubted whether subsidiarity could be effectively justiciable: see Emiliou, “Subsidiarity: An effective barrier against the enterprises of ambition?” 17 *EL Rev.* (1992), 383; Toth, “Is Subsidiarity Justiciable?” 19 *EL Rev.* (1994), 268; Bermann, *op. cit. supra* note 27, at 393–394.

82. Tridimas, *ibid.*; See also Pernice, *op. cit. supra* note 2, at 410.

against the Community interest in ensuring the free movement of goods.”⁸³ Admittedly, the substance of this case was shortly afterwards overturned in *Keck*,⁸⁴ and the desire to avoid having to make such a balance is widely understood as one of the reasons for this.⁸⁵ The Court did not wish to have to delve into questions of national socio-economic policy.

In essence, it is no more difficult to weigh policies against each other than to weigh policy against individual rights. The question is whether the Court considers itself competent to judge measures in the light of their purpose, and clearly that question must be answered in the affirmative. Even national measures, which it will at times declare to be outside its competence, are regularly assessed in some detail, to see whether they are justified by the Member State’s claimed aim.⁸⁶ Any desire to avoid balancing policies against each other must therefore be seen as more political than principled. Of course, there will be many questions remaining about intensity of review, but the principle of some control seems reasonable.

Given the above, and given that there is no other principle which can prevent important national measures, and important national autonomy, falling victim to less important Community action, the Court should apply proportionality fully. In judicial review of Community measures it should ask whether the importance of a Community measure is sufficient to justify its effect on the Member States. It should spell out the competence function of proportionality, and the role of national autonomy in the balance, and have a go at addressing competence concerns in this way.

8. Conclusions

When the National Health Service was founded in the United Kingdom in 1948 it was famously assumed that it would only be busy for the first few years. The previous inability of many people to pay for medical treatment meant that there would be a backlog of disease to deal with, but once that was brought under control and the population was rendered healthy, the system could be reduced to a minimal framework of emergency and family doc-

83. Case C-169/91, *Stoke-on-Trent City Council*, [1992] ECR I-6635; See on this Van Gerven, “The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe” in Ellis op. cit. *supra* note 81, at p. 41, noting that proportionality is here given a role in the allocation of powers.

84. Case C-267 and 268/91, *Keck and Mithouard*, [1993] ECR I-6097.

85. See Case C-145/88, *Torfaen Borough Council*, [1989] ECR I-3851; Weatherill and Beaumont, *EC Law*, 3rd ed. (Penguin, 1999) at pp. 610–619.

86. Davies, op. cit. *supra* note 15.

tor services, with a few surgeons in the cities. That was not, of course, how things developed.

Community goals will never be fully achieved either. Like health care, creating openness will be an ongoing process, with new obstacles arising like diseases, as sub-communities create structures and organizations to achieve their goals. Compromises will constantly have to be struck between these and the central objectives. Subsidiarity seems to envisage a world in which it is just a matter of time before borders are finally fully removed, the measures necessary to compensate for this are in place, and much of the Community apparatus can presumably shrivel up and go away.

It would be a good thing to move away from this fanciful notion, and accept that the Community purposes are no more sacred than national ones, neither will ever be complete, and we had better devise legal mechanisms for creating a balance. Proportionality can do that, but the role of national interests needs to be made explicit. An intelligent balance between Community and national interests will not be made so long as Community law concedes only one of these a public role.