ENFORCEABILITY OF THE PRINCIPLE OF SUBSIDIARITY IN THE EUROPEAN UNION

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Abstract - The paper focuses on the enforceability of the principle of subsidiarity in the European Union after the entrance into force of the Treaty of Lisbon in 2009. That is, whether the principle of subsidiarity could be used as the legal basis in the European Courts' review of legislation or whether it would only produce limited political effects which are not justiciable. In Author's opinion, after the Lisbon Treaty and the annexed Protocols have given National Parliaments and Committee of the Regions the right to take legal action based on the respect of subsidiarity by EU legislators, a new positive era of judicial review is going to impact on the sharing competences model between the European Union and the Member States.

Index Terms - European Union, Lisbon Treaty, Subsidiarity, Enforcement

I. INTRODUCTION

The multilevel governance issue in climate change law-making has been of great relevance in the recent worldwide legal scholarship. On the one side, the international community has improved its regulatory approach to climate change, but on the other the actual implementation of those policies has been increasingly moved to levels of governments closer to the people. What happened is very well known in the European Union (EU) legal system: it is called subsidiarity and it goes under the principle derived from federalist theories which stipulate that policymaking should occur at the lowest effective level [ ]-[ ].

The principle of subsidiarity is not focused on powers allocation, but rather on the regulation of the use of powers between the EU and the Member States. Looking at the Treaty and at the European Court of Justice (ECJ) case-law, one may find a very few policy areas that do not, at least potentially, fall, directly or indirectly, within the competences of the Union. However, the third paragraph of Article 5 makes it clear that the subsidiarity principle governs all non-exclusive competences.

However, it does not help solving the issue whether the EU is the most appropriate decision-maker. Each policy not exclusively given to the EU has to clear a double test in order to verify the best decision-making level of government allocation. First, the EU bodies must demonstrate that the objectives of the proposed action cannot be sufficiently achieved by the Member States "either at central level or at regional and local level". Second, they should also demonstrate that the proposed action "by reason of the scale or effects, can be better achieved at Union level". Whether the principle of subsidiarity could be used as the legal basis in front of ECJ or whether it would only produce limited political effects is still strongly discussed. Firstly, such doubts regard the two criteria given in paragraph 2 for justifying the EU action: "not sufficiently" and "better" are in fact very ambiguous legal concepts. Secondly, the provision only regards the relationship between the Community and the Member States and leaves the sub-national level – mainly the regions - out. Thirdly, it refers to the relationship between the EU and the Member States as a whole, not an individual State; but in the EU legal system, in some policy areas, powers are distributed differently. Finally, the principle of subsidiarity concurs with other principles in the Treaty and cannot claim priority in all cases.

The lack of a secure legal basis calls for a general consensus about the function of subsidiarity as a mere political issue. Since environmental policy is not a competence exclusively given to the EU, but it falls into the so-called shared competences, the principle of subsidiarity applies to that specific matter and the need to investigate what its legal nature and the most appropriate level of decision-making and regulation are, it is of great interest for scholars.

II. THE PRINCIPLE OF SUBSIDIARITY IN THE EU

When compared to other federal systems, the EU contains a rather complicated system of division of powers between the Member States and the Union[ ]-[ ]. The higher authority is not allowed to take action which the lower level government is capable of well performing on its own (more efficient action is not a sufficient criterion). If this is not the case, then the higher authority is obliged to give support. However, until the Lisbon Treaty, the principle of subsidiarity has only served as a symbolic principle. There is a general feeling amongst legal scholars that the principle of subsidiarity is a "non-binding political principle", and national parliaments and the courts has been widely limited in enforcing the principle of subsidiarity[ ]-[ ]. This is probably the reason why the Lisbon Treaty has introduced significant new elements, along with the annexed Protocols, ensuring

the Member States and the Court of Justice a major role in the ex ante political control of the use of the principle of subsidiarity by the EU bodies. On the one hand, national parliaments are now asked to check all EU legislative proposals for their compatibility with subsidiarity; on the other, the ECJ is given a specific jurisdiction to hear actions sued by the Member States for the respect of the principle of subsidiarity. As a consequence, the EU Commission "shall take into account of the reasoned opinions issued by national parliaments or by a chamber of national parliaments".

It is likely to assume that the Member States' and judicial control over the respect of the competences conferral to the EU would be more effective in the future, in spite of what happened so far. A significant argument for that may be already found in the German and Czech Constitutional Court's (so-called) Lisbon Rulings, where both courts not only held that every transfer of competences needs a clear "delimitation" of the transferred powers, to let the national parliaments predict, as far as possible, the degree to which competences are actually transferred to the EU; but also they ruled the so-called principle of "ultra vires review". According to the latter, rather than address preliminary proceedings to the ECJ when in doubt about European law (as stated in the Treaties), both Constitutional Courts announced the will to keep their own authority to decide whether EU regulations are compatible with the "remaining national identity" of their sovereign Countries .

III. THE ROLE OF THE (COMMITTEE OF THE) REGIONS AND THE PRINCIPLE OF SUBSIDIARITY

The expression "Europe of the Regions" has been used in the EU with a broad range of meanings. In general terms, "Region" refers to a geographic portion of land. However, in the European history Regions have also assumed special features giving an area a distinct character from an economic perspective, or an administrative entity, or even a political body generating a feeling of identity - religious, ethnic, linguistic, cultural, historic - among the inhabitants. Also their denomination vary widely: Lander (Germany), Regioni (Italy), Comunidades Autonomas (Spain), Regions (UK) are only some examples.

That concept basically means processes of regionalization or federalization, by which territorial entities (below the level of the nation state) have acquired a more autonomous status and wider authority within the nation state . For others, since the nation states are no longer capable of performing their tasks and functions properly, they have been replaced by smaller territorial units (Regions) as the new basic component parts of the international system "beyond the nation state". Whichever definition one may agree with, it seems that Regions count more than before in the EU legal system and form a separate level within its multi-level governance system.

There has been a general trend throughout Europe favoring the sub-national level over the past two to three decades, through the "top-down" or "bottom-up" regionalism .A number of reasons may explain that trend. Solutions taken at state level, away from populations affected by them, are no longer regarded as appropriate because of their lack of democracy or legitimacy. An input from below is seen as necessary and however, in most cases, implementation is done at the lower level. This is especially true at the European level where population in smaller regions now asks for greater regional autonomy to escape from the big economic crisis , since market integration has increased disparities between different areas.

The growing role of sub-national territorial entities in their nation states have required a principle to guide the interaction between them and the wider EU legal system has been, first of all, a practical necessity and reflects the growing role that the Committee of the Regions has been entitled for over the last few years, especially after the entrance into force of the Lisbon Treaty in 2009.It was only with the Lisbon Treaty that the Committee of the Regions was given a more significant role in the EU legislative process. On the one hand, through the increasing of areas of its mandatory consultation; on the other hand, through the right granted to the Committee to bring legal actions before the Court of Justice for protecting its prerogatives (art. 263 TFEU). The higher role of the Committee after Lisbon is ensured by the new wording of Article 5.3 TEU which limits EU action if goals "cannot be sufficiently achieved by the Member States either at central or at regional and local level". The Committee has always favored this wider notion of subsidiarity and the Protocol no. 2, on the application of the principle of subsidiarity and proportionality, has finally accorded to the Committee the right to initiate direct subsidiarity review before the EU Court of Justice over EU legislative acts in areas of mandatory consultation.

However, the actual influence of the Committee of the Regions has been largely neglected . However, CoR's opinions do often produce effects on policy-making, both on the addressee and the final policy outcome even though their recommendations are not binding . As some have pointed out , the actual influence of the Committee's advisory opinions relies on a number of variables: first, it is more influencing when the recommendation comes early in the formal decision-making process, if the addressee believes that the Committee has high expertise in the subject matter and only when its position is close to the own position of the addressee. Overall it is proved that the Committee exercises a stronger influence in the position of the addressee body than over the final policy outcome. It is more likely to have a positive effect on the final policy by influencing the initial position of the Commission, or the European

Parliament and the Member States very early in the process since the Committee has no formal vote in the legislative procedure and it is excluded from political negotiations between the European Parliament, the Council and the European Commission.

Protocol No. 2, however, now gives the Committee of the Regions a powerful tool for strengthen its own role as watchdog of the principle of subsidiarity acknowledging it the right to bring legal action, against legislative acts on which it was consulted, before the European Court of Justice.

IV. THE ROLE OF THE EUROPEAN COURT OF JUSTICE AND THE PRINCIPLE OF SUBSIDIARITY

The practical application of the principle of subsidiarity has been defined as "minimal" or "very timid" or "largely inoperable at the stage of adjudication" , because subsidiarity is "essentially a political and subjective principle" .
Thus, the European Court of Justice (ECJ) has exercised a little judicial review on it, despite its well known general judicial activism.

On the one hand, the ECJ has confirmed that subsidiarity does not create individual rights under the Treaties, as it solely relates to the division of powers between the Union and the Member States [Case C-221/10], and has also held that the principle of subsidiarity is justiciable [C-376/98]. Nevertheless, the Court has never held that any EU legislative act was invalid for the breach of the principle of subsidiarity even though it is possible to find a bunch of major cases involving subsidiarity which has been decided before the Lisbon Treaty entered into force [Case C-84/94; C-233/94; C-377/98; C-491/01].
However, it was only in the Vodafone and in the Airport Charges cases that the EU regulation was expressly challenged for the violation of the principle of subsidiarity. The Lisbon Treaty and the annexed Protocol No. 2 wording makes now it clear that subsidiarity is a judicially enforceable legal principle and give the right to bring legal action on the ground of a possible breach of it. Yet, "defining at what level a task is better accomplished is primarily a political problem and it should therefore left to political process" .

One may observe that actually the Protocol does not give a direct right to bring judicial review proceedings for the breach of subsidiarity. And one may also observe that the Committee of the Region have to respect rigid pre-conditions in order to bring a legal action for the breach of subsidiarity. Still, the Protocol expressly devolves, for the first time, to ECJ the judicial application of subsidiarity and it has already sorted some effects in theapproval procedure of the Directive on Posting of Workers in the Framework of the Provision of Services. The EU Commission withdrew a proposed regulation on collective action and the Committee of the Regions issued an opinion which stated that "if the Commission had maintained its proposal […] the Committee could have considered taking the necessary steps to lodge an ex-post appeal against it for breaching the principle of subsidiarity in terms of both the choice of legal basis and insufficient evidence of the added value of EU action in this area".
One may reasonably expect that the ECJ would now bring a quali-quantitative approach in the judgments for evaluating whether an Union objective can be better achieved at Union level (instead of at State level). Both qualitative or, wherever possible, quantitative indicators must indeed be met. That maybe requires for the ECJ to develop a new justiciability test to review whether the principle of subsidiarity has been respected or not.

CONCLUSION

Should we expect a new era of subsidiarity case-law? The ECJ has already given proof of its ability to manage vague legal concepts, letting it possible for the EU to move toward a higher standard of multilevel constitutionalism. The European integration path is plenty of ECJ case-law which had showed the way for the EU legal system to improve its legal nature. The ECJ has yet explicitly recognized the relevance of internal federal arrangements for the application of EU law. According with that, even the free movement principle is not recognized as absolute, but it has to be balanced with the need to guarantee certain national public aims without the need of making any reference to the principle of subsidiarity.
The wording of Article 8 of the Protocol No. 2 enhances now the role of the Court, the national parliaments and the Committee of the Regions, and they have already showed their appreciation for the opportunity to play a major role in the subsidiarity check process.
In the near future the analysis may have an interesting extension into the EU climate change policy. Since the environmental protection is clearly an area of shared competence where it would be for the EU institutions to prove to what extent Community aims could be better achieved at the EU level and where the powers of the Member States are limited by EU law legislative action, the climate change issues could be a very interesting example in the near future to test the efficacy of the subsidiarity as an enforceable legal principle.
Environment policy entails constantly cooperation between all institutional players. In fact, the allocation of competence between the EU and the Member States tends to be not so much a separation but rather an intermin- gling of powers. Their relationship is more dynamic than static. Accordingly, subsidiarity comes much more to the fore in the environmental field than

in other policies such as the internal market. Thus, there are a number of good reasons supporting the view that EU environmental measures easily pass the hurdles of subsidiarity:the transboundary nature of the topics involved but at the same time subsidiarity does not preclude the EU lawmaker to regulate issues that don't have cross-frontier elements; finally it is likely that unilateral (that is, Member States' measures would exacerbate the distortion of competition and create new barriers to free trade).

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