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## SUBSIDIARITY AND/OR HUMAN RIGHTS

*Daniel T. Murphy\**

The post-Maastricht world of the European Union is only about two years old. Within that new world, however, few concepts are as important, and yet as elusive or unsettled, as the doctrine of subsidiarity. On the other hand, the European Community has for many years evidenced concern over human rights.<sup>1</sup> The purpose of this essay is to consider the implications of the concept of subsidiarity for human rights law and enforcement within the European Community and the European Union.<sup>2</sup>

The doctrine of subsidiarity has only recently been imported into the lore of the European Community and Union.<sup>3</sup> Although

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1. See, e.g., Joint Declaration by the European Parliament, the Council and the Commission, April 5, 1977, 1977 O.J. (C 103) 1, in which the three political institutions of the Community affirmed the importance they attach to the protection of fundamental rights and declared that they would respect such rights in the exercise of their powers; see also Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419.

2. The discussion in this paper will focus on the European Community, rather than the European Union, although consideration will be given to the issue of subsidiarity within the context of the European Union as well. See *infra* notes 83-88 and accompanying text. For an explanation of the distinction between the European Community and the European Union, see *infra* note 6.

Given the uncertainties surrounding the principle of subsidiarity, conclusions regarding its application to the area of human rights are per force highly tentative.

3. Subsidiarity has been vociferously debated in Europe, but only for about the past five years. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 332 (1994). However, the doctrine had been suggested as early as 1975 when the Commission submitted a report on European Union to the Council. *Report on European Union*, 8 BULL. EUR. COMMUNITY, Supp. 5, (1975). In that report the Commission stated that to prevent the proposed Union from becoming a "superstate," the Union should have responsibility only for those matters with which the member states were not capable of dealing effectively. *Id.* at 10; Akos G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 COMMON MKT. L. REV. 1079, 1088 (1992).

The subsidiarity principle was imported into the law of the EC in the 1985 Single European Act, but in only one area: the environment. Single European Act, Feb. 17, 1986, art. 25, 1987 O.J. (L 169) 1. The Single European Act added a new

its parameters may be vague, the principle could hardly be more deeply embedded in the Union law and culture, however, inasmuch as it is enshrined in the 1992 Treaty on European Union ("TEU").<sup>4</sup> This treaty radically reshaped the European Economic Community through amendments to the Treaty of Rome.<sup>5</sup> As importantly, the TEU added significant new dimensions to Europe through the establishment of the European Union and the objectives assigned to it.<sup>6</sup>

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article to the Treaty of Rome relating to environmental protection, Article 130r. Subpart 4 of Article 130r notes that the Community should take action in this area to the extent that the objective can be attained better at the Community level than at the level of the member states. *Id.* at 12-13.

4. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1 [hereinafter TEU] (signed at Maastricht).

5. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]. Throughout this piece the term "EC Treaty" is used to refer to the Treaty of Rome as amended by the TEU and the term "Treaty of Rome" is used to refer to the treaty in its pre-Maastricht version, including the amendments contained in the Single European Act.

6. The TEU contains seven titles. Title II contains the amendments to the Treaty of Rome. These amendments themselves are by no means minor. In addition to articulation of the subsidiarity principle, this title treats citizenship of the Union (Title I); the new economic policies and the significant new monetary system, with a single currency and separate institutions (Title VI); and it adds new sections dealing, among other things, with social policy, education and vocational training (Title VIII); culture (Title IX); public health (Title X); and development cooperation (Title XVII). In several of the remaining titles, the TEU establishes the European Union, which consists of the twelve signatory states (Title I, Article A). In other substantive titles it sets forth procedures for accomplishing the Union's objectives in the areas of common foreign and security policies (Title V) and cooperation in the fields of justice and home affairs (Title VI). The institutions of the European Community are charged with assisting in the accomplishment of the Union's objectives. TEU, *supra* note 4, tit. I, arts. C, E.

The role of the Court of Justice of the European Communities has not been significantly changed or expanded by the TEU, however. In exercising its power, the court is, with one exception, to apply only the EC Treaty, not provisions of the other substantive parts of the TEU. tit. VI, Article K.3(2)(c) para. 3. Thus, its jurisdiction is largely confined to matters arising under the EC Treaty.

As structured in the TEU there is permeability between the European Union and the European Community including significant participation of the Community's three political institutions in the work of the Union. But legally, historically, and functionally there is a distinction between the two. The European Community, even as its structure and functions are expanded by Title II of the TEU, is the entity established in the Treaty of Rome.

For an exposition and assessment of the principles of the TEU generally, see LEGAL ISSUES OF THE MAASTRICHT TREATY (David O'Keeffe & Patrick M. Twomey eds., 1994) [hereinafter LEGAL ISSUES]; Trevor C. Hartley, *Constitutional and Institutional Aspects of the Maastricht Agreement*, 42 INT'L & COMP. L.Q. 213 (1993).

The TEU adds new article 3b to the Treaty of Rome which states the principle of subsidiarity 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 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.<sup>7</sup>

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7. TEU, *supra* note 4, tit. II, article G.B(4). This article reads in its entirety as follows:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

*Id.*

The essence of the principle of subsidiarity is contained in the second paragraph of this article. In the English version that paragraph seems phrased a bit awkwardly. One is tempted to read the first clause, "[i]n areas . . . the principle of subsidiarity," as equal to the second clause, "only if and in so far as . . . achieved by the Community." If this were done, the second clause would not explain or define subsidiarity; instead the paragraph would read that subsidiarity, however it is defined, is to be applied according to the limitations in the second clause. In fact, the second clause is the definition of subsidiarity.

The first paragraph of Article 3b restates the settled notion that the Community and its institutions can act only within the limits of the powers conferred on them by the EC Treaty. It does expand on this settled notion a bit. Community action although within the power conferred by the EC Treaty is also limited to action consistent with the objectives of the Treaty. *See* Hartley, *supra* note 6, at 215.

The third paragraph incorporates the principle of proportionality which has been applied by the Court of Justice of the European Communities as part of its jurisprudence. *See generally*, Akos G. Toth, *A Legal Analysis of Subsidiarity*, in *LEGAL ISSUES*, *supra* note 6, at 37, 38.

A version of the subsidiarity principle was set forth in Article 12 of the Draft Treaty on European Union, Feb. 14, 1984, 1984 O.J. (C 77) 1, (prepared and adopted by the European Parliament, but never acted upon). *See generally* ROLAND BIEBER ET AL., *AN EVER CLOSER UNION, A CRITICAL ANALYSIS OF THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION* (1985).

Arguments abound to the effect that the principle of subsidiarity is an essential counter weight to the drive toward federalism within the European Union.<sup>8</sup> It is also argued that the principle is either mischievous or devoid of substance.<sup>9</sup>

The principle is now a common term of "Eurospeak" and is a means whereby distribution of authority between the Community institutions and the member states can be regulated.<sup>10</sup> But the term is ecclesiastical in origin. In its current form the principle was stated in Pope Pius XI's 1931 encyclical *Quadragesimo Anno*.<sup>11</sup>

8. During the debate in the United Kingdom over the proposed ratification of the Maastricht Treaty, subsidiarity was held up as the principle which saved national autonomy and sovereignty from being completely overrun by the EU principles and the EU central government. See Peter Riddell & Philip Webster, *68% Say No to Europe Treaty*, THE TIMES OF LONDON, Oct. 5, 1992, at 1; Peter Riddell, *Major Comes Out Fighting*, THE TIMES OF LONDON, Oct. 2, 1992, at 14; see also Deborah Z. Cass, *The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Power within the European Community*, 29 COMMON MKT. L. REV. 1107 (1992). See generally George A. Bermann, *Subsidiarity and the European Community*, 17 HASTINGS INT'L & COMP. L. REV. 97 (1993); Toth, *supra* note 3.

9. See, e.g., Vlad Constantinesco, *Who's Afraid of Subsidiarity*, 1991 YEARBOOK OF EUROPEAN LAW 33, 51; Lord Alexander J. Mackenzie-Stuart, *Subsidiarity—A Busted Flush*, in CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW, ESSAYS FOR THE HON. MR. JUSTICE T.F. O'HIGGINS 19 (Deirdre Curtin & David O'Keeffe eds. 1992); Lord Alexander J. Mackenzie-Stuart, Letter, THE INDEPENDENT, Jan. 15, 1992; Toth, *supra* note 7. See also the numerous authorities cited in Bermann, *supra* note 3, at 331 nn.1-7 & 347 n.51.

10. See Nicholas Emiliou, *Subsidiarity: Panacea or Fig Leaf*, in LEGAL ISSUES, *supra* note 6, at 65, 66.

11. In his encyclical, Pope Pius XI noted that

just as it is wrong to withdraw from the individual and commit to a group what private enterprise and industry can accomplish, so too it is an injustice, a grave evil and a disturbance of the right order, for a larger and a higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies. This is a fundamental principle of social philosophy, unshaken and unchangeable. Of its very nature the true aim of all social activity should be to help members of the social body, but never destroy or absorb them.

Pope Pius XI, *Quadragesimo Anno*, (1931) sec. 79.

See generally J.M.E. LOMAN ET AL., CULTURE AND COMMUNITY LAW 202-04 (1992).

The principle also is one of German constitutional jurisprudence. See Constantinesco, *supra* note 9, at 38; Nicholas Emiliou, *Subsidiarity: An Effective Barrier Against "The Enterprises of Ambition"?*, 17 EUR. L. REV. 383 (1992); Emiliou, *supra* note 10, at 71.

The elements of the principle as set forth in Article 3b of the EC Treaty are quite clear: (1) in areas of shared competence between the Community and the member states; (2) the Community shall act only when the objectives of the proposed action cannot be sufficiently achieved by the member states; and (3) the Community shall act only when the objective can, by reason of the scale or effects of the proposed action, be better achieved by the Community because it cannot be achieved sufficiently by the member states.

In a sense subsidiarity is, of course, a version of "states' rights." The Community should act in those areas in which it shares competence with the member states only when the objective cannot be adequately achieved by the member states. Moreover, the presumption is in favor of member state action, not Community action.<sup>12</sup> The Community should act only when it is demonstrated that action by the states cannot adequately accomplish the objective. If given full effect, this principle clearly has the capacity to circumscribe action by Community institutions.

So stated the principle raises a host of questions. For purposes of this discussion only a few will be considered. It goes without saying that the Community may, indeed must, act in those areas in which it has, as against the member states, exclusive competence. Likewise, of course, the member states may act, and the Community institutions may not, in those areas where the EC Treaty or Community policies give the Community no authority to act. The doctrine of subsidiarity comes into play only in the middle position, in the areas of shared or concurrent competence where both the Community and the member states have the right to act. This reading of Article 3b is straightforward, but raises the obvious though very difficult question of where those areas of concurrent competence lie. There is also the serious and related question of defining the notion of shared or concurrent competence. A somewhat easier issue, however, is to which institutions is the principle directed.

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12. See *Communication of the Commission on the Principle of Subsidiarity for Transmission to the Council and Parliament*, 25 BULL. EUR. COMMUNITY, No. 10, 116, 119 (1992) [hereinafter *Commission Communication*].

To consider this latter point first, the principle as stated in Article 3b is not directed at any particular Community institution. Instead, it is apparently to be applied by each of the institutions within its respective sphere.<sup>13</sup> The principle is also intended to operate on several levels. Subsidiarity's most important value is probably at the political level. It is a guiding principle which should inform the development of Community policies and decision making.<sup>14</sup> Consequently, one specific, and perhaps the most important, application of the principle is in the legislative process. The Council, Commission, and the Parliament ought to take it into account in the development of specific legislation.<sup>15</sup>

Despite its overtly political character, subsidiarity is embodied in an amendment to the EC Treaty. There is nothing in the TEU or the EC Treaty which removes it from the competence of the European Court of Justice.<sup>16</sup>

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13. Community institutions must act within their spheres of responsibility and as charged by the provisions of the EC Treaty. EC Treaty, *supra* note 5, art. 3b, para. 1. Since subsidiarity is a principle of Community law contained in the EC Treaty, it follows that each institution should apply it *mutatis mutandis*. For a discussion of the sources of Community institution authority, see generally, TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (2d ed. 1988).

The European Council is of the view that the principle is binding on all Community institutions. European Council in Edinburgh, Conclusions of the Presidency, Dec. 11-12, 1992, at 7-8 [hereinafter *Subsidiarity Guidelines*] (on file with the *University of Richmond Law Review*).

14. See Bermann, *supra* note 3, at 366-67, 371; see also *Interinstitutional Agreement between the European Parliament, the Council and the Commission on Procedures for Implementing the Principle of Subsidiarity*, 25 BULL. EUR. COMMUNITY, No. 10, 118, 119 (1993) [hereinafter *Interinstitutional Agreement*].

15. Such cognizance is now commonplace and is required. Pursuant to an agreement among these institutions reached in the autumn of 1993, an explanatory memorandum accompanying any Commission legislative proposal shall include a statement of justification under the principle of subsidiarity. Any amendment to that proposal by the Council or the Parliament must contain a similar justification if it entails more extensive or intensive Community action. *Interinstitutional Agreement*, *supra* note 14, at 119.

The Commission believes that the subsidiarity principle has resulted in a reduction in the number of legislative proposals put forth in 1993 as opposed to prior years. *Commission Report to the European Council on the Adaptation of Existing Legislation to the Subsidiarity Principle* (Nov. 24, 1993), at 4 [hereinafter *Adaptation Report*] (on file with the *University of Richmond Law Review*). In the *Adaptation Report* the Commission set forth categories of rules and regulations which it suggests should be recast, simplified or repealed as a consequence of subsidiarity.

For an explanation of the Community's legislative process after the TEU see JOSEPHINE SHAW, *EUROPEAN COMMUNITY LAW* 78-85 (1993).

16. But for one exception the court's jurisdiction does not extend to issues arising

Subsidiarity, thus, has become a principle of Community law which the court should employ in reviewing issues.<sup>17</sup> In this

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under or activities undertaken pursuant to titles of the TEU other than Title II. See *supra* note 6. The court's jurisdiction is to apply Community law, including the EC Treaty, in reviewing acts of the institutions, and subsidiarity is part of the Treaty. See generally Akos G. Toth, *Is Subsidiarity Justiciable?*, 19 EUR. L. REV. 268 (1994).

The European Council believes that interpretation of the principle of subsidiarity as well as review of legislation for compliance with it are matters for the Court of Justice. Subsidiarity Guidelines, *supra* note 13, at 9.

Regarding jurisdiction of the court see generally L. NEVILLE BROWN & FRANCIS G. JACOBS, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* (2d ed. 1983); HARTLEY, *supra* note 13, ch. 2; STEPHEN WEATHERHILL & PAUL BEAUMONT, *THE ESSENTIAL GUIDE TO THE LEGAL WORKINGS OF THE EUROPEAN COMMUNITY* 165 (1993).

17. See Bermann, *supra* note 3, at 390; Hartley, *supra* note 6, at 216; Josephine Steiner, *Subsidiarity under the Maastricht Treaty*, in *LEGAL ISSUES*, *supra* note 6, at 49, 62; Toth, *supra* note 16.

Some argue to the contrary that the court is not fit to determine compliance with the subsidiarity principle. Lord MacKenzie-Stuart, formerly a judge and President of the court, views the principle as a political one. He acknowledges with frustration that the TEU places responsibility for its interpretation and application with the Court of Justice.

The interpretation of subsidiarity is a political issue and not one for the Court of Justice . . . Maastricht, however, placed that responsibility squarely on its shoulders. Worse . . . the definition of subsidiarity contained in the Treaty . . . is a rich and prime example of gobbledygook embracing simultaneously two opposed concepts of subsidiarity. To regard the chosen formula as a constitutional safeguard shows great optimism.

Lord MacKenzie-Stuart, *supra* note 9. See Emiliou, *supra* note 10, at 77.

Compliance with the principle and compliance with the *Interinstitutional Agreement*, *supra* note 14, for example, would be an issue in reviewing the legality of legislation under Article 173 of the EC Treaty, just as is compliance with other procedures in the legislative process. Presumably the court would not substitute its determination as to whether the legislation complies with the principle, but rather would decide whether the law makers had engaged in a "subsidiarity analysis." An example of what such a "subsidiarity analysis" might entail is contained in Subsidiarity Guidelines, *supra* note 13, at 10.

Compliance with the subsidiarity principle could be raised in an action brought by a Community institution or member state under Articles 169 or 170 of the EC Treaty. The issue could also be raised in the request for a preliminary ruling by a court in a member state under Article 177. An applicant may argue that a piece of Community legislation on which its case depends is invalid since it is contrary to the principle. See generally Bermann, *supra* note 3, at 390-403; Toth, *supra* note 16, at 273-80.

It is generally agreed that the principle does not have "direct effect" within the member states, that is it does not give rise to private rights. In the Subsidiarity Guidelines the European Council explicitly stated its view that subsidiarity has no direct effect within member states. Subsidiarity Guidelines, *supra* note 13, at 9. See Toth, *supra* note 16, at 278. But this fact does not affect application of the principle in the Article 177 reference context. The issue before the national court will not be Article 3b, but the compatibility of some national legislative measure or governmental act with some piece of Community legislation. When the national court refers such an



context subsidiarity appears to be both a substantive and a procedural principle.<sup>18</sup> In a procedural sense the principle will require that in taking action, the Community institutions consider whether such action meets the test of subsidiarity.<sup>19</sup> In a substantive sense, it articulates what that standard is. One of the ironies of this aspect of subsidiarity is that it may force the court, which has been one of the driving forces toward the centralization of authority within the Community and the supremacy of Community law,<sup>20</sup> to uphold a principle which may retard the process of integration and which literally ascribes a paramount role to the member states.<sup>21</sup>

The issue of what substantive areas the subsidiarity principle regulates is an extremely difficult one. The problem certainly does not lie in the articulation of the principle. Article 3b quite clearly indicates that the doctrine is inapplicable in those areas in which the Community has exclusive competence. Rather it is operative only in those areas in which there is shared or concurrent competence.<sup>22</sup> The difficulty, of course, is that the EC Treaty does not delineate those areas which are exclusively within the purview of the EC or those in which it shares competence with the member states. Moreover, there is uncertainty as to the meaning of the concepts of exclusive and shared competence.

Prior to the TEU the focus of the analysis was Community competence versus member state competence, and, in an organizational sense, on the allocation of competencies among the institutions.<sup>23</sup> Shared competence was of less concern.<sup>24</sup> The

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issue to the Court of Justice for its opinion, the Court of Justice will have the opportunity to review the validity of the pertinent Community legislation on subsidiarity grounds as well as all other grounds. Toth, *supra* note 16, at 278.

For a discussion of whether the principle of subsidiarity otherwise constrains the court see *infra* notes 105-13 and accompanying text.

18. See Bermann, *supra* note 3, at 390-95.

19. See *Interinstitutional Agreement*, *supra* note 14.

20. See generally, Hartley, *supra* note 6, at 217; Stephen Weatherhill, *Beyond Pre-emption? Shared Competence and Constitutional Change in the European Community*, in *LEGAL ISSUES*, *supra* note 6, at 13, 15.

21. On the other hand, since the principle is so elusive, the court may have the opportunity to narrow its scope or virtually define it away. See Hartley, *supra* note 6, at 217.

22. By definition it does not operate in areas in which the Union has exclusive or no competence.

23. Constantinesco, *supra* note 9, at 51.

Treaty of Rome contained little helpful guidance in this delineation. Indeed, given the even broader ambit of authority conferred on Community institutions by Article 235<sup>25</sup> and expansive interpretation of authority by the Court of Justice,<sup>26</sup> the dominance of Community competence over member state competence in areas relating to the Treaty of Rome was fairly great.<sup>27</sup>

The TEU did not clarify this issue. The injection in Title II of the doctrine of subsidiarity focused attention on the murky issue of shared competence and shifted the inquiry from the allocation of competence among the institutions to an analysis of subject matter allocation.<sup>28</sup>

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24. See Toth, *supra* note 7, at 39.

25. See generally HARTLEY, *supra* note 13, at 103.

26. Hartley, *supra* note 6, at 217; Weatherhill, *supra* note 20, at 15.

27. Hartley, *supra* note 6, at 217. The Commission was of the view that the Community has exclusive competence in six areas: 1) removal of barriers to the free flow of goods, persons, services and capital; 2) common agricultural policy; 3) general rules on competition; 4) common organization of agricultural markets; 5) conservation of fisheries resources; and 6) essential elements of a transportation policy. *Commission Communication*, *supra* note 12, at 121. The Commission believed that measures necessary for forming a single market were encompassed within the first category. It raised the question about "flanking measures," such as the environment, which are implicated in the single market measures, but are broader. See for example Case 300/89, *Commission v. Council*, 1991 E.C.R. 2867, 3 C.M.L.R. 358 (1993), which involved the issue of whether a harmonization directive regarding reduction of titanium dioxide waste was properly enacted. The Council acted pursuant to Article 130s of the Treaty of Rome, governing environmental legislation. The Commission challenged the effectiveness of the directive before the court, arguing, successfully as it turned out, that the directive should have been based on Article 100a of the Treaty of Rome regarding accomplishment of the single market. The Commission also took the narrower view that such "flanking measures" did not expand the Community's exclusive competence to encompass member state competence. *Commission Communication*, *supra* note 12, at 121.

It has been argued that such an enumerated list supports the proposition that virtually everything arising under the Treaty of Rome is part of the Community's exclusive competence, and that subsidiarity is thus inapplicable when the Community acts even now within any area covered by Treaty of Rome. Toth, *supra* note 3, at 1091; Toth, *supra* note 7, at 41.

It is also argued more narrowly that the Community's exclusive competence extends to all areas under the treaty in which the Community is given the authority to take binding measures, and in which the Community has so acted. Hartley, *supra* note 6, at 216.

28. Constantinesco, *supra* note 9, at 51. For a discussion of where human rights fits into this allocation of competence, see *infra* notes 89-101 and accompanying text.

Perhaps the question of what "exclusive" and "shared" competence mean should be settled prior to determining what are the areas of exclusive competence. Although the answer is clear in the abstract, application of the answer creates great uncertainty as to the reality of the distinction. Exclusive Community competence is straightforward. The Community occupies such areas to the exclusion of member states who have no right to legislate in those fields.<sup>29</sup> Shared or concurrent competence means that either the Community or the member states have the right to occupy that particular area. Once the Community has legislated in the area, however, the area becomes part of its exclusive competence.<sup>30</sup> Because of the supremacy of Community law, the reverse is not true. The fact that some or all of the member states have legislated in a field does not preclude the Community from legislating in and occupying that field. Once a field is so occupied by the Community, member states are ousted from the area. Shared competence is different from mixed competence, under which each actor would continue to have a right to act.<sup>31</sup>

To the point of this piece, the relation of subsidiarity to human rights is quite unsettled. The EC Treaty is not intended as a human rights document and does not contain a comprehen-

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29. See Toth, *supra* note 16, at 268-69.

30. Emiliou, *supra* note 11, at 392; Hartley, *supra* note 6, at 216; Weatherhill, *supra* note 20, at 14.

31. "Shared" or "concurrent" competence is distinct from the concept of "mixed" competence:

"[M]ixed competence", a concept originally used in the field of treaty-making, . . . refers to a situation where an international agreement which the Community intends to conclude covers matters which are not fully within Community competence. Therefore, the competence of the Member States has to be added to that of the Community: *both* the Community *and* the Member States must act *jointly*.

Toth, *supra* note 16, at 269.

In a sense, it is safe to cynically conclude that shared or concurrent competence works in only one way—so long as the Community does not act. When it acts, the area becomes part of the Community's exclusive competence. Subsidiarity would thus be applicable only the first time that the Community acted in a particular area. Hartley, *supra* note 6, at 216.

This understanding of shared and exclusive competence is a premise to the conclusion that subsidiarity does not apply to anything within the Treaty of Rome. See *supra* note 27. Any area in which the Community has acted has become part of its exclusive competence. Thus, further action in that area is Community exclusive and, by definition, not subject to subsidiarity.

sive set of human rights norms or protections.<sup>32</sup> However, scattered throughout the EC Treaty are some explicit provisions of a human rights character. Article 7 of the EC Treaty prohibits discrimination on the grounds of nationality in the application of the Community's activities and charges the Council to promulgate rules to enforce this prohibition.<sup>33</sup> Articles 48 to 51 assure the free movement of workers within the Community.<sup>34</sup> Gender equality in the area of equal pay for equal work is assured by Article 119.<sup>35</sup> But there is no particular emphasis in the treaty on human rights. This listing makes clear that such treaty-based rights as they exist are limited to the context of the economic nature of the Treaty of Rome.

The actions of the Community institutions to apply and indeed expand these human rights-like provisions have been manifold.

The Community's legislative effort regarding human rights has been extensive. There are no doubt hundreds of regulations and directives which could be considered to have human rights aspects.<sup>36</sup> But again these measures are not part of an overall

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32. There is no reason that it should contain such a set of protections. As originally conceived, the EC Treaty was of an economic nature. Those human rights provisions which it included are in that context. For discussions of human rights aspects of the EC, see RALPH BEDDARD, *HUMAN RIGHTS IN EUROPE* 33 (3d ed. 1993); ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* ch. 8 (1993); Andrew Clapham, *A Human Rights Policy for the European Community* 1990 Y.B. EUR. L. 309 (1990); Manfred A. Dauses, *The Protection of Fundamental Rights in the Community Legal Order*, 10 EUR L. REV. 398 (1985); Jean Paul Jacqué, *The Convention and the European Communities in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* (Ronald St.J. MacDonald et al. eds., 1993); M.H. Mendelson, *The Impact of European Community Law on the Implementation of the European Convention on Human Rights*, 1983 Y.B. EUR. L. 99 (1983); M.H. Mendelson, *The European Court of Justice and Human Rights*, 1981 Y.B. EUR. L. 125 (1981); Demetrios G. Metropoulis, *Human Rights, Incorporated: The European Community's New Line of Business*, 29 STAN. J. INT'L L. 131 (1992); Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Community*, 61 WASH. L. REV. 1103 (1986).

33. Treaty of Rome, *supra* note 5, art. 7.

34. *Id.* art. 47.

35. *Id.* art. 119.

36. See, e.g., Regulation 1251/70 on the Right of Workers to Remain in the Territory of a Member State After Having Been Employed in that State, 1979-II O.J. SPEC. ED. 402; Council Regulation 1612/68 on Freedom of Movement for Workers Within the Community. 1968-II O.J. SPEC. ED. 475; Council Directive on the Approximation of the Laws of the Member States Relating to the Safeguarding of

scheme to adopt human rights norms. Instead, they are measures implementing various provisions of the treaty, and like the treaty based rights themselves, are concentrated in the economic arena.

In addition to these legislative measures there have been calls from Community institutions for adoption of a more comprehensive approach to human rights and for a deeper institutional commitment to their protection.<sup>37</sup>

The European Court of Justice, as in most other areas of Community law, has been extremely active in the human rights context. Early on it developed a jurisprudence of human rights which it frequently applied, and one to which the political institutions have rallied.<sup>38</sup> This effort began in a trilogy of cases quite some time ago.

In *Stauder v. Ulm*<sup>39</sup> the court was confronted with slightly different requirements stemming from differing translations of a Commission decision regarding the sale of Community surplus butter at less than the market price to citizens of member states receiving social assistance. The German version of the decision stated that member states must adopt measures neces-

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Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Businesses, 1977 O.J. (L 61) 26; Council Directive on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion and Working Conditions, 1976 O.J. (L 39) 40; Council Directive on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Equal Work, 1975 O.J. (L 45) 19; Commission Directive 486/77 on the Education of Children of Migrant Workers, 1974 O.J. (C 13) 1.

37. For example: (i) a 1976 Commission report to the Parliament, *The Protection of Fundamental Rights in the European Community*, 9 BULL. EUR. COMMUNITY, Supp., 5, (1976), in which it argued that the best method of protecting human rights could be achieved by the Court of Justice's use of such norms as general principles of law; (ii) the 1977 Joint Declaration by the Parliament, the Council and the Commission, *supra* note 1, in which these institutions declared that they would respect human rights in the exercise of their powers; (iii) a 1979 Commission report urging the Community to adopt the European Convention on Human Rights, *Accession of the Communities to the European Convention on Human Rights*, 12 BULL. EUR. COMMUNITY 2 (Supp. 1979); and (iv) in 1989 the Parliament adopted a set of human rights norms, European Parliament, Declaration of Fundamental Rights and Freedoms, 1989 O.J. (C 120) 52. See also Single European Act, *supra* note 3, preamble.

38. See *The Protection of Fundamental Rights in the European Community*, *supra* note 37.

39. Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419, 9 C.M.L.R. 112 (1970).

sary to assure that recipients receive the butter only upon presentation of a coupon made out in their name.<sup>40</sup> Other language texts of the decision stated only that the recipient must present an "individualized" coupon, thereby allowing means of identification other than the individual's name. Stauder, a German citizen, argued that it was a breach of his basic rights as set forth in the German constitution to be required to disclose his name in this context. The European Court of Justice followed the more liberal translation of the decision. In doing so the court noted that so interpreted, the issue "does not contain any element that might jeopardize the fundamental rights of the individual contained in the general principles of the law of the Community of which the Court must ensure the observance."<sup>41</sup>

The second and more expansive case, *Internationale Handelsgesellschaft*<sup>42</sup> also entailed a reference from a German court. The Community by regulation had established a procedure that required an exporter of cereals to obtain an export certificate and to pay a deposit. The deposit would be forfeited if the exporter did not export the cereals within the time specified in the export certificate.<sup>43</sup> Petitioner, Internationale

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40. *Id.* at 425, 9 C.M.L.R. at 117.

41. *Id.* at 425, 9 C.M.L.R. at 119. This language in the judgment was not essential to the ruling, as the court also determined that with respect to differing requirements in the various language texts, preference should be given to the least onerous interpretation. *Id.* at 425, 9 C.M.L.R. at 118. The Commission had also previously supported an amendment to the decision making clear that tender of a coupon bearing the recipient's name was not required. *Id.* at 425, 9 C.M.L.R. at 116.

The court's position that fundamental rights are enshrined in general principles of Community law and protected by the court is strikingly different from that taken about ten years earlier in Case 1/58, *Freidrich Stork & Co. v. High Authority of the European Coal and Steel Community*, 1959 E.C.R. 17. That case, like *Nold*, see *infra* notes 47 & 48 and accompanying text, involved a challenge to the joint selling rules for Ruhr Basis coal approved by the High Authority of the European Coal and Steel Community. Applicant sought to annul a decision which eliminated it from the class of first tier wholesalers. It argued that this decision violated certain rights under the German constitution, including that of free development of personality. The court held that it had no jurisdiction to annul a decision on the basis of national, not Community law. *Stauder*, 1969 E.C.R. at 425, 9 C.M.L.R. at 6. See Mendelson, *The European Court of Justice and Human Rights*, *supra* note 32, at 124.

42. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle Fur Getreide und Futtermittel*, 1972 E.C.R. 1125, 11 C.M.L.R. 255 (1972).

43. Council Regulation 120/67 of 13 September 1967, 1967 J.O. (117) 2269; Commission Regulation 473/67 of 21 August 1967, 1967 J.O. (204) 16.

Handelsgesellschaft, did not complete an export transaction during the time specified in the applicable certificate and its deposit was forfeited. It brought an action in a German administrative court seeking return of the deposit. The administrative court referred certain questions to the European Court of Justice.<sup>44</sup>

The court ruled that the regulatory scheme did not pose an excessive burden and that such burdens as it did entail were a normal result of a market organization system structured to meet the general interest of the Community.<sup>45</sup> But it acknowledged that the compatibility of the scheme with fundamental rights must be considered. The court noted that such rights, although they are "inspired by the constitutional principles common to the member-states, must be ensured within the framework of the Community's structure and objective."<sup>46</sup>

In the third of these cases, *Nold v. Commission*,<sup>47</sup> applicant, a German coal wholesaler, sought annulment of a Commission decision which accepted the German coal producer Ruhrkohle AG's new rules on conditions of sale. These new rules stated different requirements as to the minimum quantities of coal first line wholesalers had to purchase in order to maintain the right to purchase directly from the producer.<sup>48</sup> Wholesalers not meeting this requirement would not be able to purchase from the producer, but would have to purchase from a first line wholesaler. Applicant challenged this decision before the Court

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44. *Internationale Handelsgesellschaft*, 1972 E.C.R. at 1126-27, 11 C.M.L.R. at 258. Although the referring court did not phrase the question in this way, the court deemed that the referring court was questioning the compatibility of the relevant Community regulations with the principles of freedom of action and disposition, economic liberty and proportionality which flow from Articles 2(1) and 14 of the German Constitution. *Id.* at 1154, 11 C.M.L.R. at 282.

45. *Id.* at 1155, 11 C.M.L.R. at 285.

46. *Id.* at 1154, 11 C.M.L.R. at 283.

47. Case 4/73, *Firma J. Nold KG v. E.C. Commission*, 1974 E.C.R. 491, 14 C.M.L.R. 338 (1974).

48. The facts in this case involved a central selling organization for coal produced in the Ruhr Basin which predated formation of the European Coal and Steel Community. The High Authority under that convention authorized the joint sale of coal subject to certain conditions. The Commission, as successor to the High Authority, authorized new trading rules which altered the previous rules in certain respects. It is that decision which applicant Nold sought to have annulled. See Commission Decision, 1973 O.J. (L 120) 14.

of Justice on various grounds, including that the decision violated certain of its fundamental rights. By being relegated to the status of second tier wholesaler, Nold's profitability was likely to be injured. This, the applicant argued, violated a quasi-property right and the right of free exercise of commercial activities protected by the German constitution and by various human rights instruments, in particular the European Convention for the Protection of Human Rights.<sup>49</sup>

The court denied the application for an annulment, ruling that the Commission's regulation was not unreasonable. It concluded that even if the applicant had a fundamental right in this regard, such right would be subject to limitations in the public interest.<sup>50</sup> The court reaffirmed its earlier position that "fundamental rights form an integral part of the general principles of law, the observance of which it ensures,"<sup>51</sup> and extended this notion in two respects. The court noted that in assuring the protection of such rights it is required to base itself on the constitutional traditions common to the member states. Therefore, it could not "allow [to stand] measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States."<sup>52</sup> The court also noted that international human rights treaties to which the member states are parties "can supply guidelines which should be followed within the framework of Community law."<sup>53</sup>

Several points about these three cases are noteworthy. In none of them is the relevant treaty provision of a human rights character. Indeed, insofar as they treat human rights issues, these cases entail the assessment of otherwise presumably legitimate Community acts against a body of law external to the Treaty and Community secondary legislation. In *Stauder* the corpus of such law is left unstated. But in *Internationale Handelsgesellschaft* the touchstone for the rights is clearly the constitutional principles common to the member states. The

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49. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

50. *Nold*, 1974 E.C.R. at 506, 14 C.M.L.R. at 354.

51. *Id.*

52. *Id.*

53. *Id.*



court in that case did not consider that it would be applying member state constitutional protections, however. Rather it extrapolated generalized versions of those constitutional protections and characterized them as general principles of law. It then incorporated those general principles as part of the law which it is required to apply. This is clear from the language of *Internationale Handelsgesellschaft* wherein the court states that while the protection of these rights is inspired by the constitutional principles of the member states, they "must be ensured within the framework of the structure and objectives of the Community."<sup>54</sup>

The evolution continued in *Nold* when the European Convention was added as another touchstone.<sup>55</sup> But again its provisions were extracted into general principles of law to be applied by the court. The language in *Nold* is susceptible of a broader reading, a reading under which the constitutional protections and international human rights norms become part of positive Community law which could be used to review issues unrelated to Community objectives. The court noted that in basing itself on constitutional traditions, and by extension on international

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54. *Internationale Handelsgesellschaft*, 1972 E.C.R. at 1133, 11 C.M.L.R. at 283. This conclusion did not settle concern of several of the national courts regarding a perceived lack of protection of fundamental rights within the Community order. The German Constitutional Court ruled two years later that, so long as the Community did not have a democratically elected parliament with legislative power and a codified set of directly applicable human rights protections, Community secondary legislation was not capable as a matter of German constitutional law of overriding national human rights provisions. Case 52/71, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Fur Getreide und Futtermittel*, 2 C.M.L.R. 540, 549 (1974). The Court of Justice holdings in this trilogy would blunt such concerns by incorporating those constitutional protections into the Community legal order and applying them as such. In 1986 the German Constitutional Court again considered the status of Community law in relation to the fundamental rights guaranteed by the German constitution. It declared that so long as the Court of Justice generally ensured protection of fundamental rights, it would no longer exercise its jurisdiction to decide the status of secondary Community law *vis a vis* the German Constitution. Case 197/83, *In re Application of Wunsche Handelsgesellschaft*, 73 BVerfGE 339, 3 C.M.L.R. 225 (1986). See Mendelson, *The European Court of Justice and Human Rights*, *supra* note 32, at 132.

55. In *Nold* the court employed the term "constitutional traditions" of the member states and also the constitutions of those states. It is not clear whether this is a distinction without a difference. Mendelson, *The European Court of Justice and Human Rights*, *supra* note 32, at 149. In Case 374/87 *Orkem v. Commission*, 1989 E.C.R. 3283 (1989), the International Covenant of Civil and Political Rights was referred to as a possible source of Community rights.

human rights treaty provisions, it could not allow "measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States."<sup>56</sup> This language could be read to mean that fundamental rights are part of positive Community law. If they were, national legislation of any type would, because of the supremacy of Community law, be subject to review for compatibility with these rights. The narrower reading confines this review to Community law or national legislation in areas in which the Community has a legitimate interest.

Each of these cases dealt with the compatibility of Community law or action with human rights norms which are said to be part of Community law in the broader sense.<sup>57</sup> The court has also applied Community law in this broader sense to review national legislation.<sup>58</sup>

While the court has considered numerous cases in which claims are based on human rights matters,<sup>59</sup> rarely have the decisions squarely turned on the human rights issue, or even on the generalized version of human rights. In the three cases previously outlined, the court found other bases for its holdings, or determined that the Community actions were reasonable regulation of such rights. Also, in some of its significant substantive cases having human rights dimensions such as *Defrenne v. Sabena*<sup>60</sup> and *State v. Royer*,<sup>61</sup> the decisions were reached on other grounds.

One interesting exception is *Regina v. Kirk*.<sup>62</sup> This case in-

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56. *Nold*, 1974 E.C.R. at 506, 14 C.M.L.R. at 354.

57. Throughout this discussion I use the term "Community law in the narrower sense" to mean the law of the EC Treaty and secondary legislation, excluding human rights norms arising from common constitutional traditions or international human rights treaties, and "Community law in the broader sense" to include such human rights norms.

58. See, for example, *infra* notes 65-82 and accompanying text.

59. See for example the lists in WEATHERHILL & BEAUMONT, *supra* note 16, at 221, 222 n.150, and those discussed in CLAPHAM, *supra* note 32, ch. 8, and in M.H. Mendelson, *The European Court of Justice and Human Rights*, *supra* note 32, at 130-52. A LEXIS ECCASE Library search of "Human or fundamental rights w/100 Community law or European Community" revealed over 75 ECJ cases in which the issue of human or fundamental rights were germane.

60. Case 43/75, *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, 1976 E.C.R. 455.

61. Case 48/75, *State v. Royer*, 1976 E.C.R. 497.

62. Case 63/83, *Regina v. Kent Kirk*, 1984 E.C.R. 2689. See also *Joined Cases*

volved a reference from the British Crown Court. Kirk, a Danish national and captain of a Danish fishing vessel, was arrested and prosecuted for fishing within British coastal waters. He challenged his arrest, claiming that as a Community national he and the Danish registry vessel had the right to fish within British coastal waters at the time of his arrest. Under the terms of the United Kingdom's accession to the Treaty of Rome, Britain was given the right for ten years to exclude certain Community vessels, including Danish vessels, from fishing in its coastal waters. This permission expired 31 December 1982. By regulation the Council extended the permission for an additional ten years on 25 January 1983, retroactive to 1 January 1983. As luck would have it, Kirk was arrested on 6 January 1983, during the three-week period when the United Kingdom was prohibited by Community law from excluding Kirk and the Danish registry vessel on the basis of nationality.

The court noted that the retroactive feature of the regulation could not validate *ex poste facto* penal measures. It thereby applied the principle that penal provisions may not operate retroactively. It noted that this principle is common to the legal order of the member states, is enshrined in Article 7 of the European Convention and is among the general principles of law the observance of which is ensured by the court.<sup>63</sup> This case entailed an expansive use of human rights norms in two respects. First, the judgment rests on the human rights norm. Second, the human rights principle is applied not to review Community legislation, but the conduct of one of the member states, the prosecution of Kirk by U.K. officials. This judgment appears to follow the more expansive approach of *Nold*, although not specifically referring to the older judgment in this regard.<sup>64</sup>

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46/87 and 227/88, *Hoechst AG v. Commission*, 1989 E.C.R. 2859, in which the court ruled that enterprises under investigation by the Commission for violation of the competition rules (Articles 85 and 86 of the EC Treaty) have a right to protection against arbitrary investigations. In conducting its investigation the Commission is required to observe the procedural formalities regarding search warrants in effect in the member state in which the search is to take place. *See also* Case 136/79, *National Panasonic (UK) Ltd. v. Commission*, 1980 E.C.R. 2033.

63. *Kirk*, 1984 E.C.R. at 2718.

64. The British action was thought closely related both to a Community interest and a Community regulation. The new regulation, that of January 25, 1983, did authorize the British to detain the Danish vessel from January 1, 1983. The court noted

In its recent case involving human rights issues, *SPUC v. Grogan*,<sup>65</sup> the court took a more conservative approach to generalized human rights issues, following the rationale of a case decided six years earlier.<sup>66</sup> In this well known case the court confronted the highly charged issue of abortion.

The Society for the Protection of Unborn Children ("SPUC") is an Irish company whose purpose is to prevent the decriminalization of abortion and promote human life from the moment of conception. Stephen Grogan was an officer of one of several Irish university student organizations which had published information regarding the availability of abortion services in the United Kingdom, including the names and addresses of a number of clinics in the U.K. performing abortion procedures. SPUC instituted a proceeding in the Irish High Court for a declaration that the publication of such information was illegal and for an injunction restraining the publication or distribution of such information.

The High Court decided to refer several questions to the Court of Justice.<sup>67</sup> The first and second referred questions were Community law-based in the narrower sense. The third question contained a human rights aspect.<sup>68</sup> The Advocate

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that the retroactive aspect of the regulation could not validate *ex post facto* imposition of criminal penalties. *Id.*

65. Case 159/90, *Society for the Protection of Unborn Children Ireland Ltd. (SPUC) v. Grogan*, 1991 E.C.R. 4685. See Grainne de Burca, *Fundamental Human Rights and the Reach of EC Law*, 13 OXFORD J. LEGAL STUD. 283 (1993); Siofra O'Leary, *The Court of Justice as a Reluctant Constitutional Adjudicator: An Examination of the Abortion Information Case*, 17 EUR. L. REV. 138 (1992); Diarmuid Rossa Phelan, *Right to Life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union*, 55 MOD. L. REV. 670 (1992).

66. See *infra* notes 76-81 and accompanying text.

67. The procedural history of the case is somewhat convoluted. The Irish trial court (the Irish High Court) determined that it should refer certain questions to the Court of Justice of the European Communities under Article 177 of the Treaty of Rome. The SPUC appealed that decision to the Irish Supreme Court. The Irish Supreme Court granted an injunction restraining defendants from printing, publishing or distributing any information giving the identity, location or means of communicating with clinics providing abortions. The Irish Supreme Court did not, however, quash that part of the High Court's decision which referred questions to the Court of Justice. Instead, it gave the parties leave to apply to the High Court for a modification of the Supreme Court's injunction in light of the eventual opinion of the Court of Justice. The High Court subsequently made the referral.

68. The three questions referred were:

General in his opinion argued that consumers' freedom to shop in another member state for a particular service is restricted if they are deprived in their country of information regarding the service. And he extended this conclusion to include receipt of information from a person who is not the provider of the service.<sup>69</sup>

The Court of Justice noted that while the third question referred to Community law in general, the question should be focused on Articles 59 *et seq.* of the Treaty of Rome regarding freedom to provide services and the argument regarding human rights.

In its judgment, the court deftly decoupled the question of human or fundamental rights as an inherent element of Community law from Community law in the narrower sense. It noted that the information disseminated was not provided on behalf of the economic operator of the clinic. It stated that quite to the contrary the information constituted a manifestation of the freedom of expression and the freedom to impart and receive information which was independent from the economic activity of the clinics.<sup>70</sup> Thus, distribution of the information became a free-standing issue and one that could not be considered a restriction on services within the meaning of Article 59 *et seq.* of the Treaty of Rome.

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1. Does the organized activity of carrying out an abortion constitute a "service" within the meaning of Article 60 of the EC Treaty?

2. In the absence of Community-based measures for the approximation of member state laws regarding the organized activity or process of carrying out abortions, can member states prohibit distribution of specific information regarding the identity location and telephone numbers of clinics in other member states where abortions are performed?

3. Does a person in member state A have a right in Community law to distribute information about the identity, location and telephone numbers of clinics in member state B where abortions are performed when the provision of abortion is prohibited under the law of member state A but is lawful under the law of member state B? 1991 E.C.R. at 4689.

The third question does not contain the words human or fundamental rights. Rather, it is an open-ended question asking whether there is any right in Community law to distribute the information in question. Under the jurisprudence of the prior human rights cases which stand for the proposition that fundamental or human rights are part of Community law, this question does in part ask if the human rights law of the Community confers such a right.

69. *Grogan*, 1991 E.C.R. at 4712-13 (Opinion of Advocate General Van Gerven).

70. *Grogan*, 1991 E.C.R. at 4740.

Having decoupled the freedom of expression and freedom to impart and receive information issues from the narrower Community law issues as contained in Article 59, the court then went on to consider whether such prohibitions violate portions of the European Convention for Human Rights, in particular Article 10(1) regarding freedom of expression.<sup>71</sup>

After this decoupling, the response to the issue of whether a restriction on the freedom to impart information violated Community law became quite simple. The court acknowledged that its responsibility upon a requested preliminary reference regarding the compatibility with Community law of a piece of national legislation in a field of application of Community law is to provide the national court with all of the elements of the interpretation necessary in order to enable it to assess the compatibility of the legislation with fundamental rights, in particular those in the European Convention the observance of which the court assures.<sup>72</sup> However, the Court of Justice determined that it has no such jurisdiction with regard to national law lying outside the scope of Community law.<sup>73</sup> From this premise the court concluded that the reply to the Irish court must be that it is not contrary to Community law for member states to prohibit distribution of information of the type in question when the clinics had no involvement in the distribution.<sup>74</sup>

The court thus neatly avoided ruling on a substantive issue of controversy and great moral importance. But beyond that it reinforced a notion stated in prior cases regarding the relationship of human rights law and Community law as narrowly described. Human rights norms embodied in the European Convention, and by extension in the constitutional traditions of

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71. The third question asked by the Irish court was whether there was a Community-based right to distribute information of the type in question. *See supra* note 68. The perspective was whether the distributor, Grogan, had such a right. The court initially indicated that the question involved both the freedom to impart and receive information, rights of both the provider and the receiver or consumer. 1991 E.C.R. at 4740. But, the court addressed the issue and responded in its judgment only to the question asked that is whether a distributor has the right to impart information. The consumer's right to receive it was not addressed.

72. 1991 E.C.R. at 4041.

73. *Id.*

74. *Id.*

the member states, are not part of Community law to be applied by the court generally. The fact that human rights norms may be part of the law applied by the court does not incorporate such norms into Community law or broaden the corpus of it. The assumption behind the ruling in *Grogan* is that Community law was not broadened to encompass Article 10 of the European Convention for Human Rights. The court stated that national legislation in a field of application of Community law must be reviewed for conformity to Community law including fundamental rights, but that the court has no such jurisdiction when the national legislation is outside the scope of Community law.<sup>75</sup> If Article 10 were part of Community law, the national legislation at issue in *Grogan* would be within the scope of Community law.

This approach is not new with the *Grogan* case. In fact, the court was following the rationale of its opinion six years earlier in the *Cinéthèque*<sup>76</sup> case and applied about four months prior to *Grogan* in the *Elliniki Radiofonia*<sup>77</sup> case.

By statute and decree<sup>78</sup> France generally prohibited the production or sale of video cassette and video disc versions of films released for showing in cinemas for a period of twelve months from the date of the issuance of a performance certificate. *Cinéthèque* obtained a right to produce and sell video cassettes of a film before the expiration of the year. The French Film Federation obtained an order seizing the cassettes until the end of the one-year period. *Cinéthèque* brought an action in the Tribunal de Grande Instance in Paris to have the order lifted. That court made a preliminary reference to the Court of Justice asking whether the statute and decree were compatible with the provisions of Articles 30 and 34 of the EC Treaty on the free movement of goods. The court determined that the legislation was not incompatible with the free movement provisions.<sup>79</sup>

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75. *Id.*

76. Cases 60 & 61/84, *Cinéthèque SA v. Fédération nationale des cinémas français*, 1985 E.C.R. 2604.

77. Case 260/89, *Elliniki Radiofonia Tileorassi Anonimi Etairia v. Dimotiki Etairia Pliriforissis*, 1991 E.C.R. 2951.

78. Law No. 82-652 of 29 July, 1982, art. 89; implemented by Decree 83-4 of 4 January, 1983.

79. 1985 E.C.R. at 2625-26.

*Cinéthèque* also argued that the French legislation violated the principle of freedom of expression in Article 10 of the European Convention and was thus incompatible with Community law.<sup>80</sup> With respect to that argument the court acknowledged its duty to protect fundamental rights within the field of Community law, but indicated that it had no power to examine the compatibility with the European Convention for Human Rights of national legislation falling in an area of national jurisdiction.<sup>81</sup>

Again, only Community law in the narrow sense or national law in an area of Community law in the narrow sense are to be reviewed for compatibility with human rights norms. Community law is not broadened to include such norms as positive law.<sup>82</sup>

From the foregoing brief overview of the legislative initiatives and the court's judgments it is obvious that the Community's involvement with human rights exists at many levels. How this involvement may be affected by subsidiarity, even assuming a clearer understanding of the term, is uncertain, but will no doubt vary from institution to institution, by type of initiative, and by the supporting EC Treaty provision or Community policy.

There is reason for optimism—from the perspective of increased attention to and enforcement of human rights—but

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80. *Id.* at 2627.

81. *Id.* Again the ambit of Community law was not expanded to include Article 10.

In *Elliniki Radiofonia*, by Greek constitutional provision and legislation, radio and television broadcast rights were exclusively held by a state run company, Elliniki Radiofonia Tileorassi ("ERT"). ERT brought an action in a Greek court to enforce this exclusive franchise against a competitor company. Defendant argued in part that its right to broadcast was protected by Article 10 of the European Convention on Human Rights. The Greek court referred a number of questions to the Court of Justice. Among them was whether Article 10 imposed obligations on the member states independent of the written provisions of Community law. 1991 E.C.R. at 2957. The court reiterated that human rights norms form an integral part of the general principles of law, the observance of which the court assures. It determined, however, that it has no jurisdiction to examine the compatibility with those principles of national legislation not falling within the scope of Community law. *Id.* at 2964.

82. The approach in the *Kirk* opinion is different and is more consistent with the broad reading of the *Nold* opinion. In *Kirk* the fundamental right to be free from *ex post facto* application of penal law was used as the basis for the conclusion that Kirk's prosecution was unwarranted. However, that fundamental right was not en-cased in Community law in the narrow sense. *But see supra* note 64.



there is also at least as much reason for pessimism. If the principle of subsidiarity were faithfully adhered to, the likely result would certainly not be greater Community initiative and involvement in the sphere of human rights, and more likely it would be less involvement.

On the optimistic side, the TEU contains specific references to human rights—references not directly fettered by the subsidiarity principle. In Title I of the TEU the members of the European Union specifically commit themselves to respect as general principles of Community law the fundamental rights guaranteed by the European Convention for Human Rights and the constitutional traditions of the member states.<sup>83</sup> Moreover, the Community institutions are specifically charged in Title I with exercising their powers under the conditions and for the purposes set forth in both the EC Treaty and the TEU.<sup>84</sup> Thus, one could expect more activity in the human rights area not less. But such a reading of the TEU provides only an illusion of more intense effort. As early as 1977<sup>85</sup> the three political institutions pledged to do practically as much as that with which Title I charges them. Thus, Title I does not charge the institutions with, or exhort them to, a degree of activity much beyond that which they pledged to exercise more than fifteen years ago. Also, this injunction to the institutions in Title I is itself burdened by the principle of subsidiarity. Although the institutions' sources of authority are broadened by the addition of the TEU, the other source of authority is the EC Treaty in which subsidiarity is embedded. Moreover, the TEU notes that the objectives of the European Union are to be accomplished while respecting subsidiarity.<sup>86</sup>

Also on the optimistic side, other provisions of the TEU specifically charge the Council to act in certain respects. In order to achieve the objectives of the Union, in particular the free

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83. TEU, *supra* note 4, tit. I, art. F.

84. *Id.* art. E. The authority of the Council, Commission and Parliament now comes from two strains, the EC Treaty and the TEU. The authority of the Court of Justice has not been similarly expanded, however. The court's authority is essentially limited to applying the law arising out of the EC Treaty. *See supra* note 6.

85. *See supra* note 1.

86. TEU, *supra* note 4, tit. I, art. B. The European Council accepts that subsidiarity applies to action within the European Union. Subsidiarity Guidelines, *supra* note 13, at 7.

movement of persons, member states are to consider certain areas, including asylum and immigration policies, to be matters of common concern.<sup>87</sup> In so doing the member states are to consult one another within the Council, and the Council may adopt and implement joint action if such seems a better way of achieving the objective than member state action.<sup>88</sup>

Finally, subsidiarity will have no effect in some areas in which, to date, the Community's legislative human rights activity has been centered. Much of the Community's legislative measures are of a character supported by treaty provision and are in areas which the Commission believes are within its exclusive competence.<sup>89</sup> Further, Community legislation regarding, for example, the free movement of workers under Articles 47 through 52 of the EC Treaty would be free from subsidiarity.<sup>90</sup>

However, human rights measures taken in support of other significant portions of the EC Treaty, as, for example, the Social Policy, Articles 117 through 122, are of a different order. The Commission does not claim the Social Policy portion of the treaty to be within its exclusive competence.<sup>91</sup> And not even the expansive conclusion that future Community action in virtually every area of action under the Treaty of Rome<sup>92</sup> is unfettered by subsidiarity could free proposals within this portion of

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87. TEU, *supra* note 4, tit. VI, art. K.1.

88. *Id.* art. K.3(1)(b). This provision, however, contains its own version of the subsidiarity principle:

The Council may: . . . adopt joint action in so far as the objectives of the union can be attained better by joint action than by the Member States acting individually on account of the scale of effects of the action envisaged . . . .

*Id.*

89. *See supra* note 27.

90. The Commission could articulate several Community objectives to be served by proposed legislation, one of which fits clearly within an area of exclusive competence and another of which does not. The Commission is not likely to use such a device to put forth human rights-based initiatives, and then claim that the area is covered by the proposal because it is within its exclusive competence. The Commission is of the view that such "joined objectives" do not enlarge the areas of Community exclusive competence to include the "appended areas." *See supra* note 27.

91. That is so except to the extent that measures fall within the accomplishment of the single market or free movement of workers, as for example Article 121's provision regarding social security for migrant workers. *See supra* note 27.

92. *See supra* note 27 and accompanying text.

the EC Treaty from subsidiarity. The obligations of the treaty under these articles are for the most part imposed on the member states. For example, Article 119 provides that the member states shall ensure gender equality of pay. And the Community's main initiative in support of this Article<sup>93</sup> specifically acknowledges that it is primarily the responsibility of the member states to ensure application of that principle.<sup>94</sup>

Any future Community-initiated comprehensive human rights measures would seem to be enmeshed in subsidiarity. Such potential initiatives also illustrate the serious conceptual difficulty of the exclusive versus shared competence dichotomy. Comprehensive initiatives surely are within national competence, or at best may be matters of shared competence. If they are matters of national competence, then, of course the Community has no right to act. If such initiatives are thought to be of shared competence, then any Community's action regarding them must meet the test of subsidiarity.

Shared competence is said to mean that both the member states and the Community have the initial right to act in the sphere. But once the Community enters it, the sphere is said to come within the Community's exclusive competence.<sup>95</sup> That the Community has broadly acted in the human rights sphere, no one can doubt.<sup>96</sup> But it is incredible and disingenuous to assert that by so doing it has ousted the member states from action in this area. Surely neither the Community institutions nor the member states would accept that Community action ousted member states from future action. Yet that might be the conclusion dictated by the definition of shared competence.<sup>97</sup> The

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93. Council Directive of Feb. 10, 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Equal Work, 1975 O.J. (L 45) 19 [hereinafter *Equal Pay*].

94. *Id.* at preamble. A major initiative regarding worker rights, the Community Charter of the Fundamental Social Rights of Workers, adopted by all EC members except the United Kingdom at the European Council meeting in December 1989 (the text is contained in GEORGE A. BERMAN, ET AL., *EUROPEAN COMMUNITY LAW: SELECTED DOCUMENTS* (1993), and BERNARD RUDDEN & DERRICK WYATT, *BASIC COMMUNITY LAWS* (4th ed. 1993)) accepts in the preamble that under the principle of subsidiarity responsibility for implementation of the rights set forth lies with the member states. See also *Equal Pay*, *supra* note 93, art. 27.

95. See *infra* notes 29-32 and accompanying text.

96. See *supra* note 38.

97. The *Adaptation Report*, *supra* note 15, does not discuss human rights mea-

position of human rights initiatives in this dichotomy highlights an unreal aspect of the dichotomy and, as a consequence, of subsidiarity itself.

If one looks at the spirit of subsidiarity rather than the definitional sophistry of exclusive or shared competence, Community-based broad human rights initiatives probably would be subject to subsidiarity scrutiny.

The member states of the Community are all members of the Council of Europe and are signatories to the European Convention for the Protection of Human Rights, one of the most comprehensive and effective human rights instruments extant, and one with a most effective enforcement procedure.<sup>98</sup> Indeed, the Community member states as members of the European Union explicitly undertake to respect the human rights guaranteed by the Convention.<sup>99</sup>

Given this commitment by the member states to that instrument and its enforcement system, it is difficult to see how Community-generated comprehensive human rights initiatives could meet the subsidiarity test. The member states are acting, and effectively. Thus, movements as have taken place in the past to have the Community assent to the European Convention<sup>100</sup> and Parliament's Declaration of Fundamental Rights<sup>101</sup> would seem unwarranted under the principle.<sup>102</sup>

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asures generally. In its discussion of measures which ought to be reviewed or recast in view of the subsidiarity principle, it does suggest that the treatment of the right to residence is scattered throughout many pieces of legislation and should be consolidated. *Id.* at 10. Likewise, certain measures regarding free movement of workers should be consolidated. *Id.* at 18. The Commission noted that legislation under the Social Policy was too recent to warrant examination and instead should be supplemented with legislation to implement the Charter on the Fundamental Social Rights of Workers.

98. See generally, BEDDARD, *supra* note 32.

99. TEU, *supra* note 4, tit. I, Article F.

100. *Memorandum of the Commission of the European Community*, 11 BULL. EUR. COMMUNITY, Supp. 2, (1979); 23 BULL. EUR. COMMUNITY, No. 1, para. 72, (1990).

101. 1989 O.J. (C 120) 51.

102. The argument can be made that Community assent to the European Convention on Human Rights is justified under subsidiarity. Having the Convention incorporated into the member states' domestic legal systems is an objective that could be accomplished by this Community action. If the Community were to assent, the Convention would likely be directly applicable and directly effective within the Community's legal system. See Metropoulis, *supra* note 32. However, that objective could also be achieved by the member states. The fact that some states, as the Unit-

The Court of Justice certainly has one role, and arguably a second role, regarding subsidiarity. First, it is widely agreed that the principle is a justiciable one.<sup>103</sup> The court, therefore, should employ it in reviewing legislation and action by Community institutions.<sup>104</sup> That much seems non-controversial. There is the additional question, however, of whether the court is otherwise obligated under the principle. Clearly, the court as a Community institution is bound to both act in accord with the principle and, in a pro-active way, to make the principle work.<sup>105</sup> There is nothing in Article 3b to suggest whether or how the court might or ought to act, or mold its jurisprudence, in accord with the principle.

Admittedly, the principle is primarily addressed to the Community's three political institutions. The European Council in its Subsidiarity Guidelines, however, emphasized that to make the principle work is an obligation of all of the institutions.<sup>106</sup> But in explaining how the institutions might accomplish this task, it limited its discussion to the Commission and the Council.<sup>107</sup> Also, Article 3b provides that the Community should take action only when, and so far as, "the proposed action cannot be sufficiently achieved by the member states . . . ."<sup>108</sup> This reference to "proposed action" surely encompasses action by the political institutions. Perhaps the work of the court is not within the meaning of "proposed action." On

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ed Kingdom, have chosen not to so act raises the question of whether such objective cannot better be achieved by Community action. Such inaction also raises the question, however, of whether such objective is appropriately a Community one, as opposed to a purely national one.

103. See *supra* notes 16-17 and accompanying text.

104. Subsidiarity is not only a check on the Community, however. It is also a check on the member states. See Subsidiarity Guidelines, *supra* note 13, at 8; *Adaptation Report*, *supra* note 15, at 2. The court can employ it in assessing the appropriateness of member state action in an area of Community exclusive competence. The likelihood of challenges on subsidiarity grounds to Community action and to member state action will cause a more rigorous delineation of the contours of the Community's exclusive competence.

105. Subsidiarity Guidelines, *supra* note 13, at 8, 11.

106. *Id.*

107. *Id.* at 11. The *Adaptation Report*, *supra* note 15, is in part the Commission's response to the European Council's urging in the Subsidiarity Guidelines for action by all of the institutions.

108. TEU, *supra* note 4, tit. II, art. G.B(4).

the other hand there is nothing to exclude the work of the court, or a particular judgment.

In the vast majority of the court's cases, the question of whether or how it ought to mold its jurisprudence in view of subsidiarity is completely idle. The court most often is interpreting completely Community-based law or is applying such law to action or inaction by a Community institution or a member state. Any assessment of the appropriateness of Community versus national action in these settings simply is not germane. Human rights, alas, may be an area in which the question of whether or how subsidiarity should cause the court to act becomes a real one.

The Court of Justice has repeatedly committed itself to the notion that the fundamental rights as found in the constitutional traditions of the member states or international human rights agreements are part of the general principles of law which it will apply. Such principles are kept by the court in the separate category of general principles of law. They are not part of Community law which is directly applicable or directly effective.

The spirit of subsidiarity is that action should be taken at the Community level, even in areas in which the Community has a clear interest, only when the objective of the action can be better accomplished at the Community level than the national level.<sup>109</sup>

Cases with human rights aspects arise under both the court's contentious jurisdiction,<sup>110</sup> as in *Nold*,<sup>111</sup> or under its preliminary reference jurisdiction, as in *Grogan* and *Cinéthèque*.

Within its contentious jurisdiction, the court is reviewing the legality or appropriateness of Community legislation or action. It is certainly appropriate for the court to determine, as it has, that one aspect of the validity of Community secondary legislation or its application is conformity with fundamental rights.

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109. See *Adaptation Report*, *supra* note 15, at 1.

110. TEU, *supra* note 4, art. 169-76, 179.

111. See also cases listed *supra* note 62.

In cases coming under its reference jurisdiction, the question becomes more difficult. In such cases, the court is not deciding the case on the merits, it is merely giving an opinion to the national court on the questions presented to it by the national court. In many such requests the questions call for the interpretation of Community law. In these instances, like in the cases coming under the contentious jurisdiction, it is appropriate for the court to interpret Community law as requiring conformity with human rights norms.

However, in other cases the questions asked of the court require advice on the compatibility of national legislation or action with Community law.<sup>112</sup> An argument can be made, however, that in this part of its preliminary reference jurisdiction, analysis of national legislation's compatibility with human rights norms is not consistent with subsidiarity. The Court of Justice opinion is not dispositive of the case. It is an opinion regarding conformity of national legislation or action with Community law which the national court will apply. All member states are signatories of the European Convention. The spirit of subsidiarity might dictate that the question of compatibility of such measures with human rights norms embodied in constitutional law or international conventions should be left to the national court deciding the case. For example, why should the Court of Justice decide as in *Kirk* that the arrest of Kirk violated the fundamental right against retroactive application of penal laws? Is not the national court capable of such decision? One response is that the national court would apply only its

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112. Article 177 provides that the court may give a preliminary ruling regarding: a) interpretation of the treaty; b) validity and interpretation of acts of Community institutions; and c) interpretation of statutes of entities established by the Council. There is no direct reference to national legislation or acts of member states. Hence, on its face Article 177 could be read as not authorizing the court to give a preliminary ruling on matters of national law. However, national legislation or action is in fact included within a) and b). The inquiry is whether Community law as properly interpreted controls and thus overrides the national legislation.

For example, the third question asked in *Grogan* was whether there was a right in Community law for a person in member state A to distribute information about clinics providing abortion services in member state B when provision of abortion is prohibited by the Constitution and laws of member state A, but is lawful under the laws of member state B. See *supra* note 68. Also, in *Kirk* the question asked was whether, having regard for all relevant Community law, did the United Kingdom have the right after December 31, 1982 to exclude Danish-registered vessels from fishing in British coastal waters. *Kirk*, 1984 E.C.R. at 2692.

constitutional precepts, not those of the other members. Also, if the various international human rights conventions are not incorporated into domestic law, as they are not in the United Kingdom, the national court cannot apply them.

The court's current approach to the protection of fundamental rights is respectful of subsidiarity. In both *Grogan* and *Cinéthèque* the court acknowledged that it had a duty to give advice as to all elements of Community law, including human rights norms, when the issue involved falls within the area of Community law. But if the issue does not so fall, then the court has no such jurisdiction. In both of these cases the court narrowly defined the ambit of Community interest narrowly. This would be consistent with subsidiarity in these opinions. The court escaped the need to opine on the compatibility of the measures with human rights norms. It also broadened the ambit of national interest in fields where the Community certainly also has interests.<sup>113</sup>

While it is possible to argue that the court is obliged to take the principle of subsidiarity into account in its judgments, the court's current approach seems consistent with attention to this obligation. Thus, subsidiarity may not entail any significant radical shift in the court's approach, but it may discourage a more expansive application of human rights norms.

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113. In *Grogan* the court could have determined that the consumer's right to information regarding services extended to information from sources other than the provider of the services. In enforcing such a Community law right, it would have been appropriate to review any restriction on it for conformity with Article 10 of the European Convention on Human Rights.



