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《Article》

THE PRINCIPLE OF SUBSIDIARITY : FROM JOHANNES ALTHUSIUS TO JACQUES DELORS*

Ken ENDO

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INTRODUCTION

1. Subsidiarity : Why so important?

The principle of subsidiarity has suddenly become fashionable "Eurolanguage."¹ At the same time it has been so misunderstood that something inconceivable could happen ; as Jean-Pierre Cot, head of the EP's Socialists Group, observed, "Ça arrange M. Delors d'être d'accord avec Mme Thatcher sur un malentendu."² Indeed, some warn that this principle is a Trojan horse of Euro-federalists and that it, inevitably, will bring about a over-centralised Leviathan in Brussels.³ The other says ; "Tout homme est, dès sa naissance et sa nature, appelé à gouverner sa propre personne. C'est pour cette raison que tout autorité extérieure doit rester subsidiaire,..."⁴ Here the subsidiarity principle takes on a decentralising character.

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This confusion in the political world can at least partially be attributed to the poor performance of the academic world on the issue. Firstly, there are surprisingly few books concerning the subsidiarity principle.⁵ Secondly, most books on subsidiarity were written in the 1950s

1. Marie-Pierre Subtil, "Un casse-tête: la répartition des compétences entre la Communauté et les Etats membres," *Le Monde*, 22 juin 1990, p. 7.

2. Quoted in *ibid*.

3. Pedro Schwartz, "Is the Principle of Subsidiarity a Solution?" in François Goguel et al., *A Europe for Europeans* (London ; The Bruges Group, 1990), pp. 16-17.

4. Alain Madelin's remarks, quoted in Vincent Lecocq, "Subsidiarité et réforme des institutions européennes," *Revue politique et parlementaire* N° 956 (Novembre-Décembre 1991), p. 45.

5. One of the rare classic studies of this principle is Dr. Hans Stadler's *Subsidiaritätsprinzip und Föderalismus* (Freiburg ; Universitätsbuchhandlung, 1951). His study is based on Swiss experiences and considers how society can assist its members.

Another systematic study of the subject is Edwald Link's book, *Das Subsidiaritätsprinzip : Sein Wesen und Bedeutung für die Sozialethik* (Freiburg ; Herder, 1955). Here the principle of subsidiarity is analysed from various viewpoints ; it is considered, for instance, as a *Ordnungsprinzip*, a *Seinsprinzip*, a

or 1960s (mainly in German). In contrast, numerous articles about it have appeared since 1988-1989.⁶ Lastly, this contrast is connected with a

Solidaritätsprinzip, a *Rechtsprinzip*, and in the context of the *Sozialethik*. Furthermore, it traces the principle back to the age of Pope Leo XIII. Cf. Chapter II-1 of this paper.

Besides these, there are a few books, although they are out of print ; Arthur Fridolin Ulz (Hg.), *Das Subsidiaritätsprinzip : Sammlung Politeia Bd. II.* (Heiderberg ; 1953) ; Josef Isensee, *Subsidiaritätsprinzip und Verfassungsrecht : Schriften zum öffentlichen Recht Bd. 80* (Berlin ; 1968) ; Anton Rauscher, *Personalität - Solidarität - Subsidiarität : Katholische Soziallehre in Text und Kommentar, Heft 1* (Köln ; 1975).

Just before this article went to print, a book entitled *Making Sense of Subsidiarity: How Much Centralization for Europe?* Monitoring European Integration No. 4 (London: CEPR, November 1993) was published. This is a bold attempt to paraphrase the principle of subsidiarity in the implementation of macroeconomic policy in the European Community.

6. Several interesting exceptions written before 1988 should be mentioned. The first was edited by Otto Kimminich in 1981, whose title is *Subsidiarität und Demokratie* (Patmos Verlag Düsseldorf, 1981). This includes an article by the editor himself who points out the relationship between the subsidiarity principle and personalism, and another article by Walter Kerber which emphasises the meaning of the subsidiarity principle as a social and political principle of democracy.

The second is Jean-Marie Pontier's "La subsidiarité en droit administratif" in *Revue du droit public et de la science politique en France et à l'étranger* (novembre-décembre 1986), pp. 1515-1538. This contains a definition of the subsidiarity principle and tries to formulate it as a principle of administrative law.

The third exception is a book written by Dr. Siegfried Battisti, *Freiheit und Bindung ; Wilhelm von Humboldt 'Ideen zu einem Versuch, die Grenzen der Wirksamkeit des Staats zu bestimmen' und das Subsidiaritätsprinzip* (Berlin ; Dunker & Humblot, 1987), allocates one chapter to several aspects of subsidiarity and another chapter to the relationship between subsidiarity and Humboldt's ideas.

The reason why there are relatively few references on the subject of subsidiarity in the 1970s may have something to do with the fact that its importance was lost in the late sixties and in the beginning of seventies, for the assessment of economic roles by the central government had changed, especially under the influence of Keynesian policies. See the argument of Joachim Genosko, "Der wechselnde Einfluß des Subsidiaritätsprinzips auf die wirtschafts- und sozialpolitische Praxis in der Bundesrepublik Deutschland," *Jahrbücher für Nationalökonomie und Statistik*, Bd. 201/4 (Stuttgart ; G. Fischer Verlag, 1986),

tendency that, on the one hand, relatively old reference materials deal only with socio-philosophical or legal aspects, and on the other, recent articles nearly exclusively focus attention upon EC matters. There are very little research to bridge this gap.

In this context, however, it is worth mentioning a few works concerning subsidiarity.⁷ The first is the often-quoted Discussion Paper of

pp. 404-421.

7. Although only a few works are referred to in the text, a lot of articles have appeared concerning subsidiarity. The author picks up a limited number among them which seem useful ; Genhard Jooss, "Europäischer Zentralismus - Tendenzen und Gegenkräfte," *Politische Studien*, 40/306 (Juli/August), pp. 482-490 ; Otto Hieber, "Projet ; Le principe de subsidiarité 'L'Etat est postérieur à l'homme'," *Cellule de prospective, Commission des Communautés Européennes SEC* (89) 8345-FR, 16 février 1990, pp. 1-14 ; Dr. Franz-Ludwig Knemeyer, "Subsidiarität - Föderalismus, Dezentralisation," *Deutsches Verwaltungsblatt*, Heft 9, 1 Mai 1990, pp. 449-454 ; André Thiéry, "Le principe de subsidiarité au Parlement européen," *L'Europe en formation* N° 280 (Hiver 1990-Printemps 1991), pp. 21-26 ; Dr. Kurt Schelter, "La Subsidiarité : Principe directeur de la future Europe," *Revue de marché commun et de l'Union Européenne* (février 1991), pp. 138-140 ; Jacques Delors et al., *Subsidiarity: The Challenge of Change* (Maastricht ; European Institute of Public Administration, 1991). The contents of the book were initially presented at the Jacques Delors Colloquium in Maastricht on 21-22 March 1991.

Several stimulating articles also appeared after this paper had originally been written ; Karlheinz Neunreither, "Subsidiarity as a Guiding Principle for the European Community Activities," *Government and Opposition* (Spring 1993), pp. 206-220. In the debates attached to the Neunreither's paper, Micheal Moran rightly pointed out the Calvinist origin of subsidiarity that has been too often neglected so far in scholarly works. In this regard, see Chap. II-1 of this study ; Deborah Z. Cass, "The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community," *Common Market Law Review* 29 (1992), pp. 1107ff. The Cass' paper traced, similarly to this study, the history of subsidiarity in the Community, although it failed to describe a Spinelli's role in bringing the subsidiarity principle into the Commission's contribution paper to the Tindemans Report in 1975. Cf. Chap. III-1 of this paper ; Lord Mackenzie-Stuart, "Subsidiarity-A Busted Flush?" in Curtin and O'Keefe eds., *Constitutional Adjudication in European Community and National Law* (Ireland ; Butterworth, 1992), pp. 19-24. He pointed out the danger of the European Court of Justice becoming involved in highly political judgment on subsidiarity ; In Japanese, see Dr. Akio Sawada, "Hokansei genri :

the Royal Institute of International Affairs (No. 27) written by Marc Wilke and Helen Wallace (1990).⁸ It touches on almost every aspect of the subsidiarity principle and takes the view that the principle as well as the differentiation policy (e.g. a two-speed Europe) is an approach to power-sharing in the EC. Nevertheless, as a whole, it cannot help leaving the impression that this discussion paper is a medley of each aspect of subsidiarity, which could be deepened in its analysis. The second work is an article of P.J.C. Kapteyn, "Community Law and the Principle of Subsidiarity" (1991).⁹ This short but well-balanced paper refers to several points which will be considered in the following chapters; the importance of the classic meaning of subsidiarity; the relationship between subsidiarity and the corporate structure of Society; a possible boomerang effect of subsidiarity towards the 'excessively' centralised States, resulting from the inclusion of the subsidiarity principle into the new Treaty as a safeguard to the EC's over-centralisation, and so on.

Nevertheless, the Kapteyn's article, like the Chatham House paper, does not analyse in depth each issue it raises, despite his efforts to bridge the above-mentioned gap.¹⁰ In addition to this, both of these two articles take

bunkenshugi genri ka shukenshugi genri ka (The Principle of Subsidiarity : Decentralist or Centralist Principle?)" *Nihon EC Gakkai Nenpo* 12 (1992).

8. The title is *Subsidiarity : Approaches to Power-sharing in the European Community* (London ; Chatham House, 1990).

9. *Revue des Affaires Européennes* N° 2 (1991), pp. 35-43.

10. For instance, despite his recognition of the importance of the classic usage of the term, he does not analyse it in depth, nor even quote the first expression of the "principle of subsidiary function" by Pope Pius XI. As a result, he overlooked another context of its use. This more or less conservative Pope intended not only to "bolster the activities and organizations of individuals" (as Kapteyn observed) but also to restore a more effective State by stressing its subsidiary function to the private matters.

This is an important point because his way of partial focus can lead to the neglect of the positive concept of subsidiarity, which will be formulated later in this thesis. Compare his article (*ibid.*, p. 36) with Chapter I-1 and II.

Moreover, an interesting reference to the relationship between the principle of subsidiarity and the corporatist view of State-Society relationship resulted only in pointing out an extreme example of corporatism, i.e. the Salazar regime in Portugal. The failure to see the implication of the relationship seems, once more, to come from the lack of detailed analysis. In this regard, see Chapter II.

more of an policy-oriented approach than an analytical one, although it is understandable because both of them were written at the height of discussions for the Maastricht Treaty, and also because one is the result of a seminar held at the famous policy research institute and the other was written by a judge of the European Court of Justice. Consequently, they discuss at length whether or not to include the subsidiarity principle in the Treaty ; if so, where to locate it in the structure of the Treaty (e.g. the preamble or substantive clause); whether or not to give it a constitutional status being subject to judicial review, etc.

Perhaps the most detailed study so far has been made by Ms. Professor Chantal Millon-Delsol. In an article entitled "Le principe de subsidiarité" (1990) and a book *L'Etat subsidiaire* (1992).¹¹ Millon-Delsol traces the notion of subsidiarity back to Aristotle and Thomas Aquinas, and concludes that the notion is a typical product of European political culture. In analysing the foundations of subsidiarity, this expert of European political thought points out the relationship of subsidiarity with human dignity, corporatism, liberty and personalism. However, Millon-Delsol rarely refers to the development of the subsidiarity principle in the context of the European Community, although she would probably keep it in mind.¹² Thus the task to follow the evolution of subsidiarity in the EC still remains.

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Despite (or probably because of) the conceptual confusion in the political world and the rather poor performance of the academic world concerning the subsidiarity principle, as mentioned above, it was written into the "Treaty on European Union" adopted at the end of the Maastricht Summit in December 1991. After stating in the Preamble that "decisions are taken as closely as possible to the citizen in accordance with the principle of

11. Chantal Millon-Delsol, "Le principe de subsidiarité : origines et fondements," *Cahiers de l'Institut La Boetie* N°4 (avril 1990), pp. 4-11 ; Chantal Millon-Delsol, *L'état subsidiaire ; Ingérence et non-ingérence de l'état : le principe de subsidiarité aux fondements de l'histoire européenne* (Paris ; Presses Universitaires de France, 1992).

12. After writing this thesis, Chantal Millon-Delsol published a book in which she also followed the history of subsidiarity in the European Community; see *Le Principe de Subsidiarité* (Paris ; Presses Universitaires de France, 1993).

subsidiarity,"¹³ the Article 3b reads 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.¹⁴

This inclusion in such a circumstance almost unavoidably raises various questions and calls for detailed analyses. Moreover, the principle of subsidiarity has already been taken as an actual guideline for some policies of the European Community, as was the case with the Social Charter or the Media Programme.¹⁵ Furthermore, after the Danish rejection of the Maastricht Treaty in June 1992, the principle of subsidiarity became a dominant issue throughout the ratification process of the Treaty. It must

13. "Text in Full of the Treaty on European Union," *Agence Europe* (Documents) No. 1759/60, 7 February 1992. For almost all the primary document-sources on the subsidiarity principle, see Appendix I.

14. *Ibid.*

15. "Community Charter of the Fundamental Social Rights of Workers" adopted by all the Member States except the UK refers to the "virtue of the principle of subsidiarity" in its text at p. 11. (Luxembourg ; Office for Official Publications of the European Communities, 1990). And a Council Decision about the Media Programme remarked ;

Whereas due regard for the principle of subsidiarity entail that the purpose of the Community's measures in this area should not be to replace but to complement what is being done by the authorities in the Member States ; whereas establishing machinery for liaison and cooperation is subsidiary to national efforts.

See Council Decision (EEC) 90/685 of 21 December 1990 concerning the implementation of an article programme to promote the development of the European audiovisual industry (Media) (1991 to 1995), in David Goldberg and Dr. Rebecca Wallace, *Regulating the Audiovisual Industry-The Second Phase* (London ; Butterworths, 1991), Appendix 2.

therefore be said that there exists the necessity to investigate this principle, despite its popularity. In view of the dichotomous tendency of the academic world to concentrate either on the historical-philosophical aspects or on current EC affairs, the task of this paper will naturally be to treat these two with coherent viewpoints.

2. Method and Scope

The description will be as analytical as possible. By doing so, this paper shall not enter the world of policy-evaluation, which is outside its direct interest, if indirectly referred to.

By sticking to the word of 'subsidiarity' (or 'subsidium' 'subsidiarité' 'Subsidiarität'), we shall not analyse some related issues such as democracy, transparency and openness. We also shall exclude the subject of the Committee of Regions, which would require another substantial article.

Even after limiting the tasks, numerous questions remain to be answered. What was the classic meaning of subsidiarity? In what context was it raised? More specifically, what kind of assumptions did it contain concerning the nature of Man and Society? How was it brought into the context of Federalism or the European Community? And as a result of this, how has it been transformed? Why and how has its meaning been taken so differently from country to country, from person to person? How could its formal inclusion into the Maastricht Treaty be realised, and with what kind of political implication in the future? How has the Community tried to 'translate' the philosophical concept of subsidiarity into practice?

In dealing with these questions, it is necessary to base the arguments upon primary reference materials such the Papal encyclicals and the official documents of the European Community. Yet this is not sufficient to answer these questions. A more important point is that it is necessary to have coherent analytical tools in order to examine at once the classic sense of subsidiarity and the recent uses. In other words, it is only with these frameworks that we will be able to trace consistently the conceptual evolution of subsidiarity, thus overcoming the gap between an older generation of research and recent discussions.

3. Structure

Chapter I will set three frameworks with which to analyse both the historical evolution of subsidiarity and the current discussions on it. Chapter II will investigate the origin of subsidiarity. Later in this chapter, the world views around which the notion of subsidiarity have been elaborated will also be explored. Chapter III will follow the historical evolution of subsidiarity within the context of European integration. We shall focus upon actors who have promoted and events which have been closely associated with the principle of subsidiarity, instead of seeking for some 'subsidiarity elements' in the EC documents. In the Conclusion we will summarise the analyses of this study and go on to consider the significance of subsidiarity in European political society.

CHAPTER I

FRAMES OF REFERENCE

I-1. Negative and Positive Subsidiarity

The first and the most important distinction should be drawn between the *negative* concept of subsidiarity and the *positive* concept of it.¹

Basically the negative concept of subsidiarity refers to the *limitation* of competences of the 'higher' organisation in relation to the 'lower' entity,² whilst its positive concept represents the *possibility* or even the *obligation* of interventions from the higher organisation. We can clarify this distinction in the following way.

The negative concept means that ;

- 1) the higher organisation *cannot* intervene if the lower entity *can* satisfactorily accomplish its aims,³ or

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1. The author would like to thank Mrs. Josephine Moerman very much for this distinction. Based on her suggestion, the author tried to reformulate the distinction more precisely. She is the Principal Administrator on the Institutional Affairs for the Liberal Group of the European Parliament, and was a very important contributor to the draft of Giscard Report on subsidiarity. The author's interview with Mrs. Josephine Moerman, at the office in the European Parliament, Strasbourg, 11 March 1992. This distinction can also be seen in Chantal Millon-Delsol, "Le principe de subsidiarité : origines et fondements," *Cahiers de l'Institut La Boetie* N°4 (avril 1990), p. 4.
 2. A word 'higher' is parallel with 'superior' 'bigger,' while 'lower' is with 'inferior' 'smaller' 'lesser,' etc. The latter includes individuals or persons. This way of using words derives from a hierarchical view of Society in the Roman Catholic Church, as will be analysed in Chapter II.
 3. Here we have to face a question ; i.e. how to categorise the case (the higher organisation can intervene only if the lower entity cannot satisfactorily accomplish its aim). Although this is written in the positive grammatical form, the author categorises this version using the word 'only' into the *negative* concept, since it more explicitly emphasises the *limitation* of the higher organisation's activities.

Article

- 2) (a more strict version) the higher organisation *should not* intervene if the lower entity alone *can* accomplish its aims, or
- 3) (as a variant) the higher organisation *cannot* intervene if it is *not* assigned to do so.

The positive concept can be formulated as follows ;

- 1) the higher organisation *can* intervene if (or to the extent that) the lower entity *cannot* satisfactorily accomplish its aims, or
- 2) (as its stronger expression) the higher organisation *should* intervene if the lower entity alone *cannot* accomplish its aims, or
- 3) (as a variant) the higher organisation *can* or/and *must* intervene if assigned to do so.

In the actual political scene, the British Conservatives stressed upon the negative concept during the preparatory period for the 1991 Maastricht Summit and their ideas were partially adopted in the final text of the Maastricht Treaty, whilst a parliamentary forum in the European Parliament like the GUE (Group for the European Unitarian Left) emphasises exclusively the positive concept.

Though only the negative sense of subsidiarity is quite often circulated, and, as will be argued in the next chapter, its positive concept is of secondary importance at least in its origin, both concepts should not be neglected. A researcher was aware of it when she wrote that ; "la notion de subsidiarité contient non seulement la suppléance, mais aussi le secours (...), l'idée de secours signifie que l'autorité la plus haute, celle qui possède davantage de moyens et de prérogatives, se doit d'aider l'instance la plus restreinte quand celle-ci en exprime le besoin."⁴ In the political world, one of the most balanced views was expressed by Jacques Delors, although probably because he wished to defend and develop the EC's competences. Delors argued ;

Subsidiarity is not simply a limit to intervention by a higher authority *vis-à-vis* a person or a community in a position to act itself, it is also an obligation for this authority to act *vis-à-vis* this person or this group to

4. Chantal Milon-Delsol, "Le principe de subsidiarité," *op. cit.*, p. 5.

see that it is given the means to achieve its ends.⁵

This double meaning of subsidiarity is, in fact, the key to understanding a wide spectrum of its interpretation.

I-2. Territorial and Non-Territorial Subsidiarity

A second distinction is made between the *territorial* concept of subsidiarity and the *non-territorial* concept. This differentiation is parallel with a distinction known as *vertical* and *horizontal*, respectively.⁶

The principle of subsidiarity in the Catholic doctrine initially represented the delimitation of spheres between the private sectors and the public, in the way that the latter's activities should be 'subsidiary' in relation to the former's. Every 'natural' group such as the Church, occupational groups (e.g. guilds) and the family, which is basically non-territorial in nature, has to retain its own sphere of autonomy. Yet as we shall see, the conceptual focus of the subsidiarity principle seems to have gradually shifted from this non-territorial scheme to the territorial one: i.e. the division of powers among several levels such as the EC, the State, the Region and the Local Authority, each of which can be territorially imagined by the people (see chapter II-4).

One can cite a number of historical examples which could support this shift of conceptual focus. For instance, throughout the 19th century and the beginning of this century, several West European countries have witnessed harsh struggles between the State, inspired by Liberalism, and the

5. Jacques Delors, "Principle of Subsidiarity; Contribution to the Debate," in Jacques Delors et al. *Subsidiarity: The Challenge of Change* (Maastricht; European Institute of Public Administration, 1991), p. 9.

6. For instance, Giscard d'Estaing's Working Document on subsidiarity for the EP's Institutional Committee, dated 5 April 1990, made the distinction in the following way;

Under this 'vertical' subsidiarity, a distinction is made between the powers of the Union and those retained by the Member States. There also exists another type, known as 'horizontal' subsidiarity, under which a distinction is made between the powers of the public authorities and those of society.

Catholic Church. Their disputes remained unsolved in some countries like Belgium until after the 1960s, especially in the sphere of education.⁷ In the process, the Church as a non-territorial organisation attempted to defend its prerogatives vis-a-vis the powerful State, thus constituting the spirits of subsidiarity. Moreover, as we will see in the next chapter, since Pope Leo XIII's recognition of State intervention in the social field, the Church was seeking for the way to counterbalance the resulting expansion of the State's power (Chapter II-1). It was in this context as well as against the background of growing Totalitarianism that Pope Pius XI brought the words 'subsidiarii officii principium' into the first use in 1931.⁸ We can safely state that the principle of subsidiarity was born to protect and promote non-territorial associations.

Fusing with Federalism, this non-territorial principle of subsidiarity has steadily given way to the territorial one. The *Grundgesetz*, Basic Law of the Federal Republic of Germany, established in 1949, unmistakably contains the idea of subsidiarity in Article 72, although the insertion of the term was avoided "because of its obviously 'denominational' origin."⁹ After the catastrophe of the Totalitarian regime, the draftsmen of *Grundgesetz* carefully divided the powers between the Bund and the Länder, both of which are of territorial existence. The subsidiarity principle has thus crept into the context of Federalism, and the weight of territoriality in the principle increased (Chapter II-4). In the middle of 1970s, the Godfather of Euro-federalism, Altiero Spinelli, brought the principle of subsidiarity in the EC field, by incorporating it into the EC Commission's contribution report to the Tindemans Report, and successively, in the first half of 1980s, developed the concept in the Draft Treaty establishing European Union

7. E. g. Vernon Mallinson. *Power and Politics in Belgian Education* (London ; Heinemann, 1963), Part I ; R.E.M. Irving, *Christian Democracy in France* (London ; 1973), chap. 1 ; Daniel Singer, *Is Socialism Doomed? : Meaning of Mitterrand* (Oxford ; Oxford University Press, 1988), chap. 7.

8. It should again be stressed that this conservative Pope did so with the double intention, on the one hand, of bolstering the activities of individuals' organisations, and on the other hand, of saving the over-stretched State and of restoring it. See paragraph 77-80 of "Quadragesimo Anno" in *The Papal Encyclicals 1903-1939* (Raleigh ; McGrath Publishing Company, 1981).

9. P.C.J. Kapteyn, "Community Law and the Principle of Subsidiarity," *Revue des Affaires Européennes* N° 2 (1991), p. 36.

(Chapter III-1&2). Here the principle of subsidiarity was 'territorialised' in the EC context ; that is, the EC, the State, the Region and the Local Community are all territorially limited entities. Based upon this shift of the conceptual centre of gravity, the territorial element of subsidiarity apparently monopolises the recent discussions. Nevertheless, both types of subsidiarity should be kept in mind.

The reason why the distinction of territorial/non-territorial is more preferable to that of vertical/horizontal is that nearly all types of subsidiarity can be analysed as vertical, not horizontal, especially in its classic sense. That is to say, the Catholic Church presupposes the hierarchical view of Society in which all its components should be located in the 'proper' places. Moreover, the Church considers that other components of Society than the State are subordinated to the State in a harmonious way as if they were part of its body (to put it in a different way, in accordance with the common good. Concerning the Church's corporative view, see Chapter II-2).¹⁰ This is reflected in the Church's terminology ; for example, those components of Society are expressed as 'lesser' 'weaker' 'subordinating' 'inferior' entities, whilst the State is referred as 'superior' 'stronger'.¹¹ Therefore in view of the context that the subsidiarity principle has been used, the public-private relationship can only be taken as vertical.¹² If so, it could be confusing to use the term 'horizontal' in order to represent the private-public relationship.

I-3. Criteria

The third and last analytical tool is a classification of *reasons* to justify

10. See, for example, the Leo XIII's encyclical "Rerum Novarum" of 15 May 1891 in *The Papal Encyclicals 1878-1903* (Raleigh ; McGrath Publishing Company, 1981). For analysis on it, see Donal Dorr, *Option for the Poor : A Hundred Years of Vatican Social Teaching* (1983), chap. 1.

11. Pius XI's "Quadragesimo Anno," *op. cit.*, para. 79.

12. In connection with this point, it may be noted that Otto Hieber remarked ; "La séparation horizontale des pouvoirs n'a rien à voir avec le principe de subsidiarité." See his "Projet ; Le principe de subsidiarité 'L'Etat est postérieur à l'homme'," *Cellule de prospective, Commission des Communautés Européennes*, 16 février 1990, pp. 1-14.

interventions by a higher organisation. These reasons are the hurdles that the higher organisation has to overcome if it is to take action. Five *criteria*, as formulated below, are relevant to disentangle the complexity of current discussion on the principle of subsidiarity, especially to differentiate the similar versions of subsidiarity.¹³ Those criteria are;

- ① the *better attainment* criterion
- ② the *effectiveness* criterion
- ③ the *efficiency* criterion
- ④ the *cross-boundary dimension or effects* criterion
- ⑤ the *necessity* criterion.

① the *better* criterion appeared in Article 25 of the Single European Act (EEC Treaty 130 R) concerning the EC's environmental policy. It says that; "the objectives can be attained better at the Community level than at the level of the individual Member States."¹⁴ The *more satisfactorily* or *more sufficiently* criterion is parallel with the *better* one, which can be found in the Preamble of EP's Draft Treaty establishing European Union and the Maastricht Treaty (Art. 3b) respectively.¹⁵ A common feature among them is that these are considered in relation to their objectives set in the Treaty or the Act. Another is the vagueness of these criteria; this vagueness is only slightly mitigated by coupling them with following criteria ②③④. For instance, the draft Treaty of the Luxembourg Presidency on European Union used the *better* criterion which was equivalent to criterion ④.¹⁶ The Maastricht Treaty goes further by adding the *more sufficiently* criterion to the criteria of the Luxembourg draft, and thus, by making the hurdles higher,

13. Here the author owes to the Kapteyn's scheme. For his slightly different classification, cf. P.C.J. Kapteyn, *op. cit.*, pp. 40-41. One might add another criterion of "proportionality" or "intensity" that can be found in recent official documents, although this can also be differentiated from the principle of subsidiarity. See in this regard Chapter III-6 and 7 of this study and also Ken Endo, "Implementation of the Principle of Subsidiarity", *Crocodile* (May-June 1993).

14. Quoted in Jacques Santer, "Some Reflections on the Principle of Subsidiarity," in Delors et al., *op. cit.*, p. 23.

15. For the Draft Treaty, see *OJ C* 77, 19 March 1984.

16. The Luxembourg Draft can be found in *Agence Europe* (Documents) N. 1722/23, 5 July 1991.

it becomes even more strict for the EC's activities.¹⁷

② the *effectiveness* criterion has its classic example in the *Grundgesetz* of Germany. Article 72 (2) envisages;

The Bund shall have the right to legislate in these matters to the extent that a need for regulation by federal legislation exists because:

1. a matter cannot be effectively regulated by the legislation of individual Länder, or, ...¹⁸

This *effectiveness* criterion is widely used in combination with or specified by the ④ criterion. An example of the former is the so-called Giscard Report for the EP's Institutional Committee,¹⁹ with the latter's example in the European Peoples Party's declaration on the European Union.²⁰

③ a slightly different criterion from ② is that of *efficiency*. They differ in that the *effectiveness* criterion focuses upon the extent to which the intended result is attained, whilst the *efficiency* criterion pays more attentions to injected resources, thus to whether the aim is attained without wasting time and energy. Theoretically speaking, it might be *efficient* if the Union would develop a new type of LSI or fighter rather than each Member State's developing twelve different types. It is *effective* for the EC rather than a Member State to negotiate with other economic powers as regards the trade disputes. Among the EC documents, the Commission's contribution report to the Tindemans Report in 1975 referred to the question of efficiency when it read; "the Union will be given responsibility only for those matters which the Member States are no longer capable of dealing with efficiently" (Art.

17. See the earlier citation in the Introduction.

18. For the basic documents on Germany, see Carl-Christoph Schweitzer et al. eds., *Politics and Government in the Federal Republic of Germany: Basic Documents* (Leamington Spa; Berg Publishers, 1984). Art. 72 is at p. 142.

19. "Report of the Committee on Institutional Affairs on the principle of subsidiarity (Rapporteur: Valéry Giscard d'Estaing)," *EP Session Documents* A3-0267/90, 31 October 1990.

20. "In Favour of a Federal Constitution for the European Union," a document adopted by the EEP during the eighth Congress in Dublin between 14 and 16 November 1990, *Agence Europe* (Documents) No. 1665, 5 December 1990.

12).²¹ Just as the effectiveness criterion, the efficiency criterion tends to be combined with ④. The so-called Colombo Resolution by the EP is a case in point. Its Article 12 of the Preamble says that ;

... the Union shall, in carrying out its tasks, take action in so far as the achievement of these objectives requires its intervention because, by virtue of their magnitude or effects, they transcend the frontiers of the Member States or because they can be undertaken more efficiently by the union than by the Member States acting separately.²²

④ the *cross-boundary dimension or effects* criterion can be considered as parallel with the *cross-boundary scope or implications* criterion and with the *cross-boundary magnitude or effects* criterion. One can point out, as a case of the cross-boundary *dimension*, the measures to prevent acid rain, since this issue in nature can rarely be solved by the efforts of a country or a region alone. In the case that a measure of a country or a region affects the interest of other peoples, this would fall in the category of the cross-boundary *effects*. Its classic formula can be found in *Grundgesetz*. Its Article 72 (2), as cited above, was followed by a provision ; "[a need for regulation by federal legislation exists because : | 2. the regulation of a matter by a Land law might prejudice the interests of other Länder or the people as a whole ...]"²³ Most recent declarations, resolutions and Treaties have adopted this criterion, coupling it with ②③. It may be noted that the EP's Draft Treaty treated this ④ criterion as a special case of ②. The Article 12, paragraph 2 reads ;

... The Union shall act only to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers.²⁴

⑤ the last criterion is that of *necessity*. This appears in the Final

21. "Report on European Union," *Bull. EC Suppl.* 5/75.

22. "A Constitution for European Union : The Basis for a European Parliament Draft Treaty," *Agence Europe* (Documents) No. 1674, 19 November 1990.

23. Schweitzer et al., *op. cit.*, pp. 142-143.

24. *OJ C* 77, 19 March 1984.

Declaration adopted by the Conference of the Parliaments of the European Community in Rome on 27 to 30 November 1990. Its provision E said ;

proposing that, in keeping with the subsidiarity principle, only those powers should be conferred on the common institutions that are necessary for the discharge of the Union's duties,²⁵

A more strict version of this formula, and probably the most strict single criterion is that of *absolute necessity*. This is expressed in the Munich Declaration of the Minister-Presidents of the Länder (1987) as follows ;

The European Community shall carry out new tasks only if their carrying out on the European level is absolutely necessary in the interest of the citizens and if their full effect can be attained only at the community level.²⁶

Which criterion would lead to centralisation or decentralisation in the EC context remains an unsettled question. Giscard d'Estaing's "Interim Report on the principle of subsidiarity" picked up ② and ④ as "two approaches to the principle of subsidiarity" and indicated that the latter (④) would bring about decentralisation. It stated ; "The first approach assigned to Community level only those tasks the dimension or effects of which extend beyond national frontiers. This theory tends to have a decentralisation or federative effect."²⁷ However, concerning the cross-boundary effects, P. C. J. Kapteyn, a judge of the European Court of Justice, remarked that ; "It [the cross-boundary effects] is nevertheless a technological criterion that in many cases will lead to centralization."²⁸ Even this criterion which is said to be relatively "objective" by the same judge provides ample room for

25. "Conference of European Community Parliaments : Final Declaration (Rome)," *Agence Europe* (Documents) No. 1668, 8 December 1990.

26. Quoted in Kapteyn, *op. cit.*, p. 40.

27. Giscard d'Estaing's Working Document on the subsidiarity principle for the EP's Institutional Committee, dated 5 April 1990. This formula appeared again on his Interim Report. See EP Session Documents A3-163/90/Part B, Series A, 4 July 1990, p. 5.

28. Kapteyn, *op. cit.*, p. 41.

interpretation of its potential consequences.²⁹ In short, at the stage where the Maastricht Treaty has just completed its process of ratification, it is far from clear what sort of outcome the principle will bring about, and more specifically, which criterion will lead to centralisation or decentralisation in the EC context.

29. He says ; "If one wishes to find more objective criteria for the purpose, these result from the *cross boundary effects test*." *Ibid*.

CHAPTER II

ORIGIN AND IDEAS

OF THE PRINCIPLE OF SUBSIDIARITY

II-1. The Origin of Subsidiarity : Formulation of Its Classic Meaning

(i) The Etymology¹

In Latin, the word *subsidium* or *subsidiarius* initially meant something in reserve, or more specifically, reserve troops. Then it was used for the reinforcement or fresh supply of troops. Later it acquired the broader sense of assistance or aid. In this derivation of the word, we already see that the notion of subsidiarity can contain positive connotations, as it envisaged the intervention of forces for the benefit of those in trouble.

(ii) A Western Political Thought

As Professor Millon-Delsol — an expert on European political thought and the author of a detailed study on subsidiarity² — points out, the notion of subsidiarity cannot date exclusively from the Popes' encyclicals of the Catholic Church. The idea is rather a typically European or western thought, and can be traced back to Aristotle and Thomas Aquinas.³

1. See Jean-Marie Pontier, "La subsidiarité en droit administratif," *Revue du droit public et de la science politique en France et à l'étranger* (novembre-décembre 1986), p. 1516.

2. See Chantal Millon-Delsol's two works. One is an article, "Le principe de subsidiarité : origines et fondements," *Cahier de l'Institut La Boétie* N° 4 (avril 1990), pp. 4-11. The other is a book published in 1992, *L'Etat subsidiaire ; Ingérence et non-ingérence de l'Etat : le principe de subsidiarité aux fondements de l'histoire européenne* (Paris ; Presses Universitaires de France, 1992).

3. Millon-Delsol, *L'Etat subsidiaire*, *ibid.*, pp. 15-45. It may be noted that Ernest Barker, an expert on Aristotle, referred to the principle of subsidiarity which Pontiff Pius XI envisaged would limit intervention from the totalitarian regime. 'Corporativism' of the Fascist regime is described as clearly different from that

It is reasonable however to also identify Althusius as the first proponent of subsidiarity and federalism (he uses, in fact, the word "subsidia" in the text).⁴ He was a Calvinist theoretician of the laical State at the beginning of the 17th century.⁵ As the Syndic of Emden - a city in East

of the papal ideology. See his *Reflections on Government* (London: The Clarendon Press, 1942), p. 353.

4. The author is not entirely competent to discuss further Althusius' usage of "subsidia", which would take a specialist of political thought who can read Latin. Althusius began his *Politica* in the following sentences;

Politica est ars homines ad vitam socialem inter se constituendam, colendam & conservandam consociandi. Unde συμβιωτική vocatur. Proposita igitur Politicæ est consociatio, qua pacto expresse, vel tacito, symbiotici inter se invicem ad communicationem mutuam eorum, quæ ad vitæ socialis usum & consortium sunt utilia & necessaria, se obligant.

Politics is the art of associating (*consociandi*) men for the purpose of establishing, cultivating, and conserving social life among them. Whence it is called 'symbiotics'. The subject matter of politics is therefore association (*consociatio*), in which the symbiotes pledge themselves each to the other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life.

...

... neque in adulta ætate etiam externa illa, quibus in vita commode & sancie degenda opus habet, in se & apud se invenire, cum suis viribus omnia vitæ subsidia parare nequeat.

... Nor in his adulthood is he able to obtain in and by himself those outward goods he needs for a comfortable and holy life, or to provide by his own energies all the requirements of life.

The Latin text was taken from Carl Joachim Friedrich, *Politica Methodica Digesta of Johannes Althusius* (Cambridge; Harvard University Press, 1932), p. 15. The English translation can be found in Frederick S. Carney, *The Politics of Johannes Althusius* (London; Eyre & Spottiswoose, 1965), p. 12. Our emphasis.

5. As regards the influence of Calvinism on subsidiarity, including that of Althusius, the author is indebted to Dr. Marc Luyckx, a theologian advising President Delors of the EC Commission, at the Cellule de Prospective, concerning religious matters. According to him, Althusius is, in fact, the key to understand subsidiarity, and the Calvinist influence is evident. For instance, the Synod held in Emden in 1571 hammered out an embryonic notion of subsidiarity to regulate the relationship between several levels of synods.

Provinzial- und Generalsynoden soll man nicht Fragen vorlegen, die schon früher behandelt und gemeidsam entschieden worden sind, ...

Friesland which was one of the first in Germany to embrace the Reformed faith, Althusius found himself in the stormy movement of the Counter-Reformation, and tried to maintain the relative autonomy of his city vis-à-vis its Lutheran provincial Lord and Catholic Emperor.⁶ In this circumstance, Althusius considerably revised his book "*Politica Methodice Digesta* [Systematic Analysis of Politics]" in 1610 and in 1614 which first appeared in 1603. According to him, "no man is self-sufficient,"⁷ and therefore, a man

und zwar soll nur das aufgeschrieben werden, was in den Sitzungen der Konsistorien und der Classicalversammlungen nicht entschieden werden konnte oder was alle gemeinden der Provinz angeht.

This pointed to a formula in which decisions should be made at the lowest possible level ; the Provincial or General Synod could not take decisions in the areas where the community synods had taken decision, or could take decisions only if the latter could not decide or if the questions under consideration concerned all the parishes. The citation is taken from Dieter Perlich, "Die Akten der Synode der niederländischen Gemeinden, die unter dem Kreuz sind und in Deutschland und Ostfriesland verstreut sind," in 1571 *Emden Synode 1971* (Neukirchen, 1973), pp. 61-63. Quoted by Marc Luyckx, "Histoire philosophique du concept de subsidiarité," Cellule de prospective, Commission des communautés européennes, 13 février 1992.

The author thought it all the more necessary to investigate further the Protestant influence on the idea of subsidiarity, when as a speaker he was invited to attend a conference on subsidiarity organised by the local and regional authorities of Nordic countries. Founded on a strong sense of autonomy and self-determination that could be influenced by the Protestant tradition, the local municipalities and regions in Sweden and Finland considered subsidiarity indispensable if they are to join the European Community, one of the organisers told the author.

Their approach towards subsidiarity as well as that of Denmark and perhaps the Netherlands takes on a bottom-up character, and does not necessarily coincide with the conception of southern European countries, which are in general coloured by Catholicism. This is an important point to make when we recall a wide spectacle of interpretation in a word "subsidiarity".

Conference, entitled "The Nordic Model and Subsidiarity," Brussels, 1 June 1993.

6. Concerning the background against which Althusius wrote his *Politica*, Carney, *op. cit.*, Introduction ; Friedrich, *op. cit.*, Introduction ; Antony Black, "Althusius" in David Miller ed., *The Blackwell Encyclopaedia of Political Thought* (Oxford ; Basil Blackwell, 1987), pp. 8-9.

7. Carney, *ibid.*, p. 12.

is unable to live comfortably, being isolated from society. Men need the assistance or aid of others, and thus establish, cultivate and conserve associations such as family, collegium (e.g. guild/corporation), city, province and the State.⁸ Seeking for “sympiotics” among these associations - that is the essential subjective matter of politics,⁹ Althusius picked up a biblical concept of “foedus” (the alliance or league that originally meant the bond between God and men), and secularised it to apply to associations in this world.¹⁰ This term is no doubt the origin of the word “federalism” as we use it today, and the view of society is rather corporatist. With his obvious sympathies laying with quasi-independent cities and Estates General, Althusius also maintained that sovereignty belongs collectively to the constituent cities and provinces.¹¹ With this quasi-democratic interpretation of the Holy Empire, he tried to secure the autonomy of those associations, excluding unnecessary interference from more powerful associations. Thus we see, Althusius was a man of subsidiarity.

During almost the same period, J. Locke argued that governmental power ought to be restricted to those instances where the people could not solve their own problems. With some influence of Calvinism, it is possible to read Locke in relation to subsidiarity, despite differences with Althusius especially in Locke’s dichotomic view of society between individuals and government.¹² After Locke, we can continue to find a libertarian way of interpreting of subsidiarity.

In the 18th century, Montesquieu already claimed that the State’s functions should be secondary and supplementary.¹³ W. von Humboldt also gave one of those libertarian interpretation in the 19th century. In his argument on the State’s role, he maintained that the State should not

8. *Ibid.*, p. xix in the Introduction.

9. *Ibid.*, pp. 12-21.

10. Apparently, Althusius used the terms of “*pactum foederis*.” See a detailed preface by C. J. Friedrich to Caney’s book, *op. cit.*, at pp. viii-x. For a fascinating account of the theory of federalism, see Murray Forsyth, *Unions of States: The Theory and Practice of Confederation* (Leicester: Leicester University Press, 1981), esp. chap. 4, concerning Althusius.

11. Antony Black, “Althusius”, *op. cit.*

12. See Millon-Delsol, *L’Etat subsidiaire*, *op. cit.*, pp. 83-92; see also her “Le principe de subsidiarité”, *op. cit.*, p. 8.

13. Millon-Delsol, *L’Etat subsidiaire*, *ibid.*, p. 70.

intervene if individuals possess the means to achieve their goals.¹⁴ Following the frameworks, explained in Chapter I, Humboldt's idea falls into "negative subsidiarity" since it tries to limit activities of the higher organisation. Moreover, some national constitutions followed this libertarian stream ; the 10th Amendment of the US Constitution and Article 3 of the Swiss Constitution in 1848 are cases in point. Both of them make it clear that the competencies vested in the central authority are the exception, not the rule, with power resting with the Canton, the state or the people. US President A. Lincoln stated in 1854 that ; "The legitimate object of government is to do for a community of people whatever they need to have done but cannot do at all, or cannot so well do for themselves in their separate and individual capacities. In all that people can do individually well for themselves, government ought not to interfere."¹⁵ It is important to quote this passage since it shows a link between the European notion of subsidiarity and American federalism. In 1861, J. S. Mill also remarked that ; "It is but a small part of the public business of a country, which can be well done, or safely attempted, by the central authorities."¹⁶ According to him, implementation of policies set by the central government should be left to the hands of local authorities.

Meanwhile, socially conscious Catholics began to acquire the notion of subsidiarity in the 19th century, and later came to occupy the main seat in the subsidiarity discussions. A personalist and federalist J. Proudhon, whose views were coloured by his deep-rooted Catholicism,¹⁷ argued clearly in favour of subsidiarity, when he wrote ; "Tous ce que peut exécuter l'individu, en se soumettant à la loi de justice, sera donc laissé à l'individualité ; tout ce qui dépasse d'une personne sera dans les attributions de la collectivité."¹⁸ Social Catholic thinkers like W. von Kettler and L.

14. Millon-Delsol, "Le principe de subsidiarité", *op. cit.*, p. 9.

15. Quoted by Oswald Nell-Breuning, *Baugesetze der Gesellschaft : Solidarität und Subsidiarität* (Freiburg ; Herder, 1990), p. 88.

16. John Stuart Mill, *Representative Government* (London ; Parker Son and Bourn, 1861), p. 226.

17. See George Lichtheim, *A Short History of Socialism* (Glasgow ; Fontana/ Collins, 1970), pp. 69-70.

18. P. J. Proudhon, *De la capacité politique des classes ouvrières* (Paris ; M. Rivière, 1924), p. 213, quoted in Millon-Delsol, *L'Etat subsidiaire*, *op. cit.*, p. 112.

Tapprelli became aware of social problems caused by the Industrial Revolution. In order to solve these problems, they urged the higher entity to assist the weakest in society,¹⁹ thereby championing "positive subsidiarity". Influenced notably by Ketter's idea of "le droit subsidiaire",²⁰ as we shall soon discuss in detail, the Pontiff Leo XIII will issue an encyclical "Rerum Novarum" in 1891, which officially committed the Church into social reforms and which admitted that the State should play a role in the social field, though not without limitations to its role. Thus as we see, the notion of subsidiarity penetrates the whole history of western political thought and can be seen as a typical product of European or western political culture.

(iii) The Making of the Principle

It is nevertheless equally true that, it was the Catholic Church who established the notion of subsidiarity as an important 'principle'. Perhaps more importantly, the Church made deliberate efforts to systematise the principle of subsidiarity. This fact makes it necessary to investigate specifically the context in which the Church elaborated the principle of subsidiarity and the world view that the Church expected to realise with the introduction of this principle.

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In May 1891, Pope Leo XIII issued an encyclical "Rerum Novarum" to all the Bishops. This encyclical turned out to be a monumental landmark in the official teachings of the Catholic Church, with which the Church started to commit itself to social problems. In the document, Leo condemned, for the first time in Church history, the capitalistic exploitation of the poor, just as harshly as the socialists did. This must be seen as a radical change of stance, especially given that the 19th century was the age of Catholic fundamentalism when most of the Popes, notably Pope Gregory XVI of the mid-19th century, averted their eyes from the problems of political, economic or social modernisation.²¹

In relation to the subsidiarity principle, it is important to note that

19. Millon-Delsol, *ibid.*, pp. 126-133.

20. *Ibid.*, pp. 129-131.

21. See Richard L. Camp, *The Papal Ideology of Social Reform : A Study in Historical Development 1878-1967* (Leiden ; E. J. Brill, 1969), chap. 1 ; and Donal Dorr, "Rerum Novarum : A Call for Justice," in his *Option for the Poor* (1983), chap. 1.

"Rerum Novarum" cleared the way for the State to protect workers. This meant that the Church officially allowed the State to intervene in the social field where the Church had found itself as the main actor. The Vatican, however, was cautious of the resulting over-expansion of State power. In fact, the Church, hereafter, sought for a way to counterbalance it. One can find this attempt even in the Leo's encyclical. Take, for example, the paragraphs 35, 36 and 55 ;

«Para. 35»

We have said that the State must not absorb the individual or the family ; both should be allowed free and untrammelled action so far as is consistent with the common good and the interest of others.

«Para. 36»

The limits must be determined by the nature of the occasion which calls for the law's interference - the principle being that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief.

«Para. 55»

... The State should watch over these societies of citizens banded together in accordance with their rights, but it should not thrust itself into their peculiar concerns and their organisation, ...²²

It is clear that he intended to limit the sphere of State intervention in societal - especially family - activities. Probably, for a Pope towards the end of last century, memories of anticlericalism were too vivid to ignore the dangers of excessive State power.²³ Whatever his reasoning, we can interpret his remarks as being an embryonic form of the *negative* notion of subsidiarity, since they represent the *limitation* of the activities of the higher organisation.

However, Leo's starting point and priority concerned the duty of the State to protect workers' dignity, as can be seen in the following quotation ;

It would be irrational to neglect one portion of the citizens and favor another, and therefore the public administration must duly and solicitously provide for the welfare and the comfort of the working class.

22. "Rerum Novarum : Encyclical of Pope Leo XIII on Capital and Labor, May 15, 1891," in *The Papal Encyclicals 1903-1939* (Raleigh ; McGrath Publishing Company, 1981), paras. 35, 36, 55.

23. Camp, *op. cit.*, p. 142.

...

Whenever the general interest or any particular class suffers, or is threatened with harm, which can in no other way be met or prevented, the public authority must step in to deal with it.²⁴

Thus he repeatedly emphasised the necessity of public intervention in favour of the workers, who “have no resources of their own to fall back upon and must chiefly depend upon the assistant of the State.”²⁵ This was, as was said before, a breakthrough in the Vatican’s position in that the Church made legitimate the State’s intervention in social affairs. In this instance, Leo was affirming *positive* subsidiarity which admits the *obligation* of the higher organisation. Here, we can glimpse early-on the two conflicting ideas of subsidiarity : the negative and the positive, with an inclination to the latter.

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The principle of subsidiarity acquired its first explicit formula in 1931 when Pope Pius XI made an address entitled “*Quadragesimo Anno*.” Before turning to its content, a few remarks should be made concerning the background and context of this encyclical.

First of all, as the title of the encyclical tells us, the address was made on the occasion of the fortieth anniversary of Leo’s “*Rerum Novarum*.” During this period, the Church had, if not always,²⁶ attempted to secure a autonomous sphere for the intermediate corps of civil society, while admitting the State’s role in the field of social questions. Pius XI’s “*Quadragesimo Anno*” can be understood as a development in the internal thinking in the Church.

Secondly, Pius’ reign was characterised by rising Totalitarianism where the State apparatus tried to penetrate every piece of Society. Against this background, the “*Quadragesimo Anno*” expressed growing scepticism about excessive State control over Society, although the relationship between the Catholic Church under Pius XI and the Fascist or Nazi regimes was complex during the inter-war period.²⁷

24. Para. 33 and 36, respectively. See Pope’s “*Rerum Novarum*,” *op. cit.*

25. Para. 37, *ibid.*

26. Leo’s successor Pius X was no keen to pursue the Leo’s ideal. See Camp, *op. cit.*, pp. 13-15.

27. Andrew Adonis and Andrew Tyrie, both of the Thatcherite-inclined Institute of

Bearing these contexts in mind, it would be useful to quote the first expression of the subsidiarity principle;

«Para. 79»

... that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy : Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is in justice and at the same time a great evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.

Economic Affairs, criticised the principle of subsidiarity, partially because of its origin. Pointing out that Pius XI was the Pope who signed a Concordat with Mussolini, they remarked "Subsidiarity and Authoritarianism went hand-in-hand."

Certainly the Pontiff concluded the Lateran Pact in order to solve the Roman Question of the 1870s. In addition, Pope Pius XI's conservative ideas seemed, in some instances, to resemble the corporatism of Mussolini. However, it would be an illogical jump to say that their ideas were the same.

For one thing, we should distinguish between the State corporatism of Mussolini or of Salazar which in fact concentrated the power on the State or on one party, and, so to speak, the societal corporatism of the Papacy, which tried to retain the autonomy of social groups. On this point, see Ernest Baker, *op. cit.* pp. 351-356.

Moreover, due to these differences, Pope Pius XI was sceptical towards the Italian Fascist Government, although he might have chosen this regime, if he would have been forced to choose between Fascism and Communism. His scepticism about Fascism is seen in the following quotation ;

We must be compelled to say that ... there are not wanting some who fear that the State, instead of confining itself as it ought to the furnishing of necessary and adequate assistance, is substituting itself for free activity ; that the new syndical and corporative order savors too much of an involved and political system of administration ; and that ... it rather serves particular political ends than leads to the reconstruction and promotion of a better social order.

For the quotation and explanation, see Camp, *op. cit.*, pp. 148-149, and p. 18. Cf. Andrew Adonis and Andrew Tyrie, *Subsidiarity - as history and policy*. (London ; Institute of Economic Affairs, 1990).

«Para. 80»

The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them : directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of "subsidiary function," the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.²⁸

This is the birth of "the principle of subsidiary function" (in German translation "das Prinzip der Subsidiarität").²⁹ What is immediately apparent from this extract is that this time the Church's main intention was to restrict the State's interference rather than to emphasise State duties. Following the formula above, the higher organisation cannot be assigned the tasks which the smaller entities can carry out by themselves, just as the community cannot take away from the individual what he or she can accomplish. This "most weighty principle," "cannot be set aside or changed," and "remains fixed and unshaken in social philosophy." With this *limitation* on the activities of the higher organisation, we can say, that the principle of subsidiarity took on a *negative* character.

Nevertheless, one should not overlook the elements of *positive* subsidiarity, i.e. the emphasis on the *duty* of State intervention, in the "Quadragesimo Anno." Indeed, Pius XI fully agreed with Leo XIII in that the State had obligations in the field of social reforms, and he urged the State to put into effect what was called for in the "Rerum Novarum."³⁰ His concern over social questions is best expressed in his criticism towards capitalistic Liberalism ;

28. Pius XI, "Quadragesimo Anno : Encyclical of Pope Pius XI on Reconstruction of the Social Order, May 15, 1931" in *The Papal Encyclicals 1903-1939* (Raleigh ; McGrath Publishing Company, 1981), paras. 79-80. Our underlines.

29. Dr. Hans Stadler, *Subsidiaritätsprinzip und Föderalismus : Ein Beitrag zum Schweizerischen Staatsrecht* (Freiburg in der Schweiz ; Universitätsbuchhandlung, 1951), S. 11.

30. Camp, *op. cit.*, p. 146.

Free competition, kept within definite and due limits, and still more economic dictatorship, must be effectively brought under public authority ... The public institutions themselves, of peoples, moreover, ought to make all human society conform to the needs of the common good ; that is, to the norm of social justice.³¹

In this regard, Pius can be seen as a spiritual successor of Leo. Moreover, while the positive aspect of subsidiarity derived from the Church's internal development and thought since Leo, it also came from Pius' conviction that the State had to revive its efficiency and strength through easing its burdens. The classic formulation of subsidiarity, as quoted above, was preceded by the following description ;

When we speak of the reform of institutions, the State comes chiefly to mind, ... because things have come to such a pass through the evil of what we have termed 'individualism' that, following upon the overthrow and near extinction of that rich social life which was once highly developed through associations of various kinds, there remains virtually only individuals and the State. This is to the great harm of the State itself ; for, with the structure of social governance lost, and with the taking over of all the burdens which the wrecked associations once bore, the state has been overwhelmed and crushed by almost infinite tasks and duties.³²

We are now in a position to say that Pius XI delineated the sphere of State intervention also on the grounds of the State's own interest. By leaving to smaller groups the settlement of minor business, "the State will more freely, powerfully, and effectively do all those things that belong to it alone".³³ This can be related to the ideas found in many christian denominations that, the State is also one of the natural groups which should have its own *raison d'être*. These arguments, as developed above, show that Pius XI did not forget the State's duty to intervene in Society.

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In conclusion, 1) the notion of subsidiarity can be seen as typical of western political thought and deeply etched in its society, and whilst it is

31. Pope Pius's Encyclical, "Quadragesimo Anno," *op. cit.*, para. 78.

32. *Ibid.*, para. 110. Emphasis added by the author.

33. Para. 80, *ibid.*

reasonable to identify Althusius as the first proponent of subsidiarity and federalism, subsidiarity as a 'principle' was given its first formula by Pope Pius XI ; 2) Pius succeeded Leo XIII in that he thought legitimate the State's role to take care of the poor, but he placed greater emphasis on the limitation of State activities against the background of Totalitarianism ; 3) to put it another way, Pius expressed the principle of subsidiarity, primarily, with the *negative* connotation, while, though on a secondary level, he affirmed its *positive* sense, too, by approving of the obligations of the higher organisation.

II-2. A Hierarchical View of Society Influence of Organic Conservatism on Subsidiarity

There is no doubt that Catholicism in the political arena has had a close affinity with Conservatism. The Catholic thinkers like Joseph de Maistre, Louis de Bonald or Adam Müller were hostile to Liberalism which was the ideological basis of the French Revolution. Even if paying much attention to the problems of the poor, a Catholic can easily retain conservative beliefs, especially in terms of the family view or of the overriding concern about the order vis-à-vis the justice. Leo XIII' way of thinking is a case in point.³⁴

Opinions vary as to what constitutes Conservatism, but it seems reasonable to suppose that there are some common denominators in it ; for instance, the priority of the social, the emphasis on authority and order, the attachment to the historic, and so on.³⁵ In the context of this chapter, the hierarchical view of Society is of particular importance.

To the founding fathers of Conservatism such as Edmund Burke, it was only within the social and political hierarchy, that the historically derived concept of order, and therefore of liberty, could be preserved.³⁶ This view was connected with fear of the 'masses' and the direct, centralised, omni-competent power which they could potentially control.³⁷ Burke as well

34. Dorr, *op. cit.*, pp. 22-28 ; Camp, *op. cit.*, pp. 29-32.

35. Robert Nisbet, "Conservatism," in T. Bottomore and Robert Nisbet, *A History of Sociological Analysis* (London ; 1978), pp. 98-105.

36. G. L. Mosse, "Conservatism," in his *The Culture of Western Europe* (London ; 1963), chap. 7, at p. 125.

37. Nisbet, *op. cit.*, p. 102.

as other conservatives abhorred those who would seek "to tear asunder the bonds of the subordinate community and to dissolve it into an unsocial, uncivil, unconnected chaos of elementary principles."³⁸ In order to avoid the chaotic situation, the historically concrete and graduated order of hierarchy ought to be maintained. In short, hierarchy is an essential element of Conservatism.

What is characteristic of conservative Catholicism was that the whole universe had a hierarchical structure with God at its apex. The absolutism of de Maistre is an extreme example of this sort.³⁹ Moreover, for Catholics, hierarchy should be bodily constituted. For de Bonald, for instance, hierarchy of functions, authorities and individual statuses was no less real than the hierarchy of neurophysiological functions in the human body.⁴⁰

Nothing illustrates this organic and hierarchical view of Society in Catholicism better than a pontiff's address. Here, for example, is a passage from Pius XI's encyclical "Quadragesimo Anno" of 1931.

If the members of the body social are, as was said, reconstituted, and if the directing principle of economic-social life is restored, it will be possible to say in a certain sense even of this body what the Apostle says of the mystical body of Christ: "The whole body (being closely joined and knit together through every joint of the system according to the functioning in due measure of each single part) derives its increase to the building up of itself in love."⁴¹

Ideally, Society should constitute a perfect and harmonised body as if it were the body of Christ.

Six years later, in his encyclical "Divini Redemptoris," Pius XI made his organic view of Society more sophisticated as can be seen in the following quotation ;

We have indicated how a sound prosperity is to be restored according to

38. *Ibid.*

39. For Joseph de Maistre, see Béla Menczer, *Catholic Political Thought 1789-1848* (Westminster, Maryland ; The Newman Press, 1952), pp. 30-37 and pp. 59-76.

40. *Ibid.*, pp. 40-49 and pp. 77-95 ; Nisbet, *op. cit.*, pp. 89-97 and p. 101.

41. Pius XI's "Quadragesimo Anno," *op. cit.*, para. 90.

the true principles of a sane corporative system which respects the proper hierarchic structure of society ; and how the occupational groups should be fused into a harmonious unity inspired by the principle of common good.⁴²

Thus Pope Pius XI - who formulated the principle of subsidiarity - was clearly pointing to a hierarchy organised in a corporatist way.

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What was the position of the State in relation to the hierarchy? For Catholics, the State was certainly the strongest amongst all the organisations. However, it was not without constraints. The Church taught that every political power came from almighty God, and therefore that the State also had to be under the guidance of natural and divine law.⁴³ To borrow Leo XIII's phrase, "the state is bound by the very law of its office to serve the common interest."⁴⁴ Or, take another example from John XXIII's encyclical ; "As for the State, its whole *raison d'être* is the realisation of the common good in the temporal order."⁴⁵ This is to say, the State is a means to achieve the common good in this world, and it itself has to obey the principle of the common good. In this sense, we can say, the Church expected the State to be properly positioned within the hierarchy under the supreme authority of God.

It is against this background that Pius XI's scepticism towards the Fascist regime should be understood. It is because, in the Totalitarian regime, the State or the Fascist party tried to control every piece of civil society, and thus, went far beyond its proper position in the hierarchy.

42. Pius XI's Encyclical, "Divini Redemptoris, March 19, 1937," quoted in Terence McLaughlin, ed., *The Church and the Reconstruction of the Modern World : The Social Encyclicals of Pope Pius XI* (NY ; Doubleday & Co., 1957), p. 378.

43. Thomas J. Harte, "General Theory of the State," in his *Papal Social Principle : A Guide and Digest* (Gloucester, Mass. ; Peter Smith, 1960), chap. 7, at p. 97. See also Pius' words, quoted in Camp, *op. cit.*, pp. 146-147.

44. Quoted in Rev. John F. Cronin, *Catholic Social Principles ; The Social Teaching of the Catholic Church Applied to American Economic Life* 3rd Print (Milwaukee ; The Bruce Publishing Company, 1952), p. 95.

45. Pope John XXIII, "Mater et Magistra, Encyclical of Pope John XXIII on Christianity and Social Progress, May 15, 1961," in *The Papal Encyclicals 1958-1981* (Raleigh ; McGrath Publishing Company, 1981), para. 20.

The principle of subsidiarity, too, was a reaction of the Church to Totalitarianism. That is to say, the Church, by raising the principle, attempted to reset the State into its right place within the hierarchy. This is a very different matter from saying that the Church was anti-State at that time. Certainly the Church tried to limit the overstretching sphere of the State's activity, but at the same time, in doing so, it intended to regain the efficiency and strength of the State.⁴⁶ Here, again, one can observe the two conflicting notions of subsidiarity, i.e. negative and positive, in the Church's attempt at once to limit and to affirm the functions of the State.

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There is one further point that we must not forget; that is, the importance of the intermediate bodies in the hierarchy.⁴⁷ What the principle of subsidiarity presupposes is not the dichotomous society of atomised individuals and a strong State, but the graduated hierarchy in which various organisations enjoy their autonomies. To quote, once more, the classic formula of the principle of subsidiarity in Pius XI's "Quadragesimo Anno";

the more perfectly a graduated order is kept among the various associations, in observance of the principle of "subsidiary function," the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.⁴⁸

In this hierarchical view of the Catholic Church, every authority has its proper place, and by limiting its function in accordance with the subsidiarity principle, it can be strong. In other words, all the higher organisations ought to be 'subsidiary' in relation to the lesser ones,⁴⁹ otherwise they would

46. A similar view can be found in the patterns of Christian Democratic way of thinking. See Michael P. Fogarty, *Christian Democracy in Western Europe 1820-1953* (London; Routledge & Kegan Paul, Ltd., 1957), pp. 89ff. According to him, Christian Democrats believe in a strong State with its proper limits; if a State is to be strong, it must restrict its responsibilities.

47. In this regard, see Chantal Millon-Delsol, "Le principe de subsidiarité," *op. cit.*, p. 5.

48. Pius XI's "Quadragesimo Anno," *op. cit.*, para. 80.

49. Millon-Delsol, "Le principe de subsidiarité," *op. cit.*, p. 4. This point is potentially important in considering the current situation of the European Community. Within the structure of today's political structure of Europe, the

undermine not merely the autonomy of the lesser societies but also the effectiveness of their own.

II-3. A Conviction of Human Dignity : Influence of Social Catholicism on Subsidiarity⁵⁰

Why does the principle of subsidiarity presuppose the hierarchical Society in which various intermediate groups can enjoy autonomy? This is not solely a mechanism whereby groups in Society can regain their individual authority, but above all one which aims at promoting human dignity and developing each person's potential. As Ms. Millon-Delsol argues, "The foundation of the idea of subsidiarity is the conviction of the human dignity."⁵¹ In relation to the following sections of the study, we may note that this conviction of human dignity constitutes the core of personalism.

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Although, at the root of the hierarchical view of Society, there is an assumption of the inequality of human capability or strength, all men or women are equal in terms of human dignity in the papal doctrines. The following passage from Pius XII's address in 1948 is a good illustration of the idea ;

The Church does not promise that absolute equality which others are proclaiming because she knows that life in human society always and of necessity produces a whole range of degrees and differences in physical and mental traits, inward dispositions and inclinations, in occupations and in responsibilities. But at the same time she assures you full equality in human dignity, ...⁵²

principle of subsidiarity would be applicable not only to the EC but also to the Member States and the Regions, if we are to follow the classic formula of subsidiarity. That is, the State's or the Region's activities as well as the EC's would have to be 'subsidiary' in relation to the lower entities'.

50. In this section, 'Society' refers to the whole structure or system whereby people live together and organise their lives, while 'societies' refer to various groups, associations and organisations, small or large, within Society.

51. Millon-Delsol, "Le principe de subsidiarité," *op. cit.*, p. 6.

52. Pius XII's "Address to Representatives of Fiat Automotive Plant, October 31, 1948," in Cronin, *op. cit.*, p. 65.

Pope Leo XIII had already in his "Rerum Novarum" expressed a similar idea, when referring to the human soul ;

Life on earth, however good and desirable in itself, is not the final purpose for which man is created ; it is only the way and the means to the attainment of truth and that love of goodness in which the full of the soul consists. It is the soul which is made after the image and likeness of God ; it is in the soul that the sovereignty resides ... In this respect all men are equal ; there is no difference between rich and poor, master and servant, ruler and ruled, "for the same is Lord over all."⁵³

Thus whatever their position in the hierarchy, everybody is equal in terms of the soul or dignity, which allows him or her to be a unique and spiritual individual.

The idea of dignity can only be deeply understood by looking at the Christian metaphysics. Let us look at, for instance, the following quotation from an address by Pius XI ;

Man has a spiritual and immortal soul. He is a person, marvelously endowed by the Creator with gifts of body and mind. He is a true "microcosm," as the ancients said, a world in miniature, with a value far surpassing that of the vast inanimate cosmos. God alone is his last end, in this life and the next. By sanctifying grace he is raised to the dignity of a son of God, and incorporated into the Kingdom of God in the Mystical Body of Christ. ...⁵⁴

A person is at once created by God and bound by destiny to God. Only man and woman were created with some resemblance to God and destined to immortal lives with God. This nature of the person confers upon him or her a unique and unalienable value which is called dignity. It is for this reason that a person should be fully respected as a free and responsible agent. For example, the Church's protest against capitalistic exploitation of workers was based upon the argument that the workers should not be treated as a commodity but with dignity.

However, this intrinsic dignity will never become concrete and

53. Leo XIII's "Rerum Novarum," *op. cit.*, para. 40.

54. Pius XI's encyclical "On Atheistic Communism," in Cronin, *op. cit.*, p. 64.

finalised unless a person tries to develop it through interactions with other persons.⁵⁵ Therefore, a person needs Society. Encyclicals dealing with the social questions do not usually fail to emphasise this importance of Society. The following serves as an example ;

God has likewise destined man for civil society according to the dictates of his very nature. In the plan of the Creator, society is a natural means which man can and must use to reach his destined end. Society is for man and not *vice versa*.⁵⁶

In order to reach his/her end, that is, to complete the dignity and to fulfill the potentials given by God, a man or woman has to “use” Society.

Within the framework of Society, a person ought to fulfill his/her proper responsibility to it. In the process of finding his/her own role, making decisions and taking actions through various kinds of contacts with others, one can develop his/her potentials, and thus point to the full realisation of his/her dignity.

Crucial is that any society should not stifle the individual. Without the sphere of freedom, a person would never be able to think of his/her proper tasks nor to initiate actions. With detailed interventions from societies, s/he might not dare to take action. These situations would impede a person from blossoming fully. Therefore, if s/he can fulfill his/her own goals, any society should not intervene into details, and, borrowing Pius XI’s words, “it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community.”⁵⁷ Needless to say, this is the negative concept of subsidiarity.

Nevertheless, all societies exists for each person, and for the realisation of his/her dignity. If the person can develop his/her own possibilities, any society should not have to interfere in his/her own business, as was seen above. Yet, if, on the contrary, s/he cannot attain his/her goals alone, various levels of societies have an obligation to assist the person. Here is the *raison d’être* of Society. The best expression of it was

55. In this regard, see Millon-Delsol, “Le principe de subsidiarité,” *op. cit.*, p. 6. See also her *L’Etat subsidiaire*, *op. cit.*, chap. VIII and IX.

56. Pius XI’s “On Atheistic Communism,” in Cronin, *op. cit.*, p. 67.

57. Pius XI, “Quadragesimo Anno,” *op. cit.*, para. 79.

made by Leo XIII when he said ; “nature has not formed society in order that man might look to it as an end but in order that in it and through it he might find fitting help to his own perfection.”⁵⁸ The Church expected societies to help those who lacked the means or ways to attain their goals. Here, we see the positive notion of subsidiarity.

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Thus the idea of dignity is deeply connected with that of subsidiarity. On the one hand, an upper organisation should leave the sphere of freedom to each person. Only within this sphere and through interactions with others can a person develop his/her full potentials. On the other hand, the society has to assist him/her when in trouble. In either of the cases, societies are necessary for the development of any person, therefore for the ‘concretisation’⁵⁹ of human dignity. This is why the principle of subsidiarity presupposes and defends various societies.

II-4. The Acquisition of Territoriality : A Fusion of Subsidiarity with Federalism

Subsidiarity of the christian origin, as was seen in the previous sections, was primarily concerned with the ordering of relationships between the public authorities and civil societies, with the ultimate goal of personal development. The current pontiff John-Paul II argues ;

The relations between the public authorities and the citizen, the family and intermediary bodies must be governed and brought into equilibrium by the principle of subsidiarity.⁶⁰

Or, take a sentence from Pius XII's letter ;

... we must guarantee full weight and directive influence to the principle,
..., according to which the activity and services of society must play a

58. Leo XIII's encyclical “*Sapientie Christianae*,” in Cronin, *op. cit.*, p.67.

59. Millon-Delsol, *L'Etat subsidiaire*, *op. cit.*, pp. 123-126.

60. John-Paul II's “*Pacem in Terris*,” quoted in P.J.C. Kapteyn, “Community Law and the Principle of Subsidiarity,” *Revue des affaires européennes* N° 2 (1991), p.36.

merely “subsidiary” role, aiding or supplementing the activity of the individual, the family, and the profession.⁶¹

We may note here that, apart from the State for which territoriality is a vital component, what the Roman Catholic Church defends by raising the subsidiarity principle has little to do with the territoriality ; the individual, the family, professional groups are not natural territorial entities. When organised, each of them is imagined as an association or a bond among members based on love or belief.⁶²

However, the principle of subsidiarity has been increasingly used to explain the relationship between territorial organisations ; the supranational polity, the State, the Region and the Local Community etc. A first clear sign of this tendency can be found in the *Grundgesetz*, the Basic Law of the Federal Republic of Germany, established in 1949. Let us consider the following provisions ;

Art. 30. Functions of the Länder

The exercise of governmental powers and the discharge of governmental functions shall be incumbent on the Länder insofar as this Basic Law does not otherwise prescribe or permit.

61. Pius XII's “Letter to Semaines Sociales (1947),” quoted in Cronin, *op. cit.*, p. 212.

62. Some of the intermediate bodies which the Church defended might be of territorial existence. For instance, in a rural Flemish village, “the boundaries of the religious parish, the civil commune, and the main organisations for work and leisure will normally coincide.” Thus there is a possibility that the members of the local community might imagine their various organisations to be limited territorially.

Nevertheless, with the spread of urbanisation, the territorial coincidence of these organisations has become blurred. We can only understand the Christian reaction to revive the life of the parish against this background. In addition, such organisations are primarily based on love, feelings or religious belief etc., while one of the fundamental factors in establishing the State or the Region is to remain or become a territorial entity. Furthermore, as we shall see later, when we compare the territorial elements of these organisations with that of Bund or Länder, it is evident that the latter has a more fixed territory for each, and therefore can be more easily imagined as a territorially limited entity. For the quotation and the Christian reaction to urbanisation, see Fogarty, *op. cit.*, pp. 84-85.

Art. 72. Concurrent Legislation of the Bund, Definition

- (1) In matters within concurrent legislative powers the Länder shall have power to legislate as long as, and to the extent that, the Bund does not exercise its right to legislate.
- (2) The Bund shall have the right to legislate in these matters to the extent that a need for regulation by federal legislation exists because:
 1. a matter cannot be effectively regulated by the legislation of individual Länder, or
 2. the regulation of a matter by a Land law might prejudice the interests of other Länder or of the people as a whole, or
 3. the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of any one land, necessitates such regulation.⁶³

An important point is that this formula unmistakably contains the idea of subsidiarity, although the Grundgesetz avoided the inclusion of the term because of its obviously denominational origin.⁶⁴ After prescribing that the Länder should retain power outside the explicit competence of the federal government, the provisions specify the cases which necessitate federal legislation; that is, when 1) the federal legislation is more effective than that of the Länder; 2) a Land legislation may do harm to other Länder or the people; 3) it is necessary to maintain the legal or economic unity. If we utilise the analytical tools that we set out in the Chapter I, it can be said that Art. 72 picks up the *necessary* criterion, and that the criterion is further explained by those of the *effectiveness* and of a variant of the *cross-border dimension or effects*. Moreover, the Article chooses the *positive* sense of subsidiarity when it affirms the *possibilities* of federal legislations. This provision provides, one can argue, a type of subsidiarity.

Even more important is that the Grundgesetz applies the subsidiarity principle to the Bund-Länder relationship within the federal structure. The Land is clearly recognised as a territorial entity, as can be seen in the last sentence of the quotation above, while the Bund is supposed to have a legal and economic unity in its territory. Given that the classic formula of

63. In C. C. Schweitzer et al. eds., *Politics and Government in the Federal Republic of Germany, Basic Documents* (Leamington Spa; Berg Publishers, 1984), pp. 142-143.

64. Kapteyn, *op. cit.*, p. 36.

subsidiarity was chiefly applied to non-territorial entities, one can observe a shift of emphasis from non-territorial entities to territorial ones.

This conceptual shift of gravity has been strengthened, since Altiero Spinelli, as we shall see in the following chapter, introduced the idea of subsidiarity to European federalism. In its doctrine the principle of subsidiarity is applied to the division of powers among several levels: the European Community, the Member State, the Region or *Länder*, and the Local Community, all of which can be imagined as territorially limited entities. Current discussions on subsidiarity concentrate on this dimension.

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Before turning to the development of the subsidiarity principle in the European Community, one more point should be mentioned that the principle of subsidiarity lost its importance roughly in the late sixties and early seventies.

As Joachim Genosko analysed in his research on the changing influence of subsidiarity in West Germany,⁶⁵ this fact has to do with the change of expectation or evaluation on the role of central government. According to Genosko, in the fifties and the early sixties, the idea of subsidiarity retained its importance, with the government respecting the "*Selbstverwaltungsbereich* [sphere of self-management]."⁶⁶ Yet, broadly speaking, as the influence of Keynesian policy expanded, or more specifically, as the central government began to finance and treat hospitals as part of an infrastructure, the central government tended to forget the idea of "*Hilfe zur Selbsthilfe*."⁶⁷ Accordingly, "*feststellbare Trend gegen das Subsidiaritätsprinzip ist ... auf sozialpolitischem Gebiet zu erkennen*."⁶⁸ This was the situation at the end of the sixties and the beginning of the seventies.

On the contrary, with the rise of neo-liberalism since the end of the seventies, the (primary and negative) idea of subsidiarity was re-evaluated.

65. Joachim Genosko, "Der wechselnde Einfluß des Subsidiaritätsprinzips auf die wirtschafts- und sozialpolitische Praxis in der Bundesrepublik Deutschland," *Jahrbücher für Nationalökonomie und Statistik*, Band 201/4 (Stuttgart; G. Fischer Verlag, 1986), pp. 404-421.

66. *Ibid.*, p. 415.

67. *Ibid.*, p. 405.

68. *Ibid.*, p. 414.

One can point out, for instance, a Dutch case in the eighties. Dutch Christian Democrats elaborated the notion of “responsible society” which combined the Calvinist idea of “sphere sovereignty” and the Catholic notion of subsidiarity.⁶⁹ They utilised the notion of “responsible society” in order to limit governmental activity during the last decade.⁷⁰

However, the recent popularity of subsidiarity can only in part be explained by this rise of neo-liberalism. Discussions over the European Community have played a more vital role. This question shall be discussed in the next chapter.

69. Fogarty, *op. cit.*, chap. 4.

70. In this regard, see a case study by Marc Wilke in his discussion paper with Helen Wallace, *Subsidiarity : Approaches to Power-sharing in the European Community* (London ; Chatham House, 1990), chap. 5.

CHAPTER III

EVOLUTION OF THE PRINCIPLE OF SUBSIDIARITY IN THE EUROPEAN COMMUNITY

As we have seen in the previous chapter, the notion of subsidiarity was deeply etched into societies in western Europe. Then how has this notion been brought in the context of European integration? This chapter shall attempt to give an answer to the question.

It will focus on the main actors and events which have been important for the development of the subsidiarity principle.¹ This is because, in doing so, it will become easier to grasp the main stream of its evolution in the European Community.

III-1. Dahrendorf's Criticism of the Commission (1971)

Although it is often forgotten, the word of *Subsidiaritätsprinzip* was first referred to in the EC context by an incumbent Commissioner sharply criticising the illusion of supranationality and the over-bureaucratisation of the Commission itself. In July 1971, Ralf Dahrendorf (now Lord Dahrendorf), the then EC Commissioner from West Germany's Liberal Democrats, made two contributions to *Die Zeit* under the pseudonym of "Wieland Europa".² Once it was later made public that it was Commissioner Dahrendorf who had written these articles, headted calls for his immediate resignation began to be heard. Altiero Spinelli, a founding father of the European federalist movement and also a Commissioner at that time, turned

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1. The author concentrates on the core actors and documents. For subsidiarity "elements" which this study does not cover, see Marc Wilke and Helen Wallace, *Subsidiarity: Approaches to Power-sharing in the European Community* (London; Chatham House, 1990), esp. chap. 7-9, and Vincent Lecocq, "Subsidiarité et réforme des institutions européennes," *Revue politique et parlementaire* N° 956 (nov/déc 1991), pp. 44-49.
 2. See "Wieland Europa," *Die Zeit*, no. 28, 9 Juli 1971, S. 3; and "Ein neues Ziel für Europa," *Die Zeit*, no. 29, 16 Juli 1971, S. 3.

out to be one of his most vociferous critics.³ The European Parliament also picked up the issue and a few of its members threatened to table a vote of censure.⁴ Franco Malfatti, the ineffectual Commission President who was negatively referred to by name in the articles expressed his regret that “l’un de ses membres ait émit une opinion manifestement contraire à celle du Collège.”⁵ Yet, inside the Commission, Vice-President Sicco Mansholt who was soon to become the President after Malfatti’s departure for national politics helped Dahrendorf, and the procedure that allows the Parliament only to pass a vote of censure on the entire Commission, not a single Commissioner, saved him from a forced resignation.⁶

As far as the content and background of these articles are concerned, Dahrendorf strongly argued against the increasing bureaucratisation of the Commission. Though a convinced European, his liberal convictions meant he felt he had to stand up against the widening gap between the supranational rhetoric of Europe and the worsening reality of the Community’s politics.⁷ A single biggest factor that led him to become a proponent of the subsidiarity principle, according to him,⁸ was the Common Agricultural Policy (CAP). In reality, unimportant topics such as size of beef or label of cheese were the central subject but in Euro-rhetoric, the CAP was expected to be a launching pad for the European Monetary Union at that time. Dahrendorf used subsidiarity in the following way ;

Not everything in Europe is lovely because it happens to be European. A

3. Altiero Spinelli referred to Dahrendorf’s articles as “the naive complacency expressed by certain newspapers over this happy beginning of a second Europe.” See his *The European Adventure: tasks for the Enlarged Community* (London: Charles Knight & Co. Ltd., 1972), p. 35. Cf. a quotation from the Dahrendorf’s article below.

4. One of the MEPs, Mr. Bos (Christian Democrats, The Netherlands), for instance, expressed strong doubts as to Dahrendorf’s quality as EC Commissioner. See “Question orale n° 10/71 avec débat: articles de «Wieland Europe» dans l’hebdomadaire «Die Zeit»,” *Journal officiel des Communautés européennes* N° 141, septembre 1971, pp. 76-85, at 79.

5. *Ibid.*, at p. 80; see also *Bull. EC*, Vol. 4, No. 11-1971, pp. 95-96.

6. Author’s interview with Lord Dahrendorf, Oxford, 19 January 1994.

7. His “Wieland Europa,” *op. cit.*, p. 3.

8. Interview with Lord Dahrendorf, Oxford, 19 January 1994.

European Europe is also a much more differentiated, colourful, multiple Europe. It is a Europe in which those matters are dealt with and regulated in common which could perhaps only be sensibly dealt with in this way. The transition from the First to the Second Europe demands a move away from the dogma of harmonization towards the principle of subsidiarity (*Subsidiaritätsprinzip*).⁹

For Dahrendorf, the First Europe, despite its earlier success since the Treaties of Paris and Rome, had become increasingly an illiberal and undemocratic bureaucracy. The danger of 'uniformism' and the craze for 'harmonisation' was a real one. He felt this First Europe should be replaced by the Second Europe based upon practical policy cooperation among European sovereign states or upon the common exercise of sovereignty. In doing so, Europe needed to restrain itself only to those instances which the national or regional level of government cannot adequately deal with particular problems or situation, thereby preserving diversity.¹⁰

In the context of the following section, it is useful to note that Dahrendorf had not discussed subsidiarity with a fellow Commissioner Spinelli.¹¹ Hence no interaction on the subject between them. Born in a Catholic district in Hamburg, though not a Catholic, he had known about the notion of subsidiarity since the 1950s when he wrote his first doctoral dissertation on Marx's concept of social justice in comparison with that of Protestants and Catholics.¹² It seems that Spinelli's initiatives, analysed below, did not have much to do with Dahrendorf's criticism.

Thus we see, the principle of subsidiarity was brought into the European context by Dahrendorf. Its usage is distinctively 'liberal' and therefore *negative* in the sense that his primary aim was to *limit* unnecessary intervention by the EC. Yet it should also be borne in mind that by doing so

9. Taken with some revision from an English translation in "Ralf Dahrendorf: A New Goal for Europe," in Micheal Hides ed., *European Integration: Selected Readings* (Harmondsworth: Penguin, 1972), p. 82. The original text can be found in "Ein neues Ziel für Europa," *op. cit.*, p. 3.

10. Dahrendorf repeated this point in his often-quoted lecture, "A Third Europe", Jean Monnet Lecture, European University Institute, Florence, 26 November 1979.

11. Interview with Lord Dahrendorf, Oxford, 19 January 1994.

12. *Ibid.*

he attempted to open the way for a new European cooperation.

III-2. Spinelli Initiative Part I:

The EC Commission's Contribution to the Tindemans Report (1975)

After a long commitment to Euro-federalism from the early years of the 1940s, Altiero Spinelli had already established a reputation as a leading federalist in the 1970s, even before the 1980s when he made a decisive contribution to European integration by bringing MEPs into the adoption of the Draft Treaty establishing European Union (see III-3 of this chapter). From 1970 to 1976, he was the EC Commissioner in charge of industrial policy.

Around the same period, European Heads of State and Government was trying to find the way to give a new impetus to the European Community. In 1972, the Paris Summit was held under the presidency of George Pompidou. He raised a rather vague concept of a "European Union" at least in part to avoid paralysing the EC because of doctrinal disputes.¹³ This concept was adopted, and the task to define it was left open.

Two years later, the leaders turned their eyes to Leo Tindemans, the then Prime Minister of Belgium, and asked him to submit a report on the European Union by the end of 1975. At the same time, they demanded the Community's institutions to elaborate their opinions on it by the end of first half of 1975.¹⁴ Thus the EC Commission began to prepare its contribution to the Tindemans Report.

Emile Noël, the Secretary-General of the Commission at the time, selected young functionaries to fulfill the task. Spinelli's influence as a highly regarded Commissioner is evident here, since his *chef du cabinet*, Riccardo Perissich (current Director-General of the DG III) was one of the members of the working group and turned out to be the virtual author of the

13. Michael Burgess, *Federalism and European Union: Political Ideas, Influences and Strategies in the European Community, 1972-1987* (London: Routledge, 1989), pp. 75-76.

14. "L'Union européenne: Présentation du rapport de synthèse de M. Tindemans," *Bull. CE* 12/75.

Commission Report.¹⁵

With regard to the content of the Commission Report, we can easily find Spinelli's ideas. For instance, a distinction was made between the exclusive, concurrent and potential competences of the European Union, which was typically federalistic as was illustrated in the Grundgesetz and as would be incorporated into the Draft Treaty establishing European Union adopted by the European Parliament later in 1984.

More significantly, this report explicitly and for the first time used the principle of subsidiarity (*'principe de subsidiarité'*) in a official document of the European Community. Article 12 of the report states ;

No more than the existing Communities have done so, European Union is not to give birth to a centralizing super-state. Consequently, and in accordance with the *principe de subsidiarité*, the Union will be given responsibility only for those matters which the Member States are no longer capable of dealing with efficiently. If the Union is to be given competence in areas not specified in the Act of Constitution, the Act will have to be amended by a procedure probably entailing ratification by all the Member States.

Hence, the competence of the Union will be limited to what is assigned to it, meaning that its fields of competence will be specified in the Act of Constitution, other matter being left to the Member States. There is nothing new in this. As in the existing Communities, the Union could be given competence of three types : exclusive, concurrent and potential, as explained below. The term on which competence may be exercised may vary from type to type.

Of course, in deciding on the Union's competence, application of the *principe de subsidiarité* is restricted by the fact that the Union must be

15. Author's interview with Mr. Pier Virgilio Dastoli, Brussels, 26 March 1992. Mr. Perissich remarked in retrospect that, it was probably Spinelli who initially had the idea of inserting the principle of subsidiarity into the Commission report. Mrs. Spinelli, keen German federalist, helped her husband become familiar with German federalism. Interview with Mr. Riccardo Perissich, Brussels, 23 August 1993. It may be noted, however, that Mrs. Spinell was a jewish German, not a Catholic. Interview with Lord Dahrendorf, Oxford, 19 January 1994.

given extensive enough competency for its cohesion to be ensured.¹⁶

Beyond doubt, this provision proposes the subsidiarity principle as an antidote to the “centralizing super-state.” It is all the more clear when we look at the preceding Article 6 which admits “growing resistance to attempts to centralize power” as “one basic aspect of recent developments in our society.”¹⁷ Members of the working group (and the Commission) recognised the tendency towards decentralisation, against the background of which the newly power-transferred Union might be criticised. Therefore, for them, “any power-transfer process at European level need not and must not be allowed to impede the attainment of a greater degree of decentralization.”¹⁸

In this context, it is understandable that most of the words are related to the *limitation* of power and therefore are expressed *negatively*. For instance, “the Union will be given responsibility only for those matters which the Member States are no longer capable of dealing with efficiently,” or “the competence of the Union will be limited to what is assigned to it” with “other matter being left to the Member States.” The principle of subsidiarity was thus introduced in the EC context initially with a negative connotation.¹⁹

However, Tindemans did not, or, more accurately, could not, follow the Commission Report inspired by Spinelli’s federalism. After hundreds of consultations with each government and representatives of public opinion,

16. “Report on European Union,” *Bull. EC Suppl.* 5/75.

17. *Ibid.*, Article 6.

18. *Ibid.*

19. Certainly, Spinelli and the Commission led by him knew that this principle could have a negative effect on the Union in favour of the Member States, otherwise, there would not be the Para. 3 of the Art. 12 which envisaged the restricted application of the principle. This is one of the reasons why most of the European federalists are rather cautious about this principle.

Yet here, we can catch a glimpse of Spinelli’s realistic strategy. His attempt to increase the Union’s power is coupled with emphasis on the ‘subsidiary’ nature of the Union, and this would, to some extent, forestall possible criticisms from the Member States fearing the loss of their competence, and as seriously, from the Regions or Local Communities whose claims have democratic legitimacy as the nearest governments to the citizen.

Tindemans confessed that he “was struck by a contradiction”²⁰ between an intergovernmental scepticism and some enthusiasm for the Community action. Therefore he “deliberately refused to draw up a report claiming to be, at least in part, the Constitution for the future European Union.”²¹ Consequently, the Tindemans Report took a “modest approach”.²² For example, a federalistic distinction between the exclusive, concurrent and potential powers disappeared, although Tindemans himself was “personally convinced”²³ of European federalism. The principle of subsidiarity was neither written into the Report nor even discussed during its preparation.²⁴ A personalist Tindemans knew about the subsidiarity principle at that time but “the time [to include the principle] was not ripe yet.”²⁵ Even with this modest approach, his Report could only bring a request for the EC Commission and Council of Ministers to report on progress towards European Union without defining what the Union meant.²⁶ Tindemans acknowledged later this, for himself, “more than disappointing.”²⁷

Nevertheless, this Tindemans Report, which was said to be “essentially federal in character,”²⁸ included some elements of subsidiarity. Referring to the Union’s social policy, it writes as follows ;

20. “Text of Mr Leo Tindemans’ Letter to his European Council colleagues sent on 29 December 1975,” *Bull. EC Suppl.* 1/76.

21. *Ibid.*

22. Paul Taylor, *When Europe Speaks With One Voice : The External Relations of the European Community* (London ; Aldwych Press, 1979), pp. 27-28.

23. “Tindemans’ Letter,” *op. cit.*

24. Author’s interview with Mr. Leo Tindemans, Chairman of the European People’s Party (Christian Democrats), 15 June 1992, European parliamentary building in Brussels.

25. Interview with Tindemans. He was a former leader of the Boy Scouts. Inspired by the *personalisme* of Emmanuel Mounier and especially of Jacques Maritain, he became a member of the Social Christian Party in Belgium whose programme laid great emphasis on those two philosophers. When he was in Jesuit school in Antwerp, the priests taught him about the subsidiarity principle.

26. Burgess, *op. cit.*, p. 91.

27. Leo Tindemans, “The Future of Europe,” Speech at the Foreign Affairs Club, London, December 1976, quoted in *ibid.*

28. *Report of UACES Study Group on European Union* (London ; HKing’s College, 1976), p. 13, quoted in Burgess, *op. cit.*, p. 88.

... Sharing out the benefits of this prosperity by means of taxation, social security and public investment projects will remain essentially the responsibility of the States, who can take account of the traditions and facts which vary from one country to another. The social policy of the Union must manifest itself in specific projects which manifest at the European level the social aims of our undertaking and which guide and supplement action on the part of individual States. ...²⁹

By using the word “supplement” instead of subsidiarity and limiting the Union’s roles to specific spheres, this expresses the same philosophy as subsidiarity. We can find a similar idea in the description about the delegation of executive power.

The practice of delegation should apply particularly to the Council. Because of the increase in common tasks, the Council, if it is to be efficient, must concentrate on its decision-making role ...

The existence of a single decision-making centre supplemented by the principle of the delegation of executive power will enable us politically to make the best use of the available executive bodies, while adhering to the Treaties, and will give our action the flexibility necessary to deal with complex situations.³⁰

Clearly, the Report intended to delineate the Council’s power in order to improve the effectiveness and flexibility. These are important points to stress, because this report, originating from the intergovernmental arena, contained some elements of subsidiarity.

III-3. Spinelli Initiative Part II :

The Draft Treaty Establishing European Union (1981-84)

Altiero Spinelli was very disappointed with the fact that the Tindemans Report brought about nothing. It proved so frustrating for him that he decided to retire from politics in 1976.³¹ Eventually, however, he

29. “European Union : Report by Mr Leo Tindemans, Prime Minister of Belgium, to the European Council,” *Bull. EC Suppl.* 1/76, p. 24.

30. *Ibid.*, p. 33.

31. Burgess, *op. cit.*, p. 90.

reconsidered this step and moved from the Commission to the European Parliament in order to fight his "last political battle"³² for Europe.

Meanwhile, in September 1976, the Council made, though long-delayed, a far-reaching decision to implement direct election for the European Parliament. In July 1978, the President of the Council formally informed the President of the European Parliament, Emilio Colombo, of the implementation of the first direct election in June 1979.

As a result of this direct election, the European Parliament became the only institution with democratic legitimacy in the EC. Spinelli believed that the EP with this legitimacy should play the role of Constitutional Assembly.³³ He mobilised almost all the political forces within the EP and led them to adopt the Draft Treaty establishing European Union in 1984. A close study of this process, the so-called "Crocodile Initiative" after the name of a restaurant in Strasbourg where the initiators met in 1980, is not necessary for our purpose here.³⁴ It suffices to say two things. One is that, throughout the process, Spinelli's influence was prominent. It is somewhat surprising to find a Conservative MEP from the UK praising a former Communist Spinelli in the following way; "If Spinelli hadn't existed, Parliament would have had to invent him."³⁵ The other, as Helen Wallace puts it, is that; "It was well recognized by those involved that they were dealing with a core issue for the Community,"³⁶ when they discussed the

32. Pier Virgilio Dastoli ed., *Altiero Spinelli : Discours au Parlement européen 1976-1986* (Rome ; Groupe Communiste et Apparentée du Parlement européen, 1986), p. 98.

33. "Extracts from the First Issue of the 'Crocodile'," in Marina Gazzo ed., *Towards European Union : From the "Crocodile" to the European Council in Milan (28-29 June 1985)* (Brussels-Luxembourg ; Agence Europe, 1985), pp. 11-17.

34. For the Crocodile Initiative, see Rita Cardozo and Richard Corbett, "The Crocodile Initiative," in Juliet Lodge ed., *European Union : The European Community in Search of a Future* (New York ; St. Martin's Press, 1986), pp. 15-46 ; also Otto Schmuck, "The European Parliament's Draft Treaty Establishing European Union (1979-1984)," in Roy Pryce ed., *The Dynamics of European Union* (London ; Routledge, 1987), pp. 188-216.

35. By Stanley Johnson who was also one of the original eight members of the Crocodile Club, quoted in Cardozo and Corbett, *op. cit.*, p. 22.

36. Marc Wilke and Helen Wallace, *Subsidiarity : Approaches to Power-sharing in the European Community* RIIA Discussion Papers 27 (London ; Chatham House, 1990), p. 2.

subsidiarity principle.

A EP resolution of the 6th of July 1982, led by Spinelli's draft,³⁷ made an explicit reference to the principle of subsidiarity as "one of the essential principles,"³⁸ and defined it in detail ;

- (a) the Union shall only undertake those tasks which can be executed more effectively in common than by the Member States separately, or those whose execution requires a contribution from the Union ;
- (b) the Union shall act only in clearly delineated areas ;
- (c) the Union's competences shall take strict account of the distribution of tasks and areas of activity between the Union and the Member States ;
- (d) the distribution of tasks, of areas of activity and of competences shall take account of the present state, but also of the prospects and the inevitable evolution of the Union ;³⁹

Making use of the frameworks, as explained in the Chapter I, it can be said that, paragraphs (a)(b)(c) clearly refer to the *negative* concept of subsidiarity, and emphasises the *limitation* of the Union's power by using 'only' or 'strict.' This should be considered in relation to the huge increase of the Union's powers in other provisions. As to the criteria for the Union's activities, the resolution picks up two ; i. e. the *effectiveness* criterion and a variant of the *necessity* criterion, the latter of which is expressed as 'require.'⁴⁰ One can also notice that, in either of the cases, the Union would

37. Cardozo and Corbett, *op. cit.*, p. 27.

38. *Ibid.*, p. 29.

39. "Reform of Treaties and Achievement of European Union," Resolution adapted by the European Parliament, 6 July 1982, in Marina Gazzo ed., *Towards European Union : From the "Crocodile" to the European Council in Milan (28-29 June 1985)* (Brussels-Luxembourg ; Agence Europe, 1985), pp. 20-25.

40. This negative principle of subsidiarity and the effectiveness criteria are repeated in Spinelli's note on terminology.

Responsibility is assigned to the Union on the basis of the subsidiarity principle : the Union is given only those tasks which the Member States cannot execute independently - or cannot execute as effectively.

(N. B. : Consequently, Union action is subsidiary to that of the Member States, and not vice versa)

See "Note by the Rapporteur, Mr. Spinelli, on Some Problems of Terminology to the Committee on Institutional Affairs on 20 October 1982," in Marina Gazzo ed., *Towards European Union : From the "Crocodile" to the European Council in*

be entitled to take action. That is to say, these two criteria are linked by 'or,' and by doing so, the provision leaves a wider range for the Union's potentials than, for instance, the Maastricht Treaty. In paragraph (d), the 'evolutionary' nature of the Union is emphasised. With this provision, it is apparent that Spinelli intended to create the possibility for the Union to develop its activities from 'intergovernmental cooperation' to 'common action.'⁴¹

From 1982 to mid-1983, the Committee on Institutional Affairs of the European Parliament thrashed out the major issues and drew up the contents of the Draft Treaty. It was in this period that Spinelli displayed his skill in bringing various viewpoints together by way of "cajoling, persuading, compromising and on occasion using ambiguous language."⁴² On the 14th of September 1983, the European Parliament approved the Committee's resolution. This included a more sophisticated provision on subsidiarity. After referring to the Union's aims in accordance with the principle of subsidiarity, one of which is to contribute "towards enabling local and regional authorities to participate - in an appropriate manner - in the unification of Europe."⁴³ Articles 15 and 76 (on the international relations) state ;

«15> The Union shall only act to undertake those tasks which can be executed more effectively in common than by the Member States acting separately, or those whose execution requires a contribution from the Union because their dimension or effects extend beyond national frontiers (principle of subsidiarity).

«76 : International Relations>

... To this end, the Union shall assume responsibilities :

(a)

(b) in fields where the Member States acting individually cannot act as

Milan (28-29 June 1985) (Brussels-Luxembourg ; Agence Europe, 1985), pp. 26-28.

41. Juliet Lodge's interview with Altiero Spinelli, 15 September 1983, quoted in Lodge's "Institutional Provisions : towards a Parliamentary Democracy," in Lodge ed., *op. cit.*, p. 60.

42. Cardozo and Corbett, *op. cit.*, p. 30.

43. "Resolution concerning the substance of the preliminary draft establishing the European Union," *Of C 277/95-117*, at pp. 97-98, 17 October 1983.

effectively as the Union acting jointly;⁴⁴

The tone of the *negative* concept of subsidiarity remains unchanged. However, for the first time, the *cross-boundary dimension or effects* criterion acquired its classic formula as the explanation of the *necessity* criterion. This *cross-boundary dimension or effects* criterion is linked with that of *effectiveness* by a word 'or,' giving the Union the possibility to take action in either case of them.

This resolution was translated into legal terms at the beginning of 1984, although it was far from just purely technical.⁴⁵ In the final version of the Draft Treaty, adopted by the European Parliament on the 14th of February 1984, the principle of subsidiarity was referred to as follows ;

«Preamble»

- Intending to entrust common institutions, in accordance with the principle of subsidiarity, only with those powers required to complete successfully the tasks they may carry out more satisfactorily than the States acting independently ;

«Article 12, para. 2»

Where this Treaty confers concurrent competence on the Union, the Member States shall continue to act so long as the Union has not legislated. The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers. ...

«66 : Cooperation»

The Union shall conduct its international relations by the method of cooperation where Article 64 of the Treaty is not applicable and where they involve :

- ...

- fields in which the Member States acting individually cannot act as efficiently as the Union, or

- ...⁴⁶

44. *Ibid.*, at p. 98 and p. 108.

45. Cardozo and Corbett, *op. cit.*, p. 30.

46. "Draft Treaty establishing European Union," *OJC* 77 Vol. 27, pp. 36-38 and 49.

First of all, the way of including the subsidiarity principle attracts our attention. In the preamble, the principle is referred to in general terms, then in the text, it is defined in detail. This structure of double inclusion was later inherited by the Maastricht Treaty, irrespective of the content. Secondly, the first sentence of Art. 12 (para. 2), which is directly inspired by the *Grundgesetz*,⁴⁷ makes it clear that the Union's legislation shall be superior to the Member States' and, at the same time, implies that the principle of subsidiarity shall be applied in the 'concurrent' competences, the grey zone in which both the Union and the Member States share the powers concurrently. It seems reasonable to suppose that this formula reflects Spinelli's idea, for he repeatedly expressed similar ideas.⁴⁸ Thirdly, again, the principle of subsidiarity takes on a *negative* character with the word 'only.' This means that the main concern was in the *limitation* of the Union's powers in order to counterbalance their increase resulting from other provisions. Fourthly, the description of the criteria is different from that of the previous resolution. Basically, Art. 12 of this Draft Treaty - the main provision on subsidiarity - chooses only one criterion, i. e. the *effectiveness*. As a special case of this criterion, it refers to the *cross-boundary dimension or effects*. This may slightly narrow the possibility of the Union's activities, since the previous resolution sets two criteria, both of which can justify actions by the Union. As a final and fifth point, it should be noted that the *efficiency* criterion is chosen for the international relations of the Union, while the previous resolution uses the effectiveness criterion here.

The Draft Treaty establishing European Union, as mentioned above, contributed, at least, to the 'issuenisation' of EC's institutional reforms in the mid-1980s. One may say that, mainly through French President François Mitterrand, on whom Spinelli concentrated his energy in order to get support for the Treaty,⁴⁹ and who endeavoured to set up the Dooge Committee on institutional affairs (1984-85), this Draft Treaty contributed

47. See Article 72 (1) of the *Grundgesetz* in the Appendix I.

48. For instance, Spinelli's note on terminology, *op. cit.*, p. 28, or EC Commission's Contribution Report to the Tindemans Report, *op. cit.*, pp. 10-11. See also the remarks in the Editorial Comments on "The subsidiarity principle" of the *Common Market Law Review* 27 (1990), p. 184.

49. Dastoli ed., *op. cit.*, p. 240 ; Richard Corbett and Juliet Lodge, "Progress and Prospects," in Juliet Lodge ed., *op. cit.*, esp. pp. 154-161.

to the coming into existence of the Single European Act (SEA) in 1985. Concerning the principle of subsidiarity, the SEA contained its element rather clearly in the clause on the environment, although the Dooge Committee did not even mention it. Article 25 of the SEA (the EEC Treaty : Art 130 R) states ;

The Community shall take action relating to the environment to the extent to which the objectives (...) can be attained better at the Community level than at the level of the individual Member States. Without prejudice to certain measures of a Community nature, Member States shall finance and implement the other measures.⁵⁰

Though this is the first inclusion of a fixed form of subsidiarity into EC documents of an intergovernmental nature, its clear-cut inclusion with a constitutional status did not appear until the Maastricht Treaty, agreed in 1991. Before turning to a closer examination of its content, let us look at the initiatives of two personalities which have contributed to the recent bloom of subsidiarity : Jacques Delors and Valéry Giscard d'Estaing.

III-4. Delors Initiative (1988-1992)

There were two contexts in which Jacques Delors, the President of the European Commission, became fascinated by the principle of subsidiarity. One was the German Länder's anxiety over the expanding power of the EC, and the other Mrs. Thatcher's criticism of Delors' ideas.

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West Germany in the second half of the 1980s experienced a third post-Second World War period of centralisation, following the 1950s and

50. *Treaties establishing the European Communities*, Abridged Edition (Luxembourg ; EC Commission, 1987).

The draftsmen of the SEA could be found in the "groupe institutionnel" inside the Commission. This group had informally begun its activities in 1984 and became formalised with Delors' arrival as the Commission president. Its members include E. Noël, F. Lamoureux, and R. Perissich. Therefore it is no surprise that we can find a typical formulation of subsidiarity in Art. 130 R. The author's interview with Mr. Riccardo Perissich, Brussels, 23 August 1993.

the end of 1960s.⁵¹ This was chiefly caused by the Single European Act (SEA) in 1986. The Länder were concerned about the dilution of their competences for three reasons. First, the extension of EC action, resulting from the SEA, threatened the Länder's exclusive competences, particularly in the sphere of culture and education. A directive "Television without frontiers" and a EC language programme LINGUA are cases in point.⁵² Secondly, the SEA clearly gave the EC the legal basis for environmental and industrial policies, thereby increasing the Bund's involvement in those fields, since only the Bund can represent German interests.⁵³ Thirdly, the commitment to increased use of majority voting in the sphere of internal market raised a problem because the Bund, which the Länder concentrated their efforts to bind, could simply be outvoted.⁵⁴

It was under these circumstances that the Länder held a meeting with President Delors in Bonn in May 1988. Although a Bavarian source argued that their representation at the conference made Delors familiarised with the concept of subsidiarity,⁵⁵ Delors himself used the term in the working document for the conference,⁵⁶ as can be seen in the following quotation ;

51. See Simon Bulmer, "Efficiency, democracy, and West German federalism : a critical analysis," in Charlie Jeffery and Peter Savingear eds. *German Federalism Today* (Leicester ; Leicester University Press, 1991), pp. 104-113.

52. Marc Wilke and Helen Wallace, *Subsidiarity : Approaches to Power-sharing in the European Community* (London ; Chatham House, 1990), p. 3.

53. Bulmer, *op. cit.*, p. 107.

54. *Ibid.*

55. Dr. Kurt Schelter, "La Subsidiarité : principe directeur de la future européenne," *Revue de marché commun et de l'union européenne* (février 1991), pp. 138-140. He is the General Director of the Ministry for Federal and European Affairs in the Bavarian Government.

56. This raises a question on what was the direct cause for Mr. Delors to become 'familiarisé' with the principle of subsidiarity. While he might have already known it for long from his Catholic background, there is a possibility that it was brought back to his mind by the Padoa-Schioppa Report in 1987, which referred to subsidiarity. This report was originally requested by Delors to examine the EC's economic issues.

Alternatively, Delors' collaborators might have reminded him of subsidiarity ; the speech in Bonn is said to have been drafted by his advisers Jérôme Vignon and François Lamoureux. Whatever the origin, it seems clear that the conference with the Länder was a catalyst for Delors to turn to the

En toutes circonstances j'ai affirmé qu'une Europe unie ne peut se passer d'une solide base régionale, avec des compétences autonomes. Je suis également un défenseur du principe de subsidiarité, attaché à une Europe qui se construit par en-bas, et non à coup de lois et de décrets. Peut-être n'est-ce pas exactement le concept précis de subsidiarité qui prévaut dans le droit allemand. Mais il s'agit bien pour l'essentiel de ne pas chercher à régler au niveau communautaire ce qui peut l'être avec d'usage et de raison au niveau national ou régional.⁵⁷

Although this formula was not as sophisticated as his later expression, Delors clearly recognised the importance of subsidiarity. It is important to note that he referred to the essence of subsidiarity in the *negative* form when he said ; "ne pas chercher à régler au niveau communautaire..." However, in the following phrase of the same document, he also emphasised "l'idée de complémentarité" and went on ; "la Communauté peut renforcer, ... les efforts menés par les Länder, sans contrevenir à leurs prérogatives."⁵⁸ Thus by defending the Community's action, he might be pointing to the double meaning of subsidiarity, i. e. the negative and the positive one ; formulated three years later in definite form at the Delors Colloquium in Maastricht.

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Another context where Delors turned his eyes to the principle of subsidiarity in earnest was Mrs. Thatcher's criticism. This criticism was, as is well known, provoked in part by Delors himself. During the summer of 1988, he declared that in the year 2000 he expected 80 percent of macro-economic policy to take place at Community level. Soon afterwards (September 1988) this led to the famous Bruges speech by the UK Prime Minister Thatcher, who criticised Delors' policy as socialism through the back door and attacked the Brussels bureaucracy. Since this speech, Mrs. Thatcher's remarks have influenced consciously and unconsciously Delors'

subsidiarity principle. See Wilke and Wallace, *op. cit.*, p. 29, and Marie-Pierre Subtil, "Un casse-tête : la répartition des compétences entre la Communauté et les États membres," *Le Monde*, 22 juin 1990, p. 7.

57. Document de travail de Jacques Delors, Président de la Commission des Communautés Européennes à l'occasion de la rencontre avec la Conférence des Présidents des Länder, Bonn, Le 19 mai 1988. The author's underlines.

58. *Ibid.*

way of thinking.⁵⁹

Following the Bruges speech, the Commission decided to establish a small informal group to discuss the subject of subsidiarity.⁶⁰ Apparently on the basis of discussion here, Delors, at the beginning of 1989, referred to the principle of subsidiarity in his speech on administration policies for the second term,⁶¹ and then made an inclusion of the subsidiarity principle as "an essential element"⁶² into the Delors Report on the Economic and Monetary Union in April 1989. More importantly, in October 1989, Delors chose Bruges (!) as the place to roll back the criticism directed at him. In the speech entitled "Reconcile the Ideal and the Necessity," he mentioned the principle (of subsidiarity) twelve times. His fascination was best expressed when he said ;

I often find myself involving federalism as a method, with the addition of the principle of subsidiarity. I see it as a way of reconciling what for many appears to be irreconcilable : the emergence of a United Europe and loyalty to one's homeland ; the need for a European power capable of tackling the problems of our age and the absolute necessity to preserve our roots in the shape of our nations and regions ; the decentralization of responsibilities, so that we never entrust to a bigger unit anything that is

59. In the sense that Thatcher urged him to rethink, and that as a consequence he reached a deeper understanding of subsidiarity, it would not be so surprising if Delors made a remark praising the contribution Britain was making by insisting on a serious debate about the nature of sovereignty. See an interview article on Delors by Godfrey Hodgson and David Osborne, "A Man on a Great Adventure," *The Independent*, 13 December 1990, p. 23.

60. See a Commission document, "Groupe de travail sur la subsidiarité," 22 décembre 1988. This group was later called "Groupe subsidiarité" and was consisted of 8 ~ 10 members including A. Van Solinge -responsible for institutional affairs in the Secretariat General, Otto Hieber -writer of a Commission's internal paper on subsidiarity, and Jérôme Vignon -principal advisor to Delors and the Director of the Cellule de Prospective. This group eventually made a report on subsidiarity and submitted it to Delors.

61. Jaques Delors, "Les perspectives 1989-1992 : Devant le Parlement Européen à Strasbourg, le 17 janvier 1989," in his *Le Nouveau Concert Européen* (Paris ; Éditions Odile Jacob, 1992).

62. Committee for the Study of Economic and Monetary Union, *Report on economic and monetary union in the European Community* (Luxembourg ; EC Commission, 1989), Article 20.

best done by a smaller one. This is precisely what subsidiarity is about.⁶³

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However, Delors was not merely fascinated by the subsidiarity principle but had a deep understanding of it. We are going to review briefly its background.⁶⁴

For a long time, Delors has been a strong supporter of decentralisation. One of his favorite authors is Proudhon, whose life work was on Federalism and decentralisation.⁶⁵ His writings very much influenced Delors. In addition, his experience as mayor of a local community in the suburbs of Paris might help strengthening his belief.⁶⁶ Take, for example, some sentences from his book, written in 1975 ;

... des dizaines de milliers de décisions doivent être prises au bon niveau - la commune, le département, la région... et pas toujours l'Etat central. ... cet Etat omniprésent manque de muscle, parce qu'il s'enforce dans la graisse inutile de tâches qui seraient mieux assurées par les collectivités décentralisées ; il décourage la prise des responsabilités, la créativité et l'engagement de groupes de citoyens au service de l'intérêt général.⁶⁷

Already two decades ago, he was arguing almost the same thing that we now call subsidiarity. His consistency is evident especially in that he has

63. Jacques Delors, "Speech by President Delors at the Opening Session of the 40th Academic Year of the College of Europe - Bruges, 17 October 1989," EC Commission Document, Ref. Speech/89/73. For the French version, see "Réconcilier l'idéal et la nécessité," in Jacques Delors, *Le Nouveau Concert Européen* (Paris ; Éditions Odile Jacob, 1992).

64. Concerning Delors' convictions, see Ken Endo, "What is 'Delorism' : Convictions of Jacques Delors," an unpublished thesis submitted for the European Studies Programme, Catholic University of Leuven, Belgium, August 1992. Its summary in French can be found in Ken Endo, "Qu'est-ce que le delorisme?: Convictions de Jacques Delors," Cellule de Prospective, N°862/93, Commission des Communautés européennes, 14 avril 1993.

65. For instance, Worsthorne, *op. cit.*

66. Delors himself emphasised this point, see Document de travail de Delors, *op. cit.*

67. Jacques Delors, *Changer : Conversations avec Clause Glayman* (Paris ; Stock, 1975), pp. 212-213.

combined decentralisation with the responsibility of citizens, as can be seen in the last sentence.

Of key importance in understanding this position of Delors is his conviction of *personnalisme*. While one can briefly summarise the *personnalisme* as an eternal search for the third way between Marxism and individualism or as an attempt to reconcile Christianity and Socialism, to examine it in depth would require another book.⁶⁸ It is enough here to make Delors himself talk about his own *personnalisme*. The following remarks are worth reading ;

As a personalist, a disciple of Emmanuel Mounier, whose influence will, I am convinced, revive as Europeans become aware of the guandaries of frenzied individualism, just as, for some years now, they have been rejecting collectivism and, in its attenuated form, the benevolent State.

.....

The time has come to return to ideals, to let them penetrate our lives. Let us continue to consider, in everything we do in the field of politics, economics and social and cultural life, what will enable every man, every woman, to achieve their full potential in an awareness not only of their rights but also of their obligations to others and to society as a whole. We must sustain our efforts to create a humane society in which the individual can blossom through contact and cooperation with others.

-Bruges Speech. October 1989.⁶⁹

I will start from the widely recognized idea that subsidiarity can be applied in two different situations : on the one hand, the dividing line between the private sphere and that of the State, in the broad meaning of the term ; on the other hand, the repartition of tasks between the different levels of political power.

At the end of my speech I will return to the first aspect which is often neglected but is so important for selecting the criteria for granting powers to the public service in keeping with an essential objective : the development of each individual. But, as we all know, steps in this direction presupposes that there are men and women capable of assuming the responsibilities in order to achieve the common good.

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Subsidiarity is not simply a limit to intervention by a higher authority

68. See, for example, Emmanuel Mounier, *Le Personnalisme* (Paris ; Presses Universitaires de France, 1957).

69. Delors, Speech at Bruges, *op. cit.*, p. 1 and 5.

vis-à-vis a person or a community in a position to act itself, it is also an obligation for this authority to act *vis-à-vis* this person or this group to see that it is given the means to achieve its ends.

-Maastricht Delors Colloquium, March 1991.⁷⁰

In the speeches quoted above, Delors casts focus upon one point: the development and achievement of the full potentials of each person. For him, "to achieve their [every man and woman's] full potentials" is an *ideal*, and "the development of each individual [l'épanouissement de chaque individu]" an *essential objective*.

From this purpose, the followings are necessary; 1) any State or larger authority should leave a certain sphere for individual's activity; 2) the sphere guaranteed by 1) has to be fulfilled not merely with individual rights but by the responsibility of each person to the society; 3) if a person alone cannot attain his/her goals, a higher organisation should take care of him/her.

These arguments completely fit in with *personnalisme*, because it takes those positions which; 1) while Society takes care of individuals, it should not cover all the spheres of individuals' activities (anti-Totalitarianism or anti-Communism); 2) on the other hand, each individual must not be atomised, separated from Society (anti-individualism); 3) within the sphere that is not eroded by a larger authority like State, each individual has to be personalised (*personnalisé*), in order to retain his/her uniqueness vis-à-vis others, and at the same time, individuals have to fulfill their obligation to community.⁷¹

70. Jacques Delors, "Principle of Subsidiarity; Contribution to the Debate," in *Subsidiarity: The Challenge of Change [Proceedings of the Jacques Delors Colloquium]* (Maastricht; European Institute of Public Administration, 1991), pp. 7-9.

71. Concerning the anti-individualism of *personnalisme*, see Emmanuel Mounier, *Le Personnalisme*, *op. cit.*, pp. 35-37; on his anti-Communism, see "Le marxisme contre la personne," extracted in Jean Conilh, *Emmanuel Mounier: sa vie, son œuvre avec un exposé de sa philosophie* (Paris; Presses Universitaires de France, 1966), pp. 89-91; concerning the *personnalisation*, see Delors' *Changer*, *op. cit.*, pp. 235-6, in which he says;

Personnaliser a donc encore un sens aujourd'hui. L'homme ne peut se retrouver complètement ni dans une aventure solitaire par le repli sur

It was this imbuelement with *personnalisme* that enabled Delors to reach a deeper understanding of the subsidiarity principle. Look back at, for instance, the citation above. He catches both the *negative* and *positive* meanings of subsidiarity, when he mentions not only the limit to intervention but also the obligation. Moreover, he is aware of two types of subsidiarity ; i. e. one for the dividing line between the private and the public sectors, another for the division of tasks among several levels of political power. This distinction is similar to that of the non-territorial and territorial subsidiarity in this study. Furthermore, and above all, he points out, as the absolute aim of the principle, the development of each person, which is combined with "assuming the responsibilities in order to achieve the common good." This is exactly what the notion of subsidiarity presupposes.⁷²

Parallel to this might be Delor's attachment to natural groups.⁷³ The quotation above was followed by one remark in which he said ; "it [subsidiarity] assumes that society is organized into groups, not broken into individuals."⁷⁴ He also referred to "small entities naturally rooted in a solidarity of interests and a convergence of feeling,"⁷⁵ in his Bruges speech. Probably in the mind of an ardently Catholic Delors, these groups are thought to be bodily constituted under the common good. In this sense, as some believe,⁷⁶ Delor's position is near to corporatism. It led Delors to consistently pursue the concertation between the two sides of industry, both

soi, ni par l'exaspération de ses instincts, la permissivité étant à la fois facteur de liberté et risque de dégradation, ni en s'intégrant totalement dans la société, dans une aventure collective, au point d'y perdre son identité. A la fois personne unique et irremplaçable et membre de communautés dont il est solidaire, il doit être en mesure de tenir les deux bouts de la chaîne. (His own Italics)

72. Chantal Millon-Delsol, *L'État subsidiaire, Ingérence et non-ingérence de l'Etat : le principe de subsidiarité aux fondements de l'histoire européenne* (Paris ; Presses Universitaires de France, 1992), pp. 142-143.

73. He points out, for example, the role of the family as one of the first components of a European model of society. See Jacques Delors, "Europe : Embarking on a new course," *Contemporary European Affairs* Vol. 1 No. 1/2 (1989), p. 26.

74. Delors, "Principle of Subsidiarity," *op. cit.*, p. 9.

75. Delors, Speech at Bruges, *op. cit.*

76. Worsthorne, *op. cit.*

in his days as Chaban Delmas's adviser (*La Nouvelle Société*) and in his Commission presidency (*Social Dialogue*). It is therefore not without reason that *The Economist* called today's Delors a "Euro-corporatist."⁷⁷

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Thus the personalist Delors could turn to the principle of subsidiarity, probably at first from instinct, and then grasp it more deeply on the basis of his philosophical background. He would then have no hesitation to declare that the principle of subsidiarity is his "cheval de bataille [charger]."⁷⁸

III-5. Giscard d'Estaing's Involvement (1990-1991)

With the 1989 election, Giscard d'Estaing became a member of the European Parliament (MEP). It was an open secret from the beginning that he would have liked its presidency. On recognising that there was no such possibility since his Liberal Group was too small to push him into that position,⁷⁹ Giscard tried to find another way to be in the political spotlight, some cynics says.

Meanwhile, the Parliament itself was struggling to be involved in the coming Inter-governmental Conference (IGC) on European Union, from which it was excluded at the time of the Single European Act. A parliamentary strategy was to elaborate a report on European Union in order to influence the IGC process. On 24 October 1989, the Committee on Institutional Affairs was authorised to draw up the report.⁸⁰ After the name of the rapporteur, David Martin, this report is usually called the Martin Report.

77. *The Economist*, 28 March 1992.

78. Serge Hirel's interview with Jacques Delors, "Delors attentif aux éditeurs européens," *Le Figaro*, 12 mars 1992, p. XII.

79. Probably for this reason, Giscard had already moved from the Liberal Party to the European People's Party (Christian Democrats) in the European Parliament. Marcel Scotto, "M. Giscard d'Estaing adhère au groupe des démocrates-chrétiens," *Le Monde*, 13 décembre 1991, p. 48.

80. See "Rapport Interimaire fait au nom de la commission institutionnelle (Rapporteur : David Martin)," Parlement Européen, *Documents de Seance* A-3-47/90, 27 février 1990.

Giscard finally found the political stage to play his role. He volunteered for the position of rapporteur specially for defining the principle of subsidiarity. The Institutional Committee accepted him as the rapporteur at its meeting on 29-30th January 1990 and started to discuss the principle in February, although it was not until April that the Committee was formally authorised by the EP President Enrique Baron to report on the subject.⁸¹

Giscard's initiative should not just cynically be dismissed as a political show. He has long stressed the importance of "*l'épanouissement individuel*" and "*la responsabilité de l'individu*," the words which can be found in Delors' vocabulary, although the liberal Giscard put greater emphasis upon individual rights than Delors did.⁸² Again as Delors did,⁸³ Giscard spoke of the philosophy of the *Sozialmarktwirtschaft*, which at once leaves ample room for individual initiatives and retains the sphere of common action to create social harmony.⁸⁴ Furthermore, the *Parti Républicain* (the Giscardians' party in the 1970s) counted "on the *corps intermédiaires* - voluntary and public bodies situated between citizen and central government."⁸⁵ These terms are parallel with those of subsidiarity. It can therefore be said that Giscard's initiative was at least partially derived from and supported by his own convictions.

Giscard's own ideas in defining the principle of subsidiarity is best expressed both in the Working Document for the Institutional Committee

81. "Interim Report on the principle of subsidiarity (Rapporteur : Giscard d'Estaing)," European Parliament, *Session Documents* A3-163/90, 22 June 1990. Also see "Report on the principle of subsidiarity (Rapporteur : Giscard d'Estaing)," European Parliament, *Session Documents* A3-267/90, 31 October 1990, p. 3.

82. Valéry Giscard d'Estaing, *Démocratie Française* (Paris ; Fayard, 1976), esp. chap. IV and VI.

83. Jacques Delors, "Europe's Ambitions," *Foreign Policy* (Fall 1990), p. 24.

84. J. R. Frears, *France in the Giscard Presidency* (London ; George Allen & Unwin, 1981), p. 21.

85. D. L. Hanley et al., *Contemporary France : Politics and Society since 1945* New Edition (London ; Routledge & Kegan Paul, 1984), p. 166.

dated 5 April 1990,⁸⁶ and in his article, published in early 1991.⁸⁷ His arguments can be summarised in three points. Firstly, he presented two types of federalism, i. e. a *système fédéraliste centralisateur* and a *système fédéraliste décentralisé*. It is no doubt that he favoured the latter, in which the principle of subsidiarity strictly meant that of "limitation et non de concentration du pouvoir."⁸⁸ In other words, he understood the principle only as the negative one. Secondly, Giscard drew another distinction between "a *fédéralisme dérivant*, which aimed at expanding progressively the field of federal competences, and a *fédéralisme stabilisé* where the line of demarcation of competences was drawn."⁸⁹ Again he preferred the latter and proposed a list of competences. This is an opposite approach to that of Spinelli, who emphasised the *evolutionary* character of European Union. Lastly, Giscard paid much attention to how to guarantee the principle, both politically and juridically. He initially proposed to set up a European Senate (after the image of the French Constitutional Council) with the status of co-guarantor of the principle, and later added an option to transform the Council into a Chamber of States. More importantly, he insisted that the European Court of Justice should be able to ensure observance of the principle, turning it into the fully-fledged Constitutional Court.

These ideas were basically followed by the Interim Report of July 4th. The European Parliament in a resolution passed one week later, however, changed Giscard's ideas to a significant degree. First, although the attempt to list the competences remained, the resolution emphasised the character of "inevitable evolution of the Union."⁹⁰ Secondly, the guarantees of the principle were referred to in a much weakened way. No concrete descriptions of a political guarantee such as a European Senate appeared on the document. Moreover, in referring to the guarantees, the resolution

86. European Parliament, "The Principle of Subsidiarity (Rapporteur: Giscard d'Estaing)," Committee on Institutional Affairs, *Working Document*, 5 April 1990.

87. Valéry Giscard d'Estaing, "La règle d'or du fédéralisme européen," *Revue des affaires européennes* N°1 (1991).

88. Giscard, "La règle d'or," *op. cit.*, p. 65.

89. *Ibid.*

90. *Journal officiel des Communautés européennes* N° C 231/163-165, 19 septembre 1990, Article 4.

pointed out the risk of institutional blockage,⁹¹ which could occur if a Member State or other institutions could take to the Court all the proposals that would not conform to their interest. Furthermore, an amendment by David Martin was adopted, in which the political, not the legal, character of subsidiarity was stressed.⁹² This was another attempt to take the teeth out of Giscard's initial ideas, and at the same time, expressed scepticism about legalising the subsidiarity principle.⁹³

Based on this resolution, Giscard wrote a Draft Report in September. This Draft contained a first fully fledged definition of subsidiarity, which referred to the principle *negatively* and used criteria of *effectiveness* and of *cross-border magnitude or effects*. However, since the list of the competences disappeared completely, it was the arrangement of judicial guarantee that came to the fore as a major issue.⁹⁴ To put it in concrete terms, it referred especially to the conditions under which a Member State or other institutions could appeal to the Court, or to what extent the Court should have additional powers concerning the principle. Some socialists, who were rather hostile to the Giscard initiative, expressed their concerns that the judicial control by the Court would "deprive the Community of inherent dynamics in the process of integration,"⁹⁵ and tried to emasculate it further, though without much success, by putting forward their amendments.⁹⁶

After 28 amendments, Giscard made a final Report concerning subsidiarity, on the basis of which the European Parliament adopted a Resolution on 21st November 1990. It may be noted that, among 14 major amendments which preceded the final Resolution, one of Medina Ortega (Socialists Group) intended to pull the definition of subsidiarity towards a

91. *Ibid.*, Article 12.

92. See Amendment No. 1, by David Martin on behalf of the Socialist group, European Parliament, Document A3-163/1.

93. Author's two interviews: Mr. Richard Corbett in Strasbourg on 10 March 1992 and Mr. Leo Tindemans, Brussels, 15 June 1992.

94. It may be noted that, concerning the definition of subsidiarity, the Experts' Commentary in the Draft Report states "[t]he actual formula is straightforward and does not necessitate specific commentary."

95. A letter of Manuel Medina Ortega MEP to Jean-Pierre Cot, President of Socialist Group, dated 9 October 1990.

96. For example, see Amendments No. 14 and 24, both by Manuel Medina Ortega and David Martin, European Parliament, Document PE 143. 075/AM/1-28.

more *positive* term when it attempted to omit one word : 'only.'⁹⁷ In contrast, another MEP, van der Waal, tried to put the definition in a more strict version by linking the two criteria with 'and' instead of 'or,' thus making the hurdle higher.⁹⁸ Though these two amendments were turned down in the chamber, it is useful to look at the last-minute struggle between those who are in favour of further integration and those who try to retain national prerogatives.

The main parts of the Resolution took the following form ;

The Community shall act only to fulfil the tasks conferred on it by the Treaties and to achieve the objectives defined therein. Where powers have not been exclusively or completely assigned to the Community, it shall, in carrying out its tasks, take action wherever the achievement of these objectives requires it because, by virtue of their magnitude or effects, they transcend the frontiers of the Member States or because they can be undertaken more effectively by the Community than by the Member States acting separately.

⟨172a⟩

1) The Council, the Commission, Parliament or any Member State may, after the definitive adoption of an act and before its entry into force, request the Court of Justice to verify whether this act does not exceed the limits of the powers of the Community. At the request of an institution or of a Member State, the Court shall give its judgement by urgent procedure, which shall suspend the act's entry into force.⁹⁹

In the first place, the question of *negative-positive* concept of subsidiarity becomes more complex in this formula. In the field of the EC's *exclusive* competences, the MEPs incline to *negative* subsidiarity by using 'only.' But for the *concurrent* competences, where the Union and the Member States would share the power concurrently, they adopt *positive* subsidiarity when saying "it [the Community] shall,, take action whenever" Here the EP's formula differs from the Maastricht version, in which the Heads of State and Government applied the positive concept to the exclusive

97. See Amendment No. 6, by Medina Ortega on behalf of the Socialist Group, European Parliament, Document A3-267/6.

98. *Ibid.*, Amendment No. 7.

99. "Resolution on the principle of subsidiarity," *OJ C* 324/167-168, 24 December 1990.

competences, while using the negative concept to the concurrent (see next section too). The Maastricht version might be more 'logical' than the EP's, as a former close collaborator to Giscard observed,¹⁰⁰ because it would be in the concurrent competences that certain limitation to the activities of higher organisation is necessary, and therefore that the negative concept of subsidiarity is required. This complexity in the EP's version is the best proof that its final Resolution was a product of compromise. In the second place, two criteria to justify the Union's activities are picked up in the EP Resolution : i. e. the *effectiveness* and the *cross-border magnitude or effects*. This has been a traditional EP position since it adopted those criteria in a resolution for the Draft Treaty on European Union in September 1983.¹⁰¹ Finally, there is a new element in the EP Resolution : the role of the European Court of Justice. The risk of institutional blockage is mitigated by "urgent procedure" that the Court would adopt in giving judgements. As to the question of when a Member State or an institution can appeal to the Court, the Resolution takes the position of "after the definitive adoption of an act and before its entry into force," despite the efforts of Socialists who wanted other formulas such as "as soon as a legislation act has been adopted."¹⁰² The Socialists also resisted, to the end but without success, Giscard's formulation on the Court's new power concerning subsidiarity : "[the Court's negative judgments] shall suspend the act's entry into force."¹⁰³

Evaluations of the Giscard initiative, as mentioned above, can be ambivalent. Among three major ideas which Giscard initially had in his mind, 1) the political and judicial guarantees of the principle of subsidiarity were much weakened ; the political guarantee was totally erased, while the judicial remained but reduced in its content. 2) the idea of *fédéralisme stabilisé*, which virtually meant the summing-up of competences, was

100. Author's interview with Mrs. Josephine Moerman, Principal Administrator on Institutional Affairs for the Liberal Group of the EP, Strasbourg, 11 March 1992.

101. "Resolution concerning the substance of the preliminary draft establishing the European Union," *OJ C* 277/95-117, 17 October 1983, Art. 15.

102. Amendments No. 1, by Manuel Medina Ortega for the Socialist Group, European Parliament, Document A3-267/1.

103. Richard Corbett's letter to the members of the Socialist Group, dated 12 November 1990.

dropped completely. 3) the idea of *fédéralisme décentralisé* was fading away, as the idea of decentralisation in subsidiarity became vague in the EP and the term 'federalism' itself disappeared. Why were the Giscard's ideas toned down? It is because Giscard's preoccupation was, in essence, with "the maintenance of the prerogatives of States" and he feared "the decay [dépérissement] of the State."¹⁰⁴ This point of departure was unpopular and raised suspicions among the basically pro-integrationist MEPs, who forced a wide range of amendments upon Giscard. Thus, "Giscard would have been satisfied more with the Maastricht version than the EP's,"¹⁰⁵ as was pointed out by his former aid.

Nonetheless, it is fair to say that he contributed to the discussions on subsidiarity by enriching the options to realise it in the actual 'European society.' This is the case especially for his insistence on political and judicial guarantees, embodied in a European Senate or Chamber of States and the European Court of Justice, respectively. The option of listing the competences was, reportedly, once under consideration in the EC Commission, although it was eventually abandoned.¹⁰⁶ Moreover, the proposition that Giscard made raised a serious question: how to translate the notion of subsidiarity into practice. As long as this question remains to be solved, the MEPs' discussions initiated by him will be noted, referred, and sometimes made use, thus will not lose the validity. In this sense, Giscard's initiative was far from a mere political show.

III-6. Towards the Maastricht Treaty (1990-1991)¹⁰⁷

The Treaty on European Union was negotiated from the end of 1990 and

104. André Thiéry, "Le principe de subsidiarité au Parlement européen," *L'Europe en formation* N° 280 (hiver 1990 - printemps 1991), p. 25.

105. Interview with Mrs. Moerman, Strasbourg, 11 March 1992.

106. David Gardner, "Commission adopts a humble profile," *Financial Times*, 20-21 June 1992, p. 2. An EC official denied that the Commission was preparing a list-up of competences.

107. Where not otherwise noted, information in this and following sections is taken from the press clippings by the Spokesman's Service, EC Commission, and from interviews. As regards the IGC on political union in general and the various positions of the Member States in particular, see Finn Laursen and Sophie

was agreed in Maastricht in December 1991. The Maastricht Treaty came into effect in November 1993 after Germany had completed ratification with a ruling from its Constitutional Court. It is not the purpose of this section to follow the whole process towards the Maastricht Treaty, let alone the ratification process which had been in turmoil after the first Danish referendum held in June 1992. Nor is the purpose here to examine every article relating to subsidiarity in the Treaty (e. g. the Committee of Regions).¹⁰⁸ Our main concern is confined to considering the formulation process of and the definition of subsidiarity in Article 3b of the Maastricht Treaty.

(i) The Preparatory Period of the Intergovernmental Conferences

With the rise of interest in subsidiarity since the late 1980s, as analysed in the previous sections, discourses at the national level were activated, too. For instance, early in 1990, the UK House of Commons began to discuss the subject.¹⁰⁹ In March 1990, a Belgian Memorandum called for the inclusion of the principle in the Treaty.¹¹⁰

Following a joint proposal on 19 April 1990 by President Mitterrand and Chancellor Kohl to open negotiations on political union, the first Dublin Council was held on 28 April, and the second in June, where the Twelve agreed to convene another Intergovernmental Conference (IGC) on political union, besides the initial IGC on economic and monetary union. The Presidency Conclusion of the Dublin Council II referred to the objectives of political union, which contained the question of how to define the subsidiarity principle "in such a way as to guarantee its operational

Vanhoonacker, *The Intergovernmental Conference on Political Union: Institutional Reforms. New Policies and International Identity of the European Community* (Maastricht: European Institute of Public Administration, 1992).

108. The author focuses virtually only on Article 3b, thus excluding other articles even if they are related to subsidiarity, as is the case with Articles 198a, b and c which envisage the establishment of the Committee of the Regions. The process of how this was decided or how the Committee is to be organised, and the interconnection between the Committee and the notion of subsidiarity, etc. are left to future consideration.

109. Marc Wilke and Helen Wallace, *Subsidiarity: Approaches to Power-sharing in the European Community* (London: Chatham House, 1990), p. 21.

110. Mark Eyskens, *From Detente to Entente* (London: Brassey's, 1990), Appendix.

effectiveness."¹¹¹

Meanwhile, the Foreign Ministers and the Commission President appointed their personal representatives for preparing the convocation of the IGCs.¹¹² The German representative made a proposition - the first among the Member States - including the definition of subsidiarity. Here, the German delegation was in favour of *negative* subsidiarity and of the *satisfactory* (better) criterion specified with the *cross-boundary* dimension.

On 12 November 1990, the Italian presidency diffused a Non-Paper exclusively on subsidiarity, on the basis of which the group of personal representatives discussed three major issues ; ①how to define the principle of subsidiarity, ②where to locate it in the Treaty, ③in which ways to guarantee its observance, politically or judicially. In view that this discussion highlights well the delegations' original positions, it is worth analysing these three in turn.

① Concerning the definition, the majority reacting vis-à-vis the German proposal expressed their scepticism in defining subsidiarity at that stage. A closer investigation of the discussion also indicates that the UK delegation stressed the *cross-boundary* dimension as one of the criteria to justify EC's intervention. Moreover, the UK delegation also attempted to decouple the discussion on subsidiarity from a possible transfer of competences to the EC, thereby wishing only to obtain some policy measures to control the EC activities under the banner of subsidiarity. This idea immediately faced criticisms from some delegations led by France, which only favoured the introduction of subsidiarity into the Treaty combining with the newly acquired competences.

② With regard to the location, the Italian presidency suggested three options ; a) in the preamble, b) as an article, c) as a declaration. The majority positively responded to a), whilst Germany, supported by the Commission, preferred b), probably hoping that the explicit form of inclusion in the main text would better meet the Länder's concerns. Belgium, Luxembourg and Greece suggested inclusion in various articles with specific references.

111. "Conclusions of the European Council, Dublin 25 & 26 June 1990 : Full and final version," in *Agence Europe* (Documents) No. 1632/1633, 29 June 1990.

112. Concerning the role of personal representatives in the preparatory period of the IGC, see Yves Doutriaux, *Le Traité sur L'Union Européenne* (Paris ; Armand Colin, 1992), p. 32 and pp. 46-47.

Spain suspecting that subsidiarity is a constraint to further integration, did not consider the insertion indispensable.

③ The presidency's Non-Paper also dealt with the issue of how to ensure the observance of the subsidiarity principle. It put forward a few options for political guarantees such as the wisemen's committee or ad hoc conciliation meeting of Member States and national parliaments. The majority of participants estimated that the political control, principally by the Council, would be sufficient. Yet the German representative thought other ways of political control ought to have been considered, too. As to judicial guarantees, the timing of exercising jurisdiction became an issue. Only the UK representative regarded the possible creation of a new constitutional court as useful, and in addition, favoured the idea of judicial controls before certain proposals would come into effect. It should be recalled that this formula is the same as in the Giscard d'Estaing's report on subsidiarity (III-5). What is abundantly clear is that the UK tried to catch every opportunity to reduce the scope of Community action. In contrast, France, Greece, Portugal and Spain declared that they were firmly opposed to the *a priori* judicial control. Belgium and Germany made reservation on the opposition to this *a priori* control, indicating their interest in Giscard's report.

(ii) The Process of the Intergovernmental Conferences

The IGCs started in Rome on 15 December 1990. The Presidency assessment by the Italian government revealed at the beginning of December, indicated that, before the Rome Summit, there was a consensus on the inclusion of subsidiarity into the Treaty. It read ;

Delegations agree that subsidiarity is an important principle which will have to be laid down in the Treaty in an appropriate form. At the present stage most delegations prefer an inscription in the preamble and possible subsidiarity elements inscribed in individual Treaty articles. The presidency notes however the link which some delegations establish between a basic Treaty article on subsidiarity and transfer of competence in specific areas.¹¹³

113. "Preparation of the Intergovernmental Conference on Political Union : The Presidency's Assessment," in *Agence Europe* (Documents) No. 1666, 6 December 1990. Underline is in the original version.

What the last sentence implies is that the Italian presidency adopted the majority's position, not the UK's, in linking the issue of subsidiarity with the future increase of EC's competences. In the communiqué of the Summit, which was slightly more balanced, the leaders recognised "the importance of the principle of subsidiarity, not only when considering the extension of Union competence, but also in the implementation of Union policies and decisions."¹¹⁴

At the start of 1991, the Presidency of the Council changed from Italy to Luxembourg. The Luxembourg Presidency circulated another Non-Paper - a bundle of draft articles for the Treaty - to its eleven partners in April. The Luxembourg Non-Paper contained the presidency's definition of subsidiarity, as can be seen in the following quotation ;

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 the areas which do not fall within its exclusive jurisdiction, the Community shall take action, in accordance with the principle of subsidiarity, if and in so far as those objectives can be better achieved by the Community than by the Member States acting separately because of the scale or effects of the proposed action.¹¹⁵

The first thing one notices is that this formula adopts the *positive* concept of subsidiarity, both in the exclusive and in the concurrent competences. The second is on the criterion ; it uses only the *better* criterion, which is paraphrased as cross-border *scale or effects*. The third thing, in relation to the later version, is that it is written in one paragraph. One can say, as a whole, that this formula is not very strict for EC activities, but takes rather a loose definition.

The Draft Treaty on the Union, elaborated by the Luxembourg Presidency in June 1991, followed the term of the Non-Paper concerning the

114. Presidency Conclusions of the European Council in Rome on 14 and 15 December 1990, quoted in Jacques Santer, Prime Minister of Luxembourg, "Some Reflections on the Principle of Subsidiarity" in *Subsidiarity : The Challenge of Change* (Maastricht ; European Institute of Public Administration, 1991).

115. "Non-Paper ; Draft Treaty Articles with a View to Achieving Political Union," in *Agence Europe* (Documents) No. 1709/1710, 3 May 1991.

subsidiarity principle. This was the same case for another Draft Treaty submitted in September by the Dutch government, which assumed the EC Presidency in July, although the latter draft was supported by few governments, and thus was not the basis for negotiations.¹¹⁶

New developments came only towards the end of IGC process. A working document of the Dutch Presidency at the end of November shows some significant changes in the definition of subsidiarity. Let us consider the following quotation ;

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 jurisdiction, the Community shall take action, in accordance with the principle of subsidiarity, only if and to the extent that these objectives can be better achieved by the Community than by Member States acting separately, by reason of the scale or effects of the proposed action.

Action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.¹¹⁷

We should note that the definition became more precise and strict for the EC's interventions. Firstly, the previous paragraph was separated into three. Among these three, the first paragraph refers to the EC's exclusive competence, while the second to the concurrent or shared competence between the EC and Member States. Secondly, the representatives from each nation began to give the *negative* connotation to subsidiarity in the sphere of concurrent competences, by adding 'only'. Thirdly, a new sentence appeared in the last part : "Action by the Community shall not go beyond..." This envisaged the principle of proportionality - a brother principle of subsidiarity- with which to limit the *intensity* of Community action in accordance with the Treaty's objectives. Moreover, as a result of strong insistence by the UK representative, this paragraph was deliberately

116. "The Dutch Draft Treaty Towards European Union," *Agence Europe* (Document) No. 1734, 3 October 1991.

117. "Note from the Presidency," in *Agence Europe* (Document) No. 1746/1747, 20 November 1991.

separated from the preceding paragraph. Why did the British government insist that the last sentence should be separated? The reason is that, by separating it from the second paragraph, the UK government wished to apply the third paragraph to both of the first and the second paragraphs, and thus to both of the exclusive and the concurrent competences. Without that separation, one would have been able to interpret the last sentence as applicable only to the concurrent competences, to which the second paragraph basically referred. At this stage, the UK delegation succeeded in imposing a further limitation on EC's activities even in the EC's exclusive competences. Lastly, it may be noted that the last paragraph adopted the *necessity* criterion for justifying the EC interventions.

(iii) The Maastricht Treaty

The Heads of State and Government of the Twelve gathered in Maastricht on 10-11 December 1991 and, for the first time in the EC history, included the principle of subsidiarity, explicitly in the Treaty. Yet at the same time they made the definition of subsidiarity even more strict for the EC activities. In the final version of the Treaty, the criteria, which previously was the *better* criterion paraphrased by the *cross-border scale of effects*, became complex and many-fold. Article 3b of the Maastricht Treaty states ;

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.¹¹⁸

118. "Text in Full of the Treaty on European Union," in *Agence Europe* (Documents) No. 1759/60, 7 February 1992.

In observing these terms, the Community cannot take action in the sphere of non-exclusive competences, either in the case that the Member State can act *sufficiently*, or in the case that the Community cannot achieve the objectives *better*. In addition, the *better* criterion is specified, which would enable the Member State to say that the better judgment has to be derived from the *cross-border scale or effects*. These strict criteria were inserted at the insistence of the German government at the late stage of the IGC process, according to a close observer of the process. It should also be added that, both in the sphere of exclusive and concurrent competences, the degree or intensity of Community's action has to be justified by the *necessity* criterion, as it appeared in the last paragraph.

Thus we see, 1) the Maastricht version applies the positive concept of subsidiarity to the exclusive competences, at least *grammatically*, and the negative concept to the concurrent competences ; 2) concerning the criteria, it adopts one of the most strict formulas that we have seen by then ; 3) the last paragraph, whose formula is nothing but negative subsidiarity, uses the necessity criterion in order to limit the intensity of Community action ; 4) in comparison with the Giscard Report, the Maastricht version allocates no role for the Court of Justice. This last point may be explained by the leaders' fear of increasing power of the Court or of the possible institutional paralysis. Yet the inclusion of subsidiarity into the Treaty (not only in the Preamble but also as a specific Article) would enable the Member States or other institutions to request the Court to examine relevant problems related to subsidiarity.

III-7. Implementation of the Principle of Subsidiarity (1992-1993)

Since the principle of subsidiarity has actually been enshrined in a legal document, it has raised a very complex problem of implementation.¹¹⁹ To make matters worse, after a short euphoric period following the adoption of the Maastricht Treaty, the Danes threw the ratification process into turmoil, with their negative answer to the June 1992 referendum. Throughout the ratification process, subsidiarity once more dominated discussions on how

119. On this subject, see also Ken Endo, "Implementation of the Principle of Subsidiarity," *Crocodile* (May-June 1993).

to organise European political society. We shall limit the descriptions here up until the end of 1993 when discussions on subsidiarity have come to the end of a phase. The issues of transparency and democracy, which have been combined with the principle of subsidiarity, are not the primary concern of this section.

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Soon after the Danish rejection of the Treaty, the Commission President Delors suggested the possibility of returning some competences to the Member States. The Lisbon Summit at the end of June 1992 "invited the Commission and the Council to undertake urgent work on the procedural and practical steps to implement the principle of subsidiarity and to report to the European Council in Edinburgh."¹²⁰ Even before putting the Treaty into effect, the Lisbon Summit urged the Commission "to justify, in the recitals of future proposals, the relevance of its initiative with regard to the principle of subsidiarity,"¹²¹ though the Council, too, will have to do the same if it is to amend the Commission proposal. The Twelve also decided to embark on a re-examination of certain Community rules.

Following the instructions of the Foreign Ministers on 20 July 1992, the Secretariat of the Council under the new presidency of the UK produced a Non-Paper on 27 August. Based on this paper, the COREPER (Committee of Personal Representatives) discussed subsidiarity weekly in September. With a few draft reports elaborated by the COREPER, the Foreign Ministers of the Twelve exchanged views on the issue under the chair of Douglas Hurd of the United Kingdom on 5 October. Foreign Minister Klaus Kinkel of Germany, whose delegation had submitted a memorandum on subsidiarity in the previous week, reaffirmed during the session its position that favoured consultation with the Member States in the light of subsidiarity before formally presenting a Commission proposal. He also expressed his support to an inter-institutional agreement on the application of subsidiarity and equally emphasised the role of the Committee of Regions.

Meanwhile, the Commission continued its internal discussions. President Delors circulated inside the Commission a communication on 9

120. See "Conclusions of the Presidency: European Council in Lisbon 26/27 1992," p. 9.

121. *Ibid.*

October, yet its publication was delayed until after the Birmingham Council due to some objections in the following Collège (Commissioners) weekly meeting. Delors instead made an oral presentation at the Council.

Before and after the Birmingham Council (16 October 1992), a couple of the Member States put forward their opinions on the issue of application, following the example of the German delegation. On 10 October, the Benelux countries took a joint initiative by presenting a memorandum.¹²² They defended the Commission's right of initiative that had in one way and another been put into doubt. The Greek government also circulated a memorandum at the Birmingham Summit.¹²³ This represented a view that was basically loyal to the corollaries of the Treaty, supporting the Commission's right of initiative and the Court's role as the ultimate judge, arguing at the same time in favour of the decentralisation of certain Commission departments to the Member States. The presidency conclusions of the Birmingham Summit itself remained a vague description.¹²⁴ Later in the same month, Spain, too, made an input with its memorandum, which took one of the most pro-integrationist standpoints.¹²⁵

Then on 27 October 1992 the Commission published a communication¹²⁶ that has been to date the most systematic answer to the question of how to implement the subsidiarity principle. First, the Commission argued that, in the blocs of exclusive competences of the Community, it is not necessary to defend the *necessity* of taking action, because it is assigned to do so by the Treaty. Nevertheless, there remains a task for the Community to show that its policy measures are *proportional* to the objectives set by the Treaty (principle of proportionality). In the areas of shared or concurrent competences, one has to demonstrate whether a action

122. "Aide-mémoire des pays du Benelux pour le sommet de Birmingham," dated 10 October 1992.

123. "Birmingham European Council: Greek memorandum on subsidiarity," 19 October 1992.

124. See "Birmingham Declaration," attached as Annex I to the Presidency Conclusions, European Council, Birmingham, 16 October 1992.

125. "Mémoire de l'Espagne sur le principe de subsidiarité," 30 octobre 1992.

126. "The principle of subsidiarity," Communication of the Commission to the Council and the European Parliament, SEC (92) 1990 final, 27 October 1992.

should be necessary at the Community level in the first instance. This judgment, in other words, of whether a proposal complies the *necessity* criterion is a political question rather than a judicial one. Legislative or executive bodies would therefore have to be in charge of judging the necessity of Community action, though the Court's role as the final judge would not be affected. This position was followed basically by the presidency conclusions of the Edinburgh Council later. Secondly, the Commission proposed to introduce a looser form of proposition -the framework law- above the regulation, which would just lay down the basic rules and leave a greater margin for implementation to the Member States. Thirdly, the Commission tried to preserve its right of initiative, by making certain that there must be no separation of the subsidiarity issue from the substance of the matter in hand. For the Commission, subsidiarity is part of decision-making, not a precondition for it. By saying so, the Commission intended to deter the Council or a Member State from rejecting Commission proposals solely on the ground that they were contrary to the principle of subsidiarity. Lastly, the Commission formally proposed a inter-institutional agreement to meet the conflicting demands from Community institutions.

In the preparatory process to the Edinburgh Summit in December 1992, the UK presidency elaborated some draft reports, which first appeared on 3 November. Italian Foreign Minister Emilio Colombo as well as Commission President Delors complained that the UK presidency had not seriously taken into account the Commission proposal on subsidiarity. Spain remained sceptical to the whole project of implementing subsidiarity. The Edinburgh Council, nevertheless, hammered out a detailed conclusion on how to interpret and implement Article 3b of the Treaty.¹²⁷ On a number of points, we can observe some similarity to the Commission report. Two tools to justify Community action, i. e. necessity and proportionality, are cases in point. The idea of inter-institutional agreement is another case. What was new and made sure or more precise in the presidency conclusion, Part A, Annex 1, is as follows.

127. See 'Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b of the Treaty on European Union,' in Annex I to Part A of the "European Council of Edinburgh-11-12 December 1992-Presidency Conclusions," Special Edition, *Agence Europe*, N°5878BIS, 13-14 December 1992.

In the first place, the Twelve's Heads of State and Government declared that making subsidiarity work would not affect the balance between the Community institutions, thereby confirming the Commission's right of initiative would not be called into question. In the second place, the criteria used to justify the Community's intervention was made precise. The conclusion reads ; "the proposed action cannot be sufficiently achieved by Member States' action and they can therefore be better achieved by action on the part of the Community."¹²⁸ In order to examine whether this *better* criterion is fulfilled, 1) the issue under consideration need to have 'transnational' aspects, and/or, 2) actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty, and/or, 3) there should exist clear benefits by reason of scale or effects. In the third place, the Commission will have to comply some procedures in its proposal ; 1) by means of "green papers", consulting more widely with the Member States or other actors before proposing legislation, 2) attaching to the proposal a recital or explanatory memorandum in relation to subsidiarity, 3) submitting an annual report on the application of subsidiarity. In the last place, it was made clear that interpretation of the subsidiarity principle, as well as review of compliance with it by the Community institutions are subject to control by the Court of Justice.

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At the beginning of 1993, Delors asked the Commissioners whether to carry on business as usual or to withdraw proposals until after the ratification of the Treaty. The majority responded in favour of the latter. In fact, the number of legislative proposals in 1992 had already been reduced to almost the one quarter of what it was in 1990. In March, the Commission produced an internal note that set out seven questions to be answered when proposing legislation. These include the objectives of the proposed action, its efficiency, scale merits, cost-benefit estimation, forms of the action, etc. Some proposals have already begun to follow this instruction.¹²⁹

Meanwhile the three political institutions of the Community (the Parliament, the Council and the Commission) were working towards an

128. *Ibid.*, p. 2.

129. Look, for instance, at a Commissioner Matures' proposition on "Transports maritimes-Inspection et viste des natives," COM (93) 218, 12 mai 1993, p.4

interinstitutional agreement on subsidiarity. Despite earlier expectation that it might be concluded by March, it was not until October that an agreement was reached, which basically confirmed the procedures as previously agreed by the Edinburgh European Council and which opened a fresh way to convene interinstitutional conferences when difficulties arose.¹³⁰ The delay was caused mainly by Parliament efforts to link the issue of subsidiarity with that of democracy and transparency, and the issue of establishing the Committee of Enquiry still remains unsolved.

After the positive outcome of the second Danish referendum in May 1993, discussion of subsidiarity appeared to be on the wane. The Copenhagen Council in June was overshadowed by the issue of unemployment, which Delors succeeded in putting on the political agenda. The presidency conclusions merely expressed the leaders' satisfaction with the progress in its implementation. Yet hard bargaining over subsidiarity between the Commission and the Member States was under way. Soon after the Copenhagen Council, the French and British Governments put forward a joint paper on subsidiarity, in which they listed which legislation should be retreated or modified in accordance with subsidiarity.¹³¹ The German Government also produced document in a similar vein both in July and November 1993.¹³² No doubt the aim of these initiatives from the Member States was to gain the edge in the implementation.

The Commission agreed in its report to the European Council that it would review or withdraw 16 out of 22 proposals on the Anglo-French "hit-list" (initially the UK Government planned 71 legislation).¹³³ Nevertheless, many other proposals that the Commission endorsed to review are in fact for

130. See *Agence Europe*, No. 6094, 27 October 1993, p. 12; "European Council in Brussels, 29 October 1993: Presidency Conclusions," *Agence Europe*, No 6098, 31 October 1993, p. 8; "Draft Interinstitutional Agreement Between the European Parliament, the Council and the Commission on Procedures for Implementing the Principle of Subsidiarity," *Agence Europe* (Document), No. 1857, 4 November 1993, pp. 3-4.

131. Commission of the European Communities, "Commission Report to the European Council on the Adaptation of Community Legislation to the Subsidiarity Principle," COM (93) 545 final, 24 November 1993, pp. 25-27.

132. See *ibid.*, p. 8.

133. David Gardner, "More retreat than defeat on Euro-laws," *Financial Times*, 13 December 1993, p. 2.

simplification and recasting rather than scrapping.¹³⁴ The Brussels European Council II in December 1993, which was dominated by the GATT issues and unemployment, "took note of the Commission report" and expressed "satisfaction that the Commission... was withdrawing a number of proposals and suggesting the repeal of certain existing legislative acts and the simplification or recasting of others."¹³⁵

Thus the stormy discussions over subsidiarity has come to the end of one phase. Although the annual review has still to be published, the issue of subsidiarity itself may not attract any more attention than it did in 1991-1993. Yet one thing is however certain that, because subsidiarity concerns the manner in which power is exercised, we cannot take our eyes off future developments in this sphere.

134. *Ibid.*; Commission, COM (93) 545 final, *op. cit.*

135. "European Council Brussels 10 and 11 December 1993: Presidency Conclusions", *Agence Europe*, No. 6127, 12 December 1993, p. 11.

CHAPTER IV

CONCLUSION

The principle of subsidiarity is a typical product of European political thought and is deeply etched into western Europe. Amongst all, J. Althusius in the early 17th century can be seen as the first proponent of subsidiarity and federalism. Coloured by a corporatist view, the Calvinist Syndic of Emden tried to maintain the relative autonomy of his city in the stormy Counter-Reformation movement by establishing "symbiotics" among various associations within the Holy Empire.

The classic formula of the subsidiarity principle as developed by Pope Pius XI in 1931 was a reaction of the Roman Catholic Church against the omnipresent State. Therefore it stressed more the *limitation* of the activities of the higher organisation than its duty of intervention. Subsidiarity as a principle was thus born primarily as a *negative* concept. Nevertheless, it also contained, if on a secondary level, a *positive* concept by affirming the *obligation* of the State to assist those in trouble.

The *Weltanschauung* envisaged by the classic formula can be summarised by three components ; 1) a hierarchical view of Society ; 2) an attachment to the intermediate bodies ; 3) above all, the full realisation of each person's potential. In addition, subsidiarity in its classic sense was chiefly concerned with non-territorial entities such as the individual, the family or the occupational groups.

This so-called *non-territorial* concept of subsidiarity has steadily given way to the *territorial* one, as subsidiarity fused with federalism. The German Constitution *Grundgesetz* (1949) can be seen as a first clear sign of this tendency, which has been strengthened since A. Spinelli firmly introduced the idea of subsidiarity to the European Federalism in the mid-1970s.

Meanwhile, the subsidiarity principle lost its importance around the late 1960s and the early 1970s. This was not only because of the influence of Keynesian policy but also of the expectation that the central authority should intervene in detail, especially in the sphere of social security. These

ideas undermined the first concept of subsidiarity, i. e. the negative one, although the reverse trend, resulting from the rise of neo-Liberalism, emerged after the end of the 1970s.

The current popularity of the subsidiarity principle is owed mainly to the discussions on the European Community ; In 1971, R. Dahrendorf used the principle of subsidiarity as an antidote to the over-bureaucratisation of the EC Commission ; A. Spinelli reignited discussions by incorporating this principle into the EC Commission's contribution to the Tindemans report in 1975 and then into the European Parliament's Draft Treaty Establishing the European Union in 1984 ; J. Delors, deeply imbued with social Catholic doctrines, could reach a well balanced view on subsidiarity, and promoted it vigorously ; Giscard d'Estaing also contributed to the discussions on subsidiarity by making a report in the European Parliament. In 1991, the Heads of the Twelve States entered the principle of subsidiarity into the Maastricht Treaty with constitutional status. Throughout the ratification process, the implementation of subsidiarity remained a dominant issue.

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We can go on from the summary above to the conclusion that ; 1) Once the EC countries have adopted the subsidiarity principle, these countries have tacitly accepted a hierarchy vertically organised among the several polities, each of which has its own competences ; 2) This structure is far from what has been depicted by the traditional view of the sovereign state system in which no superior organisation or value than the State is supposed to exist ; 3) Perhaps more importantly, the State turns out to be on the defensive in the long term, since, by raising the subsidiarity principle, it attempts to protect and assure its own sphere of competences within the hierarchy. If state sovereignty is to be self-evident, it would not have been necessary for the State to uphold the principle.

However enthusiastically the State defends solely the negative concept of subsidiarity, it will not succeed in retaining its sovereignty in the traditional sense,¹ if it is to use the principle of subsidiarity. This is precisely because the negative concept of subsidiarity is always

1. Here, state sovereignty refers to exclusive power over the people or resources within a territory.

accompanied by the positive one which enables or obliges a higher organisation to intervene in the affairs of smaller entities in case that the latter alone cannot attain their goals. We may recall here that the term of subsidiarity, from its origin, envisages assistance or aid to those in trouble.

In this sense, one may argue, the Member States of the European Community have started to stop being sovereign entities. They are openly declaring this by adopting the subsidiarity principle. At least these States are no longer those of one generation ago, when, for instance, General de Gaulle could assert and exercise sovereignty. As long as the principle of subsidiarity remains as a constitutional principle, there will be the legitimate interference of the EC onto the territory or the people of each member state when it is required. It is no exaggeration to say that the traditional State theory, at least concerning western Europe, is put into question in earnest, with the appearance of subsidiarity.

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To accept the principle of subsidiarity creates another possibility ; the State may be eroded from within. Currently, with the principle, some of the EC Member States try to defend themselves against centralisation of power in Brussels. However, since the subsidiarity principle envisages that *any* organisation within the structure is limited in its activities in relation to a lower organisation by subsidiarity, the State also ought to be subject to the principle in relation to the lower entities. André Thiéry rightly points it out when he says ; "Il [L'échelons national] ne peut revendiquer l'application du principe de subsidiarité dans ses relations avec l'Union européenne que s'il accepte qu'il puisse jouer dans ses rapports avec les collectivités de rang inférieur."²

This is the so-called "boomerang effect"³ of subsidiarity. According to the logic of subsidiarity, an 'excessively' centralised State has to limit its intervention to the smaller entity, since it would impede citizens from fully developing their potential. All the entities, including individuals, intermediate groups, ethnic minorities, and local or regional authorities, can

2. André Thiéry, "Le principe de subsidiarité au Parlement européen," *L'Europe en formation* N° 280 (Hiver 1990-Printemps 1991), pp. 25-26.

3. P. J. C. Kapteyn, "Community Law and the Principle of Subsidiarity," *Revue des affaires européennes* N° 2 (1991), p. 42.

assert their right to retain a sphere of freedom. Thus by utilising the principle of subsidiarity against Brussels, the Member States may have to be challenged by the smaller entities in their own territory. The State would be besieged by potentially damaging elements, on introducing this double-edged principle.

Moreover, the Region or Local Community, which is an enthusiastic supporter of the subsidiarity principle, is not free from the same principle. This again is because the notion of subsidiarity aims at the full realisation of each person's potential. The fact that the Region or Local Community is a smaller polity than the State or the supranational body does not necessarily guarantee this aim to be fulfilled. Following the subsidiarity principle, the Region or Local Community would be legitimate, only if it serves the development of human potential. Furthermore, the Region or Local Community may not be the only beneficiary of the principle of subsidiarity, in view of the fact that the principle in its classic formula had little to do with territoriality. All sorts of civil societies, and ultimately individuals, can equally benefit from the principle.

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Western Europe has already moved on from the dichotomous scheme of integration versus state sovereignty. Making a success of the 1992 movement put the EC into a higher stage of integration, but at the same time, drove the Europeans to wish to control it. In other words, the Europeans at once had to affirm their efforts of integration and to limit them. In doing so, they have found a clue from their rich store of political thought : that is, the notion of subsidiarity.

The focus of discussions in Europe is now on how to democratise the highly integrated EC structure and on how to prevent the over-centralisation of power to Brussels. This process is unlikely to be a mere return to the Age of Nationalism. Now that the Maastricht Treaty is put into effect, the Region and Local Community will, if only partially, be incorporated into the EC decision-making process through the framework of the Committee of Regions. In some policy areas, notably in monetary policy, the EC could be significantly strengthened. We can say with fair certainty that (west) European society is now on the way to its full-scale restructuring.

The principle of subsidiarity will remain a key concept in this process. With the twin ideas of subsidiarity, i. e. the negative and the

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positive, European states will point to the decentralisation as much as possible, while they will defend the *raison d'être* of the EC, believing that it would be good for the development of each person's potential.

APPENDIX :
List of Interviews

Sir Leon Brittan^{*} (Brussels, 24/03/93) ; Vice-President of the EC Commission.

Carlos Camino (Brussels, 10/06/93) ; Cabinet Member of Vice-President Marin of the EC Commission.

Claude Cheysson (Brussels, 13/04/93) ; MEP ; Former Foreign Minister of France ; Former EC Commissioner.

Richard Corbett (Strasbourg, 10/03/92, Brussels, 07/11/91) ; Principal Administrator, Constitutional Expert for the Socialist Group of the European Parliament ; Former collaborator of Altiero Spinelli ; Former President of Jeunesse Européenne Fédéraliste.

Lord Dahrendorf (Oxford, 19/01/94) ; Warden of St. Antony's College, University of Oxford ; Former EC Commissioner ; Former Secretary of State for foreign affairs in West Germany.

Pier Virgilio Dastoli (Brussels, 26/03/92) ; Co-founder and editor of *Crocodile* ; a close former collaborator of Altiero Spinelli.

Viscount Etienne Davignon (Brussels, 03/06/92^{*}, 28/07/93) ; Former Vice-President of the EC Commission ; chairman of Société Générale de Belgique ; Kissinger associates ; Member of the Royal Institute of International Affairs ; Member of the ERT, European Roundtable of Industrialists.

Wisse Dekker^{*} (Eindhoven, 26/05/92) ; Co-founder and former Chairman of ERT, European Roundtable of Industrialists ; Chairman of the management board of Philips ; Professor of international management at the University of Leiden ; Editorial board of *European Affairs*.

François Lamoureux (Brussels, 10/2, 22/04, 23/07/93) ; Principal Advisor to the Legal Service, EC Commission ; Former Chef du Cabinet Adjoint of the Commission President Delors ; Former Chef du Cabinet Adjoint of French Prime Minister Mme Cresson.

Josephine Moerman (Strasbourg, 11/03/92) ; Principal Administrator on Institutional Affairs for the Liberal Group in the European Parliament ; the writer of the draft of Giscard's Report on the principle of subsidiarity.

Jean Claude Morel (Brussels, 23/04/93) ; Director General of the Cellule de Prospective, BC Commission.

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Riccardo Perissich (Brussels, 23/08/93) ; Director General of the DG III ; Former Chef du Cabinet of Altiero Spinelli, the then Commissioner.

Leo Tindemans (Brussels, 15/06/92) ; Chairman of the European People's Party ; Former Prime Minister (1974-78) and Former Foreign Minister (1981-89) of Belgium ; Author of the Tindemans Report on European Union ; Former Senior Professor at the Catholic University of Leuven.

Michel Vanden Abeele (Brussels, 07/07/93) ; Director General Adjoint, DG Budget, EC Commission ; Former Chef du Cabinet of EC Commissioner Van Miert.

Williem Van Eekelen * (Brussels, 29/01/93) ; Secretary General, West European Union.

Karel Van Miert * (Brussels, 25/05/92) ; Vice-President of the European Commission ; former EC Commissioner for transportation policy ; former MEP.

Alain Van Solinge (Brussels, 02/04/92) ; Head of Unit, Institutional Affairs, Secretariat General of the EC Commission.

Jérôme Vignon (Brussels, 11/12/91 and on other occasions) ; Principal Advisor to the President of the EC Commission, Jacques Delors ; Director of the Cellule de Prospective, EC Commission ; Former Economic Counsellor to the Minister of Finance in France, Jacques Delors.

※ With the Head of the Yomiuri Shimbun Brussels Bureau.

LIST OF ABBREVIATIONS

Bull. EC	Bulletin of the European Communities
--Suppl.	--- Supplement
COREPER	Committee of Permanent Representatives
DG	Directorate General (of the EC)
Draft Treaty	Draft Treaty establishing the European Union (by the EP)
EC	European Community
EEC	European Economic Community
EP	European Parliament
EPP	European People's Party
IGC(s)	Intergovernmental Conference(s)
MEP(s)	Member(s) of the European Parliament
OJ C	Official Journal of the European Communities, C series
SEA	Single European Act
The Twelve	Member States of the EC

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