

**Robert Schuman Centre for Advanced Studies**

Subsidiarity & its Enemies:  
To What Extent Is Sovereignty Contested  
in the Mixed Commonwealth of Europe?

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## **Robert Schuman Centre for Advanced Studies**

### *European Forum*

The European Forum was set up by the High Council of the EUI in 1992 with the mission of bringing together at the Institute for a given academic year a group of experts, under the supervision of annual scientific director(s), for researching a specific topic primarily of a comparative and interdisciplinary nature.

This Working Paper has been written in the context of the 2000-2001 European Forum programme on “Between Europe and the Nation State: the Reshaping of Interests, Identities and Political Representation” directed by Professors Stefano Bartolini (EUI, SPS Department), Thomas Risse (EUI, RSC/SPS Joint Chair) and Bo Stråth (EUI, RSC/HEC Joint Chair).

The Forum reflects on the domestic impact of European integration, studying the extent to which *Europeanisation* shapes the adaptation patterns, power redistribution, and shifting loyalties at the national level. The categories of ‘interest’ and ‘identity’ are at the core of the programme and a particular emphasis is given to the formation of new social identities, the redefinition of corporate interests, and the domestic changes in the forms of political representation.



## **ABSTRACT**

A once-fashionable discourse of subsidiarity looks having faded away, as its vagueness is stressed and, accordingly, its (especially legal) usefulness becomes in doubt. Yet, seen from a different perspective, it might well represent the most significant conceptual change, signalling the long-term transformation in contemporary Europe: the creation and development of the European Union (EU) and its resulting multi-level governance.

The purpose of this working paper in this light is to re-assess the nature, scope and significance of the principle of subsidiarity in the EU. By tracing the various ideas of subsidiarity in the history of European political thought, and by identifying sovereignty as its principal opponent concept, it seeks to clarify the scope of the 'deliciously vague' concept of subsidiarity. In doing so, it also attempts to gauge how far this principle has brought Europe away from the world of sovereign states at the idea's level. Whereas this paper itself is a modest exercise of assessing the strength of subsidiarity vis-à-vis sovereignty, the ultimate goal of this project would be to see whether and to what extent the experience of European integration can be recast as a political theory, contributing to re-configuration of traditional categories such as the State, Nation, People (Volk), Democracy, Constitution and Citizenship.

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## I. INTRODUCTION

### *1) Subject and Focus*

The purpose of this paper is to explore the nature, scope and significance of the principle of subsidiarity in the European Union (EU). By tracing the various ideas of subsidiarity in the history of European political thought, and by identifying sovereignty as its principal opponent concept, it seeks to clarify the scope of the oft-vague concept of subsidiarity. In doing so, it also attempts to gauge how far this principle has brought Europe away from the world of sovereign states at the idea's level. Whereas this paper itself is a modest exercise of assessing the strength of subsidiarity vis-à-vis sovereignty, the ultimate goal of this project would be to see whether and to what extent the experience of European integration can be recast as a political theory, contributing to re-configuration of traditional categories such as the State, Nation, 'Volk' (or People), Democracy, Constitution and Citizenship.

### *2) A Formulation of the Problematique*

Behind the purpose lies the fundamental problematique, that is, a gap between the actual advancement of EU integration and the theoretical backwardness surrounding it. Let me formulate it, step by step, even if some of the points might well be considered obvious.

First of all, Europe has no doubt attained an exceptional level of integration over the last half-century, enough to be categorically distinguished from an ordinary international organisation or regime.<sup>1</sup> In terms of competences, the policy areas the EU covers spread from internal market, through justice and home affairs, to diplomacy; and now, it exercises the exclusive power over monetary policy, with the creation of the Euro and the European Central Bank (ECB). Fiscally, the EU's annual budget with some 80 billion euros exceeds the combined budget of, say, Portugal and Greece. In parallel with these, the administrative interactions between the member states and the Commission have intensified, and the legislative activities reportedly have caused 30 percent of entire legislation and 70 percent of business-related legislation in the UK.<sup>2</sup> Also, judicially, the European Court of Justice has apparently transformed itself into the final arbitrator on EU competences. And lastly, every time when a new treaty is ratified or a new member state is admitted, a body of 'acquis communautaires' has been approved and consolidated. This has amounted to an accumulated legal practice with which to endow some legitimacy to the EC or EU.<sup>3</sup> Thus, even a glance of these developments suggests that comprehensive governance, both in form and in substance, has been established at the European level.

And yet, the EU cannot be seen a State, not even a Federal State at least in the traditional sense.<sup>4</sup> The absence of an army with unified command structure, of fiscal resources to match the large and affluent population, and of a head to personify the political existence,<sup>5</sup> just to mention a few, has led a number of commentators to reject equating the Union as the State. In the meantime, the Member States have retained the bulk of fiscal resources, military forces and, above all, civic loyalty.

In other words, the Union is a ‘hung-polity’, located somewhere in-between the state and the international organisation. It is then no surprise that the searches to capture the nature of the beast have been unleashed,<sup>6</sup> accompanied by a wave of labelling exercises.<sup>7</sup> This is in itself a highly welcome shift in agenda, away from the decades’ old controversies over inter-governmentalism and neo-functionalism.

More importantly, the emergence of this ‘hung-polity’ in Europe has put serious question marks on the basic categories, familiar in the political and legal studies: i.e. State, Nation, People, Democracy, Sovereignty, Constitution and Citizenship.<sup>8</sup> In the modern, traditional terms, all these have been linked and fused, only within the framework of which each category can fully be understood and realised. At the risk of over-simplification, a Sovereign People or Nation (or a Demos, through social contract(s)) sets up an independent State, usually expressed in the form of a written Constitution, which also determines a set of rights and obligations (Citizenship). What European integration has done is to establish a - however imperfect - polity, through a series of treaty revisions, administrative interactions, judicial activism, and functionalistic incrementalism; yet all these without a Euro-wide Nation and People, but with limited channels for democratic participation and, at the later stage, the supplementary Citizenship. The sacred conceptual linkage has thus been shaken if not broken, into which a categorically new entity (EU) has intruded. This gap between the traditional assumptions and categories, on the one hand, and the reality of the Euro-polity, on the other, is a real one.

If anything, the gap seems to have sharpened when the practices and discourses adhered to the traditional terms in facing the hung-polity in Europe. In this light, the years 1992-3 were a critical moment, displaying such a widening gap. The 1992 Danish rejection of the Maastricht Treaty revealed the depth of legitimacy lay in the hands of a national democracy, though it has subsequently been fudged into a legal solution. Even more profound theoretical implications can be drawn from the 1993 ruling of the Constitutional Court of Germany concerning the Maastricht Treaty. By making abundantly clear who were the ‘Masters of the Treaties’, it reaffirmed the terms with which to proceed, or recede, the process of European integration; and these terms were



predominantly based upon the traditional conception of nation-state and its *völkische* democracy, which typically conflates Volk, Democracy, Sovereignty, State as well as Constitution.<sup>9</sup>

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

The efforts to fill the gap between the still powerful (traditionally linked) categories and the new reality of the Euro-polity have only recently started. Joseph Weiler has led the move in this direction,<sup>10</sup> joined and expanded by Neil MacCormick,<sup>11</sup> and deepened by Richard Bellamy and Dario Castiglano.<sup>12</sup> Yet, as these authors acknowledge, this is a rich and still largely uncultivated field. Nature and character of the European governance remain to be more fully explored and articulated. It is here that the once fashionable discussion of subsidiarity, with its long tradition of fighting against one and indivisible people and of empowering a multi-level co-operative governance, has to be re-introduced.

The important normative point in doing so is that, while one cannot possibly stick to the traditional discourse simply neglecting the half-century development of European integration, one also cannot and should not re-create the sacred conflation of Volk, Democracy, Nation, Sovereignty, State and Constitution at the European level.<sup>13</sup> To struggle to find a European identity in a way replacing national identities, to push for a parliamentary democracy on the basis of Euro-Demos (not Demoi), and to relinquish or invalidate the national constitutions by a European Constitution, would be practically impossible and theoretically undesirable. It would simply result, if it ever happens, in reducing the number of sovereign actors in international arena, by establishing the European State/Democracy/Constitution/Citizenship, which could be just as

exclusive as the individual member states. It would be if the ‘hung-ness’ of the Euro-polity becomes a well-flanked norm, if the above-mentioned conflation is dissolved, and thereby if the plurality of opportunities and standards is kept at various levels of polities, that European integration would continue to entail significant challenges and indeed contributions, both theoretical and practical, to the world.

### 3) *The Central Arguments*

The central argument advanced here is three-fold. First, I seek to examine the nature of the ideas of subsidiarity, attempting to recast it as an age-old concept against the excessive centralisation of power by the sovereign state over the last four centuries. It will be shown that, from Johannes Althusius to Jacques Delors, there have been roughly two versions in it, i.e. negative and positive.<sup>14</sup> Negative subsidiarity refers to the *limitation* of competences of the larger organisation in relation to the smaller entity, whilst its positive concept represents the possibility or even the *obligation* of interventions from the larger organisation, both aiming to fulfil and enhance the human dignity.

Second, I explore the reasons of why the principle of subsidiarity was brought in, used for, and established as a central governing principle of, EC/EU politics. The short answer is that the EC or EU had by then been firmly established; and the growing concerns over the ever-centralised Leviathan in Brussels led to the formation of a sort of grand-coalition among a variety of actors, so that they would be able to secure the EU’s achievement so far and to simultaneously control the process of European integration, under the banner of subsidiarity.

Last, I consider the scope of the principle of subsidiarity, suggesting that its strength lies in the ability to moderate and contain the absolutism of any level in a multi-level and co-operative governance. However, this strength of subsidiarity might rest on a prior settlement of whether the state of normalcy exists or not, and might still be largely cancelled by the overriding concept of sovereignty, which would come to the fore when an exceptional circumstance arises.

## II. SUBSIDIARITY: AN UN-PRINCIPLED PRINCIPLE?

Towards 1989, the principle of subsidiarity suddenly became fashionable ‘Eurolanguage.’<sup>15</sup> At the same time it has been so misunderstood that something inconceivable could happen; as Jean-Pierre Cot, ex-head of the European Parliament’s Socialists Group, observed, ‘ça arrange M. Delors d’être d’accord avec Mme Thatcher sur un malentendu.’<sup>16</sup>

Indeed, some warn that this principle is a Trojan horse of Euro-federalists and that it, inevitably, will bring about a over-centralised Leviathan in Brussels.<sup>17</sup> The other says: “Tout homme est, dès sa naissance et sa nature, appelé à gouverner sa propre personne. C’est pour cette raison que tout autorité extérieure doit rester subsidiaire ...”<sup>18</sup> Here, the subsidiarity principle takes on a decentralising character.

This confusion in the political world can at least partially be attributed to the poor performance of the academic world on the issue.<sup>19</sup> Firstly, there are surprisingly few books concerning the subsidiarity principle, particularly in English. Secondly, most books on subsidiarity were written in the 1950s or 1960s (mainly in German). In contrast, numerous articles as to the role of the principle within the EC/EU have appeared since the end of 1980s.<sup>20</sup> Lastly, one might notice the tendency in which, on the one hand, relatively old reference materials deal only with socio-philosophical aspects, and on the other, recent articles nearly exclusively focus attention upon EC/EU matters. There are simply not many books that bridge this dichotomous focus.<sup>21</sup>

Despite (or probably because of) the conceptual confusion in the political world and the rather poor performance of the academic world concerning the subsidiarity principle, as mentioned above, it was written into the Treaty on European Union (TEU) adopted at the Maastricht Summit in December 1991. After referring in the Preamble that “decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,” Article 3b reads as follows:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, by reason of the scale or effects of the proposed action, be better achieved by the Community.

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

One can immediately recognise the built-in confusion within the Treaty. The autonomous regions thus could be encouraged by the preamble, referring to the lowest possible decision-taking. The member states would feel more secure with the generally restrictive terms of Article 3b for Community actions, while the Commission simply might continue its business of integration, by finding a few justifications for such actions.

This inclusion in such a circumstance in itself almost unavoidably calls for clarification of meanings and implications of the subsidiarity principle. In addition, the debate is far from dead. From the Danish rejection of the Maastricht Treaty in June 1992 through the ratification process of the Treaty to the inclusion of a protocol to the Amsterdam Treaty, the principle of subsidiarity not only became a salient issue but also was explicitly used to diffuse the conflicts in the EU. The German Länder, a stakeholder of the European construction, via Bundesrat, remain ardent supporters of this principle, although slightly disappointed with the failure to contain the further erosion of their competences under the banner of subsidiarity. Thus, the inherent confusion of the Treaty, and renewed and continuing discussions, coupled with the underlying fussy-ness, leave us with the need to clarify the principle.

Is this principle simply convenient for all, and therefore an un-principled principle? If not, what does it mean? For what does it work? What sort of implications is it likely to carry for the EU governance? In the following sections (III-V), I make a three-fold proposition:

1. The more malleable it looks, the more necessary it is to examine the principle of subsidiarity from a historical viewpoint, thus clarifying the direction of confusion at least;
2. We would fail to grasp the scope of subsidiarity, if focusing only on one - say Catholic - origin, not its multiple (at times competing) origins;
3. Subsidiarity, however fussy it might look, is not necessarily an un-principled principle.

### III. ALTHUSIUS AS A POINT OF DEPARTURE

#### 1) *The Etymology*

In Latin, the word ‘subsidiium’ or ‘subsidiarius’ initially meant something in reserve, or more specifically, reserve troops. Then it was used for the reinforcement or fresh supply of troops. Later it acquired the broader sense of assistance or aid.<sup>22</sup> In this derivation of the word, we already see that the notion of subsidiarity is double-edged: while it presupposes something proper should be in charge first, it also can contain positive connotations, as it envisages the intervention of forces for the benefit of those in trouble.

#### 2) *Althusius: Local Autonomy in a Wider Federative Framework*

The notion of subsidiarity cannot date exclusively from the Popes' encyclicals of the Catholic Church. The idea is rather a typically European or western thought, and can be traced back to Aristotle and Thomas Aquinas.<sup>23</sup>

It is reasonable however, to also identify Johannes Althusius (1557-1638) as the first proponent of subsidiarity and federalism (he uses, in fact, the word of ‘subsidia’ in the text).<sup>24</sup> He was a Calvinist theoretician and practitioner of politics at the beginning of the 17th century. As the powerful Syndic of Emden, a city in East Friesland which was one of the first in Germany to embrace the Reformed faith, Althusius found himself in the stormy movement of the Counter-Reformation, and tried to maintain the relative autonomy of his city vis-à-vis its Lutheran provincial Lord and Catholic Emperor. In this circumstance, Althusius considerably revised his main book *Politica Methodice Digesta* [*Systematic Analysis of Politics*] in 1610 and in 1614, which first appeared in 1603.

Had Althusius aspired only to protect the independence of his city, he could have made recourse to the language of separatism. Yet, his age was that of state building. Indeed, his immediate upper echelon of governance was the provincial lord who tried to establish a sovereign state in East Friesland – the complicated relations with which he could not afford to neglect. Another factor in his mind was the fact that Emden was then a leading centre for interdependent commerce, especially after the capital had fled from the Netherlands in the middle of the Eighty Years (independence) war.

Thus he commenced his theoretical enterprise with the Aristotelian presupposition: “no man is self-sufficient.” For him, a man is unable to live comfortably, being isolated from society. Men need the assistance or aid of others, and thus establish, cultivate and conserve associations, such as family,

collegium (e.g. guild and corporation), city, province and the state. None of associations is self-sufficient, and they are therefore required to cooperate each other within a universal association. Seeking for ‘symbiotics’ among them, which is the essential subjective matter of politics, Althusius picks up a biblical concept of ‘foedus’ (the alliance or league that originally meant the bond between God and men), and secularised it to apply for associations in this world. This term is the origin of the word ‘federalism’ as we use it today. Within this federal structure, he tried to maintain both the political autonomy and commercial interests of Emden.

He was also the theorist who first conceptualised the consociational political systems; indeed, his ideal in politics was to ‘consociandi’ men, as seen at the beginning of his *Politica*:

(§1-2) Politics is the art of associating (consociandi) men for the purpose of establishing, cultivating, and conserving social life among them. Whence it is called “symbiotics.” The subject matter of politics is therefore association (consociatio), in which the symbiotes pledge themselves each to the other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life.

(§3-4) The end of political “symbiotic” man is holy, just, comfortable, and happy symbiosis, a life lacking nothing either necessary or useful. Truly, in living this life no man is self-sufficient, or adequately endowed in nature. ... Nor in his adulthood is he able to obtain in and by himself those outward goods he needs for a comfortable and holy life, or to provide by his own energies all the requirements of life [subsidia].<sup>25</sup>

He thus refers to the word ‘subsidia’ but not in a systematic manner akin to the later Pope Pius XI (see the next section). It was rather used in the sense of supply of all the necessities. Nonetheless, his name is likely to be repeatedly mentioned as an origin, because his *Weltanschauung* fits almost perfectly that of subsidiarity: a presupposition of diverse but co-operative groups of people, support of local autonomy within a wider federative framework, an ascending series of contracts leading up to the formation of a universal association, etc. Also, both of the two currents of subsidiarity, soon to be discussed, can be found in Althusius, which is another reason why he can be considered as a point of departure.

Here, I wish to emphasise the two faces of Althusius. On the one hand, he aspired to harmonise the graduated social order, namely amongst the levels of families, guilds, cities, provinces, the universal empire. His *Weltanschauung* was strongly coloured by an organic harmony, pointing to a consociational and corporatistic governance. By communicating ‘whatever useful and necessary for

the harmonious exercise of social life' among various associations (i.e. consociations), the universal body politic would be orderly preserved.

On the other hand, Althusius evidently wished to protect the religious and political autonomy of his city, Emden - the stronghold of the Reformist Church. Power in this context must be reserved at the lowest possible level, rejecting unnecessary interference from the upper echelons. One could easily imagine the oft-violent circumstances of Counter-Reformation, under which he wrote his *Politica*. The Catholic soldiers from Spain were fighting with his Dutch neighbours, while the Lutherans (who held the power of the East Friesland) locally competed with the Calvinists for post-Reformation hegemony.

Against this backdrop, his book aimed at protecting the local autonomy in an interdependent and mutually respectful world. It is better to bear in mind that Emden was one of the most prosperous trade centres at that time. His dual aim, and two-face character, embodied in the idea of subsidiarity, thus derived from the double necessity of preserving the local autonomy and the commercial interests of the city, in a symbiotically graduated world. From here, two conceptual currents of subsidiarity flow, that is, negative and positive, with which to reaffirm the importance both of autonomy of smaller entities and of a larger framework.

### 3) *The Althusian Version of Shareable Sovereignty*

In relation to the later discussion, it is also necessary to examine Althusius' theoretical construction on sovereignty. His chosen opponent here, was Jean Bodin who had by then been well known for his study on the subject. Let us take a look at some of Althusian themes in his discussion on sovereignty (Chap. IX).

(§20-21) Bodin ... says that the right of sovereignty ... is a supreme and perpetual power limited neither by law (lex) nor by time. I recognize neither of these attributes of the right of sovereignty, in the sense Bodin intends them, as genuine. For this right of sovereignty is not the supreme power; neither is it perpetual or above law. ... Indeed, an absolute and supreme power standing above all laws is called tyrannical.

(§22) ... But by no means can this supreme power be attributed to a king or optimates, as Bodin most ardently endeavors to defend. Rather it is to be attributed rightfully only to the body of a universal association, namely to a commonwealth or realm, and as belonging to it.<sup>26</sup>

Having at one point declared that he would 'not [be] troubled by the clamors of Bodin', Althusius was thus determined to confront the latter's idea of sovereignty as absolute and as belonging to the King. His insistence that the 'ownership of a realm belongs to the people, and administration of it to the king'

directly derived from the Monarchomach theory of the right of resistance. This aspect of his theoretical construction, coupled with the contractual terms he used, was viewed by later thinkers as a vindication of his democratic credentials - a forerunner of Rousseau.<sup>27</sup>

At the same time, Althusius also opened the way for Rousseau to advance his thesis of 'one and indivisible' people and therefore sovereignty. This is because, Althusius was so adamant in designating the entire people as the owner of sovereignty. In this regard, sovereignty in the Althusian world is far from simplistic, requiring some further explanations.

For Althusius, as can be seen in the following passages, the people in its entirety are the one who establishes sovereignty and where it belongs.

(§12-13) Its [the realm's] right is the means by which the members ... are associated and bound to each other as one people in one body and under one head. This right of the realm (*jus regni*) is also called the right of sovereignty (*jus majestatis*).

(§15) ... Therefore, the universal power of ruling (*potestas imperandi universalis*) is called that which recognizes no ally, nor any superior or equal to itself. And this supreme rights of universal jurisdiction is the form and substantial essence of sovereignty (*majestas*) or, as we have called it, of a major state. When this right is taken away, sovereignty perishes...

(§16) The people, or associated members of the realm, have the power (*potestas*) of establishing this right of the realm [i.e. the right of sovereignty] and of binding themselves to it.<sup>28</sup>

Combined with his remark which approvingly quoted a jurists' view that sovereignty is indivisible, the Althusian popular sovereignty should be considered as one and indivisible.<sup>29</sup> This is a troublesome aspect of Althusian theory, because with it he has introduced the whole problematic of the one and indivisible popular sovereignty that Rousseau later championed. It is therefore with some justification that Althusius has been characterised as a forerunner of Rousseau.

At the same time, however, this one and indivisible sovereignty of Althusius is shareable and limited, far from absolute. This is because, unlike Rousseau, the Althusian 'people' are the amalgam of concrete and particular communities, not the abstract construction, among whom such sovereignty should be shared. Take the examples from his *Politica* once more:



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

(§18) This right of the realm, or right of sovereignty, does not belong to individual members, but to all members joined together and to the entire associated body of the realm. For as the universal association can be constituted not by one member, but by all the members together, so the right is said to be the property not of individual members, but of the members jointly.<sup>30</sup>

The Althusian fullest polity (paraphrased as ‘imperium, realm, and commonwealth’)<sup>31</sup> is composed of cities, provinces, and regions, which in turn are composed of citizens of a plurality of associations, i.e. families, guilds and corporations. These people, formed as one body, jointly own sovereignty.<sup>32</sup>

Sovereignty, for Althusius, is also a limited one, because it is bounded not only by the natural and divine law but, more importantly, by the logic of the supply of mutual needs [subsidia] in an interdependent world.

(§30) ... Universal symbiotic communion is the process by which the members of a realm or universal association communicate everything necessary and useful to it, and remove and do away with everything to the contrary.<sup>33</sup>

It is now clear that the Althusian sovereignty, though one and indivisible, is shareable and limited. As a leading student of Althusius of our time acutely observed: ‘such [Althusian] sovereignty may be considered indivisible, but it is organized and shared within a system of mutual checks and balances among the plural constituents of a commonwealth.’<sup>34</sup>

#### *4) A Counter-Tradition to the State Sovereignty*

From Althusius on, the tradition opposing the Bodinian sovereignty runs throughout the history of European political thought. Here is not the place to do justice to all the important theorists who contributed to the tradition, though later sections will cover some. Instead, this section will only briefly demonstrate the link between Althusius and the pluralist thinkers in the last century.

With the arrival of the age of state- and nation-building, Althusius himself was almost forgotten for a long time, except as a dangerous thinker undermining the foundations of absolute monarchy. It was only in late 19th century when Otto von Gierke reintroduced the Althusian theme that his name and theory regained the currency.

Gierke's use of Althusius derived from one of his main concerns that the Prussia-led State-building process under Bismarck, coupled with the tendency of individualistic atomism, would destroy the good old Germanic tradition of 'Genossenschaft'. By referring to the Althusian system of the universal consociation, composed of smaller consociations, Gierke tried to restore and develop the more pluralistic but harmonious society vis-à-vis the excessively centralised and bureaucratised State.

It was not a coincidence that the English pluralists relied on Gierke, in their opposition to the unitary state in the UK. Both Frederic Maitland and Ernest Barker extensively translated and introduced Gierke's work to the British audience<sup>35</sup>; and Harold Laski, much influenced by these pluralists, remained one of the most critical of the state sovereignty, until he shifted further to the left in his political belief.<sup>36</sup>

Subsidiarity, taken together with the theorists and practitioners analysed below, should be seen in this light of the counter-tradition against the absolute state sovereignty. After the double-faced Althusius, there would be roughly two versions, positive and negative, or personalistic or liberal currents, with a number of variants in each of these two. The following sections III-IX will trace these versions in some detail.

#### **IV. THE PERSONALISTIC AND CORPORATISTIC CURRENT OF SUBSIDIARITY**

The social-conscious, personalistic Catholics began to acquire the notion of subsidiarity in the 19th century, and later came to occupy the main seat in the subsidiarity discussions. Yet before examining the Catholics' systematic formulation of subsidiarity as a principle, we would better examine another personalist thinker, quite influential in the current subsidiarity discourse: that is, Pierre Joseph Proudhon.

##### *1) Proudhon's Personalistic Federalism*

Although a fiercely anti-Church himself, Proudhon was ironically influential on the later Catholic thinkers and practitioners; and not without reason. While he is usually identified as a socialist, his views were coloured by agrarian Catholicism: an attachment to 'natural' communities, organic view of society, stress on voluntary contributions to society, as well as an anti-city, anti-establishment, anti-State, anti-bourgeois, and anti-liberal (and anti-Jewish and somewhat xenophobic) attitude earned him supporters from all parts of the political spectrum, including fascism.<sup>37</sup>

Relevant for the present study among his many radical ideas is his hostility towards the over-centralised state and popular sovereignty in the Jacobin mould. What was at stake, for Proudhon, was the right balance stroke between the two imperatives: authority and liberty. The centralised state, founded on the Rousseauist notion of one and indivisible republic, undermined this balance, in favour of the authority. Liberty would have to be recovered within the framework of co-operative and federative pact amongst the plurality of more ‘natural’ groups such as families, guilds, communes and regions.<sup>38</sup>

The Proudhonian concept of ‘liberty’ has a double connotation, both deeply related to the fulfilment of personality. On the one hand, one’s personality does not blossom without an autonomous sphere for reflection and action. Thus one needs a certain degree of freedom, in the sense of non-interference. On the other, if one does not contribute to society, simply staying aloof from it as an atomised individual, his or her personality will not be fully realised.

From here it is not too distant from the two-fold concept of subsidiarity – the idea that Proudhon himself did not refer to, unlike his followers, but that comes close to his own remark:

Tous ce que peut exécuter l’individu, en se soumettant à la loi de justice, sera donc laissé à l’individualité; tout ce qui dépasse la capacité d’une personne sera dans les attributions de la collectivité.<sup>39</sup>

Against the two evils of excessive atomism and (nation-)statism, his theory of federalism was an essential part of his theoretical construction. The federal structure would link the natural groups in a wider pluralistic governance, which would not allow the over-centralisation of the nation-state and would encourage the individuals’ contribution to the concrete and particular societies. This view is nothing but an immediate origin of ‘fédéralisme personnaliste’ or ‘integral federalism’, as will later be called.

Set against this background, it is no surprise that Proudhon made a frontal attack on the state sovereignty.

Je demande le démembrement de la souveraineté politique...<sup>40</sup>  
La commune est comme l’homme, comme la famille, comme toute individualité, et toute collectivité intelligente, un être souverain.<sup>41</sup>

Semblablement, selon le nouveau pacte, la souveraineté politique, l’autorité civile et l’influence corporative se coordonnent entre les régions, districts, communes et autres catégories, et par cette coordination s’identifient avec la liberté même.

La vieille loi d'unité et d'indivision est abrogée. En vertu du consentement, au moins présumé, des diverses parties de l'Etat au pacte d'union, le centre politique est partout, la circonférence null part.<sup>42</sup>

Sovereignty in the Proudhonian system would thus be dissolved, as a result of a federal and union pact among the natural entities: families, guilds, communes and regions. The states, unionised and federalised within themselves, would then form a European federation. The state in this picture would retain the function to guide and coordinate the natural groups, but lose its foremost character: i.e., sovereignty. It is in such a multilevel system that the balance between authority and liberty would be recovered and that a person could develop his or her potential fully, with no overwhelming authority to intervene in detail but with more likelihood to contribute to concrete societies.

He thus became the founder of a still significant current of socialist thinking, the integral federalism, and influential for the later social Christian thinkers. Emanuel Mounier, Denis de Rougemont and Alexandre Marc are the followers in one sense or another of Proudhon, and Jacques Delors, a social Catholic, is the prominent practitioner of our age.<sup>43</sup>

## 2) *'Rerum Novarum': The Catholics and the Problematic of Subsidiarity*

Around the same time as Proudhon, some social Catholic thinkers like W. von Kettler and Luigi Tapprelli became aware of social problems intensified by the Industrial Revolution.<sup>44</sup> In order to solve these problems, they urged the higher entity to assist the weakest in society, thereby championing 'positive subsidiarity'. Influenced notably by Ketter's idea of 'le droit subsidiaire', as we shall soon discuss in detail, the Pontiff Leo XIII will issue an encyclical 'Rerum Novarum' in May 1891, which officially committed the Church into social reforms and which admitted that the State should play a role in the social field, though not without limitations to its role.

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

In relation to the subsidiarity principle, it is important to note that 'Rerum Novarum' cleared the way for the State to protect the workers. This meant that the Church officially allowed the State to intervene in the social field where the Church had traditionally found itself as the main actor. The Vatican, however, was cautious of the resulting over-expansion of State power, which, the Church, hereafter, sought to counterbalance. One can find such an attempt already in the Leo's encyclical. Take, for example, the paragraphs 35, 36 and 55:

<Para. 35> We have said that the State must not absorb the individual or the family; both should be allowed free and untrammelled action so far as is consistent with the common good and the interest of others.

<Para. 36> The limits must be determined by the nature of the occasion which calls for the law's interference – the principle being that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief.

<Para.55>... The State should watch over these societies of citizens banded together in accordance with their rights, but it should not thrust itself into their peculiar concerns and their organisation, ...<sup>45</sup>

It is clear that he intended to limit the sphere of State intervention in societal - especially family - activities. Probably, for a Pope towards the late 19th century, memories of anticlericalism were too vivid to ignore the dangers of excessive State power. Whatever his reasoning, we can interpret his remarks as being an embryo of the negative notion of subsidiarity, since they represent the limitation of activities by the higher organisation.

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

It would be irrational to neglect one portion of the citizens and favor another, and therefore the public administration must duly and solicitously provide for the welfare and the comfort of the working class. ... Whenever the general interest or any particular class suffers, or is threatened with harm, which can in no other way be met or prevented, the public authority must step in to deal with it.<sup>46</sup>

Thus he repeatedly emphasised the necessity of public intervention in favour of the workers, who "have no resources of their own to fall back upon and must chiefly depend upon the assistant of the State."<sup>47</sup> This brought, as was said before, a breakthrough in the Vatican's position in that the Church made legitimate the State's intervention in social affairs. In this instance, Leo is affirming positive subsidiarity which admits the obligation of the higher organisation. Here, we can already have a glimpse of the two conflicting ideas of subsidiarity: negative and positive, with an inclination to the latter.

### 3) 'Quadragesimo Anno' of Pius XI: The Making of a Principle

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

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

Secondly, Pius' reign was characterised by rising Totalitarianism where the State apparatus tried to penetrate every sector of society. Against this background, 'Quadragesimo Anno' expressed growing scepticism about the excessive State control over society, although the relationship between the Catholic Church under Pius XI and the Fascist regime was highly ambiguous and complex during the inter-war period.<sup>48</sup>

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

<Para. 79> ... that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: *Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is injustice and at the same time a great evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.* For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.

<Para. 80> The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concern of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of *the principle of "subsidiary function,"* the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.<sup>49</sup>

This is the birth of 'the principle of subsidiary function' (in German translation 'das Prinzip der Subsidiarität'). What is immediately apparent from this extract

is that this time the Church's main intention was to restrict the State's interference rather than to emphasise the State duty. Following the formula above, the higher organisation cannot be assigned the tasks which the smaller entities can carry out by themselves, just as the community cannot take away from the individual what he or she can accomplish. This 'most weighty principle,' 'cannot be set aside or changed,' and 'remains fixed and unshaken in social philosophy.' With this limitation on the activities of the higher organisation, we can say, that the principle of subsidiarity took on a negative character.

Nevertheless, one should not overlook the elements of positive subsidiarity, i.e. the emphasis on the duty of State intervention, in 'Quadragesimo Anno.' Indeed, Pius XI fully agreed with Leo XIII in that the State had obligations in the field of social reforms, and he urged the State to put into effect what was called in 'Rerum Novarum.'<sup>50</sup>

While the positive aspect of subsidiarity thus derived from the Church's internal development and thought since Leo, it also came from Pius' conviction that the State had to revive its efficiency and strength through easing its burdens. The classic formulation of subsidiarity, as quoted above, was preceded by the following passages:

When we speak of the reform of institutions, the State comes chiefly to mind ... because things have come to such a pass through the evil of what we have termed 'individualism' that, following upon the overthrow and near extinction of that rich social life which was once highly developed through associations of various kinds, there remains virtually only individuals and the State. This is to the great harm of the State itself; for, with a structure of social governance lost, and with the taking over of all the burdens which the wrecked associations once bore, the state has been overwhelmed and crushed by almost infinite tasks and duties.<sup>51</sup>

Thus, Pius XI delineated the sphere of State intervention also on the grounds of the State's own interest. By leaving to smaller groups the settlement of minor business, 'the State will more freely, powerfully, and effectively do all those things that belong to it alone'. This can be related to the ideas of many of Christian Churches that, the State is also one of the natural groups which should have its own *raison d'être*. In the end, Pius XI too, took the State's duty of intervention in society seriously.

#### 4) *The Human Dignity in the Idea of Subsidiarity*

Behind the papal doctrine, there is a firm metaphysical conviction on the nature of human being. It would be useful to consider it briefly in order to understand the *Weltanschauung* of subsidiarity fully.

According to this conviction, a person is at once created by God and bound by destiny to God. Only man and woman were created with some resemblance to God and destined to immortal lives with God. This nature of the person confers upon him or her a unique and unalienable value which is called dignity. It is for this reason that a person should be fully respected as a free and responsible agent. For example, the Church's protest against capitalistic exploitation of workers at the end of the 19th century, was based upon the argument that the workers should not be treated as a commodity but with dignity.

However, this intrinsic dignity will never become concrete and finalised unless a person tries to develop it through interactions with other persons.<sup>52</sup> Therefore, a person needs Society. Encyclicals dealing with the social questions do not usually fail to emphasise this importance of Society. The following serves as an example:

God has likewise destined man for civil society according to the dictates of his very nature. In the plan of the Creator, society is a natural means which man can and must use to reach his destined end. Society is for man and not vice versa.<sup>53</sup>

In order to reach his or her end, that is, to complete the dignity and to fulfil the potentials given by God, a man or woman has to 'use' Society as a commodity and facilitator.

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

Crucial here is that any society should not override a person. Without the sphere of freedom, a person would never be able to think of his or her proper tasks nor to initiate actions. With detailed interventions from societies, he or she might not dare to take action. These situations would impede a person to blossom fully. Therefore, if he or she can fulfil his or her own goals, any society should not intervene into details, and, borrowing Pius XI's words, "it is gravely wrong to take from individuals what they can accomplish by their own initiative



and industry and give it to the community” (as quoted above). Needless to say, this is the negative concept of subsidiarity.

Nevertheless, all societies exist for each person, thus for the realisation of his or her dignity. If the person can develop his or her own possibilities, any society does not have to interfere his or her own business, as was seen above. Yet, if, on the contrary, he or she cannot attain his or her goals alone, various levels of societies have an obligation to assist the person. Here is the *raison d'être* of any society (inclusive of the State). The Church expected societies to help those who lacked the means or ways to attain their goals. Here, we can have a look at the positive notion of subsidiarity.

Thus the idea of dignity is deeply imbued with that of subsidiarity. On the one hand, an upper organisation should leave the sphere of freedom to each person. Only within this sphere and through interactions with others, one can develop his or her full potentials. On the other hand, the society has to assist him/her when in trouble. In either of the cases, societies are necessary for the development of any person, therefore for the ‘concretisation’ of human dignity.<sup>54</sup> This is why the Catholics can defend both the positive and negative concepts of subsidiarity.

## V. THE LIBERAL CURRENT OF SUBSIDIARITY

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

### 1) *The Emden Synod in 1571*

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

Provinzial- und besonders Generalsynoden soll man nicht Fragen vorlegen, die schon fröhler behandelt und gemeidsam entschieden worden sind, ... und zwar soll nur das aufgeschrieben werden, was in den Sitzungen der Konsistorien und der Classicalversammlungen nicht entschieden werden konnte oder was alle gemeinden der Provinz angeht.<sup>55</sup>

This pointed to a formula in which decisions should be made at the lowest possible level. With striking similarities to the multilevel governance discourse in the present Europe, the Provincial or General Synod could not take decision in

the areas where the community synods had taken decision, or could take decision only if the latter could not decide or if the questions under consideration concerned all the parishes.

## *2) Liberal Thinkers & Negative Subsidiarity*

The negative notion of subsidiarity can be found in liberal thinkers at the later periods as well. In the second half of 17th century, John Locke argued that governmental power ought to be restricted to those instances where the people could not solve their own problems. With some influence of Calvinism, it might be possible to read Locke in relation to subsidiarity, despite differences with Althusius especially in a Locke's dichotomic view of society between individuals and government.<sup>56</sup>

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

Some national constitutions followed this liberal stream. Take the example of Article 3 of the Swiss Constitution in 1874:

Les cantons sont souverains en tant que leur souveraineté n'est pas limitée par la constitution fédérale, et, comme tel, ils exercent tout les droits qui ne sont pas délégués au poivoir fédéral.

Or, the 10th Amendment of the US Constitution can be seen another case in point:

The powers not delegated to the United States by the Constitution or prohibited by it to the States, are reserved to the States respectively, or to the people. (US Constitution 10th Amendment, 1791)

Both of these constitutional provisions make it clear that the competences of the central authority should prove to be exceptions, not the rule, with the power resting with the Canton, the state or the people. In a spirit similar to subsidiarity, moreover, US President Abraham Lincoln left a remark in 1854 that:

The legitimate object[sic] of government is to do for a community of people whatever they need to have done but cannot do at all, or cannot so well do for themselves in their separate and individual capacities. In all that people can do individually well for themselves, government ought not to interfere.<sup>57</sup>

It is important to quote this passage since it shows a link between the European notion of subsidiarity and the American federalism.

To these can be added a remark by J. S. Mill in 1861 that: ‘It is but a small portion of the public business of a country, which can be well done, or safely attempted, by the central authorities.’<sup>58</sup> According to him, implementation of policies set by the central government should be left to the hands of local authorities, thus freeing the local habitants from the detailed interventions from the central government.

### *3) Negative Subsidiarity & European Integration*

In the context of European integration, this liberal interpretation has prevailed in its appearance, though almost always coupled with the proposed increase of the EU’s competence. It was Altiero Spinelli, for instance, the champion of European federalism since the Resistance period, who introduced the principle of subsidiarity in the EU’s formal document, when he first led the European Commission to make a contribution report to the Tindemans Report in 1975, and then the European Parliament to adopt the Draft Treaty on European Union in 1984. On these two occasions, he attempted to soothe the fear for a over-centralised Leviathan in Brussels, by stressing the negative aspect of subsidiarity.<sup>59</sup>

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

Not everything in Europe is lovely because it happens to be European. A European Europe is also a much differentiated, colourful, multiple Europe. It is a Europe in which those matters are dealt with and regulated in common which could perhaps only sensibly be dealt with in this way. The transition from the First to the Second Europe demands a move away from the dogma of harmonisation towards the principle of subsidiarity.<sup>60</sup>

As a then Commissioner in Brussels, he was alerted by the scope and depth of the bureaucratisation of the Commission, especially in the field of Common Agricultural Policy. This First, over-bureaucratized Europe should, in his eyes, give way to the Second one of differentiation, in line with the principle of subsidiarity. Here we see a typical expression of the liberal current of

subsidiarity.

And one could add that the criticism against Brussels, unleashed after the Danish rejection of Maastricht in 1992, led to the emphasis on the negative version of subsidiarity. Delors became a central figure upholding the principle of subsidiarity, in this post-Maastricht debate, in which he made full use of negative subsidiarity. By promising to return some of the competences to the member states under the banner of subsidiarity, Delors retreated from an ever expanding programme for integration in an attempt to allay the fear for over-centralisation of power in Brussels.<sup>61</sup>

## **VI. SUBSIDIARITY IN THE EUROPEAN UNION<sup>62</sup>**

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

The above-mentioned initiatives of Altiero Spinelli exemplify it. When he first introduced the concept in the EEC Commission's contribution report to the Tindemans Report in 1975, that was accompanied by his radical proposals for strengthening the Community. The same can be said with the 1984 Draft Treaty on European Union by the European Parliament.

Apart from Valéry Giscard d'Estaing who made a major report on the subject in the EP, it was Jacques Delors who came out as a champion of subsidiarity, or 'M. subsidiarité', in the late 1980s. When he set out the date of 1992 in his inaugural speech in 1985, he mentioned this principle of subsidiarity. When he chaired the committee of central bankers whose report was later named as the Delors Report on EMU, he explicitly referred to the principle once more. With the 1992 boom starting to attract attentions, inside or outside of Europe, Delors felt it necessary to allay the fear for over-centralisation in Brussels.

It should be noted that this Delorist initiative under the name of subsidiarity was initially triggered in part by Länder. They expressed their concern in a meeting with Delors in Bonn in May 1988 that they lost control over legislative decisions taken in Brussels by their federal government. With subsidiarity, both Delors and Länder found a solution.<sup>63</sup>

The Maastricht Treaty and the successive Treaty of Amsterdam, which enshrined the detailed provisions for implementing subsidiarity, elevated the principle to one with a constitutional status. Here, subsidiarity works as a principle constitutive of a multilevel governance in Europe. So far as subsidiarity appears into the EU treaties, it presupposes some well-justified

intervention from the larger organisation, i.e. the EU, into the member-states' affairs. The overall structure of European governance distinctly shows a multi-level or at least two-level character, which the upholding of the subsidiarity principle embodies and supports. Some time ago, European integration proceeded by stealth, most of its activities being impinged – and to some extent legitimised – on their functional achievement. Now, its entire structure is constituted, or at least flanked, by this principle. The constitutionalisation of a multi-level governance in this sense is thus signalled by the rise of the principle of subsidiarity.

The point here is that while defending the further strengthening of the EU, the principle has been in use to assuage the fear for its over-centralisation. Yet, so far as the concept subsidiarity, not of sovereignty, is in use as the principle governing Community or Union, it presupposes the just and necessary interference from Brussels. The introduction of subsidiarity into EU politics means both the securing of the EU's achievement so far and the simultaneous control over the process of European integration.

Increasingly, the question seems to be how to use this principle for the sake of their own levels. Regions, member states and indeed the EU all try to interpret it in their favour. Even Margaret Thatcher initially tried to use it for her favourite sports of Brussels' bashing, though later she became critical of the idea.<sup>64</sup> Länder remain a keen supporter in advocating the strict implementation of the principle, though their priority seems to have shifted to the constitutionally explicit division of competences.

That almost everybody tries to use it in his or her favour strengthens, rather than weakens, the multi-level governance. This is because, these actors of two-to-three levels are constrained by the very use of subsidiarity which does not allow any level or unit to go absolute. With the principle of subsidiarity thus framing the way of thinking, Europe looks miles away from the sovereign state system, indeed.

## **VII. ON THE RESILIENCE OF SOVEREIGNTY**

The resurgence of subsidiarity in the EU discourse should thus entail some significant implications for the concept of sovereignty. To what extent does it transform the latter, or does it mean the demise of sovereignty?

In fact, sovereignty has repeatedly been declared dead or out of mode in its conceptual history. Yet it has at the same time remarkably well survived over the past few centuries. In order to finalise assessing the strength of subsidiarity

vis-à-vis its designated enemy, sovereignty, it is necessary to gauge the resilience of the latter. The present section attempts to serve this purpose.

The familiar and still widely accepted version of sovereignty is predominantly that of Jean Bodin, Thomas Hobbes, Jean Jacques Rousseau or, perhaps more controversially, Carl Schmitt. Relying mainly on these authors, the following section briefly analyses its three principal elements, that is, the absolute, indivisible and latent nature of sovereignty, each of which will then be compared and gauged with the principle of subsidiarity in the next conclusive section.

### *1) The Absoluteness of Sovereignty*

The absolute nature of sovereignty was so famously advanced by Bodin, whose definition of the concept starts: ‘Sovereignty is the absolute and perpetual power of a commonwealth, which the Latins call *maiestas*, ..., that is, the highest power of command.’<sup>65</sup> By focusing on the legislative power as all-encompassing, he set out the sovereign as some body above the law who can make and break laws at will. Behind this formulation lay Bodin’s view of the man and the society: Man has a voluntary will, not identical to God’s providence, which therefore is not necessarily directed at the goodness; and the society is composed of patricentric families. Combining these two, Bodin presupposed the chaos in which all the families would fight against each other. To suppress this chaos (as well as to run counter to the Monarchomach’s theory of the right of resistance), the Bodinian definition of sovereignty drew a sharp distinction between the sovereign and the subjects, liberated the former from all the restraints, and thereby established the absolute power at the idea’s level.

This thesis of the sovereign’s absoluteness has been reinforced by two theorists: Hobbes and Rousseau. For Hobbes who attempted to free the people from fear of disorder in the age of civil wars,<sup>66</sup> the absoluteness of sovereignty is founded on the rational calculations and voluntary will of the people who choose to avoid the ‘warre, as is of every man, against every man’<sup>67</sup> and thereby to renounce their private right for self-preservation. The preferred form of governance should be, just like Bodin, the absolute royal rule but, at the same time, Hobbes justified this in terms of social contract.

Jean Jacques Rousseau completed the justification of the absolute sovereignty, by making the people the master of themselves. This identification of the ruled as the ruler was made possible through the Rousseauist social contract, or more specifically through the highly mythical concept of ‘general will’. By subjecting to laws that the people make by themselves, the people would obtain the higher virtue and freedom, thus transforming themselves into

the fully-fledged citizens, the model which was obviously based on the ancient Greek city states. Thus Rousseau could easily state that: ‘the social pact gives the body politic absolute power over all of its members, and it is this same power which, directed by the general will, bears, as I have said, the name of sovereignty.’<sup>68</sup>

All the three authors had a theme in common, whose immediate predecessor would be found in Niccolò Machiavelli: freeing the sovereign from traditional ways of evaluating the right and the wrong. In charge of securing the basic order, the sovereign in the mould of Bodin and Hobbes was made unmistakable, while the Rousseauist sovereign is nothing but the all righteous ‘general will’ that the people form themselves. And it is this aspect of the sovereign’s infallibility that reinforced its absoluteness, and the idea of popular sovereignty inherited it.

To borrow the words of Emile Boutmy, ‘Rousseau applied to the sovereign the idea that philosophes held of God: he may do anything that he wills but he may not will evil.’<sup>69</sup> Thus the sovereign cannot will ‘evil’. Applied this conception of sovereignty to the people, nothing could have stopped Emmanuel Sieyès declaring that: ‘the people are always virtuous. In whatever manner a nation expresses its wishes, it is enough that it wishes; all forms are good but its will is always the supreme law.’<sup>70</sup>

At the same time when it was established as the infallible sovereign, the concept of ‘the people’ became abstract.<sup>71</sup> As the value of securing order prevailed in Bodin and Hobbes’ theories, just as the ‘general will’ in Rousseau’s writings, the idea of the people started to lose the particularities of smaller communities, which were seen a divisive factor in the order, or will, formation.<sup>72</sup> Accordingly, the flat and monolithic conception of the peoplehood was to be preferred. This opened the way in which the ‘people’ could be equated with the homogeneous ‘nation’ conceptually, which also coincided with the actual processes of nation-building and democratisation. In parallel with these processes, ‘the people’ has since then been a countable noun: a people (nation) neighbouring peoples (nations). All these peoples are now firmly sovereign and absolute, as the idea of popular sovereignty, fused with that of national self-determination, has been widely accepted. Thus, sovereignty, though the holder has passed from the King to the people, has not changed in terms of its absoluteness.<sup>73</sup> It can even be argued that its absolute nature has been reinforced by the idea of popular-national sovereignty – that is still the dominant ideology of the present time.

## 2) *The Indivisible and Unshareable Nature of Sovereignty*

The recent Euro-parlance of shared or pooled sovereignty is an interesting phenomenon in itself, seen against the background that the at least traditional concept of sovereignty has long been considered indivisible, not subject to sharing with others or pooling at elsewhere than the hands of the sovereign.<sup>74</sup>

In refuting the mixed polity discourse, Bodin was particularly sensitive to the idea suggesting the possible sharing of sovereignty, as can be seen in the following quotation:

Sovereignty will thus be tossed up and back between two parties, and sometimes the people, sometimes the prince will be the master – which are egregious absurdities and utterly incompatible with absolute sovereignty, as well as contrary to the laws and to natural reason.<sup>75</sup>

By identifying ‘the first prerogative (‘marque’) of a sovereign prince is to give law to all in general and each in particular ... without the consent of any other, whether greater, equal, or below him,’ he added that: ‘It cannot be shared with the subjects.’<sup>76</sup> If shared, he would no longer be sovereign.

The posture is more or less the same with Hobbes who says: ‘A Kingdome divided in it selfe cannot stand,’ calling the authority ‘Indivisible.’<sup>77</sup> For him, as well as for Bodin, any fragmentation of this absolute sovereignty was seen as the cause of instability and possibly of a civil war.

Once again, the Rousseauist notion of ‘general will’ reinforced this aspect of sovereignty: the indivisible and unshareable nature. The sovereignty that is now in the hands of the people themselves can be neither forfeited nor alienated. The general wills are the expression of ‘one and indivisible’ people, whose division would lead to particular wills, not the general ones. Thus for Rousseau, to divide and share sovereignty is both impossible and undesirable; hence his conclusion: ‘whenever one believes one sees sovereignty divided, one is mistaken.’<sup>78</sup>

Into the last century, one would find one of the major theorists of sovereignty in the figure of Carl Schmitt. Here is certainly not the place to determine his complex relationship with the Nazis and to locate his ever-shifting enemies in his theoretical construction.<sup>79</sup> The point relevant for this paper is that he ‘was determined to reinstate the personal element in sovereignty and make it indivisible once more.’<sup>80</sup> His definition of the sovereign is as famous or infamous as that of Bodin: ‘Sovereign is he who decides on the exception.’<sup>81</sup> As to the nature of ‘the exception’, the following section will soon discuss. Here, we should better keep in mind that, the abstract concept of Rousseauist ‘general



will', formed among a large number of people, has been expelled from the Schmittian definition. The sovereignty is once again personalised, more in line with Bodin and Hobbes. Embodied in a person, accordingly, sovereignty has regained its surest character: the one and indivisible nature.

### 3) *The Latent Nature of Sovereignty*

Carl Schmitt merits a detailed discussion not only in terms of a re-personified sovereignty, but more importantly in terms of its another, perhaps more contentious, nature: the latent and dormant character.

For Schmitt, '[sovereignty] is not the adequate expression of a reality but a formula, a sign, a signal'<sup>82</sup> and '[t]he connection of actual power with the legally highest power is the fundamental problem of the concept of sovereignty. All the difficulties reside here.'<sup>83</sup> Thus actual power can perfectly be exercised elsewhere than the sovereign, especially for the day-to-day business. Those who focus sociologically on the daily power management can easily doubt the validity of the sovereignty concept altogether.

He was well aware of this problem, when he says: 'It is infinitely pliable, and therefore in practice, depending on the situation, either extremely useful or completely useless.'<sup>84</sup> The solution he made was a quite insurmountable trick: a sharp distinction between the normalcy and the exception.

Based on a charitable reading of Bodin,<sup>85</sup> Schmitt redefined the concept of sovereignty as something 'associated with a borderline case not with routine,'<sup>86</sup> and continued to state that:

A jurisprudence concerned with ordinary day-to-day questions has practically no interest in the concept of sovereignty. ... What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes. ... Unlike the normal situation, when the autonomous moment of the decision recedes to a minimum, the norm is destroyed in the exception.<sup>87</sup>

Here, the Schmittian image of sovereignty is the one which comes to the fore, when an exceptional circumstance is judged to arise. As a scholar who has paid considerable amount of energy to introduce Schmitt since the 1960s acutely observed: 'in normal times the sovereign is, so to speak, slumbering, and he is suddenly awakened at a crucial moment: namely, at the borderline between the normalcy and the state of exception.'<sup>88</sup>

Perhaps more problematic in this image is that, as the exceptional situation arises, the ordinary arrangements that should govern the normalcy, including the established legal and normative discourses and practices, recede into the background. It is under this circumstance that sovereignty expresses its two main features to the fullest extent: absolute and indivisible.

This could be considered a stark warning for those who tend to live in normal situations and those who make a discourse out of the normalcy. According to Schmitt, the exception cannot be subsumed,<sup>89</sup> and even the recourse to the normalcy would also be determined by the sovereign.<sup>90</sup> Can a theorist of norms and normalcy have any role to play in the sovereignty discourse?

## **VIII. CONCLUSIONS: ASSESSING THE STRENGTH OF SUBSIDIARITY IN THE EU GOVERNANCE**

Having shown the two main interpretative currents of the idea of subsidiarity, its developments and meanings in the EU context, as well as the contrasted idea and the resilience of sovereignty, we are now in the position to conclude and to reflect on the findings' implications.

### *1) A Grand-Coalition under the Banner of Subsidiarity*

It is better not to underestimate the width of support to the principle of subsidiarity. The Liberals, Catholics and even Socialists of a Proudhonian flavour all are keen to uphold this principle. The widespread support can also be found in the current EU: the Commission, Member States and Regions all espouse the principle of subsidiarity, if to varying degrees and purposes. It is a sort of grand-coalition, which elevated the principle of subsidiarity to a constitutional status at Maastricht.

### *2) Not an Un-principled Principle*

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

Thatcher, for instance, wished to utilise the idea of subsidiarity, yet at some point (certainly by the time when she wrote the second volume of her Memoirs) realised that she cannot command the interpretation only to justify the State's power. On the other hand, the militant segments of post-Spinelli Euro-

federalists dislike the idea of subsidiarity, for the opposite reason: it would prevent the EU from acquiring further competence easily. The excessiveness of both the EU's and State's power is likely to be punished by the principle of subsidiarity. This is why we still can call subsidiarity a principle.

### *3) The Three Paths for Sovereignty and Subsidiarity*

In relation to this EU-wide coalition for the anti-centralisational, multilevel governance, sovereignty in Europe could take three possible forms, in each of which the principle of subsidiarity may play a role.

#### (i) Europe of the Schmittian Sovereignty

The Schmittian moment still might come. When an exceptional circumstance arises, the sovereign power entrusted by a national-popular democracy is still able to curb that power of subsidiarity, possibly to a subversive extent.

Although the 'exception', by nature, cannot be fully defined or even articulated in advance, it would usually appear when the existence or serious interest of a nation becomes threatened. The sources of threat might be military, financial or environmental. It may be that, a secession or even partial withdrawal out of a core EU arrangement (say, currency) by a core member state (say, France or Germany) cannot be ruled out, if one takes the time span up to 50 years. A world-wide financial crisis at the time when a populist force holds a casting board within a coalition government, coupled with the divergent interests between the core countries, could coincide the lowering threshold for a partial pull-out in the aftermath of enlargement, which might lead to a (partial) withdrawal. The result of such a modestly exceptional event would be a serious problem in practice, but should even be more damaging to the 'end of sovereignty' thesis in theory, particularly when the perceived threat and the resulting measures, with all the likelihood, will be justified under the name of the 'one and indivisible' people self-determining their own future utterly legitimately.

Whatever the scenario, the principle of subsidiarity in such a re-awakened sovereignty, would not be powerful enough to replace the principle of popular sovereignty, whose decisions can blow up the problematique of subsidiarity itself. The popular sovereignty gives any decision only of one unit or at one level an irresistible legitimacy, and contradicts the principle of subsidiarity coordinating, harmonising and ultimately legitimising the multi-level decision-making system, which does not give supremacy to any level. If this and that decision of one unit is 'über alles', subsidiarity may not have a word in the discourse.

What subsidiarity can do, is to be a reminder of co-operative multilevel governance that is a rule. At the level of ideas, it can ensure that such a crisis is indeed an exception in the light of the established norm of subsidiarity. After all, the trick of Schmitt is that the state of emergency is initially depicted as an *exception*, yet ends somehow up with the time-transcending essence of the political (in which to discern the ‘friends and foes’) – the logic that has to be kept in mind *always*. As Julien Freud pointed out: “When the exception is not covered by rules or norms, an instance other than law is needed to decide what should be done. Those situations will always be present, especially because they are unpredictable.”<sup>91</sup> Thus the Schmittian scheme allows the exception to be present at all times, making it a rule rather than an exception.<sup>92</sup> It is against this trick that subsidiarity can keep informing how the norm of multilevel governance looks like, even at the height of exceptional circumstances.

## (ii) Europe of the Althusian Sovereignty

And yet, the Schmittian sovereignty might well be ‘slumbering’, for the time being. As long as the age of normalcy where the multilevel governance is part of life lasts, as it seems highly likely for a foreseeable future, a discourse of the Althusian sovereignty would gain some currency. The theory of Althusius is often misrepresented as the ‘divisible’ sovereignty, as opposed to the ‘one and shareable’ sovereignty, but it does not matter much here.<sup>93</sup> The point is that, in either way, the use of Althusius in EU context might result in the claim that it is Europe as a whole where sovereignty resides, no matter how highly divisible internally. This is another direction in which the concept of sovereignty might well survive.<sup>94</sup>

Just as in the theory of Althusius, the thesis of a shared sovereignty is no denial of sovereignty, but favours the sort of sovereignty that is plural, distributed, and limited, with the upper level power always dependent upon the consent of the lower ones and with the concept of the people based on the participation and representation of the particular and concrete identities. In a definite sense, it is a huge advancement, as compared to the organic-ethnic based, absolute and indivisible sovereignty.

The problem is that, when conceived that sovereignty resides with the entirety of the European commonwealth, it still looks, and perhaps is intended, as one and exclusive, seen from outside. Take the case of Alain de Benoist:

A well-conceived Europe, i.e., a federal Europe, would not be the agent of the dissolution of existing sovereignties, but, rather, the instrument of their rebirth as a means of European sovereignty conceived and practiced differently.<sup>95</sup>

One of the principal references that Benoist relies on in referring to ‘European sovereignty’ is Chantal Delsol – rather well known ‘Mme subsidiarité’. Having set out her scheme in which the rational criteria of sufficiency and insufficiency in achieving a given objective should guide the competence sharing between the member states and the EU, this another Althusianist is not hesitant in arguing that:

L’Europe, objet politique non identifié, devra pour être crédible ... augmenter la puissance politique là où l’imcompétence des États est évidente. Il y a plus de lois communes entre les pays européens qu’entre les États américains aujourd’hui ... L’Europe surveille la fabrication des objets les plus simples. Mais nous n’avons pas la possibilité de régler le conflit bosniaque sans les Américains. Il y a là une absurdité dont il faudra bien sortir. ...

Pendant longtemps la valeur culturelle, historique, symbolique de la nation cherchait sa sauvegarde dans la puissance étatique; mais la politique ne se fait-elle pas ailleurs que dans l’État, la puissance n’a-t-elle pas à bien des égards changé de nature, les moyens de sauvegarde d’un destin commun n’ont-ils pas pris d’autres formes?<sup>96</sup>

Here, she seems to be arguing that, under the banner of subsidiarity, a political Europe should protect the values of member nations, as well as project its influence well beyond its boundaries, to the extent that it can contain ethnic conflicts in neighbouring countries, independent of the US’s wills and capabilities. The image of Europe as a super-power in formation, visible in an analogy with the US (history), as well as the emphasis on the ‘common destiny’, point to the embryonic European sovereignty, externally united.

When a leading scholar on Althusius in our time (on whom Benoist relies a good part of his argument once again) admits the following, a fear on the Althusius-inspired European external sovereignty could be justified:

Sovereignty [after the Treaty of Westphalia] ... not only became the key concept of external regulation for a new inter-state system, it was also internalized as a principle of unitary and, increasingly, absolute power within states. The significance of Althusius’ theoretical contribution lies in the fact that *he accepted the new system of territorialized politics in its external dimension*, but sought to preserve the internal plurality or rule, constitutionally stabilizing it into an organized process of power sharing and solidarity.<sup>97</sup>

Here, we might well need a note of caution. Europe obviously does not exist in isolation of the world. It is an island where the states assemble and integrate themselves to a uniquely high degree. The world beyond this island, however, remains one of sovereign (nation) states. Given this posture, Europe with internally divisible sovereignty can be viewed by outsiders simply as a sovereign

entity.<sup>98</sup> And this external view and practice might have some feedback for further strengthening the European sovereignty.

Already in Kyoto where the world gathered to regulate the CO<sup>2</sup> emission, the EU was treated as a single unit by the rest of the world. How to allocate the quota within the EU, the non-member states just let the EU member states negotiate and decide. This treatment of the EU by the rest of the world perfectly fits the thesis of ‘(externally) one and (internally) divisible’ sovereignty in Europe. In other areas such as anti-dumping or competition policies, the EU has long been viewed as a single entity. With the arrival and circulation of the Euro, the tendency to regard Europe as the ‘one and divisible’ sovereign entity is only likely to be reinforced.

If this is the case, then the rich theoretical implications that European integration could entail vis-à-vis sovereignty would be significantly diluted. The world would see a reduction of number of sovereign states, but nothing more (at least for outsiders). As some hope, it is increasingly viewed and could in the end become a superpower, however strange it might look.<sup>99</sup> In such a scenario, the discourse and practices to exclude ‘foreigners’ would be carried out under the name of Europe, instead of each member nations. Though partially overlapped with this Althusian Europe, a subsidiarian Europe might put forward a different picture.

### (iii) A Subsidiarian Europe

Nothing is absolutely sovereign in the world of subsidiarity, as advanced here. It does not view the member states and the EU as sovereign entities. It is a Europe equipped with multiple levels of governance internally, and viewed as such by those outside the EU.

Subsidiarity does not tolerate the excessive centralisation of any entity – that is why it remains a principle. At the level of member countries, the one and indivisible sovereign state is to be dissolved, not unlike in the Proudhonian sense. Here, the ‘Weltanschauung’ that subsidiarity is imbued with does not view the statal People (Volk), i.e. the foundation of state, as one and indivisible. Particularities of communities and entities, be they religious, linguistic, functional, local or regional, are all given recognition in the world of subsidiarity. This, on the other hand, does not mean to exclude or suppress a national community; on the contrary, subsidiarity can easily give it due weight, as long as it remains the focal point for civic loyalty and as it does not suppress smaller communities and individual liberties within the community. The concept of subsidiarity thus can be seen one of the most inclusive and flexible in terms of recognising communities.

At the level of Europe, too, the Union is a mixed commonwealth that, though less than sovereign, nonetheless does ‘communicate everything necessary and useful to it, and remove and do away with everything to the contrary,’<sup>100</sup> to use the Althusian terms selectively. This logic constrains both the member states and the EU, making them less than sovereign.

By not privileging the statal people and nation, a subsidiarian Europe also helps de-couple the link between the People, Nation, Democracy, Sovereignty, State and Constitution. A smaller as well as larger communities than a National People are incorporated into the sort of multilevel governance that subsidiarity flanks and empowers. Accordingly, Democracy in one Nation should not be given an absolute legitimacy, if always largely respected. In the state of normalcy, popular and national Sovereignty and the State thus are deprived of its distinctive characters: absolute and indivisible, though under exceptional circumstances subsidiarity is likely to lose its relevancy, except as a reminder of the very norm of multilevel co-operative governance. Lastly, subsidiarity is a principle constitutive of such multilevel governance. This aspect does not neatly fit the State-Constitution equation in the traditional discourse. Although it does not support the establishment of a Constitution to support a European Sovereign State, subsidiarity can empower the multilevel constitutional order in Europe without replacing that of the member states.

Also in the world, the European commonwealth would be viewed a subsidiarian entity: plural, divisible and shareable, not one and absolute. The diplomatic corps of non-member states would stop being a Kissinger having no idea where to make a phone call. Instead, they slowly need to learn how to deal with a plural and divisible entity diplomatically, by taking the trouble of making appointments with the President of the General Affairs Council, High Representative of the Union, External Affairs Commissioner, and indeed the Foreign Ministers of the member states – the symbol of the divisible (external) commonwealth of Europe. The (limited) presence of local entities in diplomacy adds to it further complexity, but would reinforce the practice of the multilevel governance, to which the outer world might need to adjust themselves. Thus depending on the issues involved, the outsiders would deal with different levels and actors, making the external dimension of the European commonwealth divisible. Here, the principle of subsidiarity, supporting such a practice, can be seen transformative for the external, as well as internal, world.

More than anything, subsidiarity thus serves as a critical viewpoint with which to constantly undermine the internal and external foundations of the State Sovereignty. It still is not and probably will never be strong enough to replace Sovereignty that comes to the fore in emergency. Yet, with a long history combating the enemy in one way or another, it will continue to offer an alternative vision that informs the norm of a multilevel governance.

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## Endnotes

<sup>1</sup> See an analysis of European integration in a comparative perspective by William Wallace, *Regional Integration: The West European Experience* (Washington, DC: The Brookings Institution, 1994), Chaps. 1-2.

<sup>2</sup> The density of interactions between the administrators and politicians can be observed in an episode that, in 1991, Douglas Hurd, British Foreign Secretary, introduced his counterpart, Roland Dumas, at a conference in Paris, saying that it was their 10<sup>th</sup> meeting in two weeks and the sixth country for such a meeting. Quoted in Wallace, *ibid.*, p. 21. For a systematic survey of increasing legislative pressures, see Andreas Mauer and Wolfgang Wessels, 'The EU Matters: Structuring Self-made Offers and Demands,' in Wessels, Mauer, and Jürgen Mittag eds., *Fifteen in One? The European Union and its Member States* (Manchester: Manchester University Press, forthcoming).

<sup>3</sup> See on this last point Neil MacCormick, *Questioning Sovereignty: Law, State, and Practical Reason* (Oxford: Oxford University Press, 1999), esp. Chaps. 8-9; *idem.*, 'Liberalism, Nationalism and the Post-sovereign State,' *Political Studies* XLIV (1996): 553-567.

<sup>4</sup> Here I draw on a formulation by Hermann Heller: 'The point of departure should be the fact, beyond doubt nowadays, that any federal state as a whole is a sovereign state which makes universally applicable decisions within its territory.' Taken from the Japanese translation of his *Souveränität* (Berlin & Leibzig: Walter de Gruyter, 1927), Chapter 5: The essence of sovereignty, Section B.

<sup>5</sup> My previous work was concerned with the potential and limits of the Commission President's political leadership. See *The Presidency of the European Commission under Jacques Delors: The Politics of Shared leadership* (Basingstoke: Macmillan/St. Martin's Press, 1999).

<sup>6</sup> Thomas Risse, 'Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union,' *Journal of Common Market Studies*, 34/1 (March 1996): 53-80; Philippe Schmitter, 'Imagining the Future of the Euro-Polity with the Help of New Concepts,' in Gary Marks et al., *Governance in the European Union*, (London: Routledge, 1996): 121-150.

<sup>7</sup> One of such examples can be found in Dimitris N. Chrysochoou's 'Consociational Confederation' in his *Democracy in the European Union*, (London: Tauris Academic Studies, 1998).

<sup>8</sup> Joseph Weiler, The State 'Über Alles': Demos, Telos and the German Maastricht Decision, *Harvard Jean Monnet Working Paper* 6/95 (1995).

<sup>9</sup> I learned from Miriam Aziz, European Forum, RSCAS, EUI, that behind this official line of Karlsruhe on the Maastricht Treaty, there is a highly polarised discourse in German legal scholarship between the national sovereignty and the Europeanised legal order. See her 'Sovereignty Lost, Sovereignty Regained? The European Integration Project and the Bundesverfassungsgericht,' Paper presented at the European Forum, Robert Schuman Centre, European University Institute, Florence, 8 February 2001. See also J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), esp. chaps. 8-9; Weiler, 'The State "Über Alles"', *op. cit.*

<sup>10</sup> Joseph Weiler, *The Constitution of Europe, ibid.*

<sup>11</sup> Neil MacCormick, *Questioning Sovereignty, op. cit.*

<sup>12</sup> Richard Bellamy, Victorio Bufacchi & Dario Castiglione, *Democracy and Constitutional Culture in the Union of Europe* (London: Lothian Foundation Press, 1995); Richard Bellamy and Dario Castiglione, 'Building the Union: The Nature of Sovereignty in the Political Architecture of Europe,' in Neil MacCormick ed., *Constitutional Legal Systems: "European Union" in Legal Theory* (Dordrecht: Kluwer Academic Publishers, 1997): 91-115.

<sup>13</sup> Weiler, *The Constitution of Europe, ibid.* Although I do not fully elaborate this normative standpoint here, I share 'cosmopolitan communitarianism', which tends to 'combine a communitarian appreciation of the importance of identity politics within a civic and democratic setting, with the recognition that globalization and supra- and post-national processes have already altered the structure of state sovereignty beyond what communitarians are prepared to admit and to allow.' See the point articulated and espoused by Richard

Bellamy and Dario Castigliano, 'Building the Union: The Nature of Sovereignty,' in MacCormick ed., *Constitutional Legal Systems, op. cit.*, pp. 111ff, reprinted from *Law and Philosophy* 16/4 (1997): 441ff.

<sup>14</sup> Ken Endo, "The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors," *Hokkaido Law Review*, XLIV/6 (1994): 553-652, esp. Part I.

<sup>15</sup> Marie-Pierre Subtil, 'Un casse-tête: la répartition des compétences entre la Communauté et les Etats membres,' *Le Monde*, 22 juin 1990, p. 7.

<sup>16</sup> Quoted in *ibid.*

<sup>17</sup> Pedro Schwartz, 'Is the Principle of Subsidiarity a Solution?' in François Goguel et al., *A Europe for Europeans* (London: The Bruges Group, 1990), pp. 16-17.

<sup>18</sup> Alain Madelin's remarks, quoted in Vincent Lecocq, 'Subsidiarité et réforme des institutions européennes,' *Revue politique et parlementaire* N. 956 (Novembre-Décembre 1991), p. 45.

<sup>19</sup> See a survey article by Andreas Føllesdal, 'Subsidiarity,' *Journal of Political Philosophy*, 6/2 (1998): 231-259.

<sup>20</sup> See for a fuller bibliographical review in Ken Endo, 'The Principle of Subsidiarity,' *op. cit.*, pp. 647-9.

<sup>21</sup> Some of the exceptions can be found in Chantal Millon-Delsol, *L'Etat subsidiaire; Ingérence et non-ingérence de l'Etat: le principe de subsidiarité aux fondements de l'histoire européenne* (Paris: Presses Universitaires de France, 1992); idem, *Le Principe de Subsidiarité* (Paris: Presses Universitaires de France, 1993).

<sup>22</sup> Jean-Marie Pontier, 'La subsidiarité en droit administratif,' *Revue du droit public et de la science politique en France et à l'étranger* (novembre-décembre 1986), p. 1516.

<sup>23</sup> Chantal Delsol, *L'Etat subsidiaire, op. cit.*, Chaps. I et III.

<sup>24</sup> See for a recent, and probably the most, systematic and thoughtful introduction of the political ideas of Althusius, Thomas O. Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* (Waterloo, Ontario: Wilfrid Laurier University Press, 1999).

For the following discussions on Althusius, see also Patrick Riley, 'Three 17th Century German Theories of Federalism: Althusius, Hugo and Leibniz,' *Publius: The Journal of Federalism* 6/3 (1976): 7-41; Thomas Hueglin, 'Johannes Althusius: Medieval Constitutionalist or Modern Federalist?' *Publius: The Journal of Federalism* 9 (4 1979): 9-41; idem, 'New Wine in Old Bottles? Federalism and Nation States in the Twenty-First Century: A Conceptual Overview,' in Karen Knop, Sylvia Ostry, Richard Simeon, and Katherine Swinton. eds., *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World* (Vancouver: University of British Columbia Press, 1995): 203-223.

<sup>25</sup> Carl Joahim Friedrich, *Politica Methodica Digesta of Johannes Althusius* (Cambridge: Harvard University Press, 1932), p. 15. The English translation can also be found in Frederick S. Carney, *The Politics of Johannes Althusius* (London: Eyre & Spottiswoose, 1965), p. 12, reprinted as: Johannes Althusius, *Politica: An Abridged Version of Politics Methodically Set Forth and Illustrated with Sacred and Profane Examples*, ed., trans. & intro., by Carney (Indianapolis: Liberty Fund, 1995), Chap. I, pp. 17-8. All the following quotations are taken from this new version.

<sup>26</sup> Althusius, *Politica, ibid.*, pp. 71-2.

<sup>27</sup> Otto von Gierke serves as the best example of this line: his *Johannes Althusius und die Entwicklung des naturrechtlichen Staatstheorien* (Aalen: Scientia, 1958). I relied on the substantial introduction and translation of his other works: *Political Theories of the Middle Age*, ed., trans. & intro. by Frederick W. Maitland (Cambridge: Cambridge University Press, 1900); *Natural law and the Theory of Society 1500 to 1800*, ed., trans. & intro., by Ernest Barker (Cambridge: Cambridge University Press, 1934); *Community in Historical Perspective*, ed., trans. & intro. by Anthony Black (Cambridge: Cambridge University Press, 1990).

<sup>28</sup> Althusius, *Politica, op. cit.*, Chap. IX, pp. 69-70.

<sup>29</sup> Alain de Benoist's claim that Althusius is the advocate of the divisible sovereignty is imprecise. As will soon be argued, the Althusian sovereignty is shareable, but not divisible. See his 'What is Sovereignty?' *Telos*, No. 116 (Summer 1999): 99-118. Compare, on the divisibility of sovereignty, with Julian H. Franklin, 'Sovereignty and the mixed constitution,' in J. H. Burns ed., *The Cambridge History of Political Thought 1450-1700* (Cambridge:

Cambridge University Press, 1991): 298-328, where Christoph Besold is described as the theorist more successful than Althusius to envision the divisible and shareable sovereignty.

<sup>30</sup> *Politica.*, Chap. IX, p. 67 and p. 70.

<sup>31</sup> *Ibid.*, Chap. IX, p. 66.

<sup>32</sup> Note that the Althusian version of ‘people’ are all inclusive, in that they, formed under the universal consociation, comprise every sort of smaller consociations, irrespective of their qualitative and quantitative weight. See Hueglin, *Early Modern Concepts*, *op. cit.*, p. 180.

<sup>33</sup> Althusius, *Politica*, *op. cit.*, p. 74.

<sup>34</sup> Hueglin, *Early Modern Concepts*, *op. cit.*, p. 174.

<sup>35</sup> Cited as above. It might be noted, in connection with the discussion below, that Ernest Barker quoted and espoused an Encyclical of Pontiff Pius XI who established the principle of subsidiarity. See Barker’s work in the middle of WW2, *Reflections on Government* (London: Clarendon Press, 1942), p. 353.

<sup>36</sup> See for instance his *The Foundations of Sovereignty and Other Essays* (London: George Allen & Unwin, 1921); ‘The Pluralist State’, *Philosophical Review* 28 (1929): 562ff.

<sup>37</sup> The *Cercle Proudhon* was founded within the *Action Française* in 1911. See Donald Kelley and Bonnie Smith’s ‘Introduction’ to Proudhon’s *What is Property?* (Cambridge: Cambridge University Press, 1994), p. xxxiii.

Amongst the supporters of the Vichy regime could also be found a significant number of Proudhonists. It might be interesting to note that the young Jacques Delors, himself deeply imbued with social Catholicism, felt sympathetic towards the Vichist propaganda for social harmony, as he himself confessed in his *Changer: Conversations avec Clause Glayman* (Paris: Stock, 1975). Here I draw on my unpublished paper: ‘What is “Delorism”? Convictions of Jacques Delors,’ *European Studies*, Katholieke Universiteit Leuven, August 1992.

<sup>38</sup> For the same reason opposing the homogeneous nation-state in France, Proudhon objected the contemporary establishment of a national state in Italy which, for him, would lead to the suppression of natural groups such as municipalities and regions. One of his main publications (*Du principe fédératif*) derived from his struggles to counter-argue for the federal union in Italy, which would then be incorporated to a wider European federation.

<sup>39</sup> P. J. Proudhon, *De la capacité politique des classes ouvrières*, *Oeuvres complètes III* (Paris: M. Rivière, 1924), p. 213

<sup>40</sup> *Théorie de la propriété* (Éd. Lacroix), chap. IX, p. 241, cité par Jean Bancal, *Prodhon: Pluralism et autogestion, tome II: les réalisations* (Paris: Aubier Montaigne, 1970), 118.

<sup>41</sup> Proudhon, *De la capacité politique*, cited by Bancal, *ibid.*, pp. 104-5.

<sup>42</sup> *De la capacité politique des classes ouvrières*, *Oeuvres complètes III*, nouvelle édition (Genève- Paris: Slatkine, 1982), pp. 197-8.

<sup>43</sup> Here, I draw on my unpublished paper, “What is ‘Delorism’? The Convictions of Jacques Delors,” *Katholieke Universiteit Leuven*, Leuven, August 1992; *idem.*, ‘The Principle of Subsidiarity,’ *op. cit.*, esp. Part III.

<sup>44</sup> See with this regard, Delsol, *L’État subsidiaire*, *op. cit.*, p. 126-36.

<sup>45</sup> Leo XIII, ‘Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labor, May 15, 1891,’ in *The Popal Encyclicals 1903-1939* (Raleigh: McGrath Publishing Company, 1981), paras. 35, 36, 55.

<sup>46</sup> Para. 33 and 36, respectively. See Leo’s ‘Rerum Novarum,’ *ibid.*

<sup>47</sup> Para. 37, *ibid.*

<sup>48</sup> We should distinguish between the State corporatism of Mussolini or of Salazar which in fact concentrates the power on the State or on one party, and, so to speak, the societal corporatism of Papacy, which tries to retain the autonomy of social groups. Due to these differences, Pope Pius XI was sceptical towards the Italian Fascist Government, although he would have chosen this regime, had he been forced to choose between Fascism and Communism. His scepticism towards Fascism is seen in the following quotation:

We must be compelled to say that ... there are not wanting some who fear that the State, instead of confining itself as it ought to the furnishing of necessary and adequate assistance, is substituting itself for free activity; that the new syndical and corporative order savors too much of an

involved and political system of administration; and that ... it rather serves particular political ends than leads to the reconstruction and promotion of a better social order.

For the quotation and explanation, see Richard L. Camp, *The Papal Ideology of Social Reform: A Study in Historical Development 1878-1967* (Leiden: E. J. Brill, 1969), pp. 148-149, and p. 18. It may be noted that, by expressly referring to the principle of subsidiarity, Ernest Barker expressed some sympathy towards the papal societal corporatism, as distinguished from the Fascist corporatism. See his *Reflections on Government* (London: Clarendon Press, 1942): 353. Compare with Andrew Adonis and Andrew Tyrie, *Subsidiarity - as history and policy* (London: Institute of Economic Affairs, 1990), who dismissed the principle of subsidiarity on the ground that it was espoused by the same Pope Pius XI who concluded Concordat with Mussolini.

<sup>49</sup> Pius XI, 'Quadragesimo Anno: Encyclical of Pope Pius XI on Reconstruction of the Social Order, May 15, 1931,' in *The Papal Encyclicals 1903-1939*, *op. cit.*, paras. 79-80. Emphasis added.

<sup>50</sup> His concern over social questions is best expressed in his criticism towards capitalistic Liberalism:

Free competition, kept within definite and due limits, and still more economic dictatorship, must be effectively brought under public authority ... The public institutions themselves, of peoples, moreover, ought to make all human society conform to the needs of the common good; that is, to the norm of social justice. (*Ibid.*, para.78.)

<sup>51</sup> *Ibid.*, para. 110.

<sup>52</sup> See Delsol, *L'Etat subsidiaire*, *op. cit.*, pp. 123ff.

<sup>53</sup> Pius XI's 'On Atheistic Communism,' in Rev. John F. Cronin, *Catholic Social Principles: The Social Teaching of the Catholic Church Applied to American Economic Life*, 3rd Print (Milwaukee: The Bruce Publishing Company, 1952), p. 67.

<sup>54</sup> Delsol, *L'Etat subsidiaire*, *op. cit.*, pp. 123ff.

<sup>55</sup> Dieter Perlich, 'Die Akten der Synode der niederländischen Gemeinden, die unter dem Kreuz sind und in Deutschland und Ostfriesland verstreut sind, gehalten in Emden, den 4. Oktober 1571' in Elwin Lomberg (Hrsg.) *1571 Emdener Synode 1971* (Neukirchener, 1973): 49-66, at p. 63.

<sup>56</sup> For the following paragraphs, I mainly rely on Delsol, *L'Etat subsidiaire*, *op. cit.*, esp. Chap. VI.

<sup>57</sup> Quoted by Oswald Nell-Breuning, *Baugesetze der Gesellschaft: Solidarität und Subsidiarität* (Freiburg: Herder, 1990), S. 88.

<sup>58</sup> John Stuart Mill, *Considerations on Representative Government, Collected Works of John Stuart Mill* Vol. XIX (Tronto: University of Tronto Press, 1977), p. 534.

<sup>59</sup> A detailed discussion on these Spinelli initiatives can be found in Ken Endo, 'The Principle of Subsidiarity,' *op. cit.*, Part III.

<sup>60</sup> Quoted (with some minor revisions of translation) from Micheal Hodges ed., *European Integration: Selected Readings* (Harmondsworth: Penguin, 1972), p. 82.

<sup>61</sup> For details, see Ken Endo, 'The Art of Retreat: A Use of Subsidiarity by Jacques Delors,' *Hokkaido Law Review*, XLVIII/6 (1998): 1684-1700.

<sup>62</sup> For a fully documented analysis of subsidiarity within the context of European integration, see my 'The Principle of Subsidiarity' *Hokkaido Law Review*, *op. cit.*, Part III, pp. 569-609.

<sup>63</sup> 'Document de travail de Jacques Delors, Président de la Commission des Communautés européennes à l'occasion de la rencontre avec la Conférence des Présidents des Länder, Bonn, 19 mai 1988.'

<sup>64</sup> Margaret Thatcher, *The Path to Power* (New York: HarperCollins, 1995): 482.

<sup>65</sup> Jean Bodin, *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*, ed & trans. by Julian H. Franklin (Cambridge: Cambridge University Press, 1992): 1

<sup>66</sup> Richard Tuck, 'Introduction', in Thomas Hobbes, *Leviathan*, ed. by Tuck (Cambridge: Cambridge University Press, revised student edn., 1996), esp. at p. xxvi.

<sup>67</sup> Hobbes, *Leviathan*, *ibid.*, Chap. XIII [62], p. 88.

<sup>68</sup> Jean Jacques Rousseau, *Of the Social Contract or Principles of Political Right*, ed. & trans. by Victor Gourevitch, *Rousseau: The Social Contract and other later political writings* (Cambridge: Cambridge University Press, 1997), Chap. 4: On the Limits of Sovereign Power, p. 61.

<sup>69</sup> “La declaration des droits de l’homme et du citoyen et M. Jellinek,” *Annales des sciences politiques* n. 4 (1902): 418, quoted in Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Mass.: MIT Press, 1985): 46.

<sup>70</sup> Emmanuel Sieyès, quoted in *ibid.*, p. 48.

<sup>71</sup> Alain de Benoist made a similar point. See his ‘What is Sovereignty?’ *Telos*, No. 116 (Summer 1999): 99-118, at 107-8.

<sup>72</sup> See the hostility of Rousseau against the intermediate bodies: ‘It is important, then, that in order to have the general will expressed well, there be no partial society in the State, and every Citizen state only his own opinion.’ In Rousseau, *op. cit.* p. 60.

<sup>73</sup> Cf. Proudhon, *What is Property?* ed. & trans. by Donald R. Kelley & Bonnie G. Smith (Cambridge: Cambridge University Press, 1994): 28.

<sup>74</sup> The best article pointing to the alternative formulation of divisible and sharable sovereignty in the history of European political and constitutional thought, can be found in Julian H. Franklin, ‘Sovereignty and the mixed constitution,’ in J. H. Burns ed., *The Cambridge History of Political Thought 1450-1700* (Cambridge: Cambridge University Press, 1991): 298-328. See also the section discussing Althusius above.

<sup>75</sup> Bodin, *On Sovereignty*, *op. cit.*, p. 27 [Fr. 1583, Livre I, ch. 8, p. 145]

<sup>76</sup> *Ibid.*, pp. 56, 58.

<sup>77</sup> *Leviathan*, *op. cit.*, Chap. XVIII [93], pp. 127-8.

<sup>78</sup> *Of the Social Contract*, *op. cit.*, Chap. Two: That Sovereignty is Indivisible, p. 59. Under the influence of Rousseau, the 1791 French Constitution stated: ‘sovereignty is indivisible, inalienable, and imprescriptible.’ (Chap. III, Art. 1)

<sup>79</sup> The latest and sophisticated reconstruction of his life and work can be found in Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000), although the issues related to sovereignty are not one of the main subjects discussed in this book.

<sup>80</sup> George Schwab, ‘Introduction,’ in Carl Schmitt, *Political Theology*, *op. cit.*, p. xvi.

<sup>81</sup> Schmitt, *Political Theology*, *ibid.*, p. 5

<sup>82</sup> *Ibid.*, p. 17

<sup>83</sup> *Ibid.*, p. 18

<sup>84</sup> *Ibid.*, p. 17

<sup>85</sup> *On Sovereignty*, *op. cit.*, Book I, Chap 10: On the True Marks of Sovereignty.

<sup>86</sup> *Political Theology*, *op. cit.*, p. 5

<sup>87</sup> *Ibid.*, p. 12

<sup>88</sup> George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936* (Berlin: Duncker & Humblot, 1970): 50.

<sup>89</sup> The state of exception, in which the sovereignty can most visibly be observed, cannot be subsumed. The example of the Austrian constitution and government, cited by Herman Heller, is highly illustrative in this regard. In 1926 when the country faced a financial crisis, which might have led to the bankruptcy of its central bank, its government took highly controversial emergency measures to prevent it, without consultation with the legislature. What makes this case illustrative is that their constitution was drafted by Hans Kelsen who had boasted that he had eliminated all the Schmittian emergency clauses from the constitution. Thus, a constitutional suppression of emergencies does not prevent them from erupting. See Herman Heller, *Souveränität* (Berlin & Leipzig: Walter de Gruyter, 1927): Chap. V. On the sovereignty that is most vividly observed in such an exceptional circumstance, see also Schmitt, *Political Theology*, *op. cit.*, p. 13.

<sup>90</sup> ‘He decides whether there is an extreme emergency as well as what must be done to eliminate it.’ Schmitt, *Political Theology*, *ibid.*, p. 7.

<sup>91</sup> Julien Freud, *L’essence du politique* (Paris: Sirey, 1965): 125, quoted in Benoist, *op. cit.*

<sup>92</sup> Here is yet another character of the Bodinian sovereignty, i.e., permanency, regained.

<sup>93</sup> See Benoist, ‘What is Sovereignty,’ *op. cit.* and also the section III discussing Althusius

earlier in this paper.

<sup>94</sup> I am probably not advancing a hypothesis here: it is in a sense a rapidly developing reality, in the discourse aiming to put forward an alternative formulation of sovereignty, particularly relying on Althusius. Beside Benoist quote as above, see Chantal Delsol, 'Souveraineté et Subsidiarité ou l'Europe contre Bodin,' *La Revue Tocqueville*, XIX/2 (1998); Hueglin, *Early Modern Concepts for a Late Modern World*, *op. cit.*

<sup>95</sup> Benoist, 'What is Sovereignty,' *op. cit.*, 118

<sup>96</sup> Chantal Delsol, 'Souveraineté et Subsidiarité ou l'Europe contre Bodin,' *La Revue Tocqueville*, XIX/2 (1998): 52 et 55.

<sup>97</sup> Hueglin, *Early Modern Concepts for a Late Modern World*, *op. cit.*, p. 5. Emphasis added.

<sup>98</sup> One classic work pointing out this possibility is Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Basingstoke: Macmillan, 1977): 265.

<sup>99</sup> David Buchan, *Europe: The Strange Superpower* (Aldershot: Dartmouth, 1993).

<sup>100</sup> Althusius, *Politica*, *op. cit.*, p. 74.