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From the principle of subsidiarity to Joseph Haydn

Ladies and Gentlemen,

Please accept above all my apologies for my audacity, or arrogance (not being a specialist or expert on European law, nor even an internationalist or an expert on international law) in coming before you with thoughts on the principle of subsidiarity in European law. Besides that, I can not let my other handicap go without mention: however filled with satisfaction at the formation of a new Europe in the previous 50 years and however joyful at Central European nations being able to participate in this process since 1989, in confrontation with the language, intelligibility and competence of clear and foreseeable interpretation and application of European law, I feel that classical legal knowledge and education (focussed on logic, philosophy and political science), as well as many years of judicial practice represent to me more of a burden than an advantage.

The principle of subsidiarity is one of the classifying principles of the system of jurisdictional relations and ties between the European Union and its members. In my opinion this can not be considered without taking at least a general, basis consensus in the matter of its political-science comprehension.

The legal basis of the European Union is its primary legislation, which is contractual law comprising the basic EU constitutional treaties concluded by EU Member States (to which the Vienna Convention on the Law of Treaties from 1987, No. 15/1988 Coll., applies). It can be said of secondary European legislation that "the Amsterdam Treaty subordinated 80% of the legislative process to the newly amended process under Clause 251" according to which "the vast majority of all legal acts of secondary legislation are accepted based on the co-determination process".[1]

At the same time, let us remember that currently valid primary legislation does not include any catalogue of powers from which "division of power between the Community and the Member States would be obvious" and "above all, it is not possible to find the precise boundary between exclusive power of the Community and concurrent powers", whereas "the case law of European courts has contributed towards resolution of this issue in a very limited way", since "The European Court of Justice enunciated the exclusive jurisdiction of the Community only for the area of international trade, and subsequently developed its opinion in its constant case law (C-83/94 Leifer)" but "it did not develop any criteria by which it would be possible to proceed", and "there are not even very many papers on this issue in literature".[2] This fundamental question was "resolved" in the Memorandum on the principle of subsidiarity of 1992, in which the Community informed the Council and Parliament of the areas in which the Community has exclusive power. The Lisbon Treaty attempts to remove this deficiency of the current regulation (at this point, let us leave the aspect of legislative evaluation of this attempt). Clause 4 paragraph 1 of the Treaty on the Functioning of the EU anchors exclusivity; paragraph 2 of that Clause shared power; paragraphs 3 and 4 power in exercising which the Union may not intervene in exercise of the powers of the Member States; and Clauses 5 and 6 power by which the Union coordinates and supplements the activities of the Member States.

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[1] L. Tichý, R. Arnold, P. Svoboda, J. Zemánek, R. Král, Evropské právo (European law). 3rd edition, Prague 2006, p. 257.

[2] Ibid., p. 89, 91.

So, to sum up: Clause 5 of the valid Treaty on European Union (previously Clause 3b) stipulates that the Community acts within the bounds of the power given to it by this Treaty and the goals set therein, whereas in areas that do not fall within the Community's exclusive power, in accordance with the principle of subsidiarity it pursues an activity only if, and to such extent as the monitored goals cannot be satisfactorily achieved at Member State level and can thus, due to their scope or effect, be better achieved at Community level. Primary legislation, then, presupposes exclusive and shared power and for the field of shared power it sets the aspect of subsidiarity, but does not contain any explicit definition of this.

How should this phenomenon be interpreted? From the viewpoints of the "national" lawyer, the judge and the traditional political-science conceptual apparatus, this is an undesirable situation and one that constitutes obscurity, uncertainty and extemporaneousness. It is possible that the view of an internationalist offers a different view or perspective: he regards conception of primary European legislation not as a constitutionalist criterion but as differing traditions and customs of international contractual law. For him, an area of relations so conceived between the Union and the Member States is one of constant negotiation (creation) and, to a lesser extent, one of application.

Eighty percent of the participation on the obscurely defined powers in the case of secondary legislation (directives) is covered by the Commission as the petitioner, and the Council and the Parliament by co-decision (if not stipulated otherwise in primary legislation, the Council decides by a qualified majority).[3] How could this institutional model be characterised? Is it a composite state, a state union or an international organisation? How could the European Union be characterised from the perspective of this terminology?[4]

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[3] Under Clause 16 paragraph 1 of the consolidated wording of the Treaty on European Union the European Council, together with the European Parliament, carries out a legislative and fiscal function, while under paragraph 3 the Council decides by a qualified majority, unless the Treaty on European Union and the Treaty on the Functioning of the European Union stipulate otherwise (if the Council decides matters in accordance with Clause 15 paragraph 1, i.e., on motions for its development and on definition of their general political directions and priorities, then in accordance with Clause 15 paragraph 4, unless these Treaties stipulate otherwise, it decides by way of consensus).

[4] The composite state as understood in modern times is the result of a compromise of the "fathers" of the Constitution of the USA in 1787 between supporters of the strong central state ("Virginia Plan") on the one hand and those of the state union ("New Jersey Plan") on the other hand at the Constitutional Convention held in Philadelphia (28 May to 19 September 1787). The substance of this arrangement became dual government – in the European/continental terminology: dual sovereignty (let us remember that Clause 10a of the Constitution reservedly mentions "cession of power"). Central power (national government) was not established by either a federal or an international treaty, but by a constitution derived from the authority of all people (and not individual states, although it also anchored the requirement for ratification as a condition for its validity). Central power (i.e., the power of the federal or composite state) acquired the power of immediate enforcement in relation to all nationals. At the same time the Member States also remained sovereign in the area of competency demarcated by the constitution. Interaction of individual states on creation of the public will of the composite state was expressed by means of representation in institutions of the composite state, chiefly in the Senate of the Congress. By way of various modifications of this model during the 19th and 20th centuries, a number of composite states came into being: Canada, Australia, the Federal Republic of Germany, Austria, Belgium, etc. Literature applied and still applies various nomenclature to the title 'composite state'. For the Anglo-Saxon world, federation is typical; for central, German speakers and Europe it is Bundesstaat (federal state). The word 'federation' is derived from the Latin word *foedus*, which means 'covenant'. The word 'Bundesstaat' is actually a German translation of the word 'federation'. To sum up, then, the substance of the composite state: it is division of sovereignty between the composite state and the individual member states (territorial units). Division of sovereignty means separation of individual areas of social relations between the composite state and the member states, whereas in such separated areas both the composite state and the member states exercise sovereignty in the full extent. Exercise of sovereignty in the full extent comprises state activities from legislative power to its application in the areas of administration and justice; it means exercise of state power from primary power regulation in the given area or areas (by way of adopting laws) to their realisation in practice. The characteristics

The unit that was created by the set of integration agreements – the European Union – can not be subordinated under the concept of either the composite state or the international organisation. It is a point of discussion whether it can be likened to a confederation or not. To indicate the European Union in the Maastricht Decision (BVerfGE 89, 155 (192 et seq.)), inspired by Paul Kirchhof, the Federal Constitutional Court of the Federal Republic of Germany used the term "Staatsverbund".[5] At the same time the Court referred to the limited scope of power vested in the Union under Clause E of the Maastricht Treaty and Clause 3b paragraph 1 of the Treaty of Rome Establishing the European Economic Community, to the principle of subsidiarity as per Clause B paragraph 2 of the Maastricht Treaty and Clause 3b paragraph 2 of the Treaty of Rome Establishing the European Economic Community, as well as by referring to a thesis according to which the EU Member States remain "masters of the treaties".[6]

Not long ago, the Constitutional Court of the Czech Republic also gave its opinion on the constitutional nature of the European Union in decision Pl. ÚS 19/08. It stated that "The European Union has advanced by far the furthest in the concept of pooled sovereignty, and is already today creating an entity *sui generis* that is difficult to classify in classical political science categories. It is more a linguistic question whether to describe the integration process as a "loss" of part of sovereignty or competences, or, somewhat more fittingly, as, e.g., "lending, ceding" of part of the competence of the sovereign. It may seem paradoxical that the key expression of state sovereignty is the ability to dispose of one's sovereignty (or part of it), or to temporarily or even permanently cede certain competences. From the modern

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of the composite state flow from its substance: One of these is the fact that the territorial units forming it have a constitutional (and not an administrative) nature; others are the dual arrangement of the constitutions and the supreme state bodies (i.e., existence of the constitution and supreme bodies of the composite state and the constitutions and supreme bodies of the member states), dual legislation and dual nationality.

The key question of every composite state is therefore division of competency between the composite state and the individual member states. This division can be conceived via a positive and exhaustive enumeration of competency of the composite state and a negative definition of the competency of member states: for example, as per Amendment X to the US Convention of 1791: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The opposite concept was elected by the constituent members in Belgium, where the competency of individual territorial units (communities and regions) is constitutionally, positively and exhaustively enumerated while the competency of the composite state is negatively defined. In Belgium, this fact relates to the evolution of the Belgian state from a unitary state to a federation. The Basic Law of the Federal Republic of Germany incorporates a unique construction in this respect. Apart from competency of the Federation and the Laender, it also anchors the area of concurrent legislation: "On matters within the concurrent legislative powers the Laender have authority to legislate as long as, and to the extent that the Federation does not use its legislative power." (Clause 72 paragraph 1 of the Basic Law of the Federal Republic of Germany).

The state union differs from the composite state in that member states retain their sovereignty in it. This characteristic manifests itself in the fact that the decision-making of the union's organs does not immediately bind citizens of individual member states, but only these states themselves (the union's organs therefore do not have imperative authority). Examples of state unions were the Swiss Confederation until 1948 or the German Confederation until 1871. We no longer encounter state unions in the 20th century, with the exception of certain attempts at integration in third-world countries (e.g., the United Arab Republic, uniting Egypt and Syria, or the experimental unifications carried out by Libya between the Maghreb states, or Senegambia – the attempt at uniting Senegal and Gambia). Historical development and the experience gained from it have shown that the state union ("Staatenbund" in German terminology) represented in the history of states a certain transient stage in their unification or disintegration (e.g., the unification of Norway and Sweden, terminated in 1904). Thus, the state union did not come into being via the rational, long-term coexistence of states, justness and functionality, as experience would confirm.

[5] P. Kirchhof, Der deutsche Staat im Prozeß der europäischen Integration. In: Handbuch des Staatsrechts der BRD. Bd. VII., Heidelberg 1992, Hrsg. J. Isensee. P. Kirchhof, p. (855 et seq.).

[6] For details see M. Hošková, the Maastricht Treaty before the constitutional courts of the EU Member States. Právník, no. 8, 1995, p. 737 et seq.

constitutional perspective, then, supremacy (sovereignty) need not mean only 'independence of state power from any other power, both outwardly (in the area of international relations) and in internal matters'. Thus, today sovereignty is (probably) not understood in any traditional democratic country and, *stricto sensu*, no state would match the characteristics of sovereignty. National sovereignty means, above all, a legitimate government that has the formal power to choose between feasible options and not to pursue the option directly dictated by a foreign power. In other words, for both the national state and for the individuals within society, practical freedom means being a participant and not a subject. A shift of some of the state's powers arising from the free will of the sovereign, and that are to continue to be exercised with its participation in an agreed and controlled way, is not a dilution of the concept of sovereignty; to the contrary, the outcomes of such a shift can lead to a strengthening in the common approach of the integrated whole. The EU integration process does not take place in any radical way that would generally mean a 'loss' of national sovereignty. Instead, it is an evolutionary process and, among other things, also a response to progressive globalisation. … The Constitution interpreted as a whole is consistent as regards the relation between Clause 10a and Clause 1 paragraph 1: Clause 10a evidently can not be used for unlimited transfer of sovereignty: in other words, based on Clause 10a it is not possible – as already stated – to transfer powers by whose transfer Clause 1 paragraph 1 of the Constitution would be affected in the sense that it would no longer be possible to talk about the Czech Republic as a sovereign state. Here, intervention by the Constitutional Court should come into consideration as a last resort, i.e., in the situation where the limits of discretion were unambiguously exceeded and Clause 1 paragraph 1 of the Constitution was affected, since there was a transfer of powers beyond the limit of Clause 10a of the Constitution."

It is not the task of constitutional courts to create theoretical models; that is the task of doctrine. The thinking connected with the debate on state sovereignty against a backdrop of tensions, doubts, discussions and controversies about the Lisbon Treaty, therefore, can only lead to formulation of the fundamental question: To what extent is doctrine prepared to present a theoretic, political-science model capable of describing not only a phenomenon the only embodiment of which is the European Union, but also its structural characteristics and the outcome of changes in the parameters of this model? At the same time, the thesis according to which the European Union comprises the characteristics of both a composite state and a state union (international organisation) is an acceptable starting point. In other words (i.e., words that in Europe are from the times of the persisting legacy of romanticism and a combination of ethnicity and statehood and are considered scarcely acceptable), the characteristics of both a federation and a confederation. Moreover, the political thought of Central (post Communist) Europe is necessarily influenced by the fall of Communism, the demise of the Soviet colonial system and freedom regained (sovereignty). Therefore, sovereignty blends and links Central European political thinking (or a significant part thereof) with freedom (and, in doing so, repeatedly in Czech political thinking – this was first the case distinctively in connection with formation of the Czechoslovak Republic in 1918). Finally, apart from national romanticism and the historical connection of sovereignty with freedom, the political restraint of the Central European elite as regards the European integration project can also be associated with a less pleasant phenomenon: the local elite's fear of loss (restriction) of their own power.

For formation of the semblance of the European Union this is a significant paradox. The international organisation is typically a horizontal structure and the extent of its democratism is given by the extent of democratism of the members (subjects) and of the arrangement of the organisation (for negative examples see the CMEA, the Warsaw Treaty), i.e., realistic equality of subjects and democratism of the deciding process, in other words, the

democratic legitimisation chain and the democratism of the domestic organisation. The friction between the increasing stress of decision making, broadening powers, in the absence of a realistic legislative power (the European Parliaments' limited position tends to put it in the position of a surveillance authority, thus putting the brakes on the power division system), combined with growing executive power and the demand for functionality and between the quantity and the principle of equality of subjects (again, one "deterring" example from history – the "famous" *liberum veto* in the Polish Sejm), led to introduction of majority voting in the European Council (in an organ that is international-law in character – it is made up of representatives of the EU Member States) and to growth of the executive influence (the European Commission), while expanding the elements of horizontal and vertical power division (horizontal – comprising extension of the influence of European Parliament; vertical – extension of the influence of domestic parliaments). Strengthening of the democratic elements in the institutional architecture would, or does, mean a weakening of the democratising chain and a direct legitimising linkage of voters and the Union's supreme body, which institutes a change of the function of the European Parliament, its position in the role of supreme legislative organ and in the role of the creative organ of the European executive. If the Union's democratic deficit is seen in an absence of direct legitimacy of the Union's supreme organ and executive by citizens, then direct legitimacy is connected with a tendency towards federalisation. This paradox could be denominated as a paradox between the demand for direct democratic legitimacy of the Union and the concept of sovereignty of Member States accepting only cession of power to international organisations but not to state units. The paradox changes into a contradictio in adiecto...

In recent years, two fiercely debated concepts have appeared in the European legal arena: the first is plurality of legal orders, and the second is the judicial "Bermuda triangle". Armin von Bogdandy asks whether Kelsen's perception of a pyramidal arrangement of legal order[7] has survived in Europe.[8] Moreover, a number of authors refer to actual and potential tension between three courts or groups of courts that aspire to decide with final effect in Europe (in either the full or only the partial scope of the content to be decided), i.e., between constitutional courts, the European Court of Human Rights and the European Court of Justice.[9] If standpoints are presented by realistic reflection of the fact, then the basic theoretical problem introduced thereby is ensuring consistency of the legal order (legal orders) in the situation where there is no hierarchy of rules. At this point let us remember Weinberger's thesis, according to which the postulate of consistency is stronger than that of the hierarchy of legal rules.[10] If we examine general consideration of the necessity to

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[7] As to gradual formulation of the legal order, see A. Merkl, Prolegomena einer Theorie des rechtlichen Stufenbaues. In: Gesellschaft, Staat und Recht. Untersuchungen zur Reinen Rechtslehre. Hrsg. A. Verdross, Festschrift Hans Kelsen zum 50. Geburtstage gewidmet. Wien 1931, p. 252-294.

[8] A. von Bogdandy, Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law. International Journal of Constitutional Law, vol. 6, no. 3 & 4, 2008, p. 457 et seq.

[9] See, for example, S. Oeter, Rechtssprechungskonkurenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte. In: Bundesstaat und Europäische Union – zwischen Konflikt und Kooperation. Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer. Berlin 2007, p. 362.

[10] This thesis was explained by O. Weinberger in his report, Nový institucionalismus jako základ právní a politické teorie (New institutionalism as the basis for legal and political theory), which he presented on 9 April 1999 at the Law Faculty of Charles University in Prague. As a starting point for solution of the issue of conflict of validities, Weinberger's principle of priority of the postulate of consistency over the hierarchy of the body of laws leads to a necessity also to accept other sources of law rather than statutory law, particularly case and common law (regardless of the method of semantic grasp of the problem). It is obvious that within the context of the ability to broaden the system of sources of law it will not be necessary to solve the issue of their legitimacy as well. It could even be worth mentioning an example from history of resolution of conflicts between analytic

coordinate supreme courts or the necessity for their restraint, then in the position of a realistic mechanism ensuring consistency of the normative system, corresponding value and conformity on basic principles of the European culture and the European arrangement (on the one hand) and the applicative precedence of European law in relation to domestic law (on the other hand) can be seen.[11] However, practice does not always confirm such optimism, and an example of this is the decision of the Federal Constitutional Court of the Federal Republic of Germany in the Görgülü case dated 14 October 2004 (BVerfGE, 111, 307). I think that the functioning of European law in practice has created a further legal order (legal orders) unifying the mechanism. The deciding masses of European law function in the form not of incorporated, but of transformed law, i.e., in the form of domestic law. Thus a situation is created where the reason for validity does not correspond to the form of law (European law, according to content, features in the form of domestic law), and in which the national judge takes the role of the European judge. I am convinced that this very circumstance in legal practice results in minimising conflicts and a relatively high measure of domestic consistency of both the European and the domestic legal orders. The domestic judge interprets and applies both domestic and European law crucially from the same perspectives – methodologies and values (and there is no reason to assume he is schizophrenic). I think that this circumstance results in a relatively small number of conflicts in relation to the huge amount of the two normative systems – European and domestic.

However, let us try to advance in reasoning to the principle of subsidiarity itself. In the sense of Clause 5 paragraph 3 of the Treaty on European Union, as amended by the Lisbon Treaty, according to the principle of subsidiarity one Union in areas that do not fall within its exclusive power, only if and to such extent as the objectives of cogitation can not satisfactorily be met by the Member States at central, regional or local level, but which, due to their scope or effects, can be better met at Union level, whereas the Union's bodies apply the principle of subsidiarity in accordance with the Protocol on the application of the principles of subsidiarity and proportionality (which regulates the procedure linked with application thereof and review of compliance therewith). As per paragraph 4 of this Clause, then, according to the principle of proportionality neither the content nor the form of the Union's activity exceeds the framework of what is necessary for achieving the Treaties' objectives, again referring to the Protocol on the application of the principles of subsidiarity and proportionality.

Under Clause 2 paragraph 2 of the Treaty on the Functioning of the European Union, as amended by the Lisbon Treaty, if the Treaty gives the Union power shared with Member States in a certain area then both the Union and the Member States may compile and adopt legally binding acts in this area. The Member States exercise their power to such extent as the Union has not exercised such power. Again, the Member States exercise their power to such extent as the Union has decided to stop exercising its power. Clause 4 paragraph 2 then contains an exhaustive list of powers shared by the Union and the Member States (the

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validity and sociological validity: "The Hungarian laws frequently refer to common law and recognise it as binding … As to the relationship of common law to the Tripartitum it stated that common law may make new laws, change old ones and interpret the law authentically … These principles were maintained in the Hungarian legal system and thus Hungarian law allows for common law to supplement acts …, interpret authentically …, or for common law to cancel acts." (J. Rauscher, O obyčajovom práve na Slovensku. In: Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a Podkarpatské Rusi (A commentary on the Czechoslovakian general Civil Code and civil law valid in Slovakia and Carpathian Ruthenia). Part one. Ed.: F. Rouček, J. Sedláček, Praha 1935, p. 162.)

[11] See, for example, F. Merli, Rechtssprechungskonkurenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte. In: Bundesstaat und Europäische Union – zwischen Konflikt und Kooperation. Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer. Berlin 2007, p. 420-422.

domestic market, social politics, as concerns aspects determined in this Treaty, economic, social and territorial solidarity, agriculture and fishing except for preservation of marine biological resources, the environment, consumer protection, transportation, trans-European networks, energy, the area of freedom, safety and law, the common issues of public health safety, as concerns aspects determined in this Treaty). From the comparison of the Union's exclusive and shared powers (Clause 4 paragraphs 1 and 2), as well as powers that, in being exercised, must not interfere with exercise of the Member States' powers (Clause 4 paragraphs 3 and 4), and powers by which the Union coordinates and supplements the Member States' activities (Clause 5 and 6), it is possible to reach a conclusion whereby the Union's largest scope of power is actually concentrated in the area of shared powers.

How could one recapitulate almost seventeen years of operation of the principle of subsidiarity? Let us remember that the findings of the European Council's session in Birmingham in October 1992 and Edinburgh in December 1992, the Interinstitutional Agreement of October 1993 and subsequently the Protocol to the Amsterdam Treaty on the application of the principles of subsidiarity and proportionality of 1997 contain the procedural or jurisdictional aspects of application of the principle of subsidiarity, but no specification of its material content, i.e., no aspects of a potential test of subsidiarity (carried out by both the Union's political organs and the European Court of Justice). Recapitulation of the existing case law of the European Court of Justice in respect of the principle of subsidiarity leads, through professional reflection, to the conclusion that the Court's current approach is very restrained and subsidiarity is of small significance in its case law, and that the Court shows unwillingness to apply the principles in any conception other than minimalist and thus far has avoided a proper investigation of compliance therewith.[12] From the minimum of starting points via doctrine, at least a rough outline is abstracted of the subsidiarity test, which comprises two steps ("double test"): "First, a so-called comparative efficiency test must be carried out at Member State level. By means of this test it can be determined whether Member States have the means (including the financial means) to achieve the respective goals. The second step is to test the better efficiency of the Community. This test is characterised as a value added test, i.e., the Community must demonstrate a more effective solution. The review, during which the objectives of the Treaty and the interests of the Member States and individuals who are affected must be taken into account, is decisive."[13]

In an interview for Frankfurter Allgemeine Zeitung on 24 July 2007, when asked about current practice when applying the principle of subsidiarity Hans-Jürgen Papier, President of the Federal Constitutional Court of the Federal Republic of Germany, critically observed: "although the principle of subsidiarity is positive law, in practice it plays no role – this must change". He goes on to point out that application of the principle must comprise two steps, the first being to establish the given fact of the Union's power, which is only then followed by the subsidiarity test itself. He takes a positive view of the proposed "timely warning" system, or fortification of the position of national parliaments, and of introduction of the system of a priori monitoring of compliance with the principle of subsidiarity.[14] At a lecture at Humboldt University in Berlin on 21 February 2008, however, he is already more

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[12] See T. Břicháček, Přístup Evropského soudního dvora k principu subsidiarity (The approach of the European Court of Justice to the principle of subsidiarity). Právník, no. 2, 2008, p. 154-155 and professional literature mentioned therein.

[13] L. Tichý, R. Arnold, P. Svoboda, J. Zemánek, R. Král, Evropské právo (European law), p. 93.

[14] http://www.faz.net/s/Rub99C3EECA60D84C08AD6B3E60C4EA807F/Doc~EDBFB74C1D1114FE2AEA0917043918AE3~ATpl~Ecommon~Scontent~Afor~Eprint.html. See also H.-J. Papier, Das Subsidiaritätsprinzip - Bremse des europäischen Zentralismus? In: Depenheuer/Heintzen/Jestaedt/Axer (Hrsg.), Staat im Wort, Festschrift für Josef Isensee, 2007, s. 691-705.

sceptical. In his introduction he sums up his current basis: "I consider fortification of the principle of subsidiarity to be one of the most valuable benefits of the Lisbon Treaty. The Treaty attempts to equip what is, after all, the rather toothless criterion of subsidiarity with a defensible control mechanism. On the one hand the so-called timely warning system was created which, together with other procedural changes, should ensure effective political control ex ante, and on the other hand the Lisbon Treaty introduces a new kind of legal proceedings to the European Court of Justice for breach of the principle of subsidiarity, which allows procedural review ex post." These proposed changes are rated by H.-J. Papier very reservedly, however: "The form of the timely warning system seems to me not to be very practical. In the EU a total of 18167 decrees and 750 directives were issued from 1998 to 2004. Although for the most part these legal acts are limited to regulation of agriculture, their sheer number gives an idea of the torrent of papers pouring out of Brussels every day. Thus, I consider provision of an individual and qualified test of subsidiarity to be quite out of the question. Let us add to this the short, eight-week deadline that has been set … This deadline, which for that matter naturally can not take into consideration parliamentary recesses, etc., renders review of the proposed regulations from the perspective of their potential impacts practically impossible. This is because before there has been time to push the appropriate commentary procedure through the ministries and councils, the deadline could already have elapsed. Even if theoretically an objection succeeded in being made in time, there would only arise an obligation of the European organs to take it into account. If their wills correspond they can, without further ado, persist with their legal approach and continue in their original direction. In order to achieve a new decision it would be necessary to fill the quorum of one-third, or one-quarter of national parliaments, which would of course require significant international coordination that could be achieved during those eight weeks only with great difficulty." On the periphery of legal a posteriori review, he also sceptically adds: "Not even this change, however, should provoke great expectations. For one thing, subsequent judicial review is always only the second best way to remedy the defect; and for another, it must first be shown whether the European Court of Justice will extend its review to the frequently asked – and ultimately often decisive – jurisdictional questions or whether it will limit itself only to reviewing the criteria of subsidiarity, thus omitting the worst cases of jurisdictional licence from application of legal proceedings for breach of the principle of subsidiarity. And finally, it can not be expected that the European Court of Justice will change its heretofore very restrained case law because of a new type of procedure." To conclude, he adds ironically: "Ultimately, reformed review of subsidiarity can hardly be such an 'ingenious construction' as we may have read."

Papier's dilemma – positive evaluation of legislative changes and concurrent scepticism about practical application thereof – also embodies other problems. Accordingly, at present the courts do not represent the ultima ratio of the legally consistent state only; they are also expected to perform this role within the framework of the Union. Thus, the question of proportionality of the elements of democracy in relation to the elements of the legally consistent state in the European Union remains open. If the Court aggressively and actively embraces jurisdictional review and the relating review of subsidiarity, then will it not be accused of a trend towards activism and "judiciocracy"? With all probability, such a development will bring a dual measure: on the one hand it could operate as an effective braking system for excessively "pro-Union" interpretation of the EU framework of powers, while conceptually it will be an element of the composite state, a federative element. The federative momentum of arrangement of the entity may prove to be an effective guarantee of national interests.

However ingenious academic and professional conceptual constructions are, the key question is whether they are applied, or can be applied at all, in practice. This enunciation also applies to consideration of the content of the subsidiarity test. It is the current practice itself of constitutional courts (or supreme courts performing the function of constitutional justice) that developed the publicly accepted tests of division of power in composite states and proportionality for the area of monitoring of rules, whose individual components of its function are also applicable to the potential subsidiarity test, and that also developed the publicly accepted interpretive procedures concerning reconstruction in legal texts by implication of the objectives contained. Time will tell whether this constitutionalist "intellectual wealth" will create a spawn for future European Court of Justice case law or whether development will wend in another direction.

Besides, everything depends fundamentally on what value and institutional form of Union the nations of Europe accept as a natural area for their existence. In his magnificent contemplation of the intersection of law and art, Karl Korinek finds inspiration for his field among other things in the values of Haydn's works. According to him, these are diversity, creativity and order.[15] In Haydn's day, which was also, unfortunately, one of turbulence and uncertainty, they are values that can also be considered the decisive ones for formation of the semblance of the European Union.

[15] Auch das ist Kultur. Recht der Kultur – Kultur des Rechts. Karl Korinek im Gespräch mit Ursula Magnes. Mit Musik von Bethoven, Haydn, Mozart, Schubert, Strauß Vater, Webern. CD. Manz. Wien 2006, sub 5.