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## ***AFTER THE GLOBAL CRISES: WHAT NEXT FOR REGIONALISM?***

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### **Subsidiarity & its Enemies: On a Post-National Constitutional Principle of the European Union**

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**SUBSIDIARITY & ITS ENEMIES:**  
**ON A POST-NATIONAL CONSTITUTIONAL PRINCIPLE**  
**OF THE EUROPEAN UNION\***

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## INTRODUCTION

With the benefit of hindsight, the years 1992-3 were a turning point in the history of European integration. The Danish rejection of the Maastricht Treaty revealed the depth of legitimacy lied in the hands of a national democracy, though it has subsequently been fudged into a dubious legal solution. Perhaps more profound in terms of theoretical implications is that, the 1993 ruling of the Constitutional Court of Germany reaffirmed the terms with which to proceed, or recede, the process of European integration; and these terms were unashamedly based upon the conception of nation-state and its *völkische* democracy, which typically conflates Volk, Sovereignty, State, Democracy, and Constitution as well.<sup>1</sup>

What we see here is the still powerful principle of popular sovereignty, inspired by Jean-Jacques Rousseau's formula of 'general will', and his successor of an extreme kind, Carl Schmitt. Nobody can really stop a people whose majority determines scenarios of their own future, including secession, oppression, ethnic cleansing and, in Schmitt's case, dictatorship. I am not engaged in any awkward exercise in which to suggest that the Danish people and the judges in Karlsruhe are supporting dictatorship. What I am arguing here is that, those two events in 1992-93 made crystal clear the resilience of popular legitimacy retained in the hands of a national democracy. The logic behind them remains the same: a people (or its majority) expresses their will, free to self-determine their future (and this is the cornerstone of their achieving a higher liberty); sovereignty can never be divided or even shared, just as 'one and indivisible' people cannot; this sacred conflation of Nation, State, Sovereignty is represented in the form of a Constitution; the dichotomy between treaty and constitution is an essential one in this context.

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<sup>1</sup> See J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), esp. ch. 8.

While these 19<sup>th</sup> century terms of national self-determination remain powerful, the European Union has serenely and firmly established itself as a political entity. It has resources, in-built legislative programme, and some legal legitimacy, all to the extent that they are incomparable to any international organisation. It is equipped with some 80 billion (Euro) annual budget. The sheer amount of legislative activities allegedly caused 30 percent of entire legislation and 70 percent of business-related legislation in the UK. Every time when a new treaty is ratified or a new member state is admitted, a body of ‘*acquis communautaires*’ has been approved and consolidated. This has amounted to an accumulated legal practice with which to endow some legitimacy to the EC or EU.<sup>2</sup>

An ordinary solution to control this kind of political beast is to treat it as a State, most likely a Federal State, and to have a fully-fledged democracy for itself. Yet, ‘twelve [or now fifteen] into one won’t go’.<sup>3</sup> Every time the European Parliament goes to the poll, the rate of turnout decreases, failing to excite any member population; and this happens despite the repeated strengthening of its competences over the last decade.

Not surprisingly, alternative explanatory paths have been sought. Governance is a generally preferred term to describe the structure covering this entity; yet the question is: governance based upon what, characterised by what? Some labelling exercises of the beast as a Regulatory State (Majone), Confederal Consociation (Chryssoschoou), or Commonwealth (MacCormick), just to give a few examples, demonstrate the efforts to bridge the gap between the existence of the already huge political entity and the 19<sup>th</sup> century terms far lagging behind the realities. This is a rich and still largely uncultivated field. Nature and character of the European governance remain to be more fully explored. It is here that the once fashionable discussion of subsidiarity with its long tradition of fighting against one and indivisible people and of empowering a multi-level cooperative governance, has to be re-introduced.

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<sup>2</sup> Here I am inspired by Neil MacCormick, ‘Sovereignty, Myth and Reality.’ In *Towards Universal Law: Trends in National European and International Lawmaking*, ed(s). N. Jareborg. 227-48. 1995; ‘Liberalism, Nationalism and the Post-sovereign State.’ *Political Studies* XLIV (1996): 553-567; ‘Democracy, Subsidiarity, and Citizenship in the “European Commonwealth”.’ *Law and Philosophy* 16 (1997): 331-356.

<sup>3</sup> Julie Smith, “The 1994 European Elections: Twelve into One Won’t Go,” ed. Jacques Hayward. *The Crisis of Representation in Europe* (London: Frank Cass, 1995): 199-217.

The central argument advanced here is three-fold. First, I seek to recast the principle of subsidiarity as an age-old concept against the excessive State centralisation over the last four centuries, with two versions in it, i.e. negative and positive.<sup>4</sup> Negative subsidiarity refers to the *limitation* of competences of the larger organisation in relation to the smaller entity, whilst its positive concept represents the possibility or even the *obligation* of interventions from the larger organisation. Second, I try to explore the implications of why the principle of subsidiarity was brought in, and used for, the European Community or Union notably in the late 1980's and early 1990's. The EC or EU had by then been firmly established; and the growing concerns over the ever-centralised Leviathan in Brussels, it seems to me, led the Europeans both to secure the EU's achievement so far and to simultaneously control the process of European integration. Last, I examine the nature of the European governance in the light of the principle of subsidiarity, suggesting the constitutionalisation of a multi-level governance under the banner of subsidiarity.

### I. Subsidiarity: Why Important & Malleable?

Towards 1989, the principle of subsidiarity suddenly became fashionable 'Eurolanguage.'<sup>5</sup> At the same time it has been so misunderstood that something inconceivable could happen; as Jean-Pierre Cot, ex-head of the European Parliament's Socialists Group, observed, "ça arrange M. Delors d'être d'accord avec Mme Thatcher sur un malentendu."<sup>6</sup>

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.<sup>7</sup> 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, ..."<sup>8</sup> Here, the subsidiarity principle takes on a decentralising character.

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<sup>4</sup> Ken Endo, "The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors," *Hokkaido Law Review*, Vol. XLIV, No. 6 (1994), Part I.

<sup>5</sup> Marie-Pierre Subtil, "Un casse-tête: la répartition des compétences entre la Communauté et les Etats membres," *Le Monde*, 22 juin 1990, p. 7.

<sup>6</sup> Quoted in *ibid.*

<sup>7</sup> 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.

<sup>8</sup> Alain Madelin's remarks, quoted in Vincent Lecocq, "Subsidiarité et réforme des institutions européennes," *Revue*

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, particularly in English. Secondly, most books on subsidiarity were written in the 1950s or 1960s (mainly in German). In contrast, numerous articles about it have appeared since 1988-1989.<sup>9</sup> Lastly, this contrast is connected with the tendency in which, 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 EU matters. There is little research to bridge this gap.<sup>10</sup>

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 (TEU) adopted at the end of the Maastricht Summit in December 1991. After referring in the Preamble that “decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,” 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, 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.

This inclusion in such a circumstance almost unavoidably begs various questions and calls for detailed analyses. Moreover, the principle of subsidiarity has already been taken as a actual guideline of some policies of the Union, as was the case for the Social Charter or the Media Programme. Furthermore, from the Danish rejection of the Maastricht Treaty in June 1992 through

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*politique et parlementaire* N. 956 (Novembre-Décembre 1991), p. 45.

<sup>9</sup> See a survey article by Andreas Føllesdal, “Subsidiarity”, *Journal of Political Philosophy*, 6/2 (1998): 231-259.

<sup>10</sup> See Bibliography. Some of the exceptions can be found in Chantal Millon-Delsol, “Le principe de subsidiarité: origines et fondements,” *Cahiers de l’Institut La Boétie* N.4 (avril 1990), pp. 4-11; idem, *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); idem, *Le Principe de Subsidiarité* (Paris: Presses Universitaires de France, 1993).

the ratification process of the Treaty to the inclusion of a protocol to the Amsterdam Treaty, the principle of subsidiarity became a salient issue in the EU. It must therefore be said that there exists the necessity to investigate this principle.

Is this principle simply convenient for all, and therefore an un-principled principle? If not, what does it mean? I make a three-fold proposition here: 1) Subsidiarity, however fussy it might look, is not necessarily an un-principled principle; 2) the more malleable it looks, the more necessary it is to examine the principle from a historical viewpoint, thus clarifying the direction of confusion at least; 3) we would fail to grasp the scope of subsidiarity, if focusing only on one - say Catholic - origin, not its multiple origins.

## II. Althusius as a Point of Departure

### *The Etymology*

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.<sup>11</sup>

### *Althusius*

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.

It is reasonable however, to also identify Althusius as the first proponent of subsidiarity and federalism (he uses, in fact, the word of ‘subsidia’ in the text).<sup>12</sup> He was a Calvinist theoretician of

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<sup>11</sup> Jean-Marie Pontier, “La subsidiarité en droit administratif,” *Revue du droit public et de la science politique en France et à l'étranger* (nov-déc. 1986), p. 1516.

<sup>12</sup> On Althusius, see Riley, Patrick. *Three 17th Century German Theories of Federalism*:

the laical State at the beginning of the 17th century. As the powerful Syndic of Emden - a city in East 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. 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,” and therefore, a man 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. Seeking for ‘symbiotics’ among these associations – that is the essential subjective matter of politics, Althusius picks up a biblical concept of ‘foedus’ (the alliance or league that originally meant the bond between God and men), and secularised it to apply for associations in this world. This term is the origin of the word ‘federalism’ as we use it today.

Empirical concerns apart, his chosen theoretical opponent was Jean Bodin who is known for his theory of sovereignty.

Chapter IX:

(§5) ... The members of a realm, or of this universal symbiotic association, ... are many cities, provinces, and regions agreeing among themselves on a single body constituted by mutual union and communication.

(§22) ... But by no means can this supreme power be attributed to a king or optimates, as Bodin most ardently endeavors to defend. Rather it is to be attributed rightfully only to the body of a universal association, namely to a commonwealth or realm, and as belonging to it.

(§23) ... Whence it is shown that the king does not have a supreme and perpetual power above the law, and consequently neither are the rights of sovereignty his own property, although he may have the administration and exercise of them by concession from the associated body .<sup>13</sup>

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Althusius, Hugo and Leibniz. *Publius: The Journal of Federalism* 6 (3 1976): 7-41; Hueglin, Thomas. Johannes Althusius: Medieval Constitutionalist or Modern Federalist? *Publius: The Journal of Federalism* 9 (4 1979): 9-41; Hueglin, Thomas. New Wine in Old Bottles? Federalism and Nation States in *The Twenty-First Century: A Conceptual Overview. In Rethinking Federalism: Citizens, Markets, and Governments in a Changing World*, ed(s). Karen Knop, Sylvia Ostry, Richard Simeon, and Katherine Swinton. 203-223. Vancouver: University of British Columbia Press, 1995.

<sup>13</sup> Johannes Althusius, *Politica*, trans. by Frederick S. Carney (Indianapolis: Liberty Fund, 1995): 67-73.

Thus Althusius countered Bodin's idea of sovereignty as the property of King. With his obvious sympathies laying with quasi-independent cities and Estates General, he maintained that sovereignty belongs collectively to the constituent cities and provinces. 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.

Here, I wish to emphasise the two faces of Althusius. On the one hand, he aspired to harmonise the graduated social order, namely amongst the levels of families, guilds, cities, provinces, the empire. His *Weltanschauung* was strongly coloured by a consociational and corporatistic conception. He was the theorist who first conceptualised the consociational political systems; indeed, his ideal in politics was to 'consociandi' men, as seen at the beginning of his *Politica*:

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.

The end of political "symbiotic" man is holy, just, comfortable, and happy symbiosis, a life lacking nothing either necessary or useful. Truly, in living this life no man is self-sufficient, or adequately endowed in nature. ... 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 [or support, subsidia] by his own energies all the requirements of life.<sup>14</sup>

On the other hand, Althusius evidently wished to protect the autonomy of his city, Emden - the stronghold of the Reformist Church. Power in this context must be reserved at the lowest possible level, rejecting unnecessary interference from the upper echelons. One could easily imagine the often violent circumstances of Counter-Reformation, under which he wrote his *Politica*. Another source of this his democratic credentials comes from his earnest learning of Monarchomachi Thought, which he encountered in Geneve and elsewhere.

His book aimed at protecting the local autonomy in an interdependent and mutually respectful

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<sup>14</sup> Carl Joahim Friedrich, *Politica Methodica Digesta of Johannes Althusius* (Cambridge; Harvard University Press, 1932), p. 15. The English translation can also be found in Frederick S. Carney, *The Politics of Johannes Althusius*

world. It is better to bear in mind that Emden was one of the most prosperous trade centres at that time. His dual aim, and two-face character, embodied in the idea of subsidiarity, thus derived from the double necessity of preserving religious and local autonomy in a symbiotically graduated world. From here, two currents of the idea of subsidiarity flow: negative and positive.

### III. The Liberal Current

By 'liberal' what is meant here is the tendency which favours the reservation of power at the lowest possible level or unit, including individuals ultimately. Let us trace this liberal current in the following section.

The Synod held in Emden in 1571 - before Althusius took the power of the city - symbolises a negative notion of subsidiarity to regulate the relationship between several levels of synods.

Provinzial- und Generalsynoden soll man nicht Fragen vorlegen, die schon fröhler behandelt und gemeidsam entschieden worden sind, ... 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. Emden Synode (1571)<sup>15</sup>

This pointed to a formula in which decisions should be made at the lowest possible level; the Provincial or General Synod could not take decision in the areas where the community synods had taken decision, or could take decision only if the latter could not decide or if the questions under consideration concerned all the parishes.

The negative notion of subsidiarity can be found in liberal thinkers at the later periods as well. During almost the same period as that of Althusius, 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 might be possible to read Locke in relation to subsidiarity, despite differences with Althusius especially in a Locke's dichotomic view of society between individuals

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(London; Eyre & Spottiswoose, 1965), p. 12.

<sup>15</sup> 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.

and government.<sup>16</sup>

In the 18th century, Montesquieu already claimed that the State's functions should be secondary and supplementary. W. von Humboldt also gave one of those liberal interpretations in the 19th century. In his argument on the State's role, he maintained that the State should not intervene if individuals possess the means to achieve their goals. Humboldt's idea falls into “negative subsidiarity” since it tries to limit activities of the higher organisation.

Some national constitutions followed this liberal stream: the 10th Amendment of the US Constitution and the Article 3 of the Swiss Constitution in 1848 are cases in point. Both of them make it clear that the competencies of the central authority should prove to be exceptions, not the rule, with the power resting with the Canton, the state or the people. US President A. Lincoln left a remark 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.<sup>17</sup>

It is important to quote this passage since it shows a link between the European notion of subsidiarity and the 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.”<sup>18</sup> According to him, implementation of policies set by the central government should be left to the hands of local authorities.

In the context of European integration, this liberal interpretation has prevailed in its appearance, though almost always coupled with the proposed increase of the EU's competence. It was Altiero Spinelli, for instance, the champion of European federalism since the Resistance period, who introduced the principle of subsidiarity in the EU's formal document, when he first led the European

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<sup>16</sup> For the following paragraphs, see Millon-Delsol, *L'Etat subsidiaire*, *op. cit.*

<sup>17</sup> Quoted by Oswald Nell-Breuning, *Baugesetze der Gesellschaft: Solidarität und Subsidiarität* (Freiburg: Herder, 1990), S. 88.

<sup>18</sup> John Stuart Mill, *Representative Government* (London: Parker Son and Bourn, 1861), p. 226.

Commission to make a contribution report to the Tindemans Report in 1975, and then the European Parliament to adopt the Draft Treaty on European Union in 1984. On these two occasions, he attempted to soothe the fear for a over-centralised Leviathan in Brussels, by stressing the negative aspect of subsidiarity.

In case of Spinelli, the upholding of subsidiarity was partly designed to form coalition with the Christian Democrats in the Parliament, who are more eager to support the principle for the reason I shall state later in this paper. It was Ralf Dahrendorf (now Lord Dahrendorf), earlier than Spinelli, who advocated for the principle of subsidiarity, as a ‘cri de coeur’ rather than as a calculated political act of a Spinellian mould. Let us quote his controversial article in *Die Zeit* in 1971:

Not everything in Europe is lovely because it happens to be European. A European Europe is also a much differentiated, colourful, multiple Europe. It is a Europe in which those matters are dealt with and regulated in common which could perhaps only sensibly dealt with in this way. The transition from the First to the Second Europe demands a move away from the dogma of harmonisation towards the principle of subsidiarity.<sup>19</sup>

As a then Commissioner in Brussels, he was alerted by the scope and depth of the bureaucratisation of the Commission, especially in the field of CAP (Common Agricultural Policy). This First, over-bureaucratized Europe should, in his eyes, give way to the Second one of differentiation, in line with the principle of subsidiarity. Hereby we could trace the liberal current of the idea. And let me add that the criticism against Brussels, unleashed after the Danish rejection of Maastricht in 1992, markedly showed the resilience of this negative version of subsidiarity.

#### IV. The Personalistic and Corporatistic Current

The social-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 argued clearly in favour of subsidiarity, when he wrote:

Tous ce que peut exécuter l’individu, en se soumettant à la loi de justice,

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<sup>19</sup> Quoted (with some minor revisions) from Micheal Hodges ed., *European Integration: Selected Readings* (Harmondsworth: Penguin, 1972), p. 82.

sera donc laissé à l'individualité; tout ce qui dépasse la capacité d'une personne sera dans les attributions de la collectivité.<sup>20</sup>

I do not believe we have enough time/space here, to reflect fully on such a complex thinker as Proudhon, whose views were coloured by his deep-rooted Catholicism, despite his hatred vis-à-vis the established Catholic Church. He is the founder of a still significant current of socialist thinking, the integral federalism. Here, each echelon or segment of the entire society has to play its proper role, so that the society in its entirety can be harmonised and that each person can fully develop his/her own potential. Emanuel Mounier, Denis de Rougemont and Alexandre Marc are the followers in one sense or another of Proudhon, and Jacques Delors, a social Catholic, is the prominent practitioner of our age.<sup>21</sup>

Social Catholic thinkers like W. von Kettler and L. Tapprelli became aware of social problems caused by the Industrial Revolution.<sup>22</sup> In order to solve these problems, they urged the higher entity to assist the weakest in society, thereby championing 'positive subsidiarity'. Influenced notably by Ketter's idea of 'le droit subsidiaire', 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.

### *The Making of a 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 has 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 see with the introduction of this principle.

In May 1891, Pope Leo XIII issued an encyclical 'Rerum Novarum' to all the Bishops. This

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<sup>20</sup> P. J. Proudhon, *De la capacité politique des classes ouvrières, Oeuvres complètes III* (Paris: M. Rivière, 1924), p. 213

<sup>21</sup> Ken Endo, "What is 'Delorism'? The Convictions of Jacques Delors," Katholieke Universiteit Leuven, Leuven, August 1992 (unpublished); idem., *The Presidency of the European Commission, op. cit.*; idem., *The Principle of Subsidiarity, op.cit.*

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 in the view 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.

In relation to the subsidiarity principle, it is important to note that ‘Rerum Novarum’ cleared the way for the State to protect the 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, ...<sup>23</sup>

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. Whatever his reasoning, we can interpret his remarks as being an embryo of the negative notion of subsidiarity, since they represent the limitation of the activities of the higher organisation.

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<sup>22</sup> See with this regard, the books by Mme Chantal-Delsol, *op. cit.*

<sup>23</sup> “Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labor, May 15, 1891,” in *The Popal Encyclicals 1903-*

However, Leo's starting point and priority concerned the duty of the State to protect the 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. ... 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.<sup>24</sup>

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 assistance of the State.”<sup>25</sup> This brought, 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 is affirming positive subsidiarity which admits the obligation of the higher organisation. Here, we can already have a glimpse of the two conflicting ideas of subsidiarity: the negative and the positive, with an inclination to the latter.

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 forty years' celebration of Leo's ‘*Rerum Novarum*.’ During this period, the Church had, if not always, attempted to secure an 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

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1939 (Raleigh; McGrath Publishing Company, 1981), paras. 35, 36, 55.

<sup>24</sup> Para. 33 and 36, respectively. See Pope's “*Rerum Novarum*,” op. cit.

<sup>25</sup> Para. 37, *ibid*.

growing scepticism about the excessive State control over Society, although the relationship between the Catholic Church under Pius XI and the Fascist or Nazis regime was not simplistic during the inter-war period.<sup>26</sup>

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 injustice 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.

<Para. 80>

The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concern 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.<sup>27</sup>

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<sup>26</sup> We should distinguish between the State corporatism of Mussolini or of Salazar which in fact concentrates the power on the State or on one party, and, so to speak, the societal corporatism of Popacy, which tries to retain the autonomy of social groups. 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 towards 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 Richard L. Camp, *The Popal Ideology of Social Reform: A Study in Historical Development 1878-1967* (Leiden; E. J. Brill, 1969), pp. 148-149, and p. 18. Cf. Andrew Adonis and Andrew Tyrie, *Subsidiarity - as history and policy* (London; Institute of Economic Affairs, 1990).

<sup>27</sup> Pius XI, "Quadragesimo Anno: Encyclical of Pope Pius XI on Reconstruction of the Social Order, May 15, 1931" in

This is the birth of ‘the principle of subsidiary function’ (in German translation ‘das Prinzip der Subsidiarität’). 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 the State duty. 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 in the ‘*Rerum Novarum*.’ His concern over social questions is best expressed in his criticism towards capitalistic Liberalism:

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.<sup>28</sup>

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

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*The Popal Encyclicals 1903-1939* (Raleigh; McGrath Publishing Company, 1981), paras. 79-80. Our underlines.

<sup>28</sup> *Ibid.*, para. 78.

individuals and the State. This is to the great harm of the State itself; for, with a 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.<sup>29</sup>

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'. This can be related to the ideas of many of Christian Churches that, the State is also one of the natural groups which should have its own *raison d'être*. These arguments, as were developed above, show that Pius XI did not forget the State's duty of intervention in Society.

### *The Human Dignity*

Behind the papal doctrine, there is a firm metaphysical conviction on the nature of human being. Let me describe it briefly. According to this conviction, 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 at the turn of the last century, 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 finalised unless a person tries to develop it through interactions with other persons.<sup>30</sup> 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.<sup>31</sup>

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<sup>29</sup> Ibid., para. 110.

<sup>30</sup> See Millon-Delsol, *op. cit.*, pp. 123ff.

<sup>31</sup> Pius XI's "On Atheistic Communism," in Rev. John F. Cronin, *Catholic Social Principles; The Social Teaching of the*

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 override a person. 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, he/she might not dare to take action. These situations would impede a person to blossom fully. Therefore, if he or she 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" (as quoted above). Needless to say, this is the negative concept of subsidiarity.

Nevertheless, all societies exist for each person, thus for the realisation of his/her dignity. If the person can develop his/her own possibilities, any society does not have to interfere his/her own business, as was seen above. Yet, if, on the contrary, he or she 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 Church expected societies to help those who lacked the means or ways to attain their goals. Here, we can have a look at the positive notion of subsidiarity.

Thus the idea of dignity is deeply imbued 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, one can 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' of human dignity. This is why the Catholics can defend both the positive and negative concepts of subsidiarity.

## V. Subsidiarity in the Context of EU Politics

The principle of subsidiarity always comes to the fore when the political system experiences, or attempts at, centralisation. Its use in EU politics is no exception.

When the late Altiero Spinelli, then a Commissioner, first introduced the concept in the EEC Commission's contribution report to the Tindemans Report in 1975, that was accompanied by his radical proposals for strengthening the Community. It was more or less the same case with the 1984 Draft Treaty on European Union by the European Parliament, which was inspired by Spinelli once more.

Apart from Valéry Giscard d'Estaing who made a major report on the subject in the EP, it was Jacques Delors who came out as a champion of subsidiarity, or 'M. subsidiarité', in the late 1980s. When he set out the date of 1992 in his inaugural speech in 1985, he mentioned this principle of subsidiarity. When he chaired the committee of central bankers whose report was later named as the Delors Report on EMU, he explicitly referred to the principle once more. Important to note is that, with the 1992 boom starting to attract attentions, inside or outside of Europe, Delors felt it necessary to allay the fear for over-centralisation in Brussels. It was presumably triggered in part by Länder. They expressed their concern in a meeting with Delors in Bonn in May 1988 that they lost control over legislative decisions taken in Brussels by their federal government.

The Maastricht Treaty and the successive Treaty of Amsterdam, which enshrined the detailed provisions for implementing subsidiarity, elevated the principle of subsidiarity to one with a constitutional status. This is not to suggest that the EU has become a federal State with a fully-fledged written constitution. It is still based upon a series of treaties, not a constitution, the posture which one perhaps does not need to change. What is suggested here is that, so far as subsidiarity appears into the EU treaties, it presupposes some well-justified intervention from the larger organisation, i.e. the EU, into the member-states' affairs. The overall structure of European governance distinctly shows a multi-level or at least two-level character, which the upholding of the subsidiarity principle embodies. Before, European integration proceeded by stealth, most of its activities being impinged – and to some extent legitimised – on their functional achievement. Now,

its entire structure is governed, or at least supported, by this principle. The constitutionalisation of a multi-level governance is thus signaled by the rise of the principle of subsidiarity.

Having said that, the question looks increasingly like how to use this principle for the sake of their own levels. Regions, member states and indeed the EU all try to interpret it in their favour. Even Margaret Thatcher tried to use it for her favourite sports of Brussels' bashing. Länder are as keen as ever in advocating the strict implementation of the principle.

Delors became a central figure upholding the principle of subsidiarity, in the heated debate over the Maastricht Treaty, especially after the Danish referendum in 1992. Delors made full use of the negative side of subsidiarity in the process, promising to return some of the competences to the member states.

I could go on to tell on these debates within the context of EU politics, but stop here for the sake of time/space constraint.<sup>32</sup> The point here is that while defending the further strengthening of the EU, the principle has been in use to assuage the fear for its over-centralisation. Yet, so far as subsidiarity is in use as the principle governing European Community or Union, it presupposes the just and necessary interference from Brussels. That almost everybody tries to use it in his or her favour strengthens, rather than weakens, the multi-level governance. The introduction of subsidiarity into EU politics means both the securing of the EU's achievement so far and the simultaneous control of the process of European integration.

## VI. Conclusions: Some Implications for the EU's Governance

Having shown the two main interpretative currents of the idea of subsidiarity and its developments in the EU context, we can go on to conclude and to reflect on the implications.

### *1) a grand-coalition under the banner of subsidiarity*

It is better not to underestimate the width of support to the principle of subsidiarity. The Liberals, Catholics and even Socialists of a Proudhonian flavour all are keen to uphold this principle. It is a

sort of grand-coalition, which brought about the constitutionalisation of subsidiarity at Maastricht.

*2) not an unprincipled principle*

However malleable it may look, the principle of subsidiarity points to a set of certain norms. If one looks at the limits of its permissiveness, it is obvious that the excessive centralisation at any level, be it the State or the EU, cannot be tolerated under this principle.

Thatcher, for instance, wished to utilise the idea of subsidiarity, yet at some point (certainly by the time when she wrote the second volume of her Memoirs) she realised that she cannot command the interpretation only to justify the State's power. On the other hand, the militant segments of post-Spinelli Euro-federalists dislike the idea of subsidiarity, for the opposite reason: it would prevent the EU from acquiring further competence easily. The excessiveness of both the EU's and State's power is likely to be punished by the principle of subsidiarity. This is why we still can call subsidiarity a principle.

*3) the significance and limit of subsidiarity*

The power of subsidiarity derives from the width of coalition for the principle in the EU. Yet, the democracy in one country, or a national democracy, coupled with populism, is likely to curb that power of subsidiarity, possibly to a subversive extent.

This is because the popular sovereignty can blow up the problematic of subsidiarity itself. The former gives any decision only of one unit or at one level an unresistable legitimacy, and contradicts the principle of subsidiarity coordinating, harmonising and ultimately legitimising the multi-level decision-making system, which does not give supremacy to any level. If this and that decision of one unit is 'über alles', subsidiarity does not have a word in the discourse.

The idea of subsidiarity frames and empowers the de facto multi-level governance, the idea relativising the Nation-State as the only public body and sphere, transcending the state-centric conception of constitution, mitigating the exclusive and absolute nature of one and indivisible

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<sup>32</sup> See Ken Endo, "Principle of Subsidiarity," *Hokkaido Law Review*, *op. cit.*, Part III.

people. Nothing is absolutely sovereign in the world of subsidiarity. Yet, it can only mitigate, not quite replace, the powerful principle of popular sovereignty in each nation. If one separatist nation says: 'let us get out,' subsidiarity which focuses on which level should or should not intervene in which level and to which extent, loses its relevance. Here are both the significance and the limit of subsidiarity.

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