Principles of Subsidiarity and Proportionality at European Union Level, as Expression of National Interests

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Abstract: Objectives: For the European Union, the principle of subsidiarity is associated with the principle of proportionality, credited with maintaining the balance between the interests of Member States and those of European Union. This study aims to analyze the principle of subsidiarity and the failures of EU and analyze the conditions which bring under regulation the implementation of this principle. The essay also examines interdisciplinary the impact of the implementation of the principles of subsidiarity and proportionality towards the powers exercised within the Union. **Prior work**: I've tried to find and debate hermeneutical new regulations and doctrinal opinions in this domain very important for those who practice international public law. **Results**: In European Union and Member States, the enforcement of principles of law is viewed with great interest, being considered sources of law. **Value**: We think this article represents an important step in the disclosure of the problem raised by appliance of subsidiarity and proportionality principles on european and national level.

Keywords: subsidiarity; proportionality; sovereignty; European construction

1. Introduction

The independence and sovereignty of Member States are a concernment within the relations established between the afore-mentioned and the European Union. The principle of subsidiarity had not been initiated since the beginnings of European construction, but was regulated much later, considering it the key to many problems which the European Communities faced. Thus, we can say that subsidiarity is a mechanism which aims to severely restrict the European powers in order to protect the sovereignty of countries.

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The idea of subsidiarity was extensively underlined by the social doctrine of the Church and afterwards by the German constitutional law. The subsidiarity embodies a support which was granted by the higher communities to the nether ones, without replacing these in terms of powers and duties (Duculescu: 2004, p. 47).

2. Teoretical Approach of Sovereignty

The principle of subsidiarity features a pattern of contiguity political structure which combines the large requirement of sovereignty with the respect towards autonomy, being the one to take on the diversities of European Union and the simultaneous aims to enlarge and deepen the European integration process and to preserve the sovereignty of Members States, whereas the idea of subsidiarity is built on acceptance of a pluralistic society (Velișcu:2004, p. 174). The subsidiarity provides an array for the division of powers between different levels of authority.

The principle of subsidiarity is automatically linked to the exercise of power at different levels of decision making. In fact, the European institutions bring into existence a supranational power in order to cope with problems that states cannot solve alone.

Pausing the analysis of the principle of subsidiarity, Jean Louis Clergerie states: "subsidiarity is the origin of many debates antagonizing those for whom it allows to take decisions closest to the citizens of which it, on the contrary, allows further tightening Eurocrats' powers in Brussels. It is true that it is rather a philosophical concept, not legal, which remains difficult to assess both in terms of content and its consequences" (Clergerie:1997, p.5).

Analyzing the content and role of subsidiarity within European regulations, we believe that we are facing a inferentially apprehended subsidiarity in the content of Treaties establishing the European Communities and practice of the Court of Justice in Luxembourg, and we can discuss on the explicitly subsidiarity within the european regulations encated after the Maastricht Treaty.

3. The Aplicability of the Principle of Subsdiarity and Principle of Proportionality within the Activity of European Union

The principle of subsidiarity was officially introduced into European Law by the Maastricht Treaty, wherein the preamble approves: "The decision to continue the process of creating an endless Union and much more congregate among the people of Europe, in which decisions may be as much as possible taken by citizens, according to the principle of subsidiarity"[1].

Art. 3-B of the Maastricht Treaty provides the following: "The Community shall act within the limits of the powers conferred by the Treaty and of the objectives that have been set".

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity only if and as far as the objectives of the suggested action cannot be satisfactorily met by the Member States and can therefore, by reason of the scale or effects of the considered action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".

The enunciation of the second paragraph of this article reflects a difficult compromise between the positions of Germany and Great Britain. Germans suggested to define subsidiarity in terms of effectiveness, so that the community would take action that could be better accomplished or achieved at supranational level. On the other hand, the British insisted that the Community's actions should be undertaken only when necessary or essential to achieve that objective. Effectiveness and necessity are different motivations and, on principle, one does not involve the other. Some actions may be necessary in order to meet certain objectives of the Treaty (inclusively some political objectives) however without being effective (if efficiency is estimated in terms of a precise economic criteria). Also, some actions can be effective without being strictly necessary. The final enunciation of the text includes both elements and seems to suggest that, if an

[1] In his speech in Maastricht on 7 February 1992, at the signing of the Treaty of the European Union, Jacques Delors, the President of the European Commission, said: "Subsidiarity is not a limiting intervention to a higher authority towards a person or a community able to act itself, it is also an obligation on the authority to act towards a given person or community so as to provide the means to achieve that objective"

action objectives cannot be achieved by Member States, the Community's intervention is expected to be more efficient[1].

The introduction of the principle of proportionality in the text of this article is intended to limit Community action since it is limited to not go beyond what is necessary in order to achieve the objectives of the Treaty. Recently, some Member States have made use of this principle to limit the Commission's involvement in the concrete implementation of its policies. As France, Germany and Great Britain who dispute the Commission's role in setting priorities and monitoring dysfunctions in the implementation of regional policy within regions of industrial decline[2].

Whilst within the framework of national law the implementation of the principle of proportionality is present on matters such as expropriation, self-defense, excess power and so on, in European law it embraces various functions related to the bounds European powers and the means by which they are achieved.

In European law, the principle of proportionality is to identify the substance and meaning of the fundamental freedoms appointed by the constitutive treaties, being complementary to principles of justice and equity. The principle of proportionality is of great importance in the protection of the individual, given its role as "guarantor of substance" relating the fundamental rights protected (Alexandru:2005, p. 221).

The European Court of Justice, when assessing the legalism of a measure in the light of the principle of proportionality, is less reclined to make distinctions according to the manner and form of action undertaken by the referred authority (Schwartze:1992, p. 862).

The enunciation of the principle of subsidiarity is not explicit in terms of defining of exclusive competence. If a strict legal interpretation is followed, these powers

[1] The Commission reversed this logic, suggesting that if an action is more effective at Community's level, the objectives of the given action would be better achieved, so that action is needed at Community level (see Commission comment AE 1804/5). The Commission also expressed the view that the principle of subsidiarity does not affect the mechanisms by which powers are allocated to the Community. In other words, according to the Commission, the principle does not conflict with use or teleological interpretation of Article 235 of the Treaty. The Commission takes the view that the principle simply regulates, how distributed powers are exercised.

[2] Edinburgh European Council (11-12 December 1992) estimated at the request of the states that do not want to give the sovereignty, that the proportionality principle regards the exclusive and the competitive powers.

will be limited to commercial policy and the protection of the sea. Commission fostered, however, a broader interpretation (in AE 1804/5) according to which the exclusive powers are corresponding to the four freedoms (free movement of goods, capital, services and people) involved. Therefore, the Commission suggested that the barriers removal for movement of goods, capital, services and persons (Article 8), as policies which are upshot of the four freedoms, including trade policy, competition policy, organization of agricultural markets, protection of sea and transport policy belong to the exclusive competence and hence not subject to the principle of subsidiarity. However, they are nevertheless accepted as subject of the principle of proportionality.

The creators of the Maastricht Treaty did not explicitly established the principle as a tool for the allotment and exercise of powers, without having a list of specific areas where Community action might be necessary and effective. Consequently, the principle of subsidiarity at the Community level remains rather a general political principle than a source of explicit guidance.

There are four conditions regulating the implementation of this principle: 1) that there be no exclusive Community competence; 2) that there be parallel or competitive competences, 3) that the objective cannot be achieved by Member States in a satisfactory manner and 4) that the objective, due to scale or effects designed, can be better accomplished at Community level.

The importance of the subsidiarity principle is reasserted by means of a resolution by the European Parliament on 18 November 1992 and was afterwards taken over in the form of a declaration by the European Council in Edinburgh in December of the same year. Edinburgh Declaration emphasizes the obligation to minimize financial and administrative tasks for the Member States relating them proportionate to the objective accomplished: "Subsidiarity is a dynamic concept which allows the extension of the Community action when circumstances require so, and reversely, which rejects when it is not justified ". This means that the decision will be made at a level which ensures maximum efficiency of the set objective.

The Council, the Commission and the European Parliament enacted an Interinstitutional Agreement on 25 October 1993 through which conditions for the implementation of the principle of subsidiarity were defined. In accordance with the provisions of the Agreement, the principle of subsidiarity cannot instate here

the "acquis communautaire", nor the provisions regarding the powers of the institutions or even the institutional balance. The three EU institutions have engaged themselves in monitoring the observance of the principle, an annual report in this regard being framed by the Commission.

An additional proof of the value ascribed to the principle of subsidiarity in the Maastricht Treaty is given also by the importance attached to regions. The Heads of State or Government have established the creation of a Committee of the Regions, with advisory competences, consisting of representatives of regional and local community.

The second phase of the subsidiarity principle recognition process is the Treaty of Amsterdam, in which the provisions of the Treaty of Maastricht on this matter are not modified, however includes an annexed Protocol[1] on implementing principles of subsidiarity and proportionality. According to this protocol, the principle of subsidiarity does not put forward the issue of competences brought to the Community, still it includes only some instructions on how to exercise the powers in terms of the objectives set out in the Treaty, establishes the obligations of the European institutions for compliance and enforcement of subsidiarity, all these aiming at approaching the decision-making process to citizens and to help identifying the best level of administrative and legislative action that takes place within the Union.

> Nevertheless, behind the apparent consensus of the Member States upon subsidiarity - as a remedy to the problems occurring in Europe - there are concrete difficulties, both in theory and in practice. It can be seen that some states were reluctant to reopen the debate during negotiations in Amsterdam. The truth is that the principle of subsidiarity is not simple outline nor easy to implement, often its approach being ambiguous.

On a theoretical level, the main difficulty arise from the positive or negative interpretation that may be given. Some authors consider the principle as a restricting the Union's action only to what is necessary: a duty of non-intervention. Others considered mandatory for the Union to act when Member States fail: a duty to intervene.

[1] The Irish Presidency proposed that Edinburgh Declaration of 1992 and the Interinstitutional Agreement of 1993 to be part of the Treaty, leading to the development of the annexed Protocol.

Also, another element which acts as a difficulty in interpreting this principle is time. The concept of what can be better achieved at Community level or which is insufficient at national level will vary over time.

Regarding the Treaty of Nice, it does not include references to subsidiarity, which in our point of view is a disadvantage, with negative implications upon the interest of implementing this principle

The need to clarify the division of responsibilities between Member States and the Union was one of the key missions of the EU Treaties, being that over time the Union's nature and purposes have enlisted some developments.

Thus, in addition to the regulation of fundamental principles applicable to division of powers, it was considered necessary naming not only the three categories of skills but also the areas where they are to be exercised, a special provision to take account of contingencies. In this context, are noticed some important changes in some areas, from one competence category to another.

Since the moment the Treaty of Lisbon became effective the division of powers between the Member States and the European Union assumed a formal status. Articles 3, 4 and 6 of the Treaty on European Union enlist the same three types of competences, defining them and establishing the same areas of application.

Exclusive Competences of the Union

The Union has exclusive competence in the areas of internal market, of establishing competitiveness rules necessary for the functioning of internal market, monetary policy for the Member States whose currency is the euro, of the common commercial policy and the conservation of marine biological resources under the common fishing.

Under some *conditions*, the Union is exclusively competent to conclude international agreements in the field of the common commercial policy. The extension of Union's competence in this area is the consequence of ECJ case law (AETR and Open Skies cases).

Exclusive competences have as distinctiveness the fact that only the Union may legislate and adopt legally binding. Member States may themselves not do so, only if empowered by the Union or for the implementation of Union's acts[1].

Shared Competences between Member States and the Union

In this category of competences can be included the following areas: internal market, social policy, economic, social and territorial cohesion, agriculture and fisheries, excluding the conservation of marine biological resources, environment, consumer protection, transport, trans-European networks, energy, space of freedom security and justice and common security objectives in public health.

In terms of shared competences, Member States exercise jurisdiction to the extent that the Union has not exercised its own or to the extent that the Union has decided to cease exercising its own jurisdiction. This may occur when EU institutions decide to repeal a legislative act, in particular to ensure a better and constant observance for the principles of subsidiarity and proportionality[2].

Supporting, coordinating, supplementing competences of Union

The areas where the Union shall carry *actions to support (supporting action), coordinate or supplement actions* are: industry, education, fostering vocations and youth, culture, tourism, sport and protection against disasters. Special emphasis is given to employment issues, adding that Member States shall coordinate their employment policies in the EU labor area.

It is worth mentioning, although the Union shall hold the right to carry out *supporting action* in these areas, *they are to be coordinated by Member State.* On these lines, it stipulates that if such competences, legally binding acts enacted by the Union under the provisions relating to these areas may not lead to harmonization of national laws in the area that may be exercised[3].

This division is an expression of the principle of subsidiarity, namly the Union shall act, except in areas of exclusive jurisdiction, unless the action is more effective than any action taken at national, regional or local.

[1] Art. 2 (1), TFEU
[2] Art. 2 (2), TFEU
[3] Art. 2 (5), TFEU

As in the Constitutional Treaty, the Lisbon Treaty introduced two policies characterized by a different, specific regime:

- Economic and employment policy on which, according to Article 5 of the TFEU, Member States shall coordinate their policies within the Union.
- Common foreign and security policy which, in accordance to Article 2 (4) TFEU, the Union shall have competence to define and implement, including to frame progressively a common defense policy .

The progressive outlining of a common defense policy is further evidence for the increasing trend of political integration by developing the current European Security and Defense Policy (P.E.S.A./E.S.D.P.) within the P.E.S.C./C.F.S.P. It should be considered under this policy, the need to avoid duplication of EU competence over some powers of military alliances to which are part of some members of the Union.

In order to keep to the principle of subsidiarity, with the coming into force of the Lisbon Treaty, national parliaments are involved in decision making, with a requirement that all draft legislative act sent to the European Parliament and the Council to be simultaneously sent to them. They become, if possible to say, guardians implementing this principle.

According to Article 4 of Protocol (no 1) on the role of national parliaments within the European Union, it is compulsory keeping a period of eight weeks from the date on which a draft legislative act being made available to national Parliaments in the official languages of the Union and the date the project shall be included on the provisional agenda of the Council for its enactment or for the enactment of a position under a legislative procedure. Thus exceptions are possible in cases of emergency. In other cases, there may be no agreement on a draft legislative act during those eight weeks.

The Protocol (No. 2) on subsidiarity and proportionality requires that within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, any national Parliament or any chamber of a national Parliament may address to the President of the Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.

Supposing the well-grounded opinions on the non-compliance of a draft legislative act with the principle of subsidiarity may represent at least one third of the votes allocated to national parliaments (each parliament having two votes, shared out on the basis of the national Parliamentary system, under a bicameral system, each of the two chambers has one vote (Article 7 (1), paragraph 2)), or a quarter in legislative projects relating the Area of security, freedom and justice, the draft must be reviewed. Following such review, the Commission or, an appropriate group of Member States, European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank may decide to maintain the proposal, or to amend or withdraw, decision which must be justified.

Within the ordinary legislative procedure, supposing the reasoned opinions represent at least a simple majority of the votes of national parliaments, then the project must be reviewed. Following the review, the Commission also has three options: to maintain the proposal, to amend or withdraw it.

Supposing the proposal is maintained, through a reasoned opinion, it should be justified the arguments through which the proposal assorts with the subsidiarity principle. This reasoned opinion, as well as those of the national parliaments will be submitted to the Union legislator in order to be taken into consideration in the proceeding, in this manner:

a) before concluding the first reading, the legislator (the Parliament and the Council) overlooks the compatibility of the legislative proposal with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national parliaments and the Commission's reasoned opinion ;

b) if, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the legislator considers that the legislative proposal is not compatible with the principle of subsidiarity, it will not be examined.

Within the protocol (no. 2) article 5, is also enlisted the obligation of grounding the draft legislation in relation to the principles of subsidiarity and proportionality. These shall include a statement which allows assessing the compliance with the two principles and the reasons leading toa conclusion that achieving an objective is better achieved at Union level should rest upon qualitative whenever it is possible and quantitative indicators. Equally, at the observance the principle of subsidiarity also contributes the mandatory consultation of the European Parliament, the

Council and the Committee of the Regions and the Economic and Social Committee in all cases expressed within the treaties and where necessary. Unfortunately, their opinion is advisory both when enquired and when issued of its own initiative.

There is also a compulsion mechanism. Article 5 of the Protocol (no 2) enlists the competence of the Court of Justice of the European Union to voice in terms of actions relating to breach of the principle of subsidiarity as set out by the Committee of the Regions regarding the acts for whose enactment, the treaties oblige the consultation of Members States in accordance with their national law, on behalf of their national Parliament or a chamber of the latter

4. Conclusions

Due to the regulation and historical development, the European construction develops contradictions as well, given that through its declared and recognized character by the rest of the subjects of public international law it is seen and remains an international organization, while the pursued objective and the actions undertaken behave as a whole. In this case, when in the presence of contradictions, the subsidiarity is a solution able to defuse tension, to improve the efficiency of system activity, particularly inside the European structures and maintain the balance.

Looking at the competitive competences of Member States and those of EU, the effective exercise of regulatory power of a state, the subsidiarity lies under a suspensive term, in so far as priority is given to the European regulation without it being lost in its substantiality and the prerogatives it holds, firstly *jus imperii*, which means authoritarian regulation (Predescu:2001, p.105).

Like the majority of European solutions, the subsidiarity is more of a *de facto* case, than *de jure*, being in accordance with cautious pragmatism which describes the European development model.

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