The British Balance of Competences Review, launched in 2012, sparked a lively political and academic debate about the core competences of the European Union. Today, the Balance of Competences Review is no longer just a debate about the EU's power, but has stimulated much broader issues about the position of the Member States in the European Union. How far does the range of their power reach? This is the central theme of this book.

What should the relationship between the Member States and the European Union look like from a liberal perspective? Is the EU a union of liberal states or a liberal union of states? Or both? Readers are invited to sharpen up their own ideas about the position of Member States in relation to European institutions.

ISBN/EAN: 978-90-73896-72-7

BALANCING COMPETENCES

BALANCING COMPETENCES

MEMBER STATES IN BRUSSELS AND BRUSSELS IN THE MEMBER STATES

Charlotte Lockefeer-Maas

Editor

Balancing competences

Member States in Brussels and Brussels in the Member States

Charlotte Lockefeer-Maas
Editor

Published by the European Liberal Forum asbl with the support of Prof.mr. B.M. TeldersStichting (TeldersFoundation, Dutch liberal think tank), VšĮ 'Atvira visuomenė ir jos draugai' (Open Society and its Friends, Lithuanian liberal think tank), and Liberalismi Akadeemia (Academy of Liberalism, Estonian liberal think tank). Co-funded by the European Parliament.
Neither the European Parliament nor the European Liberal Forum asbl are responsible for the content of this publication, or for any use that may be made of it. The views expressed herein are those of the author(s) alone. These views do not necessarily reflect those of the European Parliament and/or the European Liberal Forum asbl.

Copyright © 2015 European Liberal Forum asbl, Brussels, Belgium
This publication may only be reproduced, stored or transmitted, in any form or by any means, with the prior permission in writing of the publisher. Enquiries concerning reproduction outside these terms should be sent to the European Liberal Forum.

Cover illustration: Juggler by Katrin Leo Pako from the Noun Project.

Further information and distribution:
Prof.mr. B.M. TeldersStichting
Mauritskade 21
2514 HD Den Haag
The Netherlands
0031 (0)70 363 19 48
www.teldersstichting.nl
info@teldersstichting.nl

Printed in the Netherlands by Oranje/Van Loon B.V. Den Haag

ISBN/EAN: 978-90-73896-72-7
Keywords: European Union, liberalism, balance, competences, subsidiarity

Contents

Preface III
Felicita Medved

1. **Introduction** 1
   Charlotte Lockefeer-Maas

The foundation of the European Union

2. **Competences review in the European Union. Is there a liberal solution?** 5
   Krisztina Arató

3. **Everything flows and nothing abides. Or: how to prevent the subsidiarity debate from obscuring our view about what really matters** 13
   Jieskje Hollander

4. **Subsidiarity. An ambivalent principle** 23
   Robert Nef

Governance and policy

5. **The virtues and vices of multi-level governance from a liberal perspective** 39
   Caspar van den Berg

6. **Do we need EU regulation to open up trade in Europe? Mutual recognition versus harmonisation** 55
   Pieter Cleppe

Reforms

7. **Evidence from the British Balance of Competences Review** 71
   Michael Emerson

8. **How to shape a more effective European Union** 85
   Derk Jan Eppink

9. **Concluding remarks** 93
   Charlotte Lockefeer-Maas

About the authors 97

About the organisations 99

Preface

Felicita Medved

With a mandate to promote liberalism, liberal ideas and policies and make a contribution to the democratic development of the European public sphere, the European Liberal Forum (ELF) creates space for liberals to exchange knowledge, to debate and reflect and, in so doing, to increase our capacity to take action at European, national, regional and local levels. Of late, much energy amongst members of our foundation has been focused on the future of Europe.

The publication you are about to read discusses the sensitive field of 'Balancing Competences'. The eloquent subtitle with its focus on 'Member States in Brussels and Brussels in the Member States' refers to the ongoing theoretical, political and functional challenges facing Member States in the European Union (EU) and the future distribution of powers between these states and the EU.

The arguments presented in this book illustrate these problems by examining subsidiarity, a principle which can be understood and carried out in various different ways. Complementing the principles of conferral and of proportionality, subsidiarity is fundamental to the functioning of the EU. But Member States have different expectations of the principle of subsidiarity, driven by the amount of power they each possess and by the various national interests they are trying to promote.

Sparked by the recent so-called subsidiarity reviews conducted by the United Kingdom and Dutch governments, which spelled out the policy areas in which they feel the EU should be less involved or not involved at all, the authors of this book offer a d ebate o n t he c onceptual a nd s ubstantive d imensions o f s ubsidiarity a nd proportionality and provide some possible reforms in relation to the problems of implementation.

The i ssue o f subsidiarity strikes a chord w ith m any p eople a cross Europe a nd national subsidiarity reviews are a response to the growing euroscepticism at home. But even those who, on all sides of the political spectrum, are sceptical or opposed to radical changes to the EU - either for 'more' or 'less Brussels' - accept that there is a need to change in future. Indeed, it appears that no one is happy with the status quo. We, the liberals, remain committed to the EU and its core values, and believe that we should continue to share the same principles. Any engagement with, or structural changes to, the institutions of the EU and the Member States alike should not endanger the fundamentals of subsidiarity, proportionality and solidarity, if we are to deliver a more democratic Europe which is close to its citizens. In my understanding, balancing competences would mean the implementation of these key principles understood primarily on functional and consequently only in a territorial manner.

Enjoy your read!

Felicita Medved
President of the European Liberal Forum, asbl

Introduction

Charlotte Lockefeer-Maas

In 2012, the United Kingdom launched a Balance of Competences Review asking its ministries to make an inventory of the distribution of power between the UK and the EU in all the policy areas over which Brussels exerted influence. The British Balance of Competences Review sparked what would become a lively political and academic debate about the core competences of the European Union. In 2013, the Dutch government published a report which compared European policy to the principles of subsidiarity and proportionality; what followed was a list of examples of legislation that should either remain within the scope of the powers of Member States, or be recalled. In the United Kingdom, this debate continues with the British government wanting to renegotiate its position within the EU and for the British people to vote in a referendum – to be expected in 2017 – about their membership of the EU.

It is clear that the Balance of Competences Review is no longer just a debate about the EU's power, but has stimulated much broader issues about the position of the Member States in the European Union. How far does the range of their power reach? This is the central theme of this book, a book which the European Liberal Forum hopes will make a real thought-provoking contribution to the current debate about the distribution of powers between Member States and the Union.

If we want to examine the position of the Member States vis-à-vis Brussels in depth, we first need to address the more fundamental questions about the existence of the EU and the way it is structured. This is done in the first section called: *The Foundation of the European Union*. In the three chapters written by Krisztina Arató, Jieskje Hollander and Robert Nef, questions are addressed about the nature of the union, the reasons for European integration and the principle of subsidiarity which is the theoretical root of the distribution of powers within the EU. Why are we - as European States - actually together? What exactly is the principle of subsidiarity? These are the questions we cannot avoid if we want to know what policies can be made in Brussels or belong to the Member States.

In the second section: *Governance and policy* we then look at the method of governance and policy within the EU. The relationship between Brussels and the Member States is, by no means, a simple relationship between two bodies of the democratic public administration. The traditional image of a centralised State distributing powers clearly to other levels of government seems, in any case not to apply to the relationship between Member States and the European institutions. The theory of *multi-level governance*, which states that powers are diffusely distributed based on territorial and functional factors, seems more applicable.

Caspar van den Berg asks what impact administrative flexibility will have on the liberal norms underpinning public administration, such as democracy, legitimacy and transparency. In the next article, Pieter Cleppe weighs up the pros and cons of the two different types of regulation that Brussels can use: mutual recognition of the different national kinds of legislation versus harmonisation of legislation so the same rules apply to all Member States. The particular type of regulation that is selected by Brussels has, of course, an effect on the policy freedom of the Member States.

Finally, in the third section, *Reforms*, we focus on ideas about reformation. First, Michael Emerson analyses and criticises the British Balance of Competences Review, explaining what the project covers, what its outcome was and the conclusions that can be drawn from it for other Member States. Finally Derk Jan Eppink presents his ideas for a reform of the EU, but not after arguing where the enlargement of the European Union went wrong.

The authors contributing to this book alternately adopt a contemplative or a normative position. This means that we not only provide an analysis of the position of the Member States in relation to Brussels, but we also ask what this relationship should look like from a liberal perspective. Readers of this book, therefore, are not simply offered informative and thought-provoking ideas, but are also invited to sharpen up their own ideas about the position of Member States in relation to European institutions from a liberal point of view.

The foundation of the European Union

Competences review in the European Union. Is there a liberal solution?

Krisztina Arató

Introduction

The European Union is active in a lot of policy areas. Most probably there is an actual number. However, it is very difficult to count. Even if we include the policy areas listed on the EU website, we still find quite a few sub-categories under every policy. The Treaty of Lisbon defines the categories of EU policies (exclusive, shared and supporting competences) but it is challenging to identify all the ones listed in the treaty.

Recently a debate was initiated by the UK government to give the British electorate a clear idea about what their state is responsible for, and what areas lie within the scope of the European Union. The project title: 'Review of the Balance of Competences between the United Kingdom and the European Union' suggests that there is, or there should be, a balance between the two centres of power, the UK and the EU; in more general terms, the Member States and the European Union.[1] The project was planned to give a comprehensive overview of 32 policy areas and was to be completed by the end of 2014.

The Dutch government, as a response to a provision in the coalition agreement, set out the results of its review of EU competences on 21 June 2013[2] under the slogan 'European where necessary, national where possible'. In this review it claimed that the EU did not respect the principles of subsidiarity and proportionality properly when it exercised these competences and it published a list of 54 points which required correction.[3]

Although the EU level policy changes to date have been in the direction of growth, recent review processes suggested that the EU had perhaps outgrown the 'necessary' scale; maybe there were already too many policy areas being governed at EU level. Should these be reviewed and, perhaps, their governance returned to Member States?

This paper examines whether there is a liberal answer to the question 'who

---

1 'Review of the Balance of Competences', https://www.gov.uk/review-of-the-balance-of-competences (Accessed 10 April 2015)

2 'Testing European legislation for subsidiarity and proportionality – Dutch list of points for action. Government of the Netherlands', http://www.government.nl/documents-and-publications/notes/2013/06/21/testing-european-legislation-for-subsidiarity-and-proportionality-dutch-list-of-points-for-action.html (Accessed 10 April 2015)

3 Michael Emerson, *'The Dutch wish-list for a lighter regulatory touch from the EU'*, *CEPS Commentary*. 1 July 2013. http://www.ceps.eu/system/files/Emerson%20Commentary%20Dutch%20wishlist_table.pdf (Accessed 10 April 2015).

should do what' and if there is, how this could be formulated. In order to do this, the paper is divided into three sections. In the first I examine whether a list of 'necessary' EU policies can be identified on the basis of the history of European integration, or rather, on the basis of the history of EU policies. Second, I look at whether social sciences might help: can political science, economics or law suggest a framework, provide a kind of a recipe to find a 'balance of competences'? In the third section I invite integration theories, especially liberal integration theories, to help in the search for an 'ideal division' of policies between the EU and Member States. In the conclusions I try to summarise my findings and also widen the scope of analysis by pointing out the questions which must be answered before we can begin to answer the question posed in the title.

Historical approach

The prime objective of the European project at its inception was clearly political (safeguarding peace on the continent, as well as strengthening cooperation in Western Europe in order to survive the Cold War). Based on the ideas of Jean Monnet, it would be achieved by integrating more and more policy areas. This meant a constant growth of common policies that has been characteristic of the European integration process since the Schuman speech of 1950. Moreover, the integration philosophy that provided a basis for the EU, neofunctionalism, argued that there is an embedded feature of modern European integration, spillover, which makes policy shift from Member States towards the centre almost automatic.

Later, in the 1960s, De Gaulle and the 'empty chair' crisis questioned this approach (and proved that Member States were still strong and influential players). But what we have still witnessed, is a systematic growth of EC competences, even in times that we retrospectively call the times of 'eurosclerosis' (1970s).[4] The birth of the European Union in the Maastricht Treaty, and the treaty modifications that followed, brought about major new policies: the introduction of the Euro, employment policy, Common Foreign and Security Policy, Schengen and many others.

Can we identify the reasons for bringing the governance of such a vast number of competences to the EU level? According to the textbooks, so far we can see four major factors that have resulted in a policy shift from Member States to the EU.[5] *Economic Challenges* contributed greatly e.g. to the creation of the European Monetary System in 1979 (the effects of the collapse of the Bretton Woods system can clearly be identified as a prime driver to create a European version), and we can, of course, name here the creation of the Euro in the 1990s to acess the global

---

4 It was in the 1970s when regional policy, the European Monetary System (EMS), the first signs of European Community social and enviromental policy was born, etc.

5 See Tamás Kende and Tamás Szűcs (eds.), *Bevezetés az Európai Unió politikáiba,* Budapest, 2010. Naturally, the creation of all European policies, including the listed ones, are the result of more than one factors, but here only one is named in order to illustrate the category.

market more effectively. *Particular Member State interests* may also bring about new policies. The Common Agricultural policy was one of the prime interests of France, establishing industrial free trade (customs union) was important for (West) Germany. *Enlargements* also contributed to the list of policies growing longer: regional policy was promised to the UK when it complained about being a net contibutor during their long negotiation process and was geared up as a result of the Southern enlargement and extended at the Eastern enlargement. And finally, so-called 'outside' interests (business lobbying, environmental groups, trade unions and other NGOs) play a role, e.g. business interests were considered crucial to the creation of the Single Market.[6]

So in all the policy areas there is a story, or an interest (or more interests pointing to the same direction), a situation and a number of reasons why and when a particular aspect of policy ended up with its governance at European level. At the same time, history does not give us any guidance about an 'ideal' division of competences. It seems that there is a tendency for more and more policy areas to be governed by the EU but is this moving in a general direction towards an ideal status? Is that ideal status a federal structure? Or can or should we define the principle of subsidiarity that is the guiding principle of the British and the Dutch competences review from one policy to the next? Historical analysis does not help us to anwer these questions.

Normative approach (social sciences)

Social science theories include ones that do not take reality as a starting point, but instead try to formulate a particular structure which determines how certain polities, social activities, and norms *ought to* look like. These so-called normative theories are rather common in social sciences.

During Professor Jan M. Smits of Maastricht University's analysis of the problems of competences reviews, he called upon social sciences to suggest 'viable criteria (…) for the optimal distribution of competences among the EU and the member states'.[7] He examined how law, economics and political science approached the 'who does what' question, and he concluded that the normative approach of these social science areas was inadequate. He argues that social sciences should provide clearer guidelines as to how their basic principles should be applied in practice (just as Béla Balassa prescribed how economic integration should look like),[8] that social sciences should demonstrate how the policy fields

---

6 See the debate about the impact of business on the negotiations for the Single European Act in Andrew Moravcsik, 'Negotiating the Single European Act: National interests and conventional statecraft in the European Community', *International Organisation*, 1991, 45 (1), pp 19-56.

7 Jan M. Smits, *Who does what? On Cameron, Rutte and the optimal distribution of competences among the European Union and the Member States*, Maastricht European Private Law Institute. Working Paper No. 2013/16. 5, Maastricht, 2013.

8 Béla Balassa, *The Theory of Economic Integration*, Homewood, Illinois, 1961.

could be sufficiently distinguished and how the basic concepts like competences, government, governance, etc. should be interpreted. He calls for normative criteria for the optimal assignment of competences for the various policy fields to be identified, suggesting the following parameters as a methodological basis: the dimensions of competence, the factors relevant to the assignment of a competence, the techniques to balance these factors against each other, the goals of European integration in the policy field in question and the extent to which it is burdensome to change the existing division of competences (path dependence). According to Smits, the interaction between the parameters provides a flexible framework for the optimal distribution of EU competences.

However, in my view, the proposed project – that science should come up with an optimal solution – is highly questionable. First, the definition of 'policy' in the EU is rather problematic. There are a number of types of policies at community level, e.g. exclusive, shared and supporting competences, which were established in the Treaty of Lisbon.The question is: could the governance of a specific policy area, apart from the exclusive ones, be considered that of the EU? On the other hand, the level of discussion poses questions as well, which can be seen in the Dutch competences review list which addresses quite a few concrete pieces of EU legislation, but no policy areas.

Then, after potentially solving the problems of definition, the second question arises: what is an 'optimal distribution of competences'? Optimal for whom? From what perspective? Can social sciences define what optimum is in a political issue? And third, if there is a defineable optimum, would the political players find the proposed structure acceptable and/or applicable?

Liberal EU theories

So far little has been said about a potential liberal answer. If history and social sciences cannot answer the question, perhaps other answers exist. There are various liberal theories about the European integration process, the problem though is that the starting points of these theories are very different and so the answers they could potentially give to our basic question are also different, even though they belong to the same discipline. The differing starting points can easily be understood in the wording of the following question related to the nature of the EU: *is the EU a community of liberal states or a liberal community of states*?[9]

Andrew Moravcsik, a leading scholar in European studies and a major representative of Liberal Intergovernmentalist (LI) integration theory, argues that the European integration process has been dominated by Member State interests and actions. In this school of thought, based on the realist school of international relations theories, the European Union is a very special international organisation.

9 Frank Schimmelfennig, 'Liberal theory and European integration', in: Rebekka Friedman, Kevork Oskanian, Ramon Pacheco Pardo (eds.), *After Liberalism?, The Future of Liberalism in International Relations*, Basingstoke, Hampshire/New York, NY, 2013, pp. 321-343.

Moravcsik argues that decisions in the European Union are made following a three-staged process: first, governments express their preferences at the negotiations (that are developed within the state through the preference-formation of interest groups and bargaining among different political actors), second, international bargaining starts with usually hard negotiations as states try to represent their interests as vehemently as possible, and third, when compromise is reached. Institutions which are common to all Member States, and which may also help agreements to be reached, are there to delegate any further technicalities.[10]

This approach is clearly based on economic liberalism as the very idea of post-World War II European integration was created to support trade among Member States. Thus, according to the LI approach, the European Union is a *community of liberal states*. We can also add here that, in line with his general explanation of the EU's nature, Moravcsik is in disagreement with the widespread 'democracy deficit' arguments; surely if the EU is merely an international organisation of liberal democracies it does not have to meet the constitutional criteria of those states.[11]

However, there is clearly more to liberalism than merely the economic approach that LI theorists concentrate on. Moravcsik himself argues that, apart from commercial liberalism, ideational liberalism (concentrating on legitimate political institutions, values and identity) and republican liberalism (focusing on the nature of domestic representation) are also relevant, even in international relations.[12] According to Frank Schimmelfennig, it is perhaps more useful to understand the European Union not only as a community of liberal states but also as a liberal community of states. His argumentation suggests that there is more to the European Union then merely economic liberalism. Ideational liberalism can be seen in Article 2 of the European Union which shows that there are also common values at community level, not only economic interdependence: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

Also, segments of republican liberalism can be traced in the structure of European institutions: the very existence and the widening of the competences of the European Parliament shows that not only the values, but the structures, of liberal democracy have begun to be transferred on the supranational level. The

[10] Andrew Moravcsik, *The choice for Europe. Social purpose and state power from Messina to Maastricht*. Ithaca, New York, 1998.

[11] Andrew Moravcsik, 'In Defence of the „Democratic Deficit": Reassessing the Legitimacy of the European Union, *Journal of Common Market Studies*, 40(4), 2002, pp. 603-634.

[12] Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', *International Organization,* 51(4), 1997, pp. 513-553.

widespread support for the existence of a democracy deficit in the EU and the tendency to minimize it also supports this argument.

These two liberal approaches may give us a framework to decide who does what in the European Union and how competences should be distributed between them. But first we have to make a choice: do we understand liberalism in the case of the EU as Moravcsik does or as Schimmelfennig? If we go Moravcsik's way and take the road of economic liberalism, then the EU has gone probably too far as policies like education, employment and European social commitments do not fit the proposed framework. However, if we accept Scimmelfennig's model of a liberal community of (liberal) states, that includes ideational and republican liberalism as an addition to commercial liberalism, then the current state of the division of labour between the EU and Member States is adequate. Moreover, there is a way ahead for a further transfer of currently national competences to the European level that probably has to go hand in hand with the strengthening of the EU's political system in the direction of a federation. (It is usually dangerous to say this as the word 'federation' itself was a taboo for a long time.)

Conclusions

We have seen above that the answer to the question 'who should do what' in the European Union is far from being inevitable. After examining the issue from three different approaches we find that neither history (the history of European integration in general and the history of particular EU policies) nor normative social science theories (political science, law or economics) are useful in providing an answer to what is first and foremost a political question. Liberal theories are also Janus-faced: if we follow liberal intergovernmentalism which recognises the EU as a commercial venture and an international organisation, the EU has already assumed the governance of too many competences. If we understand the EU as a liberal community of states, the current division of labour between Member States and the EU is adequate and further transfers to the centre are acceptable.

However, if we are to provide a more specific answer to the question, we should dig deeper. The core of the question is the reason for the underpinning of European co-operation. Why are we together in the European Union? What is the aim of the European project today? It used to be quite clear in the 1950s: preventing war and supporting each other in the Cold War. But today? Do we want only to trade? Or do EU Member States constitute a community of values that distinguishes us from other parts of the world? Or do we want to be global players in economic and politics as well?

I believe that, apart from commercial co-operation, the European Union should be a stronger global player and a value community as well (I also strongly believe that it is one already). I think the European Union should be a *liberal community of liberal states,* which means that the values and structures of liberal democracy (which I understand to be a collective category of modern

democracies)[13] should be expressed and represented in both Member States and at community level. I think that the current division of labour between the EU and Member States reflects a stage in its development. The EU is moving away from simply being an international organisation and is taking steps towards becoming a state. As it exists now, there are tensions and mistakes. I think the EU 'pretends' to have policies that it does not really have the power to manage (e.g. social policy understood by average voters as the transfer of wealth from the rich to the poor has not been achieved at EU level and is very limited) and there are some actions which are limited by law but which are actually carried out in reality (during the crisis the European Central Bank took actions it did not really have the power to do). Corrections are, therefore, necessary. But I argue that competences already at EU level should be kept there and that the political and decision-making system should be transformed in a way to enable the EU to manage policies in a more appropriate way (especially the Eurozone).

But this is only a personal opinion. First we, the peoples and the Member States of the European Union have to agree upon the answer to the core question and it is only after this has been established that it is worth discussing the division of labour between EU institutions and the Member States.

13 Giovanni Sartori, *The theory of democracy revisited,* Chatham, N.J, 1987.

Everything flows and nothing abides. Or: how to prevent the subsidiarity debate from obscuring our view about what really matters

Jieskje Hollander[1]

Introduction

Currently, in various EU Member States, 'subsidiarity' lies at the heart of the political debate about European integration. Dating back to the 1970s, in EU contexts, the term has repeatedly cropped up in relation to taking measures, or finding ways, to counteract centralizing tendencies.[2] As early as 1971, when observing that the bureaucracy of the Commission was growing in both scope and depth, especially in the domain of the Common Agricultural Policy (CAP), Commissioner Ralf Dahrendorf remarked that: *'Ein europäisches Europa ist vielmehr auch ein differenziertes, buntes, vielfältiges Europa. Es ist ein Europa, in dem gemeinsam getan und gleichartig geregelt wird, was auf diese Weise besser, ja vielleicht nur auf diese Weise sinnvoll getan und geregelt werden kann. Der* Übergang *vom Ersten zum Zweiten Europa verlangt die Wendung vom Harmonisierungsdogma zum Subsidiaritätsprinzip.*[3]

Later, Jacques Delors and the Dutch Prime Minister Ruud Lubbers, when working towards the adoption of the Maastricht Treaty, repeatedly brought the principle of 'subsidiarity' to the fore and,[4] in the political and diplomatic process leading up to this treaty, it was used by the pro-camp as a formula for containing

[1] The author wants to thank Inge van der Leeuw for her research assistance and comments on earlier versions, without which this paper could not have materialised.

[2] The term is much older and initially developed within the idiom of the Roman Catholic Church. For the purpose of this paper, however, it suffices to point to the use and development of the expression in the EU context.

[3] Ralph Dahrendorf (pseudonym Wieland Europa), 'Ein neues Ziel für Europa', *Die Zeit,* 29 (3), 1971. For the English translation see: Ken Endo, 'Subsidiarity and its enemies. On a post-national constitutional principle of the European Union', Paper submitted to the Conference: "After the Global Crisis: What next for Regionalisation?" (University of Warwick, 16-18 September 1999), p. 12. Here, quoted from (with some minor changes) Michael Hodges (ed.), *European integration. Selected Readings*, Harmondsworth, 1972, p. 82.

[4] See Ken Endo, 'The principle of subsidiarity: from Johannes Althusius to Jacques Delors', *Hokkaido Law Review* 44(6), pp. 2064-1965, here, for instance, pp. 2053-2052 and W.T. Eijsbouts, 'Soevereiniteit en subsidiariteit', *Theoretische geschiedenis,* Amsterdam, 1991, pp. 479-491, p. 479. http://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/15558/1/44(6)_p652-553.pdf.

anxiety about the loss of national control or 'over-centralisation in Brussels'.[5]

In the Maastricht treaty, the principle of subsidiarity was officially adopted into the *acquis communautaire* and since then has gained a more prominent position with the introduction of every new treaty. After the Constitutional Treaty of 2005 was rejected, and the Lisbon treaty came into force in 2009, the term became more mainstream in public debate as well, though – interestingly, whereas it had initially been an instrument used by the *advocates* of European integration to soothe public concern, it was now predominantly used by outright eurosceptics to rally against 'interference from Brussels' and to call for a 'return of power' to the Member States.

In this context, the term came to the centre of political debate in the Netherlands when, in February 2013, following the 'Competences Review' debate which Prime Minister David Cameron had started in the UK, the Dutch Christian Democrats called for the return of power from Brussels and proposed a list of EU measures and directives that should be abandoned because they concerned tasks that better befitted the national level of decision making.[6] The measures and directives mentioned on this list and those on the list that the Dutch government eventually agreed upon, raised important questions.

Both contained statements on, in the eyes of many, rather trivial issues such as the distribution of milk and fruit in Dutch schools, and/or the regulation of the technical examination of cars. Although a clear political perspective on whether national or European authorities should set the rules and be primarily held responsible for such issues is absolutely defendable and even necessary, the mentioning of these matters in the Dutch 'review of competences', formally issued by the Dutch government, raised a number of eyebrows.

What was the value of a competences list such as this when the competences mentioned were of such minor importance compared to the (non-)discussions on the competence of the EU in areas like finance and economy or security and defence policies? Would a competences review at the level of subjects with such minor importance actually meet the call for a serious debate about how the Union and its Member States should relate to one another? What was really behind the call for a competences review that was, for some reason, not translated into the solution suggested in the political domain?

Understanding just what the recent political debate on subsidiarity in the Netherlands really means, how and why the political answer presented seems so inadequate, and, most importantly in the context of this book, what the debate tells (or should tell) liberals about the process of European integration, requires taking a step back. So, in this paper we examine the 'questions behind the

---

5 Ken Endo, 'Subsidiarity and its enemies. On a post-national constitutional principle of the European Union', p. 20.

6 Jeroen Visser and Joost de Vries, 'CDA breek discussie open: minder macht voor Brussel', 5 February 2013, see http://www.volkskrant.nl/dossier-europese-unie/cda-breekt-discussie-open-minder-macht-voor-brussel~a3388440/.

question.' Firstly, what is at the core of the complaints about 'Brussels governing by decree' which were followed by the call for a sharply-defined list of competences? Secondly, to what extent is it a concern or dissatisfaction that liberal politicians should take seriously? And, from a liberal political perspective, what does 'taking it seriously' actually imply?

This article argues from a liberal perspective to reveal the truly fundamental issues that lie hidden underneath the recent political desire in the Netherlands to draw up a detailed list of European and national competences; a precondition for furthering the case for a (social-) liberal EU.

The subsidiarity debate in the Netherlands: what is it really about?
One important pitfall when writing about 'subsidiarity' and the political debate regarding European competences (in which that principle is presented as a panacea for the shortcomings of European integration), is taking the term at face value.

Throughout the process of European integration, 'subsidiarity' has been used in various ways and with differing meanings. From the 1990s onwards, when the principle of subsidiarity was increasingly embraced by Eurosceptics, it got the 'keep your hands off of our national business' association that it is known for today. Earlier in the history of European integration, however, the leaders and advocates of this process, although vigilant for concerns about over-centralisation, had referred to it in a more 'EU-friendly' way when arguing in favour of moving towards a European Union or jointly taking on new tasks in a European context on a subsidiarity basis.

Thus, an ambiguous, centripetal versus centrifugal interpretation of the principle developed, supported and reinforced by the formulation of Article 5 (3) of the Treaty on European Union (TEU); an article which does not state clearly whether it is the EU or a Member State that has the right to decide what competence belongs to whom, and how to deal with differences of opinion on this matter.[7] Moreover, as was recently remarked in the public-intellectual debate on the cost/benefit ratio of the subsidiarity debate in the Dutch political domain, simply focusing on the subsidiarity principle as it is laid down in the TEU comes with the risk of accepting a blind spot. In response to the Dutch parliament's recent intention to sharpen its control of the subsidiarity principle whereas this principle *does not apply* to any highly (politically) relevant policy fields, such as monetary or customs affairs in which the Union is 'exclusively competent',[8] it was stated that: 'with this focus (…) [the Chamber] is only pressing for control of

---

7 The article states that 'the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States', but does not go into detail about who is competent to judge on if and how the 'objectives of the proposed action' can or cannot be achieved by the Member States.

8 The subsidiarity principle does apply to a restricted part of the EU internal market policy. It, however, does not apply to policy fields that are within the exclusive competence of the European Union.

the restricted part of the European internal market policies. The internal market, however, is hardly of a politically sensitive nature and control of the developments of the eurocrisis falls outside the view of the Chamber.'[9]

Bearing these notes and nuances on the meaning and function of the subsidiarity principle in mind, the question then arises as to what the discussion on subsidiarity in the Netherlands is really about? As the term itself seems to hide more than it reveals and does not apply to all the fields of European integration, the debate, its purpose, and the political motives that underpin the various contributions made to it, should not be accepted at face value. Close scrutiny of the context in which the political subsidiarity debate arose is required if we are to understand to what problem the subsidiarity principle, or its recent political manifestation 'the competence review', is presented as the solution.

Although the actors have diverse backgrounds[10] and making generalising statements on what is at stake in the political debate on subsidiarity should be prevented for just that reason, some general observations can be made from the public debate from which the political discussion on the competences review emerged. Having barely recovered from the public and political unrest that the referendum on the EU Constitutional Treaty (2005) had brought to the EU and the Netherlands in particular, the economic and financial destabilisation of the international markets and the EU Member States in 2008 and the following years brought new concerns. In their search for remedies, the Member States agreed on considerable shifts in competences from the national to the EU level, touching upon essential rights hitherto reserved for national parliaments.[11] These shifts came about under high political pressure and spurred public complaints about the leaders of the Member State governments moving too fast without paying attention to the democratic wants and needs of the people.[12] Decisions were presented, so it was complained, as *faits accomplis,* without the Dutch people having had a say in, or influence on, the process.[13] People seemed to experience a distinct loss of grip and influence on their (communal) lives as a result of ongoing European integration. 'Brussels', with its 'dictates' was increasingly blamed for hindering Dutch citizen's abilities to make their own choices in a national context.[14] In public intellectual circles, as a counter reaction, the legitimacy of

[9] Adriaan Schout, David Bokhorst and Jan Marinus Wiersma, 'Tweede Kamer is zelfgenoegzaam over Europa', *Het Financieele Dagblad,* 14 February 2015.

[10] Within the Dutch parliament they range from outspoken advocates of European integration (D66, for instance) to blunt sceptics of every new initiative for unifying Europe (Geert Wilders' PVV is a well-known example).

[11] The right to control the national budget, for instance; historically one of the strongest privileges of national parliaments.

[12] J. Hollander, *Constitutionalising Europe. Dutch reactions to an incoming tide,* Groningen, 2013, p. 277.

[13] Van Mierlo Stichting, *Europa: voorwaarde voor vrijheid*, Den Haag, 2014, pp. 26-27.

[14] The Dutch politician Geert Wilders is well-known for his repeated references to 'Brussels' dictates'.

various European institutions was questioned more and more fiercely and the nation-state, though this is an extreme example, was even qualified as the sole form that legitimate government should take.[15]

It was in this climate of growing public discontent that a change of tone could also be noticed in the Dutch political domain. More and more political parties modulated their pro-integration tone in political campaigns and public statements, and the Dutch parliament as a whole started a search for ways to improve the quality of parliamentary control of European decision making that still goes on today.[16] The call for a competences review which came out of the Dutch political arena in February 2013 seamlessly befitted this trend and must be understood as an attempt to answer the demand for a tighter grip to be taken on European affairs and for control at the level of national democracy to be regained.

Europe as a liberal condition for freedom

The observation that the current subsidiarity debate in the Dutch political domain has got a lot to do with a most fundamental matter, i.e. the condition of democratic influence, leaves liberals with an important task. It causes, or rather *should* cause liberals to reflect on how the process of European integration relates to their deepest motivation for supporting it. The fundamental democratic concerns behind the subsidiarity debate give serious reasons for discussing why liberals are together in the European Union and if, and how, this motivation relates to the current state and perception of the integration process.

Since the early start of European integration, Dutch liberals aligned,[17] behind the rationale of this process owing to a shared set of deeply rooted liberal notions and ideals. Although, with the passing of time, different accents were placed on the process by the different 'blood groups' in the Dutch liberal family,[18] they continually found each other on ideologically common ground. Throughout the integration process liberals connected on two elementary political-theoretical notions. One, that individuals, in order to protect their individual freedom, needed (forms of) governmental authority as a warrant *for* individual liberty and equal opportunities and *against* the tyranny of arbitrariness, corruption and

[15] In this context the works of the legal scholar and historian Thierry Baudet, in particular his thesis *De aanval op de natiestaat* (2011) and various other articles in which he questioned the legitimacy of judgements of the European Court of Human Rights, attracted attention.

[16] Parliamentary Reports such as '*Bovenop Europa*' (2011), '*Voorop in Europa*' (2014) and – most recently – '*Gericht op Europa*' (2014) testify to this search.

[17] The Dutch *Volkspartij voor Vrijheid en Democratie* (VVD, 1948-), the *Vrijzinnig Democratische Bond* (VDB, 1901-1946) and *Democraten 66* (D66, 1966-) are all (in case of the VDB: were) liberally rooted as far as their thinking concerned the role of state authority *vis à vis* the individual.

[18] For the VVD, for instance, the realisation of the internal market has structurally been a central point of focus, whereas D66 has also constantly pushed the rule of law and EU the human rights agenda.

(feudal) private interdependencies. Second, that, as a result of globalisation and growing transnational interdependencies, nation-state government was no longer a sufficient guarantee in this regard.[19]

Here, the concept of shaping a transnational governmental framework to enhance and protect liberties became a logical next step. Since the early moves towards a European Coal and Steel Community and a European Common Market, liberals have supported European integration and European decision-making authorities because Europe is better equipped to 'internalise the externalities'[20] of cross-border issues (such as crime, pollution etc.) that have an impact on the freedoms of citizens. Easily wrongly explained as a 'technocratic argument' taking policy effectiveness or efficiency as the ultimate goal,[21] the argument that the EU is better equipped for protecting individual liberty in the case of certain transnational challenges is a *liberal democratic* argument in essence.

From a liberal democratic perspective it may be wise to deal with certain issues at the level of national or even local democracy, whereas these same liberals may be convinced of the benefits of acting and deciding at a European scale in other cases. When the networks within which our economic, social and environmental activities take place increasingly stretch beyond national borders, but the political institutions which are able and mandated to shape and set limits to these networks remain situated at a national or lower level, democratic control is weakened. Politics then loses its ability to counterbalance vested interests and the power asymmetries that threaten the *de facto* freedom and the opportunities that (certain groups of) citizens have to freely develop themselves. Herein lies the core value for liberals of joint policy-making in certain fields at a European rather than national level. This is, and always has been, the reason why liberals are attracted to European integration in the first place.

Considering the deep political-theoretical basis for supporting European integration, the subsidiarity debate as it is currently taking place in the Dutch political domain should be, and rightly is, taken seriously by liberal politicians. Given the deep democratic concerns that are behind what might at first sight seem a rather one-dimensional debate, the calls for a competences review and the question as to what it should encompass, in fact touch upon the core beliefs of liberal politicians with regard to European integration. Since the liberal plea for European integration is, in essence, about gaining democratic control of transnational challenges and aims at protecting and enlarging the freedoms

---

[19] Within the liberal family we often dispute how, and to what, extent governmental authorities can, or should, contribute to individual liberty (i.e. the debate on positive/negative freedoms). Notwithstanding the importance of this discussion, it is omitted from consideration for the moment.

[20] J. Levy, 'Federalism, liberalism, and the separation of loyalties', *American Political Science Review,* 101 (3), 2007, p. 462.

[21] E.g. W. Wallace & J. Smith, 'Democracy or technocracy? European integration and the problem of popular consent', *West European Politics*, 18 (3), 1995, pp. 137-157.

and opportunities of individuals, we – liberals – have a moral and intellectual obligation to engage in a political discussion that questions exactly these 'functions' of European integration.[22] For the sole purpose of continuously being on the lookout for ways to improve EU government in serving the liberal objectives of European integration, liberals must search for answers to questions such as if, and why, people are losing their confidence in the democratic functioning of the EU and how this loss of confidence can, and should, be best restored.

We must now examine whether the subsidiarity debate taking place in the Dutch political domain is a constructive means to a (liberal) end. Or, to put it differently, is a competences review a constructive answer to the concerns that lie at the heart of the subsidiarity debate?

Is a competences review the answer?

One question is essential here: to what extent would a competences review do justice to the fundamental concerns about the loss of individual freedom and democratic control of the process of European integration?

Seen from this angle, little constructive effect is to be expected from a debate of the sort that is currently taking place in the Dutch political domain. To put it even stronger, a political debate on the division of competences within the EU actually hides more than it clarifies. The debate falls short as it tends to focus on concrete policy questions, without addressing the underlying considerations of what is fundamentally at stake. Putting the question as to whether Europe should or should not have a say in the shape of cucumbers or the provisions concerning light bulbs at the centre of the debate, leaves us (liberals) with the problem that ultimately little liberally distinctive or meaningful in the long run can be said about it. And, more importantly, it does not contribute to repairing the deeper (democratic) flaws and shortcomings of the European integration process. If we only discuss superficial matters, we could end up with a division of competences which might be custom-made for today but worthless for tomorrow. In the meantime we run the risk of being overtaken by a reality in which the national democratic control over, for instance, political decisions about pensions silently turns into fiction because of the functioning of international financial markets. From the liberal perspective of promoting individual freedom and democratic control, this, and it goes without saying, is not desirable.

However, despite the observation that a competences review is – regarded from a liberal political background – as a 'non-solution' for quite a serious problem, this must not be understood as a call to end the debate. On the contrary, in order to keep their European ideal in sight, liberals should *continuously* reflect on the merits of popular concerns about the democratic functioning of the EU and seek to redress these concerns wherever they are needed by finding real solutions. This

[22] Van Mierlo Stichting, *Europa: voorwaarde voor vrijheid. Grondslagen van het sociaal-liberale denken over Europese integratie*, 2014, pp. 7-9.

starts by recognising that the question about what problem should be addressed at what governmental level in liberal political thought is not, and can never be reduced to a black-and-white matter, nor is it something that can be discussed without taking the time, place and historical circumstances into consideration too.

A valid liberal perspective on the issue of subsidiarity starts by addressing the relationship between different levels of decision-making and facilitating the individual freedom of citizens. As political history has shown us, usually various levels of government, (supra)national, local, and regional, need to work together in order to guarantee the best result for citizens and infrequent tasks are shifted back and forth in the course of time. Thus it follows that, from a liberal perspective, one level of decision-making is not to be *a priori* preferred to another. On the contrary: spreading political decision-making over multiple levels is inherent to the liberal goal of protecting and enabling individuals to make their own choices, to which European integration is a means, and therefore also part of the checks-and-balances system of the EU. The particular level of government that can best protect the interests of citizens in each specific case is a question to be answered in a political discussion that needs to go on continuously at all levels of politics; a political discussion, moreover, in which the citizens of Europe and their representatives should participate fully, both in their capacity as national and EU citizens. These are the same people, taking on different roles, and both are valid and valuable, as they balance different values and interests.[23] As Bellamy and Castiglione have observed, both people's allegiances and their social, political and economic interactions have become increasingly multi-layered, but this does not invalidate considerations of subsidiarity. Rather the opposite: it creates a need for mechanisms that can arbitrate between different interests and viewpoints to be available on more levels. 'If politics is defined by the questions of who gets what, when, where and how, then the answers increasingly must be in the plural – different people, in different ways and employing different criteria according to the context and the good concerned.'[24]

The need for such an ongoing political debate and, in fact, the politicisation of questions about competence has so far been largely ignored in the subsidiarity debate as the debate has focused predominantly on *what* should be done where, rather than *how* we decide on what is done by whom in the first place. Without clarity on this second question, it will be difficult to reach any democratically legitimate decision on the first.

The solution will not be found in a rigid division of competences, but rather in an ongoing and open contestation of this division, with a role for the European peoples, both as EU and national citizens. Such an open contestation needs

[23] J. Habermas, *Over de constitutie van Europa: een essay*, 2012, pp. 47-50.

[24] R. Bellamy and D. Castiglione, 'Building the Union: The nature of sovereignty in the political architecture of Europe, *Law and Philosophy,* 16 (4), 1997, pp. 421-445, p. 422.

innovative ways and instruments to facilitate democratic discussion and decision-making in which justice is done to the various interests that the peoples of Europe have in their different capacities as European, national and regional citizens. It is from this perspective that, at an earlier point in time, the Van Mierlo Foundation pointed to the democratic benefits that could be expected from the institution of a European Senate in which Europeans are transparently and democratically represented in their capacity as national citizens.[25]

In addition to considering ways to fix the infrastructure and enable a real politicised debate to take place on Europe's do's and don'ts at the European level, we should think through the ways and instruments which national parliaments could use to engage themselves more proactively in the agenda setting and decision-making processes at a European level. The fact that, in the Netherlands, the agenda of the Second Chamber is filled for months in advance with 'urgent debates' on national issues whereas the political priorities of the European Commission led by Juncker (the creation of a European Energy Union (!) to mention only one) have not raised any special (plenary) attention or national political statements on that matter, is illustrative here.

A politicised and ongoing, democratic debate about what the EU should, or should not do, starts with discussing this matter structurally at *all* the relevant political levels. And as a first step, the infrastructure to support this structural debate should be scrutinised and improved. It is only in this way, that we can start to move towards a European Union that takes its people's right to shape and control their own destiny seriously.

[25] Van Mierlo Stichting, *Europa: voorwaarde voor vrijheid,* Den Haag, 2014.

Subsidiarity. An ambivalent principle

Robert Nef

Introduction

Aristotle has already described the concept that political social duties only become newsworthy when they can no longer be resolved satisfactorily by individuals and small groups without the support (*subsidium*) of the wider community, but he did this without using the term 'subsidiarity'. Firstly, this principle justifies a burden of proof before a duty can be transferred from individuals and small private groups to political communities. Secondly, this principle justifies transferring smaller political communities' duties to more central, larger political associations, and providing arguments for returning political and financial responsibilities to regional, local and private funding bodies.

Two intellectual origins

In modern thinking, it is possible to trace two particular independent reasons for the development of this principle. After the Reformation, a religious organisational principle had to be found which offered an alternative to the centralised organisation of the Papal church and allowed an organisational minimum, from the bottom up. In 1603, in the Calvinist Netherlands, Johannes Althusius, who also described this principle in his political doctrine, then transferred the principle from the organisation of the church to the state – or that is the reason argued by the individual and small society, anyway. Because it doesn't require a centre and the centre only develops gradually as a necessary consequence of supports, you could say that the principle has a non-central approach.

An opposing trend is also happening in the context of gradual decentralisation, however, which is developing from an existing centre by delegating responsibility. The Christian image of man assumes a personal responsibility before God. According to Catholic social doctrine, the personality principle applies to the relationship between man and God, the subsidiarity principle applies to the relationship to the Catholic Church as an institution, and the solidarity principle applies to human relationships. Even a hierarchically organised church should, therefore, reject the decentralised assumption of personal responsibility and, in the long run, make this the responsibility of the individual once again. This point of view resulted in a variation of the subsidiarity principle, one that thinks from the centre outwards, but is unable and unwilling to entrust everything to the centre (top down): subsidiarity through decentralisation. This approach was already laid down in Thomas Aquinas's theory of ownership and verified in the 19th century by the Papal encyclical *Rerum Novarum*. The main reason for this approach at the time was to create a religious area of influence that was to be protected by the increasing influence of the secularised state.

The subsidiarity principle, therefore, developed in an area of tension in which trust and mistrust in the individual, and in organised society, was questioned time and time again from different perspectives: either ‘bottom up’ or ‘top down’.

No distinct political objectives

In political theory, the subsidiarity principle is first and foremost a maxim for formally managing the political process, but does not provide a hard-and-fast basis for each optimum classification of shared duties. Anyone who puts forward strong enough reasons for centralisation will be able to accept the relinquishment of individual self-determination and personal responsibility all the more easily. Anyone who sets a priority in the area of the self-determination of individuals and small communities will set much higher requirements when it comes to proving that they are actually being overstretched.

Nowadays, the principle is discussed first and foremost in connection with the political sharing of duties in federal states and state communities. Since it began, however, the other regulatory interface, namely the government regulations between the market and private autonomy, on the one hand, and the usually binding compulsory enforceable government regulations on the other hand, is actually more crucial. In this regulatory debate, it is very possible, and often even likely, that the priority in regard to problem-solving capacity lies with the anonymous economically structured society at large, rather than with the smaller group that is controlled by emotions. It does not concern the debate between ‘large’ and ‘small’, but the belief in as equal conditions as possible for all in as large an environment as possible. From this perspective, a small number of centrally issued, usually binding, reliable regulations are preferable to a complex network of unpredictable national, Member State and local political regulations. In fact, economic stakeholders have the tendency to demand as few politico-economic regulations as possible, but if regulated, they prefer large-scale, generally binding and reliable regulations, which cause as similar a combination of costs and uses as possible among those concerned.

This scepticism about the complexity and unpredictability of many small competitive local authorities in the 19th century resulted in the liberals in Germany, Italy and even Switzerland fighting for greater political centralisation and harmonization. At that time, the benefits of the peaceful regime competition for the objective ‘greater freedom and less state and less tax burden’ among liberals weren’t discovered yet and the fight for the conservatives’ federal structures was surrendered. The same phenomenon also occurred during the European unification process at the end of the 20th century. Nowadays, the liberal voters who have greater confidence in smaller, non-central stakeholders managing the competition than in centralised bureaucratic structures with their less and less flexible built in laws, even in the political process, are on the rise. The regulatively founded subsidiarity principle, which is in keeping with the individual/state relationship and gives priority to the former, overcomes the scepticism against

having too many stages of political funding bodies, all of whom have their own overlapping regulatory requirements.

The partly opposing layers of interest and politico-ideological orientations described here are causing the subsidiarity principle to be broached from an entirely different perspective, and thereby run the risk of being drawn towards the almost arbitrary basis for the argument for or against certain political measures and developments.

Non-centralism and decentralisation

The somewhat unusual use of the term 'non-central' needs to be explained. The term comes to mind because the adjective has the federal ability to describe two different tendencies: one that is more intense and emphasises closer connection compared to the 'confederal' one, or the tendency that tends more towards the autonomy of smaller organisations compared to the 'centralist' one. The current EU is a mixture of confederation, federation and central government, and the correct use of the term 'federal' means that the EU would be more federal and therefore more closely connected. In Germany and Switzerland, however, 'federal' emphasises the autonomy of the Member States, but in French and English, the adjective suggests greater competence among central government. In the EU, in addition to the historical misunderstandings in this regard, there are also the purely linguistic consequences of translation.

The purely descriptive term 'non-central', which implies more than simply a militant anti-centralism, therefore comes to mind. But why 'non-central' and not 'de-central'? Decentralisation assumes there is a centre and therefore continues to suffer from the illness for which it is holding out for a cure. Of course, given the already centralised structures, decentralisation provides an antidote, as a type of 'orderly return' from defective structures. The danger of the mental reference to the centre continuing to exist for this delicate operation and the result allegedly allowing a subtle form of central management to develop, where the politico-economic costs are pushed to the periphery and the corresponding uses nevertheless remain at the centre, cannot be ruled out. Anti-centralism, on the other hand, tends towards secession, which may be associated with very high costs of conflicts. Non-centralism results in a peaceful new founding of competences and delegations, which, by nature, should run from bottom to top and not from top to bottom if constructive competition is to result from this.

Subsidiarity in Switzerland and the EU

In Switzerland, subsidiarity is one of the basic principles of the historical constitution. The federal state was formed from an amalgamation of cantons that referred to themselves as 'sovereign', and the federation is now obtaining those competences to which it was expressly entitled in the constitution. Because the central federal organisation was newly established in 1848, the subsidiarity principle laid down in the constitution has the character of a regulation concerning

the burden of proof that favours the smaller local authority for guaranteeing the 'bottom-up' principle. It is therefore basically sceptical of the centre. The superordinate community may, and should, only intervene where first the individual and then the subordinate community are no longer able to fulfil a duty. In principle, the most subordinate, lowest level possible should be responsible, and justification is required if a duty is to be transferred to a larger association. You must prove that the lower level is *unable* to resolve the problem satisfactorily.

Since the EU was established, the significance of the subsidiarity principle can be compared to that of Switzerland, as laid down in the Maastricht Treaty (Article 5 paragraph 2 of the European Community Treaty). The details regulate the 'protocol on the application of subsidiarity and proportionality principles'. After all, the EU is not a federal state, but an intermediate form of federation and confederation. It was founded 'bottom up', and initially there was no hierarchical peak with its own sovereignty.

Due to the history of its development, the Calvinist reformed tendency that favours individual solutions and the smaller political unit (non-centralism) makes more sense than the Catholic principle of gradual and regulated delegation of responsibility (decentralisation). Even in the EU, the subsidiarity principle is a political rule concerning the burden of proof that favours national states and smaller local authorities. It tends to favour more individual, local, regional and national solutions. However, all formulations that meet the criterion of 'being able to' and operate with the formula 'as local as possible, as central as necessary' are open to the highest level of interpretation. The risk that the principle will be adopted in a centralising manner by interpreting the conditions under which the superordinate association is still 'more suitable' backs up this principle.

A principle that forms the basis for confusion

Time and time again, politics gives rise to situations in which measures cause the opposite of what they intend and what is claimed by their propagandists. As a result, when applied, the subsidiarity principle actually contradicts itself, because new arguments for 'improved classification' in more central and higher authorities are being found all the time; arguments which demand the harmonization that reduces diversity instead of the deregulation that maintains greater diversity.

Two examples can be used to illustrate this. First, like numerous national constitutions, even the EU should enable as 'equal a distribution' of wealth as possible and therefore subsidise economically weak peripheral areas and problematic areas. Promotion and redistribution by regional funds, structural funds and grants are among the most important and most popular tasks of central government and a centralised State Union. Politics then degenerates into a scramble for as many grants as possible. All types of redistribution are popular, and all types are problematic, because they only lead to satisfaction. This doesn't just apply to interpersonal redistribution between richer and poorer individuals, but, more specifically, to interregional and international redistribution within a

federation. We can reasonably assume that some of the public resources that flow into the periphery as a means of support ultimately end up back at the control centre and in effect, only enhance the centres' dependence on the periphery and distort the competition. This is at least one experience that has occurred in Switzerland with the centralised funded regional aid scheme and the so-called financial compensation scheme.

Second, Catholic social doctrine includes the classic formulation of the subsidiarity principle, namely that man as an individual should fulfil each task he is given to the best of his ability. The community, represented by the control centre responsible in each case, is only allowed to intervene in a subsidiary manner. So what does this mean when it comes to permitting methods of contraception? Firstly, according to the subsidiarity principle, you can be of the opinion that only the party involved and the woman in question are responsible for contraception (as well as the couple involved in the conception, if need be). With the argument of 'not being able to', however, the decision can always be delegated upwards again until you reach the highest religious authority, i.e. the Pope, who has a generally binding answer to this question. The subsidiarity principle is not harmed as a result of this process if you assume that all less central authorities would be morally overburdened with such a decision.

Competition between the regulatory models as a learning process

The sovereign principle of the lowest possible centralisation forms the basis of the information provided below. The gist of this contribution can be summarised as follows:

Non-central solutions based on political subsidiarity have the obvious advantage of being less consistent and less predictable. As a result, this disadvantage is more than simply compensated for, however, when the principle of non-centralisation and non-standardisation results in a competition for the best possible solution for enabling and accelerating political learning processes. These learning processes are essential for the survival of a larger, heterogeneous, political community in critical situations. Non-centrality also enables a competition between regulatory and, in particular, also politico-economic concepts, which outweighs a certain complexity and unpredictability compared to the disadvantages. Due to these advantages, it can and must also be accepted that political and economic sub-optimal solutions exist. Competition, however, is more effective when it comes to their elimination than elimination by compulsory central harmonization.

Subsidiarity and financial autonomy

It becomes even more difficult to apply the subsidiarity principle when the ability to solve problems is not financially viable, either. A centralised tax system, which first of all directs all tax money into the control centre, will create an 'inability' to fulfil subordinate authorities' infrastructural duties and in practical terms, draw attention to a one-way street to centralisation. It is, of course, a paradox if you

introduce a harmonized central tax system and only decentralise the duties without providing the communities and Member States with the necessary resources. This perfidious form of decentralisation has played a part in the discrediting of the subsidiarity principle and in federalism and community autonomy in many places.

There is also a whole variety of reasons (which would be painstaking to analyse) for politico-economic and socio-cultural pressure on increased centrality. The subsidiarity principle should, therefore, be defined and radicalised as a counter-trend in the sense that it opts for the *return of competence, responsibility and funding* in the smallest possible and problem-oriented autonomous or private-autonomous funding body, as soon as a problem at the higher, more central level can no longer be adequately resolved and/or funded in the long term. This is a very utopian programme, because what central power is voluntarily willing to make an 'orderly return'? Given the debt crisis, however, a return to the debt trap is an attractive solution.

Bail-out and national bankruptcy

The problem of the impending bankruptcy of a Member State such as that which is currently being experienced by Greece cannot be fully covered under the theme of subsidiarity. Part of the desirable financial autonomy of a Member State according to the subsidiarity principle, however, is that the Member State cannot incur debts indefinitely at the expense of the other Member States. No federal state in the world offers its Member States unlimited financial aid in the event of excessive debt. And why should a less firmly established federation act more generously in this scenario with grants and loans? The financial insolvency of a local authority requires neither exclusion from the currency or from the federation, however. Over the course of American history, almost every state has gone bankrupt once, without the dollar being abolished in that state or the state being banned from the union. Even when California almost went bankrupt, the idea of the state being excluded from the dollar or excluded from the USA never arose.

Of course national bankruptcy also has serious effects on the banking system, and in a worst-case scenario, it also results in the inability to pay individual bank customers and shareholders. Part of the banks' business is operating on the threshold of temporary inability to pay. It is much more likely that banks will find their way out of the crisis than an ailing state recovering due to the economic poison of new loans and the political imposition of a partial prohibition. Those banks that are not coping well, even with bridging loans, will then be entitled to disappear from the picture. Bank customers throughout the world should get used to the fact that even banks do not remain indefinitely and permanently solvent. And the global banks must (once again) get used to the fact that even national bankruptcy cannot be ruled out, which is part of the price to pay for a capitalism system. A stakeholder's inability to pay must be taken into account at all times, and if this results in a system collapsing, the system has a faulty design.

Public finances cannot be salvaged by politically motivated loans. As a result, the vicious political circle of compulsory redistribution due to compulsory centralisation and funding and shifting the problems to subsequent generations is only being accelerated. The command economy cannot function in the area of finance either, because central knowledge about it doesn't exist, but it is not the fault of those concerned in divided economies or the financial experts. You should not accuse them of failing to predict the future and preferring to 'bide their time' in crisis situations, but rather advise them of endless horror stories as an end to a potential, yet often entirely beneficial and informative horror story.

Privatisation, an application of regulatory subsidiarity

A significant proportion of the problems that people believed they had to organise and regulate during the last thirty years due to regionalisation, special-purpose associations, financial compensation schemes and centralisation could be resolved in the future due to the aforementioned regulatory components of the subsidiarity principle by returning them to the market and through privatisation. A feasible temporary solution would be consistent funding by the users and a socio-politically motivated subject guide for those users who rely on the uses but are 'unable' to cover the costs as individuals.

A peaceful civil society would be characterised as such if it managed with a small number of public procedural regulations, technical and socio-political infrastructures and allowed their conflicts to be resolved independently among those concerned and those involved under their own authority.

Many attempts at achieving autonomy would not be necessary at all if the respective central governments would limit themselves to what is actually necessary: limited authority, i.e. limited government power, limited power to tax and limited willingness of central public facilities and services to provide things free of charge. Local authority autonomy would therefore be created in the same process as private autonomy, namely by an orderly return to the political system from all areas in which there is nothing to be found in a peaceful civic society. A programme such as this is extremely ambitious and far from popular...

The struggle for regional and local autonomy is identical to the struggle against an oversized central political power and financing structure that has been designed for emergency situations and for maintaining power.

The more concerned, the more involved

'Whoever pays is in charge', is one of the basic fiscal rules of democracy. No one should be taxed without having the opportunity to co-determine the amount of tax and the specific intended use – at least indirectly. This basic principle, which was realised in Switzerland, has exceptionally far-reaching consequences. Against the background of the subsidiarity and autonomy discussion, it is resulting in a basic reduction in the redistribution between various regions and local authorities. Each imposition of taxes and other charges, each distribution of taxes and each

redistribution must be authorised democratically. If you consistently consider the basic principle of democracy in this relationship in its entirety, you will arrive at an additional principle, which can also be formulated in a slogan-like manner. The slogan goes like this and has far-reaching consequences for the discussion on autonomy: 'The more concerned, the more involved'.

This basic principle is a key sentence among autonomists. In many cases, it is in direct conflict with the radical-democratic basic principle 'one person, one vote', which – used in a larger area – often has conflicting results. In a heterogeneous multi-ethnic area, a majority of those involved are able to overrule a minority of those concerned with the principle 'one person one vote'. When it comes to taxes, this results in a particularly explosive dilemma. When we roughly divide the population into two categories, 'tax payers' and 'tax consumers', it is no longer possible or even likely that a majority of tax consumers will dominate a minority of tax payers. This can cause problems, especially if tax payers mainly live in the same region, i.e. in the north, and the tax consumers live in the south, as is the case in Italy.

Another autonomist principle can be derived from the principle 'The more concerned, the more involved', which can be characterised in a somewhat exaggerated manner as follows: 'No representation without taxation'.

The Swiss financial economist Charles Blankart summarised his view of the principle of autonomy as follows: 'A state that has been constructed according to the principle of autonomy does not result in a separate conglomerate of local authorities, as critics often believe. In fact, several federal levels with different responsibilities will develop, but each level or each 'club' will be self-funding. Agreement between beneficiaries, decision-makers and tax payers will therefore prevail. In particular, there are no decision-makers who are not tax payers, so institutional symmetry prevails.'[26]

The financing model tailored to the subsidiarity principle can be characterised as follows: No use of public services without contributing towards the costs. The trend towards centralising public duties in the canton and in the federation couldn't be broken in Switzerland either, although the federal state system has its own 'brakes' for this. A similar thing is happening between the EU Member States and the centre in Brussels.

Tax jurisdiction must be as citizen-friendly as possible

In direct democracy, the citizens in question (as beneficiaries of the public infrastructure) use the majority decision to determine the taxation level, but such a model cannot be transferred directly to other relationships. The question is always whether the government and parliament were able, or allowed, to suddenly leave something as delicate as the power to tax to the responsibility of tax payers. A responsibility of the popular majority for fixing taxes at all levels of the state

[26] Charles Blankart, Öffentliche *Finanzen in der Demokratie*, Munich, 2012.

organisation assumes that they should not be allowed to have too progressive a design, however, because this will enable a 'democratic heteronomy' of tax payers with higher incomes, which will ultimately end with their 'eviction'. Per-head votes only work when the per-head impacts are also comparable.

The competing tax systems and the division of direct taxes to all three state levels allowed a field of experimentation to develop in Switzerland, which is certainly not optimal in every respect, but it works, and we are combining relatively low taxes with a good public infrastructure. There is competition for good tax payers and they have a vote by opting to move house (exit option, also known as 'voting with your feet'). All in all, this competition for taxation, and for tax progression in particular, is having a moderate effect and is partly compensating for the fact that the democratic vote on taxes is making it possible for the less rich minorities to exploit the richer minorities.

The risk of a race to the bottom of a zero tax and zero performance state cannot be ruled out, but should not be overestimated. A political under-provision in relation to order and infrastructure is even less likely if comparison options exist with other local authorities that meet a demand for such commodities. In many cases, for desirable and scarce public commodities, a majority of tax payers also allow themselves to be motivated by tax increases, in other words, people are willing to pay a higher price if the collective quality of life can be increased as a result.

The politico-economic mechanics outlined here must not be disturbed by too many well-intentioned compensation payments (inter-local, inter-regional and international financial compensation schemes, development and structural funds of every description). Promotion often results in the continued operation of structures that cannot be financed or that can no longer be financed for the future and the long-term if you 'artificially feed' them with public grants and redistribution funds.

The more direct democracy is, the stronger the link perceived between tax and its equivalent, and the faster it is turned into a political issue compared to the authorities, which simultaneously impose taxes and prepare infrastructure. In this case, the responsible tax payer is identical to the responsible citizen who critically monitors the value for money of the authorities chosen by him, demands and promotes thriftiness and transparency and also responds sensitively to all types of under-provisions at all times.

Uses and danger

It is no secret that non-centrality also has its disadvantages. When systems compete, the 'worst team mate' is worse than what can be enforced by centralist average and harmonization. From a liberal perspective, there is a painful deficit in so-called under-developed areas and the price of inequality is very high. Over the course of history, it has, however, become apparent time and time again that so-called throwback steps have suddenly proven themselves to be modern and

progressive once again. Centralisation always holds the risk of a 'unification in accordance with the latest scientific and political error' - no one, from 'left to right' is immune to it, but neither are top experts.

More obvious, small non-central errors that compete against each other are also, on the other hand, more efficient and less dangerous over time from outside and as far as freedom and learning ability are concerned compared to a highly centralised system. In particular, non-centrality offers the advantage that the pioneers (and often also smaller parties, who would be outvoted in majority committees) do not get banned from acting differently, in other words as 'creative dissidents'. The pioneers' successful attempts therefore trigger learning and imitation processes that are more effective than anything that can be brought about by central force and enforced majority decisions.

One of the most impressive and most momentous achievements of technical civilisation, the internet, is also based on the principle of non-centralism, in other words, on the fact that potentially any recipient can also be a sender and any consumer can also be a manufacturer, and no one claims to improve the entire system through central control. Many collective idea-sharing and harmonization (not to be confused with unification) committees should operate according to the principle of the internet: everyone sends and receives what he wants, and everyone allows the other person to send and receive what he wants, and everyone benefits from this.

Switzerland experiment

Direct democracy and federalism are equivalent and equally important principles in themselves, but direct democracy is most likely to operate based on small communities that cooperate with one another as allies, but that also stand as independent individuals in a competition of exit options and admission tickets and are constantly able to or have to learn from one another. Understanding of the term 'subsidiarity' in relation to non-centralism is crucial in this regard. Functioning communities are ultimately based on personal networks of people who communicate and drive trade.

As already explained, according to the subsidiarity principle, common problems can basically be resolved at the deepest possible level: i.e. at private and local level. The higher level should only be switched on at the request of the lower level, when this level is no longer able to solve the common problem. This principle is among the main basic principles of living together in liberal free market and federal systems. The fact that the criterion that forms the basis of subsidiarity of 'Being able to' or 'No longer being able to' solve the ability or inability problems satisfactorily should not, however, only apply in one direction from bottom to top, but should also apply in the opposite direction. Problems that cannot be solved centrally or can no longer be financed have to be returned to smaller units or private individuals.

The root of all evil when it comes to centralisation lies in the poor central

promotion of small personal systems and in the flight to centralist hierarchies. In politics nowadays, people are becoming increasingly afraid of small-scale experiments, which would actually account for the true power of federalism. It is not the control centre that wants more and more power, but the executive authorities of the Member States and communities, which are shifting more and more duties to central bureaucracy. People only want to retain the benefits of the redistribution and are sending the unpopular expenses bill to the next highest authority.

Politicians such as elected representatives are always looking for excuses as to why they have unfortunately been unable to or not yet able to maintain what they promised during the election. Therefore they don't just need their political opponent, but also their coalition partner as a scapegoat, especially when they are in power in majority coalitions. If that isn't enough or is no longer feasible, the elected representative will need a 'higher' or more central authority in which he can shift responsibility for everything that is being made wrong or where 'too little' is being made of it. That is probably one of the causes for that 'escape into centralisation' that can be seen in all federally structured states. The central authority serves as a projection level for all unfulfillable wishes and as a permanent excuse for everything that doesn't actually work. In the EU, even 'Brussels' is unable to escape this fate.

Small-scale, federal systems are ideal environments for learning, because they allow room to experiment. The successful is copied, but the harmful is avoided. Only organisations that learn are viable in a changing world. The price for such learning processes is occasionally inappropriate and failed projects at private, local and Member State level. In the short term, harmonization can actually cause productivity and efficiency to increase if you restrict freedom and spontaneity and prevent different solutions centralistically, but in the long term, organisations such as these are only as good as their particular bureaucratic control centre, and are therefore extremely prone to errors.

Illusions surrounding the majority principle

Liberals are well aware that liberalism and democracy cannot be combined without a certain amount of tension and problems. Democracy allows representation according to the majority principle. For the majority, this representation also corresponds to personal preference. A minority, however, is heteronomous. From a liberal perspective, autonomy is more important than representation. The substitution of private-autonomous self-determination with democratic representation is not desirable as such, but in common issues, it is often inevitably preferable compared to autocracy, because direct democracy has fewer politico-economic weaknesses than representative democracy. The logical decision-making flaws of representing political interests combined with eliminating the flaws of all overruled minorities have perhaps not been investigated intensively and critically enough so far.

Even in Switzerland, there are still only a few interpreted experiences, because the federation and cantons have a combined system of direct and representative democracy. There are still surprisingly few empirical studies about this in Europe. If there were more done, too many illusions surrounding democratic representation would be destroyed. In a parliamentary democracy, a voter's personal influence is very small. He votes based on a programme and a list of one or more representatives, who will join together with others later if necessary as a result of a coalition agreement and then form a government. How great is the risk that even for a considerable majority of voters, precisely the opposite of what they actually wanted to support happens? As far as representative systems are concerned, is it still possible to talk about the majority principle at all, or is it only a highly complex filter of interests or communication falsifier where no one knows exactly what's actually happening when it comes to logical decision-making?

It is possible that direct and representative democracy are not simply two gradually different systems. The differences are also fundamental ones. The semi-direct democracy practised in Switzerland would therefore be a hybrid that doesn't just combine the advantages, but also the disadvantages of both decision-making processes. That should be critically examined before you recommend copying the combination as a democratic model for the future.

When the combination of revenue and duties are made transparent for each political decision and the key question 'Who should pay that?' needs to be answered, politics will once again come up with a joint flexible solution (and funding!) for shared duties.

Decentralising and individualising social welfare

Social politics due to public redistribution tends towards centralism because of the political compulsion for comprehensive equal treatment, so it is always more bureaucratic and anonymous and more susceptible to abuse. The less anonymous the socio-political redistribution is, the less bureaucratic control it needs and the more the willingness towards personal responsibility increases. The bureaucracy of the centralised, redistributing social state rids citizens of their social responsibility and therefore promotes individual egotism.

The 'way back' goes via the principle of user financing which, according to the subsidiarity principle, is in keeping with the smallest possible unit: the individual. In an initial step, the public contributions to public services and facilities should be retained, but instead of making them available to the institutions, they should be made available to the users. In a second step, the users, in other words the customers themselves, should conduct the cost/benefit analysis. In a free society, over time, no one can actually afford more than he is able to finance himself. Living at the expense of third parties is not a sustainable solution because it requires the use of force, resulting in refusal and avoidance strategies and corruption, as well as in the utilisation of loopholes. Anyone who promises greater affluence as a result

of increased force and increased redistribution is practising a populist policy.

The model for the future is users financing the entire infrastructure and directly supporting those in need who were no longer be able to afford the vital use of such services through tax-funded subject aid such as subsidiary supplementary services. In a transition phase, redistributive direct payments would only continue to be sent to those people who have actually been assigned to a necessary service in the original sense of the word and are demonstrably unable to fund this from their own income. Citizens' personal responsibility could increase again, as could the spontaneous mutual support in small groups and neighbourhood networks such as through patronage and philanthropy.

It is not what is happening in central systems that is crucial for the economic and social survival of a political society, but what is developing in terms of opportunities for bartering and for spontaneous aid from person to person that is being adapted to new situations all the time. This adaptation is all the faster and more flexible the more directly it happens between those concerned and those involved. The financial aid given to those who need it is important for a society's survival. The more this is guaranteed by institutional forces, the lower the spontaneous willingness to help others among private individuals. When the willingness to provide mutual personal aid in all types of need constantly decreases in a society, the sophisticated central force system of redistributing at the threshold of financial viability will also succeed. But what happens then? First of all, an attempt will be made to squeeze more financial assets for redistribution out of a national economy with higher and more progressive taxation. This financing method by permanently raising the tax load is doomed to failure, however, by the time the ever-higher taxation results in a loss of international competitiveness and in a drop in productivity, and therefore also tax revenue.

Financing of the welfare state, which has been a 'bottomless pit' since its politico-economic construction, cannot therefore simply be guaranteed by higher taxes. Some time ago, the switch was therefore made to national debt as a supplementary and increasingly important source of finance. The end of the road will have been reached, however, by the time that meeting debts requires greater capital than public revenue as a whole. Dealing with different high national debts in a politically astute manner is a current major challenge, even from a subsidiarity perspective.

References

Charles B. Blankart, *F*öderalismus *in Deutschland und Europa*, Baden-Baden, 2007.

Öffentliche *Finanzen in der Demokratie*, eighth edition, Munich 2012.

Peter Blickle, Thomas Hüglin, Dieter Wyduckel (eds.), *Subsidiarität als rechtliches und politisches Ordnungsprinzip in Kirche, Staat und Gesellschaft*, Rechtstheorie, supplement 20, Berlin 2002.

Detmar Doering, *Kleines Lesebuch* über *den Föderalismus, Argumente der Freiheit*

13, Sankt Augustin 2005.
Wolf Linder, *Swiss Democracy. Possible Solutions to Conflict in Multicultural Societies*, Basingstoke, Hampshire/New York, NY, 2010.
Hermann Lübbe, 'Subsidiarität. Zur europarechtlichen Positivierung eines Begriffs', *Zeitschrift für Politik* 2005, p. 157 et seq.
Herbert Lüthy, *Vom Geist und Ungeist des Föderalismus*, in: *Gesammelte Werke* band II, Zurich 1971.
Friedrich Naumann Foundation for Freedom *, Gemeindeautonomie, direkte Demokratie und Steuerwettbewerb in der Schweiz*, PositionLiberal 87, Berlin 2009.
Robert Nef, *In Praise of Non-Centralism. Ideas on Liberty*, Berlin 2004.
Staatskonkurs als Chance, 'Finanz und Wirtschaft', commentaries, 10 February 2015.
Martin Rhonheimer, *Christentum und säkularer Staat*, third edition, Freiburg im Breisgau 2014.
Roland Vaubel, *The Centralisation of Western Europe: The Common Market, Political Integration and Democracy*, Hobart Paper 127, Institute of Economic Affairs, London 1995.
Roland Vaubel, *Reformen der europäischen Politikverflechtung*, Freiburg im Breisgau, Institute for Economic Research, Department for Economic Policy, 2004.

Governance and policy

The virtues and vices of multi-level governance from a liberal perspective

Caspar van den Berg

Introduction[1]

Multi-level Governance (MLG) has become the dominant metaphor for present-day political and administrative steering within the European Union (Bache and Flinders 2004; Stephenson 2013). While MLG is often praised for its instrumental and normative superiority to traditional, hierarchical and state-centric modes of governance, this article challenges current assumptions and assesses MLG's actual virtues and vices from a liberal perspective on democracy and executive societal steering based on four key premises.

First and foremost, government should comply with the fundamental conditions of liberal democracy i.e. democracy, equality, legitimacy, transparency, and the separation of powers.[2]

Second is the liberal notion that government should be as restrained as possible (and therefore small in size and clear in structure), in order to offer individuals maximum liberty to shape their lives according to their own convictions. To this end, *individuals* have rights and obligations, and *government* exists in order to guarantee a maximum degree of liberty. A government thus functions as an independent body which guarantees the rights of individuals and determines the basic rules of societal and economic interaction, together constituting the Rule of Law. From the liberal perspective, government should therefore (a) facilitate the individual inasmuch as this serves the public interest, and (b) protect the individual where this is necessary, but not stand in the way of the individual's pursuit of happiness. Government itself, should be reliable in its nature (i.e. its foundations and design) and in its actions.

Third, in the liberal conception, society should be based on (a) individual self-determination, (b) resilience of the individual, (c) space for private initiative and (d) voluntary, flexible forms of collectiveness. Here the difference between the three main ideological currents becomes manifest: for social-democrats, the state is the integrative force that forms society, for christian-democrats the church and its related institutions form this integrative force, and for liberals, the individual itself is the force that constitutes society. In this sense, a liberal society is formed by individuals who voluntarily and actively associate with one another. In the

[1] Parts of this chapter are based on C.F. van den Berg, *Transforming for Europe: The reshaping of national bureaucracies in a system of multi-level governance*, Leiden, 2011. Therein chapter 2: 'Europeanization and Multi-level governance', pp. 15-37.

[2] J. Locke, *Two Treatises of Government,* London, 1772; Charles de Secondat baron de Montesquieu, *De l'esprit des lois*, Paris, 1872.

words of Mark Rutte, liberal and the present prime minister of The Netherlands: 'For me as a liberal, society starts with the individual, because I believe that strong and self-supporting people together make a strong nation. Those who are able to take care of themselves, are often also the ones who take good care of the people around them. This is what strengthens the fabric of our society.'[3]

Fourth, while the principle of subsidiarity originates from clerical and christian-democratic thought rather than from liberalism, liberalism too finds its roots in the strength of local communities and a local civil spirit. According to J.S. Mill, the principles of individual liberty and local self-government encourage the development of a public spirit, which in turn strengthens the potential for dynamism and solidity in government.[4] Alexis de Tocqueville states that a maximum of direct influence and self-determination for citizens in their local communities is superior.[5] J.R. Thorbecke, the liberal drafter of the Dutch constitution, also contended that governance '(…) flows naturally from the local community of individuals. The administration makes arrangements for the community but is not to be separated from or placed above the community'.[6]

So, to sum up, based on liberal thought a governance system should (i) adhere to the fundamentals of liberal democracy, (ii) be as retrained, small and transparent as possible (iii) center on the individual rather than some sort of innate collectivity (iv) favor the dynamism and proximity of local government over the rigidity and distance of central government.

What is multi-level governance?

First coined as an analytical concept in the 1990s, the multi-level governance (MLG) perspective has now been widely adopted as a tool for understanding the complexity and multiplicity of present-day governance. This perspective is focused on the basic premise that, in the game of governance, the players are not unitary or monolithic. Although Public Administration as a discipline has traditionally been quite sensitive to this premise, and to the idea that processes are never fully top-down, processes such as internationalisation, EU integration, privatisation and individualisation have made the MLG premise all the more credible. Politics and administration at all levels, from local to supranational, must be regarded as a complex and differentiated ensemble of actors and institutions.

The governance of Western Europe has been more or less multi-level in nature at least since Roman times. Examples of layered government can be found even in the oldest systems of government, and non-state actors have been involved

[3] M. Rutte, 'Zorgen dat de toekomst in ons leeft', 4e Kerdijklezing (4th Kerdijk Lecture), delivered on 12 November 2014, Den Haag.

[4] J.S. Mill, *On Liberty,* London, 1999.

[5] A. de Tocqueville, *De la démocratie en Amérique I*, Paris, 1981.

[6] J.R. Thorbecke, *Historische schetsen*, The Hague, 1872 (2nd edition).

in matters of administration for many centuries.[7] Examples include the role of the church and the guilds as mediators and regulators of social life in the middle ages, and the interconnection of the colonial navy and armies with private trading networks in the age of empire. Indeed, the practice of multi-level governance long predated the emergence of the analytical perspective.[8] Criticism of the alleged novelty of MLG is discussed in more detail below.

The MLG approach is not the only analytical attempt to capture the increasingly fragmented and polycentric forms of public decision making and service delivery.[9] Nonetheless, the MLG approach appears to be best suited for understanding the changed context of, and the impetus for, change among national civil service systems, because it highlights the transnational, national and subnational activities of actors and institutions, and because it focuses on both networks and constitutional frameworks as the defining features of institutional relationships. Moreover, MLG is the most widely used and the furthest developed of the new generation of conceptualisations of public decision-making and service delivery.

The notion of multi-level governance finds its origin in efforts to explain European structural policies from the mid-1980s.[10] Since those days, however, a considerable number of scholars have adopted the term and used it to analyze other aspects of governance in Western Europe, at various territorial levels. Moreover, the term has entered the discourse of practitioners as a label for present-day developments in politics and public administration.[11] So, both in academic circles and in practice, the term multi-level governance has gradually come to be applicable to European governance more generally.

Peters and Pierre identified four crucial respects in which the multi-level governance approach differs from traditional intergovernmental relationships. First of all, instead of focusing exclusively on either supranational bodies or

---

7 Th.A.J. Toonen and F.M. van der Meer, 'Territory and Bureaucracy', in: M. Burgess and J. P. Vollaard (Eds.), *State, Territoriality and European Integration*, London, 2005.

8 A. Benz, 'Mehrebenenvervlechtung in der Europaeischen Union', in: M. Jachtenfuchs and B. Kohler-Koch (Eds.), *Europaeische Integration*. Opladen, 2003; R. Mayntz, 'Governance im modernen Staat', in: A. Benz (Ed.), *Governance – Regieren in komplexen Regelsystemen. Eine Einführung*, Wiesbaden, 2004, pp. 65-76.

9 C. Ansell, 'The Networked Polity: Regional Development in Western Europe', *Governance*, 12, 2000, pp. 303-333; B. Kohler-Koch and R. Eising (Eds.), *The Transformation of Governance in Europe*. London, 1999; J. Peterson, 'The Choice for EU Theorists: Establishing a Common Framework for Analysis', *European Journal of Political Research*, 39, 2001, pp. 280-318; J.N. Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World*, Cambridge, 1997; P.C. Schmitter, 'Examining the Present Euro-Polity with the Help of Past Theories', in: G. Marks, F. Scharpf, P. Schmitter and W. Streeck (Eds.), *Governance in the European Union*, London, 1996.

10 G. Marks, 'Structural Policy after Maastricht', in: A. Cafruny and G. Rosenthal (Eds.), *The State of the European Community*, New York, 1993, pp. 391-410.

11 I. Bache and M. Flinders, *Multi-level Governance,* Oxford, 2004, p. 195.

states as actors in the European political arena, multi-level governance involves transnational, national and subnational institutions and actors. Secondly, Peters and Pierre argue that whereas traditional approaches see institutional relationships as defined by constitutions and other legal frameworks, multi-level governance suggests that negotiations and networks are the main determinants of institutional interaction.[12] Thirdly, multi-level governance includes the role of private actors (e.g. business or private interest groups) and satellite organisations (e.g. NGOs and agencies) in its analysis of governance. Since these types of bodies are not formally part of the governmental framework, they have received less attention in state-centred approaches to intergovernmental relationships.

Lastly, in multi-level governance the idea of a strict hierarchy of levels of governments seems to have been – at least partly – diluted. According to Peters and Pierre, multi-level governance 'makes no normative pre-judgments about the logical order between different institutional tiers'.[13] Thus, multi-level governance denounces the separation between domestic and international politics and the exclusive importance that both rival theories attach to either transnational or national actors or institutions, respectively.

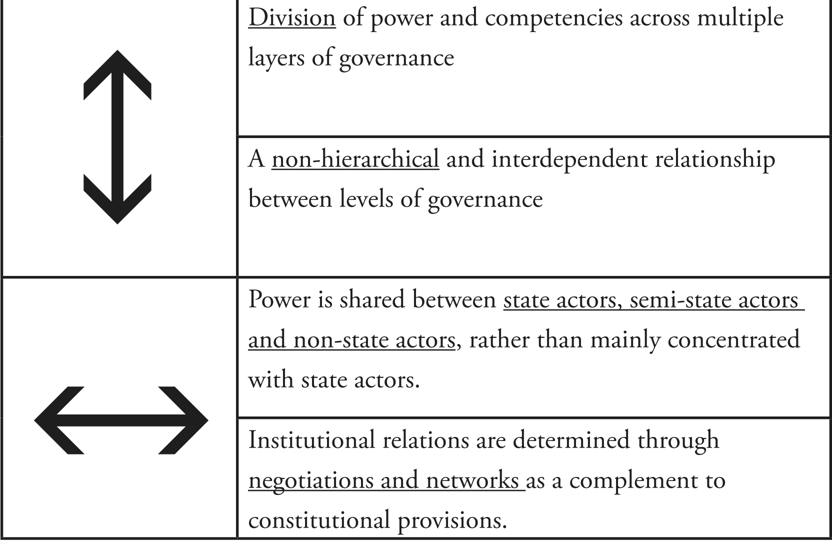

Figure 1. *Multi-Level Governance, vertical and horizontal dimensions*

The crucial innovative point in the MLG perspective is the realization that: '[s]tates are not the exclusive link between domestic politicians and intergovernmental bargaining in the EU. Instead of the two-level game assumptions adopted by

[12] B.G. Peters and J. Pierre (Eds.), *Politicisation of the civil service in comparative perspective: The quest for control,* London, 2004, p. 79.

[13] Ibidem, p. 77.

state-centrists, multi-level governance theorists posit a set of overarching, multi-level polity networks.'[14]

Within these networks, local, subnational and national actors engage in direct exchanges with actors at other levels, including the supranational. As a result, national executives can no longer monopolise decision-making procedures. In addition, the MLG perspective is sensitive to the notion that in present-day governance, informal bargaining between a wide variety of actors (individuals and institutions, public and private; local, regional, national, and transnational) is at least as decisive as are formal power relations.

As the MLG approach views governance in terms of disaggregated levels that permanently and mutually influence each other, and also accommodates various types of actors (state and non-state), it opens new ways of comprehending European integration and its implications. Figures 2 and 3 depict the contrasts between the state-centric and the MLG perceptions of international relations and comparative government.

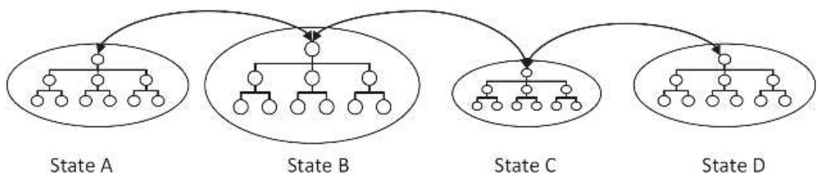

Figure 2. *The state-centric perception of international relations and comparative government*[15]

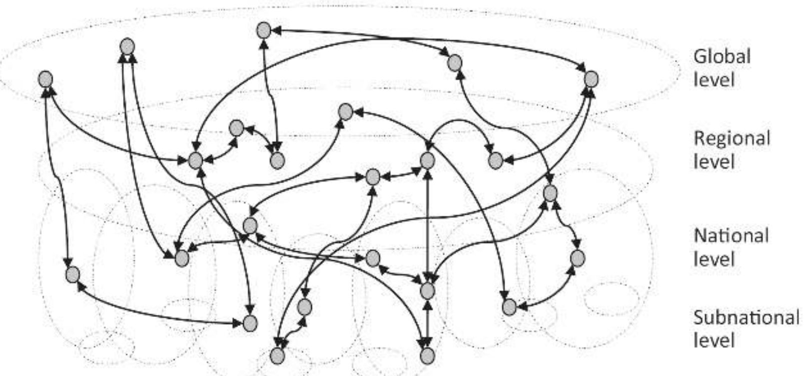

Figure 3. *The MLG perception of international relations and comparative government*[16]

---

14 G. Marks, L. Hooghe and K. Blank, 'European integration from the 1980s', *Journal of Common Market Studies*, 34(3), 1996, pp. 341-378, Quotation from p. 341.

15 C.F. van den Berg, *Transforming for Europe*, p. 18.

16 Ibidem.

Hierarchy of levels

The vertical dimension of the MLG approach contends that a hierarchy of territorial levels, which is assumed in state-centric studies, is decreasingly found in empirical reality. The term MLG implies that governance is made up of several horizontal layers and several vertical columns. However, there is little agreement on how exactly these layers or levels are related to one another.

While some perceive the concept as representing a set of vertically layered tiers of authority, bound together in a hierarchical fashion[17], others see MLG as an alternative to hierarchical government, in which the order of importance between levels is fluid and perhaps even random.[18] Should MLG be read as a system of governance in which hierarchy of levels has largely eroded, or are the policy networks MLG presents nested in formal and hierarchically ordered government institutions? Or, can jurisdictions of both types exist alongside each other? These questions are important if we want to understand the changed position of national-level governance institutions in general and the position and role of national civil service systems in EU-level decision making in particular.

The realization that MLG can be conceived as a system with hierarchically ordered political-administrative units, more or less similar to a federalist structure and/or as a system where different levels exist on a relatively equal footing next to one another, signifies that there is no single manifestation of MLG. Hooghe and Marks simplify these multiple manifestations of MLG by identifying two main types.[19] Their distinction helps to articulate the qualities of different forms of MLG. Hooghe and Marks relied on four variables to construct their types: (1) whether political-administrative units are designed around particular communities, or around particular policy problems; (2) whether competencies are bundled within one jurisdiction, or if jurisdictions are functionally specific; (3) whether jurisdictions are limited in number, or proliferate; and (4) whether jurisdictions are stable over time, or fluid. The main features of both types are set out here.

Type I MLG can best be envisaged as a Russian Doll, hosting a fixed number of non-intersecting jurisdictions, where each lower tier is nested into a higher one. Interestingly, scholars in Public Administration recognized and described this kind

17 B.G. Peters and J. Pierre, *Politicians, Bureaucrats and Administrative Reform: the Changing Balance*, London, 2001.

18 B. Frey and R. Eichenberger, *The New Democratic Federalism for Europe. Functional, Overlapping, and Competing Jurisdictions,* Cheltenham, 1999.

19 L. Hooghe and G. Marks, *Multi-Level Governance and European Integration*, Vol. 1, Lanham, Maryland, 2001; L. Hooghe and G. Marks, 'Unravelling the Central State, But How? Types of Multi-Level Governance', *American Political Science Review*, 97(2), 2003; L. Hooghe and G. Marks, 'Constrasting Visions of Multi-Level Governance?', in: I. Bache and M. Flinders (Eds.), *Multi-Level Governance*, Oxford, 2004, pp. 15-30.

of MLG as early as the 1970s as layered or territorial governance.[20] In this type, there are only a limited number of governance levels – the international, national, regional, meso and local. Each level fulfils general-purpose tasks and bundles together multiple functions. Although the division of policy competencies across the levels may change over time, the levels themselves persist for longer periods. In Hooghe and Marks' typology, jurisdictions of Type I are typically characterised by the trias politica structure (i.e. an elected legislature, an executive – plus a professional civil service – and a court system).

If a territorial system of MLG is to be envisaged as a Russian Doll, Type II can be best compared to a marble cake.[21] Analogous with the similarity between Type I MLG and territorial governance, Type II MLG closely resembles what has been known within Public Administration and Legal Studies as functional administration.[22] This type consists of a potentially infinite number of specialised jurisdictions, each fulfilling their individual function. These jurisdictions emerge and disappear according to the demands for governance. In this sense, Type II is the functional equivalent to market competition, since governmental structures are ad-hoc, problem driven, and therefore more economically efficient than general-purpose jurisdictions.

Territitorial governance (Type I MLG)	**Functional governance (Type II MLG)**
General-purpose jurisdictions	*Task-specific* jurisdictions
Non-intersecting memberships	*Intersecting* memberships
Jurisdictions organised on a *limited number of levels*	*No limit* to the number of jurisdictional levels
System-wide architecture	*Flexible design*

Table 1. *Types of MLG*[23]

As a result, their number is never constant and some jurisdictions may be very short-lived. Type II MLG implies a fragmented public sector, where there is not one government but a variety of different public service sectors.[24] Frey and Eichenberger's idea of a governance system in which jurisdictions are functional,

---

20 A. van Braam, *Wat weten we eigenlijk van de ambtenaren?* Leiden, 1988; Th.A.J. Toonen, 'A Decentralized Unitary State in a Welfare Society', *West European Politics*, 10(4), 1987, pp. 108-129.

21 L. Hooghe and G. Marks, 'Unravelling the Central State, But How?, 2003, p. 14.

22 A. van Braam, *Wat weten we eigenlijk van de ambtenaren?*; G. Dijkstra and F.M. van der Meer, 'Functionele Decentralisatie', *Compendium voor Politiek en Samenleving in Nederland*. Deventer, 1997.

23 L. Hooghe and G. Marks, 'Constrasting Visions of Multi-Level Governance?', p. 4; A. van Braam, *Wat weten we eigenlijk van de ambtenaren?*.

24 Compare V. Ostrom and E. Ostrom, 'Public Goods and Public Choices', in: M. McGinnis (Ed.), *Policentricity and Local Public Economies: Readings from the Workshop in Political Theory and Policy Analysis*, Ann Arbor, 1999, pp. pp. 75-105.

overlapping and competing (FOCJ) fits neatly into this type of MLG.[25]

Table 1 summarizes the two types of MLG and demonstrates that there are two broad ways in which the different jurisdictions in MLG can be related to one another. Marks and Hooghe stress that both types are by no means mutually exclusive. Rather, they co-exist, because some policy requirements are better or more efficiently met by Type I jurisdictions and others by Type II jurisdictions. Consequently, most governance systems consist of both a set of relatively hierarchical general-purpose jurisdictions and a set of functionally differentiated and overlapping jurisdictions. Albeit an empirical matter, two important questions that arise from this realization are: how is the division of labour organised across both types of MLG, and is either type of MLG dominant over the other?

In any case, what both types have in common is that they deviate strongly from the traditional perspective of a centralised state, in which authority is assumed to be diffused from one pivotal level of government.[26] This is not to say that state-level authorities fulfill a marginal role, but the classical notion of uncontested state power now needs to be adjusted to states' more complex, *primus inter pares* position within the governance system.[27]

Governance

The horizontal dimension of the MLG approach, as stated above, is that not only should the various levels of governance be disaggregated into a variety of different actors and institutions, but also that the role played by actors and institutions who are not formally part of governmental structures should be recognised. In other words, government has gradually but increasingly turned into governance and should be regarded as such. Governance has been defined as 'a more encompassing phenomenon than government. It embraces government, but it also subsumes informal, non-governmental mechanisms whereby those persons and organisations within its purview move ahead, satisfy their needs and fulfil their wants'.[28] Similarly, Kooiman points out that governance is more than just action by state authorities. Instead, it involves 'all those activities of social, political an administrative actors that … guide, steer and control or manage society'.[29] Moreover, the concept of government focuses on formal constitutional structures of politics and administration, whereas the concept of governance stresses processes

---

[25] B. Frey and R. Eichenberger, *The New Democratic Federalism for Europe.*

[26] L. Hooghe and G. Marks, 'Unravelling the Central State, But How?', p. 23.

[27] W. Wessels and D. Rometsch (Eds.), *The European Union and Member States. Towards Institutional Fusion*, Manchester, 1996; B.G. Peters and J. Pierre, *Politicians, Bureaucrats and Administrative Reform: the Changing Balance*, London, 2001.

[28] J.N. Rosenau, 'Governance, Order, and Change in World Politics', in: J. N. Rosenau and E.-O. Czempiel (Eds.), *Governance without Government: Order and Change in World Politics*, Cambridge, 1992, pp. 4-5. Quotation from p. 4.

[29] J. Kooiman (Ed.), *Modern Governance. New Government-Society Interactions*, London, 1993, p. 2.

and problem solving activities.

The MLG approach is also sensitive to the inclusion of quasi-state and non-state actors. It assumes that the modus operandi of public decision making and service delivery in Western Europe is now adequately characterized by policy networks in which both public and private actors can take part on a more or less equal footing. Also, the notion of governance makes it possible to appreciate the role of individual specialised experts, such as civil servants within national ministries and interest group representatives, in the decision-making process.[30] In supranational or state-centric approaches, the significance of these actors and institutions would remain elusive.

The novelty of multi-level governance

The MLG approach has also been criticized for having limited explanatory value. Some critics see the MLG approach rather as an 'amalgam of existing theoretical statements than a new theory'.[31] Although there is considerable truth in this claim, it ought not to affect the analytical value of the approach to a substantial extent. The point is not whether MLG is an approach that is theoretically built from scratch (multi-level governance scholars make no claims to absolute originality), but rather whether the approach yields new levers for analyzing political processes.

The second point of criticism related to novelty may have more serious implications. Many scholars who have contributed to the development of the MLG approach regard the practice of MLG as a relatively recent phenomenon. For instance, Marks and Hooghe trace the emergence of MLG back no further than the mid-1980s, when the Single European Act was introduced (specifically, 1987).[32] Depending on how the practice of MLG is defined, this claim can be rather doubtful. First of all, Peters and Pierre point out that if the broad and general meaning of MLG as a 'process through which public and private actions and resources are coordinated and given common directing and meaning'[33] is used, the practice of MLG existed much earlier. Many of the EU Member States have a long tradition of institutionalized consensual cooperation between the state and societal actors.

Secondly, it would be an awkward proposition to maintain that, before the 'emergence' of MLG, different levels of government were strictly bound by hierarchical and legal provisions, such that there was no room for informal

[30] C. Radaelli, *Technocracy in the European Union*. Harlow: 1999.

[31] A. Jordan, 'The European Union: An Evolving System of Multi-level Governance or Government?', *Policy and Politics*, 29(2), 2001, pp. 193-208. Quotation from p. 201.

[32] L. Hooghe, 'Subnational Mobilisation in the European Union', *West European Politics*, 18(3), 1995, pp. 175-198. Specifically p. 191; G. Marks, L. Hooghe and K. Blank, 'European integration from the 1980s', *Journal of Common Market Studies*, 34(3), 1996, pp. 341-378.

[33] B.G. Peters and J. Pierre (Eds.), *Politicisation of the civil service in comparative perspective: The quest for control,* London, 2004. Quotation from p. 78.

exchange and negotiated policy outcomes between and among the various tiers of government.[34] Most current EU Member States have known interdependent relationships across levels of government dating back to the medieval times.[35]

Therefore, in addition to the abovementioned risk of blurring empirics with normativity, when employing the MLG approach it is highly important to be cautious about treating the two pillars of MLG practice (the involvement of non-state actors in decision making processes and the decrease in formality in intergovernmental relationships) as fundamentally new phenomena.

The virtues of MLG

Historically, the distribution of power and competencies across territorial layers of government has several strong advantages from a liberal point of view. It has provided clarity, hierarchy and the possibility of shaping the governance of communities at distinct levels of scale. It enables citizens to make arrangements to shape their mutual interests at various levels of aggregation, making sure there is a maximum alignment between interest, taxation and self-determination.

Arguably, the 'scale flexibility' of MLG jurisdictions creates many advantages. For instance, jurisdictions can be custom-designed and decision makers can address the difficulty of heterogeneous policy problems by adjusting the scale of governance. Casella and Weingast added an ideological dimension to their advocacy of the normative superiority of non-hierarchical and informal political organization by arguing that 'the nested, hierarchical structure of the nation-state has no obvious economic rationale and is opposed by economic forces'.[36] They represented a group of scholars who contend that MLG is normatively superior to other types of political organization which are less inclusive in their decision-making procedures and more formal in their power structures.

In a similar way, Hooghe et al. stress that the flexibility, inclusiveness and differentiation of MLG may have 3 distinct advantages, in terms of efficiency, distribution and identity.[37] Multi-level governance allows the politics and administration to reflect the efficient production of public goods given their economies of scale and externalities. Also, the multi-level governance can more easily take into account the uneven territorial distribution of power, population density and wealth than a one-size-fits all or top-down centralized system of governance can. Lastly, MLG is sensitive to the idea that units of governance should to a real extent be based on the shared identity of the governed, i.e. MLG

---

[34] B.G. Peters and J.Pierre (eds), *Politicisation of the civil service in comparative perspective.*

[35] See also S. Verba, N.H. Nie and J.-O. Kim, *Participation and political equality: a seven-nation comparison*, Cambridge, 1978.

[36] A. Casella, and B. Weingast, 'Elements of a Theory of Jurisdictional Change', in B. Eichengreen, J. Frieden and J. v. Hagen (Eds.), *Politics and Institutions in an Integrated Europe*, New York/Heidelberg, 1995, pp. 11-41. Quotation from p. 13.

[37] L. Hooghe, G. Marks and A. Schakel, *The Rise of Regional Authority: A Comparative Study of 42 Democracies*, New York, 2010.

allows units of governance to be an expression of community and the demand for self-rule by normatively distinct, territorially based groups.

The vices of MLG

If the virtues of the MLG approach are summarized above, what critical observations can we propose? The first and most pronounced in the context of the European Union and the crumbling systemic support for it, is that MLG blurs relationships of accountability between actors and institutions and the democratic quality of decision-making,[38] as well as increasing costs and creating inefficiencies caused by decreased coordination opportunities.

The increasingly diffuse nature of governance at all territorial levels in Western Europe raises questions regarding the quality of democratic governance and accountability at the various levels.[39] The legitimacy of public policy may, on the one hand, be increased through greater efficiency and the inclusion of a larger number of actions and institutions; but, on the other hand, the legitimacy that flows from representative democratic input and scrutinising accountability may be at risk. In this context, Börzel and Sprungk signal how the complex multi-level structure of governance in Western Europe undermines the mechanisms that ensure the democratic legitimacy of domestic politics, in respect of both horizontal and vertical divisions of power. Börzel and Sprungk call this phenomenon the 'dark side of Europeanisation that has not been sufficiently paid attention to'.[40]

Similarly, Wessels and Rometsch conclude that, in all Member States, European integration has led to a deparliamentarisation and bureaucratisation at the national level.[41] The central question here is whether problem-solving capacity and outcomes have taken precedence over democratic input and accountability. While informal patterns of political coordination are often praised for their efficiency and inclusiveness, they create opportunities for the more powerful political and economic actors (such as the executive and large business) to escape and by-pass those regulations that may have been explicitly intended to formally

---

38 C.F. van den Berg and Th.A.J. Toonen, 'National Civil Service Systems in Western Europe: The End or Endurance of Weberian Bureaucracy?', in: J.C.N. Raadschelders, Th.A.J. Toonen and F.M. van der Meer, (Eds.), *The Civil Service in the 21st Century: Comparative perspectives*. 2nd edition, London, 2015.

39 T. Börzel, and C. Sprungk, 'Undermining Democratic Governance in the Member States? The Europeanisation of National Decision-Making', in: R. Holzhacker and E. Albaek (Eds.), *Democratic Governance and European Integration.* Aldershot, 2007; B.G. Peters and J. Pierre, 'Multi-level Governance and Democracy: A Faustian Bargain?', in I. Bache and M. Flinders (eds.), *Multi-level Governance*, Oxford, 2004, pp. 75-92.; W. Wessels and D. Rometsch (Eds.), *The European Union and Member States. Towards Institutional Fusion*, Manchester, 1996.

40 T. Börzel, and C. Sprungk, 'Undermining Democratic Governance in the Member States?', p. 23.

41 W. Wessels and D. Rometsch (Eds.), *The European Union and Member States*, p. 364.

guarantee the rights and input of 'weaker' actors and institutions.[42] While many authors are alert to this predicament, the literature on MLG has not yet found a satisfactory way to address it.

However, there are some exceptions. One way to overcome the loss of democratic legitimacy could be to create new mechanisms of control and accountability in the form of self-governing communities.[43] Another way, suggested by Peters and Pierre, is to extend the existing structures of representative democracy at each territorial level. Interestingly, Peters and Pierre reserve the leading role in this process for national governments since, they argue, when it comes to electoral legitimacy, national governments are the best equipped players to strengthen the democratic quality of decision-making and service delivery.[44] However, Bache and Flinders acknowledge that, given the multi-level and governance nature of the current system, 'additional mechanisms of accountability beyond those provided by representative institutions [are needed]. This does not only mean democratizing supranational and global processes, but also rethinking and revising the mechanisms of democracy within the state, at both national and subnational levels.'[45]

A final troubling element in the MLG approach is the idea that, since the emergence of this type of governance, power is shared between actors and institutions at the various levels, rather than competed for.[46] This claim implies that where informal patterns of decision making and negotiation arise, conflicts of interests evaporate too. This seems rather unrealistic. Moreover, empirical studies point to the opposite: the multitude of actors and avenues to pursue one's interests tend to encourage competition, hard negotiations and multi-strategy campaigns, rather than promote peaceful power-sharing.[47]

Conclusion

In conclusion, the vertical and horizontal dimensions of MLG both harbor a potential for increasing the flexibility and inclusiveness of governance, but at the same time pose challenges to the quality of governance in terms of democracy, accountability, transparency and identification with politics and administration. Also, what has become clear is that many advocates of increasing MLG believe in

---

42 B.G. Peters and J. Pierre (Eds.), *Politicisation of the civil service in comparative perspective: The quest for control,* London, 2004, p. 85.

43 I. Bache and M. Flinders, *Multi-level Governance*, p. 202.

44 B.G. Peters and J. Pierre (Eds.), *Politicisation of the civil service in comparative perspective.*

45 I. Bache and M. Flinders, *Multi-level Governance.* Quotation from p. 205.

46 B. Kohler-Koch, 'The Strength of Weakness: The Transformation of Governance in the EU', in: S. Gustavsson and L. Lewin (Eds.), *The Future of the Nation-State*, London, 1996, pp. 93-117; L. Hooghe and G. Marks, 'Unravelling the Central State, But How?'.

47 e.g. H. Kassim, B.G. Peters and V. Wright (Eds.), *The National Co-ordination of EU Policy: The Domestic Level*, Oxford, 2000.

the a *priori* normative superiority of this mode of governance, which in practice has not yet found systematic empirical support.

The MLG perspective remains useful since it signals the increasing degree to which various tiers of government (local, regional, national, European) and various types of actors and institutions (state, business, organized interest, media) are sharing governance responsibilities and depend on each other. The MLG approach makes us aware of the complementary presence of non-hierarchical and non-legislated arrangements and of the room for informal exchange and negotiated policy outcomes between and among the various tiers of government.[48]

Yet, in order for MLG to not degenerate into 'governance in the shadows', it is important to assess the proactivity of governance in a systematically and empirically manner and to keep asking the hard questions: on what basis do decision-makers assume political or administrative authority? To what extent does informality lead to greater inclusiveness or does the circumvention of formal structures lead to greater obscurity and less protection of under-resourced interests instead? Clearly, MLG will not lead us into a world beyond conflict and we should stay alert to the fact that the cloak of MLG can blur the fine line between consensus and dictates by the stronger players.

Lastly, as MLG is increasingly becoming the norm, as liberals it is our responsibility to uphold the open character of political debate which leads to political decision-making, rather than allowing our societies to be steered in non-parliamentary and even non-political arenas outside of the public eye and sheltered from democratic scrutiny.

References

C. Ansell, 'The Networked Polity: Regional Development in Western Europe', *Governance*, 12, 2000, pp. 303-333.
I. Bache and M. Flinders, *Multi-level Governance,* Oxford, 2004.
A. Benz, 'Mehrebenenvervlechtung in der Europaeischen Union', in: M. Jachtenfuchs and B. Kohler-Koch (Eds.), *Europaeische Integration*. Opladen, 2003.
C.F. van den Berg, *Transforming for Europe: The reshaping of national bureaucracies in a system of multi-level governance*. Leiden, 2011.
C.F. van den Berg and Th.A.J. Toonen, 'National Civil Service Systems and the Implications of Multi-level Governance: Weberianism Revisited?', in: J. C. N. Raadschelders, Th. A. J. Toonen and F. M. van der Meer (Eds.), *The Civil Service in the 21st Century. Comparative Perspectives*, Basingstoke, Hampshire/New York, NY, 2007, pp. 103-120).
C.F. van den Berg and Th.A.J. Toonen, 'National Civil Service Systems in Western Europe: The End or Endurance of Weberian Bureaucracy?', in: J.C.N. Raadschelders, Th.A.J. Toonen and F.M. van der Meer, (Eds.), *The Civil Service in*

[48] B.G. Peters and J. Pierre (Eds.), *Politicisation of the civil service in comparative perspective.*

the 21st Century: Comparative perspectives. 2nd edition, London, 2015.
T. Börzel, and C. Sprungk, 'Undermining Democratic Governance in the Member States? The Europeanisation of National Decision-Making', in: R. Holzhacker and E. Albaek (Eds.), *Democratic Governance and European Integration.* Aldershot, 2007.
A. van Braam, *Wat weten we eigenlijk van de ambtenaren?* Leiden, 1988.
A. Casella, and B. Weingast, 'Elements of a Theory of Jurisdictional Change', in B. Eichengreen, J. Frieden and J. v. Hagen (Eds.), *Politics and Institutions in an Integrated Europe*, New York/Heidelberg, 1995, pp. 11-41.
G. Dijkstra and F.M. van der Meer, 'Functionele Decentralisatie', *Compendium voor Politiek en Samenleving in Nederland*. Deventer, 1997.
B. Frey and R. Eichenberger, *The New Democratic Federalism for Europe. Functional, Overlapping, and Competing Jurisdictions,* Cheltenham, 1999.
L. Hooghe, 'The Renaissance of European Integration Studies', *West European Politics and Society Newsletter*, APSA Section, 2001.
L. Hooghe and G. Marks, *Multi-Level Governance and European Integration*, Vol. 1, Lanham, Maryland, 2001.
L. Hooghe and G. Marks, 'Unravelling the Central State, But How? Types of Multi-Level Governance', *American Political Science Review*, 97(2), 2003.
L. Hooghe and G. Marks, 'Constrasting Visions of Multi-Level Governance?', in: I. Bache and M. Flinders (Eds.), *Multi-Level Governance*, Oxford, 2004, pp. 15-30.
H. Kassim, B.G. Peters and V. Wright (Eds.), *The National Co-ordination of EU Policy: The Domestic Level*, Oxford, 2000.
B. Kohler-Koch, 'The Strength of Weakness: The Transformation of Governance in the EU', in: S. Gustavsson and L. Lewin (Eds.), *The Future of the Nation-State*, London, 1996, pp. 93-117.
B. Kohler-Koch and R. Eising (Eds.), *The Transformation of Governance in Europe*. London, 1999.
J. Kooiman (Ed.), *Modern Governance. New Government-Society Interactions*, London, 1993.
J. Locke, *Two Treatises of Government*, London, 1772.
G. Marks, 'Structural Policy after Maastricht', in: A. Cafruny and G. Rosenthal (Eds.), *The State of the European Community*, New York, 1993, pp. 391-410.
G. Marks, L. Hooghe and K. Blank, 'European integration from the 1980s', *Journal of Common Market Studies*, 34(3), 1996, pp. 341-378.
R. Mayntz, 'Governance im modernen Staat', in: A. Benz (Ed.), *Governance – Regieren in komplexen Regelsystemen. Eine Einführung*, Wiesbaden, 2004, pp. 65-76.
J.S. Mill, *On Liberty,* London, 1999 [1869].
Charles de Secondat baron de Montesquieu, *De l'esprit des lois*, Paris, 1872.
V. Ostrom and E. Ostrom, 'Public Goods and Public Choices', in: M. McGinnis (Ed.), *Policentricity and Local Public Economies: Readings from the Workshop in*

Political Theory and Policy Analysis, Ann Arbor, 1999, pp. pp. 75-105.
B.G. Peters and J. Pierre, *Politicians, Bureaucrats and Administrative Reform: the Changing Balance*, London, 2001.
B.G. Peters and J. Pierre (Eds.), *Politicisation of the civil service in comparative perspective: The quest for control,* London, 2004.
J. Peterson, 'The Choice for EU Theorists: Establishing a Common Framework for Analysis', *European Journal of Political Research*, 39, 2001, pp. 280-318.
C. Radaelli, *Technocracy in the European Union*. Harlow: 1999.
J.N. Rosenau, 'Governance, Order, and Change in World Politics', in: J. N. Rosenau and E.-O. Czempiel (Eds.), *Governance without Government: Order and Change in World Politics*, Cambridge, 1992, pp. 4-5.
J.N. Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World*, Cambridge, 1997.
M. Rutte, 'Zorgen dat de toekomst in ons leeft', 4e Kerdijklezing (4th Kerdijk Lecture), delivered on 12 November 2014, Den Haag.
P.C. Schmitter, 'Examining the Present Euro-Polity with the Help of Past Theories', in: G. Marks, F. Scharpf, P. Schmitter and W. Streeck (Eds.), *Governance in the European Union*, London, 1996.
P. Stephenson, 'Twenty years of multi-level governance: "Where does it come from? What is it? Where is it going?"', *Journal of European Public Policy*, Vol. 20 (6), 2013, pp. 817-837.
J.R. Thorbecke, *Historische schetsen*, The Hague, 1872 (2nd edition).
A. de Tocqueville, *De la démocratie en Amérique I*, Paris, 1981.
Th.A.J. Toonen, 'A Decentralized Unitary State in a Welfare Society', *West European Politics,* 10(4), 1987, pp. 108-129.
Th.A.J. Toonen and F.M. van der Meer, 'Territory and Bureaucracy', in: M. Burgess and J. P. Vollaard (Eds.), *State, Territoriality and European Integration*, London, 2005.
S. Verba, N.H. Nie and J.-O. Kim, *Participation and political equality: a seven-nation comparison*, Cambridge, 1978.
W. Wessels and D. Rometsch (Eds.), *The European Union and Member States. Towards Institutional Fusion*, Manchester, 1996.

Do we need EU regulation to open up trade in Europe? Mutual recognition versus harmonisation

Pieter Cleppe

Introduction

How can markets be opened up in the European Union? There are basically two ways to do it. Take the example of architects. How do we make sure an architect from Poland can work in France? Roughly speaking, one way would be for France to remove all protectionist aspects of its regulations for architects while, of course, still respecting all regulations concerning health, safety and consumer protection, thus enabling Polish architects to be able to work in France. In this way both countries 'mutually recognize' each other's standards; trade is about trust. Another way would be for the European Union to harmonize the rules that apply to architects, so that they are the same all over the EU.

Of course, in reality, there are many shades of grey, from maximum levels of harmonization to minimum, and to achieve mutual recognition, sometimes an EU directive has to be issued, as was actually the case for architects.[1] For the sake of clarity, in what follows below, 'harmonization' will be understood as 'the creation of new rules at the European level', whereas 'mutual recognition' will be understood as 'merely scrapping protectionist elements of national regulations', whilst bearing in mind that in reality we often see a mix.

In this paper I provide an overview of how opening trade up in Europe became more and more about harmonization, why that is not a good thing, and what should be done about it.

History

The countries signing up to the Treaty of Rome, in 1957, anticipated that there would be a transition period which meant that countries would only retain their veto in common decision making for a certain period of time. When the transition period came to an end and majority voting was due to be introduced, in 1965, France, in protest, refused to send any representatives to Brussels, which led to the 'Empty Chair Crisis'.[2] With the so-called 'Luxembourg compromise', it was agreed that, in questions of vital interest, Member States would retain a veto

---

1 http://europa.eu/legislation_summaries/other/l23022_en.htm

2 http://web.archive.org/web/20071025203706/http://eprints.lse.ac.uk/2422/01/Decommisioningempty.pdf and http://en.euabc.com/word/640

right.[3] This was a non-legally enforceable political veto, watered down[4] in the 1980s, which could be used in areas of majority voting and shouldn't be confused with circumstances in which Member States still retain a legal veto right.

In 1979, a very important principle was established by the European Court of Justice (ECJ) in its *Cassis de Dijon* ruling,[5] which stipulated that, under European law, if a company is allowed to make a product freely available for sale in one European Community country, then it must be allowed to do so in all Member States. The product involved in this case was a French liquor which had an alcohol percentage of 15%. But German law banned any product from being sold which called itself a fruit liquor if it had an alcohol percentage lower than 25%. As very few German liquors would violate this particular German law, the Court ruled that such a restriction was de facto protectionism through the backdoor.[6] The French company won the case, but France wasn't overly happy with the result because the Court, although leaving some room for exceptions,[7] had now established the so-called principle of mutual recognition much more firmly, and the French government could foresee many of its own regulations being branded protectionist and illegal under European law.

Given that returning to a context of national borders made even less sense in the 1980s than it did in the 1950s, if having all these rules at the national level wasn't possible then the obvious solution for this was to draft more rules at the European level. As Jens-Peter Bonde, an MEP for Denmark for 30 years, puts it: 'The verdict forced the Member States to agree on common standards to which they would otherwise not have agreed. It paved the way for decisions by qualified majority under the so-called Internal Market, introduced by the Single European Act in 1987.'[8]

So in order to make rule-making at the European level more easy, veto powers were scrapped by this 'Single European Act', the objective of which was to establish a European 'single market' by 1993. A laudable aim, but in order to achieve this, the Treaty extended Qualified Majority Voting to new areas,[9] something which has been repeated in every European Treaty since. It also introduced the so-called 'cooperation procedure', empowering the European Parliament, an ob-

3 http://www.eurotreaties.com/luxembourg.pdf
4 http://en.euabc.com/word/640
5 http://esharp.eu/jargon/cassis-de-dijon/ and http://en.euabc.com/word/140
6 The ECJ judged that such measures fell under European Treaty articles like the current Art. 34 TFEU which prohibit 'quantitative restrictions and measures of equivalent effect'.
7 The ECJ ruled that exceptions to this principle as described by the current Art. 36 TFEU can only be made to serve the public interest (e.g., the protection of health, the environment or consumers). http://www.internationallawoffice.com/newsletters/detail.aspx?g=ea0656e8-19a6-db11-8a05-001143e35d55 http://www.minbuza.nl/ecer/dossiers/goederen-vrij-verkeer/rechtvaardigingsgronden.html
8 http://en.euabc.com/word/140
9 Currently specified in the articles from Article 114 TFEU onward.

sessive cheerleader of ever more regulation.

Like many who support the creation of a single market, Margaret Thatcher supported the Single European Act, believing harmonization was needed to open borders. It has now become clear, even to the proponents of this approach, that there is a heavy cost to pay for this. Parallel to the growth of the body of European harmonized rules, the approach to open up trade in Europe through mutual recognition was continued.[10]

The problems with harmonisation

1. The high cost of harmonisation's 'one size fits all' – approach

When making laws for 28 diverse economies, covering 500 million people, there is a greater risk that a regulation will not suit local needs and impose higher costs than when regulation is decentralised. Also, making new rules at the European level increases the risk that these will contradict national rules, leading to regulatory overlap. Even if, in theory, European rules trump national ones, this decreases legal clarity and creates uncertainty.

We can see this when we look at the figures. Large-scale research[11] by Open Europe has concluded that the cumulative cost of EU regulation introduced between 1998 and 2008 for all 27 EU Member States was €928 trillion, which is 66% of the €1.4 trillion euro which all national and EU regulation introduced during that period has cost. By 2018, over a 20 years period, the cost of EU regulation introduced since 1998 is estimated to have been risen to more than €3.017 trillion. This is over €15,000 per household in the EU.[12]

It must be said that this investigation has only focused on the cost of regulations derived from so-called 'regulatory impact assessments', which is an imperfect estimate. It ignores any benefits of regulations, which in theory may be greater than the costs. However, more recent Open Europe research concluded that for 24 of the 100 EU rules which are most costly to the UK, estimated costs outweigh estimated benefits,[13] this is again according to official government estimates which have an inbuilt tendency to present the situation in a slightly rosier hue than assumed.

That 66% or two thirds of the impact of regulation in the EU comes from EU level should also give some pause for thought. Are two thirds of the problems in

---

[10] To make the mutual recognition principle fully operational, the European Parliament and the Council adopted Regulation (EC) No 764/2008, which concentrates on the burden of proof by setting out the procedural requirements for denying mutual recognition http://www.unms.sk/?regulation_no_764_2008_ec http://www.unms.sk/?regulation_no_764_2008_ec

[11] http://archive.openeurope.org.uk/Content/documents/Pdfs/outofcontrol.pdf

[12] Particularly because the cost of EU rules accelerated some 50% between 2005 and 2008. For the record: EU GDP amounts to around €13 trillion per year.

[13] These regulations include the Temporary Agency Workers Directive and the Energy Performance of Buildings Directive http://openeurope.org.uk/intelligence/britain-and-the-eu/100-most-expensive-eu-regulations/

Europe really of such a nature that a common solution for 500 million people is needed? But don't think this is all the result of some conspiracy by eurocrats in the European Commission in Brussels. Member States also play an important role in EU decision making, and are often very keen to decide rules in Brussels, rather than at home. For example, the ban on traditional light bulbs would have faced much more opposition in London and Berlin than it did, because it was decided at the European level.[14] In Brussels, there is less scrutiny by the media or national parliaments. When national electorates found out, a lot of criticism against the measure emerged, resulting in Germans hoarding traditional light bulbs. But it was too late. For a politician, there is a huge incentive to prefer policy making in Brussels over the national capitals, if one wants to have an easy time implementing policy.

In Brussels, the European Parliament is supposed to act as a check on the legislative process, given that there is a lack of sufficient scrutiny by the media and national politicians.[15] However, instead of restraining the Commission's machine, it acts as an extra motor driving it forward. The very least one could expect from this institution is that it would refuse to provide discharge for the EU Budget particularly when the EU's own auditor, the Court of Auditors, has refused to provide a positive statement about EU spending for 20 years in a row now,[16] because of the unacceptably high level of mistakes in EU spending.[17] The Netherlands, the UK and Sweden have all refused to discharge over the last four years.[18] The Parliament on the contrary consistently calls for a bigger EU budget. The EP gained a lot more powers with the Lisbon Treaty. Unsurprisingly, it is possibly even worse in ignoring its role of restraining the regulatory machine than it is in controlling the use of EU funds. It took until 2013 for the institution to vote to ban chocolate cigarettes.[19]

That two thirds of the impact of rules in the EU comes from the EU level is a much more rock-solid claim than all kinds of other figures floating around, which either ignore local regulation and thereby overestimate the power of the EU, or do

14 http://www.spiegel.de/international/germany/getting-around-the-eu-ban-germans-hoarding-traditional-light-bulbs-a-638494.html

15 http://openeuropeblog.blogspot.be/2014/05/the-european-parliament-failed.html

16 http://openeuropeblog.blogspot.be/2014/11/court-of-auditors-highlights-erros-in.html

17 http://www.eu-accountability.nl/accountability/opinions-eca

18 http://openeurope.org.uk/daily-shakeup/much-eurozone-less-confident-deal-greece-todays-crucial-meeting/

19 MEPs supported the proposal "Imitation tobacco products which appeal to minors and consequently form a potential gateway to using tobacco products shall be prohibited." The Council later forced the EP to abandon this position http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+20131008+ITEMS+DOC+XML+V0//EN&language=EN

not take into account indirectly applicable EU regulation.[20] These are, of course, all rough estimates, but very few dispute that the European regulatory machine is out of control. The European Commission itself admits this, as it has on regular occasions, in 1996, 2005 and 2013,[21] launched large scale attempts to cut EU red tape. These laudable attempts haven't been very successful, unlike some attempts at the national level. It emerged this year, for example, that the UK government's cuts to red tape over the last five years were entirely undone by new EU regulations which came into force in the last two years alone.[22]

There is some cause for hope, however. The second man in command at the new European Commission, former Dutch Foreign Minister Frans Timmermans, is responsible for 'better regulation.' No-one should be naive about what one man can do to change the culture at the European level, but it is the most high-profile attempt at that level to do something about this problem.[23] His initial attempts to single out 80 legislative proposals for withdrawal or reworking were met by fierce opposition,[24] not least by certain Member States, who, for example, opposed his idea to ditch the proposal for an EU ban on plastic bags.[25] It only goes to show that the root of the problem is not just with Brussels, but also with the representatives of national capitals, who sometimes like to abuse the European Union as a way of imposing regulations they couldn't pass as easily at the national level.

2. It is harder to change EU rules than national ones

Industry lobbyists are often quite keen on harmonization. They see the immediate benefits of countries having to adopt rules which lobbyists can easily influence at the European level. They forget, however, that once these rules are in place, in order to change them, one needs to go through the whole European legislative machinery again: the European Commission must issue a proposal, in most cases the European Parliament must have its say and 28 governments need to agree to the change.

The long-running discussion about changing the so-called 'posted workers directive' is a good example. This directive allows workers to work in other EU Member States for a certain period of time as long as they comply with the social

[20] http://openeuropeblog.blogspot.be/2009/04/how-many-of-our-laws-are-made-in.html

[21] http://openeuropeblog.blogspot.be/2013/10/the-war-on-eu-red-tape-will-this-time.html

[22] http://openeurope.org.uk/daily-shakeup/greece-seeks-renegotiate-bond-payments-ecb/#section-7

[23] http://www.ftm.nl/column/timmermans-gouden-kans-om-te-kappen-het-eu-regelwoud/

[24] http://www.euractiv.com/sections/social-europe-jobs/commission-cut-maternity-leave-2015-work-programme-310899 http://ec.europa.eu/atwork/pdf/cwp_2015_withdrawals_en.pdf

[25] http://www.euractiv.com/sections/sustainable-dev/timmermans-overruled-plastic-bags-deal-310152

rules of their home state. While favoured by Britain and the central and Eastern Member States, social democrats in the old Member States have long been calling for changes; finally at the end of 2013 a minor deal was reached to change it. Industry lobbyists may think they've scored a victory when a regulation is finally drafted in a way they like, but this may backfire when, as a result of technological or economic changes, a regulatory change is needed. Such a regulatory change is then much more likely to happen at the national level.

3. There is a higher risk of 'regulatory capture' with harmonisation than with mutual recognition

For interest groups of all brands, it is much easier to shape legislation when new rules are being discussed than when the focus is only on removing protectionist elements of national regulations. The phenomenon of 'regulatory capture', which allows interest groups to have a vast influence over policy making, can be witnessed at both European and national level, but it is most harmful when it happens at the European level. If a new innovative company, like the taxi ride share provider Uber, for example, wasn't able to be active on the Italian market because of the lobbying power of the Italian taxi sector, that would be bad enough, but if Uber only managed to succeed in one European country, it could use its success there to convince other countries, then ultimately Italy would also have to open its borders. If Uber were to be banned by the EU, this dynamic wouldn't exist.

4. Regulation is better if tested in 28 different jurisdictions, rather than only one

The chance that one gets it right after 28 attempts is higher than after only one attempt. The examples again of Uber or Airbnb, a website for people to rent out lodgings, is a good illustration of this. Everywhere in the world, and also in Europe, national and regional regulators are struggling to adapt their old legislative framework to the advent of these newcomers. Governments will learn from each other and copy the regulatory response of the Member State which is most successful in its venture to integrate new technologies. If the EU had the power to decide the regulatory treatment of new technologies, the risk of choosing incorrectly would be so much higher. This is currently visible in the discussions on whether to allow genetically modified organisms (GMOs), which the EU responded to by imposing stringent regulations,[26] strangling this potentially lucrative industry, while the rest of the world steams ahead.

Luckily, more powers over this choice were recently handed to national au-

[26] Which are estimated to add between 10 and 20 million pounds to the cost of developing a GM trait in a crop, which is deemed prohibitive for the public sector and for small and medium sized businesses. http://www.reuters.com/article/2014/03/14/science-gm-idUSL6N0MA2FW20140314 The UK House of Commons recently slammed the EU treatment http://openeurope.org.uk/daily-shakeup/significant-increase-net-immigration-uk-among-non-eu-eu-migrants/

thorities,[27] but only after years of unfruitful discussion which were bolstered by the EU's adherence to the so-called 'precautionary principle' which some claim[28] would have blocked inventions like the aspirin had it been applied back in the days.

5. Harmonisation is questionable democratically, given how it boosts the power of technocrats

One particular problem with drafting harmonizing regulations, which are meant to cover 28 different countries with 500 million people, is that a lot of details need to be worked out. As a result of that, a very opaque system of implementing regulations, called 'comitology'[29] has developed at the European level, providing bureaucrats with often enormous powers. No less than half of the content of regulations is being decided by committees, which are only supposed to implement the rules.

So to recap: two thirds of the rules are decided at the EU level, according to official regulatory impact assessment data, and half of the content of these rules is decided by bureaucrats in obscure committees after the actual decision has been made by the European Parliament and the Council of Ministers. Welcome to Europe.

The last big revision of the EU Treaties, the Lisbon Treaty, contained some reforms of the comitology system, but these are deemed to have actually increased the powers of the European Commission, an institution which already enjoys vast powers and even has a monopoly to propose EU legislation.[30] Most infamously, the proposed EU ban on (non-standardised) jugs of olive oil, was passed through comitology, before it was withdrawn[31] after having been ridiculed in the media.

In EU regulation we can see a lot of the use of 'technical standards', which supposedly aren't of a politically sensitive nature, but which have a worrying propensity to become politicized, which was the case with EU rules on banker bonuses.[32]

---

[27] http://www.euractiv.com/sections/agriculture-food/meps-approve-national-ban-gm-crops-cultivation-311221 http://openeurope.org.uk/blog/new-rules-gmos-step-towards-flexible-eu/

[28] http://www.spiked-online.com/newsite/article/5085#.VPnrXuo2Ja8

[29] 'Comitology' refers to a system in which implementing powers are sometimes attributed to the Commission aimed at implementing legislation uniformly in the Member States. In exercising its implementing powers, the Commission is assisted by representatives of the Member States, sitting in committees. http://europa.eu/legislation_summaries/glossary/comitology_en.htm and http://openeuropeblog.blogspot.be/2010/04/and-winner-isthe-european-commission.html

[30] http://openeuropeblog.blogspot.be/2011/02/step-backwards-for-transparency.html http://openeuropeblog.blogspot.be/2010/04/and-winner-isthe-european-commission.html

[31] http://openeuropeblog.blogspot.be/2013/05/good-news-commission-bottles-it-on.html

[32] http://openeuropeblog.blogspot.co.uk/2013/05/another-blow-in-bank-bonus-debate-but.html

6. Harmonisation can easily lead to competence creep, dangerously wide interpretations of rules and more powers for unelected judges in Luxembourg

In the case of mutual recognition, not much more is needed than to identify which elements of national regulations are protectionist. This may lead to political and even judicial discussions, but nothing compared to similar discussions in the field of harmonization, which bring new regulations into being, which then need to be interpreted. This can lead to situations in which Member States do not apply the rules in the same way, leading to unfair competition.

When the EU banned battery cages for hens, for example, the measure was implemented by the UK but some other countries (Spain, France, Poland) admitted not being ready to stop using battery cages, despite having had 13 years to prepare for the change. This led to unfair competition, something the European Union is in theory not supposed to create, but to destroy.[33]

Another consistent feature is that the rulings of the European Court of Justice (ECJ) in Luxembourg have radically changed the meaning and scope of EU rules in various EU policy areas, typically expanding the reach of the rules,[34] not least because being activist is in the DNA of the ECJ, which has been dubbed 'the least accountable and least representative institution of all'.[35] Just like the European Parliament and the European Commission, the ECJ's powers were boosted by the Lisbon Treaty.[36] One way to restrain the ECJ would be to create an intergovernmental 'EU Subsidiarity Court', to which the ECJ would be subject in matters relating to the distribution of competences.

The benefits of mutual recognition

1. Absence of expensive regulation

All the costs related to harmonisation listed above wouldn't exist if the path of the mutual recognition of norms was chosen so that trade could be opened up in Europe. Most importantly, there is of course the high cost of many of these rules.

---

33 http://www.independent.co.uk/news/uk/home-news/the-end-of-battery-farms-in-britain--but-not-europe-6281802.html

34 http://openeurope.org.uk/intelligence/britain-and-the-eu/jha-block-opt-out/ For example, the SiMAP and Jaeger rulings on working time spent being a resident on call and the compensatory rest periods have made the EU's Working Time Directive a lot more burdensome for the UK's National Health Service. Similarly, the ECJ ruled last year to scrap the insurance industry's derogation from the EU's Gender Directive, which had the effect of preventing the insurance industry from offering different premiums based on gender, even if it can be statistically proven that men and women present different degrees of risk. https://docs.google.com/viewerng/viewer?url=http://openeurope.org.uk/wp- content/uploads/2012/01/an_unavoidable_choice- more_or_less_EU_control_over_UK_policing_and_criminal_law.pdf p.16.

35 http://www.hanselawreview.org/pdf9/Vol6No01Art01.pdf

36 http://archive.openeurope.org.uk/Content/Documents/PDFs/guide.pdf http://en.eu-abc.com/?word_id=242

In today's world, with its global supply chains, the benefits of releasing European industry from crumbling regulations are perhaps even higher than assumed, as benefits would extend outside Europe. As already mentioned, it's true that regulations sometimes also bring about benefits, but given that official government data has already indicated that this doesn't happen in one in four cases, it is hard to underestimate the economic benefits which would result from a fundamental cleaning up of the European regulatory rulebook.

2. More regulatory competition, which isn't necessarily less regulation or a 'race to the bottom' of regulatory standards

As explained above, mutual recognition allows competition between states which creates the best regulatory environment. Member States could still issue stringent regulations as long as they're not protectionist. Germany can ban cigarettes, if it wants to. Banning 'French' cigarettes just isn't allowed. The absence of harmonization doesn't necessarily mean that there would be less regulation. In discussions about EU rules regarding capital standards for banks, a prominent example of EU harmonization, the UK and Sweden had to push very hard to be allowed to impose capital standards on banks that were more stringent than those prescribed in the original proposals for harmonization.[37] If this issue had been left to the Member States in a framework of mutual recognition, both countries' freedom to regulate its banks more fiercely than France and Germany would not have been threatened.

Separately, it should be noted that there isn't much compelling empirical evidence for fears that regulatory competition would lead to an undesirably low level of regulation.[38] If there is one thing we cannot accuse national politicians in Europe of, it is a reluctance to issue rules and regulations. A study by Grant Thornton concluded that Poland was Europe's undisputed leader in the volume of new legislation it draws up, at least when calculating in number of pages, closely followed by France. [39]

3. Without harmonisation, there is a lower risk of regulatory capture

Special interest groups would have a more difficult time succeeding if so many regulations weren't decided at the European level. They would no doubt still lobby fiercely in favour, or against, removing protectionist elements in national regulations if mutual recognition were the dominant practice. In itself, there is nothing wrong with lobbying. On the contrary, it's hard to imagine how poor law making

37 http://www.thelocal.se/20120502/40582

38 http://www.wirtschaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft54.pdf pg.22

39 http://barometrprawa.pl/#boxaboutfirst https://twitter.com/Exen/status/570923189964038144/photo/1 Of course one would need to look at the actual impact of the rules to get a clearer picture, but it may be an indication of some sort.

would be without the input of the industry which would be burdened by those laws, especially when it comes to very technical product standards and regulations. Of course, industry would prefer no burdensome harmonizing measures to be taken, but given that they are, they may as well try to shape them.

How do we boost the method of mutual recognition and improve harmonisation?

There are many ways to support the use of mutual recognition and to stop the EU's regulatory machine. In order to get rid of many burdensome regulations, apart from hoping that technological development will make some of these regulations redundant, there is only one, very complicated way: renegotiating at the EU level. Perhaps making it easier to abolish old EU rules than to make new ones would be an option, but this may be legally tricky. There are many ways to prevent expensive EU rules entering into force in the future, however. For some of them, Treaty changes are needed.

1. Restoration of vetoes for Member States in the EU Council of Ministers

If 28 Member States could use a veto, it would become harder to agree on new EU legislation, and encourage mutual recognition to be put forward as an alternative approach. This would increase cross-European support for EU rules and would be an extra safeguard against bad rules. There would be a flipside, however: it would also become harder to abolish EU rules.

2. Restricting what the Commission can do

One way would be for the Member States to set an exhaustive and tightly-defined agenda for the EU Commission, which has a monopoly on the initiative to prepare EU rules. Anything not included in this would be off-limits and under the competence of Member States. The ongoing attempt to harmonize taxes by harmonizing the tax base,[40] for example, is a proposal which is constantly being recycled by the Commission but has always been rejected by Member States who have made it clear that they don't think it's any of the Commission's business.

3. Red cards for national parliaments

Equipping national parliaments with a veto, a 'red card', would give the current 'yellow card' system which national parliaments can use to force the Commission to rethink proposals, binding teeth. The yellow card system has only been used a few times. It was introduced by the Lisbon Treaty and states that if one third or more national parliaments object to an EU proposal on subsidiarity grounds (within an eight week window), then the Commission has to reconsider the proposal. In the case of the yellow card against the so-called 'European Public Prose-

[40] The so-called 'Common Consolidated Corporate Tax Base' http://ec.europa.eu/taxation_customs/taxation/company_tax/common_tax_base/index_en.htm and http://forum.politics.be/showthread.php?t=159149

cutor's Office (EPPO)',[41] the Commission basically ignored the opposition from eleven national parliaments.[42] So did the European Parliament, which is even less surprising. Respect for subsidiarity is unlikely to materialize in practice as long as it remains the responsibility of EU institutions to enforce it.

4. A Subsidiarity Court

The creation of an intergovernmental 'EU Subsidiarity Court',[43] to which the European Court of Justice (ECJ) would be subject in matters of distribution of competences, could help to restrain the judicial activism of the ECJ which leads to EU 'competence creep'.[44] [45] It would then be possible to appeal ECJ rulings, but only on the grounds of subsidiarity issues. What is important here is that positions in this Court would be filled by either the presidents of national Constitutional Courts or representatives appointed by governments. In the latter case, not much would change, but if, for example, the President of the German Constitutional Court were to have a seat there, there would then be an institutional link with the national judicial order.

Of course, this might also fail to serve as a safeguard, but at the moment the ECJ is completely unrestrained, apart from the possibility of Member States nominating a judge for a period of six years, although even this is subject to formal approval by the other Member States.

5. A Subsidiarity Commissioner

To a large extent, the idea of a 'Subsidiarity Commissioner' has now been implemented with the arrival of Frans Timmermans as second in command of the Juncker-Commission which is responsible for 'Better Regulation'. It is his job to scrutinize whether legislative proposals respect the subsidiarity and proportionality principle, and to become unpopular with his colleagues, such as, for example, Energy Commissioner Canete, who saw 62 of his 64 proposals axed[46] by Timmermans last year. If Timmermans is successful, he should ultimately become popular

[41] http://openeuropeblog.blogspot.be/2013/10/european-commission-shown-its-second.html

[42] http://openeuropeblog.blogspot.be/2013/11/commissions-dismissal-of-national.html

[43] http://openeurope.org.uk/intelligence/institutions-and-democracy/european-localism/

[44] If its budget can be any guide: this has tripled as compared to 10 years ago http://www.telegraph.co.uk/news/worldnews/europe/eu/10626146/Justice-the-EU-and-its-415m-gilded-Tower-of-Babel.html

[45] http://www.worldaffairsjournal.org/article/judicial-reach-ever-expanding-european-court-justice

[46] http://openeurope.org.uk/blog/new-start-eu-red-tape/

with the public; a public of whom only 19% are currently happy with the EU.[47]

6. Improve harmonisation

In certain cases, harmonisation is needed and even in the cases where it isn't, there are ways to minimize any burden it might impose. Suggestions made by Open Europe include 'one in, one out' arrangements, sunset clauses, common commencement dates for regulation, expiry dates, improved impact assessments, an independent impact assessment board and the simplification of procedures to scrap regulation.[48]

Conclusion

In short, harmonisation or the creation of new rules at the European level should be limited to exceptional cases. The focus should instead be on mutual recognition of national rules, by removing protectionist elements from these rules.

The EU's attempts to open up borders between Member States for the delivery of services illustrates this point. The original version of the services directive recommended installing the so-called 'country of origin principle', meaning that service provides who complied with the regulations in their home country would be welcome to operate in other Member States. This was effectively an application of mutual recognition. As a result of opposition by Belgium and France, fearing the arrival of the so-called 'Polish plumber', it was watered down in favour of a system which allowed loopholes[49] allowing Member States not to open up their services markets, a loophole which they have been gratefully exploiting. As a result, implementation has been patchy at best, with many barriers still in place. A new attempt to open up services in the EU should, therefore, include the 'country of origin principle'.

Open Europe calculated that if only the twelve countries who in 2012 declared that they were willing to open up their borders for services were to do so amongst each other, through 'reinforced cooperation', about half of the economic benefits would materialize compared to a situation in which all EU Member States did it. The 'Polish plumber' would still not be welcome in Germany or France, who wouldn't have to do anything they didn't want, while he or she would be welcome

[47] http://newdirectionfoundation.org/content/comresnew-direction-poll-shows-eu-reform-now-dominant-call-accross-europe German voters have the least amount of trust in the European Commission and European Parliament of 13 national and EU institutions tested. They also want national parliaments to be able to block EU laws. http://openeurope.org.uk/intelligence/eurozone-and-finance/german-voters-views/

[48] http://archive.openeurope.org.uk/Content/documents/Pdfs/outofcontrol.pdf http://openeurope.org.uk/intelligence/institutions-and-democracy/european-localism/

[49] Allowed to impose requirements 'where they are justified for reasons of public policy, public security, public health or the protection of the environment'.

in Sweden, Italy and the UK.[50]

At the moment, a very similar discussion is raging with regards to the Transatlantic Trade and Investment Partnership (TTIP), a trade deal under negotiation between the European Union and the United States. A lot of the critics of TTIP critics complain that it will impose deregulation through the back-door. It's too early to tell if this will be the case, but TTIP negotiators know what they should do: not impose regulation or deregulation, but remove barriers to trade. TTIP shouldn't be about keeping China out of the trade system and imposing common Western standards on the rest of the world. It should be about helping businesses to expand their transatlantic activity, so wealth is created which enables trade between China and the West to be boosted even further. When the principle of mutual recognition prevails in the TTIP, and trade barriers are limited or abolished, then it will be high time to apply it again at the European level.

[50] http://openeurope.org.uk/intelligence/economic-policy-and-trade/single-market-in-services/

Reforms

Evidence from the British Balance of Competences Review

Michael Emerson

1. Introduction

The British Balance of Competences Review (BoCR) was launched in 2012 and concluded at the end of 2014. While the political context was a very specific British one, namely the imperative need felt by Prime Minister David Cameron to manage pressures coming from his Conservative Party for an in/out referendum on continued membership of the EU, its substantive findings are quite relevant for all member states and the EU institutions themselves.

While there are many detailed textbooks on the workings of the EU, the BoCR was in several respects a unique contribution to the European policy debate. Like some textbooks it was comprehensive in covering all EU policies. But each of the 32 sectoral inquiries addressed the same particular question, whether the actual competences of the EU have been appropriately defined, and whether these competences are more of less well executed. However the real originality of the exercise was to have invited submissions of evidence on these questions from any source. As a result over 1,500 written submissions of evidence were received from mostly independent sources, and then analysed by the relevant government departments, and published in 32 volumes amounting to around 3,000 pages of text.

An unusual feature for such a huge effort of research on policy issues by a government is that it was decided from the beginning that policy conclusions should not to be drawn, but left to the judgement of others. This may sound bizarre, but one can understand why. The positions of the two coalition parties on Europe differ radically, as between the largely Euro-sceptic Conservatives and the much more pro-European Liberal-Democrats. They could agree to undertake a comprehensive review of the actual policies of the EU, based on evidence to be collected openly from independent sources, without however prejudicing the conclusions to be drawn.

Still the advantage for the general public is that the basis is provided for the shaping of informed opinion. The disadvantage is that this means reading 3,000 pages of texts. But this in turn has for think tanks the merit of making available a unique research resource, which can be used as a basis for more compact and judgemental contributions. This is the approach taken by researchers at CEPS, working in complete independence from either the UK government of the EU institutions.

2. Conceptual categories

The political discourse of British politicians, and especially that of Prime Minister Cameron, is characterised by a loose use of three quite different concepts: reform, renegotiation and repatriation. For example: 'What we need in Britain is a renegotiation of our relationship with the EU and then a referendum where the British people decide do we stay in this reformed organisation or do we leave it?'[1] This seems to confuse reform and renegotiation. The Prime Minister himself has been talking also about repatriation, with language such as 'powers having to flow back to Member States'. Foreign Minister Philip Hammond contributed even blunter language of a kind commonly used by Conservative MPs: 'There has to be a repatriation of competences to the Member states'.[2] Let us be clear therefore on the use of these terms.

Reform is a loose and maybe over-used term. In principle it can embrace any steps to improve the status quo, either at the level of individual policies and laws, or on a grand scale. In the context of the EU, reform means measures taken by the EU as a whole without special provision for a single Member State such as the UK. The political speeches of the British government are talking mostly about achieving a 'reformed EU', which would be the basis for the government to recommend a 'yes' vote at the proposed referendum. UK opinion polls on this point are clear: the majority in favour of staying in a 'reformed EU' is large, whereas the majority in favour of remaining in the EU without any such qualification is much smaller or questionable. Reform is also part of the vocabulary of other EU leaders, and so in principle seems to point rhetorically to a positive way ahead. But then the question is what reforms? Here the BoC helps identify at the operational level where EU policies could be made more efficient, including where so-called 'red tape' could be cut, etc.

Renegotiation is about the UK getting special treatment or 'opt-outs' in relation to EU laws and policies. This has been done in the past notably for contributions to the EU budget. As regards opt-outs the major cases of the euro and Schengen area were negotiated at the time that these policies were being shaped. The practical question is whether further opt-outs might be sought by the UK and successfully negotiated with other Member States.

Repatriation is about returning competences to the Member States. This leads to the practical question of the level at which competences might be targets for repatriation. A first level would consist of competences as defined in the Lisbon Treaty. Repatriation at this level would require unanimous agreement on treaty changes, followed by repeal of the operational laws of the EU that have been passed on the basis of the treaty provisions. A second level would consist of specific regulations and directives, which can in principle be repealed of an individual basis without withdrawing the EU competence at the treaty level. This gets into

---

[1] David Cameron, 20 October 2014.

[2] Philip Hammond: 'I would still vote to leave Europe', *The Guardian*, 20 July 2014.

the detail of EU policies, and especially the many 'shared' competences of the EU, where the relative proportions of the sharing can in principle be adjusted. For the purpose of our analysis this second level of detailed legislative actions at sub-treaty level may best be regarded as part of the reform process.

3. Findings by categories of possible action

A summary of the findings from the BoCR is given in Annex A. These are very 'British' findings, but still contain many pointers of general relevance.

Reform. The reform agenda – past, present and future – is shown by the reviews to be extensive in virtually all areas of policy. The evidence shows that UK negotiators in EU affairs, both at political and senior official levels, have a remarkable track record of leading policy reform or improvement across many sectors. The serious problems for the UK in agricultural policy mainly arose because the ground rules were negotiated before the UK's accession. By contrast the UK's policy influence since accession in 1973 has been very substantial, comparing favourably with any other Member State at least in the broad single market domain. This is illustrated in several sectors, including cases where the UK and others currently see the need for enhanced and not diminished EU policies (energy, climate change, service sectors, financial services, the digital sector etc.). Of course this excludes the Eurozone and Schengen areas where the UK has opted out from the beginning. As for the past, a major example was in the early 1990s when the single market was advanced by adoption of seminal concepts such as 'mutual recognition', which lessened the burden of harmonising regulations.

Two notoriously controversial sectors, agriculture and fisheries, have seen important reforms along the lines advocated by the UK. Reform of the agricultural policy proves to be a decades-long process, and one that has to go on. The 'butter mountains' are no more, however. This represents reforms achieved since the 1990s from production support to income support. The burden for the EU budget remains big, but has nonetheless declined from its 75% share of the total in 1985 to the 36% planned for 2014-2020. For fisheries the reforms decided in 2013 represent a sharper and more immediately effective correction of past problems, represented most clearly in public opinion by the anomalous policy of 'discards' of fish back into the sea, which is now stopped alongside other more basic reform measures.

Another domain of notable British complaints, namely elements of labour market and social policies, sees an increasing trend towards 'soft law', i.e. non-binding peer pressure such as in the Lisbon Strategy for 2000 to 2010, followed by the Europe 2020 for the following decade. Here the reform agenda has increasingly followed British ideas favouring a flexible labour market, or concepts of 'flexicurity' (i.e. combinations of flexibility and security, with the term first advocated by the Danish prime minister).

There remains the major debate about whether the EU is in its regulatory

work managing its responsibilities as efficiently as should be the case, and whether the EU is producing too much 'red tape'. To have an independent view on this question the Barroso Commission invited Edmund Stoiber, Prime Minister of Bavaria, to chair a High level Group to advise it on how to reduce regulatory burdens.[3] This report made various recommendations, including for setting a net target for reducing regulatory costs, for a 'one-in one-out' constraint on setting new business regulations, and exempting small and micro businesses 'where appropriate' from various regulations. While these kinds of overarching proposals may be attractive politically they risk (in our opinion) proving too simplistic to be operational, and cannot dispense from the hard grind of assessing the details of masses of legislation item by item.

The Stoiber Report commented positively on current developments as follows: 'With the new approach of Smart Regulation and the launch of the REFIT Programme, President Barroso and the Commission as a whole have initiated a fundamental change in the EU law-making process. I believe that this re-direction, which has led to a change of working methods within the Commission, is a real quantum leap'. While this comment may be a bit on the euphoric side, there is little doubt that the campaign to cut Brussels red tape gains traction.

In particular the new Juncker Commission, starting in November 2014, sees a First Vice-President, former Dutch foreign minister Frans Timmermans, charged explicitly with controlling respect for the principles of subsidiarity and proportionality (i.e. for avoidance of unnecessary 'red tape'). This will give a boost to the Commission's ongoing work under the REFIT heading (Regulatory Fitness and Performance Programme). This aims at a simple, clear and predictable regulatory framework, to cut red tape, and simplify legislation so that the policy objectives are achieved at lowest cost and with respect for the principles of subsidiarity and proportionality.[4] Under REFIT, the Commission is screening the entire stock of EU legislation on an ongoing and systematic basis to identify burdens, inconsistencies and ineffective measures and identified corrective actions. Its current work programme identifies a dozen priorities (listed in Box 1). These are mostly small items, and irritants more than anything else, but to weed them out corresponds a widespread popular demand.

[3] High Level Group on Administrative Burdens (chaired by Edmund Stoiber, former Prime Minister of Bavaria), *'Cutting Red Tape in Europe – Legacy and Outlook'*, Final Report, 24 July 2014. The main report is available at: http://ec.europa.eu/smart-regulation/refit/admin_burden/docs/08-10web_ce-brocuttingredtape_en.pdf. Full information on the work of the group and annexes to the Final Report are available at: http://ec.europa.eu/smartregulation/refit/admin_burden/high_level_group_en.htm

[4] European Commission, *'Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook'*, COM(2014) 368 final, 18 June 2014.

Box 1. *Administrative Burden Reduction Plus Programme (ABR+): priority simplifications*

- Simplified accounting/auditing for small and medium enterprises (SMEs)
- Exempt micro enterprises from accounting directives
- Simplifying notification system for shipments of waste
- Limitation of documents procurement procedures
- Fewer respondents for statistics on intra-EU trade
- Reduced reporting on industrial production
- Lesser requirements for electronic invoicing
- Reduce foreign language burdens for VAT refunds
- Exemptions from tachograph rules for SMEs
- Fewer 'documents on board' in transport sector
- Simplifying egg labelling

Source: European Commission 'Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook', COM(2014) 368 final, 18 June 2014.

For perspective, the complaints about 'Brussels red tape' have to be assessed alongside the more general issue of red tape originating at national as well as EU levels. It should be recalled that whenever there is a food safety crisis, such as in the horse meat scandal of 2013, the conclusion tends to be that national implementation of EU regulations needs to be reinforced, and not that EU regulations should be abandoned. Even more dramatically, the financial crisis of 2008 demonstrated the grave inadequacy of national regulatory policies in this area.

The heaviness or lightness of touch of regulatory systems varies greatly between EU Member States, and the UK in particular is often at the lighter end of this spectrum. The EU's regulations in the employment and social policy field have not prevented the UK from having one of the most liberal labour markets, as also in the case of Denmark which ranks right at the top of the world rankings for the quality of its economic and human development. By contrast, Belgium France and the Netherlands are among the Member States whose labour markets are regulated in the most burdensome manner. Data illustrating these divergencies are given in Box 2, based on the World Bank's 'Ease of doing business' rankings. Broadly speaking one sees the Member States grouped into three categories, most of Northern Europe with high rankings for 'ease of doing business', France, Spain, Belgium and the Netherlands in a second category of much less 'ease', with Italy and Greece coming in a third category that sees them in very dubious company (Belarus, Russia).

Box 2. *Ease of doing business: selected rankings (from 189 countries)*

4. Denmark
8. UK
9. Finland
10. Sweden
13. Ireland
14. Germany
27. Netherlands
31. France
33. Spain
42. Belgium
56. Italy
61. Greece

Source: www.doingbusiness.org/rankings, World Bank, June 2014

Of the countries just mentioned, those in the top and middle categories are all law-abiding Member States, implementing the same EU laws seriously. Yet the economic impacts of their overall regulatory regimes between them results are quite different, as the small example of three architectural practices in Box 3 vividly illustrates with regard to the cases of Britain, Belgium and France.

Box 3. *A cosmopolitan London narrative*

A young boutique architectural practice in London, specializing in projects of high artistic value, employs 28 architects, of whom a third are British, with nine other EU nationalities making up the rest, together with three high-tech Asians. Average age, early thirties. The British founders of the company recently met a couple of their professional counterparts in Paris and Brussels. While their London practice has grown rapidly, Paris and Brussels remain stuck at around five architects. Why did London grow, while Paris and Brussels did not? London could grow because it could tap into the entire European labour market for highly skilled and specialized young architects with zero bureaucracy regarding such things as work permits. The British supply would have been too narrow. But Paris and London could do this too, were it not for other restraining factors. The first of these are onerous hiring and firing regulations, that are poison in a fiercely competitive business

where there has to be talent on board to prepare competitive tenders, but also the freedom to let staff go if the tenders don't win. And what about EU labour market laws? All three companies are law-abiding employers, but the London company does not find itself constrained by EU laws. Nor do Paris and Brussels, since they are really constrained by French and Belgian laws that go way beyond what EU law requires.

The moral of the story is that freedom of employment in the EU labour market is vital for high-tech, creative service sectors on which London thrives, while national red tape in France and Belgium are serious problems for which the EU is not the culprit. But secession could mean immigration quotas and red tape for other Europeans to be hired in the UK.

The crude argument that 'Brussels red tape' is suffocating the economies of the UK and the whole of the EU into stagnation is hardly convincing therefore. Clumsy national regulatory policies in the countries ranked in the middle and lower categories above, coupled to systemic problems in the Eurozone system, are more to blame for the ongoing stagnation of the Eurozone.

One proposal by Prime Minister Cameron is that reforms should be embedded in a new Treaty. There are serious problems with this. As explained by Lord Hannay, this position is mainly advocated by two groups at opposite ends of the political spectrum: on the one hand those would like drastically to reduce or 'de-construct' the EU's competences, versus on the other hand those who would like to push on to a 'fully-fledged federal Europe'.[5] In between there is a large packing of Member States and political parties who do not see the need for another treaty, and are politically averse to the prospects of another hazardous ratification process.

A further cautionary comment is due on Prime Minister Cameron's hope for a 'reformed EU'. Any broad reform process embracing a wide range of policies, such as for the EU or a national government, are complex operations with mixes of short, medium and long-term measures. To use more precise and realistic language the objective could be for 'a significantly reforming EU'.

Renegotiation. The UK's first act of renegotiation took place shortly after its accession on 1 January 1973 under Edward Heath's Conservative government. In the general election of February 1974 the Labour Party promised a renegotiation of the terms of accession, to be followed by a referendum to confirm membership. Negotiations centered on the UK's net contributions to the budget, which were notably high because it benefitted relatively little from the agricultural policy. A so-called 'corrective mechanism' was agreed, and the referendum was carried with

[5] Lord Hannay, 'Europe Daily Watch', 13 November 2014. Available online.

a 67% yes vote in June 1975. However this mechanism proved to be ineffective, and subsequently Prime Minister Margaret Thatcher, in November 1979, sought better terms under her negotiating slogan 'I want my money back'. A much more effective abatement mechanism was agreed, and guaranteed by inscription into the treaties. The mechanism has subsequently been amended, with extension to other Member States that argued that they also were making excessive contributions. The corrective mechanism is inscribed in a Treaty-level act (Own Resource Decision), whose content is therefore guarded by the unanimity rule.

More remarkable, in the area of Schengen, Justice and Home Affairs, it has secured not only a block opt-out, but also the right to opt-back-in where it wants to, as shown in the course of 2014 when it opted out of 133 such measures and then opted back in to 35 of them.

On the other hand the government certainly does not want to opt out of the single market and related sectoral policies, nor from EU foreign policy where however important decisions are taken by unanimity. Overall this means that there is little available scope for meaningful renegotiation. The flexibility that the UK requests in its relationship with the EU is already a reality on a grand scale. With its important opt-out from the Eurozone, the UK has been described as 'having the best of both worlds'.[6] i.e. to be fully in the single market while retaining flexibility over the exchange rate and monetary policy, which helped the UK get out of recession ahead of the Eurozone.

There remain two areas of high political controversy, namely immigration from the EU, where the Prime Minister has already set out his agenda for negotiation, and certain labour market rules, where some specific demands might be expected. It remains to be seen how these issues will be treated, bearing in mind that they are subject to serious divisions of opinion within the UK itself, quite apart from questions of negotiability within the EU. The issue of intra-EU migration has become politically charged, with several of the richer Member States complaining about 'benefit tourism', while the relatively poor new Member States complain about discrimination and failure to respect the fundamental principle of freedom of movement. However here there has been a recent ruling of the European Court of Justice, in the Dano case of December 2014, which has clarified the distribution of competences in a way that confirms national competence for the rights to residence for non-active or unemployed migrants, which in turn can determine the right of access to social benefits. The freedom of movement of persons and of employment remain cardinal principles of EU law, but this does not mean blanket coverage for the right to residence.

Repatriation. Finally as regards repatriation, the prime purpose of the Balance

---

[6] George Soros, http://openeuropeblog.blogspot.be/2014/03/book-review-george-soros-tragedy-of.html, 13 March 2014.

of Competences Review was to screen for those existing competences of the EU that should better be returned to the Member States. In terms of precise legal concepts this meant first of all looking at the 'competences' of the EU as they are defined in the Lisbon Treaty. At this level the evidence is clear. In not one of the 32 reviews is evidence presented of predominant or even majority views suggesting that any existing competence should be deleted from the Treaty. On the contrary, the predominant finding is that the competences of the EU are 'about right', and that they have often found a sensible balance, notably in the sphere of the shared competences as between EU and national levels.

This is before asking the question whether a proposal to delete a competence from the Treaty would be negotiable with all the other Member States of the EU, given that this would require unanimity. On this point there can be little doubt that unanimity would be elusive, since while the enthusiasm for individual competences may vary between Member States, all competences have support from numerous Member States. For example, the Netherlands, which has adopted a position closest to that of the UK on reduction of EU red tape and a more rigorous application of the principle of subsidiarity, is explicit in not advocating repatriation of competences.

This broad finding that the competences of the EU are 'about right' is due to the fact that the actual system is far more sophisticated in practice in striking the balance between EU and national powers, since most EU competences are 'shared' with, or are 'supporting' national competences.

The continuing processes of negotiation over the exercise of these competences provides for adjustments in the effective share of responsibilities. This is worked out as individual EU Directives or Regulations are defined. The legal basis at the treaty level may be fixed in simple terms, such as just naming 'transport' as a shared competence. But the reality is one of continuous evolution in the effective sharing of competences.

At the second level of individual Directives or Regulations, the Reviews throw up instances where the case is made for their repeal, or more often their reform with less onerous implementation costs. Whether moves to repeal or lighten EU laws may be called 'repatriation' or 'reform' is maybe a matter of opinion and to a degree an open semantic question. But it is still an important point for political debate, since 'reform', though a highly elastic term, is in principle an acceptable idea for all, whereas 'repatriation' is not. For present purposes we consider 'repatriation' to be about the deletion of competences at the treaty level. For all other sub-treaty changes to existing EU laws, either by repeal, amendment or new legislation, one may bundle them into the 'reform' category.

4. Conclusions

The first conclusion from this exhaustive enquiry was that in not one of the 32 sectoral reviews was the case found to justify repatriation of any treaty-level competence back from the EU to the national level. This result came as such

an embarrassing surprise to the British Prime Minister that he has ignored its findings of the BoC, despite the huge amount of high quality analysis done by almost every government department to produce its impressive publications. On 10 March 2015 a House of Lords Select Committee on the findings of the BoC tried to extract substantive conclusions from the government minister called upon to give evidence. Members of the committee were concerned at the cost of an exercise from which no conclusions could be drawn. The minister for European affairs was obliged to make a patently evasive declaration that '[…] it was right not to draw conclusions since this could not possibly do justice to the diversity of opinions reported'. On the contrary, the overall conclusions were quite clear.

The second conclusion was that in reality the balance of competences, particularly in the case of 'shared' competences, is a much more subtle matter than generally appreciated, and one where the constant processes of negotiation between the EU institutions are continuously adjusting the effective weights of EU and Member State shares. And this can carry on.

A third conclusion is that there is widespread demand for 'better regulation' at the EU level. This can mean regulation informed by better impact assessments. It can mean regulation with a lighter touch, and notably for SMEs. But beware the populist chant about Brussels red tape. On this point there is evidence that macroeconomically significant red tape burdens are more often the clumsy national policies of the most heavily regulated Member States. By contrast some of the most lightly regulated Member States, including the UK, are among those which are the most loyal implementers of EU law. There is evidence too that when there are spectacular failures of regulatory policies these days, the culprit tends not to be the EU itself but either systemically defective national regimes (such as over the financial crisis of the Eurozone), or defective implementation by national authorities of EU legislation (as with the horsemeat scandal of 2013).

A fourth conclusion is to note the huge information and comprehension gap between EU and Member State levels over how many EU policies actually work. The EU is not alone in being the target of popular criticism as a distant, bureaucracy with excessive power. The same populist language is heard in the US about Washington, where the complaints are exceedingly virulent. But the EU has the bigger problem in that its political structure is more fragile. The paradox of the British case may well turn out to be that it took the politically credible threat of secession for the people to begin to think soberly about the risks that this would entail, and maybe to converge on common sense judgements that the risks are not worth taking. This is of course a matter that may still have to be resolved by referendum, which leads into the related debate over the hazards of handling big decisions by resort to direct democracy in polities where the mainstream experience is that of representative democracy.

Annex A. *Summary of Balance of Competences findings from UK perspective*

Sector of policy	**Competence question**
Core single market policies	
Single market overview	Strategic priority for UK. Large support for EU competence
Free movement of goods	Key 1992 reform: mutual recognition & less harmonization
Free movement of services	UK interests in enhanced EU policy, including digital sector
Free movement of capital	Major reforms since the 2008 crisis. UK City interests protected
Free movement of persons	Benefits and costs contested within UK. Curbs proposed
Competition policy	Competition policy strongly supported, consumer policy nuance
External trade & investment	EU competence vital. No good alternatives outside EU
Sectoral policies	
Transport	EU competence supported, UK leading role in shaping policy
Agriculture	Severely criticised, but policy gradually reformed over decades
Fisheries	Severely criticised, but radical reforms achieved in 2013
Energy	UK increasing energy importer, driver for enhanced EU policy
Environment & climate	UK driver of EU policies. EU as amplifier of UK interests
Food safety, animal welfare	EU harmonised approach essential. UK a driver of EU policies

Digital information rights	EU competence necessary, UK active in defining rapidly evolving priorities
Public health	Limited EU actions useful, including inflow of health professionals
Economic, monetary, social policies	
Economic & monetary union	UK opt-out of euro currency, + coercive aspects of fiscal policy coordination
Social & employment	Divisive issue in UK. Sharp controversy over a few directives
Taxation	Limited EU competences useful. Unanimity rule safeguards
EU budget	UK retains special rebate; gets reform with real cuts for future
Cohesion	Competence for some regional solidarity supported
Justice and home affairs	
Fundamental rights	Divisive UK debate over European Court of Human Rights (n.b., not EU)
Civil justice	UK opt-outs & opt-back-ins, flexibility suiting UK legal system
Police and criminal justice	UK opt-outs & opt-back-ins, flexibility suiting UK legal system
Asylum, non-EU immigration.	UK opt-out of Schengen, and selective opt-in arrangements on asylum
Education, research, culture	
Education	'Erasmus generation' a transformative achievement
Research & space	UK major beneficiary of EU projects; big science achievements

Tourism, culture & sport	EU niche activities useful; UK driver for sports governance
External relations	
Foreign policy	EU multiplier of UK interests. Unanimity rule safeguard
Development & humanitarian aid	EU multiplier of UK interests. UK free to set own aid policy
Consular services	Budgetary pressures for rationalization
Enlargement	Member states control process at every stage by unanimity
General	
Voting, statistics	Present competences satisfactory
Subsidiarity, proportionality	New Commission appointment signals increasing priority

How to shape a more effective European Union

Derk Jan Eppink

Introduction

There is an ever-increasing difference between the theory of the European Union and its daily practice. The Treaties contain a legal logic that binds its provisions into a common framework. There are stated 'policy goals', 'operational means' and 'legal procedures'.

From the outset, European integration has been a product of legal experts. Its narrative sounds good, like a fairytale of best intentions. Who could possibly oppose the way the European Union works? It even won the Nobel Peace Prize! Only the utterly mean and dispirited would express any dismissive comments.

But then reality imposes itself. In spite of well-meaning objectives the European Union today is in bad shape. The European economy, in particular the euro zone, is, according to the President of the European Central Bank Mr. Mario Draghi, facing a long period of low growth and high unemployment. Unsurprisingly, the current economic situation in Europe is anathema to the philosophy of the 'unique European social model'.

In Mediterranean Europe an entire generation of young people have been deprived of a future. Young people, eager to build up their lives, cannot find employment and lack the means to own a house and raise a family. Europe has not delivered in regard to the expectations it raised. In this part of Europe, the elderly fear that their pensions will shrink and that their savings will be undermined by low interest rates, if not reduced by negative rates. Both groups wonder whether they will be able to weather the storms looming on the horizon.

The legitimacy of the integration process is at stake

The dilemma of European integration is that the reality of daily life undermines the legitimacy of the EU. Understandably, people get angry and frustrated and express these feelings at the ballot box. As a result political landscapes rapidly change throughout Europe. For government parties there is little time to implement policies of reform because the next election could very well be their last.

An increasing number of people regard 'Brussels' as a threat. The turnout percentage at European elections has been dropping for 35 years, only a minority votes and a growing minority within that minority votes 'against'.

The first question that comes to mind is: what went wrong? In my view the European institutional machinery has ignored the proper application of the Treaties and consistently followed the orthodoxy of an 'ever closer Union'. The ambition to regulate everything under the sun has dominated policy-making

in Brussels for a long time. Because of this the Treaty has been compromised and all the distinct competences (whether exclusive, shared or supporting) have been morphed into one single legal base: ‘if there is a European aspect, the EU is mandated to legislate’.

Instead of adhering to the provisions of the Treaty and observing self-restraint, the institutions have resorted to self-mandating by interpreting the morphed legal base as a ‘political imperative’ to act, and by widening the scope and adding details.

A good example of this is the Working Hours Directive the principles of which were adopted in 1993. Instead of adhering to the Treaty provisions on Social Policy, which would have provided a recommendation as its legal instrument, the Commission opted for what is now Article 288: a directive. Why? According to the Commission and the European Parliament there was a political imperative to create a ‘Social Europe’; legally binding, detailed legislation was bound to trump softer procedures, like a recommendation. The EU persistently opted for the most far-reaching form of European legislation.

As a consequence, the directive became very prescriptive and case law from the European Court of Justice made it even worse: ‘resting’ is now also defined as working time and even sleeping in a facility at the working place is classified as part of ‘working time’. The philosophy of an ‘ever closer Union’ became a driving force of its own; it is hard on detail, but short on its economic consequences.

The Employment Committee of the European Parliament (sometimes nicknamed the ‘Unemployment Committee’) welcomed the directive as ‘a symbol of civilization’, but it ignored the economic realities as it so often does. France believed that reducing working hours would inevitably lead to more employment and introduced a 35 hour working week in 1995, which came into to full effect some ten years later. Since then French competitiveness has collapsed; Dutch exports currently exceed those of the French. Unemployment is high, as is the French budget deficit and the percentage of national debt. The French are now living the ‘French dream’: *le beurre et l’argent du beurre!* Or in English: to have one’s cake and eat it. In future, French butter will have to be paid for by either Germany, or the European Central Bank (ECB) by printing money. Only a European Transfer Union will be destined to butter-up the French dream.

The political imperative to act

Contrary to the theory of ‘conferred competences’ by which European Institutions act within, and according to, the powers it derives from the Treaties, the legal base has been morphed into the imperative to act. As a result there is no legal *Ordnungspolitik* left, there is ‘no hierarchy of norms’, there is only the ‘imperative to act’.

The European institutional machinery starts gearing up the moment the word ‘Europe’ is invoked, no matter whether it concerns the single market, financial regulation, social policy, cultural policy, sports or environmental policies. The legislative machinery, in particular the European Commission and the European

Parliament, opts for the most detailed and prescriptive form of legislation, for example the Habitat directive. Finally, there is no legal wriggle room to return powers from the EU common legislative body. The Commission and the Parliament would regard this as a 'step backwards' from the process of an 'ever closing Union'. It would be tantamount to 'political capitulation'.

It is no wonder the EU has grown top-heavy. Its ambitions have by far exceeded its means. Its promises remain unfulfilled. Its image has been dented. Its legitimacy is in peril. And worst of all, the EU has brought all of it upon itself. We cannot blame Americans, Russians, Chinese or anybody else. We allowed the process to spin out of control. The EU wanted to achieve too many goals at the same time. Lacking any sense of priority, it became too soft on the real issues and too hard on the soft issues. It believed that big government in Europe would produce big results for Europe. Unfortunately, the opposite happened.

Hierarchy of norms

How could the liberal family in Europe shed some light on this conundrum? Liberals are very familiar with concepts like the self-restraint of public authorities, the need for small government, balancing power to prevent abuse, the policy of competition and having a level playing field, the virtue of small government etc.

I have always been a strong supporter of political co-operation and the economic integration of Europe. There is no alternative, but the current situation is not satisfactory at all. In fact, it could well mark the start of the unraveling of European co-operation. The European continent is confronted with economic stagnation at home, while its surroundings are struck by violent conflicts.

What is the way out?

First of all, we have to re-introduce the *principles of the 'separation of powers' and the 'hierarchy of norms'* within the European decision-making process. The separation of powers is a truly liberal concept allowing power to be managed by indicating its limitations thereby making it more efficient, transparent and democratic. Many political theories on the right, but particularly on the left, display a proclivity for centralism and the monopoly of power. This usually leads to power grabs being made by incumbencies pretending to know better. But they don't and merely produce inefficient schemes dominated by a lack of transparency and the abrogation of democratic arrangements. A separation of power balances power, makes it accountable and leaves space for criticism to reverse dysfunctional settings. That is precisely why Europe needs to look at liberal concepts and principles to get the EU back on track.

What are those principles?

1. Member States. The source of European co-operation and integration are the Member States, not the European institutions in Brussels, Luxembourg or Strasbourg. As Henri Guaino, member of the French parliament rightly

stated: Europe is France, Italy, Germany, Spain, Belgium etc. The European Commission, the European Parliament, the European Court of Justice are merely institutions serving the Member States and the peoples of Europe. The EU has buried historical, geographical, cultural and demographic realities under rules, bureaucracies and procedures. But reality always takes revenge when ignored.

2. Focus. The European Institutions need focus and should primarily serve the peoples of Europe and their nation states in areas of *pooled sovereignty*, like the common market, the monetary union for countries of the euro zone, international trade, competition policy, environmental policy and foreign policy to the extent possible. A monetary union will not succeed without a fiscal union requiring strict compliance with principles of budgetary discipline. Here, the European Union has been far too lenient, both in the past and again in recent years, and all the time vigorously policing minor pieces of legislation. The EU as it is, is too unwieldy.

3. Return of powers. A return of competences to nation states is required because the process of morphing all the various legal bases into a political imperative to act derailed EU legislation and produced overregulation of a prescriptive nature. A repartition of the competences is the only way to undo the detrimental impact of the ‘morphing process’. Repartition should, therefore, provide for the return of competences, like parts of social policy, cultural policy, even parts of environmental policy that have become too prescriptive. If cross-border issues arise, the EU should only produce a recommendation highlighting best practices. We also need to have a fresh look at certain funds that accompany the imperative to act, like the Globalization Fund. A fund that the European Court of Auditors concluded had only 25% of the money in it spent properly.

4. National Parliaments. An increased role of national parliaments as guardians of subsidiarity is much needed. The European Commission, the European Parliament and the European Court of Justice are unable to act as guardians of ‘subsidiarity’ because they all propose, amend or rule in the spirit of an ‘ever closer Union’. This was the very reason the principle of subsidiarity was ignored, because it stood in the way of political imperatives. Only national parliaments have the political legitimacy to issue proper judgment on which of the policy-areas have to be dealt with at home, and which at the European level. National parliaments should be the masters of subsidiarity, not EU institutions.

5. Workable arrangements. In addition to the vertical repartition of competences there is also a need for horizontal flexibility regarding the policy domains and the degree to which Member States participate. From the perspective of an ‘ever closer Union’ the EU is evolving into a ‘monolithic bloc’ with a common currency that was designed to be its driving force. This has failed miserably. The euro zone has not evolved into a social and economic melting pot but has instead turned into a

pressure cooker producing internal strife. As the number of Member States grows, the EU should apply more flexibility. Some countries joined the euro, others didn't. Some countries joined Schengen, others did not. Some non-EU countries joined Schengen, while some EU countries did not. In foreign affairs some countries join a 'coalition of the willing', others refrain from it. The larger the EU, the more flexibility is required to keep it working. 'Enhanced co-operation' is one of the methods, opting-out is another. The more the EU presses for a monolithic bloc, the more political and economic tension builds up within.

Redesign treaties

How can the European Treaties be redesigned in the light of these principles? I think it will not be possible without an Inter-Governmental Conference (IGC) as certain Treaty provisions will have to be reviewed.

Any other platform on whatever voluntary basis would lack the political clout to bring about Treaty change. Obviously some elements which require modification can be repaired within the context of the Treaties but that exercise would be to 'marginal'. It would not allow the structural changes needed to be properly addressed.

What we need is a hierarchy of norms, with a *catalogue of competences: Core competences.* A catalogue of competences should clearly define the core competences of the EU, like the single market, the euro system, international trade, common agricultural policy, fishery policy, competition or environmental policies. In these domains European Institutions play their full role in co-decision making and as enforcers. In case of stalemates or deadlock the European Council acts as final arbiter.

Secondary competences (now shared and supporting competences) are, in principle, within the domain of the Member States. The European Commission has supportive powers to look into cross-border aspects and offer advice by issuing recommendations. Only the European Council has the power to lift secondary competences to the level of core competences and by doing so amend the catalogue of competences, for example, adding security of energy supply.

National parliaments. If the European Commission proposes legislation on the secondary tasks (currently shared and supporting competences), it would have to seek the consent of two thirds of national parliaments of Member States acting as guardians of subsidiarity. The existing system of cards enables national parliaments to stop the Commission from legislating, but only in very short timeframes. The approval-seeking mechanism should be turned around with the Commission having to seek a sufficient number of 'green cards' from national parliaments before they are allowed to propose draft legislation. This could be achieved by either a reversed 'green card system', or by setting up a 'Senate' in Brussels, consisting of

representatives of national parliaments guarding subsidiarity. A Senate would give national parliaments a face in Brussels.

EU budget. The EU 7 year budget framework should be limited to 1% of EU gross domestic product.

Flexibility. The Treaties allow a certain degree of flexibility, for example, in the framework of 'enhanced co-operation'. However, this concept fits in the ideology of an 'ever closer Union' because non-participating Member States are supposed to join the co-operation at a later stage, for example, the monetary union. As the EU grows there will be more need for 'safety valves', for example, regarding immigration and asylum policy or when the national labor market is distorted because of excessive labor immigration.

Common market as driving force. Enhanced development of the free movement of services would produce a huge potential for economic growth. A single market based on mutual recognition is the basis of economic integration, not necessarily the single currency. A single market based on mutually accepted minimum quality requirements opens up a vast area of activity because it is able to absorb diversity. The concept of the free trade of goods has even been extended to Turkey and is accompanied by exporting standards. A similar arrangement could fit Ukraine. On the other hand, the principle of a single currency forces economic, financial and budgetary uniformity which is anathema to European diversity.

The euro system requires more flexibility, providing a country or countries with the option to leave for compelling economic reasons. Now the euro system acts like a straightjacket tying in countries with entirely different economic backgrounds. The tighter the EU pulls the jacket the more tensions will arise and political conflicts will erupt.

Prospects for reform

What are the prospects for EU reform? Politicians usually know how to jump from A to Z quite well, but are unable to get from A to B. In other words, it is easy to get from reality to an illusion, but then what is the next step?

Obviously, most pressure to reform the EU comes from Great Britain which generally radiates cold feelings whenever the word 'European Union' is mentioned. Prime Minister Cameron has promised an 'in or out' referendum before the end of 2017.

There are some documents concerning EU-reform. The first is a review of EU competences which was published by the Foreign Office. It is mainly an inventory of competences and its legal procedures and does not indicate any way or need to amend the current system. Some Tory critics of the Foreign Office will not be surprised because the department is often described as 'wetter than wet'.

A second document was issued by the Fresh Start group, a gathering of Euro-critical Tory backbenchers, chaired by former MEP and current MP Chris Heaton-Harris. The problem of this report is that it is 'too British' in the sense that it reflects the wishes of the backbenchers to 'opt-out' from European legislation wherever possible. It is not very helpful as an operational document pressing for EU-reform on the European continent.

A third document, was published by the Dutch government, drafted by the Ministry of Foreign Affairs under the aegis of then Minister Timmermans who is now the first vice-president of the European Commission. The report tables 54 examples of EU legislation, or attempts thereof, which should remain in the realm of the Member States. It is a good inventory to illustrate the extent to which the legal base of the EU has morphed into the political imperative to act. However, the examples of overregulation that it presents could be reversed without any Treaty change. A sort of 'quick fix' would suffice.

Proponents of EU reform will have to bring about an EU-wide coalition to change the Treaties. I think there is a general feeling in Europe that the EU needs proper maintenance and I hope governments will press the 'reset button'. If the EU simply tries to muddle through it will not merely lose its legitimacy, but will instead trigger political conflicts and public revolt. Creating an EU-wide transfer union will bring about the demise of the EU.

Conclusion

Let me conclude by repeating that a 'quick fix' will not do. It may bring some relief here and there but all the deeply rooted problems will simply re-emerge triggering a process of unraveling. A comprehensive review of the EU structures at an Inter-Governmental Conference is required which would include national parliaments, and could introduce a hierarchy of norms, focus the EU on its core tasks and make Europe fit for the future.

Concluding remarks

Charlotte Lockefeer-Maas

At the time of this book's publication the Greek debt crisis, after years of short-term stop-gaps, has still not been settled in a way that is sustainable. Meanwhile, the rising tension in Europe has demonstrated very painfully – to all the citizens in the Eurozone – just how crucial it is for the exercise of European powers that citizens can identify with a European administration. The majority of Greek citizens who oppose any further cut-backs and reforms are drowned out by Europeans who, with a number of conditions, want to lighten the Greek burden of debts. In actuality, Brussels is intervening deeply into Greek politics. There is no room here to discuss whether this is right or not, but this crisis situation does reveal how increasingly difficult it is becoming to distinguish national powers from European ones.

This book asks the simple question: which powers should be national and which should rightly belong in Brussels? But, in doing so, it raises much bigger questions. Why should we, for example, as different Member States, have a union at all? And what are the implications of having a complex form of governance in the EU (multi-level governance) for a liberal democratic form of public administration?

There is, therefore, no simple answer to the question about what would be an appropriate distribution of powers between Member States and the EU; an issue which formed the basis for the Balance of Competences Review conducted in the United Kingdom in 2013. In any case, this is a question for which no scientific answer can be found, as any solution depends on your vision of the EU.

The contributions to this book are, therefore, not restricted to the question about the proper distribution of powers. The authors go further and explore the various underlying questions. Krisztina Arató raises the most fundamental question on the nature of the EU and the reason for its existence. She demonstrates that liberals all have different visions of what the EU, at its core, actually is, and that the first thing liberals will have to do is make a choice: Is the EU a community of liberal states or a liberal community of states? Or both, as the author believes? Only when the core question is answered can we discuss any division of labour between EU institutions and Member States.

Jieskje Hollander agrees with Krisztina Arató as she also discusses the 'question behind the question': what essentially does the EU mean to liberals? For liberals, the EU must work in the service of the individual freedom of its citizens, and in that light, liberal complaints about the distribution of powers – about the way the subsidiarity principle is explained in the EU – should be taken seriously. But a simple 'Competences Review', compiling a list of policy areas that should be under a national or European remit, does not, according to her, contribute to

a more liberal system of European governance. Jieskje Hollander calls for more flexibility between the levels of governance and for a continued political debate to take place – at all political levels – about the proper levels at which decision-making should take place.

In the following chapter, Robert Nef explores the principle of subsidiarity, a principle which has a long history and is not always explained in the same way. Being a Swiss, he provides insight into the meaning of subsidiarity in the Swiss constitution and explains why this principle has value for the EU from a liberal perspective. What is essential for him here is: where does the burden of proof lay? 'In principle, the most subordinate, lowest level possible should be responsible, and justification is required if a duty is to be transferred to a larger association. You must prove that the lower level is *unable* to resolve the problem satisfactorily.' For liberals the value of the principle of subsidiarity means, for example, that competition between smaller communities remains possible if they retain the power to make their own policy, and being in competition means that the players can learn from each other and by doing so often come up with the best (policy) solutions. The more a system is centralised and operating top-down, the smaller the chance that the most suitable policy is devised.

Caspar van den Berg describes and evaluates the complexity of European public administration. Where Jieskje Hollander calls for more flexibility in European policy-making, Caspar van den Berg demonstrates that there already is a great degree of flexibility. European governance is multi-level governance, which means that powers are spread across many different bodies: from democratic administrative bodies which operate at regional, national and European levels to functional governing bodies that interact between themselves, but do not form a hierarchical structure. The flexibility between governing bodies may increase administrative efficacy, but in regard to liberal norms such as democratic legitimacy and transparency, it certainly has some disadvantages too. Caspar van den Berg also demonstrates that the multi-level governance in the EU makes it extremely difficult for a principle such as subsidiarity to function as a starting point for the distribution of powers between Member States and the European Union.

After Caspar van den Berg's discussion of the administration, Pieter Cleppe writes about the policies pursued by the institutions of the EU. According to Cleppe, Brussels preferences the harmonisation of regulations in the European Member States much too often, but harmonisation has many disadvantages too. It is, for example, more difficult to change EU regulations than national ones. Pieter Cleppe also refers to the flaws in European regulation in relation to democracy, due to the fact that regulation in Brussels takes place, to a large extent, via a system of 'comitology', with civil servants making decisions instead of elected representatives who are held in check by parliament. Like Robert Nef, Pieter Cleppe believes that policy competition between Member States brings the greater good. The mutual recognition of the regulations of the Member States 'allows competition between states which creates the best regulatory environment.' Pieter

Cleppe presents the idea of an inter-governmental 'EU Subsidiarity Court', where Member States can look at the decisions made about the distribution of powers given by the European Court of Justice, and compare these with the subsidiarity principle.

Michael Emerson examines the results of the British Balance of Competences Review. He is critical of this project of Prime Minister David Cameron, aimed at reforming the relationship between the UK and the EU, renegotiating British EU membership and returning the powers vested in Brussels back to the Member States. Michael Emerson notes that, of all the 32 Sectoral Reviews conducted by a number of British ministries, not one of them concluded that any powers vested in the EU should be returned to national level. As many of the powers are powers which are shared between Member States and the institutions of the EU, there is, according to Michael Emerson, in fact a constant balancing of powers. For Emerson it is clear that there is a large demand for 'better regulation', but he warns against the idea that over regulation is always the fault of Brussels. Member States also contribute to this and have policy freedom vis à vis the implementation of European directives. One Member State, therefore, could implement a policy more stringently than another.

Michael Emerson has his doubts about the broad call for reforming the relationship between Member States and the EU, however Derk Jan Eppink is very clear about the need for this. According to him, the doctrine of an 'ever closer Union' where everything that has a European dimension is put under an EU remit, has forced the European Union to burst at the seams however the conclusion is drawn that the EU should be devising policy. The principle of subsidiarity is essentially ignored. Derk Jan Eppink calls for a stronger position for the Member States. 'The source of European cooperation and integration are the Member States, not the European institutions in Brussels, Luxembourg or Strasbourg.' Other concrete proposals put forward by Derk Jan Eppink include, for example:

- European institutions working in the fields of 'pooled sovereignty' should focus on issues, such as the internal market, the monetary union for the Eurozone and international trade.
- At the same time, Eppink calls for a return of national powers in areas such as, for example, social policy, cultural policy and the environment.
- National parliaments should be 'guardians of subsidiarity'. The existing system of using yellow cards should be overturned, as it were. In areas where the European Commission does not have exclusive powers and wants to pursue a proposal, it should first have to collect enough green cards from the national parliaments.
- Greater administrative flexibility, such as having the option of leaving the Eurozone if there are compelling economic reasons.

The various authors disagree about whether returning Brussels' powers to

Member State level is needed and what the reasons are that underpin this. But all demonstrate that there are several other questions to ask before the question about the distribution of powers. The most important question here is: Why should we, as Member States, form a union at all? And since liberals disagree with one another about that question, a quick answer to the ideal distribution of powers still seems far away.

As the days pass there is an increasing need to think about the foundations of the EU, and about what reforms we want, especially now as the Greek debt crisis has still not been solved sustainably. This book demonstrates that liberals should realise that a principle such as subsidiarity can, in theory, be a wonderful liberal starting point, but that the administrative complexity of the European Union makes it extremely difficult to compare that distribution of powers with the subsidiarity principle.

About the authors

Krisztina Arató, Associate Professor, ELTE University, Budapest

Caspar van den Berg, Associate Professor, Institute of Public Administration, Leiden University

Pieter Cleppe, Head of office, Open Europe, Brussels

Michael Emerson, Associate Senior Research Fellow, Centre for European Policy Studies (CEPS), Brussels

Derk Jan Eppink, Senior Fellow, London Center for Policy Research, New York City

Jieskje Hollander, Scientific employee, Mr. Hans van Mierlostichting, The Hague

Charlotte Lockefeer-Maas, Scientific employee, Prof.mr. B.M. TeldersStichting, The Hague

Robert Nef, Head of the Board of Trustees of the Liberal Institute of Switzerland

About the organisations

European Liberal Forum
The European Liberal Forum (ELF) is the non-profit European political foundation of the liberal family. ELF brings together liberal think tanks, political foundations and institutes from around Europe to observe, analyse and contribute to the debate on European policy issues, as well as the process of European intergration. These objectives can be achieved through education, training, research, and the promotion of active citizenship within the European Union. The role of ELF is to host conferences, seminars, and workshops, issuing publications and conducting studies on policy issues of liberal interest. www.liberalforum.eu

Prof.mr. B.M. TeldersStichting
The TeldersFoundation is the liberal think tank affiliated to the Dutch political party VVD. The foundation publishes policy papers, a quarterly magazine and books on all kinds of political and societal topics, from the market economy to environmental issues and from crime fighting to defence policy, as well as books on the history and theory of liberalism. Each year, several conferences and seminars on various topics are held to stimulate debate in the Netherlands. The TeldersFoundation hosts an online platform for debate amongst liberals, at www.telderscommunity.nl. www.teldersstichting.nl

VšĮ 'Atvira visuomenė ir jos draugai'
Open Society and its Friends is a non-profit organisation which aims to spread liberal ideas and values, stimulate the growth of the open civil society, extend and deepen democratic traditions, promote citizenship, and strive for more private sector involvement in the public administration. The organisation is continuously involved in dispersing liberal ideas and their implementation. It initiated research on social, political and public issues, create concepts for liberal reforms, organise conferences, discussions, and public lectures, carry out opinion polls, and finance the publication of academic literature. www.atviravisuomene.lt

Liberalismi Akadeemia
The Academy of Liberalism is an independent liberal think tank founded by the Estonian Reform Party in 2006. The purpose of the Academy is to promote a liberal world view to oppose the emergence of socialist ideas in society. The Academy of Liberalism is focused on civic education and research projects to promote liberalism in Estonia and EU neighbourhood countries. The activities of the Academy include three main types: publishing (translations of acknowledged works in Estonian, and publications on topical issues), events (for instance training

series on liberalism, the Day of Liberalism, The Liberal of The Year Award, and conferences), and cooperation (various joint projects with other think tanks). http://www.liberalism.ee