LIMITS AND TENSIONS OF THE PRINCIPLE OF SUBSIDIARITY IN THE CONTEXT OF THE EUROPEAN UNION

Alena Krunková[1]

ABSTRACT

The Maastricht Treaty introduced the principle of subsidiarity within the European Union with the intention to declare a clear position in the exercise of the competences of the Member States and the European Union. Over time, it has become a popular concept, often used across the wide range of legal facts on which the European Union is built. However, its originally clear concept was subject to certain limitations that have sooner or later manifested in individual Member States. This paper highlights the legal and factual level of implementation of the principle of subsidiarity and its consequences, which are not always manifested directly. This causes certain tensions to develop into limitations in the application of European Union law by the Member States. Subsidiarity is also an essential aspect of federalism, reflecting its centralised and decentralised levels. Thus, the first part of this paper examines this issue from a theoretical perspective with an emphasis on the link with federalism, and the second part analyses selected aspects of the practical level based on experience in the Slovak Republic.

KEYWORDS

subsidiarity
competences of the European Union
limits of European Union law
legitimacy

1. Introduction

The concept of subsidiarity is widely known in legal theory as it is often used by both the professional and lay public. Its conceptual definition reflects the substance of supportiveness, that is, help when it is required. Conversely, in its negative definition, a characteristic of subsidiarity is not intervening in those areas that do not need help or support. For example, subsidiarity can be perceived on different planes, for example, in public administration, in the judiciary, in the elements of direct democracy, and in correlations with the European Union (hereinafter referred to as the 'Union' or 'EU'). The

1 | Associate Professor, Department of Constitutional Law and Administrative Law, Faculty of Law, Pavol Jozef Šafárik University, Košice, Slovakia; alena.krunkova@upjs.sk; ORCID: 0000-0002-4327-4795.

https://doi.org/10.55073/2025.2.73-88

principle of subsidiarity is anchored as the opposite of centralism, deepening the idea of democracy and decentralisation. It is often presented as a political principle, whose purpose is to move decision-making mechanisms to the lowest level possible, which also seems to be the most effective.[2] This paper aims to draw on the theoretical foundations of the principle of subsidiarity and also shift its perception to other areas. It first specifies this principle in the light of the legitimacy of power and then highlights the latent tensions of not respecting it, thus analysing it slightly differently. In this way, we can specify both the formal and legal frameworks at the theoretical level of the examined issue by defining specific provisions governing the principle of subsidiarity. We also consider it essential to establish a material and legal framework defining the scope of real implementation based on certain customs, general legal principles, or traditions applied. For completeness, it is also necessary to point out the possible negative definition of the framework, that is, the setting of limits within which the principle of subsidiarity must not be found either formally or materially.

2. Subsidiarity in the light of the Lisbon Treaty

According to Article (hereinafter referred to as Art.) 5 Paragraph (hereinafter referred to as para.) 3 of the Treaty on European Union,[3] we can characterise subsidiarity as the principle underpinning the exercise of certain competences of the EU.[4] Its aim is to ensure that decisions are taken at a level that is as close to the citizen as possible and that constant scrutiny is carried out to verify whether action at the EU level is justified in view of the options available at the national, regional, or local level.[5] Thus, European law

2 | Pursuant to Art. 10, para. 3 of the Treaty on European Union, every citizen has the right to participate in the democratic life of the Union and all decisions should be taken as openly as possible and as closely to the citizen as possible.

3 | Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union (as amended by the Treaty of Lisbon).

4 | Although the principle of subsidiarity first appeared in the Maastricht Treaty, its origin predates the Treaty itself. While not under this name, the subsidiarity criterion was already included in the area of the environment by the Single European Act of 1987. In its judgment of 21 February 1995 (T-29/92), the Court of First Instance of the European Communities held that prior to the Treaty on European Union's entry into force, the principle of subsidiarity was not a general principle of law under which the legality of Community measures was to be assessed. (Hvišč, 2016, p. 42).

5 | Undoubtedly, as European integration and the EU institutions have evolved, the institutional framework has evolved, too, both formally and materially. At the beginning of the European groupings of the 1950s, there was no need to address the issues of the relationship of the European Communities with the levels of public administration. The European Communities, established and functioning mainly on the basis of economic cooperation, respected the organisation of public administration in their Member States. Moreover, even in the further development of integration, the issue of levels of public administration was not one of those areas in which states would entrust decision-making powers exclusively to the Community, and this is still the case today in accordance with the applicable EU legislation. Therefore, the principle of subsidiarity has been enshrined in this area.

specifies subsidiarity in the form of a 'principle.'[6] On that basis, the EU law restricts the Union in terms of adopting any decision concerning a Member State unless its adoption would be more effective at the level of the Union than at the level of that Member State. In this sense, subsidiarity does not exclude decision-making at a common EU level; it only limits it.

According to the abovementioned Article, the principle of subsidiarity applies only to those areas that do not fall within the exclusive competence of the Union. Under the Treaty on the Functioning of the European Union, the Union has exclusive competence in the following areas: (a) the customs union; (b) the establishment of the economic competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) the common trade policy. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.[7]

The application of the principle of subsidiarity is explicitly excluded from the exercise of exclusive powers by primary law and can, therefore, be used a contrario for all other competences. For the Union's supporting action, the principle of subsidiarity will be maintained only to the extent that and only when the objectives envisaged by the activity intended cannot be sufficiently achieved by the Member States at the central level or at the regional and local levels. Thus, by reason of the scale or effects of the activity proposed, they can be better achieved at the Union level.[8]

The specification of the principle of subsidiarity in relation to its application by EU institutions is laid down in the Protocol on the application of the principles of subsidiarity and proportionality (hereinafter referred to as the 'Subsidiarity Protocol').[9] National parliaments are also required to adhere to this Protocol to ensure compliance with the principle of subsidiarity.[10] The importance of the principle of subsidiarity is underlined by

6 | Some authors cite subsidiarity as a principle that simply means decentralizing and deconcentrating as many powers as possible from the central government to the local and regional level. The principle of subsidiarity is one of the foundations of European democracy and is applied in EU countries in a way that means that each problem that arises is primarily solved at the level where it arose and where the conditions for its objective assessment and solution are best. The prerequisite for the application of the principle of subsidiarity is the decentralization of competences associated with the decentralization of finances and the decentralization of political power. (Hvišč, 2016, pp. 38–47).

7 | Art. 3, paras. (1) and (2) of the Treaty on the Functioning of the European Union.

8 | Art. 5, para. 3 of the Treaty on European Union.

9 | The principle of subsidiarity is closely linked to the principle of proportionality, which requires that any EU action should not go beyond what is necessary to achieve the objectives of the Treaties. They are also closely linked to the principle of conferral of powers, which stipulates that any policy areas not explicitly agreed upon by all EU Member States in the Treaties remain within their remit.

10 | Pursuant to Protocol No. 1 (Protocol on the Role of National Parliaments in the European Union) annexed to the Treaty of Lisbon, it is in the interest of the Union 'to encourage national parliaments to engage in EU activities and to require that EU documents and proposals be forwarded to them promptly in order to enable them to examine them before the Council of the European Union takes a decision'.

the fact that the Subsidiarity Protocol also focuses on the process of drafting EU legal acts. This is by its introduction of an obligation to justify draft European legislative acts defining the expected application of the principles of subsidiarity and proportionality. Any draft European legislative act should contain a detailed explanatory statement to help assess compliance with the principles of subsidiarity and proportionality. This explanatory statement should contain estimates of the proposal's financial impact and, in the case of a European framework law, its implications for the rules to be set by Member States, including, where necessary, regional legislation.[11]

At the same time, it lays down the obligation to deliver draft legal acts of the Union to the national parliaments of the Member States as follows:

- The Commission shall forward its draft European legislative acts and its amended drafts to national parliaments at the same time as it relays them to the Union legislator.
- The European Parliament shall forward its draft European legislative acts and its amended drafts to national parliaments.
- The Council shall forward draft European legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank, or the European Investment Bank and amended drafts to national parliaments.
- After the adoption of legislative resolutions by the European Parliament and the position by the Council (already at the stage of discussion of legal acts), the Council and the European Parliament shall forward their positions again to the national parliaments.

Any national parliament or chamber of a national parliament may send a reasoned opinion to the Presidents of the European Parliament, the Council, and the Commission, stating why it considers that the draft in question does not comply with the principle of subsidiarity, within six weeks from the date of service of the draft European legislative act.

In matters where an advisory opinion of the Committee of the Regions is required, the legislative authorities are also obliged to attach this opinion.[12]

The protection of the principle of subsidiarity is also contained in another Protocol on the Role of National Parliaments in the European Union (hereinafter also referred to as the 'Protocol on national parliaments'). According to some theorists, it is a political check of the principle of subsidiarity through yellow cards and orange cards, but also a proposal

11 | The reasons leading to the conclusion that the Union objective can be better achieved at the Union level shall be substantiated by qualitative and, whenever possible, quantitative indicators. Draft European legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators, and citizens, to be minimised and commensurate with the objective to be achieved. (Art. 5 of the Protocol on the application of the principles of subsidiarity and proportionality).

12 | In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted. (Art. 8 of the Protocol on the application of the principles of subsidiarity and proportionality).

for the use of the green card.[13] While the national parliaments originally could participate directly in decision-making only in cases of the enlargement of the EU by approving the accession treaties, the Lisbon Treaty gave them the power to intervene directly in the legislative process, through the aforementioned opinion on the compliance of draft legislative acts of the EU with the principle of subsidiarity. Compared to the previous political dialogue, this also brought benefits for national parliaments in that they were entrusted with the power to ensure compliance with the principle of subsidiarity at the political level, including the right to bring an action for violation of this principle by a legislative act before the Court of Justice of the European Union.[14]

Thus, in accordance with the principle of subsidiarity on the basis of primary law, the Union gives vertical priority to all levels of government in the Member States in the decision-making process: central (nationwide), regional, local.[15]

The Maastricht Treaty establishing the EU also institutionalised the Committee of the Regions as an advisory body to the European Commission, the Council of the European Union, and the European Parliament. The Committee of the Regions began its activities in 1994 with its headquarters in Brussels. To this day, it plays the most important role in presenting the regional interests of individual Member States. The functioning of the Committee of the Regions is complex, primarily due to the broad area of interest and the existence of different levels of decision-making. A common thread through the work of the Committee of the Regions is its operation in accordance with the three principles of proximity to citizens, partnership, and subsidiarity. One of the tasks of the Committee of the Regions is to convey the views of Member States' local and regional authorities in relation to EU legislation. The Union has thereby transferred the issue of the regional level

13 | The so-called yellow cards are issued by a group of national parliaments, or their chambers, if the reasoned opinions on the non-compliance of the draft legislative act with the principle of subsidiarity represent at least one third of all votes allocated to national parliaments. The draft legislative act must then be reconsidered. This threshold shall be a quarter of votes in the case of a draft legislative act submitted on the basis of Art. 61 of the Treaty on the Functioning of the European Union on the area of freedom, security, and justice. After such reconsideration, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank, or the European Investment Bank may decide to maintain, amend, or withdraw the draft legislative act if it originates from them. The so-called orange cards are issued by a group of national parliaments, or their chambers, if the reasoned opinions on the non-compliance of the draft legislative act with the principle of subsidiarity under the ordinary legislative procedure represent at least a simple majority of all votes allocated to national parliaments. A proposal for a legislative act returned in this way must also be reconsidered. After such reconsideration, the Commission may decide to maintain, amend, or withdraw the proposal. If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. (Balog, 2016, p. 49).

14 | Balog, 2016, p. 48.

15 | The Subsidiarity Protocol annexed to the Lisbon Treaty directly requires the European Commission to take into account the regional and local dimension of all draft legislative acts and to draw up an explanatory memorandum on how it respects the principle of subsidiarity. This protocol allows national parliaments to object to a proposal on the grounds that it is contrary to that principle. The proposal must then be reviewed and may be maintained, amended, or withdrawn by the Commission or blocked by the European Parliament or the Council. In the event of a breach of the principle of subsidiarity, the European Committee of the Regions or the Member States may refer the adopted act directly to the Court of Justice of the European Union.

from the Member States to its Community level, thus fulfilling the requirement of the principle of subsidiarity.

The principle of subsidiarity is also closely related to the principle of efficiency in the sense that decentralised administration creates space for central authorities to deal with substantive and conceptual matters, thereby streamlining public administration and making it more efficient. Recognising the importance of regional matters on the one hand and the need for horizontal interconnection of cooperation between individual regions of the EU on the other hand, the Union law introduces a specific form of addressing cooperation issues beyond the borders of the Member States yet allowing the development of cooperation within the external borders of the Union (European Grouping of Territorial Cooperation).

Perceiving the principle of subsidiarity solely from the position of primary law would be highly limiting and ineffective. Undoubtedly, its anchoring is a necessity, and subsidiarity itself is supposed to limit the Union; however, just as the Court of Justice became bold in implicitly extending its powers,[16] the implementation of the principle of subsidiarity sometimes encounters less correct application within the Union. Assumptions and principles that could have been invoked for some time are losing their relevance. Thus, with a certain generalisation, we can distil the factors that support subsidiarity and also those that suppress its application. Factors supporting subsidiarity include, for example, the legitimacy of power, decentralisation, delegation of power, supervisory powers with an advisory voice, and non-interference with the powers conferred. As a rule, the opposing factors are the factors suppressing subsidiarity, namely the dispute over the legitimacy of power, centralisation, usurpation of powers, decision-making power, control power with a cassation principle, or the extension (implicit, but often also explicit) of the powers conferred. These factors emerge as several controversies of a theoretical and application nature. Therefore, we again perceive the need to raise several elementary questions, of which the prominent ones seem to be: What is the adequate balance between the source and the executor of power? To what extent of decentralisation can we apply the principle of subsidiarity? What is the nature of the supervisory power of the authorities of a higher level of administration? What can still be considered the supplementation of competences and what is already the usurpation of powers? It holds that, in general, the purpose of the principle of subsidiarity is to limit the interference of a higher body if the lower body is able to perform the intended functions. However, the extent of this limitation remains unclear. There are even opinions on the prohibition of the interference of a higher institution in relation to lower units or vice versa regarding the obligation of intervention of a higher institution if specific criteria are met.[17]

16 | Orosz, 2003, pp. 325–337.

17 | The most accurate definition of the principle of subsidiarity can be considered the provision of Art. 4 para. 3 of the European Charter of Local Self-Government (No. 336/2000 Statutes), according to which in general, public administration is carried out primarily by those bodies that are closest to the citizen. The attribution of competence to another body should take into account the scope and nature of the task as well as the requirements of efficiency and economy. Strangely, the Slovak Republic has not committed itself to comply with Art. 4 para. 3 and Art. 9 (1) and (5) (on the principle of subsidiarity) of this Charter, which creates an interesting situation from the point of view of regional self-government, because Art. 7 para. 2 of the European Charter of Regional Self-Government stipulates that 'in relation to local self-government, regions respect the principle of subsidiarity'. (Hvišč, 2016, pp. 38–47).

The aim of this paper is not to summarise theoretical knowledge about the principle of subsidiarity in a comprehensive way. This is not even possible due to the admissible wordcount of the paper. For the same reason, the paper does not even analyse relevant court decisions. Rather, it focuses on partial issues and seeks connections across the vertical division of power between the EU and its Member States. This naturally complements the discussion by allowing space for other perspectives on the issue examined.

2.1. Subsidiarity versus legitimacy

Understanding the principle of subsidiarity requires broader circumstances to be accounted for. In the transfer of competences, subsidiarity is understood from several perspectives. It may involve the transfer of competences between individual public administration entities; however, it can also be understood in a state-law arrangement as the division of competences among individual states in a federal arrangement or, on an international scale, among individual states within a certain international community. The principle of subsidiarity mainly means the rule for determining competences in the implementation of the common good. The main belief behind this principle is that an individual does everything s/he can of their own initiative and through their own efforts, and what s/he no longer can provide for themselves should be left (transferred) to society. This principle is understood, first, as the non-interference of public authority with the autonomy of individuals and, second, as the right or obligation of a public authority to help the individual (intervene) where the individual alone can no longer manage. For example, in France, the principle of subsidiarity is applied in the sense that the higher-level exercises only those powers that cannot be exercised by the lower levels, or in Germany, where the inalienable powers of the lower levels are established. In Poland, the principle of subsidiarity is even expressed directly in the preamble to the Constitution so that the Constitution of the Republic of Poland as the fundamental law of the state is based 'on … the synergy of powers, social dialogue and the principle of subsidiarity, strengthening the rights of citizens and their community'.[18]

However, in connection with the overreach to federalism, the first question that arises is that of the legitimacy of power. The basic feature of the federation as a superstructure of the Member States is its supportive action in the vertical plane of public authority. Naturally, adequate legitimacy is the aspect that gives the mandate for the final decision when applying the principle of subsidiarity. Federal authorities, as decision-makers, are therefore mostly created directly. In the case of the European dimension of subsidiarity, the decision-making of EU bodies is equally fundamental. However, the creation and functioning of the Union's bodies (or institutions) run into the limits of legitimacy. As such, legitimacy is most closely tied to power, that is, to the existence of public power. However, can we talk about public power in the EU? If so, will the legitimacy of the EU given to it in 1992 (enshrining the principle of subsidiarity) correspond to that of the current one?

One of the measurable indicators of public power is its link to the source of power, that is, the people or citizens. Given this, it is impossible to ignore the so-called conferred EU citizenship, which is tied to the citizenship of the Member States. Undoubtedly, there are more limits associated with legitimacy; however, we will focus on the decision-making processes of the Union bodies, as it is through these processes that they have the opportunity to interact with the principle of subsidiarity.

18 | Hvišč, 2016, pp. 38–47.

The principle of majority decision-making, which makes it possible to override – and thus negate – the national will, has dealt a fundamental blow to the exclusive legitimacy of the decision-making process at the EU level, calling it into question. If this national will were to be tied to the people of a particular Member State (as the only source of legitimacy), then, the acting of the EU against this will expressed by the representation of the state in the Council of the European Union could probably be qualified as illegitimate with respect to that state. The will of the state would not have been transferred to the level of the Council of the European Union and the legitimate chain would have been broken. Opinions are emerging that this problem 'can be overcome by a theoretical construction according to which the current will of the political nation is negated by a will expressed earlier to submit to majority decisions'.[19] In the event of a similar conflict of will at the state level, the current will always applies; therefore, the effort to push through the national interest in the majority decision would have to be based on the belief in the existence of a common interest, which, however, also presupposes the existence of a common will of the European people. However, such assumption already departs from the system of external legitimisation because it is based on the existence of its own legitimising source. The existence of a community formed in this way presupposes its own legitimacy foundation not derived only from the legitimacy foundation of the state. However, the question of legitimacy does not end with the decision-making process in the EU. The other side of the same problem is the significant impact of the supranational decision-making system on the legitimacy of national will formation at the state level. In the case of implementation of indirectly applicable secondary acts, their transposition into national law is required under the constitutional rules of the Member States. In terms of the application of the representative mandate of representative bodies, it should be undesirable to expect the transposition (approval by the Members of European Parliament [MEPs]) of all secondary acts of European law (including those that would be against the will of the MEPs). There is a problem of a conflict of the state's obligation under the Treaty, that is, the earlier will of the state, with the current national will on the matter. It is unacceptable to force an MEP to vote in a certain way under an international (community) commitment, given the principle of prohibition of an imperative mandate. Certainly, this cannot be compared to a classic violation of the state's international legal obligation because, in this case, 'the state has committed itself in advance to the adoption of legislative acts in a certain area by parliamentary means, and thus establishes a latent conflict with the will of its people as a source of legitimacy'.[20] National constitutional courts tend to consider the necessity of opening up the internal law as one of the proofs of the ultimate primacy of constitutional law, in addition to competence in the area of the creation of primary law.[21] However, this concept is not shared by the Court of Justice of the European Union. Thus, the possibility of legal enforcement of the implementation of a secondary legal act conceals a threat to the essence of the functioning of parliamentarism and is evidence of the transfer of decision-making powers to executive institutions. The possibility of considering the legitimacy of the EU as being derived from the Member States is highly problematic because in such cases, the will of the parliament would have to be final and unquestionable.[22]

19 | Belling, 2009, p. 125.
20 | Belling, 2009, p. 131.
21 | Haack, 2007, p. 58.
22 | For more discussion on this, see, for example, Fasone, 2020, pp. 707–732.

The tendency of the EU to close itself into an autonomous political system can be understood as a tendency to enshrine its own competency power, that is, the authority to assume competence on the basis of the decision of European political bodies. Although, to date, this has only been hinted at, reflected in the considerations towards a federal arrangement, in the context above, this hint cannot be underestimated. If the original political power of the Union arises in this way, there is also a logical demand for its underived legitimacy. In this context, it is appropriate to consider the dual legitimisation of the EU by both the Member States and EU citizens. The concept of legitimacy is based on competence as the last foundation of acting and leads to the ultimate source from which the existing political order can be justified. The concept of double legitimisation is based on the parallel existence of two sovereigns: national and supranational, which relate once to the old nation of a Member State and once to the people – the citizenship of the EU. As a result, however, it must lead to the prioritisation of one or another legitimate source as essential in justifying power, and this is inevitable, particularly in the event of a conflict between the two sources. For this reason, legitimisation by two sources is unlikely to be sustainable over the long run. The most visible example is the European Parliament. In a democratic system, the parliament is associated with the idea of representation and, thus, with the idea of a political nation. The very idea of a parliament is based on the concept of a nation-state, which assumes the existence of a politically homogeneous whole, capable of being represented. Otherwise, even a free mandate as part of the essence of parliament makes no sense. What then is the purpose of the free mandate in the European Parliament, which 'represents' individual nations? It is impossible to talk about the representation of the whole and we can hardly expect MEPs to focus on the general interest of the EU if there is no European political nation. We do not mean a nation in the narrow sense of the word, but the so-called 'political public', which would be constituted around common topics of European policy. Even an analogous society is missing here. The effort to create it from above – by educating towards Europeanism, has not brought any significant success, e.g., Belling talks about the government's obligation to get citizens excited about, or at least interested in Europe. Thus, the transfer of democratic mechanisms from the state to the supranational level is accompanied by the necessary question of what legitimacy foundation these mechanisms rely on. If the whole nation is represented by a parliament at the national level created on the basis of democratic elections, at the supranational level, only particular interests are represented by the European Parliament according to its anchorage in the respective Treaties. Such a model is a far cry from classical democratic legitimacy because it lacks the element of representation.[23] The debate also tends to focus on the question of how the nation state is still able to be the main concept for structuring power relations on a global scale and for justifying power. It is also essential

23 | While in nation states, the retreat of representative elements and the increase in the real influence of political parties on parliamentary decision-making can be compensated for by elements of representation in political parties oriented towards the national interest, such compensation is impossible at the supranational level. Efforts to bridge this gap with the concept of representation of an imaginary European people would run into the missing reality. Although the empirical personnel substrate of the political nations of the Member States of the Union is of course identical to the personnel substrate of the Union as a whole, the socio-psychological significance of the idea of a political nation in political reality, i.e., the role played by the very conviction of the population about the existence of a political nation with a united will, cannot be overlooked. (Belling, 2009, p. 134).

to answer whether the heterogeneity of decision-making factors of a collectively binding decision-making process forces us to abandon the model of state sovereignty as a key starting source of power. It should be remembered that the concept of legitimacy is so tied to the concept of sovereignty that the resignation from one of them automatically leads to the questioning of the other.

To achieve legitimacy, there are processes of rationalisation and justification, which we call legitimisation (sometimes also legitimation). Simultaneously with legitimacy, but at the same time distinctly, it is necessary to perceive legality, which simply means the legitimacy to act, or rather the manner of acting in accordance with applicable laws. However, the problem of the principle of subsidiarity in its state and European dimension is not whether it is explicitly enshrined in normative texts, that is, constitutions or relevant international treaties, but whether it is actually being implemented. It can be considered more expedient to emphasise the fact that the principle of subsidiarity in its original version inspired by classical philosophy is not only applied to the arrangement of the mutual relations of higher and lower-level political units but also applies to the relationship between the individual and the organised society, and, thus, includes the protection of the individual against the increasingly expanding state power and bureaucracy.[24] The outlined analyses logically lead to the conclusion that the EU functions as a unique, specific, and autonomous political and legal system with its own will-making process. Notably, at present, it tends to rely on its own legitimation concept, independent of the legitimacy of nation states and their constitutional orders. It remains an open question to determine the origin of this 'own' legitimacy, since, despite the existence of 'Euro-citizenship'[25] in the EU, there is no 'European people' — the original public (personnel substrate) as in the state; therefore, it is not possible, for example, to create a discourse on problems in society, nor can solutions be adequately sought at the civil society level. This component is considerably fragmented. It is not only division according to nation states, nations, and ethnicities but mainly distrust, which is combined with the disinterest of people, which is currently a certain wound for integration processes. Perceiving the position of the state, its development in every respect, and its place in European structures naturally forces us to specify the status of the modern state to determine its role or strength within a new, supranational organisation. However, this will most likely not be possible without recalling its traditional features, operating and established at every stage of the state's development.

3. The principle of subsidiarity in concreto

The application of the principle of subsidiarity can also accelerate latently. Often, seemingly unrelated circumstances may become supportive of similar cases of addressees that had not started as such.

24 | Hvišč, 2016, p. 41.

25 | In accordance with Art. 9 of the Treaty on European Union, a citizen of the Union is any person who holds the citizenship of a Member State. Citizenship of the Union shall be additional to national citizenship, which it shall not replace.

In this context, we would like to point out the recent decision of the Constitutional Court of the Slovak Republic (hereinafter referred to as the 'Constitutional Court'), Case No. PL. ÚS 10/2022, Decision of 24 October 2023. It was a proceeding on the compliance of legal regulations, where the Constitutional Court assessed the so-called chain-linking of tenures of university teachers in accordance with Act No. 131/2002 Statutes on Institutions of Higher Education, as amended (hereinafter referred to as the 'Higher Education Act') and Act No. 311/2001 Statutes, the Labour Code, as amended (hereinafter referred to as the 'Labour Code'). Entering into employment contracts with university teachers for a fixed tenure and its subsequent extension or non-renewal has been a longer-term problem, resonating across Slovak society.

The petitioners considered the contested provisions of the Labour Code and the Higher Education Act regulating the conclusion of fixed-term employment contracts (chain-linking of tenures of university teachers) to be inconsistent with the provisions of the Constitution because of their conflict with the principles of a democratic state ruled by law and because of their discriminatory nature in relation to university teaching staff. At the same time, they were based on the realistic state of affairs, which would be unsustainable in the long run. They objected to the inconsistency of the contested legislation with the principle of equality and the prohibition of discrimination under Art. 12 para. 1 and 2 of the Constitution of the Slovak Republic (hereinafter referred to as the 'Constitution') in conjunction with the fundamental right of employees to fair and satisfactory working conditions, namely protection against arbitrary dismissal and discrimination in employment (Art. 36 para. (1) (b) of the Constitution). In addition, the petitioners objected to the incorrect transposition of Clause 4 (1) and Clause 5 (1) (a) of the Framework Agreement on Fixed-term Work, which is set out in the Annex to Council Directive 1999/70/EC on the Framework Agreement on Fixed-term Work contested by the legislation. They pointed to the inconsistency with the conclusions of the Court of Justice pronounced in its judgment in Case No. C-307/05 (Judgment of 13 September 2007, Del Cerro Alonso, C307/05, EU:C:2007:509), in which the Court of Justice recognised the social policy of the State as objective grounds for extending the validity of fixed-term employment contracts or employment relationships, but according to the petitioners, the status of university teachers cannot be subsumed under these grounds because the pursuit of their activities does not fulfil that objective.

However, the constant case-law of the Court of Justice has been upholding the opposite conclusions. The Court of Justice concluded that the fact that universities have a permanent need to employ such staff does not mean that this need cannot be satisfied by the use of fixed-term employment contracts (Judgment of the 3rd of June 2021, EB, C-326/19, EU:C:2021:438, clause 67). The above conclusions can undoubtedly also be applied to pedagogical employees of universities, or university teachers, whose employment serves to cater to both pedagogical and scientific-research tasks of universities. In addition, the Court of Justice has already posited (Judgment of the 3 June 2021, EB, C-326/19, EU:C:2021:438, Clause 69) that if the extension of fixed-term contracts is subject to a positive assessment of the teaching and scientific activities carried out, the 'special needs' of the industry concerned may adequately consist, as regards the field of scientific research (similarly also the field of pedagogical activity, note), of the need to ensure the career progression of individual scientific (similarly also pedagogical, note) workers, depending on their respective merits, which, in the view of the foregoing, must be assessed. A provision that would oblige the university to conclude a contract for an indefinite period with a

scientific (similarly also with a pedagogical, note) worker, regardless of the evaluation of the results of their scientific (similarly also pedagogical, note) activities would not meet the aforementioned requirements. Therefore, the Court of Justice concluded (Judgment of 3 June 2021, EB, C-326/19, EU:C:2021:438, Clause 71), that

> Clause 5 of the Framework Agreement is to be interpreted as not precluding national legislation, which provides for fixed-term contracts in the recruitment of university scientific (similarly also pedagogical) staff... whereby the conclusion of such contracts is subject to the condition that resources are available for planning and carrying out scientific and teaching activities, supplementary teaching activities and services to students and, at the same time, the extension of such contracts is subject to a positive assessment of the scientific and teaching activities carried out without it being necessary to establish objective and transparent criteria for verifying whether the conclusion and renewal of such contracts indeed corresponds to a real need, whether they are capable of achieving the objective pursued and whether they are necessary for that purpose.[26]

In their arguments, the petitioners stated that they were aware of a contradiction with the conclusions of the Court of Justice announced in its judgment in Case No. C190/13 (Judgment of 13 March 2014, Márquez Samohano, C-190/13, EU:C:2014:146), according to which the renewal of repeatedly concluded fixed-term employment contracts should not be used to meet the permanent and long-term needs of universities in the field of employment of teaching staff. The activities provided by the university teacher (pedagogical and scientific research activities) are not temporary but permanent. However, the Court's findings in that judgment concern the renewal of fixed-term employment contracts with external professors without any limitation as to the maximum length and number of renewals of such contracts.

Nevertheless, the Constitutional Court has (as has been the case several times before) sided with the Court of Justice, respecting the conclusions of its constant (established) case law. According to the Constitutional Court, the contested legislation is in line with the above-mentioned conclusions of the Court of Justice, as the reason for which it was adopted lies in the precise and specific circumstances characterising the activities of university teachers, that is, the performance of high-quality pedagogical and scientific research activities, which result from the specific nature of their tasks in educational

26 | In Clause 53 of the judgment in Case No. C-307/05, Alonso, the Court of Justice stated that the concept of 'objective reasons' under Clause 5 (1) (a) of the Framework Agreement on fixed-term work, as set out in the Annex to Council Directive 1999/70/EC concerning the framework agreement on fixed-term work, must be understood as referring to the precise and specific circumstances characterising the activity in question and may therefore justify, in that particular context, the use of renewed fixed-term employment contracts, such circumstances being apparent in particular from the specific nature of the tasks for which such contracts have been concluded and the characteristics associated with them or, as the case maybe, from the pursuit of a legitimate social policy objective of a Member State' (see Adeneler et al., paras. 69 and 70). The concept of 'objective reasons' under Clause 5 (1) (a) of the Framework Agreement on fixed-term work, set out in the Annex to Council Directive 1999/70/EC on the framework agreement on fixed-term work, is therefore to be interpreted by analogy with the same concept of 'objective reasons' under Clause 4 (1) of that Framework Agreement (Judgment of 13 September 2007, Del Cerro Alonso, C-307/05, EU:C:2007:509, Clause 56).

and scientific research activities. The pursuit of a legitimate social policy objective of a Member State is recognised by the Union legislation as an alternative objective ground for concluding fixed-term contracts. Therefore, the pursuit of that objective alone does not necessitate the national legislation to be compatible with it. The fact that the pursuit of such objective is mentioned in the explanatory report to the contested legislation ipso facto does not constitute its possible incompatibility with the requirements arising from the designated EU legislation.[27]

4. Conclusion

The Böckenförde paradox, which consists of the tension between the nature of the constitution (which is characterised by universality, incompleteness, and the fact that, in particular, in the part setting out fundamental rights and freedoms, it contains only principles and not standards) and the paradigm of its direct applicability (which, in turn, assumes the existence of an application capable of a standard)[28] can also be recalled in connection with the principle of subsidiarity.

The development of the EU is clearly progressive; however, it sometimes conveys the impression of uncontrollability. This naturally causes an increase in the limits by which individual Member States define the boundaries of their sovereignty. At its inception, the principle of subsidiarity introduced by the Maastricht Treaty was identified as a fundamental principle of Union law, the application of which inspired certain hopes. At that time, opponents of integration even referred to subsidiarity as the word that saved its continued existence.

However, more than twenty years of application of this principle have failed to give a clear answer to the question of how subsidiarity can actually work in practice for the benefit of Member States. The theoretical concept shows that it is impossible to effectively exist in complex state formations without subsidiarity. It must be found, in a more or less centralised form, in every federal state. However, we must remember that the EU is not a state unit. It must pay much more attention to the limits and bounds of subsidiarity, so that it can use its supportive effect only where it has a legal foundation for it. The principle of subsidiarity is enshrined in the form of a binding rule of law as a principle of the EU and its observance is de jure a condition for the legality of any legal act of the Union in areas outside its exclusive competence. In the exercise of their powers, all the Union's institutions are obliged to ensure compliance with this principle and the Court of Justice is to declare invalid those legal acts that violate the principle of subsidiarity. However, the example used in the second part of this paper does not support these conclusions. Through the settled case law of the Court of Justice, the Union also ensures the uniform

27 | According to the Constitutional Court, the contested national legislation is not limited to general and abstract authorisation for the use of renewed fixed-term employment contracts (cf. Judgment of 13 September 2007, Del Cerro Alonso, C6 307/05, EU:C:2007:509, Clauses 54 and 55), as it allows for concluding agreements with a precisely defined group of persons—university teachers, with regard to the specific content of their work and its specificities, that is, on the basis of objective reasons, or in order to achieve a specifically defined goal — the implementation of high-quality pedagogical and scientific research activities.

28 | Böckenförde, 1991, p. 17.

application of its law in the area (education), which does not fall within the exclusive competences conferred thereon by the Treaty. In addition, the regulation takes the form of a directive, whose form of implementation is to be left to individual Member States. The Constitutional Court adopted the designated line of interpretation of the law from the Court of Justice, thus de facto excluding the possibility of further remedy of law in the field of higher education, which has been the discussion topic in the field for a long time. Unfortunately, the situation cannot be viewed as other than a latent non-compliance with the principle of subsidiarity. Its application thus remains de jure only at the theoretical level, which is a far cry from its factual level. Then it remains questionable whether the 'phenomenon of the principle of subsidiarity' really remains only a theoretical concept in the sense of the words of Václav Klaus, who described it as an empty, 'escape' word that means nothing and allows everyone to imagine something different thereunder.[29]

29 | Břicháček, 2007, p. 1.

Bibliography

Alexy, R. (2009) *Pojem a platnosť práva*. Bratislava: Kalligram.

Balog, B. (2016) 'Národné parlamenty v záležitostiach Európskej únie – stále hľadanie sa' in Krunková, A. (ed.) *Európska únia a jej vplyv na organizáciu a fungovanie verejnej správy v Slovenskej republike – perspektívy a výzvy spojené s predsedníctvom Slovenskej republiky v Rade Európskej únie.* Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, pp. 38–47.

Belling, V. (2009) *Legitimita moci v postmoderní době: Proč potřebuje Evropská unie členské státy?*. Brno: Muni Press.

Böckenförde, E.-W. (1991) *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrechts*. Frankfurt am Mein: Suhrkamp.

Břicháček, T. (2007) 'Princip subsidiarity 15 let od podpisu Maastrichtské smlouvy', *Revue Politika*, 2007/8 [Online]. Available at: https://www.cdk.cz/princip-subsidiarity-15-let-od-podpisu-maastrichtske-smlouvy (Accessed: 11 March 2024).

Břicháček, T. (2008) 'Přístup Evropského soudního dvora k principu subsidiarity', *Právník,* 147(2), pp. 145–159.

Constitution of the Slovak Republic of 1992 (460/1992 Coll.).

Fasone, C. (2020) ''Constitutional amendments' theory and troubles at supranational level: Constitutional change in the EU from the perspective of Richard Albert's analysis', *Revista de Investigações Constitucionais,* 7(3), pp. 707–732 [Online]. Available at: https://doi.org/10.5380/rinc.v7i3.74848 (Accessed: 11 December 2024).

Finding of the Constitutional Court, Case No. PL. ÚS 10/2022, Decision of 24th of October 2023.

Georgiev, J. (2007) *Princip subsidiarity v právní teorii a praxi*. Praha: CEVRO Institut.

Hloušek, V. (2008) *Politologické systémy*. Brno: Barrister & Principal.

Hodža, M. (2008) *Federácia v strednej Európe: a iné štúdie.* Bratislava: Kalligram.

Holländer, P. (2009) *Základy všeobecné státovědy.* Plzeň: Aleš Čenek.

Holländer, P. (2012) 'K rozdielu medzi právnym princípom a právnou normou' in Holländer, P. (ed.) *Filosofie práva*. 2nd edn. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, p. 49.

Hvišč, O. (2016) 'O princípe subsidiarity a decentralizácie v Európskej únii z pohľadu organizácie verejnej správy' in Krunková, A. (ed.) *Európska únia a jej vplyv na organizáciu a fungovanie verejnej správy v Slovenskej republike – perspektívy a výzvy spojené s predsedníctvom Slovenskej republiky v Rade Európskej únie.* Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, pp. 38–47.

Jánošíková, M. (2021) 'Právne princípy v práve Európskej únie' in Bröstl, A., Breichová Lapčáková, M. (eds.) *Nové dimenzie metodológie právnej argumentácie: Úloha právnych princípov vo viacúrovňovom právnom systéme*. Praha: Nakladatelství Leges, pp. 174–191.

Kukliš, P. (2003) 'O princípe subsidiarity vo verejnej správe', *Právny obzor: teoretický časopis pre otázky štátu a práva*, 86(6), pp. 636–649.

Kupcová, Z., Pecníková, M. (2003) 'Ústavný súd Slovenskej republiky a princíp subsidiarity', *Justičná revue,* 55(6-7), pp. 612–628.

Mazák, J., Dobrovičová, G., Orosz, L., Jánošíková, M. (2014) 'Odkaz Súdneho dvora EÚ vnútroštátnym súdom o aplikovateľnosti a pôsobnosti Charty základných práv EÚ: Rozsudky vo veciach Aklagaren Fransson a Melloni', *Právny obzor: teoretický časopis pre otázky štátu a práva*, 97(2), pp. 115–130.

Orosz, L. (2003) 'Všeobecné ústavné princípy - základná charakteristika, význam a spôsob ich vyjadrenia v ústavnom systéme Slovenskej republiky', *Právny obzor: teoretický časopis pre otázky štátu a práva*, 86(4), pp. 325–337.

Orosz, L. (2019) 'O (posilňovaní) súdnej moci' in Bárány, E. (ed.) *Zmeny v chápaní práva: pluralita systémov, prameňov, perspektív.* Bratislava: Ústav štátu a práva SAV, Slovak Academic Press SAP, pp. 94–106.

Orosz, L. (2021) *Základy teórie ústavy*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach.

Orosz, L. (ed.) (2009) *Ústavný systém Slovenskej republiky (doterajší vývoj, aktuálny stav, perspektívy).* Košice: Univerzita Pavla Jozefa Šafárika v Košiciach.

Orosz, L., Svák, J., Balog, B. (2012) *Základy teórie konštitucionalizmu*. Žilina: Eurokódex, s.r.o.

Žofčinová, V., Barinková, M. (2020) 'Public law aspects of work-life balance in Slovak republic from the perspective of European legislation', *The Lawyer Quarterly: international journal for legal research,* 10(4), pp. 381–392.