THE SUBSIDIARITY – A FUNDAMENTAL PRINCIPLE OF THE EUROPEAN CONSTRUCTION

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Subsidiaritatea este un principiu fundamental al construcției europene, gândit implicit prin Tratatele constitutive de la Paris și la Roma, ulterior reglementat explicit prin Tratatul de la Maastricht. Odată cu Tratatul de la Amsterdam, prin Protocolul privind principiile subsidiarității și proporționalității s-a dat mecanismului reglator al exercitării în comun a puterii de reglementare de către state și Uniune forța necesară afirmării sale ca principiu constitutiv al Uniunii Europene.
Cu o evidentă natură politică, principiul subsidiarității a dobândit și consacrarea juridică necesară, care prin controlul jurisdicțional preventiv și sancționator dă garanția respectării sale de către instituții și autoritățile naționale. Pe viitor rolul său va fi mai bine evidențiat în actele comunitare spre a satisface într-o măsură mai mare nevoile cetățenilor și interesele comune ale statelor europene.

The existing conditions at the end of the 2nd World War and their long-term effects, foreseen by the Europeans, led to a new situation , expressed through to acts well in economy and in politics. This construction has proved to be the most complex and harmonious model of sustainable development, an inspiration source for other institutional structures created on the other continents.

Europe's rich historical inheritance which supposes complex accumulations of theories and practical achievements in the area of politics and economics, also careful not to repeat the mistakes of the past have led the Western-European States, by the means of a political strategy of a continuous pragmatism, to initiate a coherent system of economical assort which combines the cooperation with integration with the aim accomplish a single and common market, extended to the cultural and geographical frontiers of the continent. This material ground determined the political solidarity between the European countries and a deep cooperation between them on international politics and common security.

Like a complex area of diversity and egos, the Community of Europe is basically matters through economical and juridical solutions adopted in order to obtain the long term political purpose to satisfy two fundamental requirements which would seem to be in an irreducible contradiction: first of all, economically speaking, to create the benefits of a homogeneous market and politically, to satisfy the identity demands of the of the member states. In order to connect the two apparently irreducible components, the European Union has placed next at the foundation of the whole mechanism the principle of subsidiary, sustained in its practical form by the principle of proportionality, the two relating to the principle of powers attribution on which the construction of the Communities and then the one of the Union was release.

An ancient inheritance of the European and universal[1] culture, subsidiary has found a new meaning in the frame of the European Union as it rules the interference of the national authorities EU institutions into the exercise of the community's equilibrating power, according priority *de jure* to the States but in the spirit of integration and in the limits stated by the original Treaties and by the adhesion treaties adopted in order to join European Union. This new meaning has no recorded precedents with the mention that, till the birth of the European Union, subsidiary has been applied in systems that were hierarchically coordinated, but neglected horizontally[2].

In the framework of the founding Treaties of Paris, founding the European Coal and Steel Community (1950), and of Rome, concerning the European Economic Community and the European Atomic Energy Community (1957), subsidiary acquired an implicit meaning, mainly through the interpretation given by the European Court of Justice[3]. The first explicitly expressed mention of subsidiary is given by the Treaty of Maastricht (1993) in Art. 3B as well as in Art. 40 and 43 EEC, concerning almost all the areas aimed by integration, including the Economical and Monetary Union. Maastricht was only the beginning. The Treaty of Amsterdam (1997) has adopted by the means of a distinctive Protocol the principles of proportionality and subsidiary, providing them an explicit status. The terms of the 7th Protocol detailed the conditions of application for the essential indicators provided by Art. 5 EEC in a more precise and coherent way in regard to institutions but aiming ensure too that decisions would be favorably as possible for the citizens of the Union.

The Protocol in its 13 items sets up main rules[4] such as:

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[1] The first references to sunbsidiarity are to be found in Aristotle's work (384-322 b.c.), especially in his opinion regarding the relationship between human beings and society and on the aim of collectivities in "Politica". Subsidiarity in the frame of the relationship between human beings and society is also analysed by the Italian philosopher Tomas of Aquino (1225-1274). Subsidiarity in the political system is analysed by Thomas Hobbes (1588-1679), John Locke (1632-1704). Its political and economic aspects have been mainly stated by Alexis de Tocqueville (1805-1859), seen as the father of decentralization, and Pierre Joseph Proudhon (1809-1865), who foresaw the founding of a Federal Europe on economical grounds.

[2]Semantically, *subsidiarity* comes from the Latin term *subsidium*, which meant *help* or *accessory used to consolidate a main element.* The Latin term was also used in the form of *subsidiarius* in order to define the backup troops that were called to strengthen the army when necessary. Starting from the original form, these forms can be found in various languages, usually preserving the meaning of *secondary element*, which consolidates the arguments of a main one. S*ubsidiarity* is applied in the national legal orders, more precisely in administration, in order to designate the principle of decentralizing the local services and the competencies of the local authorities. Another application of this term can be found in federal states, where it defines the relationship between the structures functioning at the federal level and those created at the level of each state. Moreover, the term finds its place in the structure of the Catholic Church as it describes the relationship between the Vatican and the national churches which form parts of the Catholic Church. It is remarkable that in all cases mentioned above, the interactions are of coordination but also of hierarchical guidance and sometimes of subordination, while in the case of the Union, the hierarchical subordination is excluded.

[3]See Claude Bloomann, Louis Doubois, Droit institutionnel de l'Union Européenne, Litec, Paris,2004, pag.262; Joël Rideau, Droit institutionnel de I 'Union et des Communautées Européennes, L.GD.J., Paris,1999, pag.506 - 510; Louis Cariou , Jean- Louis Clergerie, Annie Gruber, Patrick Rambaud, L 'Union Europeenne, Dalloz, Paris, 2000, pag 183; Bianca Maria Carmen Predescu, Ion Predescu , Aristide Roibu - Principiul subsidiaritatii, Ed. Monitorul Oficial, Bucuresti, 2001, pag 55 -69.

[4] Les Traités de Rome, Maastricht, Amsterdam et Nice, La documentation française, Paris, 2002.

- in exercising the powers conferred to it, each institution shall ensure that the principle of subsidiary and the one of proportionality are complied with;
the application of these principles shall respect the general provisions of the founding Treaty, particularly in respect to the institutional balance and shall not affect the relationship between the national and the Community law;
- subsidiary is a dynamical concept which should be applied in the light of the objectives established by the Treaty, within the limits of the powers conferred to the Communities;
- for any proposed Community legislation, the reason on which it would be founded should be started in order to justify its necessity and furthermore it ought to be substantiated through qualitative and quantitative indicators;
- the Community action would be justified only if the objectives of the proposed action could be not well enough fulfilled by Member States and can therefore be better fulfilled through the part of the Community;
- the form of Community's action should consist of the satisfactory achievement of the pursued objective, the use of directives coming before regulations as well as the use of framework directives before detailed measures;
-regarding the nature and the extent of the Community's action, the measures taken at this level should leave as much range for national decision as possible and should respect the well established national arrangements and the organization of member states legal systems suited to the Community's legislation;
-the European Parliament should proceed to a detailed examination considering the compliance with the principle of subsidiary of each proposed action;
- The Commission should submit an annual report to the European Council regarding the compliance with the principles of subsidiary and proportionality.

The provisions already valid have created the possibility of an effective application of the principle of subsidiary. Moreover, jurisprudence has brought the necessary corrections, that can be largely found in the Treaty establishing a Constitution for Europe. The Constitutional Treaty, beyond all its imperfections and the new regulations in the economic area which have generated vivid discussions that are the origin of the negative vote coming from the citizens of certain Member States during the ratifying process, sets up a definitely higher perspective in comparison to the one established by the Treaty of Amsterdam. The constitutional Treaty introduces subsidiary as a fundamental principle for the functioning of the European Union and explicitly provides the mechanisms for its application and control.

The precision of the constitutional text requires us to render it completely: "The use of the Union competences is governed by the principles of subsidiarity and proportionality" (Art. I-11 paragraph 1 CT). "According to the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union should act only if and insofar as the objectives of the proposed action could not be entirely fulfilled by the Member States, either at central level or at regional and local one, but could rather, in reason of the range or effects of the proposed action, be better fulfilled at the Union level. "The institutions of the Union should apply the principle of subsidiarity as stated in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments should ensure compliance to that principle suiting the procedure established by that Protocol"(Art. I-11 paragraph 3 CT).

"In respect to the principle of proportionality, the contents and form of the Union action should not exceed what is necessary to fulfill the objectives of the Constitution. "The institutions of the Union should apply the principle of proportionality as stated down in the Protocol on the application of the principles of subsidiarity and proportionality" (Art. I-11 par. 4 CT).

Without considering the future rules and referring only to the actual ones, the regulation of exerting powers by Member States and by Community institutions in all the areas in which the integration is based on concurrent competences is a matter relying on the very essence of subsidiarity. In this circumstance, the Member States as well as the Union may take legislative actions but with a view to fulfill the objectives established by the Treaties. The Communities enjoy the competences conferred on them by Member States; nevertheless, the Member States have not lost them, exerting these powers at the extent of the condition that the Union has not taken any action in the area[5]. The principle of subsidiarity leaves a large power to the Member States to take legislative action for the European integration aiming to make it more appropriate and to ensure that decisions are taken as favorably to the citizens as possible. Practically, this is the case of directives which leave to and simultaneously oblige the Member States to adopt appropriate internal measures according with their distinctiveness and which should fulfill the aim of the directive in question.

We consider that this is the most harmonious solution which corresponds entirely to the essence of European integration: a single aimed coordinated decision taken through legislative measures which reflect the diversity, the distinctiveness and the particularities of the European continent, from the Atlantic Ocean to the Carpathians. The principle of subsidiarity submits direct legislative action taken by the communities institutions to the fulfillment of conditions such as the one of the inefficiency of the Member States or the pan-European dimension of the action at this level. Therefore, to rule by the means of a regulation, which would establish a certain behavior without taking into account the distinctiveness of the Member States, might presents a series of disadvantages and especially social effects which would raise question the validity of the system and its democratic nature. That's the reason why the harmonization of the national legislations through directives is more likely.

The lack of an explicit framing of the judicial control on the application of the principle of subsidiarity and particularly the restraining of the subjects that could initiate such a control remain the noticeable deficiencies of the Protocol of Amsterdam which have brought many critics about the resolution of subsidiarity.It is shown constantly that even though the established procedure offers a mechanism in the frame of which the Member States hold the main part, in fact the powers conferred to the Commission, which proposes legislative actions and to ECJ, which always emits judgments in an "European" spirit, lead to the application of the principle of subsidiarity in favour of the Union[6].

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[5] See Guy Isaac, Droit communautaire générale, Ed. Armand Colin, Paris, 1999, pag. 41 ; Jean Boulouis, Droit institutionnel de l'UE, Ed. Montchrestien, Paris, 1997, pag. 141 ; Takis Tridimas, The General Principles of EC law, Ed. Oxford, 1999, pag. 119; Bianca Maria Carmen Predescu, Drept institutional comunitar, Ed. Universitaria, Craiova, 1999, pag. 58-65.

[6] See Joël Rideau, Droit institutionnel de I 'Union et des Communautées Européennes, L.GD.J., Paris,1999, pag.515 - 518; Louis Cariou , Jean- Louis Clergerie, Annie Gruber, Patrick Rambaud, L

The judicial review mainly has a caution meaning, both at national and Community levels, as all institutions are required to verify their own actions in order to ensure that the principle of subsidiarity should be complied with and national Parliaments by cooperating with the European Parliament should ensure the respect of the national interests. The control aspect is provided by the fact that Member States have the possibility to bring before the ECJ in order to deny them legislative measures adopted by Community institutions without complying to the principle of subsidiarity. The same possibility is given as well to the institutions in order to ensure the compliance with the Treaties[7].

Despite its ambiguous[8], philosophical and political character which leaves room for discution according to the circumstances and to the pursued aim, with the weekness but also the advantage of permitting a large evaluation range, the principle of subsidiarity must be recognized as a basis of the European foundation, which settles the relationships between the member states and the Union in exerting the powers conferred to them in order to accomplish the integration. Nobody could doubt of its political character. In fact, we consider that the nature of the principle couldn't be other than political as it concerns the relationship between the authority power of the state to decide upon the national and international affairs and the exercise of such powers in a joined manner together with other Member States of the European Union.

Subsidiarity is a principle of political nature which has attended judicial recognition being enlighted by the Treaties and being subject to a judicial review, thus receiving a juridical character in its application. We also consider that in the context of the European Community it has received the most successful application, gaining a material nature and not only a theoretical one. Thus, we plead for its application in the framework of the European sustainable development system, excluding the possibility of abandoning it for reasons of inefficiency. We would like to express our conviction that in the perspective of the future evolution of the Union the principle of subsidiarity should bear the function of a "key" able to equilibrate the complex mechanism of the Union in order to fully satisfy 0the needs of the citizens as well as the common interests of the member States.

'Union Europeenne, Dalloz, Paris, 2000, pag 184-185; Bianca Maria Carmen Predescu, Ion Predescu , Aristide Roibu - Principiul subsidiaritatii, Ed. Monitorul Oficial, Bucuresti, 2001, pag. 98-105.

[7] See Guy Isaac, Droit communautaire générale, Ed. Armand Colin, Paris, 1999, pag. 41 ; Jean Boulouis, Droit institutionnel de l'UE, Ed. Montchrestien, Paris, 1997, pag. 41-41; Joël Rideau, Droit institutionnel de I 'Union et des Communautées Européennes, L.G.D.J., Paris,1999, pag. 518-526.

[8] See Louis Cariou , Jean- Louis Clergerie, Annie Gruber, Patrick Rambaud, L 'Union Europeenne, Dalloz, Paris, 2000, pag. 182 ; Bianca Maria Carmen Predescu, Ion Predescu, Aristide Roibu - Principiul subsidiaritatii, Ed. Monitorul Oficial, Bucuresti, 2001, pag. 103-104.