

APPLICATION OF THE PRINCIPLE OF SUBSIDIARITY ON DECISION MAKING OF THE ECJ IN THE AREA OF FUNDAMENTAL RIGHTS PROTECTION

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Abstract in original language

Příspěvek se zabývá vlivem principu subsidiarity na rozhodovací činnost Soudního dvora Evropských společenství zvláště v oblasti ochrany základních práv. Soudní dvůr neplní svou funkci při kontrole dodržování tohoto principu v jeho užším smyslu jinými orgány EU a rovněž tento princip neaplikuje na svoji vlastní aktivistickou rozhodovací činnost. Při posuzování principu subsidiarity v jeho širším smyslu je zřejmé, že zatímco procedurální rovina tohoto principu – vyčerpání místních opravných prostředků – není v případě Soudního dvora aplikovatelná, jeho hmotněprávní rovina (včetně doktríny margin of appreciation) může jistou roli při ochraně základních práv Soudním dvorem hrát.

Key words in original language

Princip subsidiarity; Soudní dvůr Evropských společenství; ochrana základních práv.

Abstract

This contribution focuses on influence of the principle of subsidiarity on the decision making of the European Court of Justice (ECJ) especially in the area of fundamental rights protection. It is argued that the ECJ does not fulfill its function in controlling the observance of the principle in its narrow sense by other EU bodies and that the ECJ does not apply the principle to its own activist rulings. Considering the wide sense of the said principle, it is clear that while application of the procedural part of the principle – exhaustion of local remedies – is not possible in the case of the ECJ, the material part of this principle (including the margin of appreciation doctrine) may play certain role in protection of fundamental rights by the ECJ.

Key words

Principle of subsidiarity; European Court of Justice; fundamental rights protection.

1. INTRODUCTION

The principle of subsidiarity has been part of the European law since the beginning of the 90s. Its fundamental function has been to help with distribution of powers between the European Union and the Member States. Since its introduction, the principle has undergone a massive development in the foundation treaties and it was also included in the Charter of

Fundamental Rights of the European Union. I argue that this principle could influence the fundamental rights protection. Since the ECJ plays a central role in protection of fundamental rights in the EU, this contribution aims to examine the relationship between the principle of subsidiarity and the ECJ especially in this area.

2. THE PRINCIPLE OF SUBSIDIARITY

The general definition or description of the principle of subsidiarity has been submitted by number of authors. As an illustration it is worth to mention at least two of them. According to G. A. Bermann the subsidiarity expresses “*a preference for governance at the most local level consistent with achieving government’s stated purposes*”. The principle of subsidiarity in this sense promotes a number of values, e. g. political liberty, flexibility or diversity.¹ Similarly, J. Finnis submits that in larger communities the decision-making process is estranged to those who will apply such decisions. There fore the larger communities should not appropriate functions which may be efficiently administered and executed by smaller units.² Apart of these definitions, one can not leave out of consideration the encyclical letter of pope Lev XIII “*Rerum novarum: On Capital and Labor*”³ and the encyclical letter of pope Pius XI “*Quadragesimo Anno*,”⁴ The formulations of principle of subsidiarity in these encyclical letters are operative even today. On the basis of two different views of the encyclical letters, it is theoretically possible to discern so-called positive and negative concept of subsidiarity. The positive concept corresponds to the possibility or even necessity of intervention by a larger (superior) community toward a smaller (inferior) one. The negative concept means a limitation of powers of the larger community toward the smaller one.

I argue that in the area of European law (including the field of fundamental rights) it is possible to generally discern the principle of subsidiarity in its

¹ Bermann, G. A.: Taking Subsidiarity Seriously: Federalism in the European Community and the United States. Columbia Law Review, 1994, Vol. 94, No. 2, pp. 339 – 344.

² Finnis, J.: Natural Law and Natural Rights. Oxford: Clarendon Press, 1980, reprint 2003, pp. 147. Cited from Barinka, R.: Evropská úmluva o lidských právech a doktrína margin of appreciation. Doctoral thesis, 2007, available from http://is.muni.cz/th/9687/pravf_d/.

³ Lev XIII.: Rerum Novarum. Encyclical Letter on Capital and Labor [cited 1. 11. 2009]. Available from http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum_novarum_en.html.

⁴ Pius XI.: Quadragesimo Anno: Encyclical Letter on Reconstruction of Social Order [cited 1. 11. 2009]. Available from http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html. For detailed analysis of development of the subsidiarity principle as a philosophical concept see Millon-Delsol, Ch.: L’État subsidiaire. Ingérence et non-ingérence de l’Etat: le principe de subsidiarité aux fondements de l’histoire européenne. Paris : Preses Universitaires de France, 1992, pp. 15 – 60.

narrow sense and in its wide sense. The narrow meaning of the principle could be found in article 5 paragraph 2 of the Treaty Establishing the European Community (TEC) which states:

*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.*⁵

There is also a special Protocol on the application of the principles of subsidiarity and proportionality attached to TEC which states detailed conditions to be examined when assessing consistency of certain action with the principle of subsidiarity. The narrow meaning of the said principle is concerned with the non-exclusive competence of the Community (Union). I argue in a different place that the area of fundamental rights protection may be in its majority included in the non-exclusive competence of the Union.⁶ It follows that most actions of the Union in the fundamental rights protection should be in principle subjected to the subsidiarity test.

The principle of subsidiarity in its wide sense could be found in the preamble of the Treaty on European Union (TEU):

*“(...) Resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity (...)”*⁷

Similar mentions are present also in The Charter of Fundamental Rights of the European Union. The wording of the TEU preamble seems to be clearly wider than the definition of the principle of subsidiarity in article 5 paragraph 2 TEC. In my opinion, the wide sense of the principle of subsidiarity in the European law is close to the general meaning of subsidiarity described above.⁸ In the field of fundamental rights, however,

⁵ The Lisbon Treaty moved the definition of subsidiarity principle into article 5 paragraph 3 of the Treaty on European Union. The wording of the definition was slightly changed (a regional level of governance was expressly mentioned), however this “cosmetic adjustment” will probably have no effect on the practical application of the principle.

⁶ Jirásek, J.: Sekundární normotvorba EU v oblasti ochrany základních práv a princip subsidiarity, *Právní rozhledy*, Praha: C. H. Beck, Vol. 17, No. 12, 2009, pp. 435 – 436.

⁷ The Lisbon Treaty did not amend or change the TEU preamble.

⁸ C.f. Schilling, T.: Subsidiarity as a Rule nad a Principle, or: Taking Subsidiarity Seriously. Jean Monnet Working Paper, 1995 [cited 14. 11. 2009]. Available from <http://centers.law.nyu.edu/jeanmonnet/papers/95/9510ind.html>. Schilling discerns the subsidiarity in its narrow meaning in article 5 paragraph 2 TEC and in its wider meaning in the TEU preamble. It is however not entirely clear whether he identify the wider meaning of the principle in European law with the general sense of the principle (as defined e. g. in the above mentioned encyclical letters).

the wide reading of the principle in question has a special connotation which will be discussed in part four of this contribution.

3. THE ECJ AND THE PRINCIPLE OF SUBSIDIARITY IN ITS NARROW SENSE

The narrow meaning of the principle of subsidiarity (as described in art. 5 paragraph 2 TEC) affects the ECJ in two ways. First, its task is to ensure that in the interpretation and application of the fundamental Treaties the law is observed (art. 220 TEC). This means inter alia that in the review procedure the ECJ must control whether the reviewed act has been adopted with due regard to the principle of subsidiarity. Second, the activist role of the ECJ raises an immodest question whether the principle of subsidiarity should be also applicable on its own decision making, i. e. whether the words “Community shall take action” in art. 5 par. 2 covers also the ECJ and its rulings. In the following parts of this contribution I shall examine both these issues with special regard to the fundamental rights protection.

3.1 THE ECJ AS A BODY ENFORCING THE PRINCIPLE OF SUBSIDIARITY TOWARDS OTHER EU BODIES

It is true that inserting the subsidiarity principle into the founding Treaties was welcomed with great expectations, especially by opponents to federalization of the Union. However, it is also true that the ECJ did absolutely frustrate anyone who believed in some magic power of the said principle. Simply, although breach of this principle by legislative bodies of the Union has been pleaded several times before it, the ECJ has never annulled any act on the basis of disregarding the principle of subsidiarity, nor it has established any test that would specify steps to be taken by the ECJ when examining observance of the principle in question.

From comparative point of view it is true that similar provisions on subsidiarity contained in constitutions of federative states are treated by the constitutional courts with problems and timidity. However, last decade shows that some changes in this respect were undergone by the US Supreme Court⁹ and the Constitutional Court of Germany. The case law of the last mentioned court on the subsidiarity issues even led the German Parliament to adopt a constitutional amendment which restricted the powers of the German Constitutional Court with respect to adjudication of the compliance of federal acts with the said principle.¹⁰

⁹ Sander, F.: Subsidiarity Infringements before the European Court of Justice: Futile Interference with Politics or a Substantial Step towards EU Federalism. *Columbia journal of European Law*, Vol. 12, 2006, pp. 551 - 555.

¹⁰ For overview and critics see Taylor, G.: Germany: A Slow death for Subsidiarity? *International Journal of Constitutional Law*, Vol. 7, 2009, pp. 139 - 154.

Some authors argue that the principle of subsidiarity is not justiciable since it is a political principle and requires assessment of issues which are better solved by the legislative bodies than by the judiciary.¹¹ I argue that the principle of subsidiarity is not more political than the principle of proportionality which is regularly used by courts. More over, it is not clear why the ECJ does not control at least formal compliance with the principle (i. e. each legal act must contain reasons that it is in accordance with the principle of subsidiarity). Further more, the Court can certainly (and without remarkable difficulties) seek to verify whether the EU institutions themselves really examined the possibility of alternative remedies at or below Member State level.¹² In my opinion, it is not sufficient if the EU legislator only states that the EU must act since it is better than individual actions by Member States.

The ECJ's attitude towards subsidiarity principle does not differ in any way in the area of fundamental rights protection. It is then inevitable to come to a conclusion that legislative and other EU acts concerning fundamental rights protection are not in fact subject to the principle of subsidiarity: the unification of fundamental rights in the EU level is therefore possible.

3.2 THE ECJ AS A BODY SUBJECTED TO THE PRINCIPLE OF SUBSIDIARITY

The above mentioned wording of art. 5 par. 2 TEC would seem to be primarily addressed to institutions and bodies of the Union concerned with legislation or with issuing administrative decisions. However, this narrow interpretation of the said article blunts the effect of the principle of subsidiarity because of two important facts. First, as demonstrated above, there is no real control over adhering this principle by legislative and administrative bodies, since the ECJ has failed to do this. Second, it is a well-known truth that the ECJ often takes recourse to a wide reading of the foundation Treaties and of the secondary legislation and such interpretation itself may be in antagonism toward the subsidiarity principle.

G. A. Berman when examining the possible functions of subsidiarity in practice concludes that “[i]f the Council or Commission may be presumed to observe the principle of subsidiarity in adopting legislation, then those who are called on to interpret that legislation – including the Court of Justice but more commonly the various Member State officials who administer and enforce it – should, in case of doubt, favor the interpretation that most respect that principle.”¹³

¹¹ Toth, A. G.: Is Subsidiarity Justiciable? European Law Review, Vol. 19, 1994, pp. 268 - 285.

¹² Bermann, *supra* note 1, pp. 391.

¹³ Bermann, *supra* note 1, pp. 366 – 367.

From this point of view, the answer to the question whether the rulings of the ECJ should also observe the principle of subsidiarity seems to be in affirmative. Moreover, the wording of art. 5 par. 2 TEC does not eliminate such interpretation since it only talks about “action of the Community”. I would presume that there could hardly be any objection against a thesis that decisions of the ECJ are “actions of the Community”.

However, it is clear that the principle of subsidiarity can not be applied to the decision making of the ECJ in such a way that the Court may choose which case it will decide and which not. The application of the subsidiarity principle in the decisions of the ECJ must have its limitations. Since the main role of the said principle is to distribute powers between the Union and the Member States and since such division is not a question of individual case but must be applicable in general, the principle of subsidiarity should be observed by the Court when giving general interpretation of European law. Or more precisely, the ECJ should consider the said principle if it has to make a “political choice” in distribution of powers while interpreting European law.

It is also important to bear in mind that the ECJ plays a different role than the legislative and political bodies of the Union: the interpretation of the law has certain rules and limits which are usually not present in political decision-making. De Búrca points it nicely:

“The Court is not free in the same sense as other institutions to use law as an instrument of policy. But simply because it is distinct from other institutions, and does not have the same kind of active political agenda does not mean that the Court makes no active policy choices. Neither does it mean that Community law, and the Court as the agent which enforces that law, is simply an instrument for making political bargains stick and for crystallizing agreed policy aims.”¹⁴

Unlike the legislative bodies of the Union, the ECJ does not have expressly specified duty to reason whether its decisions are in accordance with the subsidiarity principle (the Protocol on the application of the principles of subsidiarity and proportionality only refers to “proposed Community legislation” and does not mention the judicial decisions). However, if the ECJ makes similar political choices to those, which are in the legislative level subjected to the subsidiarity scrutiny, there is no reason why the ECJ should not include in its decision a similar reasoning concerning the principle of subsidiarity.

It is presumably not surprising that in practice the ECJ does not feel the principle of subsidiarity as a limitation to its rulings. Moreover, it has no

¹⁴ De Búrca, G.: The Principle of Subsidiarity and the Court of Justice as an Institutional Actor. *Journal of Common Market Studies*, Vol. 36, No. 2, 1998, pp. 232.

need to explain whether its ruling is in conformity with the said principle. As a striking example it is worth to mention the case *Factortame III*¹⁵ in which the German government argued that the creation of a right in damages by judicial decision of the ECJ would be incompatible with the allocation of powers between the Community institutions and the Member States. The question of subsidiarity was there fore impliedly raised before the ECJ. The Court, however, fabricated on its own the conditions of the state liability without stating why these conditions could not be better determined by individual Member States.

Since the area of fundamental rights protection in EU level was in its entirety created by the ECJ without any basis in founding treaties, one could argue that the whole concept could be in breach of principle of subsidiarity. This however seems to be too simplifying. First, both courts - the ECJ and the Court of First instance - ruled that the principle of subsidiarity could not be applied retroactively (i. e. on actions of the EU adopted before 1993).¹⁶ Second, in 60's and 70's the ECJ was under a great pressure put by constitutional courts of the Member States to create a sufficient protection of fundamental rights.

However, introduction of the principle of subsidiarity in the EU law seems to have no impact on the protection of human rights provided by the ECJ. More over, it is possible to conclude that the principle of subsidiarity did not prevent the ECJ in its activist case-law in the area of fundamental rights.¹⁷

This can be demonstrated by two cases connected with discrimination issues decided by the ECJ. In *P v S and Cornwall County Council*¹⁸ the ECJ ruled against the discrimination against transsexuals although the founding treaties did not contain necessary power for the EU to act in this area. This was introduced only later in 1997 by the Amsterdam Treaty. In *Mangold*¹⁹ the ECJ dealt with discrimination based on age. The time limit for implementation of a directive governing this matter did not expire yet in the time of the dispute. The Member States, therefore, treated this matter by themselves. More over, the directive in question empowered the Member States to unequal treatment under certain conditions. The ECJ however held that the principle not to be discriminated on the basis of age is one of the

¹⁵ Case C-46/93 *Brasserie du Pêcheur* and case C-48/93 *Factortame* [1996] ECR I-1029.

¹⁶ Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid* [1995] ECR II-289, paras. 330 and 331; cases C-36/97 and C-37/97 *Hilmar Kellinghusen* [1998] ECR I-6337, para. 35.

¹⁷ Tridimas, T.: *The General Principles of EU Law*. 2nd Edition. New York: Oxford University Press, 2006, pp. 184.

¹⁸ Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

¹⁹ Case C-144/04 *Mangold* [2005] ECR I-9981.

general principles of EU law. The Court left no room for Member States to deal with this issue differently.

4. THE ECJ AND THE PRINCIPLE OF SUBSIDIARITY IN ITS WIDE SENSE

The principle of subsidiarity in its wide sense holds that international fundamental rights standards are best implemented at the lowest level of government.²⁰ The wide reading of subsidiarity principle has – especially in the field of fundamental rights protection – two dimensions: a procedural one and a material one. As I show in the next part, the procedural level of subsidiarity is not applicable to the proceedings before the ECJ. On the other side, the material level of subsidiarity can be found in the ECJ's case-law and it has an impact on its decisions.

4.1 THE PROCEDURAL LEVEL OF SUBSIDIARITY

If a fundamental right of a person is breached, such person should be protected in the first place by a local authority (court). If the breach is not remedied then it should be possible to appeal to higher state authorities whereas the highest authority is usually a supreme or constitutional court. Only if the national state did not provide an efficient remedy, the affected person can seek such remedy by an international fundamental rights body.

The procedural level of subsidiarity principle - which may be identified as a rule of exhaustion of local remedies before commencing an international dispute – is a part of customary international law and was explicitly recognized by the International Court of Justice in case *Interhandel*.²¹ The rule was however predominantly developed in the area of international protection of fundamental rights: it can be found in different regional conventions on protection of fundamental rights which always state that the international protection of fundamental rights is subsidiary to the national protection. The subsidiarity principle is set forth in article 46 paragraph 1 of the American Convention on Human Rights²² and is confirmed by the case law of the Commission and the Inter-American Court of Human Rights.²³ The exhaustion of local remedies rule is also (in a more relaxed manner)

²⁰ Carter, W. M.: Rethinking Subsidiarity in International Human Rights Adjudication. *Hamline Journal of Public Law and Policy*, Vol. 30, 2008, pp. 319.

²¹ Case *Interhadel* [1959] I. C. J. Reports pp. 6: „*The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law (...)*“.

²² American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123.

²³ E. g. case (preliminary objections) *Velásquez-Rodríguez vs. Honduras* [1987] Series C, No. 1; case *Castillo-Páez vs. Peru* [1996] Series C, No. 24, and many others.

contained in article 56 of the African Charter on Human Rights and People's Rights²⁴ and is further elaborated by the case-law of the Commission,²⁵ the recently established court has not considered this rule yet. The most important (from the European point of view) is of course the principle of subsidiarity included in article 35 paragraph 1 of the European Convention for the protection of Human Rights and Fundamental Freedoms ("ECHR").²⁶ Accordingly, the case-law of the European Court of Human Rights accents the necessity of exhaustion of national remedies; nevertheless it also highlights the duty of the ECHR Member States to adopt such efficient remedies.²⁷

Application of the procedural level of subsidiarity on the proceedings before the ECJ is, however, practically impossible. The ECJ, the Court of First Instance or the Civil Service Tribunal are clearly not international courts protecting individual fundamental rights in the extent and manner as the above mentioned regional courts of human rights. These European courts do not review decisions of national courts. They deal with interpretation of European law via preliminary questions, judicial review of acts of EU bodies and institutions, infringement proceedings with Member states and several other proceedings. In majority of these proceedings the European courts are the first (and sometimes the sole) instance: there are no national proceedings which precede the proceedings before the European courts and which are to be exhausted. Similarly in the preliminary question procedure the ECJ does not review decisions of the national courts, it only rules on interpretation or validity of European law without deciding on the merits. The local remedies exhaustion rule would be in all of these procedures in principle unrealizable.

4.2 THE MATERIAL LEVEL OF SUBSIDIARITY

According to the material level of subsidiarity in the wide sense (the subsidiarity "in content") the initial definition of the content of international

²⁴ African Charter on Human Rights and People's Rights, adopted 27th June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

²⁵ For example in the decision 59/91 was the complaint held admissible although the local remedies had not been exhausted, since the appeal of the complainant had been treated by national courts fruitlessly for 12 years. The African Commission on Human and People's Rights: Information sheet No. 3. Communication Procedure, Organisation of African Unity. [cited 23. 10. 2009]. Available from http://www.achpr.org/english/information_sheets/ACHPR%20inf.%20sheet%20no.3.doc.

²⁶ European Convention for the protection of Human Rights and Fundamental Freedoms, adopted 4th November 1950, ETS No. 005, available from <http://conventions.coe.int/Treaty/EN/Treaties/Html/005.htm>.

²⁷ Case *Scordino and Others vs. Italy* (application No. 36813/97), paras. 140 – 149; Case *Nikolova and Velichkova vs. Bulgaria* (application No. 7888/03), para. 49.

fundamental rights should be reserved to national authorities.²⁸ Some authors argue that in the case-law of the ECJ in the field of fundamental rights it is possible to find certain aspects of this subsidiarity principle. For example, the Court relies on the constitutional traditions of the Member States when defining the content of fundamental rights. The ECJ also uses a stricter scrutiny when it reviews the acts of the EU institutions than when it reviews the acts of Member States implementing the European law or derogating from the treaties' obligations.²⁹ It is worth to mention that these aspects developed by the case-law were to certain degree adapted by the Charter of Fundamental Rights of the European Union.³⁰

The material level of subsidiarity is however predominantly connected with the doctrine of margin of appreciation developed by the European Court of Human Rights.³¹ The basic idea is that the Member States of the ECHR should be primary liable for observing the ECHR and they should maintain a certain margin of appreciation when regulating the society. The European Court of Human Rights should not act too actively and it should not set a uniform high standard of fundamental rights protection.

Unlike the European Court of Human Rights, the ECJ and the Court of First Instance do not have subsidiary role regarding the observation of law in the interpretation and application of the founding treaties (article 220 TEC). The observation of the law, however, covers also observation of the principle of subsidiarity. If this principle is interpreted in its wide sense, it is clear that the ECJ could apply the doctrine of margin of appreciation in the area of the fundamental rights protection.³² This conclusion is to be derived also from the article 52 paragraph 3 of the Charter of Fundamental Rights of the EU:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

Since the European Court of Human Rights is the only body which can authoritatively interpret the ECHR and since this court applies the doctrine of margin of appreciation when interpreting the ECHR, the ECJ should

²⁸ Carter, *supra* note 20, pp. 326.

²⁹ Carozza, P. G.: Subsidiarity as a Structural Principle of International Human Rights Law. *The American Journal of International Law*, Vol. 98, No. 38, 2003, pp. 54 - 56.

³⁰ See preamble and articles 52 paragraph 6 and 51 paragraph 1 of the Charter.

³¹ For the first time introduced in the case *Handyside v United Kingdom* [1976] Series A 24.

³² But see Peers, S.: Taking Rights Away? Limitations and Derogations. In: Peers, S., Ward, A. (eds): *The EU Charter of Fundamental Rights: Politics, Law and Policy*. Oxford : Hart Publishing Co., 2004, pp. 168 – 169.

respect the interpretation made by the European Court of Human Rights. Therefore, the ECJ should use the margin of appreciation doctrine in the same manner as the European Court of Human Rights.

The margin of appreciation doctrine could have two important impacts on the decision making of the ECJ in the area of fundamental rights protection: on the one side, this doctrine could limit to a certain degree the ECJ in its activist case law; on the other side this doctrine could provide the ECJ with a certain room for judging sensible issues such as abortion³³ or same-sex marriages. Although the EU was and still is predominantly economic body, the ECJ has already dealt with both these sensible issues³⁴ and many similar ones may occur. If the ECJ tried to find a uniform solution to these issues, the Member States would probably not accept it.

Finally, it is worth to mention that the ECJ has already used the doctrine of margin of appreciation in several decisions.³⁵

5. CONCLUSION

In conclusion, the introduction of the principle of subsidiarity in its narrow sense in the EU law had almost no impact on the decision making of the ECJ. The Court did not in fact control the observance of the said principle by other EU bodies and institutions nor did it apply the principle to its own decisions.

Regarding the principle of subsidiarity in its wide sense, it is clear that the procedural part of this principle is not applicable to the ECJ. The material part, however, could have significant effect on the ECJ's case law in the area of fundamental rights protection via the doctrine of margin of appreciation.

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³³ For an interesting analysis of the abortion clause in the Irish constitution with respect to the EU actions and principle of subsidiarity see Moens, A. G.: The Subsidiarity Principle in European Community Law and the Irish Abortion Issue, *IUS Gentium*, Vol. 9, 2003, pp. 35 - 71.

³⁴ Case C-159/90 *SPUC v. Grogan* [1991] ECR I-4685; cases C-122/99 P a C-125/99 P *D. v. Council* [2001] ECR I-4319.

³⁵ Case C-274/99 P *Connolly* [2001] ECR I-1611, paras. 41 and 49; cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk* [2003] ECR I-4989, para. 83; case C-540/03 *Parliament v. Council* [2006] ECR I-5769, paras. 54 – 66; case C-145/04 *Spain v. United Kingdom* [2006] ECR I-7917, para. 94; cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351, para. 360.

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