The Subsidiarity Principle at the Interface of Law and Politics

https://www.e-ir.info/2021/03/10/the-subsidiarity-principle-at-the-interface-of-law-and-politics/

THILO MARAUHN AND DANIEL MENGELER, MAR 10 2021

This is an excerpt from *Varieties of European Subsidiarity: A Multidisciplinary Approach*. Get your free download from E-International Relations.

Subsidiarity, as a concept, is all over the place. It has attracted the attention of academia and practice, of philosophy and social science, and – last but not least – of lawyers. In the European Union, subsidiarity has moved beyond being a conceptual framework. It has become part of the law, nurtured by pertinent constitutional debates in federal systems. While federal systems in a strict sense and from a global perspective are the exception rather than the rule, they have conceptually become fairly influential as telling examples of multi-level governance (Chalmers, Davies and Monti 2014; Robbers 2017). Challenges of multi-level governance systems arise with regard to their prescriptive role, their enforcement capacity and their legal jurisdiction alike. However, as the European Union has been rightly described as a law-making entity, the focus in the following will be on the legislative branch only. The latter should be separated from the administrative and judicial branches of government as highlighted, for example, in the work of Montesquieu (1977).

This chapter will not address the question why the subsidiarity principle has become so important in the context of European integration. Rather, it will examine how the subsidiarity principle reflects the interface of law and politics in European Union law. To this end, this chapter will first consider the codification of the subsidiarity principle in the Treaty on European Union (TEU), and will then raise the question whether subsidiarity does not only operate between various levels of government but also between law and politics, meaning that the law is subsidiary to politics or *vice versa*. The chapter concludes by pointing to a form of dynamic interaction.

The Codification of the Subsidiarity Principle in the Treaty on European Union (TEU)

Even though subsidiarity may be read broadly as addressing the complexities of the social fabric, this cannot be applied to governance structures in general without critical reflection and modification. Subsidiarity respects that there is a difference between the societal sphere and the governmental sphere. Federal systems refer to variations of subsidiarity when it comes to the separation of powers between various levels of government. And at the international level, there is a discourse about a division of labor between nation states and international organisations (Jackson 2002, 16–7). It is against this broad background that subsidiarity, especially when considering the debates of the 19th century, can be understood as defending the liberal sphere against excessive use of governmental powers (Schwarze 1992, 685).

This political, philosophical and historical setting has to be borne in mind when discussing the codification of the subsidiarity principle in the TEU. Preceding the Treaty of Maastricht, the debate included three options for framing the subsidiarity principle in the context of European Community (EC) and European Union law (see Schneider and Wagner 2012, 296–7):

1. a broad architectural principle ensuring multi-level governance even within the nation state;
2. a principle for the distribution of powers; and

3. a rule for the exercise of powers.

Eventually, Article 3 lit. b of the revised EC Treaty took up the third option. It may be argued that this detached the subsidiarity principle from its historical underpinnings and transformed it into a principle of efficiency. Understood in this way, law-making in the EC and EU was not to be an end in itself to achieve European integration.

The Treaty of Lisbon then built upon this in Article 5 (3) TEU with a much narrower definition than the broadly framed subsidiarity principle in the Treaty's preamble (see Schütze 2016, 252–3). The preamble, which expresses the resolution of EU member states

to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,

respects the self-determination of peoples and aims for the EU to be citizen-friendly. This broad reading of the preamble mirrors itself in Article 39 (2) lit. a of the Treaty on the Functioning of the European Union (TFEU) referring to regional peculiarities and in Article 167 (1) TFEU respecting the 'national and regional diversity' of the member states. The narrow reading of Article 5 (3) TEU as a rule for the exercise of powers is itself closely linked to Article 5 (1) second sentence and Article 4 (2) first sentence TEU, respecting 'national identities' and 'fundamental structures' of member states without changing the distribution of powers as it emerges from the Treaties. The subsidiarity principle does not question the political (and legal) decision on the separation of competencies, but requires a twofold test for the exercise of a competence by the EU: a sufficiency test (permitting the EU to 'act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States') and a value-added test (whereby the EU's objectives can, 'by reason of the scale or effects of the proposed action, be better achieved at Union level'). As this requires a political-economic assessment, it illustrates that the subsidiarity principle serves a political rather than a legal purpose. Even more so, as this should be internalised by national parliaments being equipped with tools to ensure compliance with the principle as further spelled out in Article 12 lit. b TEU, Article 69 TFEU and Protocol No. 2 on the application of the principles of subsidiarity and proportionality (see annex to the TEU and the TFEU).

The political purpose of the subsidiarity principle becomes obvious via the just mentioned Protocol. This instrument, specifying the so-called early warning system, except for the criterion of efficiency lays down only procedural rules. The early warning system allows national parliaments to object to a Commission proposal within eight weeks of their publication, arguing that the proposal is in breach of the principle of subsidiarity.

The so-called 'yellow card' enables national parliaments to simply react to a Commission proposal. This is supplemented by the so-called 'orange card', which requires a review of the proposal if at least a simple majority of the votes allocated to national parliaments submits 'reasoned opinions'. If the Commission maintains the proposal, a majority in the European Parliament, or 55 per cent of the member states in the Council, can raise an objection (Geiger 2015, paragraphs 17–8).

Three features of the Protocol demonstrate that preference is given to political rather than judicial considerations: first, the early warning system defers the discussion of the principle of subsidiarity to national parliaments, not to a national court or the European Court of Justice (ECJ). A broad reading is given to the acts concerned by Article 3 of the Subsidiarity Protocol, which goes far beyond Commission proposals and includes

initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act.

Likewise, the need to demonstrate compliance with the principle of subsidiarity according to Article 5 of the Protocol, stipulating that 'any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality', will stimulate pertinent political debates.

Second, the procedures foreseen by the Subsidiarity Protocol shift debates towards the political dimension and have an effect on the political discourse (Popelier and Vandenbruwaene 2011, 216–7). National parliaments will be able to live up to their political responsibility and can retain political momentum in the process of EU law-making. The dialogue stimulated by the 'yellow card' system clearly differs from judicial decision-making. Furthermore, the absence of specified criteria and the openness of the wording of Article 5 (3) TEU facilitates conflict management by consensus. In other words, Article 5 (3) TEU establishes a legal frame for conflict resolution in this particular way. Finally, reference to national parliaments may eventually lead to a stronger impact of their debates and deliberations on decision-making in the Council.

Third, so far, the ECJ has not applied strict scrutiny of the principle of subsidiarity. Leaving room for discretion and decision-making of EU organs allows political controversy between national parliaments and acting EU organs. Such controversy is not embedded in legal doctrine but opens up space for considerations of political expediency.

In essence, it can be argued that the codification of the principle of subsidiarity in the TEU as well as its operationalisation by EU organs and member states establishes a legal framework for political decision-making with regard to the exercise of competences. This raises an interesting question as to the relationship between the legal and political spheres: to what extent is the law as such subsidiary to political decision-making?

Subsidiarity of the Law Vis-à-Vis Political Decision-Making

The relationship between the law and political decision-making in a constitutional framework has been discussed from various angles. With the rise of the constitutional state, and with the recognition that constitutions include legal rules that can be taken up by a court of law, the relationship between political decision-making and the applicable legal and constitutional framework has become more complex. For this reason, it is necessary, first, to discuss this interaction in more general terms, before moving on to the interpretation and application of the law, and, finally, narrowing down considerations to the constitutional level.

To begin with, law and politics do not enjoy the same kind of relationships across all levels in a multi-level system of political decision-making and governance. The political dimension of public international law, for example, has often been debated, as has been the political dimension of constitutional law. It would be, however, an unacceptable simplification to argue that the global is largely subject to political considerations whereas the local is 'juridified'. The extent to which law and politics play a role at different levels of government varies – and their relationship cannot be read as a simple one-way street.

More generally, law and politics are considered to be mutually contingent. Law emerges from political decision-making and the political process normally channels the genesis of rules of law. Thus, politics serves as a foundation for the rule of law. Along these lines, law is never fully de-politicised – notwithstanding theoretical reflections and claims as, among others, emerging from Kelsen's (1967) pure theory of law. In fact, the law is much more limited than politics; in time, space, and scope. Not all matters of life – or politics – are subject to processes of legalisation and juridification. There is a moral, societal and political space outside the law. In short, law is not omnipresent.

However, there is a complex interplay between both 'systems' (Luhmann, 2017). This may be illustrated by separating two fields of analysis: the law's steering capacity and the law's capacity to organise and legitimise governance.

As to the steering capacity of law, political decision-makers use the law to control the behaviour of certain actors and certain parts of society. In doing so, political decision-makers also frame further political decisions. It may be argued that this interplay between political decisions and legal rules establishes a meta-regime of its own. Subsequent decisions at a lower level of abstraction have to be in accordance with the rules established by this meta-regime. Yet, this does not exclude changes of the meta-rules by political decisions which then themselves gain legal quality (*actus contrarius*). In this respect, a distinction can be made between amending the overarching legal framework and specifying existing legal rules. The significance or influence of politics on the law decreases with a higher degree of specification of legal rules. In turn, the rationalisation effect of law increases for subsequent political decisions. The

precise relationship between politics and law cannot be determined without consideration of a particular context. Depending on the level of abstraction, it is subject to changing dynamics. Thus, politics and law interact in an alternate fashion.

This is shown clearly by the already mentioned capacity of law to organise and legitimise governance. Frequently, politics refers to legal rules set by its own process to achieve the necessary legitimacy. Accordingly, Popelier and Vandenbruwaene (2011, 205–6) describe the subsidiarity mechanism as a tool for legitimising EU laws. In normative terms, the law preserves a decision based on prior political consensus – even at the constitutional level. Politics within the framework of legal rules is legitimised by the law. Politics legitimises itself by means of self-imposed conditions that take a legal form. These self-binding mechanisms with formal and material constraints on politics increase the desired legitimacy effect (Elster 1993, 8–14; Popelier and Vandenbruwaene 2011, 205–6). Subsequent judicial control further reinforces this. Most importantly, in this perspective, the decision on self-commitment is a political act and is not legally prescribed.

Usually, enforcement of the law or the use of legal instruments is also within the boundaries of political opportunity. In other words, a strict relation of subsidiarity between the law and politics or *vice versa* does not exist. In many cases, the use of courts with final decision-making power will be a political decision in itself. Addressing an illegal situation is not an automatic process. In fact, there is the possibility of political instrumentalisation. For example, at EU level member states have a legal obligation to fulfil the convergence criteria of Economic and Monetary Union (EMU) to facilitate the implementation of the euro currency. In the case of Sweden, however, this goal has not been achieved mainly due to a lack of political will rather than due to a lack of actual ability (Chalmers, Davies and Monti 2014, 713–5). While this legal obligation could be enforced through the ECJ by skillfully employing legal arguments, such an attempt would still fail due to the political position taken by key domestic actors. The example shows the dependence of legal mechanisms on political behavior from two different angles. If objective law is not enforced, the legal system may counteract by granting claim rights, which enable individual actors to challenge such a violation in court. In other words, enforcement is not merely an end in itself, but also a political instrument.

In areas of legal interpretation and application, the interplay of law and politics can also be observed. Politics uses the legitimacy effect of law described above in battles of political opinion as an argumentative pattern. Potentially, this can also lead to the use of law as an instrument. Sometimes political decisions and political claims are declared to be identical in their content to alleged legal claims. Then political content forms the basis for the interpretation of law in order to develop arguments and reasoning as can be seen, for example, in the case of the German basic law (*Grundgesetz*) and related judgments of the Federal Constitutional Court (*Bundesverfassungsgericht*) (2016). In particular, political views have a great impact on legal interpretation in the field of constitutional law. For instance, theories on fundamental rights often serve as a vehicle for political beliefs. In the light of different theories, fundamental rights are seen differently and in accordance with political viewpoints. Fundamental rights are then further interpreted as democratic, social or liberal rights. As a consequence, the particular content of specific rights can vary.

The relationship between politics and law is highly relevant in constitutional law. This follows from the political function of many constitutional bodies. Constitutional law, for example, covers areas such as foreign policy where legal control is limited. At the same time, political control depends on constitutional conditions which, in general, favour political freedom and the ability to act politically. Political decisions of the executive branch, therefore, can only be judicially restrained to a limited extent. Despite the absence of clear-cut legal rules, political approval or rejection is, of course, still possible. In this sense, the law cannot answer every day-to-day question of political behaviour.

At the constitutional level, some standards reflect the relationship between law and politics with regard to legitimacy considerations as mentioned above. Several legal norms of the German basic law, for example, contain so-called ‘policy objectives of the state’ (*Staatszielbestimmungen*) to guarantee principles that define county-specific political arrangements as a social state or to ensure environmental protection (Robbers 2017, paragraphs 143–72). These policy objectives oblige political actors to achieve them with the help of political and legal instruments. At the same time, however, they are also instruments to provide legitimacy for the political decision-making process itself as this is done in accordance with existing constitutional norms. They provide a pattern of justification for decisions taken

within the overall aim and purpose of a given constitutional frame.

In addition, the relationship between politics and law depends on the precise context at the constitutional level. In other words, there is no absolute subsidiarity from law to policy or *vice versa*; it rather varies according to the particular situation. Especially at the constitutional level an approach which strictly differentiates between law and politics cannot be upheld: law is always influenced by politics, and politics is always influenced by law.

Conclusion

Instead of absolute subsidiarity from law to policy or *vice versa*, there is considerable variation depending on the particular problem constellation. At the level of constitutional law, an approach which aims for a strict separation of law and politics is not convincing. Rather, there is a fairly consistent relationship of mutual interaction between both systems that cannot be qualified as a one-way street. Furthermore, the dynamic of this interplay is dependent on the social context. In legal terms, the subject-matter of regulation and the degree of detail with which a legal norm is expressed will have a major influence on the relationship between law and politics.

Therefore, law is never fully de-politicised. The use of legal instruments is often a political decision. The EU's early warning system shows this quite well. No doubt, the control of the exercise of competence on the basis of the principle of subsidiarity as set out in Article 5 (3) TEU increases political debate. The instruments of the 'yellow card' and 'orange card' facilitate and intensify political deliberations within representative fora. The involvement of national parliaments is done by procedurals rules, yet these do more than just guide the political discourse. They also create the very possibility of finding political solutions instead of legal ones. In sum, the principle of subsidiarity reminds us of the fact that law is not a hermetically sealed system cut off from society, but that it is always linked to other systems such as politics.

References

Chalmers, D., Davies, G. and G. Monti (2014). *European Union Law*. 3rd edition. Cambridge: Cambridge University Press.

Elster, J. (1993). 'Introduction'. In Elster, J. and R. Slagstad (eds) *Constitutionalism and Democracy*, 1–17. Cambridge: Cambridge University Press.

Federal Constitutional Court (2016). Judgment of the Second Senate of 03 May, 2 BvE 4/14 – paras. 1–139. Available at: http://www.bverfg.de/e/es20160503_2bve000414en.html

Geiger, R. (2015). 'Article 5 TEU'. In Geiger, R., Khan, D.-E. and M. Kotzur (eds) *European Union Treaties.* Munich: C. H. Beck.

Jackson, J. (2002). 'Sovereignty, Subsidiarity, and Separation of Powers: The High-Wire Balancing Act of Globalization'. In Kennedy, D. and J. Southwick (eds) *The Political Economy of International Trade Law: Essays in Honor of Rubert E. Hudec,* 13–31. Cambridge: Cambridge University Press.

Kelsen, H. (1967). *Pure Theory of Law*. Berkeley: University of California Press.

Luhmann, N. (2017). *Einführung in die Systemtheorie*. Heidelberg: Carl-Auer Verlag.

Montesquieu, C. de Secondat (1977). *'The Spirit of Laws'.* In Carrithers, D. W. (ed.) *Compendium of the First English Edition,* Berkeley and London: University of California Press.

Popelier, P. and W. Vandenbruwaene (2011). 'The Subsidiarity Mechanism as a Tool for Inter-level Dialogue in Belgium: On "Regional Blindness" and Cooperative Flaws'. *European Constitutional Law Review* 7: 204–28.

Robbers, G. (2017). *An Introduction to German Law*. 6th edition. Baden-Baden: Nomos.

Schneider, F. and A. Wagner (2012). 'Subsidiarity, Federalism, and Direct Democracy as Basic Elements of a Federal European Constitution: Some Ideas Using Constitutional Economics'. In Mudambi, R., Navarra, P. and G. Sobbrio (eds) *Rules and Reason: Perspectives on Constitutional Political Economy,* 289–311. Cambridge: Cambridge University Press.

Schütze, R. (2016). *European Constitutional Law,* 2nd edition. Cambridge: Cambridge University Press.

Schwarze, J. (1992). *European Administrative Law*. London: Sweet and Maxwell.

About the author:

Thilo Marauhn is Professor of Public and International Law at the Justus Liebig University, Giessen, and Head of the Research Group on Public International Law at the Peace Research Institute Frankfurt.

Daniel Mengeler is a Research Assistant in the Department of Public and International Law at the Justus Liebig University, Giessen.