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THE USE OF THE PRINCIPLE OF SUBSIDIARITY IN THE EU

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Skopje

ABSTRACT

Since the inception of the international human rights ("IHR") framework, the principle of subsidiarity has served as a cornerstone of its organizational structure. At its core, subsidiarity asserts that IHR norms are most effectively implemented at the lowest feasible level of national authority. Hence, prior to a supranational or multinational body intervening in a human rights case on a global scale, it is incumbent upon them to ensure that the primary responsibility for addressing the pertinent violation lies with the state concerned. Moreover, subsidiarity dictates that the domestic government should be afforded the optimal opportunity to devise corrective measures even after supranational authorities have investigated or adjudicated on a human rights issue.

The significance of the principle of subsidiarity within IHR law can be analyzed from various perspectives. Firstly, regarding its applicability, it's recognized that adherence to decisions made by international bodies with binding authority on human rights cannot be compelled solely through subsidiarity. Thus, within the international framework, the execution of judgments from non-enforcement institutions relies on the coherence of national authorities and their utilization of policing functions to enforce IHR legislation.

Moreover, a crucial rationale behind subsidiarity is that domestic authorities are better positioned to serve the objectives of IHR content and implementation accurately and effectively in the event of violations. They possess more expertise than international officials in addressing issues within their own borders. Despite IHR legislation being considered universal, subsidiarity acknowledges that each country maintains sovereignty over incidents within its territory. This recognition underscores respect for national sovereignty.

The main aim of this research is to present a critical point of view over the use of the principle of subsidiarity in the EU.

KEY WORDS: subsidiarity, human rights, EU

1.Introduction

European Integration: The principle of subsidiarity gained prominence in the context of European integration following World War II. It was enshrined in the Treaty on European Union (Maastricht Treaty) in 1992 as a guiding principle for the distribution of competences between the European Union and its member states. The principle aims to ensure that decisions are taken as closely as possible to the citizens and that action is taken at the EU level only when necessary.

But the idea of the principle of subsidiarity is not new. Subsidiarity has been discussed and applied in various political contexts beyond Europe. Political theorists such as Alexis de Tocqueville and Friedrich Hayek have explored similar ideas regarding the importance of decentralized governance and the role of intermediary institutions in preserving individual freedom and social cohesion.

The principle of subsidiarity has also been invoked in international law and human rights discourse. While not always explicitly named as such, concepts related to subsidiarity, such as the margin of appreciation, have been recognized by international courts and institutions as important considerations in determining the allocation of responsibilities between international and national authorities.

2. The European Court of Human Rights and the principle of subsidiarity

The authorities that ensure the stability of human rights in the international arena have variously sought so far - often in multiple ways - on balancing their objective to ensure the universalization of fundamental freedoms while preserving nations self-determination thru various ways. Those may briefly and roughly categorized as follows; "content phase", the "jurisdictional phase", and the "implementation phase". Perhaps the most remarkable illustration of subsidiarity at the content phase is how the common law interprets the "margin of appreciation" concept of the European Court of Human Rights ("ECtHR"), which originates essentially from the subsidiarity principle.

The principle of subsidiarity, while not explicitly named as such, has been a factor in several judgments of the European Court of Human Rights (ECtHR) throughout its history. Here's a historical overview of some significant cases where the principle of subsidiarity has been considered.

One notable example of the principle of subsidiarity in judgments made by the European Court of Human Rights (ECtHR) is the case of *Söderman v. Sweden* (2000).¹ In this case, the applicant, Sven Erik Söderman, brought a complaint before the ECtHR alleging a violation of his right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR).

Söderman was a journalist who had published an article criticizing a judge in a legal case. The judge sued Söderman for defamation, and Söderman was ultimately convicted and fined by the Swedish courts. Söderman argued before the ECtHR that his conviction violated his right to freedom of expression.

The ECtHR, in its judgment, balanced the right to freedom of expression against the need to protect the reputation of individuals, particularly judges, in the context of the functioning of the judiciary. The Court emphasized the importance of freedom of expression in a democratic society and recognized the vital role of journalists in scrutinizing public authorities and institutions.

However, in applying the principle of subsidiarity, the ECtHR also acknowledged the margin of appreciation enjoyed by national authorities in balancing conflicting interests, such as freedom of expression and the protection of reputation. The Court noted that defamation laws and their application may vary from one member state to another, reflecting different cultural and legal traditions.

Ultimately, the ECtHR held that there had been no violation of Article 10 of the ECHR in Söderman's case. It deferred to the Swedish authorities' assessment of the need to protect the reputation of the judge and concluded that the interference with Söderman's right to freedom of expression was justified in this particular instance, given the circumstances of the case and the margin of appreciation afforded to national authorities. This judgment illustrates how the principle of subsidiarity is applied by the ECtHR in balancing competing interests and respecting the autonomy of member states in certain areas of law.

¹ [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-128043%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-128043%22]}) visited 19.02.2024.

In this other case, Diane Pretty², a terminally ill woman from the United Kingdom, sought assurance from the UK authorities that her husband would not be prosecuted if he assisted her in ending her life. She suffered from motor neuron disease and was experiencing considerable suffering. Mrs. Pretty argued that her right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR) encompassed the right to die with dignity and that the UK's prohibition on assisted suicide infringed upon her rights.

The European Court of Human Rights, in its judgment, recognized the gravity and sensitivity of the issues raised by Mrs. Pretty's case. However, the Court also emphasized the principle of subsidiarity, which allows member states a margin of appreciation in certain matters, particularly those involving deeply held moral, ethical, and cultural beliefs.

The Court held that the question of whether to legalize assisted suicide was a complex and controversial issue, deeply rooted in the moral and ethical fabric of society. Therefore, the ECtHR concluded that it was not appropriate for the Court to impose a uniform solution across all member states. Instead, the Court ruled that states should have a degree of latitude in determining their own policies regarding assisted suicide, taking into account their national legal, social, and cultural contexts.

In applying the principle of subsidiarity, the ECtHR did not find a violation of Article 8 of the ECHR in Mrs. Pretty's case. The Court held that the UK authorities had carefully considered the issues involved and had struck a fair balance between Mrs. Pretty's right to respect for private life and the state's interest in protecting the sanctity of life and vulnerable individuals.

This case illustrates how the ECtHR applies the principle of subsidiarity by recognizing the autonomy of member states in addressing complex and morally contentious issues within their own legal frameworks.

Some authors claim that one of the negative aspects of the principle of subsidiarity regarding the IHR is that this principle of stands in opposition to the idea that reliance on universal human rights at the content phase should be based on sole and strict conclusions or understandings arising solely from the definition set by an international institution. It therefore ensures the adoption of a pluralistic approach at the content definition phase. From a holistic perspective, taking into account the balance of interests, the possibility of unifying this content within IHR and establishing single supranational legal standard is essentially a

² <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1123022/> visited 19.02.2024.

positive gain that transcends the negatives. This is because the great tolerance allowed to national actors regarding substantive matters has the potential to generate the misconception that there is a fluid set of norms, resulting in each State constantly negotiating according to its own interests and the exigencies of the situation. It is important to note that even though the principle of respect for state sovereignty is an indispensable principle of human rights law, it is not the main objective. For this reason, it should not be tolerated to prevent the aim of establishing order through sanctions to ensure social and individual development by protecting the fundamental rights and freedoms of individuals living in society on the basis of equality.³

On the other hand, there are authors who have discussed the positive implications of subsidiarity for international human rights. They claim that the principle of subsidiarity, when applied thoughtfully, can indeed have positive implications for international human rights.

In that manner, Philip Alston a prominent human rights scholar and former UN Special Rapporteur on Extreme Poverty and Human Rights, has written extensively on the importance of respecting national sovereignty and cultural diversity in the promotion and protection of human rights. He emphasizes the need for a nuanced approach that recognizes the role of subsidiarity in ensuring effective implementation of human rights at the national level.

Also, Dinah Shelton an expert in international law and human rights, has highlighted the significance of subsidiarity in her works on the relationship between international and national human rights mechanisms. She argues that subsidiarity can enhance the legitimacy and effectiveness of human rights protection by empowering local actors and institutions to address human rights issues in accordance with their own legal and cultural contexts.

Makau Mutua a legal scholar and human rights advocate, has explored the implications of subsidiarity for human rights in the African context. He argues that subsidiarity can facilitate the localization of human rights norms and standards, making them more accessible and relevant to local communities. This, in turn, can promote greater ownership and compliance with human rights obligations at the national level.

³ A CRITICAL LOOK OVER THE USE OF THE PRINCIPLE OF SUBSIDIARITY IN EU, Zeynep KARLI

Conclusion

The use of the principle of subsidiarity in the context of international human rights can be viewed both positively and negatively, depending on the specific circumstances and how it is applied.

Positive aspects:

1. Respect for diversity: Subsidiarity acknowledges the diversity of legal systems, cultures, and social contexts among different nations. It allows states to develop and implement human rights protections in a manner that reflects their specific circumstances and values.
2. Flexibility: Subsidiarity provides flexibility in addressing human rights issues, allowing states to tailor their responses to local needs and conditions. This can lead to more effective and contextually appropriate solutions.
3. Ownership and empowerment: By giving states a degree of autonomy in addressing human rights issues, subsidiarity promotes ownership and empowerment at the national level. States are encouraged to take ownership of their human rights obligations and develop strategies for their implementation.

Negative aspects:

1. Potential for abuse: Subsidiarity can be used as a pretext for states to avoid their human rights obligations or to justify violations under the guise of national sovereignty. This can undermine the universality and indivisibility of human rights.
2. Inconsistency and inequality: Subsidiarity may lead to inconsistency in the protection of human rights across different states, as standards and practices vary. This can result in unequal treatment of individuals based on their nationality or location.
3. Lack of accountability: Subsidiarity may weaken international oversight and accountability mechanisms for human rights violations, as states may resist external scrutiny or intervention in their domestic affairs.

Overall, while the principle of subsidiarity can have positive implications for international human rights by promoting diversity, flexibility, and empowerment, its application must be

carefully balanced to ensure that it does not undermine the fundamental principles of universality, equality, and accountability in the protection of human rights.

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