Subsidiarity and European Environmental Law

by Pamela van der Goot

The principle of subsidiarity has its origin in the Roman Catholic social thought. It was developed in the encyclical *Rerum Novarum* of 1891. It says that the State should not absorb the citizen or the family, they should be permitted to retain their freedom of action, so far as this is possible without jeopardizing the common good and without injuring anyone. Furthermore, if any injury has been done to or threatens either the common good or the interests of individual groups, which injury cannot in any other way be repaired or prevented, it is necessary for public authority to intervene. The subsidiarity principle was further developed in the encyclical *Quadragesimo Anno* of 1931, saying that social problems should be resolved on more local levels first.

In the context of European integration, the subsidiarity principle surfaced in 1987 when the ECJ held in *Case 247/85* that the Bird Directive 79/407 was a typical example of a measure which purpose was better served at Community level. The first time that it was mentioned in an Act or Treaty, was in article 25(4) of the 1987 Single European Act, but only in relation to environmental policy. The SEA introduced the subsidiarity principle in Article 130R para 4 EC Treaty, stipulating that

*The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States.*

*The Maastricht Treaty* moved the subsidiarity principle to article 3(b) EC Treaty and extended its application to any Community action. The content of this article was repeated in article 5 of the *Amsterdam Treaty*. The part of this provision dealing with subsidiarity now reads as follows:

*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 insofar 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.*

In the *EU draft constitution* a new subsidiarity control mechanism is introduced. Article 9(3) refers to the Protocol on the Application of the Principles of Subsidiarity and Proportionality. In short it states the following: National Parliaments are to be informed about all new Commission initiatives at the same time as the Union legislator. The National Parliaments have six weeks to send to the Presidents of the European Parliament, the Council of Ministers and the Commission a reasoned opinion stating why it considers that the proposal does not comply with the principle of subsidiarity. If one third of the votes (unicameral parliaments have two votes, in a bicameral parliamentary system each chamber has one vote) consider that a proposal does not comply with the
principle of subsidiarity, the Commission must review its proposal. It can then decide whether to maintain, amend or withdraw the proposal.

In the Netherlands a “Joint committee application subsidiarity” was launched in order to identify what needs to be changed within the Dutch Parliament to increase the democratic legitimacy of the actions of the European institutions. What repercussions will this have on, for example, the initiated environmental legislation? When it is objectively performed it may lead to assigning the best institution, National or European, to introduce the legislation. However, Member States may choose to collaborate on political grounds. The decision to object to a proposal on the basis of a breach of the subsidiarity principle is a political one, especially when it concerns environmental matters. The Community does not have exclusive powers in this area. When sensitive, for some Member States perhaps too far reaching, legislation is proposed, reasons may be sought to come to the opinion that it does not comply with the principle. This may influence the decision-making procedure. If enough votes are opposed to the initiative, the Commission needs to re-examine it. As stated above, it can still pursue its own direction. The National Parliaments do have another possibility. Their objections are also sent to the European Parliament and the Council of Ministers. If they persuade these institutions, or at least enough members to stop a QMV, the Commission initiative could still be stopped. This way less environmental legislation may be introduced at the Community level. It remains to be seen whether measures will then be taken at the national level.

Relevant Links and literature

- The International Federation for European Law (FIDE) XXth Congress in London 2002
- SCADPlus: European Convention - EU decision-making procedures