MARMARA UNIVERSITY
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THE PRINCIPLE OF SUBIDIARITY: PHILOSOPHICAL GROUNDS AND ITS APPLICATION IN EC

MA DISSERTATION FOR EU LAW

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Table of Contents

Abstract in Turkish

Introduction

PART I:

Philosophical Grounds and the development of "Subsidiarity" as a concept

1. **Various definitions about the Concept**
2. **The philosophical and historical evolution**

2.1 The historical Evolution

a) The historical evolution within the U. S.

b) The historical evolution within Europe

2.2. The philosophical evolution

a) Seeds of a new understanding in Thomas Hobbes' philosophy

b) The First federalist thoughts by Johannes Althusius

c) Dawning *Societel Federalism*

d) Subsidiarity becoming a philosophical concept

e) Recent developments in the modern age

2.3. The evolution of the concept in political science

a) The first debate: centralisation v. decentralisation

b) Carrying out allocational shifts

c) Principle –agent theory

d) Subsidiarity through political analyses: Bermann's criteria

i. Self-determination and accountability

ii. Political liberty

iii. Flexibility

iv. Preservation of Identities

v. Diversity

vi. Respect for Internal Divisions of Component States

PART II:

Subsidiarity in the European Community

1. **Subsidiarity in EC Treaties**
2. **Subsidiarity in the evolution of Community federalism with regard to the EU&US comparison**
3. **Subsidiarity in European political exercise with regard to the European Council Guidelines.**
4. **Subsidiarity in legislative analyses and the Principle of Proportionality**
5. **The strict standing Court of Justice v. elusive concept**

Conclusion

Bibliography

INTRODUCTION:

When I first came across the necessity of writing a dissertation for the completion of my MA (Master of Arts in European Law) study in the European Community Institute, I found myself at the sight of many options those would arouse excitement in my mind. Unfortunately, as the subject of an academic work, all the subjects I thought about had the common point of being in fashion and recently experienced. On the other hand, I was in a simple chaos as the natural conclusion of being a law student that requires me to work on a subject on law the public law, international law and private law at the same time. Nevertheless, that thought at the side of snobbism, tending too much perfectionist. However, the point is just determining the subject of an MA dissertation that requires only a good research rather than offering a new scientific constitution. Specifically, at the same time I was dealing with "the general principles of Community law", "fundamental rights within the Community" and "the development of the case law through the lens of ECJ exercising Community law" defined in my mind as to be appropriate goods to buy those just fit on my purpose, I tried to buy another one from the market with regard to the recommendation of my advisor, Professor Karakaş, who I deeply appreciate to give me the courage to attempt. I was lucky that the concept "subsidiarity" was just one of the few that fits on the criteria I stated above: a subject at the intersection point of international public law and private law and a mysterious area still virgin expecting to be conquested. For the means to cut the long story short, as a first step in philosophical Euopean Community Law, I have to confess that it was an inescapable necessity to determine the subject of the study as *"the principle of subsidiarity"* with reference to *"its philosophical grounds and its application within the European Community"*.

One of the difficulties I experienced while writing this dissertation was the lack of wide-ranging resources. All the 3-4 months I spared for the accession to the resources, I could find numerous articles, Commission reports, and some various books indirectly referring the subject. And this was the answer of my question "what if one day I have to write on a subject referred only on few articles but no books?" For this dissertation, I could hardly find a sample work to follow up as a source of methodology. Moreover, the dissertation is the only wide-ranging work on

subsidiarity in evolution as a concept of transnational law. Apart from that, among the resources I benefited I have to cite the article of George Bermann “taking subsidiarity seriously” published in the Columbia Law Review and the book “Making Sense of Subsidiarity:…” CEPR Annual Report of 1993.

The study, excluding the introduction, conclusion and references is composed of two parts. As namely, the dissertation is on “the philosophical grounds and application” of the principle of subsidiarity, I found it possible to prepare a ‘two-part’ dissertation which first observes the philosophical grounds of the principle and second the application of the principle.

In the first part, there are two sections. The first section is only the statement of some definitions and qualifications, those were referred by the authors of European Studies. The second section constitutes the evolution of the concept both in the perspective of historical and philosophical developments and the evolution of the concept in political science.

Within the subsections of the first part, first of all I tried to tell the story of the historical evolution of the subject in Europe and in US variant from each other.
The complex story in US was only told by Thomas Hueglin in his article ‘federalism, subsidiarity and the European Tradition’, thus narrated from Hueglin through some personal interpretation in this subsection. The history in Europe was simple that has been told by almost every author of European Studies starting since the Quadregesimo Anno until the Tindemann’s reports.

After having talked about the history the following section constituted the story of the philosophical evolution of the concept. The first subsection makes some outlines on the philosophy of Thomas Hobbes who for the first time debated the “welfare state” contexts that led to the first thoughts of federalism. In this subsection detailed the two periods of Hobbes’ philosophy: the period his being in France and the period after he was exiled from France and started to live in England where he performed the “commonwealth” idea the same time he completed his “Leviathan” following “De Cive”.

The following subsection outlines the first federal thoughts by Johannes Althusius. The origins of his Calvinist tendencies and the simple federal approaches in his school that led to the "societel federalism" that we referred in the following subsection. Consequently, the next subsection for the section 'philosophical evolution' is the story of the "subsidiarity" becoming a philosophical concept. And finally the last subsection details 'the recent developments in the modern age' so as seen that the concept still developing and moving further in its evolution.

The next and final section of the first part is the evolution of the concept in the process of political science. In this part the usual federalist theories are to be exemplified. The first debate for both federalism and subsidiarity has always been the 'centralisation- decentralisation' debate. In this subsection, the statement is just a short explanation about the advantages and disadvantages of the counter concepts although subsidiarity is deemed to have been in favour of none, instead very close to 'non-centralisation' which is very different from decentralisation in meaning.

In this section secondly debated the principle-agent theory following the centralisation-decentralisation debate as to whether the choice is in favour of centralisation or decentralisation or non-centralisation how to operate the government affairs with regard to the level of decision making and acting if we accept one level of government is the principle and the other is agent in federalist approach.

The next subsection is the debate 'how to carry out the allocational shifts' in the federalist approach, if we assume that there is a principle-agent relation between different levels of government in a non-centralised word the question appears as 'carrying out the allocational shifts' as to operate the principle-agent relations between the levels of government and balance the tendency to decentralisation by using allocations of power.

The final and last subsection of the first part is the 'political analysis: Bermann's criteria'. In this section, I referred the criterions for the political analyses of the principle of subsidiarity by George Bermann through the lens of my personal interpretation. These criteria: 'Self-determination and Accountability', 'Political Liberty', 'Flexibility', 'Diversity' and 'Preservation of Identities' are one by one

determined as a final study of the third section namely “the evolution of subsidiarity in political science”- even though the methodology does not seem to be telling an evolution history –and the first part of the dissertation that is debating the approaches in the philosophical context of the concept.

In the second part of the dissertation, the application of the principle within the European Community is observed. In this part there are five sections.

As regards the use of methodology, the second part starts with the ‘evolution of the concept in Community federalism’ that sounds to be the continuation from the first part; the federalist approach in Community and the constitutional issues involved. Thus, constitutional issues are involved because the study of this subsection made with reference to a federalist vision and constitutional comparison between the European Union and the United States. In this comparison allocation of powers between levels of government in both samples are detailed and compared. The federalist vision in the two federal structure and namely, ‘co-operative’ or ‘dual federalism’ and the questions “which one occurs in each sample?” and “what is the final presumption?” debated.

The following section for the second part of the dissertation is the examination of ‘the principle of subsidiarity in the European Community Treaties’. In this section I focus on the Article 3b of the Maastricht Treaty with regard to the other relevant articles those exist in Treaties and the general principles of the Community. In addition, the section contains the debate of article 3b considering the comments of Toth and Steiner with my own interpretation. Thus, here I tried to make my comments on the grounds of the conclusion I had from the examination of the Community federalism and its qualification with regard to the comparison made with the federalism in the United States that was stated in the previous section. Both in this section and the previous, some cases of The European Court of Justice and the American Federal Supreme Court were referred.

The next section after the observation of subsidiarity in European Community Treaties constitutes the examination of the principle in European Political exercise and particularly, European Council guidelines that had been drawn by the European

Council in Edinburgh Summit for the purpose of providing the uniformity for the meaning of the concept and detailing the application principles. In this section, briefly explained the criteria of the Community action, and member state action variations through the area that falls within the scope of the non-exclusive competence of the Community. The three important points that the Council at the Edinburgh Summit had proposed detailed in this section and besides an exclusive study for the determination of how Community action be made through the principles of Community debated.

The following section is the ‘political means’ of the concept of subsidiarity within the European Union. Of course, in the first section of this part had we outlined the political innovations with regard to the federal structure in the United States but actually, that was somewhat a general political means deriving inspirations from the United States federalism but not the European Community. For the means to fulfil the necessity of outlining the observation of subsidiarity in its existence within the European political world, this section lays out the political traditions and tendencies in Europe.

One of the main arteries of this study is the following section that we made the legislative analyses through the use of the principle of the subsidiarity. In this analyse, I tried to debate the position of principle of subsidiarity in the Community legislative process. The process has actually six different variations where the institutions alone, bilateral and multilateral jointly act. The Commission usually is in the pole position in the legislative process. With regard to the features of the principle of subsidiarity and the European Council guidelines, debated the position of the Commission and the Member States jointly in this legislative analysis. On the other hand as soon as many authors pointed out that the principle has close relations with the principle of proportionality. In the second part of the analysis, I tried to distinguish the basic distinctions between the two principles referring to the comparison by Gonzales jointly with my own comments.

The last subsection of the second part and the dissertation itself is the examination of the ‘standing of the Court of justice against the principle’. In this subsection, the Court of Justice judicial exercise on the principle is examined taking some cases

material. The Court of Justice has made many interpretations about the use of principle. I also referred the references of the Court of Justice considering the elusive concept and the use of principle with regard to the European Community treaties. On the other hand the Court of Justice acts as a supranational body here. Almost all the considerable points about this subject was elected carefully and added to the context of the subsection.

Finally, the dissertation ends with a conclusion. In the conclusion part, the aim was to keep apart from the reviewing academic debates and complicated problems in one hand and on the other hand reaching a conclusion determining the position of the principle of subsidiarity in the political and legal agenda of the developing Europe with reference to the evidence gathered from the general layout of the dissertation. I have basically detailed the conclusion I reached in the context of socio-political means and the legal means one by one distinct from each other. My purpose here was not finding out the evil in the practice nor concluding through a new future assumption built on scientific grounds. On the contrary, I was really interested in the catalogue I could perform considering subsidiarity and its legal and political issues that in the first look remains the idea of writing a conclusion not useful. Actually, this was not right, I had written the conclusion for the purpose gathering the merits of this case under a roof and descending the underlying conclusion on the minds of the readers and I hope I’ve been successful in doing so.

PART I:

Philosophical Grounds and the development of “Subsidiarity” as a concept

1. Various Definitions about the concept

It is evident that to make a clear definition of subsidiarity is a difficult task. As soon as the concept has an official definition within the Union provided by Article 3b of the Treaty of Amsterdam, debates on both the official definitions and definitions by doctrine has not yet ended, on the contrary, new comments conferred on the subjects in time. The view about the concept was to be found elusive even though it clearly defines the best level of decision making, the ambiguous points are the mean of this concept and what about it is: the effectiveness, the competence or is it about necessity? With regard to these questions there are varying solutions. A German author states that there had been more than 20 attempts for the means to define the principle.[1]

One of the claims by A.G. Toth is, the meaning is not allocation of competence. The grounds he has built his view is "competences, that is, the power to act in a particular field: have been allocated to the Community by the original EEC Treaty, as amended by subsequent texts such as the Single European Act and the Treaty on European Union. The principle of subsidiarity, as laid down in Article 3b, cannot affect the competences granted by the Treaty, nor it can confer new competences on the community".[2] It can only be used to allocate the exercise of the competences that have already been created by other Treaty provisions.[3]

Article 3b states that subsidiarity applies only "*in areas which do not fall within the Community's exclusive competence*" which at the same time means it only applies in areas which fall within the Community's non-exclusive competence. It is referred to "shared" competence meaning the competence shared between the Community and the Member States.

Within the same view, the democratic tones of "*closeness to citizen*" suggests that the subsidiarity within the European Union context is not merely concerned with the allocation of competence between the Community and the Member States on the basis

[1] KALKBRENNER H./ Die Rechliche Verbindlichkeit Des Subsidiariatsprinzip. P.518
[2] TOTH A.G. / Is Subsidiarity Justiciable? / Common Market Law Review p.205
[3] ibid.

of practical efficiency, says De Burca[4]. As the author continues, however, article 3b expresses a narrower and more legalistic idea, which has been described by the Commission as a test of "comparative efficiency" among public authorities.

Another view by Kersbergen and Verbeek subsidiarity appeared as the guiding principle to delineating the competences of Brussels versus other administrative authorities, such as national states and regions.[5]

As regards the statement by Gonzales, the concept is a two faced coin. The principle of subsidiarity implies a more important role, which must be played by state authorities. Tough, more selective action must be taken by the Community authorities, in order to counterweight to the latter's interventionism, the Community system has more extended than expected and become more complicated.

Gonzales lays out an argument analysing the introduction of subsidiarity within the Treaty of EU is very closely related with the idea of strengthening the Community. Consequently, the argument what became known as principle of subsidiarity becomes a process of decentralisation through allocating the powers from the central authority extending to the regions:

"*I also conclude that, while elusive and sometimes deeply confusing, subsidiarity is a meaningful and useful notion" as Joseph Weiler States in his article finding subsidiarity useful and meaningful*"[6].

The purpose of the dissertation is to find out whether some of the abovementioned claims are true or not and in the first part; what bases underlying the philosophical grounds and in the second part what shape it takes in implementation. Finally, as a conclusion, I aim to find out whether the supranational legal system in Europe has consistency for its application.

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[4] De BURCA, Grainne / CRAIG, P.Paul; EC Law, Texts & Materials, Cases, Oxford, 1997

[5] KEES VAN KERSBERGEN AND BERTJAN VERBEEK The politics of Subsidiarity in the European Union. Journal of Common Market Studies Vol 32. No.2 / June 1994 p.214

[6]WEILER J / Trading In and With Europe/The Law of the European Union/ New York Univ. Press,Fall 1997

2. The historical evolution and the philosophical grounds of the concept:

2.1. Historical Evolution:

The history of "subsidiarity" was to be written by the of Catholic doctrine with Pope Pius XI's *1931 Encylical Quadragesimo Anno* with regard to its catholic concept and the consisting meanings among all what had ever been talked and written about it. In the context of the Catholic conceptual meaning there are some principles laid down. The most important principal element and the *corpus vertebralis* of the concept is the idea that bases on the point that the social problems are best understood and solved by the organisations and the people closest to them.

a) The historical evolution within the United States

The concept itself has been opportunity instrument to perform a third way between the Adam Smith's *laissez faire, laissez passe* capitalism and strongly centralised socialism. Regarding the fact that the church's vagueness on how much state intervention would it tolerate, the principle would let a fair amount. At least, that was the interpretation of both liberal welfare state companions like Franklin Roosevelt and corporatists like Benito Mussolini deriving from the thought that "*social justice through social action*".[7]

Following the abovementioned feedback had this strain still a potential, in today, can that easily be seen in Europeas Christian democratic parties which have traditionally followed republican style libertarianism. Apart from that, in America's Catholic Bishops and liberals and even in some Catholic conservatives take part at this side. Finally, in the last quarter of the 20th century, Catholic neocons have tried to sweep the welfare-statists away and settle with papal social teachings with the tangential market. Consequently, the following step has to be the authorisation of Vatican for the means to avoid irreconcilable differences. Lobbied Vatican through an international

[7] HUEGLIN T. / Federalism, Subsidiarity and The European Tradition, December 1999 Wilfrid Laurier Univ. Press

group of like-minded cardinals and theology intellectuals would not create a hurdle in this process. In order to strengthen the public opinion, writings of literature were produced to prove the harmony of Catholism and capitalism. Finally, Novak, a scholar at the American Enterprise Institute, finalised through his writing on a theological justification of the corporation and a shelf of books championing classical liberalism. As Neuhaus, editor of the influential journal First things, puts it, "*Capitalism is the economic corollary of the Christian understanding of man's nature and destiny."*[8]

Heuglin briefly outlines this union:"*As a Lutherian priest (who later converted) Neuhaus headlined anti-war rallies and toiled in ghetto parishes. Novak, a sociologist who studied white ethnics, shilled for Eugene McCarthy's presidential campaign. But both were ticked off by liberalism's dalliance with liberation theology and the nuclear freeze*".[9]

In contrast with many authors, referring to many secular counterparts from various beliefs who stepped forward to an ideological side, Neuhaus and Novak moved their proposition towards a more theological than socio-political issue. By this virtue merged through their proposition, Neuhaus and Novak have not only re-determined the concept of subsidiarity, they have redefined Pius's concept of it.[10]

Notwithstanding the fact that subsidiarity is detached from historical background of religious tradition of social justice, the allocation of budget through various segments of society is to avoid sclerotic character of the capitalist state. The argument, brought by Novak, later on, over "*the creative impulse is located in the people at the grass roots who no longer trust big government*" is noteworthy. The high technocratic perspective and neocon understanding varies here where as the latter deems subsidiarity as a moral argument that state and local government (instead of the feds) and limited society groups (instead of government at all) survives the poor.[11] That was

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[8] ibid.
[9] ibid.
[10] NOVAK, Micheal. The Spirit of Democratic Capitalism, 1982, Madison Books. This book is narrated to be very impressive on some famous European Political Leaders such as Margareth Tatcher, Vaclav Havel and Leh Walesa.
[11] ibid.

the evolution within U.S., which had its own divergent dynamic from the development process in Europe.

b) The Historical Evolution within the Europe

This short recourse to the history of political thought and practice in European Continent seems to imply that subsidiarity roots in an early-modern Europe before Westphalian secular government system. The considerable movement starts by the early 17 th century Europe dealing with 30 years wars immensed from religious sect disputes. The high cost of the war led to the idea of getting rid of fighting for beliefs. Therefore, the early capitalist community of Europe was at the edge of secularism.

The unfastened federal administration in socio-economic development led to social adherence and identity was challenged by a new state devoted understanding to put forth individualised social relations.[12] Up to a winner of time has determined, both traditions furthered to exist day by day and side-by-side in strain. The famous London fire and former English Civil War of the 1640s had been a key sequence for social change.[13]

The ultimate winner of the civil war was the Parliamentary Sovereignty against King whereas it was backed by the new class emerging in public sphere in productiveness. Even there is much to say on the political metamorphoses of the administrative system, the ownership of property led the public liberties seeking for more secure governance. However, the Puritan revolution was carried forward in the name of "religion, liberty and property.[14]"Therefore, new politics of the young *laissez-faire* capitalism consented by religion. Economic modernisation and the early steps of industrialisation began to separate interests of the former and new. The economically developed South and East was seeking more autonomous action through agents at the Parliament, while the North and West vice versa with King was reciprocal supporters.

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[12] TILLY C. , The Formation of Nation-States in Western Europe, Princeton : University Press, 1975

[13] HUEGLIN T. / Op.Cit.
[14] HILL C., The Century of Revolution 1603-1714 New York : Norton, 1961

Sooner or later, community level and despotism of intimacy over large families led to "political alignment." Economic and utilitarian considerations tackled people to act under a more individualistic motivation. Solid merger of people under ideology and strategy for the prerogatives of the class consciousness could hardly overlap the individualist expectations sharpened the motivation of a majority decision making in Parliament.[15]

2.2. Developing philosophy of Subsidiarity:

The roots of the philosophical approach towards the concept extends past up to the era of Aristoteles who debated on the art of governing people, and in the mid-ages Saint Thomas Aquinos who talked about the specific missions of government proposing the protection, extension and safeguarding of the perfection of individuals that had been undertaken. Moreover, John Lock and the following authors who treasured liberal and catholic thoughts had a strong participation on this approach.

a) Seeds of a new understanding in Thomas Hobbes' philosophy

Soon as it is well known, the starting point of this new order found its theoretical expression in the political thought of Thomas Hobbes. With reference to his major political works, De Cive (1642) and Leviathan (1651), it is no surprise to underline his approach of the state through the view of a obvious royalist preference. The prominent Leviathan, for instance, alleging that Parliament as only an advisory body functioning with the command of the royal sovereign who "may" gradually dissolve it.

In his part of "Review and Conclusion," and he ended up with power oriented understanding through a statement of "*explicit call for submission to the new regime*."[16] Moreover, Hobbes modified his wills for state and ideology from an earlier endorsement of the orthodox (Anglican) religion as the sole fundament of ideological

[1515] Ibid.

[16] HUEGLIN T. / Op.cit.

stability. Consequently, no more than eight months after the publication of Leviathan, Hobbes was banned from Charles' court and returned to Cromwell's England.

In England, there had been an ongoing parliamentary system whereas the parliament was empowered by constitutional principles such as the "sovereignty of parliament" With reference to the earlier thoughts, in De Cive, Hobbes had insisted that political stability in a civil regime of many required absolute submission to the principle of majority which on one side relies on "the Right of the major part agreeing." And on the other side regarding the dissenting minority had to consent with the established will of the majority, or would be treated by "the Right of War" as "an Enemy." what obviously reopened the issue of individual freedom and economic liberty for the new bourgeois classes.[17]

Thomas Hobbes had described the individualistic space of men outside the political arena of public liberty as a balance limited by law against the supreme power of Commonwealth thought. Men should do what the men's own reasons will, for the most profitable to them.

It is highly doubtful to rely on their individual powers in the attempt to safeguard income and gratification. Therefore, it is no surprise for Hobbes that human beings may come together for the establishment of a commonwealth. Hence, the commonwealth is a single entity working with reciprocal undertakings or a network of associated contracts and offers a high quality form of a social organization. On Hobbes's view, the establishment of the commonwealth shapes a new, artificial (fiction) person (the Leviathan) to whom all responsibility for social order and public welfare is referred. And its therefore one can hardly vote for the favour of Hobbes on the thought that these "liberty of men" and "unlimited power of sovereign" had no responsibility and obligations with regard to the actions it had enacted therefore was not inconsistent in any case.

[17]HOBBES T, Leviathan, (Oxford World's Classics), Oxfrod University Press, July 1998

On the other hand, in terms of legal formalism, were there the contradiction of liberty and authority under the administration of the thought that the impact of law does not extend over thoughts but only for actions.

As it is evident that no meaningful action without thought might be taken, it is visible that Hobbes has left a question mark behind: how could there be liberty of thought when men were free to do what the law did not restrict or regulate, when those actions were to be guided by "what their own reasons shall suggest?"[18] There is no doubt that there must be a part of reasoning, public rather than private in nature, that the leviathan was to be concerned about. Indeed, it appears that the sphere of thought was not to be given away entirely to private reasoning.

Of course, society always needs a professional to take part in decision making mechanisms on behalf of this new entity, and that person will be the sole sovereign. The commonwealth-establishing convention is not in fact a vice versa communication between subjects and their sovereign at all. In contrast, what makes difference is the relationship among subjects, all of whom have the same opinion to strip themselves of their native powers in order to secure the benefits of orderly government by obeying the dictates of the sovereign authority.[19] That's why the minority who might prefer a different sovereign authority have no complaint, on Hobbes's view: even though they have no respect for this particular sovereign, they are still bound by their contract with fellow-subjects to be governed by a single authority. Since then, the sovereign under his roof of thoughts is nothing more than the institutional embodiment of orderly government.

Due to the fact that the decisions of the sovereign are completely subjective, so long as they are understood and obeyed, universally, it hardly matters how they emerged. Thus, Hobbes's leaves a space for various constructive possibilities that the sovereign will itself be a corporate person—a legislature or an assembly of all citizens—as well as a single human being (possibly monarch). Regarding these three constructive forms, however, Hobbes himself provides that the commonwealth works most

[18] HUEGLIN T.Op.cit.7

[19] HOBBES T. Op.cit.14.

efficiently when a hereditary monarch concerns the sovereign role. For Hobbes, not surprisingly, conferring power to a single natural person who can choose advisors and rule consistently without fear of internal conflicts is the best fulfilment of our social needs. Thus, the radical metaphysical positions defended by Hobbes lead to a notably conservative political result, an endorsement of the paternalistic view.

Hobbes argued that the commonwealth secures the liberty of its citizens. Genuine human freedom, he maintained, is just the ability to carry out one's will without interference from others. This doesn't entail an absence of law; indeed, our agreement to be subject to a common authority helps each of us to secure liberty with respect to others.[20] Submission to the sovereign is absolutely decisive, except where it is silent or where it claims control over individual rights to life itself, which cannot be transferred to anyone else. But the structure provided by orderly government, according to Hobbes, enhances rather than restricts individual liberty. [21]

Whether or not the sovereign is a single heredetary monarch, of course, its administration of social order may require the cooperation and assistance of others. Within the commonwealth as a whole, there may arise smaller "bodies politic"[22] with authority over portions of the lives of those who enter into them. The sovereign will appoint agents whose responsibility is to act on its behalf in matters of less than highest importance. Most important, the will of the sovereign for its subjects will be expressed in the form of civil laws that have either been decreed or tacitly accepted. Criminal violations of these laws by any subject will be appropriately punished by the sovereign authority.[23]

Despite his firm insistence on the vital role of the sovereign as the embodiment of the commonwealth, Hobbes acknowledged that there are particular circumstances under which it may fail to accomplish its purpose. If the sovereign has too little power, is made subject to its own laws, or allows its power to be divided, problems will arise. Similarly, if individual subjects make private judgments of right and wrong based on

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[20] ibid.
[21] HUEGLIN T.Op.cit.7

[22] HOBBES T. Op.cit.18
[23] ibid..p24

conscience, succomb to religious enthisiasm, or acquire excessive private property, the state will suffer. Even a well-designed commonwealth may, over time, cease to function and will be dissolved.[24]

The power to establish hegemony over a bourgeois society whose stability and survival depended on one and the same idea of "Libertie."[25] It aimed at the forceful eradication of all factions with alternative visions of liberty in an individualised market society accepting the majority principle as the institutionalized guarantor of hegemony in thought and action. In such a society there was no place for subsidiarity as a principle of differentiated levels of decision-making. Such differentiation would only signal that hegemonic control over thought and action did not exist or had broken down. Instability and civil war would return.

There is one central assumption in Hobbes' construction of modem society that departs radically from all earlier European political thought: that the existence of groups, parties and factions must inevitably lead to civil war. Hobbes wanted to do away with all factionism. As a matter of fact, he denied the natural existence of groups and classes in society. Instead, he insisted that these factions were only the consequence of political power division. From here stem the modem assumptions of individual liberalism and the organization of modem liberal democratic politics recognizing the sovereignty of the people as individuals only, denying their access to the formal political process as organized collectivities, groups, regions, nationalities or classes.

No longer able to exclude the possibility of sovereign government by assembly rather than the monarch, Hobbes had to insist on strict majority rule to avoid the problem of divided power. The majority principle became the only peaceful means of political accommodation. Minorities had to be redefined strictly as minorities of individuals instead of dissenting collectivities.

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[24] ibid.

[25] ibid.p.35

b) The first federalist thoughts by Johannes Althusius

The other and older European tradition of political thought had always accepted the existence of groups and classes as natural building blocs of society. Plato took classes and factions for granted, organising them into a rigid caste system of productives, warriors and guardians. Aristotle held against Plato a more liberal vision of social stability in the mean: a plurality of group or class interests would all contribute to a healthy polity as long as an extreme polarisation between rich and poor could be avoided. From there, Machiavelli proceeded to analyze the crisis of the Florentine Republic as a consequence of excessive and corrupted social inequality. The Prince was to stabilise the conflicts of these factions, not abolish them. Even Bodin, first insisting on indivisible and absolute sovereign authority as did Hobbes after him, continued to see the usefulness of factions, groups and classes in a decentralised unitary system of administration. Contrary to Hobbes, the existence of factions was not seen as a consequence of political power division, but, conversely, the division of powers in organised politics was seen as the consequence of natural societal divisions.

The medieval theories of collective minority resistance against tyrants as well as the quasi-federal organisation of the Holy Roman Empire grew out of this older tradition. Both received renewed attention in the post-Reformation period of fragmented territorial consolidation and religious persecution. The Augsburg Religious Peace of 1555 had given each ruler the right to determine the official and exclusive religion in his territory. Moreover, the religious conflicts were superimposed by economic ones between the new bourgeois elites and the old feudal patriciate. Religious and modernising economic minorities sought to stabilise their existence through recourse to the old order of autonomy, plurality and quasi-federal coordination of spheres of influence.

In the Second half of the 16th century, many Dutch Calvinists who found refuge for themselves in German territories founded the Univeristy of Herborn, a “school of federal theology” which became a centre of political calvinism. In this School, one of the professors Johannes Althusius published a book of politics in which he attacked the new doctrine of undivided territorial sovereignty, attributing the rightful

ownership of sovereignty to the federally organized body of the people what became known as one of the most read books at that time.[26]

The early roots of the ‘federal’ idea can be explored in the writings of Johannes Althusius. Althusius, like many other profound thinkers, was a person whose thoughts well exceeded the appropriateness of the times.

The social starting point of Althusius' political theory was not the individual but an ascending order of autonomous yet interconnected community life from families and professional guilds to cities, provinces and finally the universal commonwealth.[27] At first impression there seems to be a reconstruction of the extant power relations of the old order and particularly, the attempt to rescue the solidaristic tradition of the smaller communities of that old order into the modern world of territorial state. Using the strategic stability of the Roman Empire the democratic virtues of Greekpolis was subjected. Practically, more complicated latter civilisation renders it as an attempt to autonomize the socio-economic and cultural-religious life of a plurality of communities within the new territorial context of modern trade and commerce.

Althusius' Politica thus was the first modem theory of federalism. The first modem conceptualisation of the principle of subsidiarity can be traced to his attempt to balance the allocation of powers between communal self-determination and the universal requirements of modem statehood.

c) Dawning Societal Federalism

The key concept in Althusius' theory of politics is "consociation": "Politics is the art of consociating men for the purpose of establishing, cultivating, and conserving social life among them."[28] The entire polity is a federally constructed edifice of multiple layers of consociations. Family and kinship are private and natural consociations.

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[26] HUEGLIN T.Op.cit.7

[27] ibid.

[28] ibid.

Colleges, guilds and estates are private and civil consociations held together by common professional and social interests. Cities and provinces are constituted from the various colleges, guilds and estates as particular public consociations. In turn, they combine in the formation of the commonwealth as the final and universal consociation. However, Althusius goes onestep further, discussing functionally limited as well as politically complete confederations among several commonwealths.

The overall result can be characterized as a system of "societal federalism" because the participants are both social and spatial consociations. Representation is therefore functional (professional guilds including an organized peasantry) as well as territorial (cities and provinces). Representation is also indirect because the administrative councils at each consociational level are composed of government representatives from the consociations at the next lower level, not of individual members of those consociations.

The purpose of consociation is the mutual communication of things, services and common rights. The provision of goods and services is based on the principle of mutual aid, but it also requires common regulation and administration. Political community is a common social enterprise including cultural, economic and political activities.

In order to establish the conceptual bearings of political community in a compound or federal polity, Althusius deliberately retracts a venerable principle from the medieval heritage of counciliar resistance against papal and imperial superiority, and directs it against the new absolutism of centralized territorial governance: "What pertains to all, must be approved by all." This means that, in matters common to all, the majority cannot decide and unanimity on the basis of consent must prevail. But it means far more than just a consensus requirement in decision-making. Its purpose is the organization of solidarity; hence the insistence on mutual communication and sharing, common property and counciliar decision-making. Politics is not a formal procedure of reaching binding decisions, but primarily a process of consensus-building.

Within a compound realm, the organization of mutual communication and consent proceeds from the concrete to the general. The narrower and more specific the

consociation, the more consent and unanimity can be expected. The wider and more encompassing, however, the more decisions have to be based on majority votes. As a corollary, legal basis and political reach appear more general as well as limited. Each member consociation retains autonomy over specific sets of "civil law," and the regulatory competences of higher levels of consociation are "explicitly" circumscribed and enumerated.

In this sense, Althusius can come to the rather startling conclusion that "a commonwealth appears the more secure and stable, the less power those have who rule."

d) Subsidiarity becoming a philosophical concept

The organization of political community in a federal commonwealth is based on a detailed concept of subsidiarity. But the essence of Althusius' principle of subsidiarity is not a self-centered autonomy over particular policy priorities. Instead, it establishes the adequate distribution of powers in a multi-layered confederation according to universal standards of social need and utility.

The specific "civil laws" of each consociational level are determined by "self-sufficiency" instead of by the maximization of growth. Subsidiarity circumscribes the dialectical balance between autonomy and solidarity. The regulatory power of the superior order is held to preserve the autonomous rights of each consociation which must not be diminished or augmented at the cost of another. The purpose of superior orders of administration is the equitable provision of living conditions for all.

Repeating the old formula of consensus requirement for matters pertaining to all, Althusius elaborates on the political purpose of this provision: It is not to be understood as a negative consensus requirement allowing each member to put out of the common interest, but a positive commitment to the establishment and administration of joint tasks requiring the "faculties, strength, aid and dedication of

all" This means, at least by implication, that subsidiarity cannot be misconstrued as a concept allowing for the maximization of self-interest or for parochial withdrawal.[29]

Subsidiarity appears here as much a constructive principle for the retention of particular autonomy as a commitment to common social and regional balance. The establishment and maintenance of minimum standards of social existence must be possible for all. If this is not so, subsidiary regulation from above becomes obligatory. In such cases the consensus requirement appears invalidated. However, it must not be forgotten that consent first leads to the establishment of common administration and the principles of solidarity to which it must adhere.

Subsidiarity in the political thought of Althusius is not a decision-making mechanism. Neither is it merely a conservative attempt to insulate the old orders against the new statist influences resulting from socio-economic modernization. Instead, it appears as a qualitative guideline for organized political cooperation in a civil society. In particular, Althusius provides the conceptual bearings of a community-oriented political culture and ideology that was very much a practical possibility at the beginning of the modem age. It was very much a different culture and ideology from the one Hobbes would re-create half a century later on the basis of individualized thought and action in a competitive market society.

The historical conclusion can be drawn that the principle of subsidiarity as a process of power-sharing among "fiercely autonomous" communities in a compound and multi-layered political system is indeed incompatible with the tradition and practice of an individualised market society and its conclusion, the hierarchical nation-state. It seems possible, therefore, to utilise the political theory of Althusius as a yardstick and heuristic tool to reassess both the current acquis communautaire and the future process of community-building in the European Union.

e) Recent Developments of modern age

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[29] ibid.p.9

In an internal memorandum to the President of the European Commission, Jacques Delors, it has been pointed out that the subsidiarity principle now anchored in the Maastricht Treaty can be traced back to 16th century European political thought, and in particular to the 17th century political theory of Johannes Althusius (1557-1638). This recourse to the history of European political thought seems to suggest that subsidiarity has its roots in an early-modern Europe not yet dominated by a fully sovereign nation-state system, and that it is therefore uniquely appropriate for the organisation of a post-nation-state European union. It is, in other words, the timeless operational principle of a federally organised democratic European polity. The same Delors, after the meeting held in Bonn with the President of the German Lander, the principle of subsidiarity began to play a particularly important role in the discussion preceding the adoption of the Treaty on European Union.[30] Furthermore, by November 1993, at the request of the European Council at Edinburgh, the Commission produced a report on the Adaptation of Community Legislation to the Subsidiarity Principle (Adaptation Report). The report identified the existing Community legislation in all areas that the Commission had determined to revise, either in the interest of subsidiarity or proportionality.

Throughout the preparatory stages leading up to the drafting of the TEU, political bodies expressed a strong desire to subject the application of subsidiarity to the control of the Court of Justice. Following the various reports of the Committee on Institutional Affairs, the European Parliament considered that “judicial guarantees must be given with regard to respect for the principle of subsidiarity” and that “ the Court of Justice should be given jurisdiction as a constitutional body, with the task of ensuring in particular that the division of the competences between the European Community and the Member States is respected.”[31] The parliament repeatedly insisted that “it is necessary to guarantee respect in law of the principle of subsidiarity by endowing the Court of justice with the appropriate powers and allowing the Community Institutions and the Member States to refer matters to it when they arise.”[32]

[30]GONZALES J.P., Op.cit.p.354
[31] TOTH A.G. Op.cit. p.205
[32] ibid.

However, what appears to be a European tradition for federal political organisation has also come under attack as a self-centred practice of interest-maximising nation-states in the post-Maastricht European Union. In particular, subsidiarity has been criticised as a decision-making principle allowing each country to retain full sovereignty over its own policy priorities, while leaving possible external costs to Community responsibility. Instead of mobilising consent for a European political community on the basis of democratic cooperation and socio-economic fairness, it facilitates a self-centred retreat from universal community goals.

All these questions warrant more discussion and reflection before federalism and subsidiarity can be embraced by critical thought as new paths toward the democratic organisation of social space. It will be argued that a legitimisation deficit of the subsidiarity principle as settled at present in the European Community structure does indeed exist, and that it stems from its historical and conceptual incompatibility with market liberalism as the dominant mode of Community regulation. From a contextualized discussion of early-modern political theory, it is observed that there is a departure of two different European traditions -- an older solidaristic one based on cooperation and consent, and a newer individualistic one based on competition and majority rule. A brief reconstruction of the subsidiarity principle in the political theory of Althusius will demonstrate that the European roots of subsidiarity are firmly grounded in the former tradition. A few concluding considerations will reflect on the possibility of making the future development of the European Union more compatible with this tradition.

3.The development of the Concept of Subsidiarity in political science:

There are various implementations of subsidiarity worldwide federal regions. Among them can be remembered such as Canada, Australia, Germany and Switzerland. These states and the mechanism of subsidiarity implemented within their territories may be helpful to set up an agenda for comparison for the current and possible future implementation within the European Union. And that will be the best level of studying to determine the existing current problems and on the other hand to determine whether the EU system might ever be a better organised one or not.

Actually this does not seem possible. The reason is certain that the great mass of governing in EU can not easily take the systems in small mass states like Germany, Switzerland and even Australia and Canada as a model as well. With the mass of population, economy, human resources, interstate structure and government policies; the most appropriate sample seems to be US for a Comparison with EU. Otherwise, the small states like Switzerland, Belgium and Germany may only be good samples for the concept to be understood.

For the commitment of the abovementioned purpose, in this chapter, firstly we have to find out the theories for the development of the concept.

So long as have been stated in the previous chapter, Subsidiarity has not figured as a term in worldwide constitutionalism consisting US, it plainly touches on issues of enduring concern to the federalism balance in this country as well. Defendents of subsidiarity in the European Community trace the concept to 20 th century Catholic social philosophy, citing a 1931 Papal Encyclical of Pius XI entitled *Quadragesimo anno*. According to the Document, subsidiarity requires that " (s)maller social units…not be deprived of the possibility and the means for realising that of which they are capable (and) (l)arger units… restrict their activities to spheres which surpass the power and the abilities of the smaller units" There we have to find a list of discussion starting from the centralisation-decentralisation as a purpose for these activities and carrying out allocational shifts, the analogy to domestic political systems, defined in terms of the "authoritative allocation of values" by Easton,[33] and the principle-agent debate.

a) The first debate: centralisation vs. decentralisation

We can compare centralisation and decentralisation with regard to their advantages. Specifically for varying local needs and preferences, decentralisation is about to respond more effectually by the local government. Costs can be lowered in planning and administration, more opportunities and incentives can be provided for policy

[33] SINNOT R./ Integration Theory, Subsidiarity and the internationalisation of Issues: The implication for Legitimacy

innovation and finally can give citizens greater voice in policy-making. On the other hand, centralisation can allow government to address problems having cross-border effects. Consumers can be protected against product risks, available economies of the scale can be exploit and policies can be coordinated more effectively. Finally, equality and political homogenity across a larger domain to reflect “shared values” can be promoted. Centralisation can also secure a level playing a field for fair trade; as states seek to limit “regulatory competition”. It is apparent that the theorical advantages of centralisation and decentralisation counterbalance each other. The following part will be conferred this debate through the lens of principle-agent theory.

b) Carrying out Allocational Shifts

Considering the current debate we observe that allocations do change. In order to exploit the advantages of centralisation, decentralised units of a tiered regime, may delegate authority to a centralised unit. Consequently, the centralised unit in such a regime may at some point devolve authority back to the Member States in case the decentralisation seems advantageous. In both cases, the government in the level of possessing the current authority has to seek a shift in allocation in the position what we call the allocational shift. Several reasons may cause an allocational shift. The original allocation may have been mistaken or remain insufficient with the advantages anticipated from that allocation never materailizing or other unintended consequences arising or the conditions may have been arising a necessity to a change in the current allocation. On the other hand there may have been technological changes, government capacity and ideological changes, which can also effect the duration of the allocation.

What mechanisms used to carry out allocational shifts? And how do these mechanisms work in order to secure the allocation to remain in the right way as it was intended? And how do lower levels of government retain a control on the higher level government in making centralising allocational shifts and vice versa? Its as well to layout the centralisation-decentralisation problems through the lens of the principle-agent theory for the means to help us determining the compulsory necessity of identifying the mechanism by which governmental units ensure that the authority they delegate to another gets used for the purposes of delegation (the understanding of a misuse or abuse). The argue is that federal systems of any kind feature several

characteristic mechanisms for sustaining the legitimacy of allocations of authority between different levels, and that policy debate surrounding proposed allocational shifts needs to include attention to these mechanisms along with the discussion of the appropriateness of centralisation or decentralisation.

c) Principle-Agent Theory

Long as the scholars have noted when one individual commits an action on behalf of another, or relies on the action of another the principle-agent issue come across.[34] The ind ividual taking the action is called the agent while the other affected by those action is called the principle where he is entitled to define, monitor and reward the actions of his agent. The challenge in the principal-agent relationship arises from two sources: first is the differences in interests between agents and principals which lead them to prefer different goals and strategies; and second is the information inconsistencies which come from the fact that "agents typically know more about their task than their principals do, though principals may know more about what they want to be accomplished."[35] The result remains the possibility that the agent may perform the tasks in ways, which do not conform to the goals of the principle while the principle might not be able to do anything about them.

There are prescriptive implications of the agency approach. In the view of economists who brought it as a problem, the issue is how to minimise the agency costs what is thought to be a solution by organisation analysts or "a neat kind of social plumbing" to address the need for specialisation, decentralisation, and delegation. From both viewpoints, the principle-agent relation helps to identify to regulate positive mechanisms to regulate the relationship between the two types of actors.[36] For the means to decrease agency loss, principles typically exercise a method of control; systems of monitoring and incentives. Principle can devise ways to obtain information about the agents action with regard to the observed outcome by using the systems of

[34] For the seminal overview, see John Pratt and Richard Zeckhauser, / "Principals and Agents: An Overview" in John Pratt and Richard Zeckhauser,/ Principals and Agents: The Structure of Business, Boston : Harvard Business School Press, 1985.

[35] İbid. p.3

[36] WHITE C., / "Agency as Control," in John Pratt and Richard Zeckhauser, Principals and Agents: The Structure of Business, /Boston : Harvard Business School Press, 1985, p 188

control. And the matching up with the mandates the agent was given. Incentives with the need constrain the agent aligning with his interests better with those of its principle's. These mechanisms can be most generically described as different types of "agency ties" which form the ongoing web of connection between the agents and their principles.

The question at hearth is the problem of applying the principle agent theory to the federal governing structures-means different levels of government acting on behalf of the specific insights that can be drawn from this framework regarding the mechanisms governing allocational control in tiered contexts. When we come to the point to apply the principle/agent framework to explore the design of government and jurisdictional relations and the philosophical grounds we first have to determine who the principle and who the agent is in this context. Surely, the issue is highly complicated and contested one. If we start from the premise that the principle is the actor who holds political legitimacy and has been entrusted with the "original" authority to act in a given sphere, we need to refer to the relevant legal delineation of powers or attribution of competence.

Constitutions can be viewed as contracts, which design the story of socio-legal process of citizenship from the lower to the higher level of jurisdiction. The reverse is also possible. In both Germany and US for instance, many state constitutions explicitly shift authority originally endowed to city or county governments actions as the agents of the central government. That the functions of principal can be split between levels is a core characteristic of federal system, as reflected in Wheare's widely accepted definition:[37]

[In a federal system] powers are divided between a general level of government which in certain matters...is independent of the governments of the associated states, and, on the other hand, state governments which in certain matters are, in their turn, independent of the general government. This involves, as a necessary consequence, that general and regional governments both operate directly on the people; each citizen is subject to two governments.

[37] WHEARE K.C./ Federal Government, 4th edition, New York: Oxford University Press, 1964, p. 2.

As a result, in cases where the upper level government acts in a given area, we need to specify whether, for the purpose of analyses, authority has become reversed and the upper level is now acting as the principle (surely powers were originally delegated to it as an agent.) or the upper level is still acting on the basis of authority delegated to it by lower level units which continue to hold jurisdiction and define the upper level’s mandate.

Another point about agency issue is highlighting the importance of strategic control ; control connected with the formulation of the agent’s task and overall objects. This formulation also constitutes the initial constraint on the agent’s margin of manoeuvrer. For instance, a sales agent can be asked to act “in the best interest” of his firm, or maximise the number of products sold in a given day. Similarly, the scope of an agentive’s delegated authority in intergovernmental contexts can be more or less specifically delineated by prevailing norms and specific legal acts.

Secondly, agency theories examine mechanisms of operational control; control connected to the on-going implementation of the task delegated to the agent. In the contents of this issue are all monitoring techniques that range from obligations of reporting regularly. There may be a trade-off between such mechanisms and the first strategic aspects of control, in that the principal can afford to be flexible at the broad strategic level, if he can devise reliable modes of monitoring his agent's action. Similarly, in tiered systems of governance, principals may more readily delegate tasks to agents if they can subsequently monitor the implementation of the commonly agreed objectives by the latter.

There is a third way of controlling the agent’s action- namely by reducing its autonomy to the point where the principle shares in the activities of the agent. Therefore, a joint venture with former suppliers strengthens agency ties by allowing the principle to become a party in agent’s operations and consequently does the agent has a say in the shaping the mandate given to it. The question herein is the degree to which the principal and the agent actually share their respective functions, or participate in each other's deliberation and actions. This issue of power sharing is obviously crucial in governance contexts, where the degree of states' participation in

federal structures reflects their level of influence or subordination. This is true whether we are concerned with the level of states' control in their capacity either as principals or as agents.

Taking into account about these varying mechanisms we observed how allocational shifts carried out in government levels, and how agency ties and bilateral obligatory relations operate. The next section is the last sequence of the philosophical- theorical analyses on subsidiarity. In this section the political-constitutional means of subsidiarity will be observed.

e) Subsidiarity through political analyses: Bermann's criterions

There have been many disputes and inconsistencies arisen about the implementation of the principle of subsidiarity. The grounds for these problems were firstly that subsidiarity was an extending elusive concept that could be seen in every part of the federal structures secondly another problem was that subsidiarity as a law principle had different implementations in different fields concerning that the concept itself as being a part of the power allocated that varies in implementation.

Following will be observed the main fields that we seriously consider and apply this principle through law in cases about European integration with regard to the criterions of George Bermann in his article: "taking subsidiarity seriously…"and some of his ideas about these criterion will be referred.

Subsidiarity expresses a preference for governance at the most local level consistent with achieving government's stated purposes. Although the virtues of local governance are sometimes treated as self-evident, they actually depend on our willingness to draw connections between local governance and certain more fundamental values. It is important to identify these values, both because subsidiarity should not be viewed in isolation from them - as if an end in itself - and because intelligent application of the subsidiarity principle on any given occasion may require knowing precisely what values are at stake.

i. Self-Determination and Accountability.

Individuals are generally thought to have a greater opportunity to shape the rules governing their personal and business affairs when those rules are made at levels of government at which they are more effectively represented[38]. Self-determination is the most important issue to be debated. There's no doubt that individually and in community psychology, self-determination progress is the first step of the participation to self-governing. On the other hand, self-determination is a democratically sense that gives the autonomy of accountability both in the constitution, the economy and all policies including the sub-level of governing in a larger community.

This, certainly does not mean that self determination is a primitive action starts with the enactment of legislation. On the contrary, the participation herein minimises by this level and increases by the amendments for the current regulations, which means a social dynamic performed by the public reactions in a long period for the creation of new policies, and finally an inspection mechanism of the local implementation of these policies. Since there had been a bilateral relation between the population and the local government-soon the direction of the bilateral action towards government by population is the power of support and election and vice versa is the governments acting with the agency ties to the people is the creation of these policies and regulations. The first remains a political account for the local government in the larger community and the latter remains an indirect self-determination action for the local population.

ii. Political Liberty.

The local government exercising subsidiarity may advance a more liberal and democratic tone of consultation with the local population amongst the defragmented larger decision making institutions. However, the debated position remains a counter product unwillingly derived limited individual liberty as James Madison supported forcefully underscored the advantages of larger units of government in limiting the political power of "factions," or dominant local interests, the framers of the U.S.

[38] BERMANN G./ Taking Subsidiarity Seriously: Federalism in the European Community and the Unites States/ Columbia Law Review, March 1994 Vol:94. P340.

Constitution acted on the basic belief that individual freedom would be advanced by preventing the undue concentration of power in the same governing hands.[39]

iii. Flexibility.

The legal order for larger communities and federal structures-for instance the constitutions- may not afford much flexibility the reason that they have to be strict for the purpose of strengthening the central authority to keep the unique implementation of law all over the larger community. Flexibility in this case is minimised just regarding the circumstances of the case. On the other hand, as much as the authority is decentralised, ability of affording for flexibility extends. Flexibility becomes a natural product of self-determination. Self-determination allows the community to reflect more closely the unique combination of circumstances - physical, economic, social, moral, and cultural - that obtain at any given moment or to respond appropriately to the changes that occur from time to time. And this process continued by the enhancement of the law enacted by the local government. By enhancing the law's responsiveness to the population it serves, subsidiarity affords a flexibility that advances democracy at the same time as it produces good government. [40]

iv. Preservation of Identities.

The tendency to preserve the social and cultural identity in local governments is a well-known issue. The autonomy given for power of codification and governing will soon lead to policies safeguarding the local, social, cultural identity. One result of organising power in ways that promote self-determination and responsiveness is that local populations can better preserve their sense of social and cultural identity.

v. Diversity.

Subsidiarity also fosters diversity within the larger polity. The benefits of self-determination and responsiveness afford diversity at social and cultural approaches

[39] Ibid. p341

[40] ibid..

and may also be considered helpful to social, cultural and political experimentation that means profitable as an instrument.

vi. Respect for Internal Divisions of Component States.

A further virtue of subsidiarity - one with particular resonance in the Community - is its tendency to preserve the formal allocations of power internal to the Member States themselves.[41] The transfer of legislative and decision-making powers to a higher authority-which are the Community institutions obstructed the mechanism of ongoing experiment of federalism in the Federal Republic of Germany. The similar effect may happen to the other Member States that have the same federal Structure. The argument herein is that the subcommunities in the federal states-in Germany: die Landern- can not be represented efficiently through the use of transferred authority to the institutions of the Community.

Each of these values - self-determination and accountability, political liberty, flexibility, preservation of identities, diversity, and respect for internal divisions of component states - has figured importantly in the rhetoric of subsidiarity in the Community, sometimes in conjunction with still other values. More often, however, the term subsidiarity is invoked in the interest of some vague sense of "localism," and without any clear indication of the positive values meant to be served.[42]

[41] ibid.
[42] ibid.

PART II

Principle of Subsidiarity within the European Community

With the conclusion of the Treaty on European Union at Maastricht in December 1991 a new word has entered the fashionable language of Eurospeak: Subsidiarity, sometimes mysteriously referred to as 'the S-word'[43]And this new concept was firmly connected with the other notorious 'the F-word': federalism.

1. Subsidiarity and the European Community Treaties

The European Parliament was the first of the Community institutions to introduce the principle prominently into debates over European federalism. The Draft Treaty on European Union, which the Parliament produced and overwhelmingly endorsed in 1984 as a blueprint for Community reform, featured subsidiarity as a general constitutional rule.

In all matters falling within the concurrent competences of the prospective European Union and the Member States, the Union was only "to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately." The Draft Treaty proved much too ambitious in its federal designs to suit the Member States, and the Luxembourg intergovernmental conference that was convened in the mid-eighties to draft amendments to the Community treaties ultimately settled on a more modest document, the 1986 Single European Act (SEA). The SEA expressly embraced the principle of subsidiarity, though in one domain only - environmental protection, one of the new competences that the SEA conferred on the Community. While it did not pass unnoticed, this limited appearance of subsidiarity took backstage to other more conspicuous features of the SEA, most notably the decision to permit the Member States to adopt Community legislation in the Council of Ministers by qualified majority voting rather than by unanimity, where

[43] KEES VAN KERSBERGEN AND BERTJAN VERBEEK Op.cit.p215.

such legislation was deemed necessary to create a barrier-free internal market by the end of 1992. It was easy to dismiss the SEA's limited recognition of subsidiarity as peculiar to the politically sensitive environmental agenda and, even then, as purely hortatory in nature.

If the SEA did not itself spotlight the principle of subsidiarity, it nevertheless created the conditions that would soon make subsidiarity one of the Community's most prominent concerns. Under the system of qualified majority voting, a Commission proposal could ripen into Council legislation over the opposition of several Member States. This change made it easier for the Council to pass legislation, which in turn made the Commission bolder in its legislative initiatives and more determined in advancing them. The Member States were left in need of new instruments for controlling the Community institutions, especially since the SEA had also extended the Community's sphere of action to new areas (worker health and safety, research and technology, and regional development, as well as environmental protection). Expectations were that the next few years would bring still further treaty amendments, and still new legislative competences for the Community, among them the creation of an economic and monetary union.

It is no coincidence then that the 1992 Maastricht Treaty on European Union (TEU) - which emerged from two 1990 intergovernmental conferences, one on economic and monetary union and the other on European political union - put subsidiarity in plain view, making it a central principle of Community law.

Article A of the TEU proclaims that in the new European Union, "decisions are [to be] taken as closely as possible to the citizen." Article B of the TEU requires the Community institutions, in pursuing their objectives under the TEU, to "respect ... the principle of subsidiarity," a principle spelled out as such in a new Article 3b added to the EC Treaty:

“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."

Article 3b can be broken down for ease of analyses into two parts.

a) The Community should act within the Limits of its Powers

It is evident that the Community only has competence within the limited areas in which it has been given power. The extent to which this serves as a real limit over the sphere of the Community has been reduced by two developments. The first one is the range of areas in which the Community exercises some form of authority has expanded with each major revision of the Treaty and the second one is the Community's legislative competence broadly through recognition of the implied powers doctrine and through the use of Article 235 as the Court of Justice has interpreted.[44]

b) The exclusive Competence of the Community

Article 3b clearly sets out that subsidiarity will only fall to be considered with respect to areas which do not fall within the exclusive competence of the Community. If an area is within the Community's exclusive competence then there is no legal obligation to apply the subsidiarity concept.[45]

Herein, the problem is that there is no ready criterion for distinguishing between those areas which are, and those which are not, within the Community's exclusive competence. The Treaty itself is not explicitly framed in these terms. The commission has taken the view that an area falls within the exclusive competence of the Community if the Treaties impose on the Community a duty to act, in the sense that it has sole responsibility for the performance of a particular task.[46] It argues that there is a block of exclusive powers that are joined by the thread of the internal market including: free movement of goods, persons, services and capital the Common

[44] CRAIG P., DE BURCA G./ EC Law Texts, Cases &Materials./Oxford University Press 1997. P113.
[45] Ibid.
[46] See 1st report of Commission on Subsidiarity, COM (94) 533.

Commercial Policy, competition; the Common Agricultural Policy (CAP); the conservation of fisheries; and transport policy.

For the means to emphasise the connection between subsidiarity and the expansion of the Community's powers, the drafters of the TEU put language into virtually every new treaty chapter underscoring their intention that the Member States continue to exercise primary responsibility in these new Community spheres. This is the case with education, vocational training, culture, health, consumer protection, and industrial competitiveness, each of which the TEU brings within the sphere of Community action. The drafters took similar precautions with matters that the TEU does not make into Community competences as such, but nevertheless expressly subjects to Community "coordination."

Some observers have doubted that the drafters of the Maastricht Treaty could possibly have taken the principle of subsidiarity seriously if they coupled it with so significant an extension of Community powers. A recent study by leading European economists concludes that the drafters erred not only in making macroeconomic policy and social policy matters of Community concern, but also in failing to reduce the scale of Community involvement in existing competences, such as agricultural policy, labor and capital mobility, regional development, and much of environmental regulation.

Commentators who have examined the problem suggest quite different outcomes on the subject. Toth provides the argument in favour of the broad view stated as below:

“ The Court has confirmed time and again…that in all matters transferred to the Community to the Member States, the Community’s competence is, in principle, exclusive and leaves no room for concurrent competence on the part of the Member States. Therefore, where the competence of the Community begins, that of the Member States ends. From then on, Member States no longer have the power unilaterally to introduce legislation. They can only act within the limits of strictly defined management/implementing powers delegated back to the national authorities by the Community Institutions. As the Court of Justice has stated: ‘ The existence of Community powers excludes the possibility of concurrent powers on the part of the

Member States.'[47] Even the fact that during a certain period the Community fails to exercise a competence which has been transferred to it, does not create concurrent competence for the Member States during that period. This principle also follows from, or is closely related to, the doctrine of supremacy of Community law, which of course is a basic tenet of Community law."[48]

However, the central of the view by Toth here is debatable and seems extremely Neolithic. Relying on the idea that the Community's exclusive competence exists in those areas in which the Member States have transferred power to the Community disregarding the point whether the Community exercised this power and he concludes that subsidiarity can not apply to any matter covered by the original EEC Treaty, including : the free movement of goods, services, persons and capital; the Common Commercial Policy, competition; the Common Agricultural Policy (CAP); the common organisation of fisheries; and transport policy. The Community does not possess exclusive competence within many of the areas in which it has been given some power, such as the environment, economic and social cohesion, education and vocational training, consumer protection, and social policy. However, he rightly points out that policies can be designed to serve more than one function: Community legislation on the environment might also seek to facilitate the completion of the internal market; on the broad view of the term exclusive competence- this would preclude the use of subsidiarity.[49]

Another view to be taken into consideration on this issue is the view of Steiner who adopted a narrower construction of this important phrase: exclusive competence. The following paragraphs adopted from the author:

"The EC, even at its beginnings, was not concerned with dividing competence between the Community and the Member States, but with sharing powers over a wide range of activity in order to achieve certain common and mutually beneficial objectives. Whilst it was clear that in some areas there would be little scope for action by Member States if the desired goal was to be achieved- a customs union is a

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[47] See ERTA case, Case 22 / 70, Commission v. Council. (1971) ECR 263,276
[48] for the view by A.G. TOTH see O'KEEFFE D. & TWOMEY P.M.(eds.), Legal Issues of Maastricht Treaty (1994), Ch.3,39-40
[49] CRAIG P., DE BURCA G. Op.cit. p115

necessary prerequisite to a single market- in most areas competence was concurrent. This did not mean that States and the Community could legislate on the same issue at the same time, nor the States' competence in these matters was unrestrained (since they are bound to comply with the rules of the EC Treaty), but that their action would be complementary or supplementary. Once the Community has exercised its powers under the Treaty, to regulate a particular matter within a certain area of activity, clearly States are not free to enact measures which conflict with those rules. As the volume and the scope of the Community law increase, so will States' powers diminish. But there are few areas of activity in which Member States do not retain some degree of competence. Thus it is not surprising that commentators have had difficulty in identifying areas in which the Community has exclusive competence, nor that the Heads of the State refrained from doing so at Maastricht.

One is forced to the conclusion that the only areas in which the community has exclusive competence for the purposes of Article 3b are those in which it has already legislated …Surely the competence of the Member States ends, not as Toth suggests, where the competence of the Community begins, but where its powers have been exercised… The fact that the competence to act, even to act comprehensively, has been granted to the Community by the Treaty does not, and surely can not mean that its competence to act in these areas can not be subject to the subsidiarity principle. To allow whole areas of activity to escape scrutiny under paragraph 2, simply because the Community has potential competence in these areas, would surely undermine the very purpose for which this provision was intended."[50]

The assumption brought into view here by Steiner stands on the point that subsidiarity will be disregarded where the community has actually exercised its power in the areas that the Community has exclusive competence. Here the assumption determining the scope of the areas the subsidiarity principle will be in application that intends to keep the floodgate to attack the court of justice who closes and tries to keep the scope safe for any sort of widening malice. Even though its highly doubtful that this sort of underlying purpose is true there is really a weak point in Steiner's view which seems to be a trauma descended by the ideas imposed by the Common law- case law system;

[50] for Steiner's view see O'KEEFFE D. & TWOMEY P.M.(eds.), Op.cit., Ch.4,57

taking inspirations from practical and casuistic methods. That means community must have exercised the power in the relevant area, and for determining this area the action of the to exercise must be expected. On the other hand, the arisen disadvantage in this view is that if the exercise of the Community happens through the instrumentality of legislation enacted by the Council, Parliament and the Commission; or through judicial decisions made by the Court of justice, how would these institutions use their discretion about the principle? Should they use it in favour of the application of the subsidiarity principle or the inverse-especially when the lack of causality is taken into consideration?

Another view that is between these two counter parties argue about the competence tests those became familiar among the doctrine. Through the lens of this view:

".. in areas of shared jurisdiction between the Community and the Member States, the Community may act if a two-part test is met. The first part of the test, which appears illusory, requires that the Member States be unable to achieve the objective sufficiently. Of course, the definition of "sufficiently" would be important, if not for the second part of the test. The second part of the test allows Community's action if such action can be better achieved by the Community. The second part of the test appears intended (by use of the connector 'therefore') to be an explanation of the firs part of the test. In this sense, perhaps it is also an evisceration of the first part of the test."[51]

The last view by Trachtman also seems to be a simple formula of the article 3b through a personal standpoint of view. As clearly seen with the subsidiarity example, important issues concerning the interpretation of the actual Treaty provisions still require clarification. Many questions come across over the amenability of the notion to judicial supervision, its relationship with other principles of Community law guiding power allocation, and how to assess whether or not a particular task falls

[51] TRACHTMAN J.P. / L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity / Harvard Law Journal Vol 33., Spring 1992. p468.

within its ambit. Resolution of these issues will also further inform the debate concerning the type of legal order constituted by the European Community.[52]

2. Subsidiarity and the evolution of European federalism with regard to the EU –US comparison

Writing the history of the federalism adventure in the European Community we have to realise the likewise story of the federalism process that we come across and draw guidelines to analyse the system in Europe.

In European studies, mostly the comparison of the system transformation to federalism with the system transformation to non-federal subsidiarity is very similar to a comparison between the US and the EU. The motivation of these studies are arising from the question that whether the EU, one day, will evolve into the "United States of Europe" or revert to a looser Community of States. Both have the divided-allocation of powers that can be conferred from the structures of federal implementations within the examples. Moreover, for the developing EU and the ongoing experience since the Single European Act there are certainly other examples to confer with the system in Australia, Canada and Germany.

The main principles, which federal systems are founded on are firstly, safeguarding unity of people under a unitary single judicial body; secondly, the cohesion of different legal systems for both specific common and regional needs, such as the establishment of a common market, a common security system and a competitive economy. Another point is to find out the grounds that make this comparison between EU and US possible. "Is assuming a federal system realistic to make such a comparison?" should be, however, the first point to be argued. Within the federal perspective of view, there's no doubt that the US, on one side, is a federal body that gives possibility for discussion in this study. Contrarily, on the other side, it is highly doubtful that on may ever find an optional concept other than federalism that just suits

[52] CASS D.Z. / The word that saves Maastricht ? The principle of subsidiarity and the division of powers within the European Community/ Common Market Law Review. Vol.29.1992, p1135

on EU, in its current position. What we have to do, is to find out the detailed features of the both sides of the compared arguments and the points where they have variation from each other.

As the philosophy of Enlightenment spread over Europe, the tendency to develop the roots of liberalism and democracy shifted the schemes of intellectual unity contrary to the previous view of unity on religious grounds. In the inter-war years, the theory of functionalism, what became known as the earliest conceptual approach of the Community integration was constructed by David Mitrany. For Mitrany, "the functional approach emphasises the common index of need. There are many such needs that cut across national boundaries, and an effective beginning could be made by providing joint government of them.".[53] This was the first fewer in favour of a thought of a federal Europe. Giving special emphasis to the role of the nation state in the international system provides the starting point for all approaches to study and analysis of European Integration. Two approaches- functionalism and federalism – precede the Inception of the European Community system.[54]

Beginning with Konrad Adenauer up to Gerhard Schröder, as well as German Chancellors, the European Federalists have seen the European integration in the perspective of a step-by-step evolution towards the proposition of United States of Europe, with the model of United States of America in view.

The first question, we have to deal with, will be what a federal system constitutes and secondly we'll debate the characteristics of the EC and its constitution for the means to summarise why the Community may be characterised as a federal system: The proper balancing of powers and responsibilities between two levels of government: the federal and the (sub-)national.

In the US, the limited federal actions characterised the long initial period of dual federalism what became the centre of models suggested for the future structure of EC.

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[53]For the relevant part of essay, M.Holland European Integration from Community to Union;Craig/DeBurca,Op.cit. p.6

[54] For the relevant part of essay see; J.Lodge, The European Community and the challenge of the future, Craig/ De Burca, Op.cit.p.7

But as soon as the change in the political circumstances the presidents Kennedy and Johnson fostered a new period of cooperative federalism what became known as the creative federalism. A step backwards to more substate responsibilities ,however, was initiated by Nixon and Reagen under the "rhetoric" of New Federalism and Clinton's national Performance review continues the move for decentralisation of the decision making power.[55] As soon as in the literature there has been many popular federalism concept in order to point out a classification, the well known and long debated among them are models like "national federalism" (Samuel H. Beer), "pragmatic federalism" (Glendening / Reeves), "corrective federalism" (Micheal P. Zuckert), etc.[56]

The practical federal model laid down in EC is almost in the same direction with the model in Germany. Not surprisingly, German lander had remarkable role in the development process of EC; firstly by ratification of the Single European Act in 1986 and secondly, by meeting of the prime ministers of the Lander with the president of the EC Commission, Jacques Delors. In the developing period of EC the authority upon member states seemed to be likely a police over the Member States, which takes less consideration of the State powers. Speaking about the necessity of a more centralised powerful supreme high authority for the purpose of providing peace in Europe the principle to built the federalism on seems to be agreed upon as common ground; it is what J. Elazar calls

"Contractual noncentralisation, the structured dispersion of powers among many centres whose legitimate authority is constitutionally guaranteed"[57].

There's a self-determination and accountability advantage through the use of principle of subsidiarity, especially when circumstances of decentralisation allow the regions for a greater opportunity to determine the limits of rules governing at the level of governance where they are more effectively represented. Another point is the participation that increases in the making of the law and policy that reflects the

[55] BRIFFAULT R. Paradoxes of federalism: Ingolf Pernice's "Harmonisation of legislation in Federal Systems: Constitutional, Federal and Subsidiarity aspects"-Comments. /Essays on Liberty and Federalism/ Texas A&M University Press/ October 1988p.61
[56] ibid.
[57] Daniel. J. Elazar, Exploring Federalism, p. 34 (1987).

interests of the population concerned and enhance individual's sense of autonomy which advances the democratic values as done by the previous case as well.

Another view to point out is political liberty. On the basis of subsidiarity, the democratic values through its tendency toward the fragmentation of power to be advanced.

Comparability of EC with the US and the other federal systems effecting the European Integration. The first of all questions we face here is that whether the US system is comparable with the structure of the system in the EC. The EC is not a state; does not have a territory and people, nor does it have even any direct enforcement capacities: police or army.. It has little responsibility in external policies, no power at all for security and military affairs and its "bureaucracy" consists of about 15,000 employees compared to the 3.1 million federal civilian employees in the U.S. The Legislative action of the EC is, basically, taken by the Council of Ministers and the Member States with the active involvement of the European Parliament. Administrative action and dispute settlement mechanisms of the disputes arising from the execution of EC legislation are a matter for the national, regional authorities. Public funding in the EC is not a direct action, but it is a subject to national programs and projects.[58] However, there exists still a debate on the structural form of the US as to whether this structure forms a federal state in the political concept or not.[59] Finally, the constitution of EC is in the making. It is a process rather than an enactment such as the US Consitution, which, with the exception of a handful enactment, and the conclusion of common values of revolution, has been stable over the centuries.

Regarding the autonomy and authority of the sub-level government, EC federal structure is more distinct from the other federal states and particularly from US as well. More autonomy-almost full sovereignty except the case that the Member States transfer authority to the Community institutions-meaning less authority is the main principle that could deliberately be seen through the policy making process by the Council where the Member States are directly represented. EC law is directly

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[58] BOTHE Micheal / Constitutional, federal, Subsidiarity Issues / Essays on Liberty and Federalism, Texas A&M University Press, October 1988.,p60

[59] BRIFFAULT R. Op.cit. p.67

applicable to the citizens of the Member States, and, by the vice and sophisticated approach of the jurisprudence of the Court of Justice, entrusted with direct effect and supremacy over conflicting national law. One may call the Treaties that have founded the EC which by supranational means have a judicial body, “the constitution of the EC” including rules safeguarding the national “integrity” will be subject for a comparative case for the US Constitution. The Treaties, herein, have been ratified by the Member States, but not voted for by the people. Both in the EC, for this reason: the indirect participation of the peoples of Europe, and in the U.S. the question is almost the same: “A constitution mean a convention among sovereign states or a contract among the people of the United federal Structure?” South Carolina emphasised in 1828 and 1832 its right of sovereignty giving the right to decide upon the constitutionality of congressional legislation, which may even lead the state to leave the federation. The federal system that was co-operative and valuable which safeguarded a vision of human co-operation although when people talked different language; the language of dual federalism. That was the Supreme Court in 1869 ,which made clear that the Constitution in all its provision indicates that the federation is indissoluble states.[60]

The European Court of Justice, which has based its decisions on the elusive and vague provisions of the EC Treaty, has a very similar role with the Supreme Court, which has acknowledged a broader intrusion of federal legislation in domains of state competence. In *Garcia v. San Antonio Metropolitan Transit Authority,* the Supreme Court, surprisingly, held that states cannot expect the judiciary to protect their powers from Federal encroachment by invoking the Tenth amendment; the States must protect their powers through the political process.[61] This approach, certainly could not be an option in Luxembourg. However, the fact that, in its decision in *New York v. United States,* the Supreme Court stopped the Congress from compelling the States to enact and enforce federal regulatory programs. Thus forbidding, as George Bermann expresses it “federal commandeering” of a state regulatory apparatus, shows that the Court is ready to set limits to the federal power on the basis of the Tenth Amendment.[62] Comparatively, legislation through directives is a ghost

[60] BOTHE M, Op.cit. p59
[61] ibid.
[62] ibid.

commandeering in the EC multilevel governance System. Execution of EC Law is generally left to the Member States authorities, similar to the situation in Germany where a complicated system of agency deriving from "statehood" of the Lander is seen in their power to implement the laws of the federal legislatue.

Compared to "Lander" in Germany, the position of the States in U.S., still, seems to be much stronger than that of the Lander in the Federal Republic, where the Lander benefit from clear constitutional rules and judicial protection by the Federal Constitutional Court(Bundesverfassungsgericht) However, the German system herein need to be detailed to be understood what is meant within the previous sentence. First of all, it is as well to recall that Germany's federalism was not invented by the founders of the Bonn Republic; Members of the Parliamentary Council (Parlamentarischer Rat) in the late 1940's. On the contrary, German federalism has fundamentals in the long tradition so that some authors specifically determine 'German federalism' amongst the early political approaches of Europe including the 'British Conservatism' and 'Catholic Church'. When the Constitution of Federal Republic of Germany was adopted in 1949, the majority of the Bundesrat (of course, the name was Parlamentarischer Rat at that time but at the same moment the adoption of the federal Constitution that became Bundesrat, that was the base for my unintended use of this new concept) was performed by the supporters of decentralised federal state with autonomous lander. To cut the long story short, here can be said that besides the far-reaching traditional autonomous federal structure in Germany, the federal states in U.S. Federation remains more autonomous and authoriser. The relationship of this study with the EC system is the prospected analysis of the particular vagueness of the articles 100 and 100a on harmonisation and the reserve clause of article 235 and the attributed powers. The situation in the implementation process of the EC is clearly different. There has never been a case brought before the Court of Justice to be annulled on the grounds that a legislative act of the Council is illegitimate that there was no competence of EC to enact legislation at all. But this situation tends to change for the future since the principle of the subsidiarity has been expressly inserted into the Treaty. The Court of Justice will have to give effect to this provision to the benefit of national autonomy and individual freedoms, and as a result,

it may turn from a “motor of integration” conducting, as George Bermann says, a “federalist policy” to a Court of the European citizen.[63]

Taking into consideration all the above-debated issues, it sounds like its not impossible to make a comparison between the two systems even on the basis of early evolution whereas one of them is still in that stage, even the other is in the stage of conclusion. One of the seven original characteristics of American federalism formulated, in 1950, by Edward S. Corwin is also applicable to the EC, appearing a basic difference in attribution of both levels of action throughout administrative and judicial means, in order to enforce application of its legislation.[64] In case we assume the system in Europe is federalism, there are some characteristic features of it. First of all, in this presumed federal structure there is no area of federal power and competence that consists of all legislative and administrative functions and judicial review as well. Some exceptions of merging functionalism and extensions of institutional powers can be viewed within the Articles 145 and 100a and 5 of the Treaty of Rome. Firstly, article 145 of the Treaty of Rome allows the Council to confer upon the Commission powers for the implementation of the rules laid down by the Council. Secondly, the Court of Justice has conferred upon the Commission the power to take direct action even in harmonisation measures under article 100a of The Treaty of Rome. But finally, there is no area where Community law is enforced only by Community authorities, and the Court of Justice has stressed that the obligation of the Member States under article 5 of the Treaty to implement Community legislation is a general principle of the Community law. Even in the fields of competition and external trade, where the EC has exclusive competence, the application and the enforcement of the EC secondary legislation are based on the cooperation with, or are within the responsibility of, the national authorities.[65]

The abovementioned position of EC similar to a federal a structure- lack of direct enforcement (however, there is direct applicability instead) EC involvement of authorities, administrative and judicial, of the member States in the implementation and the enforcement of the Community law- does not actually affect the comparison

[63] ibid.
[64] ibid. p.61.
[65] ibid. p.61.

with the earlier federal US. The final scene might have been described as follows; the nature of the European federalism arising from the conceptual tradition of Catholic Church and developed as a system by the German federalism remains still the co-operative federalism shape of the earlier U.S.(the period between the 19th Century and 1960s)and in part coercive and competitive not necessarily based upon the model of dual federalism as it is visible in the U.S. of today.

EC law is directly applicable to the citizens of the Member States, and with regard to the jurisprudence of the Court of Justice, which is a result of this reason overcoming the conflict of laws through supremacy and direct effect. Consequently, the EC "federal power" is distinct from, and autonomous, with regard to the authority of Member States.

3. Subsidiarity in European Political Exercise with Regard to the European Council Guidelines

Soon as we argued in the previous sections, subsidiarity may function in different ways. The system in the Community, however, seems to be casuistic in the construction process of constitutional instruments. Soon as the Council holds meetings, every year and they are intergovernmental, where the recently issues are debated and concluded. In the conclusion, declarations stated the projects and proposals for the future visions of the Community, for instance the enlargement. The likewise issue that have been debated since the ratification of The Treaty of Maastricht, but, originally, very earlier that remained postponed for many times is subsidiarity. Consequently, the abovementioned intergovernmental process seems to be casuistic but truly not. It seems not possible that we can deny the political authority that shape the future of this Community. The existing political authority and political varying tendencies as we mentioned in the previous sections 'Catholic Church, British Conservatists and German federalists' in the early ages and 'Christian Democrats,

Socialists, Greens etc. in the modern ages; in the participation of their representatives, who have struggled to enforce the Community policies through the lens of their approach. Many dialogues, lobby actions come across even many times behind the closed doors. There had been preparatory stages for legislation, especially if the legislation subjects and amendment in the founding Treaties and even if it is a Constitutional point such as the principle of Subsidiarity. Sure the latter view reflects a merely legislative process instead of a casuistic method and that becomes the phenomena about it. Through the lens of functionalism, the principle may function in different ways, but the most important amongst them is the legislative function. Questionably, each participant in the legislative process of the Community - the Commission in proposing (and in some cases issuing) a rule, the Parliament and other bodies in expressing an opinion on a proposed rule, and the Council in adopting a rule - can determine whether the measure is in consistency with the principle of subsidiarity "before, respectively, proposing, commenting on, or adopting it and it can likewise disfavour, oppose, or reject the measure, as the case may be, if the measure fails to do so".[66]

In the view of functionalism, the legislative process evaluates the interpretive function as well. In the case that the Council or the Commission are taking subsidiarity principle as a guideline when adopting legislation, the Community institutions including the Court of Justice-and at the last stage the Member State officials- should in the case of any doubt respect to the interpretation. It is highly disputable to cover the problems of what sort of interpretation to be performed and from which points to get inspiration. But, basically, and shortly, in order to argue that the interpretation must be the one that most "respects" the principle would not be wrong. On the other hand, it is a compulsory way for the legality of the Community action.

Finally, the principle of subsidiarity can perform a confidence-building function by reassuring the constituent states, and notably the regions and other subcommunities within the states, that their distinctiveness will be respected at the European Community level.[67] However, this does not seem to be a respectful view even when we consider that the interpretive function we naturally come across after legislation

[66] BERMANN G. Op.cit.p.366
[67] BERMANN G. Op.cit.p.367

sets out the interpretation most ‘respect’s the principle. So long as we met in the doctrine, the abovementioned interpretation can not be through the lens of confidence-building and distinctiveness, instead it can be through the lens of ‘closeness to the citizen’ and ‘the best level of action in government’ disregarding that if the indirect effect is a ‘confidence-building’ or ‘distinctiveness’ function.

The European Council, for the purpose of drawing guidelines through the lens of this legislative and interpretive function of the principle, held a meeting in 1992 what later on became known as the Edinburgh Summit. This meeting and the final declarations can be deemed to be the official interpretation of the principle.

The contents of the concept deeply discussed in the previous sections. In the meetings held by the European Council at Maastricht, Lisbon and Edinburgh in 1991-1992 was debated on the merits and scope of the principle. At Edinburgh, of course the only task for the European Council was not the principle of subsidiarity. However, that time the priority over the all tasks was the clarification of how the subsidiarity would be secured within the Community system.

In Lisbon, at the European Council meeting in June 1992 it was decided, first, that the United Kingdom, the Council’s president during the second half of 1992 would compose a handbook of subsidiarity for EC law-makers, and, second, that existing EC legislation would be screened for compliance with the subsidiarity principle.[68] With respect to the former, subsidiarity’s fundamental ambiguity immediately surfaced after the first draft of the handbook. On the basis that it would reduce the Commission’s powers too much, the handbook was rejected by the Council of Ministers at their meeting of 9 November 1992. In the view of the legislative function of the principle, the Council pointed out that the principle as a legislative instrument was binding for all Community institutions. However, that would be in the limits of altering their respective functions and to affect the institutional balance. Soon as Bermann states that the European Council sought by the purpose of its remarks on subsidiarity to reassure the Member States and their various neighbourhood that the post-1992 Community would genuinely respect their separate interests and capacities

[68] KEES VAN KERSBERGEN AND BERTJAN VERBEEK.Op.cit. p.215

that specifically concluded necessary with respect to the Danes' rejection by referendum of the Maastricht Treaty and the closeness of the French vote, and in anticipation of political and judicial challenges in the UK and Germany.[69] Here, the author again boldly refers to his so- called ‘confidence-building’ function.

Nevertheless, the Edinburgh Summit on 11-12 December 1992 resulted. Two memorando were adopted: the first one was an attempt to define the principle more precision, and the second one was an overview of the Commissions assessment of Existing EC Legislation. In this first part, subsidiarity was defined as permitting the Community to act only if its objectives “can not be sufficiently achieved by Member State Action” and “can be better achieved by action on the part of the Community”.

The defendants of autocratic bureaucracy at the Community level warmly welcomed the adoption of the principle of subsidiarity. Later on, surprisingly, the opponents did the same with regard to the approach of the Council to interpret as two-sided coin. It rapidly became the ‘Euroconcept, all can admire by giving it the meaning they want’.[70] Another view by Bermann is that the “guidelines” by the Edinburgh conclusions are disappointing for each of them for different reasons.[71] It seems that the subsidiarity principle has primarily served to reconcile the conflicting interests of UK, Germany and the European Commission.

The first guideline counsels the institutions to consider whether the problem addressed by a proposed community measure “ has transnational aspects which can not be satisfactorily regulated by actions of the Member States”[72]

The second guideline directs attention to whether a failure by the Community to act "would conflict with the requirements of the Treaty (such as the need to correct distortion of competition, or avoid disguised restrictions on trade, or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests."[73]

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[69] BERMANN G. Op. cit.p.368
[70] The Economist 4 July 1992, see KEES VAN KERSBERGEN AND BERTJAN VERBEEK.Op.cit. p.220
[71] BERMANN G. Op. cit
[72] Edinburgh Conclusions, see BERMANN G op.cit.p.370
[73] Edinburgh Conclusions, see BERMANN G op.cit.p.370

The third guideline requires from the Council of Ministers, before acting, to find that the Community measure that is contemplated "would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States."

Taking into account that the members of the committers of “drawing guidelines task” were the representatives of the Member States in an intergovernmental conference, one can not expect the conclusion to be in favour of and completely satisfying for one Member State. Subsidiarity has been an instrument to reconcile the conflicting interests of the principle actors of the Community: The United Kingdom, Germany, France and the European Commission. The United Kingdom, obsessive member of Community on the completion of the integration process, would lead to narrow the national sovereignty. Germany had feared that suffering from the resistance of the German Lander on the basis that the integration would conclude as the reduced level of regional competence. France and the Commission were interested in the widening of the central power of Brussels through the program in 1992.

4. Subsidiarity in Legislative Analysis and the Principle of Proportionality

In the previous sections, the principle of subsidiarity has been observed through the lens of its definition as a concept of law, as much as its scope and implementation areas. Consequently, regarding the fact that the concept is a very recently challenged principle introduced to the Community will lead to a more extending application for the future. The on going experiment of subsidiarity within the Community remains a great deal of experience, boosting the clarification of conceptual and procedural actors. One of the important actors is the legislative body, which is under analysis in this study. Others are legislative principles, such as proportionality that will be referred in this part. It demands the observation of the legislative inquiry and its institutional implications, the distinction between policy measures and harmonisation measures what a legislative norm requires. Final one is the necessity of making

conscious trade offs between principle of subsidiarity and the other legislative principles.

In the non-exclusive Community power, apart from very peripheral national duties, the exercise of the subsidiarity stays very close to the Commission that has a monopoly over conceiving and drafting legislative proposals. The European Council at Edinburgh suggested that the Commission should consult with the Member States at an early stage on "the subsidiarity aspects of a proposal," and include in the explanatory memorandum accompanying any proposal made to the Council of Ministers a statement "just[ifying the] initiative with regard to the principle of subsidiarity."[74]

The 1993 Inter-Institutional Agreement on Procedures for Implementing the Principle of Subsidiarity requires all three institutions to have regard to the principle when devising Community legislation. In this explanatory memorandum concerning proposed legislation, the Commission must provide, a justification for the measure in terms of the subsidiarity principal. In case it entails more extensive Community intervention, the amendments to the measure by the Council or the Parliament must likewise be accompanied by a justification respecting to the principle of subsidiarity. Moreover, all three institutions are deemed to have checked that the use of the legal instrument or the procedure and the content of the proposed measure are not inconsistent with the principle of subsidiarity as the conclusion of a legitimate impulse.

The “subsidiarity impact analysis” might cause the Commission to conclude either that no alternative measures the Member States could reasonably be expected to take would adequately serve the Community’s purposes and that the Commission proposal should go forward, or that the adequate Member State alternatives in fact exist and that the Commission proposal should not proceed.[75]

Here, talking about the analysis of the different forms of Community action that would not be much absurd to take a look at the substantive and procedural conditions,

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[74] BERMANN G. Op.cit.p.378
[75] BERMANN G. Op.cit.p.379

which must be satisfied if such action is legal. Consequently, in the Community law, it is deemed to have been that the first part of substantive and procedural conditions for the legality of Community action is “general principles” and the second part is “the principle of subsidiarity”. Soon as “the principle of proportionality” that will be referred in the following paragraphs of this chapter will be counted in the contents of the primitive, though it has indirect concern with the latter. Following the Edinburgh Summit, The Assembly of Regions of Europe drew up a detailed “questionnaire” on Subsidiarity for anybody proposing Community action to complete and to attach to any such proposal, accompanied by an explanatory memorandum. The questionnaire satisfies the abovementioned conditions required for the Community action to be lawful and covers the following issues:[76]

“..

1. The basis of competence conferred within the Treaty on European Union: (a) The planned measure is based on which article? (b) Does the article contain conditions limiting recourse to Community competence?

2. The objectives sought by the Treaty: (a) What concrete objectives are sought by the planned action? (b) What reasons justify the need to take action? (c) Is the action related to any previous Community action?

3. The need for the Community action in question: (a) Which Member States are concerned by the problem? Does the problem appear the same way everywhere? (b) Which Member States have dealt with this problem to date? How did the states in question solve this problem? (c) Are there alternative solutions at lower echelons at Community level? If yes, what are they? (d) Why can’t the objectives in question be attained at Member State level? (e) What would be the disadvantages and costs if the Community failed to intervene? (f) what arguments can be used to prove that EC goals would be more easily attained by the measure in question than by measures at Member State level?

4. Implementing Community action: (a) Would co-ordination between the Member States or Community support for national measures be enough to attain the

[76] Ibid.

objectives? If no, why not? (b)Has the Community already made a recommendation that has not been followed by the Member States? (c) Is mutual recognition of different regulations possible? If no, why not? (d) Is complete harmonisation necessary or is it enough to enact minimum provisions? (e) Would it be sufficient to adopt a regulatory framework? If no, why not? (f) Is a uniform and directly applicable regulation (order) necessary or would the adoption of a directive be sufficient? (g) Would a regulation of limited duration suffice?

5. Extending Community actions: (a) Is the adoption of implementing regulations necessary? If necessary, at what level will they be adopted? (b) If implementation of Community action is limited to Community level, on an exceptional basis, why is implementation at Member State level or regional level insufficient? (c) If verification of implementation is incumbent upon the Community, why can this responsibility not be carried out by the Member States? (d) Who controls the attainment of the objectives of Community actions and on what criteria?"

According to the abovementioned statement, there have been many criteria provided for Community action for the means to achieve the Community action compatible with the provisions of the Treaties. A legislative analysis might be concluded in any way, but the eventual point here is that the Commission's impact analysis could constitute the other institutions' own initial assessments or should not limit those institutions own factual inquiries and perform their own political tendencies in Commission's proposal.

The Commission took its November 1993 Adaptation Report as a further occasion to describe the type of analysis that subsidiarity entails. While depicting subsidiarity more as "a state of mind" than "a set of procedural rules," the Commission nevertheless affirmed that subsidiarity required it to answer in the form of an explanatory memorandum a prescribed set of questions before proposing a new measure within the Community's and Member States' shared competence. Among the issues to be addressed in any such "justification" are:[77]

[77] BERMANN G., Op.cit.p.380

(a) What are the aims of the proposed action in terms of the Community's obligations?
...

(c) What is the Community dimension of the problem (in other words, how many Member States are involved and what solution has been applied to date)?
(d) What is the most effective solution, given the means available to the Community and to Member States?
(e) What is the specific added value of the proposed Community action and the cost of failing to act?

In principle, the use of any instrument (whether a directive, a regulation or a decision)[78] is subject to a decision in Council, which means the delegation of the competences by Member States to the Community is not intended as a blank cheque; member states can still exercise influence when particular pieces of legislation are proposed.[79]

Moreover, the coin has two sides in the impact analysis. We talked about the impact of Commission's action that would spread the initial assessments of the other institutions, and now probably a counter part of the "impact" action we find the member States that sounds to be in an indirect process. Individually, member states can have a decisive impact on Community legislation, both when delegation under Article 235 was required to establish competence and when particular texts were presented to the Council. The Single European Act had introduced decisions by qualified majority in most areas of policy.[80] Therefore, the Member States have

[78] Under article 189 of the Treaty of Rome, the Community has three types of instrument with which to exercise its competences: regulations, directives and decisions. Regulations are directly binding and addressed to the Member States. These are used when precise provisions of implementation are required (for instance in commercial policy). Directives specify objectives to be reached by the member States, which leaves them to choose the appropriate form and method in their own legislation. Decisions are directly binding on those to whom they are addressed, and are used typically when the Commission has to rule on the legality of particular actions (for instance in competition policy).
[79] Making sense of Subsidiarity: how much centralisation for Europe? A CEPR Annual Report, 1993
[80] Until the Single European Act in 1986, unanimity was also required for most decisions of the Council (Member States usually had a right of Veto). This was due not so much to the terms of the original Treaty (which had provided that in certain areas such as agriculture, unanimity would be replaced after a transitional period by qualified majority voting) as to the "Luxembourg Compromise" of 1966.

gained the decisive influence power by using the right of veto and the threat of veto[81] only in matter for which competence is established but the unanimity requirement has been kept.

On the other hand, The Council can delegate its power to the Commission whereas an example of this position was experienced with the implementation of competition policy. The Commission decides and its powers are subject only to the non-binding advice from the competition policy authorities of the Member States. And this exceptional case becomes one of the six procedures of legislative process within the Community.[82]

Back to the relationship of Commission with the principle of subsidiarity in 1993, the Commission also undertook to publish its explanatory memorandum that we have detailed above in the Official Journal together with the proposals to which they relate. According to the Commission, these procedures - which it had already begun to follow - had caused it to put forward fewer legislative proposals in 1993 than in prior years.

Although the Commission is the right body to make the initial investigative and analytic investment into the subsidiarity aspects of legislation, the European Council at Edinburgh nevertheless placed greater emphasis on the Council of Ministers' role in guaranteeing subsidiarity, presumably because of its greater decisional authority as an institution. [83]

As we have stated above, the principle of proportionality has become an often used concept in relation with the principle subsidiarity. Despite their apparent closeness to

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[81] This was used in foreign policy matters as well. For many years one of the Member States used the right of veto and threat of veto (that became a *de facto* right as well) within the affairs of Community with Turkey on the bases of Ankara Agreement.

[82] We can count the six procedures as follows:

i. Commission acting alone,
ii. Council and Commission acting alone,
iii. Council, Commission and Consultation with Parliament
iv. Council, Commission and the co-operation procedure with the European Parliament
v. Council, Commission and European Parliament: the Article 189b Procedure
vi. Council, Commission and the European parliament :Assent
vii. The Exercise of delegated legislative power by the Commission.

[83] BERMANN G., Op.cit.p.382.

each other, those two principles- of proportionality and of subsidiarity- vary considerably and their respective fields of application cannot be superimposed.[84]

There have been many distinguishing common features of the two concepts both in conceptual- theoretical meaning and in their application. But four of them are founded to be considerable with the guidance of Bermann. The first one is that the principle of proportionality governs exclusive fields of action while the principle of subsidiarity operates in relation to overlapping areas of competence. Secondly, while the principle of proportionality does not require an exercise of power, the principle of subsidiarity comes to be an instrument to determine the right level of government to act. Thirdly, while the principle of proportionality relies on a supervision or principle, subsidiarity, as a principle of primary law, constitutes a criterion by direct reference to which power to act is conferred.[85] And finally, the principle of proportionality helps to determine whether a measure is lawful, so that in each specific case it must be appraised in accordance with strict criteria of legality, subsidiarity is based on a criterion of appropriateness, which calls for such a wide-ranging power of appraisal that its examination presents extremely complex problems.[86]

The European Council held at the Edinburgh Summit underlined the close correspondence between the principles subsidiarity and proportionality. The Council stated that the former was dealing with the level of government to act that means "the Community should act or not?" and the latter was dealing with the Community's preferences of action in the legal agenda set up by the Treaties. Essentially, the process in question is not that simple.

The Court of Justice had derived the principle of proportionality from Continental principles of constitutional – administrative and criminal law. There have been various linguistic formula of proportionality are found. The concept of proportionality is mostly developed in German law. It appeared initially in the context of policing, as a ground for challenging measures on the basis that they were excessive or unnecessary in relation with the objective, which was being pursued. The formula

[84] GONZALES J.P. Op.cit.p.369
[85] ibid.
[86] ibid.

derived from the German law has a consensus that evaluates three factors: the suitability of the measure for the realisation of the desired objective; the necessity of the disputed measure, in the sense that the agency has no other option at its disposal which is less restrictive of the individual's freedom; the proportionality of the measure to the restrictions which are thereby involved. Being now, as a well-established principle of the Community law, proportionality has the following tests in its formulation:[87]

i. Is the disputed measure, the least restrictive, which could be adopted in the circumstances?
ii. Do the means adopted to achieve the aim correspond to the importance of the aim, and are they necessary for its achievement?
iii. Is the challenged act suitable and necessary for the achievement of its objective, and one, which does not impose excessive burdens on the individual?
iv. What are the relative costs and benefits of the disputed measure?

Any of the abovementioned tests requires us to address as a set of both prior and subsequent issues in order that we can reach a meaningful answer to the proportionality inquiry.[88] Within the context of Community, the Court of Justice has developed and enforced the notion that Community measures must rely on a reasonable relation to the conclusion proposed and must produce a net benefit, and must represent the least burdensome available. This relationship, at the same time, means that the Commission, The Parliament and the Council is actually not compelled but at least assumed be hoped to consider the principle of proportionality in making their legislative decisions. Consequently, it would not be wrong that the principle of proportionality within the Community has become a principle of judicial review.

[87] CRAIG P., DE BURCA G., Op.cit.p.340
[88]In addition, the measure must bear a reasonable relationship to the objective - presumably a legitimate one - that the measure is intended to serve. This may be regarded as the doctrine's "rationality" component. The third test we mentioned above is regarded as the doctrine's "utility" component. Finally, the measure chosen must represent the solution, among the various alternatives that were available for achieving the prescribed objective that is least burdensome. Each of the three elements of proportionality has at least some resonance among levels of judicial scrutiny recognised in U.S. constitutional review.

On the other hand, both the Maastricht Treaty and, even more explicitly, the guidelines of the 1992 Edinburgh Council have the distinct merit of clarifying that proportionality is not only a judicial doctrine for the Court of Justice to apply in reviewing the legality of Community action, but also a legislative doctrine for the political branches to follow in their policymaking as well. The reason is classically the principle of proportionality and the principle of subsidiarity are boundary through the lens of institutional duties for the Community institutions. The Edinburgh guidelines go further, implying that once subsidiarity determines that the Community should take action, proportionality then influences the action it should take. That remains subsidiarity's natural relationship with proportionality.

The suggested way would be for the institutions to take the European Council rigorously at its word and not entertain the proportionality question until the subsidiarity question is settled. Using this methodology what the Community has to do is to refrain from taking measures when the above stated objectives be achieved by the action taken at the Member State level. Another fact here is that a Community-level measure might impose fewer burdens, and thus constitute a less drastic means to the same end, means that in the same position of the abovementioned case Community action could satisfy the proportionality inquiry more or less better. In this case, the problem of making a preference between the two principles of Community law has arisen. If we choose the first option, we sacrifice the principle of proportionality in the name of realising and covering the requirements of the objectives of the principle of subsidiarity.

The other probability in this case would be to view that subsidiarity requires more effective Member State action than the Community action. If we assume that the action at or below the Member State level would impose greater burdens than Community action which means that extent would be infringing the objectives of the proportionality test, then by definition it is not equally effective. Considering this option, basically, subsidiarity would not require the Community refrain from acting for the purpose of remaining the proportionality objectives be satisfied. However, this remains only an assumption and in consideration subsidiarity never deters the Community from taking action to challenge the proportionality favours. On the

contrary, subsidiarity finds itself systematically sacrificed.

All that have presented above concerning the dilemma we met under some circumstances that subsidiarity and proportionality goes opposite directions are clarified. There surely have some solutions that the Community Institutions can escape from the existing dilemma. One of the solutions is to relax the proportionality test so as to accept Member State action substituting the Community action. In this option, the case must be not requiring additional burden and substantial enough that can provide a balance between the payment from proportionality and the income from the subsidiarity. Vice versus, the Community institutions can relax the subsidiarity test, the proportionality advantages and subsidiarity's preference for localism should be kept apart in a reasonable distance. However, these sort of solutions only complicate the problems more. First of all, what objectives are going to be used by the Community institutions when deciding that relaxing the test of each principle which one of them will be favour? For this reason, to achieve this purpose in a fair method, there must be other criteria set up to distinguish the cases in favour of each of the principles. More criteria require more detailed legislative proposition work, when preparing legislative actions, and that may cause the turn over the balance of uniformity of the Community action. Secondly, new competing concepts will arise, for instance 'closeness to the citizen v. decreasing burdensome' 'self-determination, accountability, flexibility, respect for local identities..etc v. proportionality requirements'…The probable conclusion, surely, will be turning back to the debates of welfare state in the ages of Hobbes and Althusius. Another option to escape from this dilemma is to perform a common test that involves both the requirements of two principles. First, a common agenda of objectives to be set up. Second a system that performs the balance between each principle, uniting the divergent points and decreasing the conflicting points, to be built. Nevertheless, there is a weak point for this assumption, which reflects the scope of the both principles would be narrowed in case of operating the principles just on the stage that the principles do not conflict each other.

Making likely trade offs between the two principles, the discussion is held through the lens of functionalism. In addition, it seems it's not necessary to keep a focus on the subject through the lens of institutional benefits. With respect to these considerations,

shortly, the analysis may show that a Member State action does far more harm from a proportionality point of view than it does well from a subsidiarity point of view. Furthermore, conversely, that a Community measure does far more harm from a subsidiarity point of view than it does good from a proportionality point of view. The relation, the conflict between the two concepts and principles seem to be overcome as a legislative companionship as a conclusion of future political preferences.

5. The Court of Justice vs. "the elusive concept"

Within the framework of the EC Treaty, the interpretation and application of Article 3b is subject to the jurisdiction of the Court in the same way as that any other provision of Community law. However, it seems that the drafters at Maastricht sidestepped the question of whether the principle of subsidiarity would be justiciable before the Court.

When the European Council finally addressed the question at Edinburgh in 1992, it displayed deep ambivalence, declaring, on the one hand, that subsidiarity "cannot be regarded as having direct effect," but, on the other, that "compliance with it by the Community institutions subject to control by the Court of Justice." The question which imposes itself herein is "how could the questions – a floodgate of a constant litigation, as both national and community legislation will be open to challenge, at both national and community level, on the grounds that it infringes Article3b[89]- come before the Court of Justice?

The most likely (most probable) litigants about the principle are the groups of individuals, sub-national authorities, and the Member States themselves. Considering the individuals, the statement in the Edinburgh Annex is not determining since it is not boundary for The Court of Justice.[90]Contrarily, the Court of Justice may take inspirations from this Annex for interpretation. Under this view, while individual

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[89] TOTH A.G. / "The Principle of Subsidiarity in the Maastricht Treaty / 1992 Common Market Law Review, 1079-1105, at 1101.
[90] NEUWAHL N. "A Europe Close to the Citizen?: The 'Trinity Concepts' of Subsidiarity, Transparency and Democracy, September 1994, Symposium held in Istanbul, EC Institute of the University of Marmara.

litigants in national courts might not be permitted to invoke the principle of subsidiarity to avoid the application of otherwise valid Community measures, legal challenges to Community measures could be brought on grounds of the principle of subsidiarity directly at the Court of Justice. Because standing as a party to sue the Community institutions before the Court of Justice is highly restrictive, and because the statute of limitations on such actions is in any event extremely short, the Council's solution appears to make the principle of subsidiarity justiciable without at the same time opening the floodgates.[91] All we have talked from the beginning about the elusive nature of the concept, leads to every Community measure would be subject to attack the Court of Justice on Subsidiarity grounds. Questions in connection with subsidiarity may, therefore, come before the Court via the national judge or, if appropriate, in a direct action provided for by the Treaties.

Assuming justiciability, the principal question of judicial review is whether the Court of Justice should treat subsidiarity primarily as a substantive or a procedural requirement. It is as well to state that casting subsidiarity in procedural rather than substantive terms will best allow the Court of Justice to promote respect for the values of localism without enmeshing itself in profoundly political judgments that it is ill-equipped to make and ultimately not responsible for making.[92] The abovementioned feature of the concept causes the inquiry even more difficult for the Court of Justice to deal with. Before enclosing itself to a connection with abovementioned problems, the Court of Justice may look forward to meet the other options-competing lawsuits- to establish that the institutions have taken into consideration at national levels or not. Taking this test into account, any inquiry may impose the political institutions to contour their arguments on the central classifying measures and leading the problems that really worth issuing may be addressed at the best level of government, which takes the abovementioned issues into consideration. Moreover, a decisional balance, which reveals that the institutions genuinely have considered the possible Member State alternatives leading to action is likely to get considerably more appreciation and thus receive wider political spectators among the European public opinion..

According to Bernard, the subjected sort of review shouldn’t be exaggerated, since

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[91] BERMANN G., Op.cit. p.390
[92] ibid.p.391

there are limits to the resources that the Court of Justice can or should expand in verifying whether the political branches actually resorted to subsidiarity and whether the inquiry was a genuine one.[93] Nevertheless, possible "subsidiarity impact analysis" is not a reliable due to conditional deterrence. However, the Court's performance to enforce the rather elusive proportionality principle suggests that it may be capable of drawing the necessary lines.[94] At the first stage, the Court should not attempt to monitor the performance of such analysis. Otherwise the Court's policing will cause the political areas to perform the required examinations more seriously but as well as the case is an exemption, say for instance; if the values that the subsidiarity inquiry can be expected to serve - self-determination and accountability, personal liberty, flexibility, preservation of local identities, diversity, and respect for the internal divisions of component states - are important enough.

Regarding subsidiarity as a procedural principle, the Community institutions satisfaction upon their institutional prerogatives over the Community action should be conceived in order to trigger proceeding to act. However, for the means to assess fully the merits of subsidiarity, it is also important to contemplate the situation in which the institutions ultimately refrain from action because they conclude that the Member States, left to their own instruments, can successfully realise the Community's commitments, and to evaluate the jeopardies of the institutions' initiation to act on that belief.[95]

The Member States could not have acted as expected, or their actions might not have accomplished the proposed conclusions. Nevertheless, at least theoretically, the institutions' analysis taking the principle of subsidiarity into account has to give consent to the Commission at the work of Community's choice in favour of not acting with what the institutions' preposition of commitment. In case the Commission feels confident on the intervention of the Community, it will surely consider any type of measures necessary to balance the allocation between institutions and peripheral

[93] BERNARD N., The Future of European Economic Law in the light of the Principle of Subsidiarity, Common Market Law Review, 1996 Vol:33, p.633-666. at 634
[94] ibid.p.392
[95] BERMANN G./ Taking Subsidiarity Seriously: Federalism in the European Community and theUnited States/ Columbia Law Review, March 1994 Vol.94

agencies.

Another question, herein arises as the justiciability of the principle of subsidiarity before legal dispute mechanisms. The German Constitutional Court has found out that the abstract provisions of federal subsidiarity in German Constitution, designing the relationship of Bundesstaat with lander, are nonjusticiable.[96] The German Constitutional Court (Bundesverfassungsgericht) decided on grounds of 'necessity' for federal legislation in areas of concurrent competence, essentially points out that to be "a political question" decided by policy makers without judicial obstruction. But deference to the political branches on subsidiarity does not require that the principle be made wholly nonjusticiable, any more than deference on proportionality requires that result.

That was the view of German Constitutional Court for the justiciability of the concept in German law. Within the context of the legal system of Community, the justiciability, a term widely used and known, is somewhat different from the German law comparing with the use of term within context of the Community law.

Toth discusses the three conditions of justiciability as follows:[97]

"….Because the way in which the Court of Justice has been set up and operates under the Treaty, the question whether a particular issue is 'justiciable' (that is, capable of judicial resolution) cannot be answered by a simple "yes" or "no", but depends on three further questions which must be asked in the following logical order:

1. Does the Court of justice has jurisdiction to deal with that issue? (the question of jurisdiction)
2. Is there a remedy (a form of action) whereby the issue may be brought before the Court, and, if so, by whom?(the question of admissablity);
3. Does the Court have power to determine the substance of the issue? (the question of substance or substantive jurisdiction)

[96] BERMANN, Op. Cit.
[97] TOTH A.G., Op. cit. p.272

A lack of anyone of these (that is, a negative answer to any of these questions) means that the issue is not justiciable before the Court."

It is a general principle of law that the Court of justice has jurisdiction only in cases, which the Treaties grant exclusive jurisdiction to it.[98] Article 3b contains the rule itself, appears in the amended Treaty, which forms Title 2 of the Treaty on European Union. There isn't any similar provision granting exclusive competence under other former Treaties and within the second and third pillars of the European Union; but there are references to this provision in the Preamble and in Articles A and B of the Treaty on the European Union. According to the express provisions of Article L, the Preamble, and Titles I and V and VI, including the Articles A and B do not fall within the jurisdiction of the Court of Justice.

"…Therefore, the first conclusion to be drawn is that, on purely jurisdictional grounds, the principle of subsidiarity is not justiciable before the Court of Justice except in so far as it has been incorporated in the EC Treaty…"[99]

The final argument quoted from Toth is the product of a view of a continental lawyer who, inflexibly, does not act beyond the boundaries of statutes. On the other hand, the next question arises the conflicting points here.

A matter can only be brought before the Court of Justice by means of an action or procedure specifically provided for in the Treaty. Nevertheless, as we mentioned above there is no provision in the original Treaty of Rome for submitting issues of subsidiarity to the Court. However, this does not mean that issues of subsidiarity can not be brought before the Court of Justice. There are two main ways in which a matter can be brought before the Court of Justice: by means of a direct action initiated in the Court itself; and by the way of a preliminary ruling procedure whereby a national court refers the matter before the Court of Justice. The importance of the distinction is that the extent of the Court's power of review is different depending on the procedure by which a matter was brought before it.

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[98] NEUWAHL N.A. Shared Powers or Combined Incompetence? More on Mixity, Common Market Law Review, 1996 Vol:33.p.667-687
[99] ibid.p.273

The first way to put forward along the legal procedure before the Court of Justice is the provision of Article 173. Under these actions, it seems to be possible to challenge an act adopted by the Council on the grounds that the prerequisites for Community action, as laid down in Article 3b were not satisfied. Therefore, the act exceeds the limits of the Community's powers claims Toth.[100] But, however, the terminology of the Article 173 requires 'lack of competence' or 'infringement of the Treaty'[101] In case of the argument 'lack of competence', the dilemma arises that the matter which subsidiarity deals with already be within 'non-exclusive' Community competence.

Another form of direct action by which subsidiarity issues that might be brought before the Court is an action for damages under Article 178 and 215(2) of the Treaty of Rome. This would also be a particularly suitable remedy that reverses the Community legislation on grounds of subsidiarity. This legislation may cause the Member States heavy expenses; for example to comply with environmental standards or with consumer protection requirements.

The principle of subsidiarity may also be infringed by Member States like the Community Institutions do. The Commission under article 169 of Treaty of Rome or another Member State under Article 170 of the Treaty of Rome, may be brought before the Court on the grounds that the original action, as stated in the article 3b, falls within the scope of the exclusive Community action. Therefore, through this process, the Court of Justice might be called to review the national legislation.

Another way the Court of Justice may be entailed to fall the exercise of subsidiarity through the legal procedures is the application of Article 177 of the Treaty of Rome. By this procedure, a national Court may refer a point of Community law to the Court

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[100] Toth, Op. Cit.

[101] The second paragraph of the Article 173 is as follows:

"…………

It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law, relating to its application, or misuse of powers.

……………"

of Justice for a preliminary ruling where the point is either the interpretation of the Treaty or the interpretation or validity of an act of a Community Institution.

Having considered the various ways in which subsidiarity issues may be brought before the Court of Justice, the lack of a distinct provision that provides such a principle to be a ground of review before the Court of Justice does not mean that the Court is keeping a distance with the principle and has no exercise on it. On the other hand, this current posing of subsidiarity as a refugee legal principle and concept in the Court of Justice's legal agenda remains much restrictive arising from the limited nature of the Court's jurisdiction. The case law keeps itself influencing within the Court of Justice through the advantages that the elusive and vague nature of the principle remains it available.

Here, in this context, referring another recent development within the Community keeps our minds in touch with the thought that would be much more effective in the destiny of subsidiarity than expected. A new charter of human rights to be adopted within the Community legal system may take the charge. Soon as the Community does not have an exclusive Court of Human Rights, each of the issues arising from that charter seems to be candidate to become a subject for the exercise of the Court of Justice. The Court has already been discussing the human rights issues trying to perform an exclusive Community fundamental rights agenda through the influence of its case -law. Recently, the Court has determined that 'free movement of a worker' - one of the five freedoms of the Internal Market-, is a basic fundamental right for the Community regarding the Treaties that is known as the Community Constitution. In the view of the universal agenda of human rights these to be named as the 3rd generation of the fundamental rights. The development of the case law process goes further every day and in the context of fundamental rights menu widens in scope. So long as the history of Community law enhanced, the same matter experienced in the application of the principle of proportionality may be a sample for the embryonic form of developing principle of subsidiarity within the Community law.

Conclusion

In this study I tried to examine the principle of subsidiarity regarding almost all-possible issues through the philosophical and practical view of the concept.

There are two main discussion points I would like to underline in the conclusion part of my dissertation.

One of them is the philosophical means of the principle that contents the historical, philosophical evolution and the evolution within the political science. In this part, the concept is deemed not only a philosophical subject but also a practical instrument as well. Historically, as the subject of welfare state has started to be a debated, and the conceptual appearance of the federalism, subsidiarity had been a practical style. The early ages of the roots of the concept witnessed that the issue was dependant on the classical political conflicts of governing balances.

On one hand, more centralised state powers in Europe, empowered empires those dominate the people, the arguments of social state- social action concentrates. The church feels banished and weak as a local power and the poor commons away from social aids. The church in need of state intervention and respect from the people directly proportional with the social aid it can provide. Subsidiarity becomes the hero who could balance the empowerment of the level of governance between state and the church, that satisfies the social stage of priests and parishes and ghetto groups close to the church. The slogan in the early ages had down in this text: “closeness to the citizen”

Consequently, the nation state in power was not the best of the fashion in the early ages. On the other hand local governments and regional powers existed with their

identical and economical resistance. Subsidiarity in the following era was just fitting on their requirements; keeping apart from the central government from periphery to be protected economically. The national identity also companied the general tendency of the new ideas of allocating powers.

The debates with the welfare state and federalism represented themselves following as the remaining part of the iceberg under the water. The principle-agent, centralisation-decentralisation and allocational shift discussions indirectly reflect the developed federal structures like the United States and joint venture federalist projects like the European Union. The easily recognisable point, herein, is the names, theories, circumstances and the discussions which change but the centre of the argument towards a set of political economy issues: welfare state, the state (or government) close to the citizen, etc.. So long as the on-going experiment about this philosophy reviews, the reiteration of the debates alongside the way of subsidiarity will continue.

In the second part I discussed the practical means of subsidiarity as a principle of law. The main issue, herein, was the application of the principle of subsidiarity within the Treaty context of the European Union.

First of all, I tried to examine the provisions ensuring the application of subsidiarity and the provisions indirectly effecting the application of the principle. Secondly, I focused on the evolution of the Community federalism with regard to the European Union and United States comparison. In this context, the comparison is done between the common constitutional points from both sides. In addition, in the following sections, I put forth the argument focusing the principle in legislative analysis and the standing of the Court of Justice with the application of the principle.

Out of all my observations, I sorted out that the principle, although has been debated through many angles of views, is still vague. Considering that the European Union is a young federal structure, the development of the subject seems to go further in its on-going evolution. New legislation will be enacted and probably new provisions under these legislative acts are going to secure or extend the application of the principle.

Having considered the principle through the lens of a socio-political approach, we meet postmodernism in the existing position heading to our agenda. The concept, in early ages was to be known as a principle of church, a resistance to centralised nation-state, the modern era still could not melt it in the historical museums, on the contrary, it became a well established opportunity of unifying the tradition and modernity under the same roof. Finally, I am of the opinion that the principle in socio-political view became an element of the post-modernity of today's world.

Taking the concept as a means of legal process and constitutional approach, the principle remains as the safeguard of the constitutional existence and self-determination of local government in the global world. Recent developments on globalisation of the world politics enforce the world socio-political balance a high ability strong federal states, which are given the duty to overcome wide agenda of projects. Therefore, it is a new standing, which requires the states unite to perform common budgets, common supranational powers as we experince in the European Union case. The importance of the principle of subsidiarity in this context arises as the protection of local accountability and presence within the developing global world.

References

REFERENCES IN ENGLISH

Books in English

CRAIG P.P., DE BURCA G. EC Law Texts, Cases & Materials, Oxford university Press 1997

HILL C., The Century of Revolution 1603-1714 New York : Norton, 1961 p.54

HOBBES T, Leviathan, (Oxford World's Classics), Oxfrod University Press, July 1998

HUEGLIN T. / Federalism, Subsidiarity and The European Tradition, December 1999 Wilfrid Laurier Univ. Press.p142

TILLY C. , The Formation of Nation-States in Western Europe, Princeton : University Press, 1975

WHEARE K.C./ Federal Government, 4th edition, New York: Oxford University Press, 1964,

WHITE C., / "Agency as Control," in John Pratt and Richard Zeckhauser, Principals and Agents: The Structure of Business, /Boston : Harvard Business School Press, 1985

O'KEEFFE D. & TWOMEY P.M., Legal Issues of Maastricht Treaty, Kluwer Law International, December 1994

WYPLOSZ / VENABLES / SINN / SEABRIGHT / NEVEN / GRILLI / EDWARDS / DANTHINE / CREMER / BEGG, Making Sense of Subsidiarity; A Community Economic Policy Research (CEPR) Annual Report 1993;

Articles in English

BERMANN G./ Taking Subsidiarity Seriously: Federalism in the European Community and theUnited States/ Columbia Law Review, March 1994 Vol.94

BERNARD N., The Future of European Economic Law in the light of the Principle of Subsidiarity, Common Market Law Review, 1996 Vol:33, p.633-666
BOTHE M., Constitutional, federal, Subsidiarity Issues, Essays on Liberty and Federalism, Texas A&M University Press, October 1988.

BRIFFAULT R. Paradoxes of federalism: Ingolf Pernice's "Harmonisation of legislation in Federal Systems: Constitutional, Federal and Subsidiarity aspects"- Comments.,Essays on Liberty and Federalism/ Texas A&M University Press, October 1988.

CASS D.Z. / The word that saves Maastricht ? The principle of subsidiarity and the division of powers within the European Community/ Common Market Law Review. Vol.29.1992

GONZALES J.P., The Principle of Subsidiarity(A Guide for Lawyers with a particular Community Orientation) Journal of Common Market Studies, August 1995

NEUWAHL N. "A Europe Close to the Citizen?: The 'Trinity Concepts' of Subsidiarity, Transparency and Democracy, September 1994, Symposium held in Istanbul, EC Institute of the University of Marmara.

NEUWAHL N.A. Shared Powers or Combined Incompetence? More on Mixity, Common Market Law Review, 1996 Vol:33, p.667-687

TOTH A.G. / "The Principle of Subsidiarity in the Maastricht Treaty / 1992 Common Market Law Review, 1079-1105

TOTH A.G.; Is Subsidiarity Justiciable?; Common Market Law Review 1994.

TRACHTMAN J.P. / L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity / Harvard Law Journal Vol 33., Spring 1992.

VAN KERSBERGEN K AND VERBEEK B The politics of Subsidiarity in the European Union. Journal of Common Market Studies Vol 32. No.2 / June 1994

WEILER J / Trading In and With Europe/The Law of the European Union/ New York Univ. Press,Fall 1997

REFERENCES IN GERMAN

KALKBRENNER H./ Die Rechliche Verbindlichkeit Des Subsidiariatsprinzip. Max Planck Institute, 1997

REFERENCES IN TURKISH

Hizmette Yerellik (sübsidiyarite) İlkesinin Tanımı ve Sınırları / Avrupa Konseyi Yerel ve Bölgesel Yönetimler Yönlendirme Komitesi (CDLR) / Mahalli İdareler Genel Müdürlüğü, Ankara 1995