DEFINITION AND LIMITS OF THE PRINCIPLE OF SUBSIDIARITY

Local and regional authorities in Europe, No. 55

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Report prepared for the Steering Committee
on Local and Regional Authorities (CDLR)

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FOREWORD

This study has been written for the Steering Committee on Local and Regional Authorities (CDLR) of the Council of Europe by Mr Alain Delcamp, Chairman of the Group of Specialists on the principle of subsidiarity. In addition to Mr Delcamp, the Group included MM. Massimo Balducci, Professor at the Faculty of Political Science of the University of Florence (Italy), Jost-Dietrich Busch, Ministerial Adviser at the Ministry of the Interior of the Land Schleswig-Holstein (Germany), Jean-Claude Nemery, Professor at the Faculty of Law and Political Science of the University of Reims (France), Peter Pernthaler, Professor at the Institute of Public Law and Political Science of the University of Innsbruck (Austria), Marc Uyttendaele, Professor of Law at the Free University of Brussels (Belgium). A representative from the Standing Conference of Local and Regional Authorities of Europe, Mr Alexander Tchernoff, Burgomaster of De Bilt (Netherlands) also participated in the meetings of the Group.

Within the Council of Europe the Steering Committee on Local and Regional Authorities is the body responsible for organising and implementing inter-governmental activities concerning the structure and operation of local government in member States as well as for promoting transfrontier co-operation between territorial authorities or communities. For further information about the activities of the Council of Europe in these fields, please contact the Territorial Authorities, Transfrontier Co-operation and Regional Planning Division.

INTRODUCTION

When the Council of Europe's Steering Committee on Local and Regional Authorities asked a group of experts to carry out a study on the definition and scope of the principle of subsidiarity, it had several reasons for doing so:

- current uncertainty regarding the organisation of state institutions and the future of local authorities given the economic crisis: traditional systems have been called into question, particularly the Welfare State, for both ideological and financial reasons;

- at the same time, the need for greater public involvement and for decisions tailored to specific situations has never been greater;

- within the Council of Europe itself, one could hardly fail to observe the contrast between Western democracies, which seem to have reached a standstill in the process of reforming local and regional authorities, and at the other end of the spectrum, the evident need of Central and Eastern European states to find a footing for their new democracies. Rather than models however, they need points of reference to help them tackle not only their institutional re-organisation problems, but also the requirements thrown up by reconstruction and the developments within their societies;

- in the more highly developed countries, structures have become increasingly complex because developments in trade and their economies have led to increased cross-penetration and a proliferation of different levels of administration.

All these factors make it necessary to take a comprehensive new look at democracy and local institutions.

It seemed to the Steering Committee that the concept of subsidiarity, which had been given new emphasis by the discussions on European construction, but which already existed in outline in the Council of Europe's European Charter of Local Self-Government, could serve as a basis for this re-organisation. It therefore instructed a group of experts from various different legal systems to consider the definition and scope of this principle. One cannot fail to be struck by the contrast between the new topicality of the word - which has become rather a fashionable subject - against the background of the construction of the European Union, and the uncertainty, not to say vagueness, over its definition. It may be that the very vagueness of the concept has led to its success, since in discussions on the development of the European Community, it has been adopted both by those wanting more Community and by those who have called for less Community and greater attention to the opinion of the individual state.

The group of experts accordingly worked along the three following lines:

- trying to clarify a concept rooted in very varied political and philosophical traditions, which nonetheless all belong within the common pool of European construction;

- demonstrating that the principle existed already in texts prepared by the Council of Europe, particularly the European Charter of Local Self-Government, opened for signature on 15 October 1985 and in force since 1 September 1988;

- checking to see whether the concept which emerged could, with the benefit of additional study, be a worthwhile concept for the Council of Europe and its member states, and whether it was likely, refering as it did to a power as close to the citizen as possible, to strengthen and promote local democracy.

I. TOPICALITY AND AMBIGUITY OF THE CONCEPT

1.1 The current situation in Europe

"Subsidiarity" is a fashionable idea today, although its meaning remains unclear. One might indeed wonder why it is enjoying such success given that its origins are to be found in the distant past[2]. It is doubtless well-suited to a world experiencing not only an economic crisis, but also a crisis of values marked by "new" ideas and a degree of legal vagueness[3].

It is also significant that this notion, although part of the political and legal tradition of many European countries (principally those with a Germanic culture), reappeared in the headlines during the debates which preceded the signature of the Treaty on European Union[4], which was supposed to represent a qualitative step forward towards greater integration among the twelve member states of the European Economic Community. The echoes it found in several of the political and economic traditions but also its very vagueness certainly helped to bring about agreement[5].

This is how it came to appear acceptable both to those who want Europe to become a federation and those who were demanding greater recognition of states' autonomy. Furthermore, although the word subsidiarity appears explicitly in the text of the new Maastricht Treaty, by itself it has no legal consequences[6]. It seems to be an invitation to apply the provisions of the Treaty in a certain way.

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2 In her book "L'état subsidiaire", Madame Chantal Millon-Delsol finds its origin as far back as Aristotle. Paris, PUF, 1992, 227 pages.

3 Mireille Delmas-Marty, "Le flou du droit: du code pénal aux droits de l'homme", Paris PUF, 1986, 332 p. It is also interesting to note that it was precisely in an analysis of the application of the concept in France that a sociologist specialising in institutions mentioned "the reasonable degree of vagueness and redundancy which are indispensable conditions of participation and flexibility", which with "complexity" characterise public administration in a modern society. Jean-Claude Thoenig "La décentralisation dix ans après", Paris, LGDC 1993. G. Gilbert and A. Delcamp ed. p.100.

4 The idea had already been introduced by the Single European Act at the same time as jurisdiction in environmental matters: "The Community shall take action relating to the environment to the extent to which the objectives ... can be attained better at Community level than at the level of the individual member states", Article 130 R, §4 (Article 130 G, which provides for complementary action on the part of the EEC to that "carried out in the member states" in matters of research and development). Some authors see it already in the Treaty on the Economic Coal and Steel Community, particularly in Article 5 (François Berger, "Le principe de subsidiarité en droit communautaire". Les petites affiches, July 1992, p. 41).

5 "Indeed we know that the apparent consensus around the principle of subsidiarity is possible only because it conceals different interpretations". Jacques Santer, Prime Minister of Luxembourg. Introduction to the Jacques Delors Colloquium 1991: "Subsidiarity: the challenge of change" organised by the European Institute of Public Administration at Maastricht, 21 and 22 March 1991, p. 32.

6 But it can be used to support an appeal to the Court of Justice according to the interpretation it has been given by the European Council itself. (See note below).

It is an "across-the-board" concept which can be invoked in relation to all the other provisions of the Treaty and also the various legal measures produced by the various organs applying it.

No definition, at best a direction, a series of tentative indications for Community action in a document full of imprecise concepts: "sufficiently", "better achieved", "what is necessary", "to achieve the objectives", subjective notions which leave the way wide open for interpretation or practical developments[7].

In fact, apart from its ambiguities, which require clarification, the success of the concept of subsidiarity **comes at a time when the traditional model of the state is being questioned**, fuelled by the difficulties of European construction, and especially the fears engendered by increasing centralisation of the EEC without appropriate democratic participation.

The increased internationalisation of relations and the creation of supranational structures have also induced the authorities below central government level to consider that they could also exercise powers in fields formerly the preserve of the nation-state.

Mention should also be made in this context of the creation of - or the discussion on the pros and cons of creating - a second level, frequently described as "regional" in many States, without the problem of the allocation of powers between the different levels always being clearly resolved.

The new reliance on the principle of subsidiarity can thus be seen as an attempt to respond to the numerous new problems of state organisation.

1.2 The situations to which it is intended to respond

Recent years have been marked by a questioning of the welfare state which was constructed after the second world war to revitalise the economy and dispense "general well-being".

The economic crisis, particularly the rise in unemployment, have revealed the limitations of such a model which is becoming less and less attractive due to the anonymity and complexity of the decisions it engenders and above all the steady increase in contributions levied on individuals and companies. The large, the enormous, the distant, are no longer synonymous with efficiency.

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[7] "*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 cannot be *sufficiently* achieved by the Member States and can therefore, by reason of the scale or effects of the proposed 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." (Treaty on European Union, Article 3(b). It will be remembered, however, that the European Council of Edinburgh of 11 and 12 December provided an "official" interpretation and a means of application by community institutions (see particularly Actualités communautaires No. 283, February 1993, p. 21 and also the commentary on the conclusions under the title, "From the Legal Demystification to the Political Ambiguity of Subsidiarity".

At the same time, ways of thinking have changed and are increasingly resistant to notions of hierarchy and dependence. The context is more favourable to a diminution of the role of the state which would be restricted to the major functions of diplomacy, defence, the currency, maintaining stability, etc which derive from the sovereignty it alone enjoys in federal as well as unitary states.

In western Europe, particularly in countries with a strong public sector imprint, these trends and requirements have resulted in a high degree of "denationalisation", while almost everywhere a desire to give the individual more initiative justified a general movement towards decentralisation, in unitary as well as federal states.

The reappearance of the term under discussion corresponds to the necessity of giving a name to these changes which, while affecting very different areas of life, are the manifestation of a general, profound change in society, marked by the rediscovery of the individual, his needs and his potential.

The uncertainties in the development of contemporary societies have thus helped to bring back into the limelight a concept rooted in numerous long-standing philosophical and political traditions of European thought.

1.3 History and philosophical basis

The idea of "subsidiarity" is more than just a word: it appears today to **convey a political philosophy**, and it is interesting to note that this is in fact the significance it has in the history of ideas.

It places the individual at the centre of social organisation and it is for this reason that it is to be found in most western currents of thought: from the policy Aristotle defined as "the art of governing free men" to the role Saint Thomas Aquinas gave government of "ensuring, increasing or preserving the perfection of the beings in its charge", or again "providing for its subjects while respecting their nature" and later the liberalism of John Locke and his successors or the various trends of social Catholicism.

The idea of subsidiarity is thus at the heart of very different - and sometimes opposed - doctrines. **It is linked not to the ends of society but to the principles governing its organisation**, "the question of the type of system comes after the question of the extent of government powers"[8].

The basic idea underlying the principle is that political power should intervene only to the extent that society and its constituent parts, ranging from the individual to the family, the local community and various larger groupings, have not been able to satisfy the various needs. Subsidiarity thus **goes beyond a simple principle of institutional organisation and is applied first to the relation between the individual and society and then the relation between the society and the institutions**, before possibly providing the inspiration for a division of powers between the base and the summit. It was the papal encyclicals, in particular that of Pius XI (though a decisive role was previously attributed to the jurist Althusius), issued in 1931 for the fortieth anniversary of Rerum Novarum (Quadragesimo Anno) which gave it its fullest formulation: "This most serious principle of

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8 Millon-Delsol, op. cit., p.83.

social philosophy must not be changed or undermined: just as the powers they are capable of exercising *on their own initiative and by their own means must not be taken away from people and transferred to the community*, so it would also be an injustice and would seriously disturb the social order *to take from the lower groupings and give to a wider community of a higher rank, the functions which they are capable of fulfilling themselves.* The natural purpose of any social intervention is to *help* the members of society and not to destroy or absorb them".

1.4 Definitions and different acceptations

The above text illustrates several of the interpretations generally given to the principle which are the root of **its profound ambiguity**:

- it is a **principle of social organisation**. Nothing makes it a basic principle of a democratic system, except the recognition of the freedom of the individual. This is, moreover, one of the reasons why it has provoked a degree of suspicion since it is usually invoked in a relatively traditionalist context;

- **its perfect application** obviously **presupposes the existence of social groups**. It is, furthermore, developed as a reaction against excessive individualism. Thus, in the past, it inspired organicist ideologies - in which individuals are only the parts of a whole and can pursue no other end than the "common good" exterior to them - or corporatist deviations (the Austria of Chancellor Dollfuss or the Portugal of President Salazar);

- most importantly, **it involves quite different, even opposed, implications which are to be found in its Latin etymology**.

The **first meaning** of the word "subsidiary" evokes the idea of **substitution**, hence something of secondary, lesser, importance. It is in fact the name given in Antiquity to reserve troops. This means that the higher authority, primarily the state, can intervene only **to the extent to which the lower authority (or the individual) has shown or proved its incapacity**. This first meaning is the basis of the principle of non-interference by government and at the very least presupposes a definition of the conditions in which its application can be considered legitimate or desirable. The principle of subsidiarity is therefore **firstly a principle of limitation of power but which has no normative character. Rather than defining a norm, the principle of subsidiarity indicates a trend. It leaves open the concrete conditions of its application and these can therefore vary according to the circumstances of time and place.**

The **second meaning** evokes the idea of **help** (subsidium) and has the connotation of the **idea of intervention**. Here it is a question of assessing, not if the authority has the right to intervene, but if it has the duty to do so. Far from implying pure liberalism, subsidiarity is thus a concept well-suited to modern societies in which there are a multitude of "duties"[9]. Subsidiarity in this second sense **must**

[9] It is in this duality of meaning that Jacques Delors, who has done a great deal to bring the principle back into fashion, sees the originality of the approach: "subsidiarity is not only a *limit* on the intervention of a higher authority in the affairs of a person or community which can act itself, it is also a *duty* of this authority to act in relation to that person or community in such a way as to *give* it the means to fulfil itself". Or "subsidiarity proceeds from a moral defence, which makes respect for the *dignity* and *responsibility of the individuals* of which it is composed the purpose of every society". European Institute of Public Administration, op. cit. pp. 8-9.

however be distinguished from intervention in the now traditional sense which is the basis of the welfare state. **It implies a type of help which encourages and authorises autonomy**. To refer again to the encyclical, it is "helping the members of society and not destroying or absorbing them". Unlike the intervention of the welfare state, which is blind, whose aim is equality and therefore excludes discrimination, the intervention of the subsidiary state does not, according to Madame Millon-Delsol aim to "grant equal freedom of action" but rather to persuade the actors to develop their capacity to the maximum, although it may mean directing their ends by appropriate laws[10].

Subsidiarity thus brought up to date and freed of its historical, ideological and religious trappings appears to be **an invitation to rethink social relations in a context of greater autonomy** and to seek ceaselessly a balance between freedom of the individual and the various existing bodies (local and regional authorities in the national state, states in international society and, in particular, regional groupings) and the necessary and supervisory authority of the State which is naturally responsible for security, social cohesion and the overall regulation of the economy.

It can therefore be understood why the principle of subsidiarity, which is difficult to express in legal terms, has been particularly important in inspiring the organisation of the modern federal states of Europe (especially Switzerland, Austria and Germany), countries where legal commentary on the subject has been particularly abundant[11], especially since the second world war, although it has not resulted in its being given constitutional status, as some authors would have wished[12]. An analogous debate is now developing within the EEC[13].

Neither the word nor the concept has had the same success in Italy or France, which is hardly surprising in the country of Jacobinism. It should be noted, however, that a definition of subsidiarity was to some extent used, in France as we shall see in the appendix, to determine the respective powers of the state, municipalities, departments and regions in 1983.

Thus the principle of subsidiarity has **three principal acceptations**:

- **a philosophical acceptation** which is being rediscovered but which is likely to be refined to the point of becoming one of the tools of analysis of contemporary societies and, perhaps, one of the guiding principles of their institutional revolution,

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[10] Op. cit., p. 227.

[11] One German author, H Kalkbrenner, has identified more than twenty different attempts to define the principle. Die Rechtliche Verbindlichkeit des Subsidiariätsprinzip, p. 518.

[12] The debates about the reconstruction of German institutions along federal lines found support in the fact that German philosophers had been addressing the subject since the nineteenth century. Furthermore, it was a man with a German cultural background, Monsignor Ketteler, who was the "inventor" of the word.

[13] See especially V. Constantinesco, "La subsidiarité comme principe constitutionnel de l'intégration européenne", Swiss Review of International Economic Relations, October 1991, pp. 209ff.

- **a legal acceptation**, still faltering and whose clearer definition is encountering objections of principle as well as technical objections,

- **a technical acceptation** as a criterion for the analysis of the respective powers of the different levels of government and their possible redistribution.

Accordingly, the principle can serve as a guide not only at the time of defining and allocating powers, but also when implementing them.

Seen from the institutional angle alone, it would thus operate at three levels:

- institutional organisation (implying the sharing of public powers in general - and not only those of local authorities - between the different levels vested with legal capacity and equipped with the means enabling them to exercise this capacity in their respective sphere of competence);

- as a criterion for *policy formulation*;

- as a criterion for *policy implementation*.

Nevertheless, whenever it is proposed to introduce a new principle for application in legislations of different origin and philosophy, it is necessary to guard against the different interpretations which may be put on such a concept owing to differences of cultural background or political context. This is especially true for the principle of subsidiarity owing to its relative novelty within the legal order, its intrinsically vague character and the fact that it has more to do with the method of organising powers than with the aims of public action. It has thus been possible **for it to be interpreted in two different ways**: namely to justify transfer to a higher institutional level in the power structure on the one hand and, on the other, to maintain a particular power at the level closest to citizens. In the rest of this report, it is therefore **proposed** to opt for **one interpretation and advocate the application of the principle according to its original meaning, ie implying that it should be endeavoured as far as possible to manage affairs as closely to the citizen as possible and to depart from this principle only for reasons of absolute necessity**.

1.5 Object of the study

Attention will be devoted more particularly to these different institutional aspects. Since the ground has hardly been cleared, it was felt important to provide operational criteria which could be applied as precisely as possible. The concept under consideration is undeniably in vogue and although it may only constitute a temporary response, its current topicality testifies to the considerable interest which contemporary societies are paying to the redefinition of relations between the centre and the periphery. It would have been regrettable for the Council of Europe not to take an interest in the subject considering that it is already implicit in the European Charter of Local Self-Government.

II. THE DEFINITION OF THE EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT AND SOME PRACTICAL APPLICATIONS OF THE PRINCIPLE IN NATIONAL LEGAL SYSTEMS

One of the greatest paradoxes of the principle of subsidiarity is that it is not explicitly named anywhere (apart from recent developments in European Union) although much legislation refers to it implicitly, as though most European countries already applied the principle without realising it. It is therefore less surprising that a **definition of it is to be found** in the European Charter of Local Self-Government, a Council of Europe Convention opened to signature in Strasbourg on 15 October 1985:

2.1 Definition of the European Charter of Local Self-Government

"Public responsibilities shall *generally* be exercised, *in preference*, by those authorities which are closest to the citizen. Allocation of the responsibility to another authority should weigh up the *extent* and *nature* of the task and *requirements of efficiency* and *economy*". This definition is to be found in Article 4 which is entitled "Scope of local self-government".

It is presented as a standard of general scope that the signatory states commit themselves to incorporate into their legislation. The expression "*in preference*" marks a political choice since it refers to the criterion of *closeness* to the *citizen*.

This is in fact an expression of the principle of subsidiarity, the general principle of institutional organisation, which tends to favour the base over the summit. The Charter thus **anticipates** the provisions of the Maastricht Treaty whose preamble advocates "an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen". It is particularly interesting to note in this respect that the rapporteur of the Commission for Regional Policy, Planning and Relations with Regional and Local Authorities of the European Parliament, Mr Arbeloa Muru, who is preparing the first European Parliament/ Local Authorities conference of the Community, explicitly refers to the Council of Europe Charter in the resolution he is proposing[14].

The approach of the European Charter of Local Self-Government appears less ambiguous than that underlying the succinct definitions given within the framework of the EEC, notably that in the Spinelli Report which could perfectly well be interpreted as favouring integration, ie increasing the power of the higher authority[15].

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[14] Draft report (No. PE 204-739) of 20 April 1993 on local authorities in the political and institutional construction of European Union: the principle of subsidiarity and the Committee of the Regions. The proposal is quite explicit in paragraph F: "*considering that the respect for local self-government, the essential core of the competence of local authorities, constitutes an authentic application of the principle of subsidiarity* and that local authorities are the level of political participation closest to the citizen.."

[15] "The Union acts only to undertake tasks which are more efficiently undertaken in common than by the states working separately, in particular those requiring the action of the Union because their effects reach across national borders".

There thus appears to be **a fundamental difference** between the Council of Europe's approach and that of the EEC. The latter has to find a balance between the political objective of union and the initial powers of the states (but also in some respects their constituent parts, as the German *Länder* have pointed out) while the former simply has **the priority task of spreading ideas of local and regional self-government as widely as possible, without any interference, in the internal organisation of its members**. Paragraph 2[16] of Article 4 of the Charter can thus be understood as assuming an automatic (or inherent) power of local authorities. It goes without saying that this power can be reduced in the name of other imperatives - which call for explanation as the principle of subsidiarity cannot be viewed in isolation - but not to the point that it does not cover "a substantial share of public affairs" (Article 3.1).

These are two different, complementary approaches which can, however, give rise to significant differences in the way the principle is translated in law.

Furthermore, paragraph 3 of Article 4, in addition to this general guideline, provides **several criteria for dividing powers** between authorities:

It can depend:

- on the *nature* of the task,

- on its *extent* (the idea of size).
  These are more or less "objective" notions.

There are also two more subjective notions, given the well-known difficulty of evaluating public policies: those of *efficiency* and *economy*, remembering that there is a bias in favour of decentralised management in the Charter. This is in fact more likely to be adapted to the citizens' real needs and more easily controlled by them. It remains to be seen whether the term "efficiency" takes full account of this dimension.

In the third place, the Charter defines more clearly than any other document, the second aspect of the principle of subsidiarity, namely that the higher authority **has a duty** to assist the lower authority to accomplish its task.

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[16] "Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority".

Thus, as well as the provisions that emphasise the self-government to be preserved[17], there are as many (and perhaps more) provisions which emphasise that **the actual means** to make self-government effective must be made available:

"Local self-government denotes the right and the *ability* ... to regulate and manage" (Art. 3.1).

This ability involves a number of prescriptions which amount to duties on central government[18] and deal with the principal means:

- status of personnel enabling high-quality recruitment on the basis of merit and competence (Art. 6.2);

- status of the local elected representatives which must provide for "the free exercise of their functions" (Art. 7.1);

- the right "within national economic policy, to adequate financial resources of their own" (Art. 9.1), "commensurate with the responsibilities" (Art. 9.2), "of a sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the cost" (Art. 9.4), composed in "part at least" of "local taxes and charges of which, within the limits of statute, they have the power to determine the rate" (Art. 9.3).

The last two financial prescriptions are very significant of the spirit which must prevail in the application of the principle of subsidiarity in its last acceptation: state intervention is necessary **but to enable each authority to acquire the means to exercise its own will**:

"The *protection* of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures" but which "*must not diminish the discretion local authorities may exercise within their own sphere of responsibility*" (Art. 9.5).

"The provision of grants *shall not remove the basic freedom of local authorities to exercise policy discretion* within their own jurisdiction" (Art. 9.7).

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[17] "Local authorities shall, within the limits of the law, have full discretion to exercise their initiative..." (Art. 4.2), "Powers given to local authorities shall normally be full and exclusive"..."Local authorities shall be able to determine their own internal administrative structures" (Art. 6.1). The Charter also specifies the limitations and seeks to "make objective" the conditions of administrative supervision to which these authorities are likely to be subject: the procedures and cases must be provided for by the Constitution or by statute (Art. 8.1); it shall normally aim only at ensuring compliance with the law and with constitutional principles" (Art. 8.2); it must be exercised "in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect" (Art. 8.3). Finally, local authorities must have a "right of recourse to a judicial remedy" to secure free exercise of their powers and respect for the principles of local self-government (Art. 11).

[18] This is the interpretation we believe should be given, although it may not be sufficiently clear in the explanatory report on the European Charter of Local Self-Government to the succession of "imperatives" that figure in the text (use of the word "*doit*" rendered by the auxiliary "shall" in English).

If the intervention of the higher authority is necessary (because of the "extent" and "nature" of the task or the "requirements of efficiency and economy"), the lower authority must be consulted "in so far as possible, in due time and in an appropriate way" (Art. 4.6).

In this respect, the Charter explicitly mentions two areas:

- "the planning and decision-making processes for all matters which concern them directly", (Art. 4.6);

- the way in which redistributed resources are to be allocated (Art. 9.6).

Despite a sometimes cautious wording, the Charter defines **an ideal to be achieved** which rests on a general conception, broadly inspired by the principle of subsidiarity, of the place of local authorities in the state, **be it unitary or federal**.

The presence of these definitions in the European Charter is easily explained by the fact that the idea of subsidiarity covers a sort of heritage common to the states of Western Europe, and this heritage can be transposed and used as a guide in the new Central and Eastern European democracies. The appendix gives examples of the application of the principle in the legislative systems of some of the member states. Without claiming to be perfectly representative, particularly owing to the absence of a country of the Anglo-Saxon, or more exactly the Common Law, tradition, the group of countries chosen - which corresponds to the nationalities represented in the group of experts -is nevertheless quite significant because it includes countries from the north, centre and south of Europe, countries with a Germanic tradition and with a Roman tradition, centralised unitary states, federal states (Germany and Austria) and so-called regional or "composite" states, three of which have recently undergone important changes all of which involve the transformation of the state structure towards greater local or regional autonomy.

2.2 The principle of subsidiarity and national legal and administrative systems

If the by no means easy task of summarising the references to and applications of the principle of subsidiarity in the five countries studied were attempted, the following observations might be made:

1. Without directly, let alone explicitly, inspiring the reorganisation of powers in the various countries, **the renewed interest in the principle of subsidiarity coincides with a desire to reallocate powers** between central government and other political authorities.

It cannot be said, however, that this movement - which tends rather towards decentralisation - coincides with the retreat of the interventionist state. It can be postulated, on the other hand, that decentralisation is **the only means of achieving democratic efficiency in this type of state.**

2. To confine ourselves **to the sharing of powers** which is at the heart of the debate on subsidiarity, although it is not the whole issue, **two observations are unavoidable**:

a) Firstly, power-sharing **is more the result of history or political contingency than of the deliberate application, whatever it may be, of a principle**. One is struck, however, by the proliferation of bodies examining these problems prior to the most recent changes in legislation (in

unitary states, with the exception of the Belgian model, which is a special case because of the linguistic dimension and the weight of parties in a political system, as well as in federal states). In no country, however, except in a few very particular areas (defence and monetary policy) has a power been allocated in its entirety to one level. **The factors militating towards collaboration are therefore greater** (when they do not explicitly appear in the texts) than those tending towards complete autonomy of the different levels. The result is, particularly with the emphasis on the sub-state level, a large degree of **complexity** in which the need for transparency which would enable the citizen to play his part is not always satisfied.

This complexity is the origin of **institutions or regulations encouraging co-operation** - particularly the need for "federal loyalty" which has just been inserted in the Belgian Constitution (Art. 107 ter, bis), but which has been present in the Austrian Constitution since 1923 (Art. 22) and plays a prominent role in the jurisprudence of the German constitutional Court - and making provisions for consultation but are most often introduced in relation to specific provisions:

- the idea of common outline plans worked out jointly by the German Federation and *Länder* for the accomplishment of new "common interest tasks", section VIIIa on "common interest" introduced during the constitutional revision of 12 May 1969 (Article 91(b) refers explicitly to the notion of agreement);

- the Austrian constitutional reform of 1974 has, for example, introduced the possibility of the conclusion of treaties between the federation and the *Länder* on the one hand and between the Länder on the other. This reform is generally regarded as having initiated the change from "unitary" federalism to "co-operative federalism".

The Austrian institutions are also concerned with associating local authorities in the decisions concerning them. Under a provision of general scope (Article 115/3 of the Constitution), the right to represent local authority interests is assigned, *inter alia*, to the Austrian association of communes (*Österreichische Gemeindebund*) and the Austrian association of cities (*Österreichische Städtebund*). This provision has given rise to individual measures prescribing consultation in the constitutions of certain *Länder*.

The various projects assigned to the French regional authorities by the 1982 and 1983 laws must be developed "in co-operation" with the departments and municipalities. The Regional Council must respect "the integrity, autonomy and attributions of departments and municipalities" (Art. 59, law of 2 March 1982). Furthermore, the "contrats de plan" (contracts of Plan) are an attempt to take into account regional priorities in the context of the State's investment policy.

Article 3-6 of the new Italian law of 8 June 1990 provides that "regional law establishes the form and modes of participation of local authorities in the development of regional plans and programmes" but until then the modes of association were very limited and quite ineffective (annual clarification of a "national health plan" never carried out; "state-regions conference" with purely consultative powers).

As a whole, therefore, participation by territorial authorities in drafting the rules affecting them, or indeed which govern the organisation of their own powers, seems relatively inadequate and characterised by informal elements - including the influence of the system of representation (existence or otherwise of a local government chamber, number and strength of representative associations, legislation on incompatibility of posts, particularly with respect to the accumulation of different mandates) - rather than by organised procedures.

In most of the countries under consideration, however, **there are judicial mechanisms** for settling possible disputes. There is one responsible for defining powers in Federal Germany where constitutional case law has limited the right of federal or *Länder* legislation to intervene in the definition of local powers. There is a hard core of powers, a vital sphere (*Kernbereich*), which must at all events remain.

Local authorities in Austria can also apply to the federal court but the right is incomplete and is limited to the relatively weak provisions of Article 118 of the Constitution and also to the constitutional law on taxation which gives ordinary federal law the power to allocate and share out taxes.

The German Constitutional Court has also been called upon to make a decision on the relations between the municipalities and the *Kreise*. The *Kreise*, which enjoy a broader sphere of action and greater human and financial resources than the municipalities of which they are composed[19], have tended to take on more and more responsibilities, particularly in the name of their co-ordinating role. The Court sought to put a stop to this in a judgment of 28 November 1988 whose grounds reaffirmed the right to self-administration of the lowest level (it was a question of deciding on the merits of the transfer to the *Kreise* of the responsibility for organising refuse disposal). The Administrative Courts of Appeal of Bavaria (4 November 1992) and Rhineland-Palatinate (21 May 1993) have, moreover, declared illegal the amount of the compulsory contributions the *Kreise* were demanding from the municipalities.

In Italy, the Constitutional Court has seldom had to issue rulings on regional laws, but up to now has tended to interpret the law in a way favourable to central government. In France, as we have seen, the Constitutional Council has had some opportunity to hand down case law on the matter, but this body is not accessible to local authorities.

b) Secondly, although concern about them is not entirely absent, the powers of "the level nearest to the citizen", that is the municipal level and, to a lesser extent, the powers of the intermediate level[20], where it exists, seem to be **the subject of less in-depth examination than the level immediately below the central level** (region or federate state). This is partly due to the **unfinished nature of the process of giving autonomy to the regional level**.

Alongside the local (particularly municipal) authorities' own powers, there are an increasing number of powers "delegated" either by central government or its components. This way of exercising powers is statutory in Germany (the notion of indirect state administration - "*Mittelbare Staatsverwaltung*") and in Austria where the Constitution clearly states the dual nature of the municipality - "territorial authority" and "administrative district" (Art. 116.1) whose "field of action" is "in part its own and in part delegated" by the Federation or the *Land* (Art. 118.1).

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[19] In Germany the larger municipalities also carry out the functions of the *Kreise* ("*Kreisfreie Städte*").

[20] Although it is necessary to agree on the term, the need for co-ordination of municipal activities is not always satisfied by the intermediate level or levels where these exist (province, *département*, *Kreis* and *Regierungsbezirke* in Germany, etc).

This **trend towards delegated administration** is developing concurrently with the process of giving autonomy to the sub-state level. Thus, in Italy, Article 118, para. 3 of the Constitution provides that "the region *exercises its powers normally by delegating* to the provinces, the municipalities or other local bodies or by using their services". Italian municipalities can therefore exercise at once their own powers, powers on behalf of the regions and powers on behalf of the state and this has an effect on their relations with the higher levels. In such cases one cannot speak of local self-government and the type of relation might appear to be closer to a hierarchical model than one entailing supervision. In fact the municipality acts, according to the text of the Austrian Constitution, "*by delegation by and following the instructions* of the federal or *Land* authorities (Art. 119.1). If this model were to be developed (central conception and decentralised implementation), the accent would have to be placed on the closest possible involvement of the implementing authority in the drafting of legislation.

Although France has a high degree of decentralised administration by government agents (prefects), it is not unfamiliar with this dual functioning, but it concerns only local executive officers, particularly the mayor who, *as the representative of the state*, exercises certain powers (such as police duties, over and above municipal public order, and civil status registration) under the prefect's authority. These powers are limited, however, compared to those linked to the executive functions of the municipal council.

This development of delegated functions alongside its own inherent powers is important for **evaluating the effective exercise of local self-government:**

3. These general trends are accompanied by **a considerable effort to reduce supervisory procedures**, by replacing *a priori* supervision by *a posteriori* supervision. The representatives of the higher authority are often only the instruments of this supervision and this can lead to judicial arbitration. Similarly, there is a tendency merely to monitor the legality of an act or decision (France).

These, at any rate, are the general trends. It is important, however, to round out this statement by the following observations:

a) Some constitutional provisions are opposed to the disappearance of supervision of the appropriateness of an act. Such is the case in Belgium where regionalisation of supervision has not been accompanied by the revision of the article authorising "the intervention of the supervising authority or the legislature, to prevent the law being violated or the general interest harmed" (Art. 108-6°)[21].

Certain provisions of the German Basic Law which imply instructions for powers delegated from the Federation to the *Länder* will be mentioned below (p.34) [22]. It is moreover in this connection that most of the disputes heard by the Constitutional Court arise.

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[21] The mere review of legality has, on the other hand, been deemed compatible in France with the provisions of Article 72, para. 3, which gives the government representative "responsibility for national interests, *administrative supervision* and the respect of the law".

[22] The Federation can review not only the "lawfulness of implementation" but also "the implementation of *measures taken to this end*".

The "supervision" of local authority organs is carried out by the authorities of each *Land* and interdependence is thereby established between the second and third echelons of government. Such "supervision" applies to the exercise of both inherent and delegated powers. In the former case, review relates only to the lawfulness of the measures concerned; in the second case, it covers the effectiveness of the action undertaken and may entail instructions.

The supervisory power of the Federation or *Land* over the municipality is much greater in Austria. It seeks to prevent "the municipality exceeding the limits of its jurisdiction, and ensure that it fulfils its duties within the terms of the law" (119a.1). In addition, the *Land* can monitor municipal administration with regard to its economy, cost-effectiveness and expediency (119a.2).

b) The supervising authority often retains the right to request a second deliberation (Germany, Austria) and can sometimes cancel the local authority's decision;

4. To these considerations concerning "official" supervision are added what might be called "**oblique supervision**" - the fact, for example, that the outline laws that define the powers of the Italian regions are so detailed that the result is often a further restriction of the powers of local authorities - but above all the leeway left to the higher level by the **financial difficulties** of the local authorities and the rules governing the allocation of resources. This factor is mentioned particularly in the Austrian and Italian reports, and we know that the Belgian municipalities have been subject to successive attempts to balance their books since 1975 which have justified new methods of supervising the expediency of their management.

New means of financing have been implemented in at least four of the five countries and, although insufficient, these show that the objectives set by the charter have been taken into account. They might be considered (from the triple aspects of "retained" or "granted" tax revenue, grants to be used at the discretion of the authority, but serving also as the basis for a system of equalisation) to be so many applications of what we have termed subsidiarity in the second sense, namely the state's duty to provide the levels nearest the citizen with sufficient resources for the exercise of their powers. The German Constitutional Court has recognised (27 May 1992) the Federation's right to allocate specific grants to come to the aid of the weakest *Länder* in cases of urgent financial difficulty.

The financial difficulties all states have experienced in recent years which has led them to go back on certain measures (notably the indexation of transferred resources) must not be allowed to diminish the scope of existing systems for the sharing out of resources.

In this respect, Germany, France and Belgium have quite satisfactory records, although brought about by different means (local taxes and tax-sharing in Germany based on a quasi-constitutional system of allocation, local taxes in France, while Belgium represents an intermediate position). Austria has a system for providing resources to local authorities which is comparable to Germany's but in a context in which the federal state has a much more important place, 62% of revenue and of civil service staff[23]. Only Italy (before recent legislative changes) seems to be clearly behind in this respect: the regions receive only 14.5% of their income from taxation, 26.5% through various state transfers

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[23] Figures provided by Erich Pramböck during the Conference on the European Charter of Local Self-Government, Barcelona, 23-25 January 1992. Studies and Texts No. 27, p. 107. P.PERNTHALER regrets, however, that the sharing of resources is not subject to a limited supervision by the Constitutional Court (principles of fiscal justice and being commensurate with needs).

and 40% from the national health fund which cannot be freely used. The municipalities acquire only 11% of their revenue from taxation but 46.7% from state transfers, and 6.2% from regional transfers[24].

In the light of this survey - which is in itself open to discussion and cannot necessarily be generally applied to all member states - it is possible to get a better idea of the value of including the principle of subsidiarity in the Charter, and by extension in member states' national legal systems, and particularly to identify the new developments to which it might lead.

This rapid summary, together with the problems and imperfections it reveals, clearly demonstrates the need to find a definition of the principle tailored to the institutional organisation problems of modern states. This would also imply ascertaining to what extent the application of the principle of subsidiarity, defined as the constant search for a decision-making level as close to the citizen as possible, can be harmonised with other imperatives governing the organisation of our societies.

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24 Annuario 1991 delle autonomie locali, pp. 930 and 1022.

III. CONDITIONS FOR INTRODUCING THE PRINCIPLE OF SUBSIDIARITY IN MEMBER STATES PRIOR TO ITS PRACTICAL APPLICATION

Because of the variety of interpretations attributed to the word, its philosophical rather than legal nature, and the varied and incomplete ways in which it has already been included in existing legal traditions, it is hard to envisage a very precise definition of the principle of subsidiarity which is likely to meet with everybody's approval. Indeed, one of the advantages of the concept, as opposed to more formal legal solutions, such as a rigid and supposedly exhaustive definition of the powers appertaining to central, regional and local authorities, is that it allows development and can adapt to different national situations.

On the other hand, it cannot be introduced without previous study comparing it with other perhaps more familiar principles of organisation and leading to specific suggestions likely to serve as the basis for a recommendation.

This study will therefore examine in turn the problems of application specific to the principle, the conditions in which it could be linked with other existing methods of organisation, and finally ways in which it might be included in the legal systems of member states.

3.1 Problems arising from the philosophical rather than legal nature of the principle, and the importance this could have within the Council of Europe

The debate has already taken place within the Community and, to a lesser extent, at national level: "Although the abstract concept of subsidiarity might have a clear consonance, its practical application to certain specific authorities poses a number of problems. Firstly, politicians do not share the same definition of subsidiarity and do not agree on the criteria to be applied to make it operational. A consensus must, therefore be found on these criteria before there can be any hope of a practical application of the principle"[25].

It was precisely because of the difficulty of defining such criteria that the drafters of the Maastricht Treaty preferred to content themselves with a simple reference to the principle rather than attempting even to outline the division of powers between the Community and member states, which was at one time envisaged[26], which would have clearly brought the structure of the European Community closer to a federal philosophy and could, at the same time, have reassured some member states (and even some components of those states) about the risks of creeping dispossession contained in the Treaty of Rome from the outset[27].

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[25] Klaus Gretschmann at the Jacques Delors Colloquium held in Maastricht on 21 and 22 March 1991. Subsidiarity: the Challenge of Change, IEAP (ed), pp. 64 ff.

[26] See especially Giscard d'Estaing's report to the European Parliament No. A3-163/90 Part B, 1990.

[27] Particularly Article 235.

It was for quite different reasons that the principle was not included in French legislation during the period of the "decentralising" consensus in 1979-1982: "After much reflection (the Commission) considered that it was not expedient to include in the law an article expressing this principle, an article which could have no normative value"[28]. Hence the preference given to eliminating non-essentials and a detailed division of powers in two outline laws. However, what followed showed the limits of such a choice since these laws have been constantly modified and have given birth to such a multiplicity of texts that one might regard French decentralisation as suffering from an excess of regulation.

These two examples **demonstrate the difficulty of defining the exact legal scope of subsidiarity**:

- the complexity of modern societies, added to an undoubted trend towards the diversification of levels of administration, mean that the great majority of powers are shared powers;

- the principle of subsidiarity is a dynamic principle capable of accentuating a given trend. It should not therefore be expressed in over rigid terms;

- any system of power-sharing should make allowance for the idea that all territorial authorities, even those at the same level, do not necessarily enjoy the same capacity to exercise their powers;

- effective application takes for granted that the corresponding financial and human resources necessary to the exercise of the transferred powers will be made available. But it is in fact impossible to make provision in advance for an objective allocation of these resources between the different levels.

These objections are not in themselves enough to justify not making the effort to define the principle as precisely as possible. They do however **provide an incentive to reflect on the means of indicating** clearly **the new ideas - whether legislative or behavioural - that one would like the principle to be infused with**.

The question of the authority that would supervise the application of the principle was also raised within the Community. The solution of entrusting the task to the Court of Justice was not immediately obvious as the judges themselves were not, it appears, in favour of the idea, no more than were some member states for various reasons. The principle remains, in fact, essentially a political principle. Thus the court would have found itself in a situation in which it would have to decide on a case-by-case basis what was appropriate and efficient in the development of policies and the level which should act and in what capacity. The process of seeking compromises would be cumbersome and costly and the Court *would thereby have a political role*[29].

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[28] Tinguy Report (Senate) cited above.

[29] Klaus Gretschmann, op. cit., who concluded: "For this reason we do not believe it would be useful to give the concept of subsidiarity the status of a general clause with legal consequences".

It is therefore not surprising that during the preparatory debates the idea emerged of entrusting the safeguarding of the principle to a specially elected second chamber (the beginnings of a European Senate?) whose task would be to represent national parliaments which many people complained were being dispossessed without genuine procedures for democratic supervision being established in the EEC[30].

To these two problems, can be added a third, specific to the Council of Europe, which results from the fact that, unlike the EEC, the ideas generally deduced from the principle already to a very great extent inspire the European Charter of Local Self-Government, as we showed in Part II.

The question is therefore: is it possible, by including an explicit reference to the principle, to define the objectives of the charter more clearly and reinforce the encouragement given to the member states to apply them? In the exegesis of the principle, are there factors which might help to increase institutional reflection and democracy in the states of the Council of Europe? In this connection, although the introduction of the principle of subsidiarity at Community level remains in some respects completely ambiguous, since it can be used to support either a strengthening of community power or greater emphasis on the autonomy of the individual state, this cannot be the case within the Council of Europe. The Council's message is addressed to sovereign states, and its aim is to encourage them to give greater weight to local democracy within their own institutions. This fundamental difference between the Council's approach and that of the European Union needs to be stressed. The unanimous opinion of the group of experts is therefore that the principle has to be seen **as a means of strengthening local democracy**, and not at all (except in case of real need) as a means of diminishing the local level in favour of the regional, or the regional in favour of the central. The introduction of the principle should therefore mainly help to reinforce the ideas already advocated by the European Conference on Local and Regional Authorities.

Before making concrete suggestions, it is important to remove a second hindrance: the relationship between the principle of subsidiarity with the other, existing general principles which any institutional construction must take into account.

3.2. The principle of subsidiarity cannot be considered in isolation

The idea of entrusting to the lowest level everything that cannot be more efficiently done by the level immediately above must be balanced against other principles before being accepted: the group of experts has selected four, which often overlap:

- unity of action,
- efficiency,
- unity of application,
- solidarity.

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[30] See, for example, the report presented by Mr Michel Poniatowski on behalf of the delegation of the French Senate for the European Communities. Documents Sénat No. 45 (1992-1993) of 12 November 1992.

a) The principle of subsidiarity and unity of action within the state

Unity of action is surely one of the most important requirements facing states today. While demanding constant effort by the public authorities, it is all the more necessary today in view of the prevailing crisis which calls for a mobilisation of energy on all quarters and as economical a management of resources as possible - one which is therefore desirous of avoiding duplication of effort.

This concerted action is all the more difficult to achieve because of the increased number of authorities or levels involved. It can therefore be invoked to justify certain compromises between the desire to bring decision-making closer to the citizen and the creation of new structures designed to prepare and carry out the required decisions. Where existing structures remain unchanged, however, it can only be justified, in accordance with the idea of proportionality embodied in the principle of subsidiarity, in so far as it is necessary and in those fields where it is naturally called for.

It cannot indeed be sought in every field since, by definition, there are powers that can be better exercised locally than centrally because they presuppose first-hand knowledge of situations: social policy in general and particularly matters concerning living conditions (roads, housing, culture, assistance, youth policy); development and town planning. These are fields in which the greatest possible freedom must therefore be left in theory to local initiative, central - in the Federal states the federate entities - or regional government intervening only through general directives (environment, minimal regulations, general planning outlines, principles of economic policy). Central (or regional) government must then have the ability to give up its regulatory power and only intervene in the name of unity of action in so far as is clearly necessary or in any case according to the rules formulated by means of procedures which allow for the participation of interested local or regional authorities.

This presupposes a system of representation in which the decentralised authorities are able to participate in the definition of what constitutes the desirable intervention of central government (participation in a second chamber of the Parliament with effective power to determine the powers of the various levels of administration, or a contractual system based on a system of representation of the various categories of authority, - national and regional associations -, whose opinion would be required before any modification).

If one wishes to consider that all power tends to seek its own increased ascendancy[31], reference to the opposite principle would doubtless encourage the achievement of a fair balance. In the form of a "*constitutional leitmotiv*", the principle of subsidiarity could at least be regarded as **a permanent "anti-upward" clause that could only be transgressed for clearly established reasons**. Subsidiarity could be more than just a questioning of the principle of unity of action; it could serve as a basis for debate, ensuring that the latter principle is not systematically put to the fore.

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[30] A passage of Toqueville's "Democracy in America" in which he says that "the force of free peoples resides in the municipality" is often quoted but the preceding words are usually omitted: "municipal freedom is a rare and fragile thing ... a highly civilised society tolerates attempts at municipal freedom only with difficulty".

b) Subsidiarity and efficiency

Contrary to what might have been suggested in the past, there is no criterion here. Present economic or social difficulties are themselves imputable in some respects to the ideology of an efficient state based on notions of rationality and profitability in which the notion of service has been insufficiently taken into account because it is not marketable.

We will mention here only those attempts to measure the efficiency of the organisation of powers made by the economic theory of federalism. This theory is essentially based on an analysis of the supply of services and involves three types of consideration:

- Proximity. This makes it possible to be more familiar, at lower cost, with people's preferences and thus adapt the supply of services;

- The effects of excesses. The optimum allocation of powers is achieved when the services produced wholly benefit only the citizens of the producing community. If this is not the case, the producing community, which takes into account only the marginal cost/benefit which concerns it, will produce an insufficient quantity relative to the marginal social benefit (which would itself take account of the benefits accruing to the residents of neighbouring communities). The larger the territory, the more the benefits can (theoretically) be internalised, at least for some services.

- Economies of scale whose effect is to reduce costs (again theoretically) as the quantity produced increases[32].

This analysis has the merit of taking into account the effects of size and has inspired some territorial reforms (more or less built on the idea of "optimum size"). It may not always tend towards increased centralisation (notion of diseconomy of scale or effect of exceeding certain thresholds, especially owing to the development of bureaucracy). It can be a useful guide **but does not include what might be called the "well-being" of the people and the cultural and historical problems**.

At the time when the Treaty on European Union was being drafted, the Commission of the European Communities also focused its attention on this problem and submitted communications to the Council and to the European Parliament. It regretted first of all the absence of a list of principal fields of national competence which it felt would have introduced a more practical dimension with regard to subsidiarity in respect of citizens, rather than merely asserting that national competence is the rule and Community competence the exception (cf Article 3b, para. 1). Regarding the fields in which the powers of the Community on the one hand and states on the other are not defined - and where, consequently, the principle of subsidiarity should apply to the full -the Commission maps out certain criteria but maintains above all in its preamble that it is for the Community to prove its prerogative and not the converse.

These assessment criteria are then subdivided into two groups: those which may be used to determine how powers are shared out and, in particular, whether Community action is really necessary, and those which may serve to define the required degree of action once the Community has been recognised as the competent body.

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[32] Cf especially King: "Fiscal Tiers: the economics of multi-level government", George Allen and Unwin, London and Sydney, 1984.

The first group includes what the Commission describes as a **test of comparative efficiency** according to which various elements should be taken into account, including several specific to the Community: economies of scale, cost of failure to act, need to maintain a reasonably coherent policy, limits of individual national action, need to observe the rules of competition.

The comparative efficiency test should bring out the "added value" which should result from Community action.

Regarding the degree of **intensity** of such action, in which the idea of proportionality should prevail, the Commission makes the following recommendations:

- where efficiency is equivalent, the approach which leaves greatest freedom should be chosen,

- where action is indispensable, excessive regulations should be avoided,

- priority should be given to drafting in clear and concise language.

These recommendations indicate an appreciable shift in attitudes representing a move away from excessive concentration on criteria based purely in terms of economic or financial viability. This is an important trend and it takes into account the fact that, in institutional and political affairs, efficiency can only be a relative concept. As long as the principle of subsidiarity is not interpreted as favouring narrow, systematic "localism", it could appear very well suited to changes in contemporary societies. It does not conflict with the notion of efficiency, but leads to the consideration of other criteria than the usual ones. It helps to qualify the importance of the financial and economic aspects, which have governed our societies for too long, by introducing considerations such as human factors and well-being, which alone can help to bring about a consensus.

By virtue of the mobilisation of individual and collective responsibilities which it can bring about, the principle of subsidiarity can therefore contribute to greater efficiency. **It encourages the addition of qualitative variables to quantitative factors**. Alongside the **strictly technical considerations**, it makes it possible to demonstrate the value of the human elements, giving proper importance to "politics" in the fullest sense of the term.

c) The principle of subsidiarity and unity of application

In societies naturally more enamoured of equality than in the past, since better able to compare the various situations within them, the citizen's concern to have equal conditions of existence in every area is undoubtedly one of the most difficult factors to reconcile with the application of the principle of subsidiarity. By favouring local analysis of situations, the principle of subsidiarity **encourages diversity** both in structures and in policies[33]. Although an attempt needs to be made to reconcile the requirements of equality and the introduction of the principle of subsidiarity, this should not be allowed to undermine a fundamental principle highlighted by the constitutional courts, namely the promotion of a better balance in citizens' standards of living. The aim is simply to make sure that while allowing, in the name of the principle of subsidiarity, for a certain amount of freedom of organisation at local level, institutions should be better able to take account of local situations and to pursue more suitable policies. Particularly in this specific case, the principle of subsidiarity consists more in advocating **a method of action** than in introducing a competitive element.

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[33] In this context, the debate diversity/unity concerns only the institutional dimension. The problems of minorities, in particular, are not considered, as their solution involves taking into account other principles in addition to the principle of subsidiarity.

This has various consequences:

- it can lead to a division of powers which, without necessarily coinciding with exclusive fields of competence, distinguishes within the various areas what requires solidarity (either central or regional) and must therefore be entrusted to the higher level, and the part which implies "an individual evaluation of situations". Thus in France there is the distinction between financial social benefits (old age pension, invalidity benefit) which comes under the central level (state or social security) and benefits in kind (housing for the old and the handicapped) which are the responsibility of the local level;

- it can lead to a division (which is, as we have seen, frequent in federal states) between unity of legislation and its implementation, which necessarily involves the ability to evaluate its application in real-life situations (verification that the criteria for granting a certain type of aid have been fulfilled).

The principle of subsidiarity here seems to militate **in favour of a restriction of delegated functions in favour of local authority powers**. There is no reason why, instead of being regarded simply as implementing agents, local authorities should not be entrusted with the implementation of various types of government legislation without thereby giving up their autonomy. There is a risk that habits acquired when supervising delegated powers makes the supervision of the local authorities' own powers less objective (not to mention the questions of lines of demarcation which are multiplied by this distinction, particularly if powers can be delegated by central as well as regional government).

Subsidiarity can reduce the possible rigidity and ill-adaptedness that unity of application can involve. Without entering into the debate about distributive justice and commutative justice which would doubtless involve profound questioning, subsidiarity can be satisfied by the **acceptance of a degree of statutory diversity or a spreading of powers within one category of authorities according to population, for example**. This could pave the way for initiatives or innovation. In the same way, in exploiting the dynamic, progressive potential of the principle, some decentralisation could take place on an experimental basis preparatory to its possible generalisation.

d) Subsidiarity and solidarity

Subsidiarity and solidarity appear at first sight to be contradictory, in that solidarity seems to be easier to achieve in a centralised context - permitting a better balance between rich and poor - than in an extremely decentralised context.

Indeed, one of the results of the philosophical analysis of the concept was to show that the idea of subsidiarity also implies (in its second meaning) the idea of aid, of a duty of assistance **with a view to a fuller assumption of responsibility**. Subsidiarity is therefore not opposed to the idea of aid, and more specifically to the idea of balancing out resources among different authorities, which, within certain limits, may legitimately lay claim to intervention by the central or even regional levels. Subsidiarity however introduces the idea that equalisation or aid have no meaning unless they lead to equal capacity for action and are accompanied by acceptance of responsibility. Subsidiarity may therefore be contrasted with assistance. The normal concomitant of such help is obviously the acceptance by the beneficiary authority of responsibility for the "full and unrestricted" exercice of the powers which have thus been, if not assigned, at least left to its initiative. It might be thought that, in this way, the use of solidarity could help to overcome the ponderousness and anonymity of the mechanisms instituted in numerous countries.

In order to achieve a balance between solidarity and subsidiarity, a certain number of precautions will be necessary at the practical level, and certain limits will have to be set with regard to principles. In order to achieve maximum efficiency, the organisation of solidarity (the same applies to co-operation, one of its possible modes of application) presupposes that the local authorities, and the responsibilities assigned to them, should be as clearly identified as possible, if only to enable their needs to be compared according to criteria which should also be as objective as possible.

As far as principles are concerned, subsidiarity must not be used as a pretext, on the grounds for example of giving greater responsibility to "natural communities" (such as the family), for reducing the level of social protection.

The comparison between the principle of subsidiarity and the consequences it implies - freedom, diversity, responsibility - and the other requirements of social organisation shows that there is, strictly speaking, no contradiction but rather a succession of tensions which should be harnessed in the attempt to establish a dynamic equilibrium. It has indeed often been observed that the mention of subsidiarity appears less an obstacle than a means of forcing consideration of various too often neglected aspects of public action. Subsidiarity thus appears rather to engender a method of organisation than to act as a destructive force. Between a type of organisation based on the notion of hierarchy and a type giving free rein to hypothetical co-ordination between a myriad of scattered local "principalities", taking into account the philosophy of subsidiarity inspires reflection on a new type of organisation. Far from reducing the problem to an antagonism between the centre and the periphery, the new organisation would be designed to establish social relations on confidence in the capacity of the bodies close to the citizen, primarily the local authorities, in the realisation and acceptance of a system of common values defined by the legislator.

The more explicit incorporation of such a principle therefore offers a chance to rethink the question of local self-government, making it possible to view it not as something conflictual and static, but on the contrary in a more dialectic and dynamic perspective.

3.3 Possible modalities of inclusion

All the above thoughts and analyses, and particularly the concern to translate the principle into terms capable of fitting in to existing discussion, tend towards the identification of three possible "institutional translations" of subsidiarity:

- **a power-sharing formula** which assigns to the lowest level what could not be better or more efficiently done by the level immediately above. This formula could be applied not only to relations between central government and the level immediately below it (which we might term "regional" - in the Federal States this means the federate entities) but also to the relations between the regional level and the local level(s), giving priority to the municipal level, so as to prevent any sub-state centralisation;

- **a political principle** whereby powers are exercised as near the citizen as possible, ie powers taken away from the state should be delegated only to authorities run or supervised by **elected representatives**. This idea should be given particular prominence in connection with the current proliferation of bodies at local government level, over which the basic municipal authorities as such have sometimes no control;

- **an encouragement to review** in the light of these two central ideas **the existing distribution of powers in its entirety** so as to undertake any necessary reforms.

This poses an initial technical problem: **is it advisable to recommend an exclusive or shared division of powers?**

The arguments for and against are well known and have already been referred to:

- **the general clause** is attractive but, in the absence of appropriate controls (notably at constitutional level - which really exist only in the federal states, but not all of them; in Belgium the Court of Arbitration does not have jurisdiction over municipal powers), it runs the risk of remaining a dead letter or being only a residual clause. It is important, however, that it remains formulated as such, both to affirm the basic nature of local authority's power, power which is supported by the notion of "local community", and to express the fact that citizens spontaneously turn to this power first when a new need arises.

The principle must also be publicised in the form of a clear regulation at the appropriate legislative level. This should comprise a non-exhaustive enumeration, which would undoubtedly help to uphold local power, if only by providing references for the arbitration authorities or courts called upon to intervene. This enumeration could also play an educational role, encourage local authorities to assume their responsibilities and help the citizen in the task of supervision. An over-precise enumeration would, on the other hand, risk ossifying an essentially fluid situation. Many people on the other hand believe that such an enumeration would be difficult, or even impossible, to operate, especially if there is a large number of levels of autonomy, due to the overlapping of the various areas and the necessary diversity of those involved. **The advantages of attempting to enumerate the respective powers seem to us, however, to outweigh the disadvantages**. Autonomy can only be preserved and collaboration fruitful if there is a clear rule. In its aforementioned recommendation, the Commission of the European Communities also advocated that the hierarchy of norms should be constitutionally defined, particularly in the form of framework legislation.

The difficulty of the problem leads us - and it is this which differentiates between the principle of subsidiarity which is analysed as a principle of action, and mere power sharing - to recommend **great flexibility**. This can be manifested in several ways:

- between the various authorities, vertically as well as horizontally, it militates in **favour of the contractual approach** in preference to hierarchy or supervision, on the understanding that every effort should be made to prevent such a contract from being used as a weapon by the stronger party against the weaker - which in turn means that statutory safeguards remain necessary;

The proposed contract should concern the devolution of powers according to actual situations, notably with regard to the criterion of size;

- there must be experimental devolutions of power, especially to prepare or take account of an existing statutory diversification in a particular category (diversification of municipal powers according to strata of population, for example). Decentralisation of power can itself be subordinated, by the higher authority, to conditions of co-operation between lower authorities, conditions which might be combined with financial advantages;

- if the emphasis is placed on a policy formulation and implementation division - notably in states where there is no nation-wide state administration (which is the case in most federal states) - the compensation must necessarily be the consultation of the lower authority, in an appropriate way, when the law is being drawn up.

The important question remains of the **co-ordination** between the various authorities which would seem dispersed while at the same time each holds a share of power in a particular field. The solution of a negotiated "superior law" is theoretically possible but difficult to operate. It would seem better to opt for a functional process, consisting in naming one participating authority which would devote its energy to co-ordinating a given programme.

The model thus proposed is necessarily complex, like contemporary societies which are at once complex and resistant to ideas of hierarchy and uniformity.

One last factor which is important, bearing in mind that opting for the level nearest the citizen, that is to say, the municipal level above all, unless of course there is evidence that the power could be exercised in better economic and social conditions by the higher level, is meaningless unless accompanied by practical **measures for the exercise of the powers concerned**, namely **adequate administrative, human and financial resources**. Reform of administrative division at the local level can only be used to achieve this objective. The principle of subsidiarity cannot, therefore be applied unless **both its apparently contradictory aspects are taken into account simultaneously**:

- non-intervention, for as long as possible, in the exercise of power by the authority nearest the citizen, which means that it is essential that supervision would intervene only *a posteriori* and concern lawfulness;

- as much intervention as is necessary for the effective exercise of the freedom thus accorded. This is already formulated in Article 6 of the European Charter of Local Self-Government which advocates "appropriate administrative structures and resources for the tasks of local authorities".

IV. CONCLUSIONS AND GUIDELINES

The change in outlooks resulting from the opening of frontiers, the complexity of modern societies, the limits to centralised state interventionism, together with the threats which economic recession pose for the survival of local self-government, where it exists, and the increasingly strong aspiration of citizens to participate in the decision-making process as it affects them directly are all justifications for refocusing attention on the usefulness of establishing as wide a measure of local self-government as possible.

The principle of subsidiarity is capable of injecting new life into the ever necessary debate on power relations between the centre and the periphery. It is at one and the same time a principle of social organisation according to which certain tasks are withdrawn from individual citizens or social groups only when they can be performed more efficiently and more satisfactorily by a grouping at a higher level; a technical principle for distributing powers between local, regional and national authorities; an invitation to change the manner of state intervention in a way that fosters initiative, encouraging the central authority to help with getting something done at the appropriate level rather than doing it itself.

The Council of Europe and its associated body, the Standing Conference of Local and Regional Authorities of Europe are the organisations which have the greatest justification for referring to this principle in so far as it is already explicitly stated in the preamble and in Article 4 (3) of the European Charter of Local Self-Government, opened for signature on 15 October 1985 and in force since 1 September 1988: "Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizens". This idea, which appears in the preamble, is defined, inter alia, in Articles 4 (2) and (3), 6 (1), 8 (1), (2) and (3) and 11 which emphasise the elements of local self-government to be preserved.

It is further amplified - and this is one of the original features of the Charter - by a whole series of provisions (Article 3 (1), 6 (2), 7 (1), 9 (1), (2), (3) and (4)) which spell out the practical means for translating local government into reality and constitute binding obligations for the signatory states. The two aspects of the principle which we identified above are therefore also present in this text.

Despite the difficulty of transposing the principle of subsidiarity as defined into normative terms, the working party endeavoured to examine to what extent the text of the Charter itself might be adapted in order to take the principle more fully into account and encourage signatory states, each in accordance with its own choices and its domestic rules, to give a new lease of life to local and regional self-government.

Owing to the cumbersome procedures involved, however, it did not feel that it was possible to propose formal amendments to the Charter. It nevertheless put forward a certain number of recommendations intended to amplify the contents of the Charter and to invite the governments of member states, whether or not they have ratified the European Charter of Local Self-Government, to re-examine their legislation and practices with a view to incorporating an explicit reference to the principle or, alternatively, drawing the practical consequences when dealing with the different aspects relating to local and regional self-government. In so doing, the working party is perfectly aware that the current economic difficulties, and above all their financial consequences, are hardly conducive to a vast institutional debate and that the desire to economise resources and concentrate energies, especially to combat under-employment, may on the contrary induce governments to reconsider a number of provisions and even to postpone structural reforms which they might otherwise have regarded as desirable.

It nevertheless wishes to voice its unanimous belief that the principle of assigning responsibility to the local or regional level for exercising public powers affecting the daily life of the citizen complies with the democratic ideals underlying the organisation and message of the Council of Europe and that this belief, although it may be qualified by other considerations, should be stressed all the more since its usefulness does not always appear to be an urgent necessity.

It constitutes a long-term choice whose necessity should be constantly emphasised. The group recommends the following guidelines:

- reference to the principle of subsidiarity can only with a great stretch of the imagination be regarded as an additional normative reference. Rather it is **a permanent principle** which should guide the action of law-makers and governments, particularly when making sectorial reforms;

- the definition proposed in the European Charter of Local Self-Government (Articles 3 (1) and 4 (3)) can only be considered as an example in this respect;

- the application of the principle of subsidiarity must take into account the existence of other principles governing the organisation and functioning of the state, for example unity of action, efficiency in the widest sense, unity of application and solidarity;

- the principle of subsidiarity is **essentially a political principle since its aim is to bring decision-making as close as possible to the citizen**. It is therefore an invitation to **bear in mind the unavoidably political character of decentralisation, which can only be understood as endowing elected authorities with their own powers rather than delegated powers**;

- it is not enough the state the principle. Its practical consequences must be taken into account, particularly with regard to power-sharing which constitutes its most direct application. Even if it seems difficult to arrive at a detailed power-sharing formula, let alone a standard formula, the application of the principle and the verification of its proper application (for example by a review of its constitutionality) imply that every effort must be made **to specify in the law a common core of powers vested in each level, while accompanying this measure if necessary with simple rules for co-operation between the different levels**.

  - All authorities of the same level cannot, on the other hand, necessarily claim to be able to exercise the same powers, if only owing to differences in size or resources. The state must endeavour to reduce the most glaring imbalances by means of an equalisation system, whereas the advisability of having a structural reform or transferring the exercise of a given power to a higher level should be left to the initiative of each national legislator; an intermediate solution and one which would leave scope for future developments might also consist in allowing a given authority at a given level, within certain limits, to claim the right to exercise one or other power or, on the contrary, to forgo it. In the same spirit, certain powers should be able to be decentralised on an experimental basis.

- The principle of subsidiarity thus no doubt calls for a less formal approach, whereby greater room is left for the initiative of each authority, in order to ensure **participation by local and regional authorities in the definition of their own power**, to encourage them to have recourse to contractual agreements - provided these do not result in allowing the stronger party to impose its solutions. Certain safeguards should therefore be built into the system, for example to ensure a fair balance between a power transferred and the resources to implement it.

- If this system is to be effective, however, care must be taken to ensure that citizens can perceive it clearly: defending the principle of subsidiarity must be no excuse for excessive complexity.

- Hence the need, already pointed out, to **provide for suitable procedures to supervise the application of the principle**. These may take various forms: review by a constitutional court, a chamber of parliament, or an authority representing local and central government. If it is desired to define the rule in vague terms it will then be all the more necessary to have permanent non-governmental supervision by a body capable of interpreting the principle and ensuring its correct application.

- Further, there would seem to be a case now more than in the past for seeking greater decentralisation, not only vis-à-vis the central government but also - if the tendency to set up an intermediate level were to become more firmly established - **vis-à-vis this intermediate level itself**, frequently referred to as "regional".

Far from calling in question the fundamental concepts embodied in the Charter, therefore, recourse to the principle of subsidiarity means revitalising the text, while at the same time enabling local self-government to achieve a new standard of quality. The aim would then no longer be simply an institutional rearrangement but rather - at a time when there is a parallel tendency to reduce the sphere of public intervention - the incorporation of the principle in a more general political philosophy in which individual citizens and respect for their choices - particularly as regards striking a balance between the provision of new services and the financial burden entailed - would once more clearly become the purpose of public action.

APPENDIX

SOME EXAMPLES OF PRACTICAL APPLICATIONS OF THE PRINCIPLE IN THE LEGAL SYSTEMS OF VARIOUS MEMBER STATES:

The Republic of Austria, the Federal Republic of Germany,
The Kingdom of Belgium, the Republics of France and Italy

(This appendix is based on national contributions provided by the members of the group of specialists)

The principle of subsidiarity is not explicitly mentioned in either the legislation, much less the constitutions, of any of the five countries considered. Its absence is tempered, however, by the way and the degree to which reference is made to it in domestic debates.

a) Germany

It is probably in **Germany** that the principle is most familiar. Much has been written by lawyers on the subject and it is regarded as one of the fundamental principles of the organisation of federalism, not only at institutional level but also in discussion about the relative places of the public authorities and society.

The German Constitution offers no definition of a general principle for the division of powers but the idea of subsidiarity is applied in varying degrees by a **number of provisions** of federal law. These concern the allocation of both decision-making and executive powers.

The most important is to be found in Article 30 of the Constitution which provides that "the exercise of governmental powers and the discharge of governmental functions shall be incumbent on the *Länder*, in so far as this Basic Law (*Grundgesetz*) does not otherwise prescribe or permit". This general power should be looked at alongside the provisions for legislation and especially those of Article 70.1 which give the *Länder* "the right to legislate in so far as legislative powers are not conferred on the Federation", by the Basic Law.

A similar principle of power sharing can be found in the Austrian Constitution: "Any matter which the federal Constitution does not expressly assign to federal legislation or execution remains within the autonomous jurisdiction of the *Länder*[34] (art. 15-1).

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[34] The Austrian *Länder* are sometimes referred to as "provinces" or "federal provinces" in French, unlike the German *Länder* for which the German word is generally kept or translated by the notion of "federated state". The word "province" appears in Charles Eisenman's translation of the Austrian Constitution. See, in particular, his book "La justice constitutionnelle et la Haute Cour constitutionnelle d'Autriche" which appeared in 1928 (with a preface by Hans Kelsen) and was republished in France in 1986. Paris Economica Presses Universitaires d'Aix-Marseille. Since then the Austrian scholars have proved that the Austrian Länder were at the outset, states which voluntarily decided to come together (see P. Pernthaler, Die Staatsgründungsakte der österreichischen Bundesländer, Wien, 1979). Hence the expression *Länder* will be used for Austria in the remainder of the text.

In Germany, the general power is limited almost immediately by the "catalogue" of powers exclusive to the Federation (Art. 73 of the Constitution), its intervention in numerous areas of so-called "concurrent" powers (Art. 74) and the possibility it is given by Article 75 to enact outline laws which are "general rules" for matters which are important for local and regional self-government. The *Länder* do not have the right to legislate in the areas of concurrent powers except "*as long and in so far as* the Federation does not use its right to legislate" (Art. 72.1), which depends on how strongly the need is felt to achieve uniform federal legislation. The Federal authorities have a discretionary power (recognised as such by the federal Constitutional Court) to assess the need and to affirm that it be met, provided that due attention is paid to three criteria:

- risk that a law enacted by one *Land* might affect "the interests of other *Länder* or of the community as a whole",

- "protection of legal or economic unity and particularly the preservation of the homogeneity of living conditions" (principle of equality),

- inadequacy of existing legislation in each *Land* taken separately (Art. 72.2,3°,2°,1°).

Beyond these fundamental principles the Basic Law contains more precise provisions which demonstrate that, while the principle of subsidiarity is not invoked, it nonetheless inspired the drafters: this is particularly true of provisions concerning the family (Art. 6): "the care and bringing up of children are a natural right of parents and a duty falling to them *in the first place*" (notion of subsidiarity in the first sense). Article 35.2 provides that "in order to maintain or restore public order, a *Land* may, in particularly important cases, bring in personnel and equipment of the federal frontier guard to assist the police if, without this assistance, they are *unable* to fulfil their duties or can do so only *with great difficulty*" (the second meaning of subsidiarity).

The idea of the Federation assisting the *Länder* with the exercise of some of their powers is explicitly provided for in Article 91(a) (added in 1969) if the "tasks are *important* for the community as a whole and *if the Federation's co-operation is required to improve living conditions (common tasks*)"; the universities and the improvement of regional economic structure (including agriculture and fishing) are part of this.

The principle of subsidiarity is more specifically applied in the area of **executive powers**: the Federation cannot interfere in the implementation of *Länder* laws. The Constitution also reduces to the minimum the powers for which the Federation has its own departments. These are matters of national interest or for which the central administration is desirable or necessary: central bank, foreign affairs, customs, federal army and border guard (*Bundesgrenzschutz*), administration of federal waterways and navigation, postal services, railways (Arts. 87, 87(a), 87(b), 87(e), 88, 89, 108,1). The last two fields of powers are the object of fundamental reform aimed at privatisation and devolution of responsibilities to the Länder and local government.

Other federal laws are implemented by the *Länder* as though they were their own responsibility (Art. 83) under the supervision of the Federation.

In a number of specific areas[35], however, they act as executive agents and are directed by and under the close supervision of federal ministries (Art. 85.3 and 4).

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[35] Building and maintenance of federal roads and motorways, non-military application of nuclear energy (Arts. 90 and 87).

The application of the principle extends to the organisation of the judicial system: proceedings are initiated before the *Länder* Courts (first instance and appeal), which are responsible for the organisation, localisation, staffing, equipment and financing of the five categories of courts. The Federation intervenes in a number of ways to ensure the uniformity of the system: the laws applied are more often than not federal (under Article 31 which states that "federal law prevails over *Land* law"), the procedural codes, the five supreme courts and the Federal Constitutional Court play their part in the unification of law.

The principle is not applied in such a detailed way in favour of **municipalities and *Kreise*** (districts), which come under the laws of the *Länder* but which are guaranteed certain rights by both the federal Constitution (art 28.2) and the *Länder* Constitutions:

- regulation, "under their own responsibility, within the limits of the law, of all matters concerning the local community",

- administrative autonomy,

- financial autonomy based on special taxes or a share of the taxes assigned to the *Land* to which the municipalities belong (Art. 106.5, 6, 7)

b) Austria

As for the **Austrian *Länder***, Article 15.1 of the Constitution, which seems to confer on them very wide powers, follows a series of articles which define, often in a very detailed and complex way, their relations with the Federation:

- Art. 10, areas of *federal powers* both from the point of view of *legislation* and *implementation* (finance, the currency, civil law, etc). It is interesting to note that for many of these powers an exception is made for municipal powers which belong, therefore, to the (general) powers of the *Länder*: "keeping of the peace, public order and safety, *except the local police*" (Art. 10.7). Sanitation, with the exception of regulations concerning deaths and burials, and municipal sanitary departments" (Art. 10.12).

Most federal powers are referred to by a formulation including the word "*wesen*" (legal system), which means that they must be *broadly* interpreted, according to the case law of the Constitutional Court (civil and criminal law, communication, for example)[36].

- Art. 11: matters on which *legislation* falls to the *Federation* and *implementation* to the *Länder* (traffic police, for example). Paragraph 2 further provides that in administrative matters (administrative procedure, administrative criminal law, administrative implementation) federal laws may intervene even in matters coming within the jurisdiction of the *Länder* "as long as it is deemed necessary to enact uniform measures". Generally speaking, the Federation is also given the power to issue enabling decrees to implement its own laws.

- Art. 12: matters in which the Federation has *automatic legislative power* and the *Länder* a power of *implementation* and to enact "*implementing legislation*" (social protection, "public institutions for the judicial solution of disputes", land reform etc).

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[36] The court uses an historical method (Versteinerungstheorie) as modified by an actualisation method (intrasystematische Fortentwicklung). These methods often favour the Federation.

- Art. 13: this article refers the division of powers on matters of taxation to a special federal law (constitutional law of finances, 21 January 1948).

- Lastly, Article 14 inserted in 1962, deals with powers concerning "instruction" and "education", which are divided according to the previous subdivisions.

Most of the provisions dealing with municipalities are in Section C of Chapter IV which deals with the "legislative and executive powers of the *Länder*". They were added quite recently (in 1962) and are designed to "frame" the legislation of the *Länder* which have jurisdiction in this area.

The **municipality** - in Austria there is no intermediate level between local and *Land* authorities - is defined as "a territorial community which has *administrative autonomy*" and regarded as "an *autonomous economic entity*", which gives it the right to "own property of all kinds", "to operate economic enterprises", "manage its own budget" and "levy taxes" (Art. 116.1 and 2 of the Constitution), within the framework of federal and *Länder* legislation.

It has its own jurisdiction which includes all matters "which concern *exclusively* or *predominantly* the interests of the local community organised in the municipality and which are *capable* of being dealt with by the authority *within its territorial limits*"[37]. Austrian doctrine considers this formula as an application of the idea of subsidiarity.

Within the field of its own jurisdiction the municipality has the "right to freely and autonomously issue by-laws in order to suppress and remove obstacles to the life of the local community and to rule that failing to observe these by-laws constitutes an administrative infringement" (Art. 118.6). "The laws must expressly qualify as such the matters coming under the jurisdiction of the municipalities" (Art. 118.2) but the Constitution itself lists a number (Art. 118.3): local administrative regulations of various kinds (sanitation, construction, etc) and, in some respects, "local public safety", local planning, extra-judicial settlement of disputes.

The provisions which deal with the exercise of powers in federal states thus appears to be quite detailed but they **generally concern only the respective powers of the federation and the federate states**. The local authorities enjoy much more limited constitutional safeguards and the idea of a general organisation based on the principle of subsidiarity, while it may be subjacent - though nothing is less certain - only emerges occasionally and not as the expression of a general principle.

It is quite logical that constitutional or legislative provisions seeking to define a principle for the division of powers to the advantage of the lower level be even less numerous in **unitary states**. To this must be added the fact that the concept of subsidiarity was until recently not part of the legal tradition of France or Italy - or even Belgium.

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[37] Art. 118.2 of the Constitution.The same formulation is used in relation to "local security" by Article 15.2.

c) Italy

After an article clearly inspired by personalist philosophy - but which provides the basis for an interventionist state[38] - the Italian Constitution provides, however, that the Republic, *one and indivisible*, must recognise and *favour* local self-government; bring about the greatest possible administrative decentralisation[39] of state services; adapt the principles and methods of its legislation to the needs of self-government and decentralisation[40].

Chapter V of the Constitution contains substantial provisions which outline the architecture of the state in three levels: municipal, provincial and regional: "The regions are formed into self-governing bodies which have *specific powers* and their *own functions*, according to the principles laid down by the Constitution (Art. 115).

These functions - of which there are many - are enumerated in Article 117. The region is given the power to enact "laws within the limits of the basic principles laid down in state laws" on these matters. They each have their own "constitution" (Art. 123) and are financially autonomous "within the limits laid down by the laws of the Republic, which co-ordinate this autonomy with the finances of the state, provinces and municipalities". The latter carry out administrative functions "*of exclusively local interest*" attributed to them by the law and delegated to them by the regions (Art. 118).

For political reason, these provisions were not implemented for some considerable time. **The situation of the municipalities and the provinces**, in particular, were dealt with only after the application of the long-deferred provisions concerning the ordinary regions (law No. 108/1968).

Presidential decree No. 616/77 not only transfers new powers to the regions (transport, the environment, technical vocational education, crafts, educational assistance, etc); in addition, within the general framework of the functions thus assigned to the regions, it transfers the means of carrying out these functions directly to the provinces (supervision of waste disposal, for example) and even more so to the municipalities (allocation of public housing, assistance): these measures hardly seem to have simplified the institutional scene: "The result is quite a complicated construction, concerned more with the lawful allocation of powers than with a rational organisation of decision-making bodies" ... A study carried out in 1986 shows that "Italian municipalities fail to carry out at least those increased powers the law has given them"[41].

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[38] The Republic may remove economic and social obstacles which, because they limit the freedom and equality of the citizens, are contrary to full human development and to the effective participation of all workers in the political, economic and social organisation of the country (Art. 3, para. 2).

[39] But not devolution of legislative authority.

[40] Despite the statement of the unitary character of the state and because the municipalities were to continue until 1990 to a great extent to be governed by the fascist legislation on local government of 1934, the last part of the article shows a desire to go in the right direction. This article should be compared with the almost contemporary article of the French Constitution of 27 October 1946 which provides that "organic laws will extend departmental and municipal freedom" (Art. 89).

[41] Massimo Balducci, Etat fonctionnel et déconcentration. Leçons à tirer de l'expérience italienne, Brussels Story. Scientéa 1987, p. 91.

The Italian Law No. 142 of 8 June 1990 has since attempted to bring about an overall recasting of local self-government. It confirms the general power of the municipality (Art. 9) "for all administrative functions concerning the population and territory of the municipality, principally the organisation of social services, land-use planning and economic development, which are not expressly conferred on other authorities by a state or regional law according to their respective power".

On the other hand, the law enumerates the powers of the provinces (Art. 14).

d) Belgium

Belgium, which has begun a process of "federalism by disassociation", whereas most federal states have been formed by the "association" of pre-existing state bodies, seemed to be the ideal place for the application of the principle of subsidiarity.

In fact, this principle does not seem to have been used as the basis for the division of powers between the state, the linguistic communities and the regions. Thus each entity (a more appropriate word than "level" because of the equality introduced between the state and the federate entities) are given exclusive powers. Until the latest reform, however, ("the St. Michel accords") residual power was held by central government. The recent modification of the Constitution has reversed the principle but has not made it immediately applicable.

Although the powers are, in theory, exclusive, none has been granted in its totality to any entity (that is from federal state to region or federal state to community). The result is great complexity. Since the implementation of this change, in 1980 and then 1988, the theory of "implicit powers" has naturally been applied but quite restrictively. The Court of Arbitration (a constitutional court dealing with the allocation of powers, especially to settle disputes about legislative jurisdiction) has naturally accepted that a federate entity can take upon itself a power it does not have if this is necessary for the exercise of a recognised power, but it has done so on two conditions: that the matter lends itself to a "differentiated" regulation and that the "excess powers are marginal".

Increasing the complexity, the Court of Arbitration has not failed to accept implicitly the existence of concurrent powers. In fact, it has in a number of decisions accepted that, even independently of the application of the theory of implicit powers, the communities and the regions could take powers which belong to the residual powers of the authority in so far as the essence of these was not "voided of substance". Perhaps a link can be made here with the application of the principle of subsidiarity.

In the 1830 Constitution, which for a long time affirmed the unitary nature of the Belgian state[42], the only words to be found that evoke the idea of subsidiarity concern **the municipalities and the provinces**[43]. It is interesting to note firstly that these two categories of authority are mentioned in the chapter on powers "where Article 31 gives their councils exclusive power to regulate "*communal and provincial matters*" according to the principles laid down in the Constitution. Article 108 then enumerates a series of principles which must be embodied in legislation. Among these, two explicitly concern powers: the law must confer "on the provincial and municipal councils *all provincial and communal matters*" (initial provision). In 1970 furthermore, when the first phase of state reform was set in motion, a new paragraph provided for "*the decentralisation of powers to provincial and communal institutions*".

The constitutional provisions thus seem at once vague and all the more promising since they occur in a country in which "the tradition of communal self-government" is one of the founding myths. In fact, there is no definition in Belgium of the communal interest and its defence seems to have - let us hope temporarily - passed into the background due to the difficulty of establishing federalism[44].

The process of decentralisation which began in **France** in the mid-1970s was precisely a reaction against this "unidentifiable" nature of local affairs to which the liberal legislation of the nineteenth century repeatedly refers (French municipal and departmental laws of 1884 and 1871).

e) France

It became increasingly clear, particularly following a study during which mayors were questioned after the municipal elections of 1977, that the problem of the inadequate financing of local authorities and the growing "transfer of costs" to them by the state could not be resolved without a redefinition of powers.

This was at the heart of the work carried out principally by the Commission for the development of local responsibilities which was established in 1976 and which considered it necessary first of all to answer the question: "who does what? where are the powers?". Seeking a power-sharing criterion, the commission explicitly referred to the principle of subsidiarity of which it gave the following definition in its report: "it means consistently seeking the appropriate level for the exercise of powers, a higher level being chosen *only when* the lower levels *cannot themselves exercise* the corresponding powers. The state must therefore delegate to local authorities *all the powers the latter are capable of exercising*"[45].

This is an important innovation in the French legal tradition in a number of respects:

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42 Article 25, para. 1: "All powers emanate from the Nation".

43 The only Belgian political entity whose principal powers are enumerated in the Constitution is the community (Art. 59(b)).

44 Reference to and verification of this opinion will be found in A. Delcamp "Institutions de Bruxelles", particularly in the chapter entitled "Mythes et limites de l'autonomie communale en droit belge", Bruylant 1993, pp. 163 ff.

45 Vivre ensemble. Rapport de la commission de développement des responsabilités locales, 1976, p. 97.

- the expression of subsidiarity was not totally absent from legal writings but appeared only in a "technical" sense, within the framework of a procedure relating to the organisation of the legal system, which was administrative as much as legal. "The subsidiary action is that which exists as a possibility for those cases in which the principal action will not be accepted"[46]. Applications are to be found, for example, in administrative proceedings concerning administrative liability - thus the victim can give third party notice to the state or the authority granting a concession when the concessionaire liable for a damage is insolvent[47]. In this case, subsidiarity evokes the idea of suppletive or supplementary means which make it possible to remedy an injustice. It is only with the new thinking on the division of powers that subsidiarity has been alluded to for the first time "as the *normative expression* of a certain organisation"[48]. The notion of subsidiarity thus defined had hardly left the relatively narrow circles of the Catholic intellectuals. It also came up against the French Jacobin tradition and the revolutionary will to outlaw all forms of corporatism in order to impose legal equality between all the individuals making up the Nation.

Since then, whilst not becoming a very popular concept, the actual word was used during the debates on decentralisation[49]:

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46 Jean-Marie Pontier, La subsidiarité en droit administratif, Revue du Droit public et de la Science politique, 1987, pp. 151 ff.

47 In civil procedure, mention may be made of the example of the new procedures of performance which enable a creditor to initiate a sale at the domicile of the debtor if recovery is impossible from the bank account or salary. "This measure without question introduces a degree of subsidiarity of the sale relative to the attachment of the debt. But this subsidiarity will be more or less restrictive to the creditor according to the evidence provided of the impossibility of recovering debts from the bank account or salary". Yves Desvignes, "L'incidence du silence du débiteur sur la subsidiarité de certaines saisies-ventes. A propos de certaines questions soulevées par la loi No. 91-650 du 9 juillet 1991 et le décret No. 92-755 du 31 juillet 1992. Encyclopédie juridique Dalloz - Chronique XXXVI pp. 160 ff.

48 J M Pontier, op. cit., p. 1519.

49 The declarations of Lionel de Tinguy and Michel Giraud, rapporteurs of the Senate Commission for Laws. See especially the documents Sénat No. 33 (1978-1982), Vol. I, p. 109 and No. 307 (1978-1979) Vol. II. In the first report (p. 102) the Commission "underlines the import of the concept of subsidiarity which means that *in the event of uncertainty over a power it must be conferred on the most decentralised authority*".

- academic legal texts, when they mentioned it, tended to regard subsidiarity as belonging to a foreign tradition suggesting a mode of organisation contrary to decentralisation: "The solutions must be sought at the source and here two major principles for the distribution of local powers appear which are apparently contradictory but the contradiction is perhaps more apparent than real: on the one hand, decentralisation, in the strict sense of the word, on the other, subsidiarity. I mean by this that in certain countries decentralisation, in the strict sense, moves *from the centre* and it is central government which confers *downwards*, as it were, a number of powers to local authorities which it has sanctioned or, in some cases, created. The opposite solution is the *upward solution* in which the local authorities are recognised as vested with certain inherent powers with the exception of those explicitly conferred on higher bodies by formal texts. This is, in my opinion, the case in Austria, Switzerland and the Netherlands, and there are doubtless other examples. In any case, full power is at the base, unlike the opposite case in which it is at the summit. *In the case of subsidiarity, powers are exercised at the lower level, with the exception of those retained at a higher level. In the other case, overall power is at the top and only those powers conferred on the lower level can be exercised there*"[50];

- its use corresponds to a profound change in the technique for the sharing of powers. A system characterised by a legal definition placed under the supervision of the constitutional court replaces an uncertain definition resulting from a combination of the statement of a general power and the margin of appreciation and power of annulment wielded by the representative of the state.

The division of powers established by the laws of 7 January and 22 July 1983 does not, however, refer only to the principle of subsidiarity, but is also based on a functional analysis which seeks to determine, for each sector, which level plays the dominant role. For the sake of simplicity, it proposes allocating to each level a "set of powers" as homogeneous as possible.

In its first chapter devoted to "basic principles" and "modes for the transfer of powers", the law of 7 January 1983 specifies (Art. 3) that "the division of powers between territorial authorities and the state is carried out *as far as possible* by distinguishing between those that fall to the state and those devolved to the municipalities, departments or regions in such a way that *each area* of powers and the *corresponding resources* are allocated *in their entirety* either to the state or to the municipalities, the departments or regions".

This division does not have the effect of eliminating the clause of "general power" inseparable from local authority freedom but depends on establishing the dominant "vocation" of each tier:

- the municipality is given power to "control land-use, that is the principal powers in the area of town-planning and responsibility for local facilities";

- the department is given "a mission of solidarity and equalisation, by the management of social services and a redistribution among municipalities";

- the region's "role in designing, promoting and providing incentives for regional-spatial planning and more generally stimulating economic activity and development is reinforced. It therefore also has general responsibility for occupational training".

The State, for its part, retains the major attributes of sovereignty: foreign affairs, defence, and responsibility for the economy in general. In practice, it assumes total responsibility for the judicial system and, to a lesser extent, policing (areas in which financing was partially shared with the local

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[50] Jean Rivero, Les competences du pouvoir local dans les pays européens. Annuaire européen de l'administration publique, Vol. III, p. 282. Professor Rivero would appear to restrict the principle of subsidiarity to the assigning of local authority powers, whereas it is a general principle applicable to the sharing of public powers.

authorities before 1981).

Although these intentions were on the whole carried into effect, the division is at once broader - in terms of the sectors covered - and more detailed. **Most powers**, except perhaps social assistance, **are in fact shared**. This is especially the case of education where the state retains responsibility for teaching, recruitment, management and remuneration of teaching staff, and where each level of authority receives, in principle, the responsibility for one level of teaching (in terms of investment and functioning): primary schools for the municipalities, middle schools for the department, lycées for the region and universities for the state. For town-planning, the shared nature is even specified at the beginning of the section devoted to it.

The new laws amount to a legal turning-point which is all the more important in that it coincides with the increased role of the courts in French constitutional law. Thus, as early as 1979, the Constitutional Council declared the "principle of free administration" to be a constitutional principle. The Council has gradually been giving the principle a concrete meaning.

Decisions have thus been handed down to safeguard "effective powers" of local and regional government bodies (No. 85-196 DC of 8 August 1987 and No. 87-241 of 19 January 1988) and prevent any "substantial" infringement of them. Similarly, the legislature cannot "ignore the powers of the territorial authorities" by attributing to them financial obligations which are not "clearly defined as to their object and scope" (No. 90-274 DC of 29 May 1990).

The 1982-1983 division of powers thus seems to be a rational construction built around theoretical principles on which there is a consensus but whose practical application sometimes leaves something to be desired and which modifies the relationship between the various levels.

In quantitative terms, the transfers have benefited the departments (72% of sums transferred), the regions (21%), the municipality coming a poor last. The French experience shows the difficulty of achieving an absolute division between the various levels, despite a rational will to bring about a general reorganisation of powers. The development of the accompanying instruments of co-operation nevertheless paves the way for pragmatic changes in which the communes, for example, would agree for the sake of efficiency to exercise certain functions jointly without necessarily forgoing their identity.

"Subsidiarity" is a fashionable idea today, although its meaning remains unclear. This study aims at clarifying the concept and checking to see whether it can be used to strengthen and promote local democracy. On the basis of an analysis of the practical application of the principle in a selected number of Council of Europe member states, the study formulates a number of operational guidelines concerning its inclusion in national legal systems.