Subsidiary water in a complex Europe: decision levels, federalism and decentralisation

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For several years now, Brazil has been undergoing a double decentralisation process in water policy: from the Federal government to the federated States, and within the States, to more local levels. Integrated basin management is widely discussed, and some States have developed river basin boards schemes, and want to create institutions at that level (Formiga Johnsson, 1998). It is also well known that there has been several attempts to transfer the French model of the *Agences de l'eau*. Yet, if technically one can calculate what kind of levies, and at which level, should be raised on which water users to provide optimal incentives to control pollution or to limit water abstractions, much less attention is devoted to the eventual differences in socio-political histories and present institutional contexts of countries. As a matter of fact, Brazil is a federation, while France is a centralised State, and Brazilians would need to know better the reasons for the creation of the *Agences de l'eau*, and above all their evolution, the conflicts around them, so as to better benefit from the French experience to find their own way.

At this point, it seems obvious that a comparison between several member States of the European Union should be very interesting. Indeed, Only 3 countries in Europe are covered up with water management institutions following the limits of river basins: England and Wales, France and Spain. In the Netherlands, there could well have been catchment based institutions, but the country is quite flat, being for the most part the mouth of two rivers, Rhine and Meuse. In Germany, there are the famous Genossenschaften in the Ruhr, but for most rivers, there are just working parties between concerned Länder and other institutions when needed. So that in these countries which are marked by the tradition of subsidiarity, there are few river basin institutions. In Italy, like in the Netherlands, it is still the administrative region which is considered as the most important institution for water management co-ordination. There are basin institutions only for rivers crossing at least two regions, and these institutions still have limited funding. In Portugal a proposal to create 5 basin institutions was rejected about 10 years ago ; in Greece, there are water districts, but they are under the supervision of the ministry of Industry and Energy (hydroelectricity), so that they do not have a full image of integrated water management approach, and compete with traditional levels of territorial government. In Finland and Sweden, there are water tribunals which split the countries into groups of basins, but they only regulate the conflicts of water and power (hydroelectricity), while water administration is performed by traditional regions. In Belgium, the recent federalisation of the country corresponds more or less to separate Flanders and the Schelde basin on the one hand, and Wallonia and the Meuse basin on the other. But this was not intentional.

On top of this variety of situations, there is the European Union policy, which includes many Directives on water. A framework Directive in preparation proposes to develop an integrated water management approach starting at the level of river basins, including those cases when basins are international. In terms of the E.U. jargon, is can be estimated that the basin is the subsidiary appropriate level for water resources management. This is how the Union handles the issue of centralisation or decentralisation, and institutional co-ordination between government. Yet, subsidiarity is a concept with a long history, and it needs to be presented and discussed to understand better why such and such member State adopted its own water institutions, and how they react to the E.U. project. All this is very interesting for Brazil, because subsidiarity is typically associated with a federal form of Government (albeit not only).

[1] This paper is partly derived from the author's contribution to a collective book in French edited by Alain Faure: *Territoires et subsidiarité, l'action publique locale à la lumière d'un principe controversé* (Territory and subsidiarity, local public action in the light of a controversial principle), Paris, l'Harmattan, 1997 ; but it also owes much to the work of the Dutch and German Eurowater colleagues.

The subsidiarity principle

Until I met Andreas Kraemer in Berlin in 1989, I had as little knowledge of the notion of subsidiarity as most Frenchmen. But it seemed very important in Germany, in particular to justify the role of local authorities in the provision of infrastructure services. When we got involved together in the Eurowater project[2], he insisted on including subsidiarity within the 10 topics we wanted to cover in the 5 countries involved. Typically, in a French or English sense of the word, it meant analysing the implication of the European Union in the environmental policy of member States, and the eventual resistance of these, arguing their specificity and their self-capacity to handle the situation. For the Germans however, as well as for the Dutch, and in fact for most continental Europeans, this issue is primarily one of domestic policy, and relates to the respective responsibilities of the various tiers of government: between the *Länder* (the provinces) and the federal (the central) government, and between the local authorities and the regional level. Even before they adopted the federal structure, the Germans were convinced of the capacity of their cities to run their own business, and implement regulations issued by upper tiers of government. The present attachment to the provision of infrastructure services by municipal enterprises, the well known *Stadtwerke*, is typical. Interestingly enough, while the Germans have no problem privatising public services at national level, they hardly can conceive an extension of the process to local services like water, public transportation, solid waste collection and treatment, etc. In particular, they fear that privatisation would lead to the provision of these services by large monopolies at regional, national, or even at international levels ; so that the issue of territorial competences remains more important than the public vs private debate, which is in turn more relevant in the Anglo-saxon world and in France.

The subsidiarity issue is therefore more complex and important than what has been revealed through the debates around the integration in the European Union ; it is a relevant political concept in domestic policy in most member States, if not in France or in the U.K. Among Eurowater countries, even Portugal is concerned. In all countries of course, there is a permanent debate on the governing capacity of various territorial levels, prominently concerning public services. But the issue goes beyond economic efficiency, and it has philosophical, sociological and political dimensions. This has been shown by Chantal Millon Delsol (1992), who traces the genesis of the notion in the social doctrine of the Catholic church at the end of the 19th century[3]. Her analysis echoes the work on the concept which is under way by our German colleagues at Ecologic (Kahlenborn & Kraemer, 1999 ; and in particular Pieper, 1994), but also with some earlier French research on the role of Christian reformers in the rise of contemporary local policy, and of NGOs in search of public participation to city and regional planning (Barraqué, 1983, Gaudin, 1986). Indeed, the role of municipalities in the provision of an early welfare, in particular through urban infrastructures, has been so important since the second half of the 19th century, that there are now obvious debates on their future tasks and competences. In France, the analyses of Maurice Bourjol, a professor of administrative law (*droit public*) who also is a historian of local authorities and other tiers of government, are of particular salience. He has stressed the very specific sovereignty status of French communes, as compared to local authorities in other countries. For that very reason he has always opposed the subsidiarity doctrine, may be in an excessive manner: he thinks subsidiarity is equivalent to devolution. But his contribution is all the more interesting that it also covers the history of the French commons, i.e. of French common property: even in the country of the Civil Code, there remains some forms of collective territorial management which does not fit with the liberal State ; these management formulae have precisely been considered by the Church's social

[2] Eurowater is a comparative analysis of institutions and water policies in 5 member States of the European Union, France, Germany, the Netherlands, Portugal and the U.K. The partnership includes the author's laboratory, LATTS in Ecole Nationale des Ponts et Chaussées, Ecologic, a not-for-profit consultancy in Berlin, River Basin Administration Centre in Delft T.U., the Environment and water resources section of the Lisbon technical university's Diploma de Engenharia civil, and the Water Research centre in Medmenham, England.

[3] The clearest definition of the principle is however given in 1931 in the Pope's Encyclical letter *Quadragesimo anno* (40 years after the great social encyclical letter *Rerum novarum*): « ... just as it is wrong to withdraw from the individuals and commit to the community the attributions they can accomplish by their own initiative and means, so too it is an injustice, a grace evil and a disturbance of the social order, for a larger and a higher order grouping to arrogate to itself functions which can be performed efficiently by lower order groupings » (my own translation from the French version).

reformation movement, as well as by some regionalist movements.

This leads to hypothesise a link between environmentalism, regionalism and the issue of common property: as exemplified early in this century by regional planners, in particular Patrick Geddes, it stresses the importance of public direct participation, and it picks up some characteristics of subsidiarity, like local autonomy, cooperation, etc. This is why the environment is a prominent sector for the issue of the European Union construction, even though its share in the European and member States' budget remains quite small. It makes sense to try understand the links between subsidiarity and environment.

This paper will almost exclusively focus on water, because Andreas Kraemer considers the French *agences de l'eau* as typically subsidiary institutions, while subsidiarity is theoretically incompatible with French constitution. Interestingly enough, the levy through which they operate has been criticised by French Constitutional Council. A preliminary investigation of the formation of water law and related institutions in European member States within the Eurowater research (Barraqué, in Correia, 1998, vol. II), tends to show that beyond cultural differences, beyond the opposition between Roman law dominating in Latin countries, and Germanic customary community law dominating in other countries, all nations had maintained a category of water neither public nor private but in common property, to be managed by the community of its users, i.e. by riparians or users within the same catchment. Understanding this is all the more important that the E.U. Commission wishes to bring more coherence between the numerous Directives on water, through a framework Directive where the territorial unit of management would precisely be the catchment.

We are first going to link the notions of community of use and action to subsidiarity ; then we'll show how this link applies to environmental issues in general, and to water in particular. Then we can present the issues at stake on the breakdown of competences in water management in the various Eurowater countries. In the French case, the major but fragile institutional innovation, the *Agences de l'eau*, illustrates the "rampant" character of subsidiarity doctrine in a traditionnally centralised State.

Subsidiarity, community and environment

Debates on subsidiary, i.e. appropriate levels of government often focus on efficiency, and lead to valorise malleability of territorial institutions, in a pragmatic manner, so as to optimise action. Conversely, they usually skip the notion of sovereignty, where legitimacy is beyond efficiency, and beyond action in general. Interestingly, this conforms the original definition of subsidiarity by the Catholic church. Chantal Millon Delsol (1992), who wrote her thesis on this notion, wrote that the Church bases social relations on the relationships between the "human person" and the "community". Which is fundamentally different from the relationships between individuals and society. This has been shown clearly by father founders of sociology, Max Weber, Emile Durkheim, and in particular Ferdinand Tönnies with the opposition between *Gemeinschaft* and *Gesellschaft*. Conversely, an earlier German advocate of community spirit and deep relationships like Herder, who would later have a great influence on German identity, considered the individualism of the Enlightenment spirit as superficial since universal. Anyway, for the Catholic church, and for Bishop Ketteler who first forged the doctrine, the autonomy of a person is not defined in general, but from her deeds, as they may be judged by the surrounding community: "the human person is defined much more by what she does than by what she receives or owns". This is what links subsidiarity to efficiency, which is indeed the "gospel" of our contemporary world (Hays, 1962).

The notion of community itself, conversely to society, is ordered according to a principle superior or pre-existing the will of its members. In Middle-Ages Christian Europe, the community was an organic totality ordered to realise God's will on earth, which allowed to limit the freedom of its members, since each had to contribute to the community while staying at the place where he was. In the 19th century, after the triumph of liberalism, the Church had to find a compromise with this doctrine based on individual freedom, and more generally with labour as a philosophy, which also inspired the socialists. Subsidiarity allowed the Church to be present in the debate between individualists and collectivists, as a third party opposed to both philosophies, for the sake of defending peasant communities attached to the land. In his book on commons, M. Bourjol refers to the 19th century debate on the forms of property, and he in particular quotes the Belgian christian populist author De Laveleye (1874): "to realise on earth this superior wording of justice 'to each according to his deeds', we must borrow to the Germanic and Slavic land ownership system principles better related than Roman law to the necessities of democracy, since they grant each a natural ownership right ; not the exclusive, personal and hereditary dominium applied to land, but collective ownership". He meant collective at community level, which is different of course

from nationalisation by modern States. Precisely, Bourjol shows that the commons are neither private nor in the public domain, and that they have given one essential model for modern democracy through Jean Jacques Rousseau's analyses of the Swiss Burger communes. He also shows how the German *Volksrechts* school of law incorporated elements of community and customary law in modern law. So, it is not by chance that subsidiarity was forged in the Germanic part of Europe, where cultural identity defines a bottom-up national feeling which does not necessarily coincide with the State, and stays far from a universalist form of civilisation as developed in centralised and colonial States as the United Kingdom or France (Elias, 1975).

Subsidiarity starts from the individual person, which is left autonomous as long as she can assume it. When she cannot, responsibility is granted to the community level immediately superior, which is the family. In turn, the families join in cooperative or corporative ventures when needed, then in higher and higher levels of communities, up to the State. There is of course a debate within the Church between corporation and the related vertical form of authority, and cooperation with the related horizontal form of authority.

In fact subsidiarity can be understood both ways, top down or bottom up, since it is never obvious who decides if a group at a given level is able to manage or not: the group itself, or the level above ? And indeed, very different movements have claimed their reliance on subsidiarity, from federalism to fascism: bishop Ketteler in Germany, the French socialist Proudhon, but also dictator Salazar in Portugal, and to a lesser extent Mussolini in Italy. Chantal Millon Delsol sees in fascist corporatism an abusive interpretation of subsidiarity, since it reduces the person to the mere status of producer in a corporation, and thus negates individual freedom. Yet, before the second World War, the Church was tempted to accept and even to support these dictatorial regimes ; it did not however mix them up with nazism which it has clearly condemned. And in their history, Catholic political parties have always considered the need for intermediate bodies or tiers between individuals and the government ; they have always relied first on the family, but at the upper level, they have hesitated between the corporation and the free will association (Callot, 1980). Altogether, subsidiarity can be accommodated by very different political regimes. As concerns communities, in the past their consensus has often been based on the respect of hierarchical traditions which maintained very unequal sharing of the products of the commons. Those who were not members of initial founding families were often excluded, even though they worked on the commons. This observation on Swiss or French communes in the Enlightenment century led the French revolutionaries to suppress all these associations, corporations, communities, and to support equality of free individuals. Then the ideological link between free will and property led to support free enterprise in early industry, at the expense of community traditions.

Even if subsidiarity is a notion invented by the catholic church, it does not mean that it only concerned catholic countries, with a subsequent top down interpretation. It also concerns Protestant countries, and not only Switzerland above mentioned[4]. It easily relates to federal constitutions, so that it concerns Germany. But it also concerns other Protestant countries like the Netherlands, where large degrees of autonomy have been left to provinces, and to local authorities. Like the Dutch, the Americans also hardly mention subsidiarity, but they practice it through federalism, and for a more profound reason: the first limit to liberalism isn't the State like is more the case in Europe, but communitarianism. (See the analysis by Dominisque Lecourt, 1992, on America, the bible and Darwin, where he shows the origin of natural philosophy, which is at the core of environmental protection values). In the U.S. however, communitarianism remains dominated by liberalism: this can be for instance derived from the success of Garrett Hardin's *tragedy of the commons* (1968), where the author argues that commons are unsustainable in a society based on freedom and individual interest, valorises individual responsibility and solves environmental issues through private property. This type of analysis underlies the Polluter-Pays-Principle (PPP) in environmental economics. Yet there is another, if dominated, economic approach, natural resource economics, initiated by the German born S.V. Ciriacy Wantrup: this author insists on the possibility to maintain community solidarity in a liberal system, and on its performance potential. He and his followers like Elinor Ostrom, take examples in anthropology and in history. Europe offers many examples (Ciriacy-Wantrup, 1985).

Now ‘environment’ can be considered as another word for common property, and subsidiarity is thus linked to environment via community. Envi-

[4] The story says that the Dutch catholic prime minister, Ruud Lubbers, and the French chairman of the Commission, Jacques Delors (who was earlier active in a catholic political club) together introduced the subsidiarity principle at the European level.

ronment seems to cover the kinds of goods which are too scarce to be left to private appropriation, but not enough to become public goods to be managed by the State ; in legal terms, it covers cases where "everybody and nobody is responsible at the same time. Successful environmental policies are often based on the acceptance that power is split between many actors, so that networking, and decision making through learning processes, are inevitable. Even the Earth can be conceived as a vast community, with usership-based rules which could curb the sovereignty of national governments (e.g. international rivers' commissions).

In a way, the history of the environmental movement in the U.S. illustrates the salience of notions like subsidiarity and solidarity: it starts when Indians and buffalos have been decimated, and when small pioneers settle in a disorderly manner, and threaten to ruin the country. The *conservation* movement, which is institutionalised during the 'progressive era' of Theodore Roosevelt (beginning of 20th century) both initiates integrated planning and development, and gives an empirical basis for ecology, a hardly born science in Europe, to develop and structure itself, while giving a basis for Federal intervention. The whole story of the Owens valley versus Los Angeles conflict in the 1st half of century (Kahrl, 1982), and later the famous Mono lake dispute can be interpreted as a conflict between liberalism and communitarianism, where the second had to rely on the notion of ecosystem sustainability to win the case against powerful Los Angeles (which is billionaire Randolph Hearst's network creation). Recently however, environmentalism in the US has been attacked by a come-back of libertarians: Ronald Reagan and new federalism, and the 'taking' issue; it is not by chance that this movement pushes in favour of privatisation, including of water rights, and internalisation of diseconomies within markets. Typically, under this interpretation, the PPP is meant to replace inefficient State regulations. This vision is now quite influent in international organisations, despite markets and tradeable permits do not seem to work as well for water than for air pollution control.

In this context, Europe keeps having something to say, in particular as concerns water, since basin institutions working on the usership rather than on the ownership principle have been maintained and developed. In practice, Europe does not follow the international debate between State (public) and Market (private) neither for the management of natural resources, nor for procurement of public services. Apart may be from England and Wales, mixed economy, and subsidiary institutions based on territorial solidarity are quite generalised. There are both similarities and differences which we are going to review.

River basin and other subsidiary institutions in Europe

Historians haven't transmitted to us all the stories on water institutions since Roman antiquity, but it is well known that Dutch *Waterschappen* start back in the middle ages; like the German *Wasser und Boden Verbände*, they are typically community institutions imbedded in Germanic customary law (*Markgenossenschaft*). What is not as well known, is that in Spain, irrigation communities probably predated the Arab conquest (even though Islamic culture developed them), at least in the Wisigothic part (Catalonia, Valencia, Balearic Islands ... and Roussillon in France). They would then also be a product of Germanic-type community customs.

But now there is a big difference between the Netherlands and Spain: the Dutch *Waterschappen* have survived over the centuries, even during Napoleon's invasion ; they even are constitutional. In Spain, the famous Valencia tribunal is in fact quite folkloric. Maluquer de Motes (1983) shows that 19th century Spain underwent a process of *despatrimonialisacion* of water resources, meaning the increased domination of liberal initiative and arbitrary State control over water, at the expense of users communities. At the end of the 19th century, the political crisis linked to the end of the empire ended up into a « conservative revolutionary project » basing economic development on irrigation. As soon as 1926, Basin institutions, called *Confederaciones Hidrograficas*, were set up to build hydraulic works, and they covered the country under Franco. The idea was to maintain the people in the countryside so as to avoid class struggles linked to urbanisation and industrialisation, but at the same time refusing agrarian reform. Irrigation was the solution, because it helped poor peasants to make a living on small plots of land. The first basin institution was created by dictator Primo de Rivera in 1926. Spanish Republic kept it but created a users board to control its operations. Franco suppressed the board and turned all the Confederations into purely bureaucratic and arbitrary State institutions. Water engineers then had no problem multiplying upstream reservoirs and water transfers, with the aim of delivering quasi-free water to small irrigators forced to join irrigation communities ideologically controlled by the Church. All this resulted in a non sustainable race between ever more water supply and ever more water demand for irrigation. Can the Spanish basin institutions be considered as subsidiary? If we adopt a "soft" definition, yes, since they were efficient at first, and since the government thought

that economic development, particularly in the South, could not be left to unqualified regional powers. If we adopt a harder definition, no, because the model is now inefficient and unsustainable. Portuguese water experts know about this. And it is now the autonomous regions, which develop another water policy based on self reliance on local resources. The 1985 law demanialises all water, thus potentially giving a greater role still to the national government, but it also proposes to generalise communities of water users at local level, in particular for reasonable sharing of aquifers. The model for these isn't in fact the historical Valencia tribunal (since it deals with the sole irrigators) but the Llobregat delta aquifer community of users, which has managed to revert the trend to over-exploitation in the last 20 years. However, in general, these communities in creation receive little attention and support from the Statist *Confederaciones*. Also, Spain is in a process of semi-federalisation, with the development of the Autonomous Regions, which have their say in water management. Some *Autonomias* (in particular Catalonia) develop environmentally sounder practices. Anyway, they already offer an alternative to the previous policy, based on large hydraulic projects and water transfers.

Several other European member States also experience a complex situation, with water services delivered by local authorities, a planning role given to administrative regions, but the development of river basin institutions. In Italy, water resources management had been vested at the level of the 20 administrative regions, but difficulties in planning design and implementation led to the creation of river basin institutions for rivers crossing several regions. Since the 1994 water law, local authorities are supposed to merge water services in joint boards, the *consorzi idrici*, territorialised at the level of catchments. As we pointed earlier, in Sweden and Finland, water resources are managed at the level of administrative regions, like the rest of the environment. But there are water tribunals set up at basin level to solve conflicts due to hydro-electricity. This latter industry also led Greece to create a river basin management level. But let us now consider in more detail the 5 Eurowater countries.

Germany

This is the first country to deal with, since structure of State and government in Germany has particularly been shaped by the subsidiarity principle. First of all, Germany is a federal State, which means that by principle, a variety of organisational principles have maintained an important degree of decentralisation. In particular, the federal government can only make framework laws in the water domain, but it's at the level of each Land that these laws are completed by specific legislation and implemented. Besides, the Länder have set up a permanent working party, called LAWA[5], to deal with matters where they need to co-operate.

There is another specific trait, which is as important as federalism, of German water management: it is the large autonomy retained by cities at local level. It corresponds to the culture of democracy, which is local before being national, conversely to The UK or France. The municipal enterprise for the transversal delivery of urban services, called *Stadtwerk* or *Querverbund*, is the outcome of a tradition when cities were considered as the major shield of citizens against the arbitrariness of Central government ; this was institutionalised early in the XIXth century, thanks to Baron Zum und Von Stein, and was maintained along the contemporary history of Germany. It was of course developed within the extensive Federal structure adopted after the second world war. There are still direct labour forms of management, but many towns have created a special semi-autonomous institution, and sometimes even a company with its private status but quasi 100 % public shareholders. The adoption of mixed economy status aims at maintaining subsidiarity at local level, beyond the public vs private debate.

Of course, all problems cannot be solved by general government at various levels, so that there also are functional organisations and institutions. First must be mentioned the *Wasser und Boden Verbände*, the water and soils associations set up by freewill water users, usually at infra-municipal (neighbourhood) level. They have a long and similar history to the Dutch waterboards. But most of them have never been institutionalised. They drain land, maintain dykes, and some even deliver drinking water. Some have grown or concentrated to cover large regions. They are partially subsidiary in that they rely on user participation and community autonomy, but except for the Ruhr area, they have not become statutory. After many years of inter-Länder bargaining, they now have a unified legal set up and status, and it seems they are there to stay.

Of course, there are functional joint boards between municipalities, the *Zweckverbände*, like in all other European countries. Like the water and soil private associations, they need not necessarily follow catchment boundaries. There is only one case of institutional river basin management in Germany, but it is the famous Ruhr *Genossenschaften* (cooperatives), which have served as models in France and in many other countries

[5] *Länderarbeitsgemeinschaft Wasser*

(Kneese and Bower, 1968). Back at the end of the 19th century, rapid industrial growth had largely compromised the water environment, with sometimes reverted flow regimes due to mining subsidence, and epidemics due to the absence of sewerage planning. After 20 years of conflictual discussions, cities and various industrial water users got together to form the Emscher Genossenschaft: with the taxes paid by members, the institution turned the little river into an open sewer, with a treatment plant just before the junction with the Rhine. In 1912, the Ruhr river riparians set up 2 similar institutions, one for drinking water in upstream reservoirs (Ruhrtalsperrenverein), and the other for pollution control (Ruhrverband). After the 1st world war, the fraction of the Lippe which was in Westphalia was also managed by a *Genossenschaft* to maintain its quality for non public supply uses. Thus, at regional level within Prussia, there was integrated river management (via specialisation of the 3 rivers, but with almost the same staff in the 4 agencies) by functional government institutions levying tax and having police powers while being run by communitarian user principles. The most interesting fact is that their emergence is not solely due to the extraordinary industrial pressure on the environment, but also to the need for the Westphalians to set up community forms of management (which they did also for other infrastructures), with the support, but not the direct control of, the Prussian empire at the time (Korte, 1990). It is a clear example of subsidiarity.

Interestingly enough, there was no later generalisation of this formula, probably because of the maintained autonomy of cities, and of lower pressure from environmental conditions. Now the Germans are accustomed to set up ad hoc working parties every time needed in complex networking formulas (this might resemble in fact the U.S. situation). Thus, subsidiarity in itself implies no generalisation of basin institutions.

The Netherlands

The Dutch case is also very interesting, because it is typically subsidiary, without being officially labelled so (Mostert, 1998). On the one hand, the very ancient *Waterschappen* (waterboards) are fully subsidiary institutions: their boards are made up with representatives of various types of water uses (due to history, farmers are often over-represented) ; they are now government bodies in the Dutch constitution ; they can eventually be forced to merge by the upper tier of government (the Province) in case it would fail to deliver, but this does not happen much, because waterboards prefer to concentrate voluntarily to face the growing complexity of water issues ; they levy the needed taxes, and have some police powers. However, in the Netherlands 'subsidiarity' is used almost exclusively in relation to the European Union.

Like in Germany, there are both functional forms of government, and important water related tasks given to general government at various territorial levels: municipalities, Provinces, Central government. In contemporary Dutch history, there has been controversies about the breakdown of competences: this was notably the case at the time of Napoleon's invasion, which resulted in setting up a centralised Republic with *départements* and elected municipalities, resulting in the suppression of the waterboards. At that time also the central water agency, Rijkswaterstaat, was set up. But the Dutch recovered their independence, set up a constitutional monarchy, and, while keeping elected local government, they also developed and modernised the waterboards. After the second World war, a catastrophic flood episode in 1953 forced the Rijkswatersaat to intervene directly in water policy (the Delta plan, with huge dykes) ; conversely, the rise of the environmental issue corresponded to an increased role given to the Provinces, which have been placed at the centre of the policy network on water quality (Bressers, 1995), when waterboards were the centre of quantity management. Since the 1985 policy document, Provinces are now officially in charge of coordinating integrated water management.

The fact that the Dutch pay elements of their water bills or charges to at least 4 institutions reveals a typical subsidiary set up: they pay sewerage taxes to municipalities for the local sewers ; waterboard charges for quantitative water management (drainage and flood control) and for supra-local waste water collection and sewage purification ; and groundwater abstraction charges (and sometimes also other taxes) to the Province, responsible for groundwater management. As concerns drinking water supply, municipalities and sometimes provinces have preferred to set up joint private companies which they own, the *Waterleidingbedrijven*, which charge consumers according to the volumes sold. Because the situation is very complex and not so transparent to the water users, there are ongoing discussions about projects to merge the waterboards and the water supplies, and also to transfer groundwater policy to the waterboards, or conversely to reorganise waterboards at provincial level and suppress the functional form of government. But anyway these discussions are hardly linked to river basin territories, for the very reason that the country is quite flat and below sea level for a good deal. It is at international level that the Dutch are concerned with river basin institutions, to improve upstream water management of the Rhine, the Meuse, and

the Scheldt. That's why they are strong supporters of the EU Framework Directive in preparation. They are indeed prepared, with the decreasing role of central government in water policy.

United Kingdom

Let us now turn towards centralised countries where subsidiarity could not be part of institutional vocabulary before the rise of the EU: France and United Kingdom. Having strongly contributed to invent the modern Nation State with cultural identity making citizenship national (and even to some extent universal), they have tended to generalise general government based on elections, at the expense of community institutions based on usership.

As already pointed in Eurowater vol. II (Correia, 1998), water management is probably the most centralised in Britain, and this is an old story. The basis for water management is the common law, which applies through a rather strict doctrine of 'riparian rights': nobody can appropriate the common water, and rights to use do not allow any abuse. This could explain the culture of water management at catchment level. However, in particular in England and Wales, the common law changed slowly from local communitarian customs, to a unified doctrine at national level, and with strong precedence of feudal landlords over peasant communities. Starting from the 17th century, the enclosures chased peasants and their communities to cities. Besides, common law is not the sole source of law. According to the equity principle, the King, and later the Parliament, and now the ministry of the Environment, can revert a case judged by common law, if the outcome is considered as inequitable. This was among other things needed to allow growing cities to have drinking water and discharge foul water, despite it would break the riparian rights rule. During the 19th century, there was a growing devolution of competences to municipalities by the government, so that Britain can be considered as the inventor of municipalism responsible for the first systematic approach to water services. However, due to the environmental pressure and to keynesian government intervention in the economy, after the great crisis, central government began to recover increasing fractions of tasks devolved to local government. This was the case with the concentration of water services in special districts, and with the rise of river boards, where local government would have only part of the seats. The whole process ended up with the creation of 10 Regional water Authorities (RWA) in charge both of water industry and water policy ; local authorities ultimately lost all their seats in these river basin institutions, thus making the progressive regionalisation of water management a real centralisation process. After 15 years, the RWAs were increasingly criticised for having made the wrong choices (investing in supply sided hydraulics, while what was increasingly needed was the maintenance and modernisation of the existing infrastructure. Also, the RWAs were in charge of both servicing the people and controlling their own environmental performance. Privatisation of the industry in 1989 was meant to overcome these shortcomings: but the subsequent creation of central government regulators (OFWAT for the service quality, NRA and later the Environmental Agency for the environment) is often considered as still increasing centralisation. However the process does not remain unchallenged: the profits made by the companies are quite controversial in the UK, and full privatisation is also controversial in Europe, to a far greater extent than other utilities. Besides, Scotland may escape this trend toward liberal management under State control excluding local authorities, in particular through its new parliament. Also, there are still consultative river boards, and it is well known that the British consensual government tradition involves extensive informal consultation process in decision-making. Lastly, local authorities still retain general land use planning powers, while privatised regional companies have necessarily lost them. All this might help to balance a typically non subsidiary set-up, which reduces the issue to the relationships between Britain and the European Union.

France

France is also well known as a centralised country: this goes back to the 18th century and the 1789 Revolution, when the Enlightenment philosophy invented the general interest, resulting from the contract between free and equal individual wills. General interest means that he Nation is more than the sum of its individuals, which eventually makes it the only possible 'community'. But it is the product of will (general election) and not tradition or nature or God's will. All along the 19th century, limitations were imposed to the possibilities for individuals or groups to associate or to join corporations, which would supposedly break the equality and freedom principles. In the preparation of the 1792 constitution, Revolutionaries also imagined to suppress the communes, but they finally kept them and they gave them more than a subsidiary role, a degree of sovereignty. The difference between the French commune and its model, the Swiss *commune de bourgeoisie* studied by J.J. Rousseau is that not only the origin families vote and share the commons but all the inhabitants participate, through general elections. To make sure that the landless could be part of the *assemblée de citoyens* replacing the

old commune, Robespierre even initiated a first distraction of the commons to give small plots of land to them. However, all along the 19th century, Napoleonic type of Jacobinism systematically organised the domination of liberalism and State control over traditional peasant communities and corporations. Local authorities were long reduced to mere local services of central government. With the IIIrd Republic (1884) they gained their present status with elected mayors having a strong degree of sovereignty. They have however remained influenced by the weight of small land ownership, and did not take good care of the environment. Customary and community management formulas have however remained particularly important in marshy or mountain areas, and also more important in peripheral regions (Corsica, Basque country, Alsace and Franche-Comté, Brittany etc.). Local authorities have always been in charge of water services provision, but resources management has increasingly been centralised. In particular, when compared to German cities, they were excluded from local industrial pollution control for the sake of the Prefects, representing the government at the *département* level. Centralisation was also organised through sectorisation between several ministries. The complexity of central institutions, and the sovereignty retained by the 'notables' who would be elected at both local and national levels, allowed to develop what French policy analysts call cross regulation (*régulation croisée*, see Grémion, 1976), where the latter will bargain either local pass through or subsidies with the Prefects and other State civil servants in the *départements*, as a counterpart to accepting the national rules and standards. Passes through would in fact often aim to protect private landowners: since community traditions had been minorised, policies resulted in a general confrontation between State and Private property.

Against this political structure confronting State and private property leaving no room for community, as soon as 1848 revolution a regionalist and federalist movement (socialist thinker Proudhon was an advocate of subsidiarity) proposed to improve territorial management through the creation of regions, with their regional capital and the enhancement of its specific cultural, historical and natural heritage. A vast but minority coalition included the partisans of social reform, of public participation, of a wholesome approach to heritage, and they took examples in the German *Heimatschutz*. But it remained dominated, and the participation of some regionalists to the Vichy regime (leaning on corporatist and authoritarian subsidiarity) furthered again the acceptance of decentralisation, regionalism etc., till General de Gaulle created the DATAR (Délégation à l'Aménagement du Terriotire et à l'Action Régionale), for the sake of diminishing the relative importance of Paris. That's where the environment policy, and in particular the *Agences de l'eau*, were born in France in the 1960's. Under President Mitterrand, the steady growth of competences of territorial general governments (municipalities, *départements*, regions) and of contracts and networking procedures ended up in a formal decentralisation process, which among other things results in increased importance of water policies at the Conseil Général (*département* elected assembly) level.

Yet French decentralisation cannot be assimilated to subsidiarity. According to G. Marcou, a public lawyer (1993): "this principle is not compatible with French legal order ... Even today, the principle of free administration of local authorities, which has been repeated in fact in all successive constitutions, gives them no right to make their own laws. Only can the national Parliament vote derogatory procedures for part of the country, thus contradicting the unity and equality principle of the Republic. But the Republic must remain indivisible, and cannot be changed into a Federal State..."

By French standards then, the 6 *agences de l'eau* created by the 1964 water law are strange institutions. They should look more like the centralising RWA or *Confederaciones*, yet they are now considered as decentralising institutions. Compared to the *Waterschappen* or to the *Genossenschaften*, they don't have all the attributes of subsidiarity: no police powers, no right to directly build or manage infrastructures. They just levy taxes voted by the boards of users on all the users (abstractors and polluters) so as to recover the subsidies and low interest loans they grant to those who participate in the collective effort predetermined on 5-year basis programs.

However, incredibly as it may seem, despite this weak subsidiary status, they are also considered as unconstitutional: since 1959, in conformity to the public vs private paradigm, there are only 2 types of what is called *parafiscalité*: if a charge corresponds to a service rendered by government, then the institution managing the charge should have private status (quango with industrial & commercial character, in French EPIC); in all other cases, the institution in charge should be an administrative one (EPA), and the levies being taxes should be yearly reviewed by national Parliament. The money raised should even go into the general budget. The Agences are EPA, they do not render a service (since they help only those who are willing to do something; all the others still have to pay), so that they are considered as

levying taxes; then their budget should be reviewed by Parliament, and run more directly by the ministry of Finances, which is not the case. There are now controversial projects to either reinforce the constitutionality of the Agences, or to merge their budgets into a projected 'general ecotax' run by the central government.

In 30 years existence, they have developed a system which is closer to a sort of cooperative bank than to a market internalisation of social costs. In fact, the levies, or rather the subsidies they allow, play a fundamental role of evening out the weight of heavy investments, and of the cost of money; which is particularly needed in a country where for historical reasons water services are so scattered, and where an important part of industrial premises are not connected to public sewers. In fact, one can argue that the Agences are common property institutions in a country which leaves little room for 'common' between 'private' and 'collective'. Through the Basin councils, and the permanent bargaining process, they have been the locus of a learning process which is necessarily slow. They replace the ownership principle by the usership principle: the boards are set up with water users, and interestingly, the State has less seats than 20 years ago, and has been partly replaced by consumer and environmental NGOs. The 1992 law also puts all waters "in the nation's common property", meaning that whichever the appropriative status of water, its use is subject to licensing and to bargaining with other users.

Portugal

The discussion of subsidiarity is particularly relevant here, because Portugal is representative of Mediterranean countries of Europe, with specific water resources quantity problems, as well as still big investments going on to complete the initial infrastructure for water services. These investments, which involve some regional transfer schemes, require the support of the European Union. But the situation is complexified by the history of water policy, and of its links with corporatism and fascism in the 20th century.

From 1910 to 1926, Portugal was a Republic, and it is in that period that general local government was systematised under the form of some 300 elected municipalities (grouping the pre-existing parishes, *juntas de freguesia*). By European standards these were and are indeed large municipalities. However, in 1926 the Parliament was suppressed by army generals who developed a corporatist regime with Salazar as a dictator. In the subsequent period, like in Italy and in Spain, there were large hydraulic projects to develop irrigated agriculture. Government services for water resources were organised at the level of 5 groups of river basins, and municipal water services were left largely unsubsidised to develop the infrastructure. Lisbon was an exception, with the nationalisation of the private company when the concession was over. When the Portuguese returned to democracy in 1974, they *a contrario* gave many responsibilities to the elected municipalities, among which to complete water and sewerage infrastructure. This results in a tensed policy system, since local authorities remain dependent on State (and via the government, on E.U.) subsidies. But, except for the largest urban areas, the municipal level is the functional level to operate water industry.

However, like in other European countries a couple of decades earlier, the extension of sewerage of cities and non connected industrial premises results in fast growing pollution of rivers. Then there has been several projects to tackle the issue: in the 1980's for instance, it was proposed to create 5 river basin institutions to plan the necessary infrastructure. But the proposal was rejected, because the projected boards would be usership based, with municipalities and private industry involved, and this recalled the corporatist approach at the time of dictatorship. Instead, the government has created 5 regional environment directorates with civil servants to implement regulations, which are not based on catchments but on administrative regions. More recently, there was a large debate on the creation of regions with elected assemblies, to conform to a quasi generalised European model. But Portugal is one of the smaller member States, by population and by territory, and regions are not felt necessary. The proposal was turned down by a 2 to 1 vote at the end of 1998. In 1994 however, 5 mixed joint boards with 50% shares to the government and 50% to concerned municipalities were created to coordinate the investments needed in the 5 areas where water issues are raised at a supra-local level. Besides, 15 catchment plans covering the country are in the process of being drafted, through a participatory process involving water users. Lastly, privatisation of water services, or delegation to the private sector, is being experimented. EPAL, the water utility of Lisbon area, which serves 20% of the population of the country, is now a private but State owned company, with probable sale of part of the shares to the private sector. In fact, the 5 mixed joint boards were designed after the EPAL model, except that they keep local authorities in the partnership.

Altogether, because the former corporatist interpretation of the subsidiarity principle seems now rejected, and because of the relatively small size of the country, Portugal has refused regional or

basin formal institutional arrangements, and seems to keep a water policy marked by the classical Latin confrontation between central and local governments. Yet there is another way for changes, because Portugal shares several important rivers with upstream Spain, which projected to transfer water of these streams to the Mediterranean basins. Hopefully, the Framework Directive in preparation should normally subject such projects to review by river councils with both countries' representatives. The coming up issue is then whether these councils will be purely set up with representatives of both central governments (e.g. engineers with traditional supply sided hydraulics approaches), or if they will develop user-ship-based principles of sharing, at the expense of State sovereignty, like has happened in the Northern part of the continent (Rhine commission).

Conclusion

As we pointed along this paper, other European countries still hesitate, in particular between Basin and Administrative region as the best subsidiary level for water resources management: Greece, Italy and Portugal in the south, Sweden and Finland in the north (resp. 8 and 3 water tribunals covering entire basins), and of course Belgium which is undergoing a federalisation process. We end up with a partial opposition between subsidiary countries like the Netherlands and Germany, with quasi no river basin institutions, and centralised countries like the UK and Spain where they are generalised. France would be somewhere half way with basin institutions with limited powers. But a closer look leads to hypothesise in all countries a tensed system of water management with on the one hand increasing and more uniform State regulations, permits systems, controls, etc.; and on the other hand, generalisation of community type water resources management at lower levels of government. Water is not a private thing anymore, but it is not necessarily publicly owned or demanial (in the sense of a Master-State, see Burchi, 1991) ; it is in public trust or in common property (Guardian State).

Similarly, water services provision in Europe seem to be evolving past the former public vs private dispute. We better realise that the provision goes through a large sequence of quite varied tasks which can be either performed by public or private institutions. Further, it becomes clear that, conversely to former municipalist style, service operation increasingly involves increased participation of the public through demand side management. This can be interpreted as balancing the modern 'liberal State' policy with some degree of community management. And that is why subsidiarity is a useful concept to analyse what's going on.

It should be now clear that each European country has to go on finding its own way to water management policies. And this also holds for a large federal State, but which has undergone extreme centralisation, like Brazil. It is the specific history of France, for instance, which explains why they invented their form of river basin management: the Agences are subsidiary institutions, but they are obliged to play "in a minor tune".

When analysed from a European and historical perspective, the French case acutely raises an issue of political philosophy: whether one should give sovereignty to institutions which are not the product of general elections. The promoters of the Agences are sometimes over-enthusiastic when they say that they are water parliaments. Being set up in a neo-corporatist way, they could be accused (and they are) to be giving too much weight to lobbying and not enough to democracy. But conversely, having no police and operational powers, they are better at mediation and bargaining than at top down planning. They are the locus of collective learning processes which do help to lower what the economists call the transaction costs. It is very important to point that a central regulator like exists in Britain needs a large quantity of information, to really have the power to regulate. In the UK, it is not so much of a problem, since there is an extensive tradition of consensus building at the national level. But it might not be adapted to other countries, where the arbitrariness of the State is more felt. The French 1992 law typically unifies water law and water regulations; sets up an integrated water planning process, one at the 6 Agences' level, the other at catchment level (SDAGE and SAGE); and separately, but in eventual continuity with the planning process, it allows local authorities to set up special joint boards at sub-catchment level called *communautés locales de l'eau*; these would be more like the Dutch *Waterschappen*, except that users are not supposed to be directly represented in their boards. They might in fact resemble what the Italians are trying to develop with the consorzi idrici.

Of course, the French debate around the constitutionality of the Agences probably appears as very formal to foreign observers coming from countries where subsidiarity is now a current practice, in particular federal countries with traditions of collegial decision-making. But it illustrates very well the need to closely link two issues: one pertains to the appropriate territorial level of performance of various tasks of water policy ; the other is to find appropriate financing mechanisms for costly but random investments. For the above exposed reasons, environmental policies need tax systems with refunds, allowing collective learn-

ing, more than individual incentives based on the 'rational actor' model like the theory of the PPP. Anyway, since common property is neither public nor private, there is a need for a special tax mechanism to help the management of common properties, in particular for environmental policies. For each theme of environmental action, one could set up a levy system to be managed by a "users board" type of council. It would then be something working between the fully mutual, cost recovery and low incentive system, and the direct incentive taxing mechanism that only sovereign institutions can implement. However, such common property arrangements should remain under the *a posteriori* control of government, because citizenship cannot be reduced to the status of user or to utility. Councils should also organise to have qualified water experts, so as to be able to build up the information they need to learn and bargain and plan at the same time. What Callon (1989) calls the hybrid forum (scientific debate and policy debate at the same time) is of particular relevance for environmental governance.

Last remark: as pointed already many years ago by Penning Rowsell and Parker (1980): water planning and management is a political process rather than a technical one. It should therefore mobilise many more economists and other social scientists to do field work than has been the case until now. There is a clear lack of social scientists (or engineers with a social science training) in the hybrid forums that are needed to run a better water policy. May be this is the most important lesson to be drawn from the success of Eurowater.

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