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SPENDING POWER, SOCIAL POLICY, AND THE PRINCIPLE OF SUBSIDIARITY (Work in progress)

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Abstract

This essay describes and conceptualizes the spending power and the principle of subsidiarity. The author argues that theories relative to the spending power theory could be enhanced by an application of the principle of subsidiarity. The latter shares a number of attributes with federalism, and allows a conception of the spending power as a flexible tool of governance of the welfare state. This essay contributes to linking social and economic development with Canadian constitutional design, by advocating for the use of the principle of subsidiarity when analyzing governmental action in the context of social policy.

Résumé

Dans cet essai, l'auteure décrit et contextualise le pouvoir de dépenser et le principe de subsidiarité. Elle soutient que la théorie du pouvoir de dépenser pourrait être renforcée par un recours au principe de subsidiarité. Ce dernier partage certains attributs avec le fédéralisme. Il permet de concevoir le pouvoir de dépenser comme un outil flexible de gouvernance dans un État providence qui est également un État fédéral. En favorisant l'application du principe de subsidiarité dans le contexte des politiques sociales, cet essai contribue à la création d'un lien entre le développement social et économique, d'une part, et le design constitutionnel, d'autre part.

Introduction

The Canadian Constitution contains explicit texts but also abstract concepts, such as conventions and principles that were adopted and described with time and allowed a fluid adaptation of constitutional design to social changes. Since Confederation, spending power has slowly appeared as a concept in the Canadian jurisprudence and scholarly literature. It has been controversial, however, as it was barely given any limit and does not follow the divisions of legislative powers. One reason it has never been limited is because it is understood as allowing the federal government to ensure standard levels of economic and social development across Canada, which requires a central exercise of policy determination and spending. Thus, the federal government has been given broad powers, a reality that has been accused of frustrating the values protected by federalism. Political attempts to limit it have not led to desired results and many are still considering federal spending in areas of provincial jurisdiction unconstitutional.

Only recently, the Supreme Court of Canada (SCC) referred to the principle of subsidiarity, and the details of its application remain uncertain. It has been used internationally in other federations to guide the exercise of legislative powers in areas that are non-exclusive. Subsidiarity shares values with federalism and presents attributes that could make it a promising principle for Canadian constitutional law. This essay will consider the principle of subsidiarity as a possible means to promoting a constructive exercise of power spending and a way to compromise between unity and diversity. Part I of this essay will describe spending power; Part II will describe the principle of subsidiarity and its use in Canada; Part III will analyse subsidiarity in the context of the spending power.

I. Spending Power and Social Policy

1. Origin, Constitutional Interpretation, and Criticisms

In Canada, the federal government and the provinces have spending power that allows them to redistribute tax revenues. The concept evolved rapidly following the Second World War when Canada increasingly played a role of “state provider” through welfare initiatives and fiscal intervention.¹ The federal spending power has a much larger magnitude than the provincial spending power, as the federal government is the centralising unit of government and collects more taxes from the residents of Canada.

The exercise of federal spending power can take many forms, such as shared-cost programs with the provinces, unconditional grants (including equalisation payments), and conditional grants.² The federal government can spend from the Consolidated Revenue Fund directly on individuals, organisations, and provincial governments in areas where it does not hold legislative competence.³ Canada’s health care insurance program, for example, is implemented by the provinces but partly funded by the federal government through the *Canada Health Act*.⁴ To receive the cash contribution from the federal government towards health care insurance plans, the provinces must ensure their plans satisfy the following conditions: public administration, comprehensiveness, universality, portability, and accessibility.⁵

¹ Ronald L. Watts, *The Spending Power in Federal Systems : A Comparative Study*, (Kingston : Institute of Intergovernmental Relations Queen’s University, 1999) at 1 ; For an historical account see Nadia Verrelli “The “Cents” and Nonsense of the Federal Spending Power (2013) 7 J Parliamentary & Pol L 11 at 4.

² Johanne Poirier “Federalism, Social Policy and Competing Visions of the Canadian Social Union” (2002) 14 Nat’l J Const L 255 at 4-5.

³ P Hogg, *2013 Student Edition Constitutional Law of Canada* (Toronto: Carswell, 2013) at 6-18 ; Watts, *supra* note 1 at 1.

⁴ Canada Health Act, RSC 1985, c C-6.

⁵ *Ibid* s 7.

The concept of spending power does not appear in the Constitution's text. It is inferred in the provision that provides for the creation of the Consolidated Revenue Fund (s.102), in the power to levy taxes (s. 91(3)), in the power to legislate in relation to public debt and property (s. 91(1A)), and in the power to appropriate federal funds (s.106).⁶ It has also been associated with section 36 of the *Constitutional Act of 1982*.⁷ This section stipulates the commitment of both federal and provincial governments to promote equal opportunities as well as the commitment of the federal government to ensure, through equalisation payments, that the provinces have sufficient revenues to promote comparable levels of public services.

An exercise of spending power is not limited in the same way as a legislative exercise.⁸ The enactment of legislation and the redistribution of public property have been understood as different processes that do not have the same level of constraints on people and that do not stem from the same governmental role. Legislation is understood as creating more involuntary constraints than spending, and spending as creating more voluntary opportunities than legislation.⁹ In relation to the difference in the governmental role in each exercise, Peter Hogg asserted that "there is no compelling reason to confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects."¹⁰

⁶ *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 ; Hogg, *supra* note 3 at pages 6-18, 6-19 ; *YMHA Jewish Community Centre of Winnipeg Inc v Brown*, [1989] 1 SCR 1532 at 1548 [*YMHA*].

⁷ Being Schedule B to the Canada Act 1982 (UK), 1982, c 11; *Winterhaven Stables Ltd v Canada*, (1988) 53 DLR (4th) 413 (AB CA) at para 21; Marc-Antoine Adam, "The Spending Power, Co-operative Federalism and Section 94" (2008) 34 Queen's L J 175 at 4; Thomas J Courchene, "Reflections on the Federal Spending Power: Practices, Principles, Perspectives" (2008) 34 Queen's L J 75 at 15.

⁸ *YMHA*, *supra* note 6 at 1548; *Reference re Canada Assistance Plan (Canada)*, [1991] 2 SCR 525 at 565-567 [*CAP Reference*]; Watts, *supra* note 1 at 1.

⁹ Hogg, *supra* note 3 at page 6-18, 6-19.

¹⁰ *Ibid.*

An exercise of spending power is considered impermissible if it amounts to regulation of a matter within provincial jurisdiction.¹¹ In 1937, in the *Employment and Social Insurance Act Reference*, Lord Atkin found the Act invalid as it affected property and civil rights in the province.¹² By doing so, the Privy Council indicated the limit on spending power, which is still used today.

The SCC had very little chance to interpret the spending power as there has been rare claims before the courts that its exercise was ultra vires.¹³ Governments have found the risks of constitutional litigation of the issue too high compared to its benefits.¹⁴ In *YMHA*, Justice L'Heureux-Dubé, writing for the Court, analysed its limit the following way:

[W]hile Parliament may be free to offer grants subject to whatever restrictions it sees fit, the decision to make a grant of money in any particular area should not be construed as an intention to regulate all related aspects of that area. Thus, a decision to provide a job creation grant to an organization such as the YMHA should not be construed, without other evidence, as an intention to remove provincial labour law jurisdiction over the project.¹⁵

In *Reference Re Canada Assistance Plan*,¹⁶ the SCC considered a case in which the federal government had cut its contribution under the Canada Assistance Plan to richer provinces. The

¹¹ *Canada (Attorney General) v Ontario (Attorney General)*, [1937] AC 355; *YMHA*, *supra* note 6 at 1558-1549; *CAP Reference*, *supra* note 8 at 567.

¹² *Canada (Attorney General) v Ontario (Attorney General)*, [1937] AC 355;

¹³ Two provincial judgements are often cited: *Canada Mortgage and Housing Corp v Iness*, (2004) 70 OR (3d) 148, *Winterhaven Stables Ltd v Canada*, (1988) 53 DLR (4th) 413.

¹⁴ Sujit Choudry "Constitutional Change in the 21st Century: A New Debate over the Spending Power" (2008) Queen's L J 375 at 4.

¹⁵ *YMHA*, *supra* note 6 at 1548-1549.

¹⁶ *CAP Reference*, *supra* note 8 at 526.

plan was a shared-cost welfare and social-assistance program.¹⁷ The Attorney General of Manitoba had submitted that considering the direct influence Canada had on the population of the provinces through the funding of the program, the withholding of money was creating constraints that amounted to regulation.¹⁸ Justice Sopinka, delivering the judgement for the Court, refused this position:

The new legislation does not amount to regulation of an area outside federal jurisdiction. Bill C-69 was not an indirect, colourable attempt to regulate in provincial areas of jurisdiction. It is simply an austerity measure. Further, the simple withholding of federal money, which had previously been granted to fund a matter within provincial jurisdiction, does not amount to the regulation of that matter.¹⁹

Thus, it could be said that an exercise of spending that creates constraints akin to those created by a legislation would be ultra vires. For example, when strict and specific conditions are added to the provision of funds by the federal government to a province, an exercise of spending power could create important constraints. Professor J-F. Gaudreault-Desbiens gave the example, in relation to the *Canada Health Act*, of a “norm determining the maximum delay to be respected for treatment in an emergency room”.²⁰ He also added that a difference should be made between conditions that create standards, such as those of the *Canada Health Act*, that give a substantial margin of appreciation to the provinces and those that would leave no margin. Only the latter would be unconstitutional.

¹⁷ *CAP Reference*, supra note 8 at 526.

¹⁸ *Ibid* at 566.

¹⁹ *Ibid* at 567.

²⁰ Jean-François Gaudreault-Desbiens, “Irreducible Federal Necessity of Jurisdictional Autonomy” in Choudry et al, eds, *Dilemmas of solidarity* (Toronto: Toronto University Press, 2006) at 190.

Political attempts to limit the federal spending power have not led to the desired results. Meech Lake (1987) and the Charlottetown Accord (1992) failed to be adopted.²¹ The Social Union Framework Agreement (1999),²² which was signed by all provinces except Quebec, was questioned for its effectiveness.²³

Thus, the spending power per se has been understood by some as having no limits,²⁴ or at least as being extremely broad. In relation to federalism, the question of the constitutionality and legitimacy of spending power has been debated at length by Canadian scholars and policy makers,²⁵ the biggest opposition coming from Quebec. It was said that by spending on social programs, the federal government intervened in the provincial sphere of competence and had a direct effect on people, altering social standards when it was not competent to do so.²⁶ By using conditional grants, the federal government has been accused of creating constraints often close to those created by a legislation. Parliament was accused of doing indirectly what it cannot do directly.²⁷ Furthermore, repetitive federal spending in the areas of provincial jurisdiction has the

²¹ For a description of the propositions in the Accords see Nadia Verrelli, *supra* note 1 at 9-10; For an account of the critiques associated with the propositions see Alain Noël “How do you limit a power that does not exist” (2008) 34 *Queen’s LJ* 391 at 5.

²² Framework to Improve the Social Union for Canadians : An Agreement between the Government of Canada and the Government of the Provinces and Territories, 4 February 1999, online : <<http://www.scics.gc.ca/english/conferences.asp?a=viewdocument&id=638>>; For a factual analysis see Poirier, *supra* note 2 at 17-22.

²³ Adam, *supra* note 7 at 2 ; Choudry, *supra* 14 note at 4 ; Alain Noël, *supra* note 21 at 7.

²⁴ See e.g. Adam, *supra* note 7; Alain Noël, *supra* note 21.

²⁵ See e.g. Commission on Fiscal Imbalance, *Fiscal Imbalance : Problems and Issues*, Discussion Paper for Public Consultations, (Quebec : Bibliothèque Nationale du Quebec, 2001) ; Andrew Petter, “Federalism and the Myth of the Spending Power” (1989) 68 *Can Bar Rev* 448; Choudry et al, eds, *Dilemmas of solidarity* (Toronto: Toronto University Press, 2006); The multiple essays published following the 2008 Symposium “Open Federalism and the Spending Power” sponsored by Queen’s University.

²⁶ Courchene, *supra* note 7 at 2.

²⁷ Noël, *supra* note 21 at 2.

effect of centralising power. The spending power could thus be understood as leading to “de facto changes in the divisions of powers”²⁸ in favour of federal interests.

On the other hand, the fact that flexible spending power leads to centralisation and allows a “direct reach” to citizens can be viewed as essential to providing the level of social services that we have today. Canada acts as a generous state provider that maintains standards of social security across the country in key areas of development and addresses disparities across provinces. These initiatives necessitate allocation of funds, which the central government is more apt to collect and redistribute. Conditions attached to the spending exercises are a way to safeguard a certain level of social security and reduce disparities among provinces.²⁹

2. Spending Power, Development, and Human Rights

Social programs are important in the development of the State and of each and every individual that constitutes it. Canada as a welfare state has a responsibility in development, hence, in establishing opportunities for all residents of the territory under its authority that enable them to live better lives. It is a question of fostering human rights; in this case, mainly economic and social rights. Ultimately, it is a question of interpersonal equality and distribution of freedoms. Amartya Sen’s writings have defined human rights in the context of welfare economics. Human rights can be linked to the degree of freedom that a person possesses, which enables her or him to

²⁸ Library of Parliament, Karine Richer, *The Federal Spending Power*, (Ottawa: Library of Parliament, 2007) at 21, online : < <http://www.loppar.gc.ca/content/lop/researchpublications/prb0736-e.pdf> > citing Thomas J Courchene, “The Fiscal Arrangements: Focus on 1987” in Thomas J Courchene et al, eds, *Ottawa and the Provinces: The Distribution of Money and Power* (Toronto: Ontario Economic Council, 1985).

²⁹ Harvey Lazar, “The Spending Power and the Harper Government” (2008) 34 *Queen’s LJ* 125 at 1-2; Poirier, *supra* note 2 at 6 citing Robin Boadway, “Delivering the Social Union: Some Thoughts of the Federal Role” (1998) 19 *Policy Options* 37 at 38.

realise her or his capabilities.³⁰ In turn, capabilities are “the opportunities to achieve valuable combinations of human functionings—what a person can do or be.”³¹ Thus, if human rights and human development advance together, they reinforce each other,³² and Canada as a welfare state has taken the responsibility to foster both.

Section 36 of the *Constitutional Act of 1982*, which is sometimes used in the literature to justify the spending power, is reminiscent of this theory as it enacts the commitment of all levels of government to promote *equal opportunities, to reduce disparities in opportunities, provide essential public service of reasonable quality to all Canadians*³³ and it enacts the commitment of the federal government to ensure *comparable levels of public services at reasonably comparable levels of taxation*.³⁴ This vision of welfare economics, as established in section 36, allows for an expression of multicultural diversity in the way programs are implemented. In fact, in Canada there is no claim of uniformity of social programs.³⁵ Unity and centralisation are only necessary because maintaining standard levels of social security and human development is seen as an obligation on the part of the country.

Canadian identity has been shaped by the development of the welfare state. In Canada outside of Quebec, the national sense of belonging is normally one of belonging to Canada and not to the

³⁰ Kim Lane Scheppele, “Amartya Sen’s Vision for Human rights- And Why He Needs The Law” (2011) 105 *Am Soc’y Int’l L Proc* at 1 citing Amartya Sen, *The Idea of Justice* (Cambridge : Harvard University Press, 2009); See also generally Amartya Sen “Human rights and Capabilities” (2005) 6:2 *Journal of Human Development* 151.

³¹ Amartya Sen “Human rights and Capabilities” (2005) 6:2 *Journal of Human Development* 151 at 153.

³² United Nations Development Program, Human Development Report, *Human Rights and Development*, (New York : Oxford University Press, 2000) at 2, online : <<http://hdr.undp.org/en/content/human-development-report-2000>>; The Human Development Reports are based on Amartya Sen’s ‘Capabilities Approach’.

³³ Being Schedule B to the Canada Act 1982 (UK), 1982, c 11 s 36(1).

³⁴ *Ibid* s 36(2).

³⁵ Poirier, *supra* note 2 at 33.

province where one resides.³⁶ Hence, flexible spending power, which has a double role of developing the welfare state and building Canadian citizenship, can be perceived as “desirable.”³⁷ On the other hand, people of Quebec who identify with their province, want to have the freedom to envision their own welfare program where possible, define their own national priorities,³⁸ and preserve their national sense of identity. Flexible spending power can thus be seen as illegitimate and, in fact, can be seen as threatening. The debate very much revolves around the idea of identity and protecting it, and not on the importance of having a welfare state. Writing on the Social Union, Johanne Poirier has rightly pointed out that one of its challenges was to “distinguish the aim of promoting a pan-Canadian identity, through the symbolism of social programs, from the aim of promoting Canadian unity.”³⁹

In the Canadian federation, would identities and human rights be better nurtured if we had an unlimited federal spending power, or would they be better nurtured if we had a limit to it, preserving the agency of the provinces? In the light of this question, this essay will consider the principle of subsidiarity as a possible means to promoting a constructive exercise of power spending and a way to compromise between unity and diversity. The principle of subsidiarity will be described as well as its emergence in Canadian law, and then its application to the spending power will be analysed.

II. The Principle of Subsidiarity

1. Origin, Definition, and Relation to Federalism

³⁶ *Ibid* at 31.

³⁷ *Ibid*; For the full analysis read pages 30-36.

³⁸ Hamish Telford, “The Federal Spending Power in Canada: Nation-Building or Nation-Destroying?” (2003) 33 *Publius: The Journal of Federalism* 23 at 43.

³⁹ Poirier, *supra* note 2 at 30.

Subsidiarity is understood as regulating the exercise of authority in a political order between a central unit and various subunits.⁴⁰ It suggests that legislative action is better achieved at the level of government closest to the people who will benefit from the measure unless the central government would be more effective in achieving the objective of the proposed action.⁴¹ Subsidiarity also implies that the “burden of arguments lies with attempts to centralise authority.”⁴² It can be said that subsidiarity preserves democratic agency, preserves autonomy of lower levels of authority, reduces threats of dominance and increases efficiency.

Subsidiarity is understood as having many roots. Some trace it back to Greek philosophy,⁴³ but it is was more fully theorised in the seventeenth century by Johannes Althusius in *Politica methodice digesta*⁴⁴, and in the twentieth century by the Catholic Church in the 1931 Papal Encyclical *Quadragesimo Anno*,⁴⁵ a letter sent out to all priests to address certain aspects of the Catholic doctrine. The Church was reacting to its loss in power in Italy at the time, in the areas of health, education, and welfare and was calling for limited interventions of the State in areas of real need.⁴⁶ The Church understood that the State was overwhelmed by its tasks, and individuals threatened to be “destroyed and absorbed” by the State.⁴⁷ The Church called for a new associative structure in line with the principle of subsidiarity:

⁴⁰ Andreas Føllesdal, Victor M Muniz Fraticelli “The Principle of Subsidiarity as a Constitutional Principle in the EU and Canada” (2015) 10:2 *The Ethics Forum* 89 at 89.

⁴¹ Andreas Føllesdal “Survey Article: Subsidiarity” (1998) 6:2 *The Journal of Political Philosophy* at 190.

⁴² Andreas Føllesdal, “Subsidiarity and the Global Order” in Michelle Evans et al, eds, *Global Perspective on Subsidiarity* (New York: Springer, 2014) at 208.

⁴³ Eugenie Brouillet “Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora’s Box” (2011) 54 *SCLR* (2d) at 604 citing Philippe Brault, Guillaume Renaudineau & François Sicard, *Le principe de subsidiarité, Aperçu philosophique* (Paris: La documentation française, 2005) at 11-23.

⁴⁴ For a detailed background see Føllesdal, *supra* note 41 at 200.

⁴⁵ Pope Pius XI ; Føllesdal & Fraticelli, *supra* note 40 at 91 and 93.

⁴⁶ Federico Fabbrini, “The Principle of Subsidiarity” (2016) University of Copenhagen iCourts Working paper series no 66 (Forthcoming in Takis Tridimas & Robert Schutze, eds, *Oxford Principles of EU Law* (Oxford: Oxford University Press, 2016) at 11.

⁴⁷ Libreria Editrice Vaticana, *Quadragesimo Anno* (15 May 1931) at para 78-79, online:

The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, association requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of “subsidiary function”, the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.⁴⁸

This quote easily reminds the reader of the governance of a federative structure; however, in a federation there is no relationship of subordination between the levels of governments. The subsidiarity described above applies horizontally and not vertically like it would apply in a federation.⁴⁹ The private sector, which the Church belongs to, is one of the “subordinate group” to consider.⁵⁰

In any case, subsidiarity is a similar principle to federalism and can help justify its pertinence. Federalism can be defined as a constitutionally defined structure of governance in which power is shared between a central government and the lower levels of governments. The division of specific powers is entrenched in the Constitution.⁵¹ Both subsidiarity and federalism imply that

< http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadregesimo-anno.html >.

⁴⁸ *Ibid.*

⁴⁹ Fabbrini, *supra* note 46 at 11.

⁵⁰ Føllesdal, *supra* note 41 at 209.

⁵¹ Daniel Weinstock “Liberty and overlapping Federalism” in Sujit Choudry et al, eds, *Dilemmas of solidarity* (Toronto: Toronto University Press, 2006) at 168 citing William Riker, “Federalism” in Robert E Goodin and Philip Petit, eds., *A Companion to Contemporary Political Philosophy* (Oxford: Basil Blackwell, 1993), at 508-509.

power is organised under levels of authority. Under this kind of multilevel governance there will be tension between centralisation and decentralisation of power and between the values of unity and diversity in policy across the State. Subsidiarity is a broader principle, however. If federalism were not to give a clear answer to the question of which level of government should legislate, subsidiarity would be helpful.

Subsidiarity has been associated with constitutional provisions in other federations. For example, it has been interpreted in the content of article 72(2) of the German Constitution of 1949 to regulate the action of the central government in situations of concurrent powers.⁵² More importantly, subsidiarity was included in the Maastricht Treaty as a governing principle of the European Union (EU).⁵³ It was meant as a political compromise for all EU Members to be able to accept the Treaty, as it could diminish the risk of over-centralisation.⁵⁴ By adopting the principle, the EU intended to ensure a degree of autonomy of the lower bodies in relation to the central authority within the federation.⁵⁵

⁵² Føllesdal, *supra* note 41 at 209 ; Fabbrini, *supra* note 46 at 12 : The Bund was entitled to legislate if federal regulation was needed: 1) because a matter could not be settled effectively by the legislation of the various Länder; 2) because the regulation of a matter by the law of a Land could affect the interests of other or all Länder; 3) to safeguard the legal or economic unity, and in particular, to safeguard the homogeneity of the living conditions beyond the territory of a Land. The text of Article 72(2) of the German Basic Law was amended in 1994 by the Gesetz zur Änderung des Grundgesetzes, BGBl. I 3146. It now reads that the Bund shall have the powers to legislate in areas of concurrent competences “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”.

⁵³ *Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325 5; The principle of subsidiarity was formally enshrined by the Maastricht Treaty in 1992. It included a reference to it in the Treaty establishing the European Community (TEC). The Lisbon Treaty of 2007, repealed the reference in TEC and incorporated it in article 5(3) TEU (see fact sheet http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf).

⁵⁴ Mark Pollack, “The End of Creeping Competence? EU Policy-Making Since Maastricht” (2002) 38 JCMS 519 at 525.

⁵⁵ Fabbrini, *supra* note 46 at 6 note 19 citing Mattias Kumm, “Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union” (2006) 12 ELJ 503.

In the EU, subsidiarity is understood as being the principle that regulates the exercise of the Union's powers in areas of shared competencies. It is applied as follows in s. 5(3) of the *Treaty on European Union*:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at a 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.⁵⁶

Furthermore, in the EU, compliance with the principles of subsidiarity is reviewed at multiple levels.⁵⁷ For example, draft legislative acts have to state how they comply,⁵⁸ national parliaments can flag inconsistencies with the principle according to a specific procedure,⁵⁹ and the EU Court of Justice can review their compliance.⁶⁰ Authors are generally finding the principle of subsidiarity helpful as a general legislative principle, but the judicial review by the EU Court of Justice has proven challenging.⁶¹ The principle is political in nature and policy decision-making is understood as being discretionary.⁶² In fact, the European Court of Justice has never held that a

⁵⁶ *Consolidated version of the Treaty on European Union*, 13 December 2007, Official Journal of the European Union C 115 01. The action of the Union pursuant to the principle are limited by the principle of proportionality: “[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.” *Treaty on European Union (TEU)*, s 5(4). Both the principle of subsidiarity are analysed in tandem. The *Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality*, 16 December 2004, Official Journal of the European Union C 310/207 regulates their application.

⁵⁷ For a description of the procedures see Patricia Popelier, “The subsidiarity mechanism as a tool for inter-level dialogue in Belgium: on “regional blindness” and co-operative flaws” (2011) 7:2 ECL Review 204.

⁵⁸ *Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality*, 16 December 2004, Official Journal of the European Union C 310/207 s 5.

⁵⁹ *Ibid* s 6, *Protocol on the Role of National Parliaments*, 16 December 2004, C 310 204 s 3.

⁶⁰ *Ibid* s 8.

⁶¹ Fabbri, *supra* note 46 at 14, Gabriél A. Moens and John Trone “The Principle Of Subsidiarity In EU Judicial And Legislative Practice: Panacea Or Placebo?” (2015) 41 :1 Journal of Legislation 65 at 72 ; Popelier, *supra* note 57 at 4.

⁶² Popelier, *supra* note 57 at 4; It can be said that the courts are not well equipped to challenge that discretion

legislative act was invalid on the basis of subsidiarity and gives a lot of deference to the opinion of the legislative authorities in its judgments.⁶³ It shows a flagrant uneasiness to review a political process of decision making at the EU level.⁶⁴

Competing views on the nature of the principle of subsidiarity have arisen. Some scholars perceived the principle as being restrictive, carrying a negative bias⁶⁵ towards the Member states⁶⁶ and giving an answer to the question of *whether* the Union is entitled to act.⁶⁷ In this case the central government's actions would be the exception to the norm. Another perception of the principle viewed it as a neutral, Janus-faced with both a positive and negative aspect⁶⁸. Subsidiarity would guide the allocation of power, depending on capacities of the different levels of government to deal with specific problems at one time. It would respond to the question of *how* the Union is entitled to act.⁶⁹ What has not been contested is the fact that definitions of the principle in the treaties are ambiguous.⁷⁰

2. The Principle of Subsidiarity in Canadian Law

The principle of subsidiarity is not formally entrenched in Canadian law. According to Peter Hogg, the broad interpretation given by the Privy Council and the SCC to the provincial power to

because they can not incur the information cost necessary to assess the socio-economic rationality of a proposed law, Aurelien Portuese "The principle of subsidiarity as a principle of economic efficiency" (2011) 17 *Columbia Journal of European Law* at 257 and Brouillet, *supra* note 43 at 611 citing R. Dehousse "Réflexions sur la naissance et l'évolution du principe de subsidiarité" in Francis Delpérée, eds, *Le principe de subsidiarité* (Bruxelles: Bruylant, 2002) at 495.

⁶³ Moens and Trone, *supra* note 60 at 72 and 77.

⁶⁴ Fabbrini, *supra* note 46 at 15.

⁶⁵ According to Føllesdal, there is both a positive and a negative aspect to the principle that respectively requires and proscribes central action when it would be comparatively more or less efficient: Føllesdal, *supra* note 41 at 195.

⁶⁶ Fabbrini, *supra* note 46 at 7.

⁶⁷ Robert Schütze, *From Dual to Cooperative Federalism : the Changing Structure of European Law* (Oxford : Oxford University Press, 2009) at 263-264.

⁶⁸ Fabbrini, *supra* note 46 at 7.

⁶⁹ Schütze, *supra* note 67 at 263-264.

⁷⁰ Fabbrini *supra* note 46 at 7.

legislate over property and civil rights is a manifestation of their acceptance of the principle of subsidiarity.⁷¹ The SCC has recently referred to the principle in three major decisions in a way that suggests new possibilities for the principle.

In *Spraytech* the Court had to decide if the Town of Hudson was authorised by statute to pass a by-law regulating and restricting pesticide use.⁷² The impugned provision was found valid pursuant to a *Cities and Town Acts* disposition that allows municipalities to enact provisions related to health and general welfare.⁷³ It was also found not to interfere with a related federal legislation, even though it exceeded federal norms. This made the units of governments' interventions complementary and not conflicting. To introduce her judgement, Justice L'Heureux-Dubé referred to the principle of subsidiarity:

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*, [1997] 3 S.C.R. 213, at para. 127, 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”. [...] The so-called “Brundtland Commission” recommended that

⁷¹ *Reference re Assisted Human Reproduction Act* 2010 SCC 61 at page 537 [*AHRA Reference*] citing Peter Hogg, *Constitutional Law of Canada* (5th ed. Supp.) at page 5-13.

⁷² *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, [2001] SCC 40 at page 258 [*Spraytech*].

⁷³ *Ibid* at 261 and 274.

“local governments [should be] empowered to exceed, but not to lower, national norms”(p.220) (emphasis added).⁷⁴

In *Canadian Western Bank*, the SCC reviewed the pertinence of the doctrine of interjurisdictional immunity.⁷⁵ This doctrine articulates that legislation enacted by a level of government cannot have incidental effects on the core of a jurisdiction assigned to the other level of government, even in the absence of law on the subject by the other level of government.⁷⁶ The Court argued at length for a limited use of the doctrine. It found that if used broadly, the doctrine would lead to centralisation and would not be compatible with “flexibility and co-ordination required by contemporary Canadian federalism.” At that point it cited the principle put forward in *Spraytech*: “The asymmetrical effect of interjurisdictional immunity can also be seen as undermining the principles of subsidiarity, i.e. that decisions “are often best [made] at a level of government that is not only effective, but also closest to the citizens affected”.⁷⁷

Both in *Spraytech* and in *Canadian Western Bank*, the principle of subsidiarity is used to push the analysis towards an interpretation of federalism that would empower all levels of government to act in solidarity towards common goals. Subsidiarity is used as a broad principle, broader than federalism but that can help interpret it in a constructive way. While cooperative federalism also encourages solidarity, and is a similar principle to subsidiarity, subsidiarity adds the idea of deference for the unit of government most able to respond to the residents’ needs. It gives direction to the cooperation encouraged by cooperative federalism.

⁷⁴ *Ibid* at 249.

⁷⁵ *Canadian Western Bank v Alberta*, [2007] SCC 22 at 33.

⁷⁶ *Ibid* at para 44.

⁷⁷ *Ibid* at para 45.

In the *Reference re Assisted Human Reproduction Act*, the Province of Quebec was challenging the validity of certain provisions of the Act related to medical practice and research related to human reproduction.⁷⁸ The question was whether the impugned provisions were part of a statutory scheme validly enacted under the federal power over criminal law. Justices Lebel and Deschamps, writing for the minority (Justices Abella and Rothstein concurring), placed a lot of importance on the principle of subsidiarity, even more so than Justice L'Heureux-Dubé had done in *Spraytech*. They even introduced the reader to it by tracking its history, however short, in Canadian law.⁷⁹ The justices expressed the view that the impugned provisions were outside federal jurisdiction and related instead to the provinces' jurisdictions over hospitals, property, and civil rights and matters of a merely local or private nature.⁸⁰ Subsidiarity could potentially be invoked if a doubt remained and, in this case, it would favour the provinces since they were closest to the matter of health. Their long introduction of the emergence of the principle in Canadian law, as well as the proposition that "[i]f any doubt remained, this is where the principle of subsidiarity could apply,"⁸¹ suggests a new application of the principle.

Justice McLachlin, writing for the majority (Justices Binnie, Fish and Charron concurring),⁸² argued that the impugned provisions were valid under the federal criminal law. On subsidiarity, she replied that in *Spraytech*, the principle was invoked to explain a valid legislative exercise by the municipality that was complementary to that of the federal; it did not infer a preference for

⁷⁸ *AHRA Reference*, *supra* note 71 at para 21.

⁷⁹ *Ibid* at para 183.

⁸⁰ *Ibid* at para 158.

⁸¹ *Ibid* at para 273.

⁸² Justice Cromwell wrote a separate concurring judgment.

the lower level of government that would suggest the federal government should not interfere.⁸³ More importantly, the principle itself could not be used to stop Parliament from legislating on the shared subject of health.⁸⁴

In this author's understanding, Justice McLachlin first addressed the issue that the minority had treated subsidiarity as having a more powerful bias than intended by Justice L'Heureux-Dubé in *Spraytech*. This recalls the discourse in the EU where subsidiarity can be seen as restrictive, indicating whether the central government could act in a particular situation. The majority supported subsidiarity as a neutral principle and argued against giving it a negative bias that could mean the preference for provincial exercise in the area of health care, "free from interference of the criminal law."⁸⁵ Second, Justice McLachlin for the majority rejected the proposition that subsidiarity could be added to the analysis of the divisions of powers (if doubts remained). Where Justice L'Heureux-Dubé had referred to subsidiarity in "matters of governance," Justices Lebel and Deschamps referred to it in the "operation of Canadian federalism." They suggested it could be employed to decide which level of government would be better suited to address the subject at hand, which is something that had not been done before. Justices Lebel and Deschamps even supported their argument for an application of the principle by interpreting a passage of the *Secession Reference* and the intention of the Court at the time:

In Reference re Secession of Quebec, the Court expressed the opinion that "[t]he federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity" (para. 58). In

⁸³ *AHRA Reference*, *supra* note 70 at paras 69,70.

⁸⁴ *Ibid* at para 72.

⁸⁵ *Ibid* at para 69

taking this position, the Court recognized the possibility inherent in a federal system of applying the principle of subsidiarity, thereby enhancing its democratic dimension and democratic value added.⁸⁶

Interestingly, Justice Deschamps had written a solo dissent in *Lacombe*⁸⁷ only two months earlier. Justice Deschamps stipulated that the principle of subsidiarity was a component of Canadian federalism.⁸⁸ She also used the principle of subsidiarity to support an application of the doctrine of interjurisdictional immunity and paramountcy that could advantage provincial legislation as much as federal legislation in a dispute over the divisions of power. Neither the majority judgment by Justice McLachlin nor the concurring judgment by Justice Lebel in *Lacombe* referred to the principle, however. While this dissent is not as novel as the minority opinion in *Reference re Assisted Human Reproduction Act*, it seems to pave the way to what Justices Deschamps and Lebel prepared in the *Reference*. It points to the principle as one that can make sense of the choice one level of government has over another and that both levels of government's potential to enact law should be protected.

The question that remains following the *Reference re Assisted Human Reproduction Act* would be of the precise application of the principle. The interpretation of Justices L'Heureux-Dubé and McLachlin prevails, but Justices Lebel and Deschamps's new proposition (with Justices Abella and Rothstein concurring) suggests that the application of this principle could be defined more precisely in the future. Justices Lebel and Deschamps, however, omitted to expand on the reasons for their new proposition. They did not point to the difference in breadth of the principles of

⁸⁶ *AHRA Reference*, *supra* note 70 at para 183.

⁸⁷ *Quebec (AG) v Lacombe*, [2010] SCC 38.

⁸⁸ *AHRA Reference*, *supra* note 70 at para 109.

subsidiarity and of federalism and why the principle of subsidiarity should be applied the way they suggested within the Canadian federalism doctrine.

As this author understands it, their use of the principle is in line with its contemporary definition. Subsidiarity being a broader and simpler principle than federalism, it is only if the federative principle does not give a clear answer to the question of which level of government should legislate that subsidiarity would be helpful. Justice McLachlin's argument did not shed doubt on the definition that could be given to subsidiarity but limited its use to a simple justification of existing dynamics.

In the next section, we will go back to spending power. Given that the theory of spending power lacks maturity and is being contested, it is suggested that such a principle would help frame it in a constructive way for Canadian society.

III. Applying the Principle of Subsidiarity to Spending Power

The entrance of the principle of subsidiarity into Canadian law has been solidified by *Spraytech* and *Canada Western Bank*. It is now possible to foresee that the principle will be given greater attention in Canadian case law. The following is a creative attempt to think of it as a guiding principle for Parliament in justifying an exercise of spending power. For the purpose of this essay the analysis we will not go into practical details.

One of the reasons spending power has never really been limited is because of the nature of the rights it creates. Social policy generates widespread opportunities that enable citizens to live

better lives, as well as to build a better society. It fosters interpersonal equality and the realisation of individual freedom. Accomplishing this requires the development of countrywide social standards, which in turn leads to centralisation, as it is a matter of scale and the federal will to lead the action. According to this argument, spending power's legal justification would include section 36 of the *Constitutional Act of 1982*, as it anchors these ideas in Canadian law.

The huge potential of centralising actions under a barely limited spending power has been perceived by some, mainly in Quebec, as breaching the federative agreement. Subsidiarity would give some importance to the provinces and the municipalities as the levels of government closest to the people. It would not only be a matter of efficiency, which can sometimes lead to oversimplification and unintentional disregard to diverse potentials.

Identities are to be preserved and opportunities to be developed, which requires that we look at what we collectively had in the past and what is needed in the future. However, the evolution of identities has to be accepted as governance looks to the future and leads to inevitable changes, hopefully for the common good. If subsidiarity would be affirmed in the spending power context, or in any context, it would have to be accepted because of social change. Federalism was chosen as a structure of governance in Canada with a view towards future developments and this should inform how we make and accept gradual changes to constitutional design. The reality that informed the divisions of power at the time is not the same reality that exists today. The definition and notion that we attach to Canadian federalism must allow for a fluid evolution, considering the demographic changes the country has seen, as well as changes in social and economic priorities. Subsidiarity is well suited to Canadian federalism and would not disturb its definition, while questioning centralisation, for some of the same reasons federalism was

established in the first place. In the context of the spending power, it would challenge the discourse of unity with the important task of considering diversity. Amartya Sen himself has asserted that “sometimes human diversities are left out of account not on the misconceived ‘high’ ground of equality of human beings, but on the pragmatic ‘low’ ground of the need for simplification. But the net result of this can also be to ignore centrally important features of demands of equality.”⁸⁹

For this purpose, subsidiarity should not be conceived as a justiciable principle, as it is too broad to have a high normative value, and the experience of the EU speaks of the difficulty of reviewing it judicially. It would serve as a guiding principle for the federal government. Parliament could still bind itself by agreement on some aspects of fiscal federalism.⁹⁰ The SCC treats it as a guiding principle in *Spraytech* and *Canada Western Bank* and refuses the proposition made in the *Reference re Assisted Human Reproduction Act* to see it as having a higher normative value. Also, in line with this proposition, the exercise of spending power would still have the same limit, which is that it should not amount to legislation. Spending power is otherwise not reviewed by the courts, unless it leads to the violation of one of the rights protected by the Charter.⁹¹

Further, it is suggested that subsidiarity should not imply any inability but a comparative advantage, thus the principle should not be conceived as being restrictive. Subsidiarity empowers all levels of government to act in solidarity towards common goals. Once a level of government

⁸⁹ Amartya Sen, *Inequalities Reexamined* (Cambridge: Harvard University Press, 1995) at 1.

⁹⁰ It could potentially be conceivable to have political safeguards and reinforcements such as in the EU, but more research would be needed on the feasibility of establishing such mechanisms in the Canadian context.

⁹¹ *CAP Reference*, *supra* note 8 at 567.

has decided to tackle an issue, it would guide how power should be distributed to effectively achieve the desired objective. It would mainly act as a guard against undue centralisation.

Subsidiarity promotes efficiency, which can advantage any level of government depending on the scale and externalities of the proposed action.⁹² By matter of efficiency, it could be inferred that projects of a larger scale generating potential externalities would be better accomplished through action at the central level or through a complementary action of all levels of government but not through the action of a small unit of government alone. However, in such cases, subsidiarity would help focus the exercise of spending and its implementation in a way that respects the potential of all levels of government in developing the proposed measure. The threat of dominance by the federal government and the idea that it would bypass the provinces and directly impact residents would thus be reduced. The federal government would have to wonder if the provinces could better achieve the objective of the proposed program. Perhaps the provinces would be more empowered to spend in any area. It can also promote the idea that the multiplication of exercise of authority can lead to innovative ways to conceive projects that can lead to better policy, which is desirable.⁹³ Importantly, the principle of subsidiarity promotes the needs and the ideas of people, which we value in the exercise of democracy.

If subsidiarity could not stop Parliament from spending, it at least would trigger the dialogue with the provinces on how the program should be implemented and under which conditions it should function. Diversity appears in the way programs are implemented. Subsidiarity promotes diplomacy between levels of government, which is an intrinsic process of the federated structures

⁹² Andreas Føllesdal, *supra* note 41 at 206.

⁹³ Weinstock, *supra* note 51 at 170 and 173.

of governance. Daniel Weinstock wisely pointed out that federations “incorporate multitude of occasions for deliberation, discussion, and negotiation, so that the interdependence that holds in a federation can aspire to being reflective and deliberative, rather than the result of causality of force and power differentials.”⁹⁴

Conclusion

Spending power is a complex and controversial element of Canadian federalism. It has hit the main federalist tension of unity versus diversity at its core. The divisions of power have served as constitutional protection in Quebec for much longer than the Charter of Rights and Freedoms, and spending power challenges that protection.⁹⁵ The debates that spending power theory has led to have very much been informed by differing notions of Canadian identities and how we should let them evolve. However, it is inherently a question of human dignity, interpersonal equality, and freedom. In the Canadian federation, would identities and human rights be better nurtured if we had an unlimited federal spending power, or would they be better nurtured if we had a limit to it, preserving the agency of the provinces? Since the spending power has barely been limited up to now, the principle of subsidiarity that has recently been referred to by the SCC and that is of increasing interest around the world, might offer some clues on how to regard it.

⁹⁴ *Ibid* at 173.

⁹⁵ Adam, *supra* note 7 at 4, citing Hamish Telford, *Survivance Versus Ambivalence: The Federal Dilemma in Canada* (Kingston: School of Public Policy Studies, 2005) Special Series on Asymmetric Federalism, online: <<http://www.queensu.ca/iigr/working/archive/Asymmetric/papers/13.pdf>>.