The Principle of Subsidiarity in the Maastricht Treaty and the Role of the Community Institutions

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Introduction

One of the most controversial issues found in the Maastricht Treaty[1] is the principle of subsidiarity.[2] The last years a number of diverging views have emerged.[3] A few commentators are in favour of the principle of subsidiarity,

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1 Hereinafter TEU

2 The observations made in this article will still be valid under the Amsterdam Treaty (1997). This Article uses pre-Amsterdam Article numbers.

3 Literature in this area includes: Hartley C T, The Foundations of European Community Law, 3rd ed, 1994; Kenner J, Trends in European Social Policy, Dartmouth, 1995; O'Keeffe, D and P Twomey, Legal Issues of the Maastricht Treaty, Chancery Law Publishing, 1994; Pollard, D and M Ross, European Community Law Text and Materials, 1994; Weatherill, S and P Beaumont, EC Law, Penguin, 1993;Wyatt, D and A Dashwood, European Community Law, Sweet & Maxwell, 3rd ed, 1993; Bermann A G, "Taking subsidiarity seriously: Federalism in the European Community and the United States" (1994) 94ColumLRev 331; Bermann A G, "Subsidiarity and the European Community" (1993) 17Hastings Int'l & CompLRev 97; Cass Z D, "The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community" (1992) 29CMLRev 1107; Constantinesco, "Who's afraid of subsidiarity?" (1992) 11YEL 33; Emiliou N, "Subsidiarity: panacea or figleaf?" in D O'Keeffe and P Twomey (eds), Legal Issues of the Maastricht Treaty, 1994; Emiliou N, "Subsidiarity: an effective barrier against the "enterprises of ambition"?" (1992) 17ELRev 383; Coppel J, "Edinburgh subsidiarity" (1993) 44NILQ 179; Delors J Colloquium, "Subsidiarity: the challenge of change", organised by the European Institute of Public Administration, Maastricht (1991); Fischer T, ""Federalism" in the European Community and the United States: a rose by any other name" (1994) 17 Fordham Int'l LJ 389; Gonzalez, "The principle of subsidiarity" (1995) 20 ELRev 355; Hartley C T, "Constitutional and institutional aspects of the Maastricht Treaty" (1993) 42 Int'l and CompLQ 213; Lang, "EC constitutional law: the division of powers between the Community and the Members States" (1988) 39NILQ 209; Lenaerts K, "The principle of subsidiarity and the environment in the European Union: keeping the balance of federalism" (1994) 18Fordham Int'l L J 846; Lord Mackenzie-Stuart, "A formula of failure", The times, December 11, 1992; Marquardt D P, "Subsidiarity and sovereignty in the European Union" (1994) 18Fordham Int'l L J 616; Piris, "After Maastricht, are the Community Institutions more efficacious, more democratic and more transparent?" (1994) 19ELRev 449; Robinson W, "Subsidiarity" in D O'Keeffe and P Twomey (eds) Legal Issues of the Maastricht Treaty, 1994; Scharpf, "The joint-decision trap: lessons from German federalism and European integration" (1988) 66Public Administration 239; Schemmel, M and Bas de Regt, "The European Court of Justice and the environmental protection policy of the European Community" (1994) 17 B C Int'l & Comp L Rev 53; Steiner J, "Subsidiarity under the Maastricht Treaty" in D O'Keeffe and P Twomey (eds), Legal Issues of the Maastricht Treaty, 1994; Toth G A, "Is subsidiarity

considering it as a brake on the European Community from encroaching on areas more appropriately reserved for Member States,[4] gap while others consider it as a "retrograde step",[5] an elusive concept[6] which is contradictory to the logic, structure and wording of the founding Treaties.

The aim of this article is to discuss some of the issues subsidiarity raises. After briefly considering subsidiarity in the European Community's "federalist" context and in the Community law prior to the Maastricht Treaty, I will focus on article 3b(2)EC. I will examine its scope, its differences from other "affiliated" principles, the prerequisites for its application and the implementation of subsidiarity by the political institutions of the European Community as well as by the European Court of Justice. As a last issue I will consider its virtues and weaknesses and offer some conclusions on the subject.

I. The "Federalist" European Community and Subsidiarity in Community Law before the Maastricht Treaty

Although the European Union is not a genuine federal (supra-)nation, it has borrowed many features of a federalist nature. Member States and the European Community are the two levels of government, which exercise legislative and administrative powers. The competences are shared between these two levels, while the European Community exercises only these competences conferred on it by the Treaties. Moreover, the principle of applicability, direct effect and supremacy, found in the European law, advocate in favour of a supranational system, which describes legal relationships and requires co-operation between two levels, the European Community and the Member States.

Subsidiarity was adopted in the Community's legal and constitutional order as a guideline for the sharing of powers between Community institutions and

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justiciable?" (1994) 19ELRev 268; Toth G A, "The principle of subsidiarity in the Maastricht Treaty" (1992) 29CMLRev 1079; Toth A G, "A legal analysis of subsidiarity" in D O'Keeffe and P Twomey (eds), Legal Issues in the Maastricht Treaty, 1994; Vause G, "The subsidiarity principle in European Union law - American federalism compared" (1995) 27Case Western Reserve J of Int'l law 61; Weiler J, "The transformation of Europe" (1991) 100Yale L J 2403; Wils W, "Subsidiarity and EC environmental policy: taking people's concerns seriously" (1994) 6 JEnvL 85; House of Lords, Select Committee on the European Communities, Session 1989-90, 27th Report "Economic and Monetary Union and Political Union"; House of Lords, Select Committee on the European Communities, Session 1990-91, 17th Report "Political Union, Law-making and procedures"; Bull EC 5 1975; Bull EC 10 1992; Bull EC 12 1992; OJ 1984 C77/33 [The Draft European Union Treaty]; OJ 1987 L 169/1 [SEA]; OJ 1992 C 224/1 [TEU].

4 G. Vause, "The subsidiarity principle in European Union Law - American federalism compared", (1995) 27Case Western Reserve J of Int'l L 61, at 66.

5 G. Toth, "The principle of subsidiarity in the Maastricht Treaty" (1992) 29CMLRev 1079, at 1105.

6 Idem, "A legal analysis of subsidiarity" in D. O'Keefe and P. Twomey (eds) Legal Issues of the Maastricht Treaty, 1994, at 37.

Member States. The presumption it is said to create is in favour of the Member States and its basic function is to work as an extra safety valve to the possible encroaching centralisation and concentration of powers at the Community level.

Not a newly introduced principle in the European law, it was first mentioned, although not by name, in the European Commission's Report on European Union in 1975.[7] In 1984, we find the principle of subsidiarity expressly and quite extensively mentioned in the Draft Treaty on European Union,[8] but, as G A Bermann[9] states, this document "proved much too ambitious in its federal design to suit the Member States". What finally was adopted was a "modest document"[10] in 1986. The Single European Act.[11] The SEA, although it only partly incorporated the principle of subsidiarity, restraining it to the area of environmental protection, nevertheless, paved the way for the incorporation of subsidiarity as a basic constitutional rule and a prominent concern for the treaties that were to come.

In 1992 the principle of subsidiarity was finally incorporated in the EC Treaty as a central constitutional principle of general application in Community law.

II. Subsidiarity and the Maastricht Treaty

1. Foundation

The principle of subsidiarity is found in various parts of the Maastricht Treaty.[12] First to be considered is article A of the TEU, which makes evident the basic purpose of its adoption. "Decisions are [to be] taken as closely as possible to the citizen". The principle of subsidiarity would not only help to quell the fears of the Members States with regard to the growing expansiveness of Community competences, but also reassure European citizens that decisions will be taken more democratically, transparently and closer to institutions they can control.

This written statement was a declaration against any fears of denuding or weakening of the powers of the Member States. Therefore, the Community institutions, in article B are instructed in the pursuance of their objectives to "respect...the principle of subsidiarity". Besides these references, and a number of

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7 Bull EC Supp. 5/75.
8 OJ 1984 (C77) 33.
9 G. Bermann, "Taking subsidiarity seriously: federalism in the European Community and the United States" (1994) 94ColumLRev 331, at 344.
10 Ibid.
11 1987 OJ (L 169) 1, hereinafter SEA.
12 TEU 1992 OJ (C224) 1.

others, direct or implied,[13] the article in which, in fact, subsidiarity is enshrined and defined is article 3b(2)EC.

"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 in so far as the objectives of the proposed action, be better achieved by the Community".

From the wording of article 3b(2), it follows that the principle of subsidiarity is of a general application and presents a "constitutional limitation on the scheme of power sharing between the governing bodies of Member States and the institutions of the EC".[14]

2. Scope of Subsidiarity

a. Areas of Shared Competence

The first issue to be considered is in which areas the principle of subsidiarity is applicable. Although the phrasing of art. 3b(2) is clear, "in areas which do not fall within [Community's] exclusive competence", nevertheless, which areas these actually are, is not clear.

The Community can only act under the principle of conferred powers (or attribution of powers). That means that the Community's competences are only the competences conferred on it by the Treaties. And, in turn, the competences conferred on it are the ones that are thought to be more effectively achieved at Community level, than at the level of the Member States.

Thus, art.3b(2) cannot serve as a legal basis for the expansion of the Community's competences. It can only allocate the competences already conferred on the Community by the other articles of the Treaty. The principle of subsidiarity is only applicable in the areas of non-exclusive competence (or else concurrent competence), whilst it excludes the areas where the Community has exclusive jurisdiction.

According to the theory of the European law, Community competences are divided mainly into two categories. The exclusive competences, where only the Community has the power to take action, and the concurrent or shared competences, where the competence is shared between the Community and the Member States. In the latter category, the European Community acts only where

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13 e.g. K3(2)(b)TEU.

14 G. Bermann, "Subsidiarity and the European Community"(1993) 17Hastings Int'l & CompLRev 97, at 98.

its action is considered to be necessary according to the criteria art. 3b(2) sets out.

The Treaty does not draw any distinction on the competences it confers on the Community; nor does it include anywhere else a list which will illuminate us on to whether a competence falls within Community's exclusive competence or not, so as to apply the principle of subsidiarity. However, the Commission has attempted to give some guidelines on that issue by presenting in 1992[15] a list, which is not exhaustive but which is thought to form part of the Community's exclusive competences. The areas included, in broad terms, are the free movement of goods, persons, services and capital, common commercial policy, competition, the common organisation of agricultural markets, fisheries conservation and resources, and the transport policy.

If we look closely at the areas covered by the commission's guidelines, we will notice that these are also the main targets of the Economic Community. In fact, these are the areas basically covered by the EEC Treaty. In a phrase "the principle of subsidiarity cannot apply to any matter covered by the EEC Treaty because it consists part of the Community's exclusive competence".[16] Consequently, the areas where the principle of subsidiarity applies are the newly introduced areas, found in the SEA and in the Maastricht Treaty, which form part of the Community's concurrent competences.

Nevertheless, the above areas are considered as "border areas", which have implications and effects on the internal market and generally on matters that form part of Community's exclusive competences.[17] Which criteria and how these criteria are going to be applied, so as to be decided whether an issue falls within Community's exclusive competences, are not defined. The issues raised therefore indicate the complexity of the principle of subsidiarity and imply that the Community institutions will have a rather difficult task in coping with matters that are ambiguous and problematic.

b. Prerequisites for Application : The Two Tests

When the Community finds itself in an area of shared competence, where it assumes that there is a need for action, it cannot automatically exercise its powers. This need is, according to art.3b(2), subject to two requirements, or else to two tests. Both tests should be satisfied in order to justify Community action in a field of shared competence.

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15 Bull EC10 1992, 116, at 121.

16 See Toth, supra note 5, at 41.

17 See, in particular, the Titanium dioxide case, C-300/89 Commission v Council [1991] ECR I – 2867.

The first is known as the "test of effectiveness or efficiency",[18] where the objective pursued can be sufficiently achieved only at Community level, ("...the Community shall take action... only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States..."); and the "test of scale",[19] where the objective pursued can be better achieved at Community level, ("... and ...by reason of the scale of effects of the proposed action [can] be better achieved by the Community").

Although it may seem that the two requirements laid down by art.3b(2) are the two sides of the same coin, the application of these criteria may on certain occasions speak for the opposite. There are cases where the test of scale is in favour of national action by reason of the effects of the problem and the fact that it is of limited territorial scope, while the test of effectiveness is in favour of Community action by reason of national inactivity or because its effects entail further side-effects on other European territories as well. This is usually the case in the field of environmental protection.

3. Subsidiarity and Articles 235 and 3b(3)EC

In the European law there is a tendency sometimes to confuse the principle of subsidiarity with other concepts found in the EC Treaty. One of them is art. 235EC. Specifically, some argue that art.235 is an aspect of subsidiarity and indicates that subsidiarity was a concept found in the EEC Treaty and in the case law of the European Court of Justice.

This view seems to overlook that these two provisions (arts 235 and 3b(2)) are significantly opposed. The first serves as a legal basis for implied powers, allocating to the Community powers which it did not previously have, in order to make Community action more flexible. Art.3b(2), on the contrary, deals with the allocation of powers already within Community competences and puts a barrier to their unjustified expansion.[20]

Nevertheless, these two provisions can also work in conjunction. Art. 235 can offer the Community more powers in order to achieve its objective, whilst art. 3b(2) will consider whether the powers claimed are justified in terms of their objective and the results they are bound to succeed.

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18 See Toth supra note 5, at 43.

19 Ibid.

20 Lang, EC Constitutional Law: the division of powers between the Community and the Member States, (1988) NILQ 209: "[It is] difficult to see any area which will be permanently outside the scope of the Community's powers.... There are no clear limits on how far the Community can move".

Another principle, which seems of great relevance to the principle of subsidiarity, is that of proportionality, enshrined in art. 3b(3)EC. Although in most of the cases these two principles are considered by the Community institutions indistinguishably,[21] they have different functions and they pursue different goals. While subsidiarity regulates the allocation of competences between the Community and the Member States, proportionality dictates the action Community should take if its action is already justified on the grounds of subsidiarity.

Nevertheless, there are cases where the one principle can outweigh the other, when they are seen in conjunction; and that occurs where a measure can be better carried out on Community level, but the burdens imposed by the Community may dictate that the best solution would be an action at national level. In these cases it is not safe to say where the balance should tend. It is rather a matter of interpretation of the case at issue and a weighing of the interests involved.

4. Implementation of Subsidiarity

An issue that is of importance at this stage is who has the burden of proving the need of action at Community level in areas of shared competence and what procedure is to be followed. No provisions on these issues have been provided for in the Maastricht Treaty. Therefore the matter was considered urgent and was raised in both the Birmingham Special Summit in October 1992[22] and at the Edinburgh Summit in December of the same year.[23] In Edinburgh the European Council came up with a text which included some guidelines as regards to the procedures that should be followed by the institutions concerning the implementation of art.3EC.

The fundamental role for the implementation of the principle of subsidiarity will be played by the Commission, by which also lies the initiative of proposing legislation. So, according to the European Council's text, the Commission before proposing a form of legislation, should first take into account the principle of subsidiarity and then pursue wide consultation on its intended act.

As follows from the wording of art.3b(2),[24] the onus of proof, that the proposed action should be taken at Community level, lies with the Community.

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21 e.g. Commission stated in its proposal to the Council and Parliament that both paragraphs (2 and 3) embody the principle of subsidiarity, Bull EC10 1992.

22 See Bull EC 10 1992, 9.

23 See Bull EC 12 1992, 12.

24 [T]he Community shall take action...only if and in so far as...".

The latter, in order to justify its act, has to set out in the preamble of the act the proposed measures, the objective to be attained, the relevance of the measures to the objective and the reasons that justify action at Community level. These all form part of the legal basis on which the validity of the legislative proposal will be judged and which basis's compliance with the principle of subsidiarity will be examined by the Council before the adoption of the Commission's proposal. Moreover, as part of the decision-making procedure, according to articles 189b[25] and 189cEC, the Council will also be required to inform the European Parliament as regards the decision it has reached relating to the compliance of the intended measures with art.3.

In that context, whatever runs counter to the principle of subsidiarity is to be rejected or amended. The Commission also intends to review even the existing legislation so as to be in accordance with the principle of subsidiarity. That implies, in my view, that the principle of subsidiarity will have retroactive effect, something that is rather doubtful whether it will be successful in amending well-established situations of the past so as to achieve legal uniformity. Negative practical effects and the rise of legal uncertainty are more likely to occur. Actions for damages can also be raised against the European Community under art.215(2)EC.

5. Justiciability of Subsidiarity

The principle of subsidiarity after its incorporation in the EC Treaty in art.3b(2) forms part of the European Community law and comes within the European Court's jurisdiction. Thus, Community acts can be challenged before the European Court by direct actions brought before it, either under art.173EC (actions for annulment) or under art.175 EC (actions for failure to act, if the Council rejects a Commission proposal on grounds that it does not comply with the principle of subsidiarity). Direct actions are also available under arts 169 or 170EC, against the Member States, which fail to comply with the principle of subsidiarity and, in breach of it, adopt a legislative measure relating to a certain objective.

A second way of challenging subsidiarity issues is the preliminary ruling procedure under art.177EC. Under this procedure private individuals may challenge before the national courts the validity of a Community act on which their case on progress depends, or a national legislative or administrative issue, which, according to the litigants view, falls within the Community's exclusive competence and therefore the state had no right to act. Thus, both the Community

25 Article 189b has been amended by the Amsterdam Treaty. However, the Council and the European Parliament still have to co-operate for the adoption of an act, subject to the procedure of art.189b (the co-decision procedure).

and the Member States can be challenged under art.3b(2) for the validity of any legislative measures adopted by them.

Nevertheless, how far this challenge can go is rather ambiguous as subsidiarity involves issues of political significance, which demand another type of approach. At this point, we must stress that the European Court is not inexperienced in dealing with issues of a political nature, nor has ever been involved in areas that fall within the other European institutions' competences. Therefore, the Court's contribution in clarifying the obscure areas, set out by the principle of subsidiarity, objectively and immune of any political pressures, seems to be of great importance, and to enhance its role as a constitutional court.

However, the Court does not have an unlimited ground of action. First, it is within its task to examine whether a Community or national legislation falls within the Community's exclusive competence or not, in order to apply the principle of subsidiarity. But even when it comes to decide on issues such as whether the objective pursued can be better attained by action at Community or at national level, the Court in most of the cases cannot review the appropriateness or the effectiveness of an action. That, subject to certain exceptions, calls for other sorts of equipment. Economic and political judgements of this kind cannot be reached by a mere legalistic approach and limited economic grounding. They demand specialised staff and expertise to enable them to come to appropriate conclusions.

Nevertheless, these issues basically come within Community institutions' area of discretion and this particular area is not justiciable unless the institutions exceed the bounds of their discretion, misuse or abuse their powers or commit a manifest error. Only within these limits can the court challenge Community acts and national legislation. It will not in any event substitute itself for the Commission or the Council and consequently, it will not amend an act or even set guidelines for the way a certain objective should be attained.

The political decisions and decisions of policy are to be left - or at least we hope to be left - with the executive and legislative Community institutions. That, some people would argue, sometimes does not guarantee that Community institutions will take fully into account the presumption created by art.3b(2) in favour of the Member States. On the contrary if the Community wants, it will always be able to argue in favour of its action, especially when "the preamble and the wording of the measure [at issue is]...drafted to facilitate this".[26]

And when it comes to the Court, T. Hartley characteristically observes that the impoderables involved are so many "that it will almost always be possible for

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26 T. Hartley, "Constitutional and Institutional Aspects of the Maastricht Treaty" (1993) 42 Int'l & CompLQ 213, at 217.

the Court, if it wishes, to find grounds for upholding the measure".[27] And, under certain circumstances, it is very likely for the Court to act in this way if it wants to avoid a flood of actions against Community acts or the use of subsidiarity as a "passe-partout" provision against Community measures by the Member States, which will be facilitated in that by the article's vague wording and its "multi-interpretable" nature.[28]

III. Virtues and Weaknesses of Subsidiarity

1. Virtues

The principle of subsidiarity was incorporated in the Maastricht Treaty at a stage where the Community was granted competencies in more policy areas and its powers were enhanced. Subsidiarity, however, pursued certain aims and came as a response to the criticism of the German and the British government that EC institutions were unnecessarily interfering with the legislative fields of the Member States.

Most Member States -some strongly enough[29]- opposed to powerful central government control by the European Union because they feared that centralisation will affect their undiluted sovereignty and autonomy, and will denude them of some of their powers. However, subsidiarity was not included in the Maastricht Treaty "through a desire to halt the Community's progress, still less to reverse the movement towards closer union".[30] It was included as a safety valve to the concentration of powers to EC institutions. It preserves the decision-making integrity of the Member States without at the same time preventing the Community from acting in those areas where its action would be indispensable.

The balance between strong central political unity, which will be capable of acting collectively and effectively whenever demanded, and localism, promotes the benefits and the virtues of both these concepts. However, the presumption created is in favour of localism and therefore there are localism's virtues that are mostly advanced by the principle of subsidiarity.

Firstly indicated is the advantage of "self-determination".[31] The closer the rules and actions are taken to the people, the easier it is for them to be effectively

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27 Ibid.

28 We cannot, of course, overlook and the opposite view, which contends that this vague wording of art.3b(2) may deter the Member States from challenging Community acts on that legal basis by reason of the uncertainty of the result.

29 e.g. Denmark and Great Britain

30 J Steiner, "Subsidiarity under the Maastricht Treaty", in D O'Keeffe and P Twomey (eds) Legal Issues of the Maastricht Treaty, 1994, at 63.

31 See Bermann, suprq note 9, at 340.

involved and represented. They can also pursue compensation more easily, or seek for remedies synce accountability is better preserved at lower levels of government.

What follows "self-determination" are the notions of "legitimacy" and "democratic process".[32] Notions linked with the "democratic deficit" and the transparency during the procedures of adoption of a legislative act. These two last issues are better attained when a number of decisions - the larger the better - is left with the Member States. It would not, after all be acceptable for Member States to implement decisions concerning crucial areas of public life taken at Community level by majority. The minority in these cases is an also considerable "national voise" which cannot be sidestepped or overlooked in the namu of a majority decision.

In addition, subsidiarity advances political liberty. Decisions taken mainly from a central government are sometimes oppressive and despotic. A democratic system promotes the division of powers both on vertical and horizontal axis and that is because individuals are luss involved in a central government's procedures and therefore less free to express possible views or objections. The diffusion of powers to the Member States sets more guarantees for individual freedom, justice and access to the legislative mechanisms.

Subsidiarity, also, enhances the flexibility of local governments. Where the Community proves sometimes to be slow and stiff, local governments act quicker and more effectively in areas of social nature.

Local identities[33] are also preserved. Every country has its own particularities in relation to culture and mores. These particularities dictate different needs and in certain cases a specific approach. The Community is not always equipped and therefore capable of corresponding to these diversities, which contribute a great deal to the political and cultural Community landscape.

The final benefit to be considered is the respect for the internal division of the Member States;[34] the key objective which provides the basic justification for the adoption of the subsidiarity principle in the Maastricht Treaty. The Member States need to be ensured that their sovereignty will be respected and their autonomy safeguarded. They are not intending to give away anything except what will prove to be essential and indispensable, in order to enable the Community to materialise its goals and fulfil its tasks.

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32 J Weiler, "The transformation of Europe" (1991) 100YaleLJ 2403, at 2472.
33 See also TEU, art.F(1).
34 T Venables, Amendment of the Treaties, Butterworths, 1992, at 13.

Nevertheless, although subsidiarity theoretically seems to provide this kind of balance and control that the Member States were seeking for, it raises a number of problems and weaknesses which, according to a few commentators, outweigh the virtues and put in danger hard-won achievements as well as the Union's integration process.

2. Weaknesses

The first objection raised[35] concerns the appropriateness of the principle of subsidiarity in the Maastricht Treaty, as a constitutional principle of general application. Although European Union is a Union possessing many federalist features, however, it is not a federal nation or a supra-nation within the strict sense of that word. Moreover, it does not have a genuine constitution where the principle of subsidiarity could be of use. It only possesses principles, which result from the political compromises it had to achieve to secure its existence and survival. Even its competences are of limited extent, without being systematically defined. Therefore, subsidiarity cannot work properly in a system, which has not been designed to offer the grounds to accommodate principles of such a nature.

The view of rejecting the principle of subsidiarity on grounds of lack of the Community's genuine federalist nature does not seem to be very convincing. Undoubtedly, if the European Community was to give strict answers on issues of allocation of power enumeration of federal powers, pre-emption of the state law and implied powers, it could do it only inadequately and through teleological interpretation of the European law.

However, subsidiarity's main function is in general terms the allocation of competences between different levels of government. The European Union, in spite of its incompleteness as a federal state, possesses characteristics of federalist nature,[36] which are susceptible to regulation in the light of subsidiarity. And that is because the Treaty drafters were not drafting a federal constitution, still less a genuine federalist supra-nation. In fact, they sought an international agreement with a few strict aims and goals, which only later came to be viewed as a constitutional document.

Additionally, the lack of a precisely drafted constitution does not exclude the need of constitutional principles that will serve as guidelines in the progress and integration of the European Community. This is the very role subsidiarity is intended to play, although some areas in the EC Treaty are still vague and ambiguous as to whether they form part of the Community's or of a Member State's competence.

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35 See Toth, supra note 5, at 1103.

36 As these characteristics have been described at the first chapter of this article.

After all, in the past, as well as in the present,[37] other principles of a constitutional nature have proved to play a vital role in the function of the European Community. Were their benefits for the Community challenged by the mere lack of a constitution? As long as the purpose for which they were introduced is served, the formal requirement of a constitution at that stage seems to be irrelevant.

Objections, also, based on the fact that the applicability of the principle of subsidiarity is linked to the results of the two tests provided for in art 3b(2)EC, whose result is sometimes contradictory, are lacking in substance. Although the prerequisites of a number of provisions may lead to contradictory results, that does not seem to weaken the advisability of their functions. In those cases, which I do not consider as numerous, there should be a weighing of interests before the final solution is reached.

The fact that seems of significant importance is the possible retroactive effect of subsidiarity. A review of the established legislation may open the floodgates to litigation, especially from Member States, which will use subsidiarity to challenge the existing Community legislation. This may cause confusion and legal uncertainty. Decisive here will be the European Court's role. Will it go on ruling on areas which are considered to be of a political nature or will it restrain itself and limit its investigations to merely legal issues, what may also deter Member States from abusing their right of challenging Community legislation on a regular basis before the Court?

Moreover, no procedure is provided in the Maastricht Treaty for the application of subsidiarity in practice. There are only guidelines to be followed, produced in European Summits, while the European Court the final word the European Court has in case of challenges relating to Community legislation. Thus, the responsibility of the application of subsidiarity, as well as for its proper function lies with the Community institutions and the use they intend to make of it.

The last issue to be considered, is the advisability of subsidiarity's purpose in the EC Treaty. Is centralisation always an evil? Are we to overlook the fact that the Community's problem in the 70's and first half of the 80's was that the Commission had too little power to be effective? Will the possible weakening of Community powers will not consequently entail the delay of the integration process?

Conclusion

There are undoubtedly situations where centralisation is desirable. In cases where action at Community level, although not included in Community's

37 See also TEU, art.F(2).

exclusive competences, can prove to be more effective. These cases relate to cross-border areas, which occasionally at first sight do not seem to be of that kind (e.g. environmental problems), and to areas where there are pressures from the outside world for adequate and effective uniform solutions in trade, health, social security and so on.

But, that is not always the case. This is an estimation that should be done case-by-case. The phrasing of the principle of subsidiarity is quite vague to permit manoeuvres on such occasions. Subsidiarity is a "two-edged sword which can cut against Community action, but also can cut against State action".[38] Some would argue that it is the price to be paid in order for the Member States to be provided with a clause safeguarding their powers.

The inclusion of subsidiarity in the Maastricht Treaty was an inevitable step that ought to have been taken at a stage where Community power extension and relaxation of decision-making rules were making the case for Member States' political vulnerability. Moreover, the parallel influx of immigrants in the European Community, the Member States' loss of confidence in Community action in terms of effectiveness and speed so as to deal with increasing problems in foreign policy, social security and home affairs, as well as regional demands within the States, strengthened the demand for subsidiarity even more and prepared the grounds for its adoption.

Whether this adoption is considered to be a good or a bad initiative, would be rather perfunctory and premature to say. That depends mainly on its use. Undoubtedly subsidiarity may not be a radical remedy to the "democratic deficit" and may not solve all the problems entrusted to it. Nevertheless, it lays down the preconditions for its beneficial use and it is for the European Community to meet the challenge and instead of a shadow provision turn subsidiarity into a meaningful and effective concept for the whole Union.

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38 T Fischer, "Federalism" in the European Community and the United States: a rose by any other name", (1994) 17Fordham Int'l L J 389, at 435.