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What Scope for Subnational Autonomy: the Issue of the Legal Enforcement of the Principle of Subsidiarity

by

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Abstract

The transformation of a patchwork of Westphalian nation-states into a multi-level legal order where competences and responsibilities interlock, brings about the fundamental question as to who should do what? This paper argues that the principle of subsidiarity is one of the key components of a system of multilevel governance. Subsidiarity is commonly assumed to require power to reside 'as close to those affected as possible', but, from a legal perspective, requires the allocation and exercise of competences to adhere to the optimization of relative efficiency and democratic legitimacy in the specific case at hand. The paper will start with construing a legal conception of subsidiarity and how said principle performs a crucial function in securing legitimacy in a context of multilevel governance. Subsidiarity can thus help ascertaining the scope of subnational autonomous decision-making, if based on the set of arguments pertaining to efficiency and democratic legitimacy that together construe subsidiarity.

The second part of the paper addresses the problem of legal enforcement. Increasingly, subsidiarity surfaces in constitutional texts, but its enforcement remains anemic. It is widely held in the literature - and judicial praxis - that subsidiarity is constitutionally underenforced, and supposedly rightly so since it is but a political rule, either non-justiciable or very marginally. I will argue that subsidiarity is a legal principle, and will demonstrate through comparative studies how precisely it can and ought to be enforced. From a comparative study of subsidiarity-like clauses such as art. 72 II of the German *Grundgesetz*, the ' peace, order, and good government' clause of the Canadian Constitution Act, article 118 of the Italian Constitution, and article 5(3) of the Treaty on the European Union, I'd like to engage with the possible strategies for enforcement, which include *Better Regulation* programs, procedural mechanisms such as the EU protocol n. 2, and judicial review. These mechanisms, and their interaction, further the compliance with the principle of subsidiarity.

The conclusion will highlight possible future improvements to the enforcement of the principle of subsidiarity at the general level, and as applied to the EU. A better

enforcement of subsidiarity may help determining a more justified scope of autonomous exercise of powers by governmental levels - subnational levels included.

Key-words

Subsidiarity, multilevel governance, legitimacy, judicial review

As argued by Popelier in this Special Issue, subnational constitutionalism has to be perceived on a dynamic scale, positioning subnational levels of government vis-à-vis other levels (Popelier 2014: 19). The principle of subsidiarity contains a promising regulative optimization in this respect: it may determine the most proper level for the exercise of power in terms of relative efficiency and democratic legitimacy. The operation of this principle in a domain of shared competences may potentially allow both subnational and other levels of government to assume tasks and execute policy, subject to an ad hoc test justifying its aptitude as required by the principle of subsidiarity. However, the judicial enforcement of this principle is anaemic.

1. Introduction: the Problem of Constitutional Underenforcement of Subsidiarity

The research presented here studies the legal enforcement of the principle of subsidiarity. Though this principle is in ascendance throughout multi-tiered legal systems, its enforcement is suboptimal, especially constitutional review for compliance with subsidiarity. Frequently held to be non-justiciable for lack of clear standards, or even a mere political *Klugheitsregel*, judicial scrutiny of legislative acts for compliance with subsidiarity is inept. For instance, commentators have noted that the European Court of Justice considers the requirement of subsidiarity as laid down in article 5(3) TEU to be satisfied when the objective of the legislative act concerned is clear. Subsidiarity review appears thus reduced to a mere verification of legal basis in the Treaties.

Judge von Danwitz of the ECJ posited in 2010 that the "*judicial control of subsidiarity has to focus on what the ECJ in a meaningful way can review*." [I] (Von Danwitz 2010: 45). It appears that subsidiarity review entails such questions, related to efficiency and legitimacy of governmental action, which cannot be answered in a traditional doctrinal way. Constitutional judges hence, seem ill equipped to answer such questions. The Treaty of Lisbon indicated the widespread agreement on the lack of meaningful review of EU subsidiarity, and opted to install an additional legislative procedural mechanism, preceding judicial review, by endowing the National Parliaments with a scrutiny mechanism.[II] This procedural mechanism grants the political bodies a role, which has led some to sustain that the principle in turn is of a political nature. However, one is hard pressed to find a norm in

a constitutional text that is not 'political', i.e. touching upon the will of democratically elected representatives. Indeed, the whole area of constitutional law aims precisely to regulate the political realm.

Other legal systems have struggled with the judicial enforcement of subsidiarity, too. The German harbinger of article 5(3) TEU, namely article 72, II *Grundgesetz* contains the necessity-requirement for the federal exercise of concurrent competences. From 1952 (first case before to *Bundesverfassungsgericht*) to the reform in 1994, review for compliance with this necessity-requirement was deemed '*eine nicht-justitiable Frage des gesetzgeberischen Ermessens'*. In other words, the assessment of the German federal legislator on the fulfillment of 'necessity' was sufficient and would only be scrutinized for a manifest error.

The two main arguments and have to be treated separately: a) the lack of meaningful and operable judicial standards precluding subsidiarity review, and b) the political nature of the principle, which requires a large degree of judicial restraint, and possibly even recourse to other enforcement mechanisms other than the traditional judicial policing of competence boundaries. The constitutional underenforcement of subsidiarity in systems where the norm is present relies principally on these two arguments. Both entail a serious challenge in order to present solutions ameliorating the legal enforcement of subsidiarity.

Before these questions can even be addressed, it is of great importance to offer semantic clarification with respect to this "principle of subsidiarity". Although definitions vary, the commonly shared denominator of the principle of subsidiarity indicates the search for an optimal allocation and exercise of governmental authority in terms of efficiency and legitimacy. The next section will address the meaning of subsidiarity and its role in sustaining legitimacy in multilayered legal systems. Thereafter, a comparative selection of cases will be analyzed in order to provide an overview of judicial techniques for scrutinizing subsidiarity.

2. The Principle of Subsidiarity in a Context of Multilevel Governance

2.1. Legitimacy

Multilevel governance is the umbrella concept through which political science addresses the postmodern world where "the functions and the authority traditionally assumed by the nation-state are being diffused and fragmented among a wide range of

actors (both public and private) and at many different levels." (Howse & K. Nicolaidis 2001: 1). An increase in the cross-border relationships and in global problems diminishes the connection between the territorial jurisdiction of the state and the bond with its citizens (Sieber 2010: 19). The term governance denotes "the regulations brought about by actors, processes as well as structures and justified with reference to a public problem" (Zurn, Wälti & Enderlein 2010: 2). The multilevel aspect signifies the interdependence of actors operating at different territorial levels – local, regional, national, supranational, global – while governance refers to the growing importance of non-hierarchical forms of policy-making, such as dynamic networks which involve public authorities as well as private actors. (Kohler-Koch & Larat 2009: 8). In a more positive sense, multilevel governance is a system by which the responsibility for policy design and implementation is distributed between different levels of government and special-purpose institutions.

At the root of modern constitutional thought lies the idea that the exercise of power is connected to the common good and the interests of the citizens constituting a jurisdiction. The simplicity of this circular conception of legitimacy from a user-perspective yields certain attraction. However, scaling down the level of abstraction in that statement reveals quite a bewildering complexity of institutions, constitutions, treaties, public entities, and governments. This complexity cannot be tamed through a hierarchical pyramid, but rather constitutes a heterarchical network (Ladeur 1997: 33-54; Bernard 2002: 8-11; Piattoni 2010: 250-51). The *prima facie* lack of coherence threatens the basic notion of legitimacy that underlies democracy and the rule of law.

Multilevel governance challenges the normative underpinnings of traditional democratic legitimacy. A close-knit connection between the legality of a norm and its legitimacy does not suffice in a context of pluralism. Black-box concepts such as national sovereignty have become obsolete, and the essence of the democratic principle requires a recalibration in view of legal pluralism and multilayered interconnectedness. Moreover, as Walker argues, democracy becomes dislodged from the development of a self-conception of a common political community and is located instead in disaggregated and mobile virtues of institutional arrangements (Walker 2007: 253). In particular, Walker adds, epistemic, deliberative and practical considerations bring the importance of the output of a decision making process at par with the input (Walker 2007: 253). This language of differentiation, territorial or functional, reflects different sources of legitimacy: the

territorial nation-state tradition, and the civil society functional tradition (Piattoni 2010: 259). The context of multi-level governance urges a conception of legitimacy that is capable of addressing the abovementioned complexity at three dimensions: input (e.g. stakeholders and governmental levels), decision-making processes, and output (Scott 2009: 160-173). Hence, the design of multi-level governance in terms of legitimacy needs to orient itself towards a procedural perspective (Nicolaidis 2001: 443; Dawson 2011: 105-120). In this sense, legitimacy pierces through the black box understanding of sovereignty.

Post-Westphalian legitimacy is thus built upon classical concepts as positive and negative legality, and combined with input, output, and process legitimacy (Craig 2011: 13-40; Føllesdal 2008: 380-382; Popelier 2011: 555-569). Input and output legitimacy refer to specific characteristics of democratic legitimacy, judged respectively in terms of a legal system's responsiveness to citizen interests as a result of participation (input), and in the welfare-enhancing policy outcomes for the people. The third dimension, i.e. legitimacy as established in a procedural sense, assesses the quality of the governing process, by standards of deliberation, and of justification in terms of vertical institutional balance. In an interconnected environment, where multiple centers of authority co-exist and interact, this vertical balance forms an important aspect of the process-legitimacy of decision-making (Schmidt 2013: 2-22). The constitutional pluralism literature, theorizing the overlap of states[III], in particular connects to the vertical dimension of this broader legitimacy concept (e.g. Sarmiento 2012: 343-45). In this vein, a discursive and interactive process of constitutional argument constructs legitimacy at a meta-level. With these broad requirements of legitimacy in mind, how does the principle of subsidiarity relate to them?

2.2. Subsidiarity

The principle of subsidiarity regulates authority within a political order, directing that powers or tasks should rest with the lower-level sub-units of that order unless allocating them to a higher-level central unit would ensure higher comparative efficiency or effectiveness in achieving them (Kalkbrenner, 1972: 522; Höffe, 2007: 87; Føllesdal, 1998: 190; Carozza, 2003: 38). In other words, subsidiarity contains the proposition that action to accomplish an objective should be taken at the lowest level of government capable of effectively addressing the problem (Bermann 1993: 97). The principle of subsidiarity is viewed as the epitomic illustration of competence divisions in a multi-layered context.

Features of the measure at hand will connect to the characteristics of the most "apt" governmental level, and thus determine the *locus* of decision-making or execution of a measure (Trachtmann 1992: 469). The validity of competence-exercise is formally predetermined by the requisites of efficiency and legitimacy, the twin rationales of subsidiarity. Instead of opting for a fixed and rigid division of competences, subsidiarity thus requires and individual argumentation to ensure the optimal exercise of competences (Gamper 2006: 121-125).

The *ethos* of subsidiarity can be described as bipolar: on the one hand, it fosters the preservation of lower unit autonomy, and on the other hand, it furthers a centralizing tendency based on arguments of comparative efficiency (Biondi 2012: 220). The legal principle of subsidiarity demands that a trade-off is made and argued between the requirements of efficiency and democratic (input) legitimacy, as to bolster overall legitimacy by establishing the adequateness of the spatially situated rule-maker, and fostering power sharing and cooperation. Thus, subsidiarity is to be understood as a formal and structural principle, creating an argumentative space. As such, it provides a structured test of justifiability, not unlike the principle of proportionality.

This structured justification aligns neatly with the dimensions of legitimacy set out above. Subsidiarity requires a clear indication of the additional benefit of a legislative proposal (output). Where it calls for complementary action or a margin for lower level differentiation, subsidiarity furthers a vertical balance. Additionally, by requiring compliance with subsidiarity, the procedure is rendered legitimate since it takes the lower level interest or capacity into account (process legitimacy). Additionally, where particular mechanisms such as the EU early warning system for national parliaments are in place, the input legitimacy is enhanced.

3. Comparative Analysis of Subsidiarity Clauses

This section identifies several instances of the principle of subsidiarity in different legal systems. Each of these instances will be briefly discusses, with a focus on the enforcement mechanisms in place.[IV]

3.1. Art. 72 II *Grundgesetz*

The concurrent competences, shared between the Länder and the Federal level are enumerated in art. 74 GG. Following the presumption of ar. 72 I GG, the Länder enjoy a *prima facie* competence in these domains. However, the federal level can exercise its competence, excluding regional powers, upon justifying the need requirement as laid down in the second paragraph of article 72.

Table 1: three consecutive versions of the necessity-requirement

1949	1994	2006
The Federation shall have the right to legislate on these matters, to the extent that a requirement for federal regulation exist, insofar as 1) a matter cannot be effectively regulated by the legislation of individual Länder, or 2) the regulation of the matter by a State law might prejudice the interests of other State(s) or the people as a whole, or 3) the maintenance of legal or economic unity, especially the maintenance of equality of living conditions beyond the territory of any one State, necessitates such regulation.	The Federation shall have the right to legislate on these matters, when and to the extent that the restauration of equivalence of living conditions throughout federal territory or the preservation of legal or economic unity in the interest of the nation requires a federal regulation.	The Federation shall have the right to legislate on matters falling within clauses 4, 7, 11, 13, 15, 19a, 20, 22, 25 and 26 of paragraph (1) of Article 74, if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.

The initial version of the necessity clause required a mere 'Bedürfnis' (need). The scrutiny of this 'need' requirement and the criteria of § 2 by the *Bundesverfassungsgericht* has proved to be - at best - marginal.[V] The Federal Constitutional Court, after one initial substantive judgment on subsidiarity[VI], declared the necessity-requirement a by its nature non-justiciable question. The case at hand concerned federal legislation on chimney sweeping[VII], and the Court declared concerning the need-requirement:

> *"Dabei ist zunächst zweifelhaft, ob das BVerfG das Vorliegen eines Bedürfnisses überhaupt prüfen kann oder ob es sich hier nicht […] um eine nicht-justitiable Frage des gesetzgeberischen Ermessens handelt. […] die Zuständigkeit des BVerfG zur Prüfung der Bedürfnisfrage – von Fallen eines Ermessensmißbrauchs durch den Gesetzgeber abgesehen – zu verneinen."*[VIII]

Following suit to a constitutional revision in 1994 sharpening the necessity clause[IX], the

Bundesverfassungsgericht intensified its review. In the 2002 *Altenpflegegesetzurteil* the Federal Constitutional Court delineated its review of the newly shaped article 72 II GG.[X] The Court distinguished between (a) the determinants of Art. 72 § 2 and their possible concretization, and (b) the legislature's discretion in the fact gathering and interpretation and the prediction of future developments (*Prognosen*). In order to give a concrete determination to the criteria a given by the GG in §2, i.e. the restoration of equivalent living conditions and the preservation of economic and legal unity in national interest, the Court focused on the objective, the *telos* of the federation: the interest of the nation and the benefits of integration.[XI]

Regarding *the restoration of equivalent of living conditions*, the Court specified that in order to establish the necessity, the replacement of 'unity' (*Einheitlichkeit* in the old version) with 'equivalence' (*Geleichwertigkeit*) established a higher threshold for federal legislation. No mere discrepancy in, for instance, median income, would justify 'necessary' federal legislation. What was required, according to the Court, was that the living conditions in the Federation had diverged in a substantial manner, that they threatened the social system of the federation, or that such a development could be presumed to be imminent.[XII] The federation was obliged to provide evidence in a dutiful manner to buttress this proposition.

Regarding *the preservation of economic and legal unity in national interest,* the Court emphasized that a mere divergence in legal unity was precisely a consequence of a federal system, and could therefore not constitute the required 'necessity'. What was required was a differentiation with problematic consequences (*Rechtszersplitterung mit problematischen Folgen*). With regards to economic unity, the Court required proof that individual *Länder* regulations (or the absence thereof) would constitute a substantial threat to the national economic system. This requirement had to be approached from the perspective of national, that is combined federal and *Länder* interest.[XIII]

With regards to the legislative fact gathering and the forward-looking predictions, the Court specified that its power of judicial review also extended to the factual determinations of the legislature.[XIV] The determination of necessity was fully justiciable, according to the Court. Nevertheless, there exists a certain margin of discretion, especially when it comes to future prognoses. The legislature does have to meet certain requirements when making forward-looking assessments: clarity, inclusion of all relevant options and elements, exclusion of irrelevant elements, and methodological consistency. The legislature cannot

simply state broad objectives; it has to differentiate and articulate separate concerns and objectives, when possible with empirical data: actual facts, forming the foundation for the prediction, have to be submitted.[XV] When this legislative factual assessment, with or without forward-looking elements, forms part of a judicial inquiry, the *BVerfG* does grant a margin of discretion, but is not bound by the determinations of the legislature (Messerschmidt 2000: 946). Subsequent case law of the *BVerfG* has confirmed and strengthened the reasoning on the necessity requirement: in matters of criminal sanctions on dangerous dogs[XVI], shop trading hours,[XVII] junior professors[XVIII] and student fees and unions.[XIX] In the latter case, Court repeated its criterion of the substantial effect on economic unity. Moreover, the Court's reasoning offers a prime example of judicial scrutiny of legislative predictions: the clarity, methodological consistency, and inclusion of relevant facts to construct these legislative future findings, have to support the 'substantial effect'. In this case, the Court found the evidence rendered lacking.

The federal reform of 2006 did not alter the wording of the necessity-clause, although it did restrict its material scope of operation by reducing the list of concurrent competences.[XX] For our purposes here, the methodological approach of the Court still stands (Wagner 2011: 44) as confirmed in case on the *Gentechnikgesetz*.[XXI]

3.2. Art. 5(3) TEU

Article 5(3) TEU requires the EU to enact legislative measures under the shared competences "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

i. Judicial enforcement

There is little added value in the comprehensively reiteration of the older case law from the 1990s.[XXII] de Búrca concludes that two readings are possible from these older cases: one is that the standard for the judicial review of subsidiarity amounts to nothing more than 'showing an adequate Treaty basis for action'; the other possible reading is that although the Court did require detailed reasoning, and analysed the legislative reasoning in the recitals, it did so in an unsatisfactory manner (de Búrca 1998: 223-226). Specifically

regarding subsidiarity, the Edinburgh guidelines[XXIII] and specifications remained absent from the Court's argumentation. Thus, the standard for review was very low indeed (Estella 2002: 156).

For the study of judicial review, the 2010 *Vodafone*[XXIV] case is the most interesting. Especially the Opinion of the Advocate-General, M. Maduro,[XXV] was extensive in its reasoning and provided a profound analysis. He proposed to elaborate upon the subsidiarity analysis with further indicators. First, the case clearly featured transnational aspects, since the Directive concerned roaming, retail and wholesale charges, and as such, captured roaming charges originating from providers in other Member States.[XXVI] Further, the AG noted that the national regulators 'have no incentive to control the wholesale rates which will be charged to foreign providers and the customers of such foreign providers.'[XXVII] Subsequently, he discussed the difference between retail and wholesale, noting the intimate connection between the two. Then, after identifying the objective of the directive, he approached subsidiarity in a legal fashion and emphasized the judicial role: 'In my view, neither the objective pursued by the Regulation nor the intent of the legislator is decisive for the purposes of assessing compliance with the principle of subsidiarity.'

Then the AG continued to scrutinize the arguments put forward by the Commission, by augmenting the burden of the obligation to state reasons:

> 'Price differences exist in almost any domain among Member States. Such differences in prices may or not entail competitive advantages for the economic operators of some Member States. As in many other areas, it may simply mean that prices vary between Member States. In this respect, there seems to be no clear difference from the market for domestic calls where economic operators may also be subject to different price ceilings. Furthermore, not all competitive advantages can necessarily be labelled as a distortion of competition. The Community legislator would have to develop an argument in support of this conclusion and it failed to do so.' [XXVIII]

Decisive, according to the AG, were both the cross-border elements of the issue, and the functional suitability of the legislator.

> 'The decisive argument derives, however, from the cross-border nature of the

economic activity to be regulated. […]. Due to the transnational character of the economic activity in question (roaming), the Community may be both more willing to address the problem and in a better position to balance all the costs and benefits of the intended action for the internal market.

It is the cross-border nature of the economic activity itself that renders the Community legislator potentially more apt than national authorities to regulate it even at the level of retail charges. Given that the vindication of Community law rights was at issue, the Community legislator may reasonably have concluded that national regulatory authorities may not have attached the degree of priority to such rights which the Community legislator thought necessary. […] Moreover, roaming is a small part of those services and demand for roaming is less than demand for domestic communications. While regulating this market, one could expect that the focus of national regulators would be on the costs, and other aspects, of domestic communications and not on roaming charges. It is the Community, by virtue of the cross-border character of roaming, that has a special interest in protecting and promoting this economic activity. This is the precise type of situation where the democratic process within the Member States is likely to lead to a failure to protect cross-border activity. As such one can understand why the Community legislator intervened.' [xxix]

This opinion elaborates on elements pertaining to the two criteria of article 5(3) TEU: the added value of EU action, and the insufficiency of Member State action. However, the extent to which the legal forum and actors are equipped to address such issues may vary, depending on the case at hand. The Court, for its part did not treat the arguments in a similarly extensive manner. However, it did show some improvement compared to earlier case law, particularly since the Court delved deeper into the justification offered by the legislature. It reviewed the crucial Recital (no.14) in this respect, which in turn referred to the impact assessment (Keyaerts 2010: 880). This was a crucial determinant for the subsidiarity review. The Court based its judgment on the factual consideration that a harmonisation of roaming charges necessitates both wholesale and retail charges, because of their high interdependence. The Court approached the question to subsidiarity in a two-stage process: first, the competence to coordinate retail charges was investigated and

scrutinised; secondly, the high interdependence, as apparent from the Recital, justified the broadening of the scope of applicability of the Directive.

The other case on subsidiarity of the past years, *Luxemburg* v *Council*,[XXX] does not yield any further insights with respect to subsidiarity review.

The ECJ has been demonstrated cautious approach to subsidiarity, showing a high degree of deference to legislative discretion on the grounds of legitimacy or methodology. Subsidiarity seems to epitomize the political question doctrine in this respect.[XXXI]

ii. Procedural enforcement: the Early Warning System

Protocol no. 2, annexed to the Lisbon Treaty, installs a complementary enforcement mechanism, endowing the National Parliaments an advisory role. This *Early Warning System* institutionalizes participation of national parliaments as a political safeguard (Schütze 2009: 256-265), primarily designed to protect national autonomy and providing a counterweight for dominance displayed by the executive organs in EU institutional design and policy-making.[XXXII] The *Early Warning System* sets up a collective monitoring system by National Parliaments, a compulsory form of consultation that increases the input legitimacy of EU legislation (Cygan 2013: 159).

Simultaneously, by informing the Commission of national impact and interests, it allows for the EU to interfere in a complex environment, which calls for the issuing of flexible and differentiated regulatory frameworks. The subsidiarity mechanism thus functions as prime tool for 'bringing Europe closer to the people', and enhancing transparency and the scrutiny of EU legislation (Kiiver 2012: 148). In this respect, the *Early Warning System* furthers an institutional dialogue and aims to foster a deliberative exchange. The lack of coordination mechanisms provided in the Protocol cast a shadow of doubt on the practical influence of the mechanism (Kiiver 2012: 132). The EWS however, does not elevate the collective National Parliaments as a third chamber of the EU legislature because of the absence of a veto right ("red card" in the jargon). Moreover, practice reveals that National Parliaments do not share a common conception of material subsidiarity scrutiny, and do not restrain themselves in the drafting of the reasoned opinion to a concise legal approach to subsidiarity. Instead, as was the case in the first yellow card on the right to take collective action[XXXIII], the arguments raised by the national parliaments triggering the yellow card pertained to legal basis, proportionality and/or the political merits of the proposal,

without assessing subsidiarity (Fabbrini & Granat 2013: 138).

From the perspective of legal enforcement, it seems that the current set-up and practice of the EWS still misses important aspects. Conversely, the political value of the mechanism, both enhancing transparency of EU legislative decision-making, and activating National Parliaments with respect to EU matters, is established.

3.3. Canada: Pogg and the Principle of Subsidiarity

Across the Atlantic, subsidiarity has also surfaced. In my opinion, two separate norms have to be analyzed: the judicial interpretation of the peace, order, and good government clause as a joint to allow for federal intervention in provincial powers, and the judicial invocation of the principle of subsidiarity in a foursome of cases in the last decade.

i. Peace, order and good government

The *pogg clause* of Section 91(1) serves to grant federal legislative authority in three ways, labeled 'branches': the gap branch, the national concern branch and the emergency branch (Swinton 1992: 126; Hogg 2007: 17-5; Baier 1997: 279). This clause contains a version of subsidiarity (Halberstam 2012: 594): under the 'national concern' interpretation, in order to determine whether the federal legislator is competent to act on a certain subject matter, the Court employs, amongst others, the provincial inability test to verify whether the issue is indeed better regulated at the federal level. This is a limited version of subsidiarity, in the sense that no inverse mechanism operates in favour of provincial autonomy (Brouillet 2011: 621). The premise is rooted in an evolutionary approach to division of powers, the Lords in the Privy Council held in 1896 that:

> " […] some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion."[XXXIV]

After the Second World War, the national concern interpretation resurfaced, in the case *Canada Temperance Act* and was given its definition:

> "[…] the true test must be found in the real subject matter of the legislation: if it is

such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole, then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specifically reserved to the Provincial Legislatures."[XXXV]

Examples of this 'national concern' inherent in a certain subject matter are aeronautics[XXXVI], the establishment of a national capital region[XXXVII], and the seabed natural resources.[XXXVIII] However, beyond endowing these particulars act with a degree of national concern, these cases offer no abstract criteria by which to judge the applicability of this branch of the pogg power. For instance, 'inflation' is too broad a description to qualify as a matter within the national concern branch of the pogg power.[XXXIX]

The controlling case and standing precedent is *R v Crown Zellerbach* where the Supreme Court offered a template to assess this attainment of national concern. The case concerned the federal Ocean Dumping Control Act, which prohibited dumping at sea, but was challenged on its application to marine waters within the Boundaries of the Province of British Columbia. The Court formulated the criteria to establish this national concern[XL], retaining the following determinants: (1) singleness, distinctness and indivisibility, (2) without being a mere aggregation of matters to differentiate it from matters of solely provincial concern, and (3) a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power.

To establish the first criterion, the Court added the test of provincial inability. Provincial inability seemed a more justifiable litmus test than the qualification of national concern. The Court took its cue from an article by Dale Gibson, and cited approvingly his definition:

"By this approach, a national dimension would exist whenever a significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of the federal Parliament. It is important to emphasize however that the entire problem would not fall within federal competence in such circumstances. Only that aspect of the problem that is beyond provincial control would do so. Since the "P.O. & G.G." clause bestows only residual powers, the existence of a national

dimension justifies no more federal legislation than is necessary to fill the gap in provincial powers. For example, federal jurisdiction to legislate for pollution of interprovincial waterways or to control "pollution price-wars" would (in the absence of other independent sources of federal competence) extend only to measures to reduce the risk that citizens of one province would be harmed by the non-co-operation of another province or provinces." (Gibson 1976: 34-35).

Provincial inability serves as a bottom-up approach to establish the singleness, distinctness and indivisibility of a matter. A legislative matter of national concern needs the federal ability to impose uniform legislative treatment. This need for uniformity rests on the "interrelatedness of the intra-provincial and extra-provincial aspects of the matter".[XLI]

Provincial inability was not a new concept in 1988. In a few cases, this test was proposed by the federal government defending its legislation under the national concern branch of the pogg clause, but as a necessary condition for the exercise of federal power. I.e. the test of provincial inability was not met by the federal government, national concern was excluded as a justification (Baier 1997: 289-290). *Schneider* is such a case, where the federal jurisdiction was rejected because

"there is no material before the Court leading one to conclude that the problem […] is a matter of national interest and dimension transcending the power of each province to meet and to solve in its own way. Failure by one province to provide […] will not endanger the interests of another province. The subject is not one which 'has attained such dimensions as to affect the body politic of the Dominion'."[XLII]

Provincial inability seems attractive as a criterion to maintain a federal balance. The relationship between governmental levels as expressed through a subsidiarity calculus cannot rest on a singular analysis of the policy at hand. Nonetheless, the term is not clear by itself. Swinton wonders whether the Court addresses the legal capacity of the provinces to act, or political incapacity, or even unwillingness?[XLIII] Such a supply-side analysis entails territorial and functional determinants, hardly fit for unequivocal reasoning *an sich*, without a clear and predefined framework.

ii. Jurisprudential development of subsidiarity

Canada is an interesting point of comparison for subsidiarity, since next to the jurisprudence on the pogg clause discussed above, the principle of subsidiarity features autonomously in a number of recent Supreme Court judgments. In the *Quebec Secession Reference*, the Court stresses the importance of the principle of federalism (see Gaudreault-DesBiens 2011: 93-94 on the question of legal status). The Court also explains the central objective of the principle of federalism: in a functional sense, federalism "facilitates democratic participation by distributing power to the government thought to be the most suited to achieving the particular societal objective having regard to this diversity."[XLIV] Implicitly, one may infer from the previous quote that subsidiarity as the legal obligation to enact legislation at the most suited governmental level, is presumed inherent in the federal system (Gaudreault-DesBiens 2011: 103). In other terms, the division of competences as enshrined in Sections 91 to 95 is underpinned by the principle of subsidiarity.

In *Spraytech* (2001), the prelude to the majority opinion by Justice L'Heureux-Dubré brings the cooperative *telos* of the principle of subsidiarity to the forefront.

> "The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity. La Forest J. wrote for the majority in *R. v. Hydro-Québec* that "the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by **governments at all levels**" (emphasis added). His reasons in that case also quoted with approval a passage from *Our Common Future*, the report produced in 1987 by the United Nations' World Commission on the Environment and Development. The so-called "Brundtland Commission" recommended that "local governments [should be] empowered to exceed, but not to lower, national norms".
>
> […] Nevertheless, each level of government must be respectful of the division of powers that is the hallmark of our federal system; there is a fine line between laws that legitimately complement each other and those that invade another government's protected legislative sphere. Ours is a legal inquiry informed by the environmental

policy context, not the reverse."[XLV]

This invocation of subsidiarity is colored by the Canadian particular emphasis on cooperative federalism, stressing the interplay between the competent governmental levels (Gaudreault-DesBiens, 2011, 96). Chief Justice McLachlin explained this holding in the *Assisted Human Reproduction Reference* (2010):

> "[…] in an area of jurisdictional overlap, the level of government that is closest to the matter will often introduce complementary legislation to accommodate local circumstances. In *Spraytech*, for example, the town supplemented federal pesticide controls by further restricting the use of certain substances. L'Heureux-Dubé J. decided that the town could adopt higher standards for pesticide control because the local law complemented, rather than frustrated the federal legislation. She took this as an example of subsidiarity. Moreover, as developed above, a carve-out to a criminal law would not be paramount to stricter provincial regulations."[XLVI]

This strand, initiated in the field of environmental law, emphasizes the possibility of concurrent application of laws, by allowing each level of government to enact legislation on a subject matter in relation to its comparative advantage. The federal government may adopt legislation as to ascertain the incorporation of externalities, to ensure uniformity, to alleviate any possibility of strategic action frustrating the objectives of the legislation in point. The complementary competence for the more local level of government aims at securing convergence with local circumstances. This reading of subsidiarity allows only an interpretative and secondary function for the principle in constructing the concurrence of competences, and the scope of paramountcy (Newman 2011: 27; Gaudreault-DesBiens 2011: 105-111). There seems to be no room for the principle of subsidiarity in Canadian constitutional law to alter the allocation of competences (Arban 2013: 219).

These cases illustrate the operation of the principle of subsidiarity within the framework of federalism as a normative concept guiding the interpretation of several doctrines that actually render shape to federalism in concrete issues. Presuming a higher degree of efficiency embodied by a federal competence, consistent with the structure of the division of powers, subsidiarity is invoked to grant more attention to provincial autonomy,

both in economic matters, as in cultural matters. The usage of subsidiarity serves to underline the importance of diversity within the federal balance. Its emergence in the case law of the Supreme Court is explained by a gradual retreat from an excessive centralizing approach to the interpretation of the division of powers under the guise of efficiency.

3.4. Italy: Art. 118 Constitution

Following a constitutional reform in 2001[XLVII], triggered by pressure from EU developments and local actors (Fabbrini & Brunazzo 2003: 100-120), the distribution of powers between the regions and the federal/national level has been altered. The Federal State only has regulatory or administrative powers with respect to the 17 transversal powers listed as exclusive in article 117 subsection 2. However, the Federal State can depart from this classification of exclusive, concurrent and residual powers, and legislate in regional matters, based on the principle of subsidiarity. Residual regional powers and the concurrent powers entail administrative implementation by the Regions. Adding to this division of legislative competences, article 118 invokes the principle of subsidiarity and requires that administrative functions be exercised at the lowest level of government possible, regardless of the locus of the legislative competence. The principle of subsidiarity thus expressed entails a preference for administrative action at the level of municipalities (Tubertini 2006: 37). This presumption however, can be rebutted.

The Constitutional Court labels this version 'ascending subsidiarity', which has to be read in conjunction with the principles of adequacy and differentiation. In the seminal judgement nr. 303/2003, concerning public large-scale infrastructure, the *Corte Costituzionale* held that the national legislature is allowed to regulate and assume administrative functions in matters falling under the list of concurrent powers, when a uniform exercise of these administrative functions is necessary. This derogation is only allowed under three conditions: first, that the derogation of regional power is proportionate to the public interest that requires uniformity at the national level, second, that the law is not unreasonable, and third, that there exist a prior agreement with the region(s).[XLVIII] The Court indicates that it considers the principle of subsidiarity as inspiring the division of administrative powers between the state and the regions.[XLIX] Adding to this static division as laid down in the principal division in article 118, subsection 1, the principle of subsidiarity also contains a dynamic side, which authorises a certain flexibility.[L] However,

the Court is careful to add, the mere invocation of subsidiarity does not suffice to alter the division of powers, since this would detract from the rigidity of the constitution. Subsidiarity as set out above needs to follow a procedural and consensual path (Groppi & Scattone, 2006: 137), meaning that a prior agreement with the region(s) is necessary before assuming a competence at the national level when regions should be competent.

4. Comparison of Enforcement Techniques

Table 2: overview of methods of judicial review

	ECJ	**BVerfG**	**Italian Constitutional Court**	**Canadian Supr Court**	
Norm	Art. 5 (3) TEU	Art. 72 II GG	Art. 118 (1) Const.	Pogg clause	Principle of subsidiarity
Textual determinants	Double test: added value and insufficiency of Member State action.	- Restoration of equality of living standards. - Legal unity. - Economic unity. - Necessity requirement.	None, supplemented with adequacy and differentiation	None	None
Form of scrutiny	Rather formal.	Moderately substantive.	Procedural	Moderately substantive	Formal
Interpretative aids	- Structural analysis. - Impact assessment to provide data.	- Threshold for justification requirement. - Burden of proof: problematic consequences. - Methodological standards for fact-finding	Requires proportionality, reasonableness and cooperation	'national interest' – provincial inability	Allows local divergence – restricting federal paramountcy
Exchange with other enforcement mechanisms	Early warning mechanism	- No ex ante mechanism[LI]	-	-	-

It appears from the overview of enforcement techniques and the methods of judicial review that subsidiarity is contrary to the assumptions, justiciable. The judicial review is

more intense, more substantive, when textual determinants have been put forward by the constitution. If these norms are not easily subsumed in legal reasoning, then interpretative aids such as an impact assessment yield benefits. Both the *BVerfG* and the ECJ (albeit implicitly) have referred to the obligation to gather data and provide an ex ante assessment in order to construe the relevant criteria triggering a competence.

In the absence of such criteria, as for instance in the Italian and Canadian cases, the Court has to develop its own framework, which is no easy task. The Italian Court made recourse to the procedural emphasis on cooperation, while the Supreme Court deployed the principle of subsidiarity to allow for a restriction of federal intervention, protecting local divergence. As to the pogg clause, the construction of the 'provincial inability' test displays a clear likeness to the EU subsidiarity reference to Member State inability. In both cases, this is a difficult determinant, which would benefit from a predefined framework.

5. Strengthening EU subsidiarity review[LII]

The function of the justification requirement of art. 296 TFEU is to enable the ECJ to undertake judicial review. However, "subsidiarity cannot be easily validated by operational criteria."[LIII] This does not imply that the Court should refrain altogether from reviewing because it lacks a certain epistemic ability to deal with findings of fact. This is *a fortiori* the case when an indeterminate norm in a deliberate fashion conveys vagueness towards the interpreter of the text, in order to conceal constitutional disagreement. Coherent clarification becomes paramount.

The Court may rely on two mechanisms: one substantial and one procedural. In a substantial sense, in order to strengthen the Court's handling of the material indicators construing subsidiarity, the ECJ may turn to the impact assessment. At the procedural plane, one needs to discern between the standard of proof required from the legislator, and a judicial decision whether primary decision-maker has attained this standard (Craig 2012b: 432-33).[LIV] This second-order review, albeit of a marginal intensity, may not be overlooked. In other words, even if the Court defers to the legislative findings to constitute a subsidiarity assessment, it should not relinquish this secondary function.[LV]

5.1. IA as substantive aid to interpretation

Substantial benefit could be gained from the application of the tool of impact assessment (IA), as an instrument of *ex ante* evaluation, in judicial proceedings to enhance the Court's control of subsidiarity (Craig 2012a: 78). Indeed, subsidiarity was discussed in *Vodafone* with an indirect reference to the impact assessment. But are judges equipped to deal in a substantive manner with these instruments (von Danwitz 2010: 46; Bermann 1994: 392)? Alemanno encourages the recognition of instruments of Better Regulation as essential procedural requirements, reviewable by the Court, but recognizes the difficulty of reviewing substantive aspects (Alemanno 2009: 395). The Court could approach in a formal manner the assessment by the legislator of complex underlying socio-economic indicators, by using the preparatory studies by the Commission, the impact assessments.[LVI] The impact assessment may serve as a veritable tool for dialogue in judicial proceedings[LVII], offering a framework for assessing socio-economic findings and reasoning. Because methodological standards form the very basis for the epistemic superiority of the legislator, they need to be implemented and fastidiously guarded.

5.2. Process review

A counterargument might be that orienting the subsidiarity review towards the IA merely relocates the problem of substantive assessment. Can the Court second-guess the IA? Is the Court obliged to accept whatever the IA concludes? Three points are in order to this gain an understanding of this aspect of the problem: firstly, legislative discretion is not eradicated by a procedural requirement to demonstrate the basis of evidence and rationality of the decision-making (Lenaerts 2012: 16). Instead, procedural requirements from the Better Regulation program aim at providing a rational basis for making policy-choices.

Secondly, the use of the IA has to be viewed in conjunction with other enforcement mechanisms on subsidiarity, such as the *Early Warning System*. There exists a possibility for mutual reinforcement of the *ex ante* Protocol mechanism and the judicial review of subsidiarity: the Reasoned Opinions of the National Parliaments might contain useful information in construing the arguments on subsidiarity.[LVIII]

And, thirdly, the qualitative guarantees surrounding the IA have to be taken into account: the control by the Impact Assessment Board, and the methodological standards in the IA Guidelines. Minimum standards extracted from the IA Guidelines may be

incorporated through the self-binding effect of these 'codes of conduct' and based on the principle of careful preparation (Alemanno 2009: 392-393). Furthermore, and analogous to the standards for the use of partisan expert evidence in judicial procedures (Barbier de la Serre & Sibony 2008: 973-977), standards should be taken into account with respect to the methodology of subsidiarity IA: peer review (e.g. screening by the Impact Assessment Board), publication, and contestability.[LIX]

6. Conclusion

An increasingly globalized world where the twin forces of globalization and localism urge a constant re-evaluation of the appropriate level of governmental action, requires a broad concept of legitimacy, combining input, output an procedural dimensions. The principle of subsidiarity can fulfill an important role in this context. In its constitutional form it can inspire a system of competence division, and in its legislative form, it can offer a flexible mechanism that allows for the exercise of powers at the most adequate level. However, besides its normative appeal, current legal practice seems to struggle with the issue of legal enforcement of this principle, in particular the issue of judicial scrutiny. The various arguments can be boiled down to two main currents: (a) subsidiarity is inherently political and therefore unfit for review and (b) subsidiarity entails an inquiry into socio-economic determinants with which judicial review seems to struggle.

This paper has analyzed different comparative examples of subsidiarity, highlighting the several techniques deployed in judicial review, ranging from substantive scrutiny to a more procedural emphasis. I have applied these findings to the EU setting, offering essentially three suggestions: first, the use of an *ex ante* evaluation tool, such as the impact assessment, to improve deliberation on socio-economic data, second, procedural points to reinforce and scrutinize legislative discretion, and third, making use of the interaction between different enforcement mechanisms, such as the EWS. These lessons may equally apply to the relationship between subnational levels within a federal setting, and specifically to intensify judicial scrutiny for compliance with subsidiarity.

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[I] "Die richterliche Subsidiaritätskontrolle hat sich also auf das zu konzentrieren, was der Gemeinschaftsrichter in diesem Rahmen sinnvoller Weise überprüfen kann."

[II] This Early Warning System is set out in Protocol no. 2 to the Treaty of Lisbon, OJ C 306, December 17, 2007, 150.
[III] Referring to "the capacity of constitutions to embrace multiple rules of recognition without combining them into a single legal rule that enables a state to contain multiple legal systems", see Barber, 2013:182.
[IV] The paragraphs on art. 5(3) TEU and art. 72 II GG draw on Vandenbruwaene, 2013b.
[V] "unbegrundet starke Zurückhaltung" (untenable strong reluctance) according to Knorr, 1998: 85.
[VI] *Südweststaaturteil*, of October 23, 1951, 1 BverfGE 14, 35-36, invalidating a federal law concerning the extension of the legislative session in the Länder Baden and Württemberg-Hohenzollerns, on grounds of incongruence with the terms of art. 72 II GG, specifically sub 1, since the Länder were perfectly capable of taking care of the problem themselves.
[VII] *Schornsteinfegerurteil*, of April 30, 1952, 1 BverfGE 264.
[VIII] *Schornsteinfegerurteil*, of April 30, 1952, 1 BverfGE 264, para. 272.
[IX] See the report of the mixed parliamentary commission on constitutional reform of November 5, 1993, indicating the explicit intention of sharpening the criteria in art. 72 II GG in order to "enhance the justiciability of the need-requirement" Beschluß des Deutschen Bundestages 12/6000, 33.
[X] BVerfG, 2 BvF 1/01, judgment of October 24, 2002. For a discussion, see Rau, 2003; Taylor 2006; Jochum 2003; Brenner 2003.
[XI] See section C. II, sub 5 of the decision, para. 317.
[XII] para. 321.
[XIII] para. 324-328.
[XIV] para. 335 combined with para. 341, where the absence of limits in this scope of review is again confirmed.
[XV] para. 343 and para. 345.
[XVI] *Kampfhunde-Urteil*, BVerfG, 1 BvR 1778/01 of March 16, 2004 (the differing Länder penal legislation sanctioning the import and breading of various species of dangerous dogs, was kept in place, but the federal law purported to add additional criminal sanctions to these penalties, and hence, by definition, the federal law did not bring about legal unity and failed to comply with art. 72 II GG.
[XVII] *Ladenschluss-Urteil*, BVerfG, 1 BvR 636/02 of June 9, 2004 (the federal law holding minor adjustments to the opening hours of shops did not hold the required substantial effect on economic unity – see para. 102 of the judgment. However, the law was upheld on the transitional clause of Art. 125a para. 2 GG).
[XVIII] In the Junior Professors case, the Court distinguished between direct and indirect effects on the economy It noted that the *Wirtschaftseinheit* addressed in Art. 72 II GG was not directly influenced by the legislation in point. The plea from the federal government of required unitary standards in the context of international competition was found by the Court to do exactly the opposite: namely, to reinforce the need for diversification and internal competition for better regulations. Hence, the necessity was not established. It should be noted that contrary to previously mentioned cases, this decision was not unanimous, but was decided on a 5-3 majority.
[XIX] *Studiengebühren-Urteil*, BVerfG, 2 BvF 1/03 of January 26, 2005.
[XX] This intent is expressed in the proposal for constitutional reform: *Entwurf eines Gesetzes zur Änderung des Grundgesetz*es, March 7, 2006, Bundestag, Drucksache 16/813, 8-11.
[XXI] *Gentechnikgesetz-Urteil*, BVerfG, 1 BvF 2/05 of November 24, 2010, para. 123-131.
[XXII] ECJ, Case 415/93, *Bosman* [1995] ECR I-5040; ECJ, Case 84/94, *United Kingdom v Council* [1996] ECR I-5793; ECJ, C-233/94, *Germany v Parliament and Council* [1997] ECR I-2441; ECJ, Case 377/98, *Netherlands v Parliament and Council* [2001] ECR I-7149. These cases date from the late 1990s, and encompass a subsidiarity plea as accessorium. The arguments were essentially procedural, and the review was considered very shallow.
[XXIII] The current impact assessment guidelines [SEC(2009) 92 at 23] stipulate five questions to assess compliance with subsidiarity. They employ the substantive criteria that were developed in the Edinburgh Guidelines (resulting in the Amsterdam Protocol), and subsequently disappeared in the Lisbon version. This reallocation of the substantive criteria to the realm of soft law (IA guidelines), and away from binding primary law (Treaties and Protocol), coincides with the emphasis on political and procedural enforcement.
[XXIV] ECJ, C-58/08, Vodafone [2010] ECR I-4999.
[XXV] Opinion of AG Poiares Maduro of 1 October 2009 *in re Vodafone* [2010] ECR I-4999.
[XXVI] 'Transnational dimensions' was a criterion under article 5 of the Amsterdam Protocol, and now relegated to the IA guidelines, SEC(2009) 92 at 23.
[XXVII] Opinion, para. 27 *in fine*.
[XXVIII] Opinion, para. 31.

[XXIX] Opinion, para. 33 and 34 (my emphases).
[XXX] ECJ C-176/09, *Luxemburg v Parliament and Council* [2011] ECR I-3727 para. 73-83.
[XXXI] Further exploration in Vandenbruwaene, 2012.
[XXXII] The Working group I on subsidiarity addressed this twin objective of the early warning system through the national parliaments scrutiny for compliance with subsidiarity: 'the monitoring by the national parliaments in relation to their governments should be strengthened as regards the determination of the position of the latter on Community questions' (CONV 286/02 p. 3).
[XXXIII] COM(2012)130.
[XXXIV] *The Attorney General for Ontario v The Attorney General for the Dominion of Canada (Canada)* [1896] UKPC 20 (9 May 1896). Continuing: "But great caution must be observed in distinguishing between that which is local or provincial and that which has ceased to be merely local or provincial-, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada."
[XXXV] *The AG of Ontario and others v The Canada Temperance Federation (Ontario)* [1946] UKPC 2 at p. 3 (internal citations omitted).
[XXXVI] *Johannesson v. West St. Paul* [1952] 1 SCR 292.
[XXXVII] *Munro v. National Capital Commission* [1966] SCR 663.
[XXXVIII] *Reference Re: Offshore Mineral Rights* [1967] SCR 792.
[XXXIX] *Re: Anti-Inflation Act* [1976] 2 SCR 373 at p. 457 – 458. per Beetz J: "The "containment and reduction of inflation" does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory. I should add that inflation is a very ancient phenomenon, several thousands years old, as old probably as the history of currency. The Fathers of Confederation were quite aware of it."
[XL] *R. v. Crown Zellerbach Canada Ltd.* [1988] 1 SCR 401 at para. 33.
[XLI] *R. v. Crown Zellerbach Canada Ltd.* [1988] 1 SCR 401 at para. 34.
[XLII] *Schneider v The Quee*n [1982] 2 SCR 112 at p. 131. Similar use of the provincial inability test as sole determinant of national concern in cases *R v Wetmore* [1983] 2 SCR 284 (specifically at p. 296) and *Labatt Breweries of Canada Ltd.* v. *Attorney General of Canada* [1980] 1 SCR 914 (at p. 945).
[XLIII] Swinton, 1992: 126 and 133, adding: "The provincial incapacity here rests not only on problems of territoriality, although that is a consideration, but also on problems of limited vision, […] skeptical of the provinces' ability to adopt a national perspective that could transcend their own regional interests."
[XLIV] *Reference Re Secession of Quebec* [1998] 2 SCR 217 at para. 58.
[XLV] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town*) [2001] 2 SCR 241 at para. 3 and 4 (internal citations omitted).
[XLVI] *Reference re Assisted Human Reproduction Act* [2010] 3 SCR 457 at para. 70.
[XLVII] Constitutional Law no. 3 of 18 October 2011. For a background, see Amoretti 2002.
[XLVIII] *Corte Costituzionale*, Decision 303/2003, para 2.2.
[XLIX] Id.: (transl. in French) "[le principe de subsidiarité] Enoncé dans la loi du 15 mars 1997, n° 59 en tant que critère à la base de la répartition légale des fonctions administratives entre l'Etat et les autres entités territoriales, et étant donc déjà opérative dans sa dimension purement étatique comme fondement d'un ordre préréglé des compétences […]".
[L] Id. "Outre la dimension statique primitive qui est évidente dans l'attribution tendancielle de la généralité des fonctions administratives aux Communes, s'ajoute une vocation dynamique de la subsidiarité, l'autorisant à ne plus agir en tant que ratio directeur et à la base d'un ordre d'attribution établi et prédéterminé, mais comme facteur de flexibilité de cet ordre, en vue de satisfaire aux exigences unitaires."
[LI] Curiously, during the debates on the German federalism reform of 2006, it was proposed to install an early warning system as an ex ante political tool to avoid litigation on art. 72 GG: Selg 2009:106 and 175.
[LII] This section draws on Vandenbruwaene 2013a.
[LIII] European Commission, *18th Report on Better Lawmaking*, COM (2011) 344, 2.
[LIV] See also the discussion of the German *Altenpflegegesetzurteil*, supra.
[LV] See for an application of the Impact Assessment via procedural requirements and substantive review in the case of US administrative law: Revesz and Livermore 2008: 157-59. An exemplary case is *Owner-Operator Independent Drivers v FMCSA*, n. 06-1035 (D.C. Cir. 24 July 2007) 494 F.3d 188 (failure to explain the methodology of its studies renders two administrative decisions arbitrary and capricious).

[LVI] For example, in Afton Chemical, (C-343/09, ECR I-7027 para. 27-42) the ECJ investigated the manifest error of assessment, argued by the litigant, on the basis of the Commission's impact assessment. The Court notes the broad discretion granted to the legislator on functional grounds, i.e. the legislature is better equipped than the Court to assess "highly complex scientific and technical facts". Hence the reduction of judicial review to a marginal control, to bar manifest errors of assessment. Afton Chemical submitted that the IA did not support the Commission's conclusions. The Court noted its non-binding character toward other institutions, it observed moreover the "scientific basis" that the Commission is to take into account, the obligation to take new evidence or date into account, and reiterated its view on the judicial review of legislative discretion.

[LVII] And also in the *ex ante* Early Warning System, see Kiiver 2012: 96.

[LVIII] Especially in the hypothetical case should the Commission maintain its proposal after a yellow card issued by 1/3 of the National Parliaments.

[LIX] For instance, in case of controversy on the methodological rigour of an impact assessment, the ECJ may appoint assistant rapporteurs or external experts to review the drafting of the IA, possible under art. 24 of the Rules of Procedure of the Court of Justice.

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