PART FOUR: CONCLUSION

Chapter 25: Federalism, Subsidiarity, Proportionality and Sovereignty

Meaning of Federalism

25-1 In the draft Treaty on European Union, submitted for political approval, the word "federal" appeared in the first Article. It was removed before the Treaty was signed; but, as the Treaty was not changed at that stage in such a way as to remove all provisions tending towards federalism, the question remained, how far the new European Union was in law, even if not in name, a federal entity.

25-2 Since a federal state is one in which the constitution apportions sovereign powers to the central government and the provincial governments respectively, the European Union appears at first sight to have a federal character. The principle of subsidiarity[1] governs the general scheme for the apportionment of powers, while individual provisions of the Treaties and of secondary legislation apportion specific powers to the "central government", leaving the residual powers to the Member States.[2]

25-3 However, there are two objections to the acceptance of this concept. The first is that the European Union is not itself a "state". The second is that it is not sovereign powers which are apportioned under the European Union's constitution.

25-4 To be a state a polity may be expected to possess certain characteristics. Although this is a matter of legal form rather than of political substance, the European Union, unlike the European Community, does not have legal personality.[3] Again, although this is ultimately less important in practice than in theory, the European Union does not have a Head of State or Head of Government: the Presidency of the Council, influential though it is, does not confer this status.[4] More substantially, there is not a European Union government empowered to take independent action in international affairs. Nor does the European Union possess armed forces. Nor does it have powers of taxation. Nor does it have a single currency for the whole of its territory; still less, a single economic policy. Some federal states have more than one official language; the European Union has eleven. Certainly, the European Union has extensive powers, both in domestic legislation and in external trade relations; and it has a common citizenship and far-reaching powers in promoting cooperation among the Member States. But it falls some way short of being a state itself.

25-5 As to the powers which are apportioned to the central government and the Member States respectively, it is arguable that these are not sovereign powers in the strict sense of the term. They are more in the nature of shared or pooled powers. There is an important constitutional difference between the sharing or pooling and the transfer or cession of sovereign powers. There is also a difference between the sharing of limited or specific powers and the transfer of sovereign and ultimate powers. There is a further difference between the way in which the sharing or transfer of national sovereignty is treated by the laws of each of the respective Member States.[5]

Subsidiarity

25-6 In a federal state, much depends on the superiority of the central government to the government of the constituent states; whether, in fact, the activities of the constituent states are subordinate or subsidiary to those of the central government. The very fact that a constitution includes provisions on subsidiarity suggests that the federal concept is present.[6] The constitution of the European Union includes provisions on subsidiarity. However, before assuming that they necessarily point to the federal nature of the European Union, they need to be examined in some detail. Previous chapters have referred to subsidiarity in the context of the Treaties' respective objectives; the present chapter considers the substantive provisions themselves.

25-7 Three general rules govern the principle of subsidiarity. The first is that the Community must act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein.[7] The second is that, in areas which do not fall within its exclusive competence, the Community takes action, in accordance with the principle of subsidiarity, only 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.[8] The third is that any action by the Community must not go beyond what is necessary to achieve the objectives of the Treaty.[9] The first and third rules, on *vires* and proportionality respectively, are distinguishable from, but closely connected with, the principle of subsidiarity, as set out in the second rule. As already noted, the first and third rules are the subject of some case-law.[10]

25-8 Subsidiarity is not an issue in areas which fall within the exclusive competence of the Community. These areas fall into two broad categories. One category comprises areas which are assigned under the Treaties exclusively to the Community: they include the common customs policy[11] and certain aspects of international trade.[12] The other category comprises areas in which "common rules" apply to the areas in question.[13] This means that the areas concerned are covered by either primary or secondary legislation which, either expressly or by implication, gives the Community the appropriate powers in relation to non-member states and international organisations.

25-9 In a sense, the inclusion in the second rule of the words, "in accordance with the principle of subsidiarity", is superfluous, since the words which follow are a definition of subsidiarity. As to the words themselves, these tilt the scales heavily in favour of the Community since, in an increasingly international world, there are ever fewer issues more satisfactorily dealt with over a limited geographical territory than over a larger, even continental, territory. Moreover, there are some types of Community action which must necessarily be beyond the powers of individual Member States: the harmonisation of laws is an example. For example, given that the Council has power under the Treaty to adopt minimum requirements, through harmonisation, to achieving the objective of raising the level of health and safety protection of workers,

> ... once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonise the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action ... [14]

It is true that harmonisation itself in given fields must be justified in turn; but this is not in practice

unduly difficult. The Community has only to show that there are differences among the national laws in those fields and that those differences do (or, as most harmonisation directives tend to say, "may") create barriers to trade. Nevertheless, following the introduction of the principle of subsidiarity in 1993, the authorities clearly felt that some clarification of the scope and implications of the principle was required. New rules were accordingly adopted in 1999 under a Protocol in the Treaty amending the Treaty on European Union.[15]

25-10 According to the preamble to the Protocol on the application of the principles of subsidiarity and proportionality, the purpose of the Protocol is to define more precisely the principles of subsidiarity and proportionality enshrined in the Treaty establishing the European Community and to ensure their strict observance and consistent implementation by all institutions. To this end, the Protocol prescribes the following thirteen rules of interpretation.[16]

25-11 First, in exercising the powers conferred on it, each institution must ensure that the principle of subsidiarity is complied with and must also ensure compliance with the principle of proportionality, according to which any action by the Community must not go beyond what is necessary to achieve the objectives of the Treaty. This provision is technically superfluous, since it is contained already in the text already quoted. The only difference is that there is a specific reference to the obligations of the institutions, which are in any case bound by the terms of the text in question.

25-12 Second, the application of the principles of subsidiarity and proportionality must respect the general provisions and the objectives of the Treaty, particularly as regards the maintaining in full of the *acquis communautaire*[17] and the institutional balance; it must not affect the principles developed by the Court of Justice regarding the relationship between national and Community law; and it must take into account the requirement of the Treaty on European Union, under which the Union must "provide itself with the means necessary to attain its objectives and carry through its policies".[18] Here, too, it is questionable whether the rule adds anything to the existing law.

25-13 Third, the principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice. The criteria referred to in the main rule on subsidiarity relate to areas for which the Community does not have exclusive competence. The principle of subsidiarity provides a guide as to how those powers are to be exercised at the Community level. Subsidiarity is a dynamic concept and must be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified. The first two sentences here are self-evident; the rest adds little if anything to the law or its interpretation.

25-14 Fourth, for any proposed Community legislation, the reasons on which it is based must be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators. This is a more substantial provision and must be read in conjunction with the existing rules on stating the reasons for legislation.[19] In practice, it does not appear to be unduly onerous.

25-15 Fifth, for Community action to be justified, both aspects of the subsidiarity principle must be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community. The following guidelines should be used in examining whether the above-mentioned condition is fulfilled:

– the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;

– actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;

– action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

The first and second of these "guidelines" are useful; the third adds little to the existing legal text. How far the guidelines, to the extent that they gloss the language of the basis rule, are justiciable may be questioned, since they refer to matters of policy rather than of law.

> Judicial review of the exercise of [the institutions'] discretion must therefore be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion.[20]

25-16 Sixth, the form of Community action must be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community must legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Directives, while binding upon each Member State to which they are addressed as to the result to be achieved, leave to the national authorities the choice of form and methods. Simplicity in legislation and legislative restraint are certainly desirable ends but are not necessarily a concomitant of subsidiarity. As to the preference for directives over regulations, the operative words here are "other things being equal": there are many fields, such as food safety, for which regulations may well be more appropriate. tives.

25-17 Seventh, regarding the nature and the extent of Community action, Community measures must leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care must be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures must provide Member States with alternative ways to achieve the objectives of the measures. These are admirable precepts; but how far they can be relied on to question the legality of a measure is open to doubt.

25-18 Eighth, where the application of the principle of subsidiarity leads to no action being taken by the Community, Member States are required in their action to comply with the general rules laid down

in the Treaty, by taking all appropriate measures to ensure fulfilment of their obligations under the Treaty and by abstaining from any measure which could jeopardise the attainment of the objectives of the Treaty. This rule is superfluous: the rules laid down in the Treaty and referred to here apply whether or not the question of subsidiarity has arisen.[21]

25-19 Ninth, without prejudice to its right of initiative, the Commission must

- except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever appropriate, publish consultation documents;

- justify the relevance of its proposals with regard to the principle of subsidiarity and, whenever necessary, provide in the explanatory memorandum accompanying a proposal details in this respect. and an explanation of the financing of Community action in whole or in part from the Community budget;

- take duly into account the need for any burden, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, to be minimised and proportionate to the objective to be achieved;

- submit an annual report to the European Council, the European Parliament and the Council on the application of the provisions of the Treaty on subsidiarity and also send the annual report to the Committee of the Regions and to the Economic and Social Committee.

25-20 Tenth, the European Council must take account of the Commission report referred to above in the course of its report on the progress achieved by the Union which it is required to submit to the European Parliament in accordance with the Treaty on European Union.[22]

25-21 Eleventh, while fully observing the procedures applicable, the European Parliament and the Council must, as an integral part of the overall examination of Commission proposals, consider their consistency with the rule on subsidiarity. This concerns the original Commission proposal as well as amendments which the European Parliament and the Council envisage making to the proposal.

25-22 Twelfth, in the course of the cooperation and co-decision procedures, the European Parliament must be informed of the Council's position on the application of the rule on subsidiarity, by way of a statement of the reasons which led the Council to adopt its common position; and the Council must inform the European Parliament of the reasons on the basis of which all or part of a Commission proposal is deemed to be inconsistent with the rule on subsidiarity.
25-23 Last, compliance with the principle of subsidiarity must be reviewed in accordance with the rules laid down by the Treaty.[23]

25-24 In summary, it may be said that the thirteen rules, principles or guidelines, applying to the Treaty provisions on subsidiarity, are partly superfluous, repeating obligations already laid down by the Treaty, and partly a useful set of guidelines, which may or may not have legal force. Whether they have legal force or are merely administrative or policy instructions depends on any decisions reached by the Court of Justice. At the time of writing, the Court has not given judgment in any case

based on the 1999 rules. Cases on subsidiarity before 1999 were few and have to be regarded in the light of the later rules.

Proportionality

25-25 Subsidiarity and proportionality are closely linked. As the Court of Justice has said, in a case which followed the formal introduction of the subsidiarity provisions in 1993, but antedated the subsidiarity Protocol of 1999, "a measure will be proportionate only if it is consistent with the principle of subsidiarity".[24] Proportionality had already been explained by the Court, which had recognised the principle long before its introduction as primary legislation in 1993.

> It is settled case-law that, in order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it. Furthermore, as the Court has already stated, if a measure is patently unsuited to the objective which the competent institution seeks to pursue, this may affect its legality.[25]

25-26 It is one thing for the principle of proportionality to be recognised, but quite another for it to be successfully invoked in litigation. The majority of the many cases in which the principle has been pleaded have failed. In some cases, this has been strictly on the merits; in some, it has been due to the presence of other factors or the success of other pleas. Thus, a case in which a breach of proportionality is claimed may be decided on the closely associated claim that there has been discrimination in the application of the contested measure. In two important cases, the proportionality plea has succeeded.[26] One concerned the disproportionate character of a penalty imposed by national authorities for breach of a Commission Regulation. The other involved the annulment of a Commission Regulation because it went beyond what was necessary to achieve the legislative object. Important as these cases are from a constitutional point of view, they have little bearing on the federal or non-federal nature of the European Union's constitution. Cases which arise in the future may provide some such indication; but they will almost certainly involve mixed issues of proportionality and subsidiarity.

Sovereignty

25-27 This chapter began with a definition of federalism, based on the apportionment of sovereign powers. Sovereignty itself therefore has a bearing on the question of federalism. It may be defined as the possession of ultimate legal power in any given territory. If the territory is subject to fully democratic government, it is reasonable to say that sovereignty lies with the people. This, however, is a political, rather than a legal, statement. In legal and constitutional terms, sovereignty is usually deemed to reside in one or more institutions; and, in a democratic system, these institutions are subject to election by the people or at least to indirect control by the electorate.[27]

25-28 Discussion of the extent to which Community Law involves the cession of sovereign powers from the Member States to the European Communities is bound to be sterile, since it is national law and not Community Law which determines the matter. Community Law owes its validity to the

national laws which confer powers on the Institutions. The manner in which these powers are conferred varies from one Member State to another according to the constitutional rules in the Member States concerned.[28] If a Member State's constitution provides that powers may be ceded to an international body and that the cession is irrevocable, it may fairly be argued that sovereignty has been transferred, within the limits of the specific powers granted to the institutions, from the Member State to the European Communities. Whether this has happened in any Member State is a question for experts in the constitutional laws of each of the Member States of the European Union and goes far beyond the scope of this book.

25-29 Nevertheless, the point may be illustrated, without any claim that it can be conclusively proved, from the circumstances in which the powers have been conferred under the constitutional law of the United Kingdom. The sovereign body in the United Kingdom is Parliament[29]; and it is Parliament which has ultimate responsibility for the laws under which the European Communities' primary and secondary legislation and case-law are recognised by the courts and other authorities in the United Kingdom.[30] The laws are based on statute; and, since Parliament cannot bind itself, the laws can at any time be repealed by statute. Constitutionally, no sovereignty has been ceded. Politically, there may be constraints on the termination of the powers conferred on the institutions of the European Union; constitutionally, there are no such constraints.

25-30 Termination of all, or of any fundamental, powers conferred on the Institutions of the European Union would, under international law, constitute a material breach of the Treaties concerned.[31] Here again, it would be a matter for political decision, rather than for constitutional law to determine, whether the political and legal price for committing a material breach of a Treaty was worth paying.

25-31 International law, rather than constitutional law, governs the conditions and consequences of repudiating a Treaty[32] or of claiming the termination of the Treaty on the basis of the principle of *rebus sic stantibus*.[33]

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1. Article 5 (formerly 3b) and Protocol 30, EC Treaty; cf, 12th Recital to the EU Treaty.

2. An example from trade mark law illustrates the point. Council Directive EEC/104/89 places the law on registered trade marks squarely within Community Law, but leaves the law on unregistered trade marks to the Member States: see the 3rd Recital to the Directive.

3. See paragraphs 1-14 and 24-6 above.

4. See paragraphs 5-5 and 17-4 above. The media sometimes refer to the President of the Commission as the President of the European Union. Yhis entirely without foundation.

5. See paragraph 25-27 below.

6. This point was made by the President of the Commission, Mr Jacques Delors, at the meeting of the European Council in Birmingham on 16 October 1992. Yet most commentators thought that the subsidiary provisions were a kind of protection against federal government.

7. Article 5 (formerly 3b), first paragraph, EC Treaty.

8. Ibid, second paragraph, EC Treaty.

9. Ibid, third paragraph, EC Treaty.

10. See paragraphs 19-16 and 19-17 above.

11. Articles 23-27 (formerly 9, 10, 12, 28 and 29), EC Treaty.

12. For example, under Article 133 (formerly 113), EC Treaty.

13. See, in particular, Case 22/70, *Commission v Council* (the *ERTA* case); and Opinion 1/94 (the *World Trade Organisation* case).

14. Case C-84/94, *United Kingdom v Council*.

15. Under the renumbering system incorporated in the Treaty amending the Treaty on European Union, this Protocol was deemed to be Protocol 20 to the EC Treaty.

16. The thirteen rules correspond to the thirteen Articles of the Protocol.

17. See paragraph 4-22 above.

18. Article 6(4) (formerly 3c(4)), EU Treaty. See paragraph 4-23 above.

19. Article 253 (formerly 190), EC Treaty. See paragraphs 21-24ff.

20. Case C-84/94, *United Kingdom v Council*.

21. Article 10 (formerly 5), EC Treaty.

22. Article 4 (formerly D), third paragraph, EU Treaty.

23. Foe example, under Article 212 (formerly 156), EC Treaty.

24. Case C-84/94, *United Kingdom v Council*.

25. Case 279/84, *Walter Rau Lebensmittelwerke v Commission*.

26. Case 122/78*, Buitoni v Fonds d'Orientation et de Regularisation des marches Agricoles;* and Case 114/76, *Bela-Muhle Josef Bergmann KG v Grows-Farm GmbH*.

27. Judicial institutions are seldom based on election, though senior judicial appointments may, as in the United States, be subject to scrutiny by an elected body.

28. A case heard by the German Constitutional Court is of general interest: *Brunner, in re the Treaty on European Union*, reported in English in [1994] 1 CMLR 57. The Court described the European Union as an association of states, keeping their national identity, rather than a federal state, having its own national identity. (The Court noted that the European Union was not an independent legal person.)

29. Or, to be strictly correct, "the Queen in Parliament".

30. See the European Communities Act, 1972, as amended.

31. Article 60, Vienna Convention on the Law of Treaties.

32. Renunciation is not provided for within the Treaties: see Article 51 (formerly Q), EU Treaty.

33. As in the *Fisheries Jurisdiction Case*, International Court of Justice Cases, 1970 p3.