THE PRINCIPLE OF SUBSIDIARITY IN THE EUROPEAN UNION CONTEXT

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ABSTRACT

THE PRINCIPLE OF SUBSIDIARITY IN THE EUROPEAN UNION CONTEXT

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In this study, the attitude of the European Union towards the Principle of Subsidiarity and the way it utilizes this principle is analyzed. Besides putting forward the fundamental principles of subsidiarity within the historical framework that it has evolved through, the factors that made the Union adopt subsidiarity and the attitude of the Community institutions towards this principle are examined. In this regard, the role that the principle of subsidiarity has played in the European integration process so far and those that it may play in the future formation of the Union is discussed.

Keywords: Subsidiarity, European Union.

ÖZ

AVRUPA BİRLİĞİ'NDE SUBSIDIARITY (YERELLİK[1]) İLKESİ

Demirci, Bengi

Yüksek Lisans, Avrupa Çalışmaları

Tez Yöneticisi: Prof. Dr. Şinasi Aksoy

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Bu çalışmada, Avrupa Birliği'nin Subsidiarity (Yerellik) İlkesi'ne yaklaşımı ve bu ilkeyi uygulayış biçimi incelenmiştir. İlkenin tarihsel gelişimi çerçevesinde temel prensiplerinin ortaya konulmasının yanı sıra, Birliğin neden böyle bir ilkeye ihtiyaç duyduğu ve Topluluk kurumlarının bu ilkeye yaklaşımları irdelenmiştir. Bu bağlamda, yerellik ilkesinin Avrupa'nın bütünleşmesi sürecinde bugüne kadar üstlendiği ve bundan sonra üstleneceği roller tartışılmıştır.

Anahtar Sözcükler: Subsidiarity (Yerellik) İlkesi, Avrupa Birliği.

[1] Şu an için bu ilkenin herkes tarafından kabul edilen tek bir Türkçe karşılığı bulunmamaktadır. "Yetki İkamesi" ve "Hizmette Halka Yakınlık" kavramlarının da "subsidiarity" ilkesini tanımlamada kullanıldığını görmekteyiz.

To

My MOTHER & FATHER

with my grateful thanks for their endless love and encouragement.

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I hereby declare that all information in this document has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work.

Date: Signature:

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CHAPTER 1

INTRODUCTION

Having started its evolution mainly as an economic integration process, it is quite apparent that the European Community[2] has now gained a serious political dimension. Nowadays, European intellectuals discuss the Draft Constitution for Europe that has been submitted to the European Council meeting in Thessaloniki in June 2003, which underlines the extent of advancement made so far in the integration process.

However, for the time being, the actual point that the Community has reached does neither satisfy the definition of an international organization nor a state (not even a federal or a confederal state). The nature of sovereignty that is enjoyed by the Community institutions has not yet been defined or given a name. In this regard, being a mixed polity made up of different states together with their regionally and locally diversified units, the EC has long been facing problems regarding power-sharing - i.e. regarding the appropriateness of the level for decision-making-, legitimacy, democracy, participation, identification and civic loyalty.

In order to avoid these deficiencies, European intellectuals and the Community institutions had recourse to a historical concept- namely the principle of subsidiarity- which was adopted by the Maastricht Treaty after long discussions. However, those discussions got even intensified after the official incorporation of

[2] Unless otherwise indicated, European Community (EC) will be used throughout this study regardless of pre or post Maastricht era.

this principle into the Treaty, since by then it has taken its place among the fundamental principles of the Community, which implies that it has to be made work as is the case for the other principles of the Community.

Although its popularity has increased by its incorporation into the Maastricht Treaty, in fact, subsidiarity is quite an old historical concept whose oldest traces can be found in Aristotle and which made various re-appearances in different philosophical and political contexts throughout the history. In spite of its long journey throughout the history, we still do not have a precise definition for subsidiarity that is accepted by all. This makes things even harder regarding the implementation of this principle within the European Community. However, this does not mean that subsidiarity is an unprincipled principle (Endo, 2001: 8), because when we look at its evolution throughout the history, we see that there are common denominators that make up the essence of this principle.

In spite of the discussions revolving around it, being an officially adopted principle of the European Community, the principle of subsidiarity has (at least legally) serious implications on the functioning of the Community system, more specifically on the Community decision-making processes. Therefore, it is a principle that should be taken seriously.

1. 1. Scope of the Study

In this study, the major subject matter that is going to be explored is how the principle of subsidiarity is utilized by the European Community. That is to say, how this principle is conceived and applied within the Community context.

In doing this, first of all, the general theoretical framework for the principle of subsidiarity will be drawn. In this regard, in the second chapter a detailed analysis on the evolution of subsidiarity through different philosophical, political and historical contexts is going to be made in order to extract the basic principles that make up its essence.

The third chapter, which can be regarded as the core chapter of the study, will be devoted to analyzing the principle of subsidiarity in the European Community context. As the first step, the evolution of this principle within the integration process is going to be examined. In doing this, the official documents that have been published so far on the subsidiarity principle within the Community context will be taken as the main point of reference. In making this analysis, a line will be drawn between the pre-Maastricht and post-Maastricht period, since it was the Maastricht Treaty which provided the official incorporation of subsidiarity into the Community legal structure. The main logic in making such a periodical division is to see the changes (if there are any) brought about by the adoption of this principle in the functioning of the Community system.

In the same chapter, the factors that made the Community adopt the principle of subsidiarity officially by the Maastricht Treaty are going to be analyzed. In analyzing these factors, the global scene of the 1970s, in which this principle started to become a focus of attention will also be taken into consideration; since the developments that made the EC adopt this principle were not autonomous from the developments that were taking place in the global context then in this regard.

Another important aspect that will be analyzed in this very same chapter is how the principle of subsidiarity actually reflects on the general functioning of the

Community system. In doing this, the official documents that have been cited at the beginning of this chapter while analyzing the evolution of this principle within the Community context will constitute the main point of reference. In this regard, the attitude of the Community institutions towards subsidiarity will also be analyzed in order to understand the actual situation regarding the implementation of this principle in the Community better.

In the final chapter, in the light of the conclusions drawn from the preceding chapters, a general evaluation about the role that is attributed to and actually played by the principle of subsidiarity in the European governance is going to be made. In this chapter, the ideas of those authors who are critical about the incorporation of this principle into the integration process will also be reflected. The mission that is attributed to and may be performed by the subsidiarity principle in the future formation of the integration process will be the last but not the least issue that this chapter will elaborate on.

CHAPTER 2

THEORETICAL FRAMEWORK FOR SUBSIDIARITY

Although popularity of the concept of subsidiarity has increased by the adoption of the Maastricht Treaty, the term has quite a long historical past. Its oldest traces are found in Aristotle and it has made several re-appearances in different philosophical and political contexts like Catholicism, liberalism and federalism throughout the history since then. However, there is not a unique definition for the concept of subsidiarity which everyone agrees on, either in general literature or in the European Union context. Nevertheless, this does not mean that the principle of subsidiarity is an "un-principled principle" (Endo, 2001: 8). There are common denominators which make up the principle and which will be analysed later in this study.

In this chapter we will try to figure out the general theoretical framework for the principle of subsidiarity. In doing so, besides analyzing the etymology of the word subsidiarity we will also cover different historical, philosophical and political contexts in which subsidiarity has been utilized either explicitly or implicitly. Since an entire separate chapter will be devoted to the idea of subsidiarity in the European Community context in all its details, the reflections of this principle on the European integration will not be discussed in this chapter.

2. 1. Etymological Analysis of the Concept of Subsidiarity

Before covering different perceptions of the concept in different philosophical and political contexts, it would be useful to have recourse to the etymology of the word *subsidiarity*.

When one analyses the Latin roots of the word *subsidiarity*, it is seen that the concept has a two-edged meaning:

The first edge comes from the root "*subsidiary*" / "*substitute*" and recalls the idea of "being in a state of secondary and lesser importance" (Merriam- Webster Dictionary Online). In the Antic ages the word subsidiarity was used to name the "reserve troops" which the higher authority utilized in case of a need arisen in the periphery (Delcamp, 2003: 10). This usage of the word was mainly based on the idea that the higher authority, namely the state, would substitute its troops, which were in a state of reserve/subsidiary, i.e. secondary position, for that of periphery if the periphery could not cope with the issue at hand. This first edge of the concept constitutes the *negative* notion of the principle of subsidiarity which refers basically to the limitation of competences of higher authorities in relation to lower authorities (Endo, 2001: 6).

The second edge comes from the root "*subsidium",* which means "aid/support" in Latin (Merriam- Webster Dictionary Online). This second meaning recalls the idea of "subsidy" and "help". In Antiquity, in time, the word subsidiarity gained this second meaning and implied the necessity of the support by the troops of the higher authority for the periphery in case of a need emerged in the latter. This second edge of the concept constitutes the *positive* notion of the principle of subsidiarity which refers to the possibility or even obligation of intervention from the

higher authority if the lower authority cannot cope with the issue at hand on itself (Endo, 2001: 6).

To sum up, the word subsidiarity is a two-faced concept which embodies the Latin connotations of "subsidiary", implying the higher level's being in a state of secondary position; and of "subsidium", implying the necessity of help and support by the higher level when the lower level is not capable of undertaking a certain duty.

2. 2. The Evolution of the Principle of Subsidiarity

Having discussed the origins and the etymology of the word subsidiarity, now we will analyze how subsidiarity has been utilized in different historical, philosophical and political contexts other than that of the European Community, which will be covered separately in another chapter as we have pointed out earlier. In doing so, references to certain contexts and authors where we do not find any direct use of the principle of subsidiarity will also be made. In such cases, in the light of the etymological analysis of the word subsidiarity that we have made above, we will try to trace the implicit references for the principle of subsidiarity in these different contexts.

2. 2. 1. The Idea of Subsidiarity in Aristotle (384-322)

Aristotle conceptualizes the society as an organism which is composed of social groups. For him by nature man is a social creature and since no single man is

self-sufficient, by organizing socially he satisfies his needs which he cannot undertake on himself.

Aristotle recognizes the existence of social groups like family, guild, village, city state and foresees an organic relation between these social groups that each group responds to certain needs of the individuals and that incapacity of a certain group is supported by a higher level social group.

Although in his model, the whole, i.e. the society in totality takes precedence over its constituencies, i.e. the social groups in the society, he holds the idea that "a plurality of group or class interests would all contribute to a healthy polity as long as an extreme polarization between rich and poor could be avoided" (Hueglin, 1994: 5). He identifies the city state level as the only self-sufficient and thus perfect level, however, "he calls those political systems which regulate every aspect of individual life in detail as despotic and he sees such systems suitable only for slaves since they do not respect freedom of individuals" (Canatan, 2001: 12). As is known, for Aristotle politics is the practice of governing free people.

To sum up, although the highest level, i.e. the city state level, due to its self-sufficiency has priority over the lower level social groupings that make it up, what makes Aristotle's model important for subsidiarity principle is his recognition of individuals and the other meso-level social groupings as the constituent parts of the society and the kind of relationship he foresees among the higher level social groups and lower level social groups based on the necessity arisen in the lower levels.

2. 2. 2. The Idea of Subsidiarity in Acquinas (1225-1274)

Like Aristotle, Acquinas also holds an organic conceptualization of the society. However, he adopts a Christian outlook that for him society is a natural set up created by god and what is expected from man is to turn back to god. This is only possible by extracting the spiritual and ethical values inherited in him which will come to the fore by his interactions with others in the society.

In the society, besides the natural social groupings like family, guilds, communes, etc., there is the "civitas" which is god-given and is as natural as the others (Canatan, 2001: 13). It refers more or less to what Aristotle calls "totality", namely the political power, the state and it comprises all the other social units. For Acquinas, individual and the meso-level social groups are self-sufficient only in a limited number of issues and cannot satisfy all their needs alone. This is the point legitimizing the intervention of the civitas. However, for him, the civitas or the upper-level social groups should not intervene unless the individual or the lower-level social group is unsuccessful in undertaking the issue at hand.

As Aristotle does, within the framework of organic conceptualization of the society, Acquinas also stresses the importance of totality, i.e. the civitas, compared to other social groupings that make it up. He makes reference to those meso-level social groupings in relation to the extent of their contribution to the totality. What makes him important to quote here is his recognition of the individual and of the meso-level social groupings within the society. According to some scholars, the reference made by Acquinas to the meso-level social groupings is just a reflection of the state of

affairs in the medieval feudal system where the society is not composed of individuals but of different social groupings (Canatan, 2001: 15).

2. 2. 3. The Idea of Subsidiarity in Althusius (1557-1638)

Even though he did not foresee a federal system in the manner as it is defined today, Althusius is known as the father of federalism and has become popular within the political atmosphere after the World War II, when the idea of federalism started to attract many proponents.

He lived in the late 16th and early 17th century (1557-1638), which witnessed conflicts among the sects of Christianity, the loss of power and prestige of the church and the developments towards the rise of modern secular state in Europe. In such a climate, being a Calvinist himself and the administrator of the city of Emden, Althusius was after social plurality mainly to protect the autonomy of his city against the church and the prince.

During the European transition from the 16th century to the 17th century we see the challenge of the old European order of plural rule based on corporatist social loyalties by the newly emerging centralized territorial power based on individualized social relations (Hueglin, 1994: 3). In this era we find many theories on the acquisition and practice of sovereignty:

For ***Hobbes (1588-1679)***, the only means for overcoming social conflicts was the foundation of absolute authority. In his early writings he takes parliament, one of the most important elements of the new regime, only as an advisory body which can be dissolved by the leviathan, to whom all the participants of the social

covenant have to submit their wills since in return the leviathan would provide social stability for them. One of the most important means for maintaining social stability is the adoption of majority rule. He insists that the dissenting minority should follow the path decided by the majority; if not they are considered as enemies.

He does not accept the natural existence of social groups in the society which are nothing more than the mere consequences of division of political power. The society he conceptualizes is composed of individuals who are parties to the social covenant individually and whose peaceful co-existence is maintained by the leviathan mainly through majority principle. "In such a society there was no place for subsidiarity as a principle of differentiated levels of decision-making", since this would imply the re-emergence of civil conflicts (Hueglin, 1994: 4).

Bodin (1530-1596) is accepted as the forerunner of the monarchomach tradition which had a great influence on Hobbes after him. His theory rests on the vitality of indivisible sovereignty. For him right of sovereignty should be supreme and should not be limited by any means; however it can be attributed to a king with the condition that the king would retain it himself alone. His conceptualization of sovereignty is unshareable either. If it is shared with the subjects, the king would not be considered a sovereign any more.

Although indivisible and absolute sovereignty is the basis of his theory, Bodin does not neglect the existence of social groups in the society. He considers their existence as the outcome of natural societal divisions not as the consequence of political power division which would in the end cause civil war as Hobbes claims (Hueglin, 1994: 5). In fact, other than Hobbes, nearly all the European political

philosophers do recognize different social groups and factions as the natural constituents of social set up.

Besides Bodin and Hobbes who put forward a unilateral social model in which sovereignty rests with the absolute sovereign unilaterally, approximately in the same era there are those monarchomach thinkers who put forward a dualist social model which gives the society the right to rebel if the sovereign violates the covenant.

Even though he is considered among monarchomachs, what differentiates Althusius' theory from that of other monarchomachs and that of later theorists of social contract is that while all the abovementioned theories take single and independent individuals as the parties to the social covenant, Althusius conceptualizes the society as composed of different social groups. According to Althusius sovereignty derives from the social covenant concluded between the society and the sovereign power. However, individuals take their part in this social covenant as members of a certain social group like family, guild, commune etc., not as independent individuals.

Althusius was among the Dutch Calvinist refugees who fled to Germany due to the pressure coming from catholic Spain. These refugees founded the University of Herborn which was known as the "school of federal theology" in Germany (Hueglin, 1994: 5). In 1603, one of its professors, Johannes Althusius wrote his famous book Politica Methodice Digesta (Systematic Analysis of Politics) in which he attacked the theories of indivisible sovereignty retained by absolute monarch. He argued that sovereignty belongs to the entire people while only its administration belongs to the king.

The era Althusius lived through witnessed important historical developments. On the one hand there were religious conflicts within the framework of counter-reformation movements of Calvinists as opposed to Catholic Emperor, on the other hand there was the emergence of new modernizing economic minorities as opposed to old feudal mode of production. These religious and economic minorities were after strengthening their positions in the social and political realm.

In 1604 Althusius was appointed as the Syndic of the City of Emden, a reformed city in East Friesland of Germany. Within this political conjuncture, as the Syndic of Emden, he tried to assert both the religious and commercial autonomy of his city against the Catholic Emperor and the Lutheran provincial Lord of East Friesland. In this regard he revised his book Politica Methodice Digesta, where we can find his thoughts on politics, sovereignty and subsidiarity.

As it is mentioned above, Althusius is known as the father of federalism. This is mainly because of his reference to an old biblical concept "foedus", which meant "the bond between the God and the man" and which is the origin of the word "federalism" (Endo, 2001: 10). He used the term in a secular manner in order to define the relationship between the associations that make up the society.

For him man is not self-sufficient thus he has to form up different associations like family, guild, commune, city and the state. However, no association is self-sufficient either, thus they also have to cooperate. At this point the term "foedus" is used to refer to the unavoidable "bond" between different associations making up the society. He defines politics as "the art of associating (consociandi) men for …conserving social life among them. …The subject matter of politics is therefore association (consocianto)" (Friedrich, 1932: 15, quoted in Endo 2001: 10).

He is known as the first theoretician who wrote on "consociational political systems and consociational democracy" with the concept of "consociation" (i.e. association) at the center of his conceptualization of the society (Follesdal, 1998: 9; Hueglin, 1994: 6). He foresees a universal commonwealth composed of autonomous but interconnected social groups like families, guilds, communes, cities and provinces; that is the Althusian system of universal consociation is made up of smaller autonomous but interconnected consociations. He even goes further and talks about confederations among different commonwealths.

This social model of Althusius is a multi-layered polity, a consociational political system composed of different consociations which are connected by the natural bond- the "foedus". His model is usually referred as "societal federalism" in which both territorial and social consociations are participants. (Hueglin, 1994: 6). Thus, he is also known as the first modern theoretician of federalism. In theory he tried to combine democratic values of Greek polises and the stability characteristics of the Roman Empire. In practice he tried to grant certain consociational levels some degree of religious, commercial and social autonomy. It is in this modern conceptualization of federalism that we find the first modern understanding of the principle of subsidiarity, since while he tries to maintain a stable state- a consociational commonwealth, he also assigns some degree of autonomy to the consociations that make it up.

In his model, each consociation has its domains in which it can act autonomously and higher-level consociations act in the areas which are assigned to them beforehand. Therefore, we can say that the principle of subsidiarity is adopted by Althusius in order to strike the balance regarding the allocation of powers in this

consociational system. That is to say, it is used as a guideline principle which would reconcile the two crucial aspects of this multi-layered polity- namely autonomy and solidarity, which is also the duality around which today's discussions on subsidiarity turns.

As it can be derived from the above mentioned characteristics, subsidiarity in Althusius has a dual face. On the one hand he advocates that each consociation retains autonomy which must be respected by the other consociations including those of higher levels. On the other hand if a certain consociation cannot provide its residents or members with the minimum standards of living, then the higher- level consociation should come to the scene and adopt the necessary regulations. These are today known as the "negative" and "positive" aspects of subsidiarity.

To sum up we can say that within the framework of his theory on "societal federalism" we find a lot in Althusius regarding the principle of subsidiarity. Although he does not take it as a guide for decision-making but only as a constructive principle to provide coherence and cooperation in a multi-layered polity which is composed of autonomous consociations, analyzing his theory in detail is quite enlightening for one who tries to conceptualize subsidiarity in all of its aspects.

2. 2. 4. The Idea of Subsidiarity in the Catholic Doctrine

While the Protestants bore the flag for the principle of subsidiarity against the highly centralist administration of the Catholic Church especially in the second half of 1500s, it is the Catholic doctrine where we find its original and comprehensive utilization. The principle found its first concrete conceptualization in

Quadragesimo Anno, the papal encyclical[3] publicized in 1931. However, before that we find strong influence of the idea of subsidiarity in Rerum Novarum which was another papal encyclical publicized in 1891.

2. 2. 4. 1. Rerum Novarum (1891)

Rerum Novarum was the manifest of Pontiff Leo XIII, where he elaborated on the social problems that came to the fore especially with the advent of the Industrial Revolution, which made fundamental changes in the modes of production and in the social set up. His ideas regarding the principle of subsidiarity was highly influenced by the social Catholic thinker W.von Kettler, who lived in the second half of the 19th century and who conceptualized state as a living organism made up of living sub-units like the individuals, families, guilds, municipalities, etc., each of which had its own rights, responsibilities and areas of activity. For Kettler, only in cases of inability of the lower levels in attaining the issue at hand should the higher level intervene (Endo, 2001: 16).

In Rerum Novarum, Leo XIII committed himself to the social problems brought about by the new capitalist mode of production. He wrote on the great inequality between the owners of capital that amounted to only a small percent of the society and the poor workers that made up the majority in the society. He called the state to intervene in the social realm, in which the Church was the sole actor until that time, in order to relieve this inequality. "…Whenever the general interest or any particular class suffers, or is threatened with harm, which can in no other way be met

[3] Encyclicals were the documents where the Church put forward its official attitude towards any issue, either religious or social, economic and political. Especially after the 18th century publishing encyclicals became a regular activity for the Catholic Church.

or prevented, the public authority must step in to deal with" (Rerum Novarum, 1981: para. 33, 36, quoted in Endo, 2001: 17). Here we see the notion of positive subsidiarity which necessitates the intervention of higher levels when the lower level cannot undertake the issue in question. He was the first in the Church history to talk about the capitalist exploitation of the workers. However, he also had the aim of protecting the Church and the society from the socialist ideology.

Although he calls for the state intervention against the social inequality caused by the capitalist mode of production, he is careful about the risk of the over-expansion of the state. The starting point of his argument is individual and he is for giving the individual the priority to act whenever he is capable of doing so. After the individual, he advocates the priority of the family and that of other social units like the guilds, communes, unions, associations, etc. against the higher authority whenever their action is feasible.

> …the State must not must not absorb the individual or the family. 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. (Rerum Novarum, 1981, quoted in Endo, 2001: 17).

What the higher authority should do as the first step is to "enable" the meso-level social actors, not to get on their rights and duties, which is also something against the natural set up of the society. Thus, here we see the negative notion of subsidiarity which limits the intervention of the higher levels as long as the lower level can undertake the issue at hand on itself.

To sum up, both the positive and the negative notions of subsidiarity is found in Rerum Novarum, although the former is much more referred by Leo XIII as a solution to the social problems intensified by the Industrial Revolution then.

2. 2. 4. 2. Quadragesimo Anno (1931)

Quadragesimo Anno was publicized in 1931, on the fortieth anniversary of Rerum Novarum, by Pope Pius XI. Although we see the traces of the subsidiarity principle in Rerum Novarum, the first explicit expression of it can be found in Quadragesimo Anno.

The time when Quadragesimo Anno was publicized coincided with the era of two ideologies which were challenging the authority and the role of the Church, namely communism and fascism. It was also the era in between the two world wars when the social and political tensions were at their highest points.

In such a circumstance, seeing its existence under threat, Pope Pius XI publicized the encyclical, the Quadaragesimo Anno, where he fiercely advocated the existence of individual liberties and that of meso-level social groups, the associations against communism and fascism. He also wrote on the protection of human dignity and honor against the economic and social inequalities brought about by the ongoing capitalist system.

This papal document puts forward three basic principles to be respected in order to alleviate the social and political problems of the time: protection of human dignity, solidarity and subsidiarity. What made subsidiarity appear in this encyclical was the participation of Gustav Gundlach and Oswald von Nell-Breuning, who were

the successors of Heinrich Pesch, the author of the model where the intervention of the State was limited to only the cases of high necessity, in the writing of Quadragesimo Anno (Canatan, 2001: 27).

Subsidiarity was the principle proposed to guide the division of labour between individual-society-state. We see a serious complaint about both excessive individualism and excessive state intervention. The document argues that what the individual can do on himself should reside with him and similarly what the lower-level social group can do on itself should not be taken on by the higher-level social group.

> Just as it is 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 (Quadragesimo Anno, 1931, quoted in Endo, 2001: 18).

That is to say the initiation of the individual and the plurality of social associations should be preserved while the role of the highest social unit, i.e. the state, should be limited to the activities of guiding and controlling.

> 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 associations requires and necessity demands. Therefore those in power should be sure that the more perfectly a graduated order is kept among 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 (Quadragesimo Anno, 1931, quoted in Endo, 2001: 18).

In fact the main incentive behind all these arguments seems to be the intention of the Church to limit the State's interference in social issues and consolidate its power. Stressing subsidiarity in the manner 'closeness to the individual' in undertaking any social and economic activity as a way of restricting the intervention of the State was the main argument of the Church both in the Quadragesimo Anno and the later encyclicals "Mater et Magistra" (1961), "Pacem in Terris" (1963) and "Centesimus Annus" (1991) (Canatan, 2001: 29).

The idea of subsidiarity in the Catholic doctrine rests on the metaphysical understanding regarding the dignity of human being. According to this understanding once created by God a person acquires dignity due to the fact that it is the only creature carrying the image of God and being destined to God. Because of these characteristics a person should be fully respected and should not be exploited or damaged in any way. However, what the same metaphysical conviction argues is that this inherited dignity can only be finalized by the interactions of the person with the other persons in the society, which is the only way for him to fully realize his potential and his personality. By contracting among themselves, individuals should form different associations through which they can realize their goals and satisfy their needs. The important point here is to strike the right balance between the person and the society; that is the society should not intervene as long as the individual can realize his necessities. This is also the essence of the theory of "*catholic personalism*", which later had serious influence on Jacques Delors (Follesdal, 1998: 12).

As it is seen the idea of subsidiarity in the Catholic doctrine embraces both the negative and the positive notions of subsidiarity, even though it has inclination towards the former for the sake of the continuation of the power of the Church in the society. That is to say, any social unit should not intervene as long as the individual or the lower-level social unit can develop the potential possibilities in them; however, if they cannot, the other social levels have the obligation to assist them. Here we encounter an inseparable aspect of subsidiarity, which is the idea of societal solidarity. As the Germans put it "keine subsidiaritat ohne solidariat" (Canatan, 2001: 33).

In Catholicism, subsidiarity is taken as a principle of social philosophy which makes it possible to affect many aspects of social life including politics, economy, education, etc. It stresses the idea of 'closeness to the individual' in undertaking any issue in the society. This comes from the idea in the natural law that it is the human who is the primary entity due to his reason and will and that society is the secondary entity which is the only setting that makes it possible for the individual to realize his dignity and potential.

Subsidiarity as a principle tries to put forward a societal set up composed of different social associations where the activities are undertaken at the closest level to the individual. At this point we can say that the idea of subsidiarity in the Catholic doctrine fuses the idea of subsidiarity in the organic conceptualization of the society and the idea of subsidiarity in the liberal thought. It takes the idea of meso-level social associations from the organic conceptualization of the society and the idea of priority of man from the liberal thinking.

It should be carried in mind that behind these arguments of the Church regarding the 'closeness to the citizens', there is also the effort of the Church to preserve its authority against the State with the argument that the Church is closer to the individual than the State and thus its priority should be recognized.

Before passing to a different title, at this point we should say something about ***Pierre Joseph Proudhon***, the 19th century personalistic thinker who had great influence on the later Catholic thinkers. Although he was an anti-Church, due to the multi-dimensionality of his ideas he influenced different ideological groups including the Catholics.

What is important for our subject matter is his theory of federalism, which is known as '*personalist federalism'* or '*integral federalism*' (Endo, 2001: 14). He was against an over-centralized nation state and was after striking the right balance between authority and liberty, which for him had been undermined in favor of authority with the foundation of the centralist state. He argued that the balance would be set up between the two by the foundation of a federal model among the natural social groups like families, guilds, communes, etc.

According to Proudhon, this kind of a federal pact would link the social groups in the society within a pluralist framework and this would prevent the over-centralization of the state and provide the necessary degree of freedom for the individual to realize his personality. Also this model would allow individuals to contribute to the society through that plurality of social groupings, which is another condition for man to realize his personality.

To sum up, the sovereignty in Proudhon should be dissolved between the natural social groups like families, guilds, communes, etc within a federal framework

but not be concentrated at the over-centralised nation state. Only in such a multi-level system the balance between authority and liberty can be attained and that only in such a system a person can realize his potential and his personality. This is the essence of the Proudhonian 'personalistic federalism' (integral federalism), which has influenced the later social Christian thinkers like Emanuel Mounier, Denis de Rougemont and Jacques Delors, the prominent social Catholic figure of the European integration project (Endo, 2001: 16).

2. 2. 5. The Idea of Subsidiarity in Liberal Thinkers

The intersection point of liberalism and subsidiarity is the negative notion of subsidiarity which aims at limiting the authority of the higher levels in favor of the lower levels which are closer to the individual[4]. However, in the liberal thought it's the individual that is given the priority; the meso-level social or political units between the individual and the state are not that much important. Even the liberals' approach to these is somewhat skeptical in that they are considered as groups that would further limit individual freedom.

Individual is at the focal point of the liberal theory and he is the one who by his free will and choice forms out the state. Thus the state is in a secondary-*subsidiary* position compared to the individual that makes it possible by his free will. Therefore, the state should not be in a manner to limit the freedom of the individual, on the contrary it should do its best to reinforce this freedom. That is to say, as is the

[4] In liberal tradition some authors claim that there is a necessary connection between classical liberalism and negative liberty(libertarianism), which is "a view of freedom as consisting in the non-restriction of opinions that is more germane to liberalism's central concerns".For more information on this subject refer to J.Gray, 1989: 45-68.

case in the negative notion of subsidiarity, liberal thought aims at limiting the state authority in order to prevent individual freedoms from the intervention of the state.

In ***Locke***, any kind of authority is unnatural, either that of the father in the family or that of the state in the society. These authorities are established in order to realize certain ends and they have a secondary character compared to the individual (Canatan, 2001: 21). In this context the high authority, namely the state that Locke conceptualizes is a secondary authority, i.e. a subsidiary authority besides the individual.

As is the case in all the other classical liberal thinkers, we see the individual-state dichotomy in Locke. For him the government should not intervene in any issue which the individuals can undertake by their own means, which is also the central aspect of negative subsidiarity in its aim to limit the state authority in favor of individual liberty.

In the 18th century, we also see the traces of subsidiarity in another liberal thinker, ***Montesquieu***. Within the classical liberal dichotomy of individual and state, Montesquieu argued that activities of the state should be in secondary position besides that of the individuals (Endo, 2001: 22). They should not be in a manner to limit individual freedom and activity on the contrary they should be in a supplementary manner.

Contrary to the classical liberal thinkers who do not take meso-level social and political units as a constitutive element of their theories, the German liberal thinkers give a prominent place to these units in their theories and thus contribute to the principle of subsidiarity.

According to ***Wilhelm von Humbolt***, the 19th century German liberal thinker, the state should not intervene in social life as long as the individuals and the social groups can handle the issue at hand by their own means (Endo, 2001: 22; Canatan, 2001: 22).

Robert von Mohl, another German liberal thinker argues the same thing that the intervention of the state in cases where the individuals and the social groups can realize their aims by developing their own potentials is not acceptable (Canatan, 2001: 22).

George Jellinek, who is famous for his ideas on human rights, claims that the state has an objective which is determined outside the state. In fact, state is the means to attain that objective. Other than the domains like defense, legislation or judiciary, where the state is the sole practitioner, individual and social entrepreneurship should be realized and be encouraged by the state to the extent that it is possible, especially in the domains like education, health, commercial investments, etc. The role of the state in these fields should only be regulatory and supplementary, that is, it should be in a subsidiary position (Canatan, 2001: 22).

We see that the German liberal thinkers add the role of the meso-level social groups besides the individual to the negative notion of subsidiarity which aims at limiting the authority of the state in favor of the individual. In fact Germans have a strong tradition of local democracy and it was the German Landers that pressed for the incorporation of the principle of subsidiarity into the Maastricht Treaty. May be the roots of all these developments can be sought in these thinkers.

To sum up, the idea of subsidiarity in liberal thinkers, who put the individual at the center of their arguments and try to protect his freedom against the

state authority, coincides to a large extent with the negative notion of subsidiarity, which is after limiting the authority of the higher levels in order to give the initiation to the lower levels which are closer to the individual. With the contributions of the German liberal thinkers, especially those of the 18th century, who stressed the role of the meso-level social units in between the individual and the state in the economic, social and political realm, the idea of subsidiarity gained a prominent place in liberal thinking, although it was not mentioned by the exact word until the theories of European integration.

2. 2. 6. Subsidiarity and Federalism

Federalism as a word comes from the Latin word "foedus" which, being originally a biblical concept, meant "the bond between the God and the man". As is mentioned above it was Althusius who first used the word in a secular context to define the social and political bond between the consociations that form up the consociational system he envisages. His model of multi-layered consociational system that is made up of different social and territorial consociations is usually referred as "societal federalism" and Althusius is known as the father of federalism.

As has been pointed out, it is also this multi-layered consociational system of Althusius where we encounter the first modern conceptualization of the principle of subsidiarity. Althusius has recourse to this principle in order to strike the right balance between solidarity and authority in a social model made up of different consociations. While he tries to create a stable consociational commonwealth out of these different social and territorial consociations, he also assigns some degree of

autonomy to these consociations in their domains where they would act autonomously.

In its simplest meaning federalism is the kind of political structure which brings together different autonomous units in order to form up a political union among them where both the federal state and its constituent units have their own domains of action. It is usually called as "the union in diversity".

Subsidiarity is usually referred to be one of the most suitable principles to make this kind of a "union in diversity" work in an unproblematic way and there are also claims that this principle can only be applied in federal settings where the power domains of present levels of government are defined in a legal document such as a constitution or the like (Toth, 1992: 1103). On the other hand, some authors claim that subsidiarity principle does not require a federal system, because federalism does not necessarily imposes the requirement of giving the priority to the lower levels in allocating powers, as subsidiarity principle does (Canatan 2001: 46).

In fact federalism and subsidiarity principle do not necessitate one another in order to function. Although both of them foresee a multi-layered political set up, federalism does not necessarily give the priority of action to the federal units. Due to the nature of the issue at hand, the priority of action may belong to the federal state or to the constituent units or to both of them simultaneously. However in the philosophy of the principle of subsidiarity lies the idea of making decisions and taking actions at the lower levels which are closer to the citizens. Nevertheless, although the existence of one does not necessitate that of the other, it is a fact that federalism and subsidiarity complement each other well and make each others functioning easier.

The relationship between federalism and subsidiarity is quite a popular subject nowadays especially in the discussions regarding the future of the European Community. We will turn back to this issue later in this study while examining the principle of subsidiarity in the EU context.

2. 2. 7. Subsidiarity and Decentralization

Although they both aim at realizing the participation of citizens in public affairs and founding public authorities that are close to the citizens, subsidiarity and decentralization do not mean the same thing and there are prominent differences between these two concepts (Canatan, 2001: 44):

First of all decentralization has the idea of founding local autonomy by allocating power and resources from the center to the localities. That is to say the starting point of decentralization is the center and it foresees the allocation of power and resources from the center to the local governments which are established by the center and the extent of this allocation is determined by the central authority. However, in subsidiarity the starting point is the locality. Other than those limited number of powers attributed to the central authority, power is vested to local authorities.

Secondly, in decentralization the central authority, namely the state has priority over the local units and the relationship between them depends upon the subordination of the local units to the central authority. Whereas in subsidiarity the local units have priority since they are the ones that are closer to the citizens and the relationship between the local units and the central authority is based on the

functionality criteria and it is continuously re-defined according to the changing circumstances.

Finally, the plurality that decentralization brings about is a homogenous plurality which permits the establishment of only same type of local units at a certain level. Subsidiarity on the other hand does not accept such uniformity and it tries to establish a heterogeneous type of plurality by recognizing the already present diversified structures at any level.

2. 2. 8. The Idea of Subsidiarity in the European Charter of Local Self-Government

The European Charter of Local Self-Government is a Convention of the Council of Europe which was opened to signature on 15 October 1985 and is in force since 1 September 1988. It aims at strengthening local democracy within the context of Council of Europe. Although we do not encounter any explicit reference to the principle of subsidiarity in this Charter we see some important implicit references to it.

First of all, in the preamble of the Charter we recognize the aim for attaining administrations which are '*close to the citizen*'.

> ...the right of citizens to participate in the conduct of public affairs is one of the democratic principles that are shared by all member states of the Council of Europe; …it is at local level that this right can be most directly exercised; …the existence of local authorities with real responsibilities can provide an administration which is both effective and close to the citizen…

The same aim is stressed in the Article 4 as follows:

> …Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy. …

The Charter tries to consolidate democracy in the member countries of the Council of Europe by encouraging the participation of citizens in the decision-making process. In achieving this it stresses the importance of having administrations which are close to the citizen. The idea of having administrations that are close to the citizen and of making decisions at the closest possible level to the citizen is one of the most prominent features of the principle of subsidiarity.

In Articles 3, 4 and 9 of the Charter we find explicit references to the negative notion of subsidiarity. While defining the concept of local self-government, the Article 3 reads as follows:

> Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.

In the same manner Article 4 is as follows:

> …Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority. …Powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by

> another central or regional authority except as provided for by the law...

Finally, Article 9 supports the two abovementioned articles by stating that "Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers".

As it can be understood from these articles, the Charter is after attaining local governments which have their own decision-making power and their own resources to be able to utilize the full discretion that they are deemed to have. All the three mentioned articles refer to the negative notion of the subsidiarity principle which foresees the limitation of higher-level authorities in favor of the lower-level ones that are closer to the citizen. Therefore, we can say that the European Charter of Local Self-Government has already adopted the subsidiarity principle although it does not make any explicit reference to the principle. For the time being, the Charter does not have any legal effect on the Community as a whole, however, being one of the most important documents elaborating on local governments in the world and being adopted by most of the member states within the Community, its references- though in an implicit way- to subsidiarity made it unavoidable to refer to this Charter here.

At the end of this part of the study we realize that the concept of subsidiarity has quite a long historical past through which it had made various numbers of appearances in different philosophical and political contexts. However in spite of the vast amount of writings on the subject, we still do not have a unique definition for this concept. This is even so at present as it can be seen in the European Charter of

Local Self-Government. But as Ken Endo puts it down, "Subsidiarity, however fussy it might look, is not necessarily an un-principled principle" (Endo, 2001: 8). There are common fundamental denominators that make up the principle, which can be derived from all the above mentioned statements. These can be summarized as follows:

- the social and political structure should be organized in such a way that they should allow the formation of meso-level units in between the state and the individual which are closer to the citizen,
- decisions should be taken at the lowest possible level which is closest to the citizen,
- the state or the higher authority should be in a "subsidiary" position that the priority of action should be given to the lower levels either in making the decisions or in implementing them. The higher authority should intervene only if it is vital for the attainment of the objective at hand.

In the next chapter, a detailed analysis of the principle of subsidiarity in the European Community context will be made. In doing this we will cover the emergence and the evolution of the subsidiarity principle throughout the integration process together with different perceptions and practices regarding this principle in this particular context.

CHAPTER 3

THE EVOLUTION OF THE PRINCIPLE OF SUBSIDIARITY IN THE EUROPEAN UNION CONTEXT

3. 1. The Pre- Maastricht Period

The formal incorporation of the principle of subsidiarity into the Community system has been realized by the adoption of the Maastricht Treaty in 1992; however, in fact subsidiarity was already in the Community official documents though it was not explicitly mentioned anywhere up to that time.

The European Coal and Steel Community (ECSC) Treaty, which was signed in 18th April 1951, had subsidiarity-like expressions though it does not refer to this principle explicitly. In Article 5 the Treaty states that

> The Community shall carry out its tasks in accordance with this Treaty, with a limited measure of intervention. To this end the Community shall …exert direct influence upon production or upon the market only when circumstances so require; publish the reasons for its actions. …The institutions of the Community shall carry out these activities with a minimum of administrative machinery and in close cooperation with the parties concerned.

When these statements are read carefully the implicit weight of the idea of subsidiarity can easily be seen in between the sentences. The attribution of "a limited

measure of intervention" to the Community and authorizing it to exert direct influence on production and the market "only when circumstances so require" are attitudes which the subsidiarity principle would require. Also, the requirements that the Community would justify its activities by "publishing the reasons for its actions" and that it would carry out its activities with "a minimum administrative machinery" and "in close cooperation with the parties concerned" are the kind of expressions that would recall a system which utilizes the principle of subsidiarity.

One should not be surprised to encounter such expressions in this initial Treaty of the integration process. It is quite normal that these kinds of expressions are used in the early periods of the integration process when participant the states were quite hesitant in making steps towards integration.

The European Atomic Energy Community (Euratom) Treaty which was signed in 1957 states in its third article as follows;

> The tasks entrusted to the Community shall be carried out by the following institutions: a European Parliament, a Council, a Commission, a Court of Justice, a Court of Auditors. Each institution shall act within the limits of the powers conferred upon it by this Treaty.

The statement that "each institution shall act within the limits of the powers conferred upon it" is known as "the principle of attribution of powers" (Presidency Conclusions of the Edinburgh European Council, Annex 1 to Part A). Its incorporation into this Treaty implies that this Community would have competence in a limited area, namely in those areas where the founding states had given it the power to take action, which is also the main idea behind the subsidiarity principle.

In January 1976, the then Prime Minister of Belgium, Mr. Leo Tindemans published a report on the European Union at the request of the Heads of Government,

which is known as ***The Tindemans Report on European Union*** (Wilke & Wallace, 1990: 1). In preparing this report, Tindemans was asked to put forward proposals that would motivate the member states to get into more cooperation for further integration in the skeptical environment of 70s which was mainly caused by the economic recession which made the member states turn to national remedies of their own rather than taking common action. In order to make those skeptical members more incorporated into the integration process, Tindemans implicitly referred to the principle of subsidiarity in his report. As we have just mentioned, "The core of the debate then was about finding a means of persuading the member states to embrace more, not less, common action" (Wilke & Wallace, 1990: 1) rather than finding a basis for the allocation of powers between the Community and the member states.

Whereas, ***the Draft Treaty on the European Union (February 1984)*** referred to the principle of subsidiarity in an explicit way, as a guide for the allocation of competences between the Community and the member states. *The Spinelli Initiative on European Union,* which was a group of European integration specialists leaded by Altiero Spinelli, issued certain texts on the future of the European Community with specific reference to the reform of the Community institutions and to the issue of political union (Wilke & Wallace, 1990: 2). Their proposals were taken seriously by the European Parliament and collected under the name of *"the Draft Treaty on the European Union* in February 1984.

The Draft Treaty introduced the principle of subsidiarity as a reconciliation principle between the two ideas that were fiercely discussed by the Spinelli Initiative: the idea of reinforcing the competences of the Community to get closer to a political

union on the one hand and the idea of reinforcing national and local powers in order to prevent further supranationalisation on the other hand.

The Preamble of the Draft Treaty stated that

> …Member states intend to entrust common institutions, in accordance with the principle of subsidiarity, only with those powers required to complete successfully the tasks they may carry out more satisfactorily than the States acting independently (quoted in Wilke and Wallace, 1990: 24).

Furthermore, Article 12(2) of the same Treaty provided that

> Where this Treaty confers concurrent competence on the Union, the Member States shall continue to act so long as the Union has not legislated. The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the member states acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers (quoted in Wilke and Wallace, 1990: 25).

These statements reveal that the intention behind this Draft Treaty in its utilization of the principle of subsidiarity was to provide a guide for the allocation of competences between the Community and the member states. It empowers Community institutions to act only in those areas where collective action would be more satisfactory and effective especially in those issues having cross-frontier effects. Although it does not provide any list of competences either for the Community institutions or for the member states, it asserts that the member states

would continue to legislate in the concurrent competence areas as long as any Community legislation has not been enacted.

As it can be understood from its name, this was a Draft Treaty on the European Union. The word "union" was used instead of the word "community", implying a move towards a political union. Therefore, Spinelli had recourse to the principle of subsidiarity in order to provide a soft transition to the idea of political union for the member states by asserting that in accordance with the principle of subsidiarity, the Community institutions would have competence only in those areas where collective action would be more effective and that the member states would continue to act in the areas of concurrent competences so long as there is not an already made legislation by the Community. This was an effort not that much different from the one being made at present in the utilization of this principle by those who are after further integration especially in the political domain.

Although its explicit statements regarding the principle of subsidiarity had to wait until the adoption of the Maastricht Treaty to take their place in the "official" treaties of the Community, this Draft Treaty has a prominent place in the evolution of this principle within the European Union context being the first serious document elaborating on its utilization by the Community institutions. The proposals of the Draft Treaty on the European Union regarding the principle of subsidiarity were adopted in the Single European Act. However it was an implicit adoption which applied only to the areas of environmental policy and social policy.

In its Article 8c, ***the Single European Act (SEA) (1986)*** put forward the possibility of "differential application of Community law", which paved the way for

the implicit adoption of the principle of subsidiarity in the succeeding articles regarding environmental policy and social policy.

Article 130R of the SEA states that "the Community shall take action relating to the environment to the extent to which the objectives … can be attained better at the Community level than at the level of individual member states". Yet, Article 130T of the same document, which also deals with the environmental policy, does not prevent member states "from maintaining or introducing more stringent protective measures compatible with the Treaty".

In these two articles dealing with the environmental policy, the Community adopts the principle of subsidiarity in an implicit way by limiting the Community action in the environmental arena to those cases where the Community level action proves to be better in the attainment of the objectives than the actions of individual member states. Also, the member states are set free to introduce more protective measures than that of the Community in environmental issues in so far as they are compatible with the Treaty. This implies that (the lower level) member states are given a certain degree of autonomy in environmental legislation vis a vis (the higher-level) Community legislation, in the manner the principle of subsidiarity requires.

Article 118A of the Single European Act, which deals with the social policy of the Community, asserts that member states are allowed to reinforce action regarding the working conditions, with the condition that they are based on Community rules.

Here we see another implicit adoption of the subsidiarity principle which allows (the lower level) member states to take reinforced actions regarding the working conditions than that of the (higher level) Community.

Moreover, the SEA has brought about the possibility of the adoption of national provisions regarding environment and working conditions even after the adoption of harmonization measures by the Community in these areas. Article 95 of the EC Treaty as amended by the Single European Act is as follows:

> …If, after the adoption by the Council or by the Commission of a harmonization measure, a Member State deems it necessary to maintain national provisions on grounds of major needs … relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds maintaining them. …The Commission shall… approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market…

Although it was made subject to the Commission's review, the initiative given to the member states to adopt national provisions regarding environmental issues and working conditions is another implicit step taken in the name of subsidiarity in this Act.

At this point we should note that environment has been a policy area in which the Community has been more inclined to adopt the principle of subsidiarity. In 1973, *the First Community Action Program on the Environment* already referred to this principle again in an implicit manner by stating that

> …in each different category of pollution, it is necessary to establish the level of action (local, regional, national, Community, international) that benefits the type of pollution and the geographical zone to be protected. Actions which are likely to be the most effective at the Community level should be concentrated at that level,

> with environmental policies in individual countries no longer planned and implemented in isolation (quoted in Shelton, 1993: 46).

In 1987, with the inducement of Jacques Delors, a study group was formed to analyze the economic policy and the institutions of the Community. This group, which was headed by Tommaso Padoa-Schioppa, issued ***the Padoa- Schioppa Report*** in ***1987***- with its full name "Efficiency, Stability and Equity, a Strategy for the Evolution of the Economic System of the EC, a report by T. Padoa- Schioppa" (Wilke & Wallace, 1990: 29).

This report proposed the application of the principle of subsidiarity to the economic policy of the Community in order to increase economic efficiency. It states that

> ...National legislation will not be replaced but framed in a way that respects minimum Community requirements… The principle of subsidiarity would recommend minimal responsibility on the part of the Community for many aspects of social policy cautiously (The Padoa- Schioppa Report, 1987: 43, quoted in Wilke & Wallace, 1990: 29).

The Report asserted that in the field of social policy, namely in employment and social security issues, the Community should provide the member states with the freedom to adopt their national measures rather than harmonizing them. It claims that the Community should intervene in health and safety regulations only if they have cross-frontier effects and affect the direction and the location of investment.

In deciding the appropriate level to undertake the economic activity in question, the report depends upon the criteria of "efficiency"; that the Community level should take on only those tasks which could not be undertaken efficiently at the

member state level. Here what is meant by efficiency is that if the cost/benefit ratio of an action proves to be low at the member state level, then it is legitimate to transfer the related competence to the Community level.

Although its insistence on the efficiency dimension, namely the cost/benefit ratio, in the allocation of competences between the Community and the member states makes it a bit fragile in the name of subsidiarity principle, the Padoa- Schioppa Report is important in the evolution of subsidiarity within the European integration process as it proposed the utilization of this principle in the most fundamental policy area of the Community, namely the economic policy area, even though in a limited manner and in its relation to the social policy issues.

At this point we should underline the contributions of ***Jacques Delors*** to make the principle of subsidiarity a Community principle. Although his insistence on the adoption of subsidiarity increased after the negative outcome of the Danish referendum on the Maastricht Treaty in June 1992, the earlier intellectual background of Delors also reflects his closeness to the ideals of this principle.

He was deeply influenced by the idea of person within the Catholic Doctrine, which made him participate in the semi-religious movement called “”Vie Nouvelle” in his younger times. As we have mentioned in the second chapter, the Catholic Doctrine rests on the idea of dignity of the individual and that the society should not intervene as long as the individuals and the lower-level social groupings that they have established can realize their necessities. This reflects the idea of subsidiarity in the Catholic Doctrine.

Then, he learned about socialism and tried to reconcile Christianity and socialism with the great influence of the idea of Catholic Personalism. He tried to

define the proper place of the individual in the society and wanted to integrate individual action into the dynamics of the socio-economic developments. Within this intellectual environment, Delors got quite familiar with the idea of subsidiarity which also tries to strike the right balance between the individual, the meso-level social groups and the higher authority.

His first written implicit reference to the principle of subsidiarity is found in his book dated 1975, which was called the Changer, where he criticizes the centralist administrative structure of France (Grant, 1994: 218). After he got deeply involved with the European integration process, he referred to this principle much more often than earlier. During 1980s, we saw him asserting the need for adopting subsidiarity for a more well-functioning Community in many of his speeches. He worked very hard to make subsidiarity work at least in the environmental chapter of the Single European Act.

In May 1988, Delors met with the representatives of the German Landers, who claimed that since the adoption of the SEA the Community started to take action in the fields where they had exclusive competence under the German Basic Law. As is known, although it is not mentioned in any part of the German Basic Law, Germany has been the country that is most familiar with the principle of subsidiarity due to the vast amount of competences left to the initiation of the Landers. In this meeting quite a lot of references were made to the principle of subsidiarity by the representatives of the German Landers who stressed that the powers exercised by the Community institutions "must depend on the conferral and acceptance by those who exercise the most direct and most localized political responsibility, i.e. power and accountability should be established from the bottom up, not the top down" and this

renewed the interest of Delors in the idea of subsidiarity and its utilization within the Community context. (Wilke & Wallace, 1990: 3).

In 1989, he issued *the Delors Report on Economic and Monetary Union*, where he referred to the principle of subsidiarity and stressed that apart from some central policy competences reserved to the Community, member states should have a degree of autonomy in economic decision-making. The Report adopted the subsidiarity principle in order to get at a balance between the Community and member state powers. It states that

> The attribution of competences to the Community would have to be confined specifically to those areas in which collective decision-making was necessary. All policy functions which could be carried out at national (and regional and local) levels without adverse repercussions on the cohesion and functioning of the economic and monetary union would remain within the competence of the member countries (Report on Economic and Monetary Union in the European Community, 1989, quoted in Wilke & Wallace, 1990: 32).

Jacques Delors tried to combine his favorite ideas of personalism, subsidiarity and federalism in a model which he proposed as "the European Model of Society" (Grant, 1994: 219). Federalism was the ideal administrative model for the future of the integration process, which according to him "…would allow people to live together, while retaining their diversity, because the division of power is clear" (Grant, 1994: 219). However, he adds that "He is for a federal Europe not to increase the powers of the Community but because one knows who does what" (Grant, 1994: 219). Yet, Delors never accepted the idea that the EC should adopt a list of

competences which according to him would damage the dynamic characteristic of the integration process.

For Delors, subsidiarity was the means for balancing national and Community powers, which would in the end serve to the peaceful co-habitation of many kinds of diversities within the Community which would be organized in a federal structure. Although some of the leaders manipulated this principle in order to get back the powers that they had conferred on the Community, the idea behind Delors' insistence on the adoption of subsidiarity was to attain a federal Europe.

After his great efforts to make the principle of subsidiarity incorporated into the Maastricht Treaty, in 1992, he questioned the compatibility of certain directives with this principle, e.g. the EC directives on bathing and drinking water and the directive on the hunting of wild birds. He found the first directive too much intervening in the member state competences and proposed that the Community should only lay down the general environmental principles and leave the regulations regarding the implementation to the member states. However, the second directive, which stated that certain species should not be shot while nesting or migrating and left the task of setting hunting dates to the member states, was taken as a model directive that was compatible with the application of principle of subsidiarity by Delors.

In 1992, before the Birmingham European Council, the conclusions of which had important implications for the application of the principle of subsidiarity within the Community, Jacques Delors sent quite a long report to the member state governments on the application of this principle. In this report Delors argued that for

a Community action to be compatible with the principle of subsidiarity it should pass the following two-question test:

- Is EC level action necessary in the area where the EC and the member states share competence?
- In all areas of EC activity, including the exclusive competences of the EC, is the action taken proportional to the objective? (Grant, 1994: 220).

The Community institutions benefited a lot from this test before taking an action especially in the concurrent competence areas, i.e. the areas where both the Community and the member states have powers to take action.

In order to make the subsidiarity principle work properly, Delors suggested that non-binding recommendations should be preferred instead of detailed regulations in Community legislation. He asserted that framework laws, which set the objectives and left the choice of means to achieve them to the member states, should be adopted if the Community legislation were to be binding.

To sum up, Jacques Delors has been the pioneer and the leading supporter of the idea of subsidiarity in the European integration process. He made great contributions in making it a Community principle by convincing member states to incorporate it into the Maastricht Treaty. Even after this, he continued to elaborate on the necessity to apply this principle accordingly in order to go further through the integration process. That is why he insisted on the vitality of having subsidiarity and transparency as a solution to the problems posed to the integration process by the negative outcomes of the Danish referendum on the Maastricht Treaty.

The principle of subsidiarity was incorporated into ***the Community Charter of the Fundamental Rights of Workers,*** which was adopted in ***December 1989*** in order to establish the major principles of the European labor law and the social dimensions of working environment in accordance with the preamble provision of the EC Treaty which includes amongst its objectives "the economic and social progress" of the Member States and "the constant improvement of the living and working conditions of their peoples" (www.europa.eu.int/search/97.vts).

In attaining these objectives the Charter utilizes the subsidiarity principle and gives the principal role to the member states while limiting the Community action in this area. The preamble of the Charter reads as follows:

> …the responsibility for the initiatives to be taken with regard to the implementation of these social rights lies with the member states or their constituent parts and, within the limits of its powers, with the European Community (quoted in Wilke & Wallace, 1990: 33).

That is to say, the Community is given only a limited competence in the attainment of the rights enshrined in this Charter while the main responsibility to realize them is given to the member states. Social policy, more specifically the regulation of working conditions is another policy area where the Community has been inclined to adopt subsidiarity. This is mainly due to the fact that social relations and the role and responsibilities of public authorities in this field vary widely among the member states, which makes Community level regulation in social policy issue quite unfeasible (Wilke & Wallace, 1990: 33). As we have mentioned above in this chapter, the Single European Act also provided the member states with some sort of flexibility in adopting their measures regarding the working conditions.

The principle of subsidiarity, which was started to be discussed in the 1970s by the European intellectuals, became one of the most popular and disputable issues of the Community by early 1990s. By this period, we started to have many reports, working papers, opinions and various other documents discussing the subsidiarity principle in both positive and negative manner. In ***April 1990, Valéry Giscard d'Estaing,*** submitted the ***Working Paper on the Principle of Subsidiarity*** – with its full name "The Principle of Subsidiarity, EP Committee on Institutional Affairs, Reporter: Valéry Giscard d'Estaing, European Parliament, April 1990"- to the European Parliament (Wilke& Wallace, 1990: 36). In this Working Paper d'Estaing referred to the Draft Treaty on the European Union which previously adopted the subsidiarity principle and discussed different approaches that could be adopted to utilize this principle within the Community context. He argued that there could be two approaches to adopt this principle: In the first one, where the criterion is "effectiveness", the tasks which could be better achieved at the Community level than by member states acting individually could be transferred to this level by the member states. Whereas the second approach suggests that only those tasks whose dimensions or effects extend beyond national frontiers should be undertaken at the Community level. Besides discussing the concepts like "effectiveness" and "cross-nationality", d'Estaing also elaborated on the limits, dynamism and the subjective nature of the subsidiarity principle in his Working Paper.

Nearly in the same period we have ***the Reports of the House of Lords Select Committee on the European Communities, Economic and Monetary Union and Political Union,*** which elaborated on the subsidiarity principle. In the 27th Report of Session 1989-90, the House of Lords Select Committee stated that

> The principle of subsidiarity could be of influence both when deciding whether to propose Community legislation and when formulating such legislation. It can also however be relevant in the context of the negotiation or amendment of the Treaties- where the issue is whether powers should be transferred to central institutions- and in the choice of the form as well as the substance of Community legislation. …It should avoid unnecessary interference with Member States' rights; it also allows the Community to concentrate on areas where it can be most effective (House of Lords Select Committee on the European Communities, Economic and Monetary Union and Political Union, Session 1989-90, 27th Report, pp. 14-15; quoted in Ellis & Tridimas, 1995: 74).

In addition to this positive evaluation of the principle, the Select Committee asserted that subsidiarity as a principle had a subjective nature. "But whatever definition is used, and for whatever purpose, it remains a subjective judgment. There is no agreement about who could be the judge of whether subsidiarity applies… " (House of Lords Select Committee on the European Communities, 27th Report, pp. 14-15, 55; quoted in Ellis & Tridimas, 1995: 74).

In the 17th Report of Session 1990-91, the Select Committee again discussed the subjective nature of the principle of subsidiarity and criticized the idea that it could be judged by the European Court of Justice. It states that

> The Committee does not believe that subsidiarity can be used as a precise measure against which to judge legislation. The test of subsidiarity can never be wholly objective or consistent over time- different people regard collective action as more effective than individual action in different circumstances. Properly used, subsidiarity should determine not only whether Community legislation is necessary or appropriate at all, but also the extent to which it should regulate and harmonize national divergences, and how it should be enforced. But to leave legislation open to annulment or revision by the European Court on such subjective grounds would lead to immense

> confusion and uncertainty in Community law (House of Lords Select Committee on the European Communities, Economic and Monetary Union and Political Union, Session 1990-91, 17th Report, HMSO, London; quoted in Chalmers, 1998: 230).

Although it criticizes the subjective nature of the principle of subsidiarity, especially its being reviewed by the European Court of Justice, the same Report also suggests that "…subsidiarity should be added to the objectives set out in the Preamble to the EEC Treaty, and perhaps also to the principles in Part One".

While different discussions were held in different platforms on subsidiarity and its different aspects, ***the Opinion of the Commission on Political Union,*** dated ***October 21, 1990,*** proposed the incorporation of the principle of subsidiarity into the founding treaties of the Community (Bozkurt & Özcan, 2001: 41). This was the first time that the Commission officially explained its opinion on the inclusion of this principle in the Community Treaties.

All these discussions show that by 1990s, subsidiarity started to be taken more seriously by the European intellectuals and institutions and be discussed in its details. It was after these serious and fierce discussions that the Treaty on European Union (the Maastricht Treaty) adopted this principle.

At this point it will be quite enlightening to analyze the European atmosphere just before the adoption of the Maastricht Treaty which paved the way for the incorporation of this principle into this Treaty. However, before doing that we should also talk about the global trend in focusing more on the role of the local governments in policy-making and the discussions that it brought about on the principle of subsidiarity in all over the world at around the same period.

3. 2. Factors that Made Subsidiarity a Focus of Attention in the World by the Late 1970s

By the late 1970s, the crisis in the economy brought about the end of the Keynesian Welfare State, which was established after the World War II in order to strike the distorted balance in the economy in the post war period. The economic crisis, especially the increase in unemployment, led to the fierce questioning of the welfare state, which was accused of being too much large, complex, distant, inefficient and levying too much burden on the individuals. In this regard, the role of the state and the notion of nation state came under great criticisms in various platforms.

With the substitution of new right policies instead of welfare state policies, the role of the state in economic and social arena started to diminish while leaving the ground mainly to the market forces. The advent of the globalization process helped to further this trend by making the globally roaming capital the central issue in policy-making and by over-emphasizing that the nation state level was not always the best place for political decision-making due to the trans-national characteristics and outcomes of global economic activities and thus other appropriate levels of decision-making should be found.

In addition to the transnational activities of economic actors and the trans-boundary effects of these activities as a result of the mobility of the capital all around the world, there is another factor which has led to increased interdependence and interconnectedness of the nation states. It is the voluntarily undertaken obligations on

behalf of the nation states with the establishment of international institutions like the WTO, WHO, CODEX Standardization and Environmental Summits (de Burca, 2000: 2, 8). These kinds of international institutions intervene in certain areas in the decision-making processes of the nation states by forcing them to adopt the rules that they have envisaged. This was also considered as a challenge to the idea that the nation state level was the most appropriate level for political decision-making.

In addition to all these developments, by the late 1980s the deficiencies and limitations of traditional representative democracy started to be discussed as a result of the low participation rates in the presidential elections, especially in the western democracies. With the impact of the pluralist approaches, a more participatory model in which individuals and individual-based social groups would be more active in the decision-making process was looked for. It is together with these developments that we witnessed the emergence of the concept of "governance", which challenged the idea that the locus of political and economic decision-making should be the nation state level. With the aim of providing a more participatory platform, the idea of governance asserted the attainment of an interactive decision-making mechanism with the participation of a multiplicity of actors including the state, the private sector and the civil society, at an appropriate level which would not necessarily be the nation state level.

The above mentioned developments have altogether posed a challenge to the idea that nation state level is always the best level for political and economic decision-making and they have led to various discussions on the re-organization of administrative structures and decision-making processes. They have brought about the idea that different policies can be better adopted at different levels other than the

nation state level. It is in such an environment that we see the re-emergence of the principle of subsidiarity with the aim of responding to these developments taking place on the world scene. As Delcamp puts it

> The reappearance of the term [subsidiarity] under discussion corresponds to the necessity of giving a name to these changes which… are the manifestations of a general, profound change in the society, marked by the rediscovery of the individual, his needs and his potential. The uncertainties in the development of contemporary societies have thus helped to bring back into the limelight a concept [subsidiarity] rooted in numerous long-standing philosophical and political traditions of European thought (Delcamp, 2003: 9).

Since its re-emergence as a means to respond to these developments, subsidiarity has become one of the most popular subjects on which many discussions are held in various different platforms. As we have mentioned above, these discussions were taken seriously by the Council of Europe in order to provide the western democracies with a model for reforming their regional and local authorities and were reflected on the European Charter of Local Self-Government.

Nowadays it is also quite a popular concept in the European Union. However, one should not forget that a proper analysis of the debate on the principle of subsidiarity within the European Union context can only be made by drawing the broader context of the developments which led to the re-emergence of this principle on the world scene, which we have briefly outlined above. This is mainly because; the EU itself is only one of the actors acting in this broader context among the various other actors with which it has some sort of an interdependence. As de Burca states

> It is not only a question of recognizing when the Community/Union should yield to or share decision-making power with national, regional or more local levels of government which are 'nearer' the citizen, but also when the EU itself ought to act within the constraints of international decision-making, and when it is appropriate to concede that decision-making must take place in a wider context and within the framework set by entities such as international environmental summits, the World Health Organization, the World Trade Organization and some of the increasingly influential standardization bodies such as CODEX (de Burca, 2000: 8).

Thus, while analyzing the factors that made the Community to adopt the principle of subsidiarity, we should bear in mind the framework that we have drawn above, which summarizes the developments that paved the way for the re-appearance of this principle on the scene of politics in the world.

3. 3. Factors That Made the European Community Adopt the Principle of Subsidiarity

Since the Single European Act (1986), the Community has gained new competences through the successive Treaties. In addition to this, these Treaties have increased the number of areas in which qualified majority voting would be used as the mode of decision-making. On behalf of the member states, these developments caused a loss both in the number of competences they had and in the control that they had in the Community decision-making process due to the previously conducted unanimity mode of decision-making. This made the member states fear that the

Community was evolving into an over-centralized authority which would override their powers and traditional values and practices in many policy areas.

This kind of an anxiety was also felt by the sub-national authorities, especially by those which enjoyed political legitimacy and authority in many policy areas and fought for more autonomy in their countries. Among the Spanish and Belgian sub-national authorities, it were the German Landers which played a key role in making the over-centralization of the European Community a crucial issue to be discussed in many platforms. They argued that by the new powers it gained, the Community intruded in the domains that were reserved to them by the German Constitution. Thus they wanted the adoption of certain criteria in deciding which tasks should be undertaken by the Community and wanted the Community to ensure "who does what in the Community". As we have mentioned above, it were the German Landers which gave the insight to Jacques Delors to adopt the subsidiarity principle as a solution to remedy the problems of the Community then.

At this point, it should be noted that regional and local governments of the member states wanted more autonomy and the adoption of the principle of subsidiarity not only for democratic and participatory concerns but also due to their concerns regarding the economic competition among themselves. In order to achieve the Single European Market, the member states started to reduce the tariffs and limit their economic intervention especially in the field of industrial policy. The result was the exposition of the regional and local industries to competition from other industries in any part of the Community. Since there would be no national protection according to the rules of the common market, the sub-national units within the member states claimed that they should be powerful to survive in this competitive

environment (Bennett, 1993: 17). To be competitive, they claimed that they should have legislative authority in certain fields like taxation and environmental policy. That is why they were against the Community's taking on more competences and wanted the subsidiarity principle to be adopted in order to put an end to this and to be able to make their own decisions in certain fields.

All these complaints coming from the member states and their sub-national units about the over-centralization of the Community which was said to become an over-bureaucratized and over-centralized entity intervening in many of the power domains of both the member states and the regional and local authorities in these states made the European intellectuals and the Community institutions to think about ways of evading these complaints. It was at this point that they had the serious recourse to the old European concept, namely the principle of subsidiarity in order to override those over-centralization complaints.

The establishment of the European Community with all its endeavor towards attaining the single market has resulted in the emergence of a "market without state" and this has brought about the problems of democracy and legitimacy (de Burca, 2000: 15). While a supranational integration in the economic arena was being realized, the necessary social and political community to accompany it was not there. Therefore, the problem of "democratic deficit" was another important issue that made the subsidiarity principle a point of reference for the European Community which was gaining more and more powers with the each new Treaty since the Single European Act. While the Community was getting on new powers, the integration process was not accompanied by the necessary participation mechanisms that would integrate the European people into this rapid process of unification. The expansion of

the competences of the Community caused a serious public dissatisfaction. European people were anxious about this rapidly expanding system, which was highly intervening in their everyday life practices without taking their direct consent.

In fact the participation system that the Community provides is not that representative. First of all, relatively speaking, the European Parliament is not that influential in the legislative activities of the Community, which are basically undertaken by the Council of Ministers, which is an institution not directly elected by the European people. Therefore, the European Parliament does not satisfy the minimum requirements of a democratic parliament since it cannot provide the means, via which the will of the European people can be reflected on the decisions taken at the Community level.

Secondly, there is not a "European Government" which is based on the consent of the majority of the elected MEPs (Member of European Parliament). The Community system also does not have any position like the opposition party which we are used to have in modern democracies (Thomassen & Schmitt, 1999: 262).

Finally, the European Parliament is usually accused of not representing the European interest. There have always been complaints that the MEPs represent the national interests of their own countries more than the European interests (Thomassen & Schmitt, 1999: 257). In addition to this, the absence of a truly developed party system at the Community level within which candidates would elaborate on the values of the European electorate was another criticism regarding the non-representativeness of the Community decision-making process (Thomassen & Schmitt, 1999: 257).

These deficiencies of democracy in the Community political system cause legitimacy and identification problems for the European people. There is a Community above there which is intervening in many aspects of everyday life of the European people, but they cannot be a part of it due to the lack of democratic mechanisms. Moreover, this entity does not provide them with basic rights and freedoms other than those well-known four freedoms, although it regulates many aspects of their everyday practices. In such a circumstance, it is quite normal that the European people do not identify themselves with such an entity hang above without providing them with the basic democratic rights and freedoms but identify themselves with their respective countries which provide them with at least minimal democratic mechanisms and basic rights and freedoms.

However, in such a Community having so many competences and affecting so many aspects of everyday life, it must be very clear both for the people living within its power domain and for the outsiders what their rights and responsibilities are (MacCormick, 2000: 538). Although in September 2000, the Charter of Fundamental Rights was issued by the Community in the Nice Summit, at present it is nothing more than a "declaratory charter" which is not binding and does not have a legal effect (MacCormick, 2000: 539). By June 2003, this Charter has been incorporated into the Draft Constitution for Europe, which has been submitted to the Thessaloniki European Council by the Convention on the European Union.

The debate on the future of the European integration, i.e. whether it should keep its intergovernmental structure or should evolve further into a federal entity, is quite an old debate. In the period prior to the signature of the Maastricht Treaty, with its full name "The Treaty on European Union", the debate on the future formation of

the integration process was very intensely held among the European intellectuals and European institutions. This was mainly due to the fact that with all those powers that it had gained till that time, the Community had come to such a point that the integration process had to be directed into a channel that would explicate its future formation.

At this point, again it was the principle of subsidiarity which came into the scene in order to reconcile the conflict between those who wanted to retain an intergovernmental Europe and those who wanted to have a political union in a more supranational Europe. For many authors, the principle of subsidiarity was adopted by the Maastricht Treaty in order to avoid the incorporation of the word "federalism" and replace it (Interview with Prof. Juliet Lodge, 21 May 2003). Being a two-edged concept, subsidiarity satisfied those member states and the sub-national units which wanted to retain the decision-making power in certain policy areas vis a vis the European Community and also those member states and the institutions of the Community which wanted further integration and more competences to be delegated to the Community level. As will be remembered, subsidiarity foresees the decision-making authority being retained at the lowest possible level that is nearest to the citizens at the first instance. However, the same concept also foresees the intervention of the higher level authority when the lower level authority is not capable of undertaking the task in question. Having emphasized these characteristics of the principle of subsidiarity, the drafters of the Treaty persuaded both sides to incorporate this principle into the Maastricht Treaty and provided reconciliation between them.

In the light of all the above mentioned developments, the principle of subsidiarity was adopted by the Maastricht Treaty. Now, let's have a closer look at the provisions of this Treaty and the documents issued since then regarding this principle.

3. 4. The Maastricht Treaty (Treaty on European Union) and After

The Maastricht Treaty (The Treaty on European Union [TEU]) was adopted in ***February 1992.*** In the Preamble, it was stated that the contracting parties are

> …desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions, …resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity, ...

This was the first time that the principle of subsidiarity was referred explicitly in an official Community document and this was the Treaty amending the founding Treaties. This Treaty was named "The Treaty on European Union", which had political connotations signifying that the Community was becoming a "Union". Therefore, the incorporation of the subsidiarity principle into this Treaty, which has such transitionary characteristics, had -to a certain extent- the aim of preparing the peoples of Europe to this kind of further integration. This is quite obvious in Article 1 of the Treaty which reads as follows: "This Treaty marks a new stage in the

process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen".

Article 2 re-asserts that the Union should respect the principle of subsidiarity in its functioning by stating that

> The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European Community.

At this point we should remind that with the adoption of the subsidiarity principle in the Maastricht Treaty, the ex Article 3b of the Treaty Establishing the European Community was re-named as Article 5 and amended 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 insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty (EC Treaty, Article 5).

This is exactly the Article on which the debate on the principle of subsidiarity is legally based today. As you can see it is not that much clear in defining when and how this principle should be made work. By the Maastricht

Treaty, subsidiarity took its place among the principles of the Community and thus it had to be made function. The debate on this principle got even intensified by the Maastricht Treaty due to the ambiguity of the wording it had used regarding this principle. Therefore, the Community institutions started to issue documents in which they elaborated on how this principle should be utilized by the Community.

Here, we should note that the negative results of the Danish referendum on the ratification of the Maastricht Treaty in June 1992 also alarmed the Community intellectuals and institutions to explicate this Treaty to the European Public. While doing this, they put quite an important emphasis on this Treaty's aim of "creating an ever closer union" and they stressed the necessity of the principle of subsidiarity in the attainment of this aim in certain documents. Now, let's have a closer look at these documents.

The Presidency Conclusions of the Birmingham European Council (16 October 1992) stressed the importance of the principle of subsidiarity in creating "a Community close to its citizens". The document stated that while it was developing, the Community had to respect the identity and diversity of Member States and that the European Council had agreed an Attached Declaration in order to bring the Community closer to its citizens.

In this Declaration, which was attached to the Presidency Conclusions of the Birmingham European Council of 16 October 1992 and named "*Birmingham Declaration*", under the headline of "A Community Close to Its Citizens", it was declared that as a Community of democracies the Community can only move forward with the support of its citizens. Moreover, the Declaration asserted that the Community had to respect the history, culture and the traditions of individual

nations, with a clearer understanding of what the Member States should do and what is needed to be done by the Community.

After this implicit reference of the European Council to the principle of subsidiarity, in the 5th Article of the Declaration we see an explicit elaboration on this principle. The Article reads as follows:

> We reaffirm that decisions must be taken as closely as possible to the citizen. Greater unity can be achieved without excessive centralization. …The Community can only act where Member States have given it the power to do so in the Treaties. Action at the Community level should happen only when proper and necessary: the Maastricht Treaty provides the right framework and objectives for this. Bringing to life this principle- "subsidiarity", or "nearness" – is essential if the Community is to develop with the support of its citizens.

After stating the importance of the principle of subsidiarity in getting the support of the European people for further integration and for creating "an ever closer union", the European Council asserted that it would be a priority for all the Community institutions to make the principle of subsidiarity work and that the European Council itself would ensure that it was fully observed as is the case for the other fundamental principles of the Union.

What is more is that the Declaration called the European Council that would be held in Edinburgh to take the necessary steps in order to make the principle of subsidiarity become an integral part of the Community's decision-making procedure, like adopting guidelines for applying the principle in practice-e.g. the lightest possible form of legislation- and relevant Council procedures and practices.

The Presidency Conclusions of the Edinburgh European Council (11- 12 December 1992) included quite detailed guidelines and procedures for implementing the subsidiarity principle. It not only adopted "an overall approach to the application of the subsidiarity principle and article 3b (now 5) of the EC Treaty" but also put forward a review of the then pending proposals and existing legislation in the light of the principle of subsidiarity.

The Annex 1 to Part A of the Presidency Conclusions of the Edinburgh European Council was named "*Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b of the Treaty on European Union*". In this section, first of all "basic principles of the principle of subsidiarity" were set out as follows:

> European Union rests on the principle of subsidiarity, …This principle contributes to the respect for the national identities of Member States and safeguards their powers. It aims at decisions within the European Union being taken as closely as possible to the citizen.

It was also stated that by the Treaty on European Union, the principle of subsidiarity was set as a basic principle of the European Union and that making the principle of subsidiarity and Article 3b work is an obligation for all the Community institutions. Moreover, it was stated that the Treaty on European Union reflected the idea of subsidiarity in its drafting of several new Treaty articles- namely the Article 118a (now Article 138- on social policy), the Article 126 (now Article 149- on education), the Article 127 (now Article 150- on vocational training), the Article 128 (now Article 151- on culture), the Article 129 (now Article 152- on public health), the Article 129a (now Article 153- on consumer protection), the Article 129b (now

Article 154- on trans-European Networks), the Article 130 (now Article 157- on competitiveness of the industry) and the Article 130g (now Article 164- on research and technological development).

The Edinburgh European Council also stated that the principle of subsidiarity did not relate to and could not question the powers conferred on the Community by the treaties and that the application of this principle should respect the full maintenance of the acquis communautaire, should not affect the principle of primacy of Community law and should not question the principle set out in the Article F (now Article 6) of the TEU which declared that "the Union shall provide itself with the means necessary to attain its objectives and carry through its policies".

Another characteristic attributed to the subsidiarity principle was that it was a "dynamic" concept. It was stated that, this dynamism of subsidiarity allowed Community action to be expanded where circumstances so require, and conversely to be restricted where it was no longer justified.

The European Council asserted that the principle of subsidiarity would apply only if the Community institution concerned was given the choice whether to act and/or a choice as to the nature and the extent of the action by the founding treaties. The formula was "the more specific the nature of a Treaty requirement, the less scope exists for applying subsidiarity". The explanation was that if the Treaty imposed certain specific obligations on the Community institutions- like in the areas of competition policy, enforcement of Community law, protection of Community funds- these obligations would not be affected by the principle of subsidiarity.

Two final characteristics attributed to the principle of subsidiarity by the Edinburgh European Council were that in the field of shared competences, the type

of measures to be adopted should be decided "on a case by case basis in the light of the relevant provisions of the Treaty" and that the principle of subsidiarity, whose interpretation and judicial review would be made by the European Court of Justice, would not have direct effect, i.e. it would not create any rights or obligations for the individuals living in the member states.

After setting out the basic principles that should be attributed to the principle of subsidiarity by the Community institutions, the Edinburgh European Council laid down a detailed analysis of Article 5 (ex Article 3b) of the EC Treaty where we find the legal basis for the subsidiarity principle within the Community context. Before passing to this analysis, it would be useful to remember the Article 5 of the EC Treaty which 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 insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

In its analysis of the Article 5 of the EC Treaty, the European Council first of all names what each paragraph signifies. In this regard, the European Council explicates that the first paragraph implies "the principle of attribution of powers", the second paragraph implies "the principle of subsidiarity" and the third paragraph

implies “the principle of proportionality”. Then, the European Council makes a paragraph by paragraph analysis of this Article.

Regarding the first paragraph, it states that “the principle of attribution of powers” implies that the Community can only act where it is given the power to do so. Thus, it implies that national powers are the rule and the powers of the Community are the exception. Then it asserts that any Community action has to comply with this principle. In order to provide this compliance, the Community institution in question has to make sure that the proposed action is within the limits of the powers conferred upon it by the founding treaties and is aimed at meeting one or more of its objectives. That is to say, it has to make sure that the necessary legal basis exists for the measure that it will adopt and that this measure can be justified in its relation to one or more objectives of the founding treaties.

The second paragraph, which explicates the principle of subsidiarity, is said to answer the question “Should the Community act?”. The European Council states that this paragraph does not apply to matters falling within the Community’s exclusive competence and that for a Community action to be justified it should satisfy the two criteria of the subsidiarity principle stated in this paragraph: that the objectives of the proposed action cannot be “sufficiently” achieved by the member state action and that the objectives of the proposed action can therefore be “better” achieved by Community action.

Then, the European Council puts forward the guidelines to be followed in deciding whether these two criteria, i.e. the “sufficiency” and “better attainment” tests, are fulfilled in any Community action. Thus, for a Community action to be

justified in relation to the principle of subsidiarity, it has to pass from the "sufficiency" and "better attainment" tests which require that

the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; and/or

actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty or would otherwise significantly damage Member States' interests; and/or

the action at the Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

Moreover, the European Council states that the reasons for concluding that the objective in question can be better achieved by Community action rather than member state action must be substantiated by qualitative or wherever possible by quantitative indicators. Finally, in relation to the realization of the principle of subsidiarity, the harmonization of national legislation, norms or standards are limited by the European Council in circumstances where this is "necessary to achieve the objectives of the Treaty".

Regarding the third paragraph which explicates "the principle of proportionality", which is a complementary principle to the principle of subsidiarity, and which envisages that the means to be employed by the Community should be proportional to the objective pursued, the European Council states that it determines the nature and the extent of the Community action.

According to the Edinburgh European Council, the principle of proportionality applies to all Community actions, whether or not they are within its exclusive competence; that any burden falling upon the Community, national

governments, local authorities, economic operators and citizens should be minimized and should be proportionate to the objective to be achieved. The adoption of this principle requires that Community measures leave as much scope for national decision as possible while securing the requirements of the Treaty. That is, while respecting the community law, says the European Council, care should be taken to respect the well established national arrangements and the organization and working of the member states' legal systems. Moreover, according to the European Council, where appropriate, Community measures should provide member states with alternative ways to achieve the objectives of the measures. When it is necessary to set standards at the Community level, they should be minimum standards in order to provide the member states with the freedom to set higher standards, where this would not conflict with the objectives of the Treaty.

Also, the European Council asserts that the adoption of the principle of proportionality requires that the form of Community action should be as simple as possible that the Community should legislate only when it is necessary and it should prefer directives to regulations and framework directives to detailed measures. Even, when appropriate it should prefer non-binding measures. Also, it should give consideration to the use of voluntary codes of conduct and when the issue in question is localized in one member state or in one region, the relevant Community action should not be extended to other member states or regions unless this is a requirement to attain a Community objective.

After the paragraph by paragraph analysis of the Article 5 (ex Article 3b), the Edinburgh Presidency Conclusions asserts that the Treaty on European Union obliges all Community institutions to ensure that Article 5 (i.e. the principle of

subsidiarity and as its complement the principle of proportionality) is obeyed. In this regard, it puts forward the *procedures and practices to be applied by the Community institutions*- namely by the Commission and the Council- in their work to secure the observance of this Article.

Regarding the role of *the Commission* in ensuring the practical observance of the principle of subsidiarity, first of all the European Council underlines the crucial role of the Commission in this respect, due to its monopoly in initiating legislation. It also welcomes the Commission's declaration that it will add a recital, i.e. an explanatory memorandum, to its proposals in which it will justify the compliance of its initiative with the principle of subsidiarity. In this respect, the European Council urges the Commission to give details of its own considerations regarding Article 5 whenever necessary.

What is more is that the Commission is made to submit an annual report to the European Council and the European Parliament through the General Affairs Council on the application of this Article. This report is said to be of important value for the European Council in its submission of the report to European Parliament on the progress achieved by the Community in this respect.

Regarding the role of *the Council* in ensuring the practical observance of the principle of subsidiarity, the European Council asserts that the Council, more specifically the General Affairs Council, should examine the compliance of a measure with the provisions of Article 5 on a regular basis and as an integral part of an overall examination of any Commission proposal by the Council. That in this examination the Council should include its own evaluation of whether the Commission proposal is totally or partially in conformity with the provisions of

Article 5 and whether any change in the proposal envisaged by the Council itself is in conformity with these provisions. The Council is also asked to make its decision on the compliance of a Commission proposal with the principle of subsidiarity simultaneously as it is making its decision on the substance of the proposal.

In addition to all these directions it makes for the Council in its observance of the principle of subsidiarity in practice, the European Council also provides certain practical steps to ensure the effectiveness of Article 5:

working group reports and COREPER reports on a given proposal will describe how Article 5 has been applied,

in all cases of law-making, the European Parliament will be informed of the Council's position regarding the observance of Article 5 in the explanatory memorandum, which the Council has to produce according to the provisions of the TEU. In the same manner, the Council should inform the Parliament if it partially or totally rejects a Commission proposal on the ground that it does not comply with the provisions of the Article 5.

The Annex 2 to Part A of the Presidency Conclusions of the Edinburgh European Council, which is named "*Examples of the Review of Pending Proposals and Existing Legislation"*, embodies a report by the then President of the Commission on the Commission's review of existing and proposed legislation in the light of the subsidiarity principle, whose preparation was decided by the Birmingham European Council.

The Report starts by asserting that the subsidiarity principle has an impact on all the three institutions of the Community in their decision-making processes. It also states that the Commission is intending to use its right of initiating the

legislative process in the direction of making more directives rather than regulations and other detailed acts. Moreover, it underlines the Commission's dedication in rejecting the amendments proposed by the Council and the Parliament which are contrary to the provisions of Article 5.

The Report was made up of three main parts. In the first part the Commission reviewed all the proposals pending before the Council and the Parliament then in the light of the subsidiarity principle. In the end, the Commission decided to "withdraw" some of its proposals for directives, "consider withdrawing" some others after the proper contacts notably with the Parliament and "revise" a number of them since it thought that they were not fully complying with the provisions of Article 5.

In the second part the Commission reviewed the then existing rules and regulations in the light of the subsidiarity principle. In the end, it proposed simplification and replacement for a series of directives which were embodying excessively detailed specifications. It also recommended the national authorities being given more responsibility in applying the Community legislation by allowing them to negotiate settlements with individuals where appropriate.

In the final part of the Report, the Commission declared that it was intending to abandon certain legislative initiation that it had planned, which it thought were not complying with the provisions of Article 5.

As is seen, the Edinburgh European Council provided the Community institutions with a detailed analysis of Article 5 of the EC Treaty, which forms the main legal basis for the utilization of the principle of subsidiarity within the European Community. It puts forward certain guidelines to be followed by the

Community institutions in order to realize this principle and make it work in the Community decision-making process. As we will see, these guidelines have been re-capitulated by the following documents that have been issued by the Community on the principle of subsidiarity.

The Edinburgh European Council invited the Council to seek "an inter-institutional agreement" between the European Parliament, the Council and the Commission on the effective application of the Article 5 by all the Community institutions. As we will see below, many of the guidelines and procedures put forward by the Presidency Conclusions of the Edinburgh European Council were incorporated into the Inter-institutional Agreement of October 25, 1993.

Interinstitutional Agreement Between the European Parliament, the Council and the Commission on Democracy, Transparency and Subsidiarity (25 October 1993) (EC Bulletin 10-1993, quoted in Ellis & Tridimas, 1995: 78).

The three Community institutions, namely the Commission, the European Parliament and the Council signed an agreement in the light of the principles laid down in the Maastricht Treaty, including the principle of subsidiarity, as it was decided in the Edinburgh European Council. In this agreement, the purpose of the procedures for implementing the principle of subsidiarity was stated as to govern the powers assigned to the Community institutions by the Treaties, in order to enable them to achieve the objectives laid down by the Treaties. In so doing, the Agreement also asserted that those procedures would not question the acquis cummunautaire or the powers conferred upon the Community institutions by the Treaties.

By concluding such an interinstitutional agreement, the three Community institutions declared that they would take into account the principle of subsidiarity in

their legislative activities. They also stated that the explanatory memorandum of any proposal by the Commission would include a justification of that proposal under the principle of subsidiarity. Moreover, any amendment made to the Commission's text either by the European Parliament or by the Council, if it entailed more extensive or intensive intervention by the Community, would be accompanied by a justification under the principle of subsidiarity. Furthermore, these three institutions declared that they would conduct regular checks for the actions envisaged in order to make sure that they comply with the principle of subsidiarity in terms of the legal instrument chosen and the content of the proposal.

Regarding the review of compliance with the principle of subsidiarity, the Interinstitutional Agreement stated that this principle would be reviewed under the normal Community procedures, in accordance with the rules laid down by the Treaties, i.e. it would be reviewed by the European Court of Justice. In addition to this, it was agreed that the Commission would submit an annual report to the European Parliament and the Council on compliance with the principle of subsidiarity, on which the European Parliament would hold a public debate with the participation of the Council and the Commission.

As it is seen, the Interinstitutional Agreement between the three Community institutions does not say anything new regarding the principle of subsidiarity that we cannot find in the Edinburgh European Council Presidency Conclusions. As we have mentioned above it incorporated the principles and the guidelines put forward by the Edinburgh European Council on the principle of subsidiarity. Nevertheless, this document is important in the evolution of the subsidiarity principle within the European integration process and shows the

harmony between the Community institutions regarding the implementation of this principle in Community practices.

The Protocol on the Application of the Principles of Subsidiarity and Proportionality (10 October 1997) was annexed to the Treaty of Amsterdam which was signed in 2 October 1997 and amended the Treaty on European Union. In the Preamble, the purpose of the Protocol is stated as

> …to establish the conditions for the application of the principles of subsidiarity and proportionality …to define more precisely the criteria for applying them and to ensure their strict observance and consistent implementation by all institutions.

The contracting parties declared that they "wish to ensure that decisions are taken as closely as possible to the citizens of the Union" (Preamble of the Protocol). Moreover, they confirmed that the Interinstitutional Agreement of 25 October 1993 on procedures for implementing the principle of subsidiarity, the conclusions of the Birmingham European Council of 16 October 1992 and the overall approach to the application of the principle of subsidiarity agreed by the Edinburgh European Council of 11- 12 December 1992 would continue to guide the Community institutions in their way to develop the application of the principle of subsidiarity. In fact, as we will see, except certain points, this Protocol has re-adopted the provisions put forward by the aforementioned documents rather than adding new dimensions to the development of the application of this principle in the European Union context.

First of all, the Protocol asserts that each Community institution shall ensure that the principle of subsidiarity is complied with in their activities. Then it is stated that Article 5 of the Treaty, i.e. the principle of subsidiarity, shall relate to the

areas for which the Community does not have exclusive competence and that the principle of subsidiarity provides a "guide" as to how those powers are to be exercised at the Community level.

The Protocol states that subsidiarity is a "dynamic" concept which implies that, within the limits of its powers, the Community action can be expanded where circumstances so require, and conversely it can be restricted where it is no longer justified.

It is stated that for a Community action to be justified on the basis of principle of subsidiarity it should satisfy the criteria that "the objectives of the proposed action cannot be sufficiently achieved by member state action and therefore be better achieved by Community action". Regarding this point, Article 5 of the Protocol provides the "guideline" that should be used in examining whether the above mentioned criteria is fulfilled. According to this guideline, the Community action is justified on the basis of subsidiarity principle if

> the issue under consideration has "transnational aspects" which cannot be satisfactorily regulated by member state action,
>
> actions by member states alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage member states' interests,
>
> action at Community level would produce clear benefits by reason of its "scale" or "effects" compared with action at the level of the member states.

Regarding the principle of proportionality, which is a complementary principle to the principle of subsidiarity and which foresees that means should be proportionate to the objectives to be attained, the Protocol states that the form of Community action shall be as "simple" as possible and that the Community shall act only when it is "necessary". It also states that in its legislative activities, the Community shall prefer directives to regulations and framework directives to detailed measures, which should leave the choice of form and methods to the national authorities. In the same direction, the Protocol declares that while respecting Community law, well- established national arrangements, organizations and legal systems of the member states shall be respected and where appropriate, Community measures should provide the member states with alternative ways to achieve the objectives of those measures.

In improving the application of the subsidiarity principle, the Protocol assigns the following roles to the Community institutions:

The Commission should

consult widely before proposing a legislation and publish those consultation documents wherever appropriate,

justify the relevance of its proposals with regard to the principle of subsidiarity and the explanatory memorandum accompanying a proposal will give the details in this respect,

take into account the need to minimize any burden, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens and to make them proportionate to the objective to achieved,

submit an annual report to the European Council, the European Parliament and the Council on the application of Article 5 of the Treaty, i.e. on the application of the principle of subsidiarity, and this report shall also be sent to the Committee of the Regions and to the Economic and Social Committee.

The European Council shall

take into account the above mentioned report from the Commission while preparing the report on the progress achieved by the Union, which it is required to submit to the European Parliament.

The European Parliament and the Council shall

consider the consistency of the Commission's proposals with Article 5 of the Treaty. This concerns the original Commission proposal as well as amendments which the European Parliament and the Council consider making to that proposal. During the legislative procedure, the Council shall inform the European Parliament about its position on the application of the principle of subsidiarity in that piece of legislation under way. The Council shall also inform the European Parliament about the reasons why the Commission proposal in question does not comply with the principle of subsidiarity.

Regarding the review of the compliance of the Community institutions with the principle of subsidiarity, the Protocol calls for the same procedures applying to all the other Community principles; which implies that the compliance with the principle of subsidiarity will be reviewed by the European Court of Justice.

Besides laying down the criteria for applying the principle of subsidiarity and ensuring their strict observance by all the Community institutions in order to ensure that decisions are taken as closely as possible to the citizens of the Union, we

also see that the Protocol asserts the importance of the full maintenance of the acquis communautaire and the fulfillment of responsibilities of the member states deriving from the Treaty. In this regard, the Protocol states that the application of the principles of subsidiarity and proportionality shall respect the objectives of the Treaty, the maintenance of the acquis communautaire and the institutional balance; it shall not affect the principles developed by the Court of Justice regarding the relationship between national law and Community law. Moreover, the Protocol asserts that while applying these principles, Article 6 of the Treaty on European Union, according to which 'the Union shall provide itself with the means necessary to attain its objectives and carry through its policies' (TEU, Article 6), should be taken into account. In addition to this, the Protocol states that in the circumstances where the application of the principle of subsidiarity leads no action to be taken by the Community, member states are required to ensure the fulfillment of their obligations under the Treaty and refrain from any measure that would prevent the attainment of the objectives of the Treaty.

Although it sets forth the aim of defining more precise criteria for the application of the principle of subsidiarity, we see that the Protocol on the Application of the Principles of Subsidiarity and Proportionality just brings together the provisions laid down by the previous documents on the principle of subsidiarity which we have cited in this study and it does not provide us with any guideline that is more concrete than the ones put forward previously.

Besides the Protocol on the Application of the Principles of Subsidiarity and Proportionality, two declarations were annexed to the Treaty of Amsterdam on the principle of subsidiarity:

First one is ***the Declaration No. 43 Relating to the Protocol on the Application of the Principles of Subsidiarity and Proportionality***, in which the High Contracting Parties confirm the conclusions of the Essen European Council which states that

> the administrative implementation of Community law shall in principle be the responsibility of the member states in accordance with their constitutional arrangements. This shall not affect the supervisory, monitoring and implementing powers of the Community institutions…

The second one is ***the Declaration No. 54 by Germany, Austria and Belgium on Subsidiarity***, which claims that the principle of subsidiarity should apply not only to the member states but also to their sub-national units. The Declaration is as follows:

> It is taken for granted by the German, Austrian, and Belgian governments that action by the European Community in accordance with the principle of subsidiarity not only concerns the member states but also their entities to the extent that they have their own law-making powers conferred on them under national constitutional law.

The principle of subsidiarity was also taken seriously by the Lisbon European Council of March 2000 which put forward a strategy called ***the Lisbon Process*** which has explicit and implicit references for the principle of subsidiarity, mainly in broad economic policy guidelines, employment guidelines and internal market strategy. In the Lisbon European Council, the Heads of Governments, the

Commission President and the European Parliament decided to respond to the demands of the new economy by making the EU the most dynamic, competitive and sustainable economy in the world through the "Lisbon Process", which foresees the adoption of the "Open Method of Coordination (OMC)" (Dannreuther, 2003: 1).

According to the Lisbon European Council, the economic challenges due to the globalization process, the democratic deficit challenge, efficiency challenge and the diversity of interests in a society as big as the EU necessitates a new mechanism of governance which should move from "national versus European" to "multi-level governance". In this new mode of multi-level governance, the principle of subsidiarity is said to become a necessity especially for the effective management of the local needs of the economy, e.g. that of the local SMEs, self-employed, rather than the measures taken in the form of the regulations at the supranational level (Dannreuther, 2003: 3).

The Lisbon Process stresses that the EU level is too remote to provide everyday solutions to the problems and the challenges of the new economy as the solutions should be sought at the local levels. Moreover, it asserts that it is generally the national level which is perceived to be more legitimate than the European level for making changes in the key areas like economic rights, administration, education, training, etc. At this point, the Lisbon European Council proposes the "Open Method of Coordination" (OMC), which envisages a "differential speed of integration" by allowing the member states share their ideas, experiences and extract out the most successful model to adopt (Dannreuther, 2003: 7). By doing so, they not only learn from each other but also promote the political collaboration among themselves while they solve their problems in a more transparent and participatory way. In the end,

this mode of problem solving is said to allow the Union to move forward without imposing legal sanctions on the member states by the instruments as regulations and the like (Dannreuther, 2003: 5). In this process, the role attributed to the Council is to set the wider framework and coordinate the program and to the Commission is to facilitate the discussion among the member states, spread the best practice and promote agreement.

Although it was an informal decision made by the then elites of the integration process, the Lisbon Process, more specifically the Open Method of Coordination (OMC), points to a new mode of governing- namely a multi-level governance model- for the European Union, which foresees the adoption of the principle of subsidiarity especially in the field of economic policy.

The principle of subsidiarity was also included in ***the Charter of Fundamental Rights of the European Union***, dated 28 September 2000 and adopted at the Nice European Council in December 2000. This Charter has also been incorporated into "the Draft Treaty Establishing a Constitution for Europe" by the Thessaloniki European Council in June 2003. In Article 51 of the Charter it is stated that

> The provisions of this Charter are addressed to the institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

Although the Charter is still not legally-binding, what makes it important for subsidiarity is that it directs the attention of the Community institutions towards

the principle of subsidiarity while urging them to respect for the fundamental rights of the citizens of the Union.

After presenting the route that the principle of subsidiarity has followed in its evolution throughout the European integration process, now it is time to see how this principle actually reflects on the functioning of the Community in practice.

3. 5. How the Principle of Subsidiarity Actually Reflects on the European Integration Process

Before anlysing the actual reflection of the principle of subsidiarity on the integration process, we should draw attention to the fact that in its present form of utilization, subsidiarity is a principle which applies only to the first pillar of the European Union, which is the EC pillar. As is known the second and the third pillars are respectively the Common Foreign and Security Policy and Cooperation in Justice and Home Affairs. In fact in all the above mentioned platforms and documents where subsidiarity was discussed, nearly no attention was paid to its application to the second and the third pillars, although the Treaty on European Union stated that "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken … as closely as possible to the citizen" (TEU, Article 1) and that "The objectives of the Union shall be achieved … while respecting the principle of subsidiarity…" (TEU, Article 2).

According to de Burca, this lack of attention which has so far been paid to the principle of subsidiarity in relation to the second and the third pillar may be due to three reasons (de Burca, 2000: 45-46): First one is that since the problems of these

two pillars have far been seen as the result of lack of adequate common action, application of the principle of subsidiarity to these pillars has not been seen that necessary. Second, the forms of law adopted in these pillars have not been that much detailed and regulatory as has been the case in the Community pillar and therefore there has not been a need for the framework forms of regulations in these pillars as the principle of subsidiarity envisages. Finally, since the primary actors have been the member states and since consensus has been the dominant mode of decision-making in these two pillars, member states hold the control over the decision-making process and thus they have not felt the need to invoke the principle of subsidiarity in these pillars so far. However, here we should also note that, as the interactions of the Union with the NATO or the UN increase, it is said that in the near future the principle of subsidiarity may be invoked especially in the second pillar regarding the autonomy of the Union vis a vis these international institutions (de Burca 2000: 46).

In order to understand how the principle of subsidiarity is reflected on the integration process, i.e. how it is practiced within this process, once more we had better remember the main legal base for this principle in the EC Treaty, namely the Article 5 of the EC Treaty, which 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 insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

It is the second paragraph of this Article which provides the legal base for the debate on the principle of subsidiarity. What is explicit in this paragraph is that the principle of subsidiarity does not apply to the exclusive competences of the Community and that it only applies to the so called "concurrent competence areas" in which both the Community and the member states have power to act. However, neither the founding Treaties nor any of the Community documents provide us with the information on what are the competences exclusive to the Community and what are the competences shared by the Community and the member states.

Nevertheless, there are many different lists regarding the exclusive competences of the Community put forward by different authors and institutions based on their extractions from the implied wordings of certain documents and from certain practices of the Community institutions. According to *Theodor Schilling* for example, the competences that are exclusive to the Community are the establishment of the common customs tariff, the common commercial policy and the common rules on competition in the framework of the common agricultural policy (Schilling, 1995: 17).

On the other hand, the Presidency Conclusions of Edinburgh European Council states that the Maastricht Treaty has reflected the idea of subsidiarity in the drafting of the Treaty articles regarding social policy, education, vocational training, culture, public health, consumer protection, trans-European networks, competitiveness of industry and research and technological development (Annex I to Part A). Depending upon Article 5 of the Treaty which implies that subsidiarity applies only to the concurrent competences areas, this statement of the European Council may be taken by some as the list of the concurrent competences of the

Community. However, the document does not explicitly talk about such a concrete list but only states that subsidiarity is "reflected" on these policy areas. Also, if we have a closer look at these Articles, we see that the Treaty uses expressions like "the Community shall encourage cooperation between the member states", "the Community shall support and supplement the action of the member states while fully respecting their responsibility for the content and organization", "Community action shall complement national policies" regarding the above mentioned policy areas. As you can see, these expressions are far from posing a list of concurrent competences for the European Community as they are far from reflecting the principle of subsidiarity.

Besides these, *the European Court of Justice* has so far ruled out explicitly that the Community has exclusive competences in the fields of common customs tariff (Case C-125/94 Aprile v Amministrazione delle Finanze dello Stato [1995]), common commercial policy (Case C-41/76 Donckerwolke and others v Procureur de la République and others [1976]); and fisheries (Case C-804/79 Commission v United Kingdom [1981]).

In addition to these, in its *Communication to the Council and the European Parliament* on 27 October 1992, the Commission stated that "Historically, the concept of exclusive competence originally grew out of the obligation to establish the 'common market' " and that

> …it is possible to speak of a genuine obligation to act leading… to the formation of a block of exclusive powers centered around the 'four fundamental freedoms' and certain common policies essential to … the 'establishment of an internal market' (quoted in Ellis & Tridimas, 1995: 83).

Then the Commission Communication stated what were involved in this block of exclusive powers as follows:

the removal of barriers to the free movement of goods, persons, services and capital, the common commercial policy, the general rules on competition, the common organization of the agricultural markets, the conservation of fisheries resources and the essential elements of transport policy.

However, the most important point in this Commission Communication was the declaration that this list was subject to change in the course of the integration process. In this regard the document stated that "The demarcation lines of this block of exclusive powers will have to change as European integration progress. They cannot remain frozen" (Commission Communication of 27 October 1992, paragraph b). The Communication underlined the fact that both the proceedings towards EMU and the dynamics of the four freedoms would play their roles in the revision of this list.

In line with this point of view, despite the presence of authors like Schilling, there is the prevalent idea that due to the dynamism and the evolving character of the European integration process, the competences that are exclusive to the Community and those that are shared by the Community and the member states will be determined according to the emergent contexts throughout the integration process (Chalmers 1998: 224, Mengozzi 1999: 74, de Burca 2000: 27-28).

To make this concrete by an example, we may refer to the changes that have taken place in the field of competition policy. In order to attain the simplification and effective implementation of the Community Competition Law, the

Commission is tending to share some of its exclusive powers with the related authorities of the member states (Öz, 2000: 23). Although in the past it was the Commission which retained the sole authority to grant exemptions, with the amendment made in the Regulation 17/62, now both the competition authorities and the courts in the member states can apply the related provision on exemptions (İnan, 2001: 89-90).

As it is seen, the competences that are attributed exclusively to the Community can change in time due to arising needs and changing circumstances in the course of the integration process. Therefore, we agree with the above mentioned authors in that the competences that are exclusive to the Community and those that are shared by the Community and the member states will be determined according to the emerging circumstances throughout the integration process, as has been the case till now. That is why we even do not attempt to present any competence lists in our study. This is also the right attitude in terms of making the principle of subsidiarity functional. As de Burca states

> To isolate broad issues, groups of issues, or general policy areas, and to categorise them as belonging exclusively to the sphere of Member State or exclusively to the sphere of Community action, is ultimately unrealistic and simply avoids the set of questions (those which underline the subsidiarity inquiry) which may need to be asked about the appropriate level and forum for action (de Burca 2000: 28).

Moreover, as we have cited above, the Protocol on the Application of the Principles of Subsidiarity and Proportionality stated that

> …Subsidiarity is a dynamic concept … It allows Community action within the limits of its powers to be

> expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified (Paragraph 3).

Although it does not put forward any lists of competences, what is clear in the second paragraph of the Article 5 of the EC Treaty is that the principle of subsidiarity applies only to the areas of concurrent competences, that is, to the areas in which both the Community and the member states can take action. The Article 5 of the EC Treaty states the conditions when the Community shall act in the concurrent areas by utilizing the concepts of "sufficiency" and "better attainment" in terms of "scale" and "effects" by stating that

> 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 insofar as the objectives of the proposed action cannot be *sufficiently* achieved by the Member States and can therefore, by reason of the *scale* or *effects* of the proposed action, be *better achieved* by the Community.

However, these are not that objective criteria to be employed in deciding whether the action in question should be taken at the Community level rather than at the member state level. In order to provide more objective criteria for deciding the appropriate level of decision-making in the concurrent competence areas, the Community adopted a guideline in the Protocol on the Application of Principles of Subsidiarity and Proportionality, according to which the action at the Community level would be legitimate if

the issue under consideration has transnational aspects,

actions by member states alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage member states' interests,

action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the member states.

As is seen these guidelines are also not that objective and clear either. The first guideline, although the most concrete among the three, bears the danger of being utilized in a speculative manner. There is always the possibility of finding cross-national effects to justify a Community level action and to justify proposals to harmonize national laws, especially in policy areas like environment; which may neglect the issues of local standards, local needs, democracy and so on. The second guideline is extremely open-ended and has the inclination of expanding the Community level decision-making in the concurrent competence areas; because it is always possible to extract out different national standards which may be considered as posing distortions on competition in different policy areas. A common example given on this issue is the Directive on the Approximation of Member State Regulations Relating to the Advertising of Tobacco Products (Directive 98/43/EC, quoted in de Burca, 2000: 35), which considered the issue of tobacco advertisement within the framework of internal market and thus within the exclusive competences of the Community and attempted to harmonize national legislations in this area. However, this is also as much about public health as it is about the internal market; i.e. it is within the shared competence of the Community and the member states. In

such a case, it is clear that the second guideline provided by the Protocol is far from providing an effective tool in determining the appropriate level of decision-making. It points more to making a political choice in deciding the appropriate level of decision making rather than providing a practical guide. The third guideline on the other hand brings nothing new other than restating the better attainment criteria in terms of scale and effects in legitimizing the Community level decision making in a concurrent competence areas, which is already found in the Article 5 of the EC Treaty.

As it is seen, the guidelines put forward by the Protocol on the Application of the Principle of Subsidiarity does not provide a practical tool to be utilized by the Community institutions and the member states in making their decisions or in taking actions in the areas in which they both have the power to act. When this is the case, it is not surprising that the European Court of Justice becomes the sole institution to rule on the appropriateness of the level of decision-making, being the institution in charge of reviewing compliance with the principle of subsidiarity as is the case for all the other principles of the Community, together with all those discussions on the "judicial activism" and "judicial politics" (de Burca, 1998: 234). We will deal with the attitude of the European Court of Justice towards the principle of subsidiarity later in this chapter.

May be the most concrete step taken in the name of making the principle of subsidiarity more effective in practice by the Protocol on the Application of the Principle of Subsidiarity is the obligation it imposed on the Community institutions to justify their legislative activities on the basis of the principle of subsidiarity. In this regard, the Commission is not only obliged to consult widely before proposing

legislation but also to justify its proposals with regard to the principle of subsidiarity. Its submitting an annual report to the European Council, the European Parliament, the Council, the Committee of the Regions and the Economic and Social Committee on the application of the subsidiarity principle is also a legal Community requirement asserted by this Protocol. Moreover, the European Parliament and the Council should consider the consistency of the Commission's proposals with the principle of subsidiarity during their legislative activities.

However, what is interesting in Article 5 of the EC Treaty and in the guideline provided by the Protocol on Subsidiarity is that neither of them makes a substantial reference to the basic idea lying under the principle of subsidiarity which foresees that decisions are taken at the closest possible level to the citizen. That is to say, neither of these documents "reflect the philosophy of allowing smaller units to define and achieve their own ends, and refers only to two levels of authority: that of the nation state and that of the Community" (de Burca 2000: 23). The Community has had the attitude of considering the competence sharing between the member state and its constituent sub-national units as a part of the internal affairs of the member state (The White Paper on European Governance, 2000: 12), and has not yet taken any concrete step to make the principle of subsidiarity apply all the way down to the regional and local levels of its member states. Although it emphasizes that it "wishes to ensure that decisions are taken as closely as possible to the citizens of the Union" in the Preamble of the Protocol on the Application of the Principle of Subsidiarity, it has not yet made any attempt to concretize this and has not made the principle of subsidiarity apply to the regional and local levels which are unquestionably the "closest levels to the citizens of the Union".

3. 6. The Attitude of the Community Institutions Towards the Principle of Subsidiarity

3. 6. 1. Subsidiarity and the European Commission

As it is mentioned above, the Protocol on the Application of the Principle of Subsidiarity imposed certain obligations on the Commission in order to attain the effective implementation of this principle. According to the Protocol, the Commission should conduct a wide range consultation before proposing any legislation. In this regard, we see that the Commission conducts "advance consultation" and "impact assessments" before it issues a proposal for legislation through the use of green papers and white papers and publishes these documents as declared in the Protocol. We should also remember that among the institutions of the Community it is the Commission which is at the center of lobbying activities mainly due to its monopoly in initiating legislation. Thus, even if it wants, it cannot escape from this consultation process prior to its submission of legislative proposals. Here, we will not elaborate on the characteristics of this lobbying process.

Another requirement of the Protocol from the Commission is that it should justify the relevance of its proposals with regard to the principle of subsidiarity. Although these kinds of justifications may sometimes be criticized for being formalistic and cosmetic (de Burca 2000: 42), it is important in that it forces the legislative institutions of the Community to think about the appropriateness of the actions they take. That is to say, such an obligation makes them articulate the

compatibility of their legislation with the principle of subsidiarity. This is also a transparency and accountability oriented practice on behalf of the Community legislature.

Finally, the Protocol also obliges the Commission to submit an annual report to the European Council, the European Parliament, and the Council on the application of the principle of subsidiarity, which will also be sent to the Committee of the Regions and the Economic and Social Committee. In line with this obligation, the Commission started to prepare annual reports on the application of the subsidiarity principle. Although its first reports were quite formal and simple, in its latest reports, the Commission provided quite important information not only on the application of the principle of subsidiarity but also on the legislative procedures of the Community. In the report it issued in 1998, which was titled "Better Law-Making: A Shared Responsibility", (COM (98) 715, quoted in de Burca, 2000: 43, 44), the Commission put forward serious analysis about the Community decision-making procedures together with its analysis about the subsidiarity principle. It stated that the responsibility for compliance with the principle of subsidiarity is shared between the Council, the Parliament and the member states. In saying this it pointed to the fact that being the initiator of the Community legislation, the Commission was the center of lobbying activities and because of this it asserted that quite an important number of legislative proposals did not belong purely to it but they were prepared in response to the requests from different Community institutions or member states. Moreover, in this report the Commission claimed that the legislative texts adopted by the Council and the Parliament were more complex than its proposals. As is seen, while reporting on the application of the principle of subsidiarity, the Commission

also gets the chance of elaborating its views on the decision-making procedure of the Community.

3. 6. 2. Subsidiarity and the European Parliament

The attitude of the European Parliament towards the principle of subsidiarity is somewhat skeptic. The European Parliament fears that the application of the Principle of subsidiarity within the Community has the risk of re-activating the veto rights of the member states and thus may lead to dissolution in the Community (Bezci, 1999: 32). The Parliament puts forward its anxiety that subsidiarity may be used as an argument for reducing the Community's policy activity and for engaging in softer forms of law making which might not necessarily involve a role for the Parliament (de Burca, 2000: 42).

The European Parliament criticizes the European Commission in its reference to the use of framework directives, softer forms of law and advance consultation before proposing legislation, in its annual reports (de Burca, 2000: 41). According to the Parliament this would result in uncertain forms of softer law which would not be sufficiently binding and which might not adequately transposed at the national level. The Parliament considers the engagement of the Commission in advance consultations before submitting its proposal as wasting of its energy. According to the Parliament what is necessary for the Commission and the Council is simply to demonstrate why Community action is necessary and why it would be more effective than national action.

In fact, the relatively limited powers of the Parliament in the Community legislative process has always been considered as a deficit of the Community democracy and in each step that the Parliament has gained new legislative powers it has been thought that the Community will be more closer to its citizens. However, especially with the establishment of the Committee of the Regions by the Maastricht Treaty, some sort of a rivalry emerged between the European Parliament and the Committee of the Regions, which is composed of representatives from the regional and local governments of the Community, in the representation of the interests of the European people. The European Parliament fears that with the application of the principle of subsidiarity, the institutional balance within the Community would be distorted in favour of the Committee of the Regions (Bezci, 1999: 31). In its Resolution on the Commission Reports to the European Council (O. J. 1997 C 167/34, quoted in de Burca, 2000: 41, 42), the Parliament stated that the Commission should not apply the subsidiarity principle in a way which would upset the Community's institutional balance nor detrimentally affect the acquis communautaire.

3. 6. 3. Subsidiarity and the Committee of the Regions

3. 6. 3. 1. The Attitude of Regional and Local Governments Towards The Principle of Subsidiarity

The Committee of the Regions, which is usually regarded as the "voice of the regional and local authorities of the EC" (European Commission, 2001: 29), was established by the Maastricht Treaty. It consists of 222 representatives from regional

and local bodies and has an advisory status (EC Treaty, Article 263). Although its opinions are not binding, the Commission and the Council has to consult the Committee of the Regions in conducting the policies in the fields of education and youth, culture, public health, trans-European networks for transport-telecommunications-energy, employment, social policy, environment, vocational training and transport. It also gives regular opinions on the implementation of the Community's regional policy. Other than these, when it considers necessary, the Committee may also issue an opinion on its own initiative.

As is just mentioned, the Committee of the Regions is usually regarded as the voice of the regional and local authorities of the Community since it represents the regional and local units at the Community level. Its attitude towards the principle of subsidiarity in fact reflects the attitude of the regional and local governments towards this principle. As we have mentioned before, although some of them stress that decisions should be taken at the lowest possible level that is closest to the citizen according to the principle of subsidiarity, none of the Community documents states that this principle applies to the sub-national levels. That is to say, at present the principle of subsidiarity applies only to the relationship between the Community and the member state and does not go all the way down to apply to the sub-national levels. For the time being, the Community considers this as a part of internal affairs of the member states and it has not ruled so far that this principle shall apply to the sub-national levels as well. However, depending upon the fact that the lowest possible level that is closest to the citizen is the regional and local levels, regional and local authorities put forward their assertion that the principle of subsidiarity should apply to them, through the Committee of the Regions. They agree with John

Hume in that "the principle of subsidiarity is practically meaningless if nothing is done to enable the regions to play a more significant role in the construction of the new Europe" (Hume, 2002: 7).

On 21 April 1995, the Committee of the Regions issued a Report on its position and capabilities within the Union (Canatan, 2001: 132). In this Report, the Committee put forward a formulation for the application of the principle of subsidiarity which includes the regional and local governments as well. According to this definition, "the Community shall act in accordance with the principle of subsidiarity, to the extent that if the proposed action cannot be attained by the regional and or local governments that are authorized by the national system accordingly" (quoted in Canatan, 2001: 132). The Report also demanded a clarification in the division of competences between the Community and the member states, empowerment of the Committee of the Regions to participate more effectively in the Community decision-making process, empowerment of the Committee of the Regions and the regional and local authorities to apply to the European Court of Justice, review of the then existing legislations in the light of the principle of subsidiarity and regular submission of reports on the application of the principle of subsidiarity to the Committee of the Regions.

On 1-3 October 1996 a Conference was held in Brussels with the participation of all the relevant institutions in Europe that are engaged with local governments, including the Council of Europe, the Committee of the Regions, the European Parliament and IULA-EMME (Bezci, 1999: 34). In this Conference, the participants underlined the fact that the citizens of the Community still define themselves with their regional and local identities and demanded a re-formulation for

the principle of subsidiarity which would allow its application to the sub-national levels. Moreover they wanted this to be inserted into the Treaty as one of the Treaty principles. Among their other demands were the incorporation of the European Charter of Local Self-Government into the Community law and the empowerment of the Committee of the Regions and the regional and local governments to apply to the European Court of Justice.

However, only a very small part of these demands have been responded by the Protocol on the Application of the Principle of Subsidiarity, which only granted the Committee of the Regions the right to receive the annual report of the Commission on the application of the principle of subsidiarity and requested the Commission to care about the burdens that would fall on the local authorities as a result of Community legislation (Protocol on the Application of the Principle of Subsidiarity, Paragraph 9).

3. 6. 4. Subsidiarity and the European Court of Justice (ECJ)

According to the EC Treaty, the European Court of Justice is the sole interpreter of the of the Community law which shall ensure that the Community law is obeyed by all the relevant parties (EC Treaty, Article 220). Therefore, as for all the other principles of the Community, review of compliance with the principle of subsidiarity and resolution of conflicts regarding this principle is undertaken by the European Court of Justice. This is also stated in the Protocol on the Application of the Principle of Subsidiarity, Paragraph 13 of which states that “compliance with the

principle of subsidiarity shall be reviewed in accordance with the rules laid down by the Treaty".

In undertaking this duty of reviewing compliance with the principle of subsidiarity and settling conflicts about it, the ECJ has often been accused of engaging in "judicial activism" and "judicial politics" (de Burca, 1998: 234). This is mainly because of the fact that it is not that much possible to make decision on whether a matter is to be dealt with at the Community level or at the member state level without taking into consideration the political question of what should be the scope of the Community competence. However, as de Burca asserts, unless the Community makes a decision to curb the interpretative authority of the Court or assign the duty of judicial review of the subsidiarity principle to another institution – e.g. to a 'Constitutional Council' composed of the president of the ECJ and judges from national courts, as Weiler suggests, (Weiler, 1999: 322) – it is a duty of the ECJ to settle the problems coming before it about the principle of subsidiarity (de Burca, 1998: 234).

In adjudicating about the disputes regarding the principle of subsidiarity, there are certain other principles and Treaty provisions that are taken into consideration by the ECJ. The second paragraph of the Protocol on the Application of the Principle of subsidiarity underlines this fact by stating that

> The application of the principle of subsidiarity shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law, and it should take into account Article F(4) [now Article 6(4)] of the Treaty on European Union, according to which 'the Union shall provide itself with the means necessary to attain its objectives and carry through its policies'.

This is quite an open-ended guideline for the ECJ in making decisions on the appropriateness of the level of decision-making. Because, the statement that "the Union shall provide itself with the means necessary to attain its objectives and carry through its policies" may well be manipulated by the Community institutions in order to tilt the balance towards expanding the exclusive competences of the Community.

A similar open-ended guideline is put forward by the *Article 308 of the EC Treaty* which reads as follows:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

This is usually known as the "*theory of implied powers*" (Mengozzi, 1999: 80), whose utilization has become quite common after the Paris Summit of the Heads of State and Government in October 19-21, 1972. Although in this Summit the broadest possible use of Article 308 was advocated for the attainment of the economic and monetary union, after this time we see an increase in the utilization of the theory of implied powers in many other policy areas. Article 308 still continues to play an important role especially in achieving the new objectives assigned to the Community by the Maastricht Treaty.

However, for a long time, there have been many discussions on the utilization of this Article and it has been argued that this Treaty provision gives the Community an open-ended means to expand its power domain vis a vis that of the member states. For example, Directive 76/207 on Equal Treatment for Men and Women (O. J. L39/40, 1976, quoted in de Burca, 2000: 21, 22), which was adopted under Article 308, asserted that attainment of equality between men and women was an objective of the Community although such an objective was not expressed in the Treaty at that time. In its so called "Maastricht Decision", the German Constitutional Court expressed its anxiety that Article 308 was becoming a means for revising the Treaty and expanding indefinitely the competences of the Community ([1994] 1 CMLR 57, quoted in de Burca, 2000: 21).

Then, in its *Opinion 2/94 on Accession of the EC to the European Convention on Human Rights*, the ECJ provided some sort of a relief for those who were anxious that the theory of implied powers would change the power balance between the Community and the member states. In its Opinion 2/94 the Court stated that

> Article [308] is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty. That provision, … cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as whole and, in particular, by those that define the tasks and the activities of the Community (1996 CMLR 982, quoted in Mengozzi, 1999: 83-84).

Although this statement by the ECJ relieved the anxiety of those who care for the effective application of the principle of subsidiarity, it did not eliminate it at all. Because, the theory of implied powers embodied within the Article 308 of the EC Treaty still enables the Community to take on powers, when it considers necessary to attain any objective set forth in the Treaty, although it does not have competence in that policy area. In many cases "the attainment of one of the objectives of the Treaty" can point for the Community institutions to take action in a wide range of areas which carries the risk of intervening in the power domains of the member states. Here we should also keep in mind the debate on the ambiguity of the Community objectives, which makes things even worse. As for the other conflicts arising from the application of the subsidiarity principle within the Community context, to strike the right balance between the theory of implied powers and the principle of subsidiarity takes its place among the overloaded duties of the European Court of Justice.

Another principle that has to be taken into consideration while reviewing the application of the principle of subsidiarity is *the doctrine of supremacy of Community law*, which envisages that Community law prevails when there is a conflict between the Community and national law. It is a doctrine devised by the case law of the ECJ in order to achieve uniformity in law throughout the Community. According to certain authors, the doctrine of supremacy of Community law and the principle of subsidiarity embody contradictory clauses, because, the principle of subsidiarity foresees that decisions are taken at the lowest possible level that is closest to the citizens whereas the doctrine of supremacy of Community law foresees

that Community law prevails over national law when the two conflict with each other (Schilling, 1995: 19).

Again, it is the European Court of Justice which is in the position of striking the balance between the principle of subsidiarity and the doctrine of supremacy of Community law. In undertaking this duty, we see that the ECJ adopts a case-by-case attitude, that is, it evaluates each case within its specific circumstance. In its decision in the *Casagrande Case* (Case C- 9/74 Casagrande v Landeshauptstadt München [1974]), the Court settled the conflict between the Community law and the national law by holding Community law prior to the national law. In this case, the related German authority refused to allocate an educational grant to the child of an Italian national living in Germany, on the basis of a German statute which allows such grants to be given only to German nationals. The applicant claimed that this national statute was in conflict with the Community Regulation 1612/68 which stated that the children of a national of a member state employed in the territory of another member state should be subject to the same educational rules as the nationals of that state. Although at that time there was no Community competence in education as such, basing its arguments on the Treaty provisions on the free movement of workers, the Court decided that the Community Regulation should prevail over the German statute.

Whereas in the *Veronica Case* (Case C-148/91 Veronica Omroep Organisatie v Commissariaat voor de Media [1993]), the ECJ made a judgment in which it asserted that the national law should prevail over the Community law. In this case, the media authority in Netherlands prohibited the participation of Veronica, a television broadcasting company, in the establishment of a commercial

broadcasting agency, on the basis of the Dutch law which prevent broadcasting companies from using their income for commercial activities. The applicant's claim was that this prevention was contrary to the Treaty provisions and Community regulations on the free movement of services. The Court however ruled that the Community had no competence in the field of culture and that it was legitimate for the Dutch law to incorporate and enforce provisions to protect national cultural interests.

As it can be seen from the above examples, in resolving the conflicts arising between the doctrine of supremacy of Community law and the principle of subsidiarity, the European Court of Justice has the tendency to make case-by-case analysis and evaluate each specific case within its peculiar conditionality.

Now let's have a closer look at the attitude of the European Court of Justice to the application of the principle of subsidiarity itself, that is, how it utilizes the guidelines provided by the Protocol on the Application of the Principle of Subsidiarity in adjudicating this principle and how it interprets the Treaty provisions in the light of this principle in the cases brought before it.

In the *Case UK v Council* (Case C- 84/94 UK v Council [1996]), the UK government challenged the Community Directive on Working Time. As part of its challenge, the UK government claimed that this Directive, which set maximum weekly working time, was not complying with the principle of subsidiarity and that the Community institutions that had engaged in its legislation did not take the guideline put forward by the Protocol on the Application of the Principle of Subsidiarity into consideration. In this regard the UK government claimed that the Community institutions that had legislated this Directive did not put forward their

justification on why "maximum weekly working time" had to be regulated at the Community level rather than at the member state level, which was a requirement imposed on them by the guideline provided by the Protocol on the Application of the Principle of Subsidiarity. In making its judgment, the Court did not ask the Community institutions that had legislated this Directive why they had considered this to be regulated at the Community level and it did not want them to submit any "qualitative or quantitative indicators" to support the necessity that this legislative activity had to be taken at the Community level. Rather, it put emphasis on the need for Community level action in this field in order to improve the working environment in terms of health and safety of workers, which it said was stated in the Article 138 of the EC Treaty, on which this Directive was based. According to the Court, there was no need for the legislative Community institutions to demonstrate anything further to justify the Community level regulation in this field other than their already existent assertion that there was "need" for Community level legislation in this field.

In the *Case Germany v Parliament and Council* (Case C-233/94 Germany v Parliament and Council [1997]), this time the German government challenged a Community Directive which brought about Community level regulations for the credit institutions throughout the Community, which specifically made it compulsory for them to participate in guarantee schemes. The German government argued that Community legislature had not adequately put forward its justification for enacting such a piece of legislation at the Community level on the grounds of subsidiarity principle, which was a duty imposed on it by the Protocol on the Application of the Principle of Subsidiarity. Although there was not an explicit justification in any part of the Directive for why the Community legislature considered this issue to be

regulated at the Community level, the Court took the statement of the Directive that 'individual action taken by the member state in this field would be insufficient', as a sufficient justification without asking for further details about why the member state level regulation would be insufficient in this field.

These two cases suggest that "as a standard of review of EC legislative action, the Court is treating the subsidiarity principle as an instrument of low intervention and minimal scrutiny" (de Burca, 1998: 225). In addition to these cases, there had also been some other cases in which Community legislation was challenged on the grounds of subsidiarity; but these were either dismissed by the Court of Justice or the issue was not adequately addressed by it (Case C-278/94 Commission v Belgium [1996]; Case C-11/95 Commission v Belgium [1996]; Case C-91/95P Tremblay and others v Commission [1996]; Case C-192/94 El Corte Inglés v Blazquez Rivero [1996]).

In the two cases that have been analysed above, it is seen that in its legislative activities, the Community legislature find it sufficient to assert that "they think that there is a need for Community action in the policy area in question" without putting forward their justification on why this is so in a concrete form of explanation, although they are obliged to do so according to the Protocol on the Application of Principle of Subsidiarity. The ECJ on the other hand does not demand detailed justification from the Community legislature for why they considered it necessary to take Community level action in that certain field, when a case challenging a certain Community legislation is brought before it on the grounds of its compliance with the principle of subsidiarity. However, as de Burca states

> It must surely be the case that if subsidiarity is a justiciable principle of judicial review, the institutions must be obliged to provide something more substantial by way of justification than simple assertion that they consider their legislation to be compatible with that principle (de Burca, 1998: 225).

What all these imply is that, the Court of Justice should give more importance and priority to subsidiarity scrutiny in the cases brought before it and it should urge the legislative institutions of the Community to submit detailed justifications on the compatibility of the legislations they have enacted, which are challenged before it, with the principle of subsidiarity. Because, at present, due to lack of political regulations and instruments, it is the ECJ which in the final analysis has the power to secure the proper application of the principle of subsidiarity within the European Community.

In addition to these, in certain cases, namely in the cases regarding the free movement of labour and persons, while interpreting the Treaty provisions in resolving the conflicts that are brought before it, the ECJ has exhibited a tendency of ruling in favour of the Community competences rather than that of the member states and thus neglecting the principle of subsidiarity to a certain extent. The Bosman Case is a commonly cited example for this kind of attitude of the Court.

In the Bosman Case (Case C- 415/93, Union Royale Belge des Sociétés de Football Association and others v Bosman [1995] ECR I-4921), the German government challenged the abolishment of the system of paying transfer fees between football clubs by the Community authorities, on the grounds of its incompatibility with the principle of subsidiarity. It asserted that football was not an economic activity to be considered within Treaty provision on the “free movement of

workers" (Article 39), rather it should be considered within the Treaty provision on culture (Article 151), which requires respect for cultural diversities of the member states. However, in its interpretation of these two provisions of the Treaty, the Court ruled that "free movement of workers" was a fundamental freedom and the fact that the Community did not have power under the Treaty to legislate on football club transfer fees not necessarily mean that it might not require the abolishment of such fees. That is to say, the extension of Article 39 to sporting activities in which member state diversity had to be respected according to the Treaty was found legitimate by the Court, which ruled that sporting associations should not be excluded from the free movement provision of the Treaty. Regarding the argument put forward by the German government on the insufficiency of subsidiarity justification, the Court did not seek for detailed justification from the Community legislative institutions on the compatibility of this piece of legislation with the principle of subsidiarity- i.e. why they considered it necessary to legislate in this field at the Community level.

If we are to make a general evaluation about the attitude of the ECJ towards the principle of subsidiarity, we can say that the ECJ has the general tendency to adapt a *case-by-case analysis method* in resolving the cases that are brought before it, as is the case for the other jurisdiction areas. However, by looking at its decisions so far, it can be said that in certain fields, namely in the fields of free movement of labour and persons, it tends to favour the extension of community competences vis a vis member state competences with the justification that proper attainment of Community objectives obliges this. Finally, in the light of the cases that we have cited above, we can also say that the Court has the tendency to rely on

the Community legislature's simple declaration that "there has been a need to legislate at the Community level in that certain field" rather than demanding their detailed justifications on why this has been so and how this piece of legislation complies with the principle of subsidiarity.

At the end of this Chapter, if we are to recapitulate what we have covered so far, we can make the following summary:

First of all, we tried to understand the evolution of the principle of subsidiarity within the European integration process by analysing the main documents that have been issued so far on this principle within the Community. In doing so, we made a distinction between the pre-Maastricht period and post-Maastricht period, since the official adoption of this principle was realized by the Maastricht Treaty. In analyzing all these documents, we have seen that subsidiarity was also referred in the documents of the pre-Maastricht period; however, what distinguishes the documents of the post-Maastricht era is that they are more oriented towards providing guidelines for the Community institutions on how they should implement this principle. However, we cannot say that these documents have been able to realize this aim so far, because the guidelines that they have put forward are not that concrete to provide the related parties with the practical tools in making their decisions. This in the end makes the European Court of Justice the final arbitrator about the implementation of the principle of subsidiarity, which is the sole interpreter of the Community legislation together with the Community principles.

Then, we analyzed the factors that made the European Community adopt the subsidiarity principle by the Maastricht Treaty together with the factors that increased the popularity of this principle and made it a focus of attention in the world

by the late 1970s. In this section, we saw that although there were Community-specific reasons for the adoption of the subsidiarity principle in the European context, these were not autonomous from the developments that were taking place in the global context then towards the utilization of this concept; since the European Community itself was and still is just one of the actors taking its place in this global scene.

In the final part of the Chapter, we tried to conceptualize how the principle of subsidiarity actually reflects on the European integration process, i.e. how it is utilized by the Community institutions and how is the attitude of the Community institutions towards this principle. In doing this, we mainly depended on the documents that we analyzed in the first part of this Chapter and examined how these legal provisions are adapted by the Community institutions. We can make important extractions from this section. First of all, we understand that the principle of subsidiarity applies only to the concurrent competence areas where the Community and the member states share power. However, we see that the Community has not adopted any lists of competences so far and the guidelines it put forward for the Community institutions to apply this principle are not that practical. May be, the most important step taken by these guidelines in implementing the subsidiarity principle is that they obliged the Community institutions to justify their legislation on its compatibility with this principle. Although these justifications are usually accused of being quite insufficient in explaining why Community action was necessary in that certain field, such an obligation at least makes the Community institutions take the principle of subsidiarity into consideration while legislating. Another important information that we can derive from this section is that, although in its essence the

principle has the notion of taking decisions at the lowest possible level that is closest to the citizens, for the time being the principle of subsidiarity applies only to the relationship between the Community and the member states and does not apply to the sub-national levels. Regarding the attitude of the Community institutions towards the subsidiarity principle, we can say that it's the Commission and the Committee of the Regions which are more eager to realize this principle in the legislative activities of the Community, whereas the European Parliament has a somewhat skeptical attitude towards it fearing that it may lead to dissolution in the Community. Due to lack of any political body charged with the duty of reviewing the principle of subsidiarity, it is certainly the European Court of Justice which in the final analysis is in the position of judging whether this principle is obeyed or not in the legislative activities of the Community. The general attitude of the ECJ towards the principle of subsidiarity is to adopt a case by case analysis, i.e. to analyze each case in its specific circumstance. However, if we look at the cases it reviewed so far regarding this principle, we can say that it sometimes tends to interpret subsidiarity in favour of the Community competences with the justification of attaining Community objectives.

In the next chapter, in the light of the conclusions that we have drawn from the preceding chapters we will elaborate on the present situation in the European Community regarding the implementation and manipulation of the subsidiarity principle. That is to say, we will elaborate on the role of the principle of subsidiarity within the European governance. While doing this, we will also reflect the ideas of those authors who are critical about the adoption of this principle within the Community context. Finally, we will articulate about the role that is imposed on this principle in the future formation of the European integration process.

CHAPTER 4

CONCLUSIONS AND EVALUATION: SUBSIDIARITY AND EUROPEAN GOVERNANCE

The European Community is made up of quite a large number of states together with their regional, local and even communitarian units. As is well-known, one of the most important prerequisites of being a member of this Community is to have a functioning democracy. Thus, being a Community of democratic states, the EC is also expected to realize democracy and participation in itself. However, due to the reasons that we have mentioned in the preceding chapter, it is facing problems of democratic deficit, legitimacy and lack of popular support.

Since the creation of the European Coal and Steel Community, the integration process has made a serious advancement which now even has important political dimensions. However, the actual advancement of the European integration is surrounded by theoretical backwardness, that the integration theories of the past decades are far from explaining the actual state that this process has reached by now (Endo, 2001: 3). For the time being, we cannot place the European entity that has come out of the European integration process into any one of the well-known political categories. It is a sui generis set up which does not fit into the definitions of either an international organization or a state (not even a federal state). As Endo states, it is a "hung polity" located somewhere in between the state and the international organization (Endo: 2001: 4).

In contemporary literature on European integration, the concept of "multi-level governance" (or "multiple-layered polity") has been widely used to notify this sui generis hung polity (Christiansen, 1997: 52; Wessels, 1998: 63-64, de Burca, 2000: 55; Endo, 2001: 5). In its simplest definition, governance, which has become a quite popular concept in 1990s, refers to "coordinating multiple players in a complex setting of mutual dependence" (Jachtenfuchs, 1997: 40). It includes the activities of social, political and administrative actors to guide, steer or manage societies in which public, private or civil actors do not act separately but together in co-arrangements (Kooiman, 1993: 2). We see that the advent of the term governance has been accompanied by the principle of subsidiarity, which according to some authors is an essential component of governance (Solis, 2002: 1). These authors claim that governance can only be exercised by the proper implementation of subsidiarity, which is a concept devised and utilized to provide peaceful and functional harmony of different levels and different groups of actors within the society throughout its long history.

According to Wessels,

> the EC should not be regarded as an embryonic superstate and supernation, but as one organ in a system of complex governance, consisting of multi-tiered, geographically overlapping structures of government and non-government elites. There is certainly an increasing degree of co-operation, in vertical terms between different government levels and in horizontal terms among several groups of actors (Wessels, 1998: 63-64).

That is to say, the Community combines different levels of governance and a wide range of actors which makes it a complex and a highly differentiated entity. In such a differentiated entity it is quite difficult to achieve legitimacy, civic loyalty and

democratic participation together with efficiency and uniformity. In this regard, subsidiarity has been seen as the safety belt to provide the cohesion and the continuity of this multi-level governance by eliminating or at least by relieving its legitimacy and democracy deficiencies.

However, the detailed analysis that we have made in the previous chapter has pointed out that the manipulation of the principle of subsidiarity by the European Community so far is not in full conformity with the basic requirements of this principle which we have set forth in the second chapter. Although the Community refers to this principle in order to achieve "an ever closer Union", by making it applicable only to the relationship between the Community and the member states, it neglects one of the most important characteristics of subsidiarity which foresees that decisions should be taken at the lowest possible level that is closest to the citizen. The Community has had the attitude of considering the issue of involving regional and local levels in the Community policy-making as a matter of internal affairs of its member states (The White Paper on European Governance, p.12), and has not made subsidiarity apply to the regional and local units that make it up. This attitude of the Community not only adds to the legitimacy and participation problems that the Community is facing but also weakens the crucial role attributed to this principle in sealing all those differentiated actors at different levels, especially in today's world where people are more inclined to identify themselves with their national and even local characteristics. It is undeniable that the Community intervenes in many aspects of the lives of European people without assuring them about their basic rights and responsibilities under the EC umbrella, which makes the concept of "European citizenship" something rather artificial and symbolic and thus makes European

people identify themselves with their national and local characteristics rather than with the notion of European citizenship. By not making subsidiarity applicable to sub-national levels, the Community furthers this problem of lack of civil loyalty to and popular support for the Community, which poses a very important challenge to the objective of creating an ever closer Union.

As it has been pointed out, the European Community is an entity which is neither a state (not even a federation or a confederation) nor an international organization. Although in quite an important number of areas decision-making power is vested in the European authorities, member states still retain their sovereignty in the vast majority of policy areas. In such a mixed polity as the EC, it is unavoidable to have shared (concurrent) competence areas in which both the Community and the member states have power to act. The detailed analysis that we have made in the previous chapter reveals that the main intention of the EC in utilizing the principle of subsidiarity is mainly to take it as a guide in deciding how power should be shared in the concurrent competence areas between the Community and the member states and what should be the appropriate level for decision-making or taking action regarding the issue in question.

As is mentioned in the previous chapter, neither the Treaty Article (Article 5 of the EC Treaty) nor other Community documents on subsidiarity (including the Protocol on the Application of Principles of Subsidiarity and Proportionality which put forward the aim of defining more precise criteria for its application) provide the Community institutions with neither a proper definition of subsidiarity nor with the necessary practical guidelines for the application of this principle in their legislative activities. In this case, the issue of implementing the subsidiarity principle is left to

the Community institutions, which in the end is subject to the review of the European Court of Justice. Thus, in the final analysis, at present- as is the case for all the other Community principles- it is the European Court of Justice which makes the final decision about the implementation of the principle of subsidiarity, i.e. about the appropriate level of decision-making, which entails important political considerations besides mere judicial review.

Regarding the attitude of the ECJ towards the principle of subsidiarity, we can say that it has the general tendency of adapting a case by case analysis method by which it evaluates each case within its specific circumstances. However, when we look at its decisions on subsidiarity, we see that in a number of cases- namely in those cases regarding the free movement of labour and persons- it tends to interpret it in favor of extending Community competences vis a vis member state competences. In addition to this, again in an important number of cases, it takes the simple statements of Community legislature on "the necessity to legislate at the Community level about the issue at hand" as sufficient justifications on the grounds of compatibility with the principle of subsidiarity and does not demand sound explanations.

Here it has to be mentioned that having the ECJ as the final arbitrator on the implementation of the subsidiarity principle is in the final analysis a political choice of the member states. Since the Community has not created a political body charged with the duty of reviewing the implementation of subsidiarity so far (e.g. a Constitutional Council as Weiler proposes, [Weiler 1999: 322]; or a political body with political teeth as Smith proposes, [Smith 2001: 4]), it is the ECJ which has to undertake this duty- as is the case for the review of all the other Community

principles- together with all those discussions on the weighty role of judicial activism (de Burca, 1998: 234) in the European integration process.

4. 1. Ideas against the Adoption of Subsidiarity Principle by the European Community

Besides those authors who see the principle of subsidiarity as one of the most indispensable principles for the multi-level governance model of the EC, we also have those authors who are critical about its incorporation into the EC Treaty. First of all, some authors claim that it is not relevant to talk about this principle, which have federal characteristics, within the European Community (Toth, 1992: 1103). According to them, it can only be applied in federal states where the power domains of existing levels of government are defined precisely in legal documents like constitution or the like. Since the EC is not a federation yet, neither has a constitution, they claim that this principle cannot work and thus is meaningless in this context.

Another group of authors who are critical about the adoption of this principle by the European Community claim that having such a principle represents a centralization that has already taken place in the EC and officially symbolises the acknowledgement of the growing subordination of the member states to the Community, let alone providing further participation of sub-national levels in the Community decision-making process (Steyger, 1995: 117, quoted in Wind 2001: 176). That is to say, they claim that the Community would not have recourse to such

a principle if the subordination of the national levels to the Community level had not been a fact.

On the other hand some of the skeptics argue that although subsidiarity is a principle aiming at relieving the problem of transparency and accountability, due to its complementary principle, namely the principle of proportionality, it may cause a reverse effect by replacing binding Community legislation with non-binding detailed recommendations and increased use of soft law and thus creating further legitimacy and transparency problems since these kinds of legislation would be more intrusive for the member states being in forms of suggestions and recommendations which are outside legal control (Snyder 1993: 6, quoted in Wind 2001: 176).

In the preceding chapter we have mentioned that the European Parliament also has a somewhat skeptical attitude towards the principle of subsidiarity fearing that it may lead to dissolution within the Community by urging regionalization and by re-activating the veto rights of member states. It also fears that this principle may tilt the present institutional balance towards the Committee of the Regions and make it have a more important position in representing European people and their interests.

In addition to these, Dehousse puts forward another critique of the subsidiarity principle arguing that it would allow strict divisions between different levels of European governance and this would decrease the flexibility which is a highly required characteristic for a complex society as Europe which also has a large scale economy (Dehousse 1994: 124, quoted in Wind 2001: 177). The author claims that societies like the EC which have a high degree of technical and economic interdependence may experience a need for central governmental intervention in

certain emergency or crisis situations in which the principle of subsidiarity may pose a challenge to the realization of flexible maneuvers at the Community level.

In spite of all the discussions revolving around it, the European Community continues to refer to this principle in its most recent documents. *Commission's White Paper on European Governance* attributes an important role to the principle of subsidiarity in the realization of a more effective and participatory governance in Europe. It states that reforming European governance entails the question of how the EC uses the powers given to it by the Member states and thus by the European people. Since the goal of the reform should be to open up policy-making to make it more inclusive and accountable, the document asserts that a better use of powers should connect the EC more closely to its citizens and lead to more effective policies.

In this regard the White Paper sets forth "the principles of good governance"- namely: openness, participation, accountability, effectiveness and coherence- which should be attained in order to achieve "good governance". After putting down the principles necessary to attain good governance in Europe, the document asserts that the application of these five principles reinforces those of subsidiarity and proportionality and allow better use them.

The document states that the legitimacy of the EC depends on involvement and participation, which means that the linear model of dispensing policies from above must be replaced by a virtuous circle based on networks and involvement from policy creation to implementation at all levels (White Paper on European Governance, p. 11). It also states that to improve the quality of its policies, the Community must first assess whether action is needed and, if it is, whether it should be at Community level.

All these statements reveal that the Community has the intention to utilize the principle of subsidiarity in reforming European Governance and in attaining an open, participatory, accountable, effective and coherent system, which it calls "good governance".

Subsidiarity is also incorporated into *the Draft Treaty Establishing a Constitution for Europe,* which was submitted to the European Council meeting in Thessaloniki on 20 June 2003 by the European Convention. Besides stating that "decisions should be taken as closely as possible to the citizen" the Draft Constitution explicitly refers to the principle of subsidiarity under the title of "Union Competences", within the sub-title of "Fundamental Principles". Here, being the two fundamental principles of the Community, subsidiarity and proportionality were given the major role of "governing the use of Community competences". The most important innovation that is made to the subsidiarity definition of the EC Treaty (Article 5) is that the Draft Constitution includes the regional and local levels in its definition by stating that

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the member states, either at central level or at *regional* and *local* level, but can rather, by reason of the scale or effects of the proposed action, be achieved at Union level (Draft Treaty, Title III, Article I-9(2)).

Another very important change brought about by the Draft Constitution is that it lists the categories of competences under the headlines of "exclusive competence", "areas of shared competence" and "areas of supporting, coordinating

or complementary action". That is to say, the Convention has the intention of adopting strict competence lists which has serious implications for the implementation of the principle of subsidiarity in the European Community.

In addition to this, the Draft Constitution adopts a new Protocol on the Application of the Principles of Subsidiarity and Proportionality, which puts much more emphasis on the realization of the participation of national parliaments and regional and local units in the legislative activities of the Community than the previous Protocol. Moreover, the new Protocol grants the Committee of the Regions the right to bring actions before the European Court of Justice on grounds of infringement of the principle of subsidiarity by a legislative act of the Community in the policy areas in which the Constitution foresees that the Committee should be consulted.

All these information asserts that if this Draft Constitution will be legally adopted by the Union in the next Inter-Governmental Conference that will be held in 2004, it will not only have very important implications for the implementation of the subsidiarity principle in the European Community but also have serious implications about the political nature of the Community, in fact making it much more closer to a federation, mainly due to its adoption of strict lists of competences.

At the end of all these discussions, if we want to recapitulate what is extracted from this study as a whole, we can put forward the following conclusions:

In spite of the fierce discussions surrounding it, the principle of subsidiarity continues to have a prominent place in the functioning of the multi-layered governance model of the European integration process. However, as Endo asserts "it still is not and probably will never be strong enough to replace sovereignty" (Endo,

2001: 36). The European Community has not yet made that crucial decision about what will be the political nature of the "European Sovereignty" which is embodied within the European Community. Undoubtedly, this is a question of political will, which will be answered by the political decision made by the participation and consent of the member states. For the time being, due to lack of such a decision, between the crossfire of those who want a supranational Community having a federal format and those who want an intergovernmental Europe, subsidiarity preserves its serious role in reconciling these two ends and in making this multi-layered governance system continue functioning in harmony. May be this reconciliatory role of the subsidiarity principle is reinforced by the vagueness that is experienced by the Community regarding its definition and the guidelines issued for its implementation. De Burca claims that European law has a rich tradition of evolving through the aid of "weaselwords" which are even specifically chosen for these very characteristics to mediate between very different understandings and conceptions of the issue under discussion (de Burca, 2000: 11). As de Burca states, at this stage of the integration process where the member states have not yet decided about the political nature of this sui generis entity that they have created, may be the most pragmatic choice for them is to manipulate this principle- which in fact has its own principles as we have set forth in the second chapter- in the way they need rather than making its precise definition and putting down precise guidelines for its implementation, as has been the case till now. Nevertheless, in spite of all those discussions turning around it, it seems that until the member states arrive at reconciliation about the political nature of the European Community-which becomes even harder with each enlargement

wave-, subsidiarity will continue to offer the most reliable alternative for the functional and harmonious continuation of the integration process.

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