

The Regulatory State: How Democratic?

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Abstract

The principle of subsidiarity was formally introduced as a principle of intention in the 1991 Treaty of Maastricht that recognized the devolution of competence, i.e., ‘decision-making to be performed at the lowest possible effective administrative level’ in the European multi-level system of governance. The rhetoric deployed on behalf of the principle of subsidiarity elaborated it and strongly suggested that it was, as it were, a principle of ‘nearness’ to the people, implying a more bottom-up form of governance and a more democratic mean of voicing opinions. But in what kind of framework should ‘nearness’ take place? Should it take place within the framework of the devolution of competence to elected national assemblies and the emancipation of constituencies? Or should it be applied within the framework of the regulatory state that makes use of national and international arm’s-length agencies and other governmental bodies in its governance approach? The paper gives answers to these questions, and examines how different approaches to the concept of democracy transform governance structures.

Keywords: Subsidiarity, Regulatory state, Government, Governance, New democracy

1. Democratic Models

As a point of departure we may examine reforms that have brought regulatory post national authorities into powerful positions. Those authorities are not directly executing ‘democratic government by the people’. By contrast their output perspective tends to emphasize ‘government for the people’ (Scharpf 1999: 6). Not representative in the classical democratic sense supranational authorities dominate political arenas, such as the European Union (EU) in Europe. Contextually Fritz Scharpf adds though (1999: 27): ‘It may be an exaggeration to conclude that this implies ‘the end of democracy’, but the loss of authentic and effective self-determination seems significant and visible enough to explain the present sense of malaise in democratic politics’. Reforms have created the regulatory state and its institutions. Reliance on regulation rather than parliamentary decision-making, public ownership, centralized planning or administration characterizes the methods of the regulatory state (Majone 1997, 1994, Veggeland 2010). It is decisive though that the execution of governance by the institutions of the regulatory state in some way is rooted in the will of the people. Maybe it is this approach Robert Dahl is thinking of when he writes (1989: 350): ‘New democracy in a world we can already dimly foresee are certain to be radically unlike the limits and possibilities of democracy in any previous time or space.’ We may suggest the following configuration of different models appearing across the modern polity.

Table 1. Government and governance systems or models.

| | Government consisting of elected assemblies | Governance consisting of not elected agencies |
|--------------------------------------|--|--|
| Governmental institutions | 1. Parliamentary system | 3. New democratic system |
| Regulatory state institutions | 2. New democratic system | 4. Autocratic system |

The actual government and governance systems or models of the new democracy are expressed in Table 1. By following Robert Dahl’s suggestion, the model 1, the classic democracy of origin, does not exist anymore in the modern world. The rise of the regulatory state has generated model 2 and 3, shown in Table 1. These models are mixed models. In some western states, like the Nordic countries, there is an administrative tradition for subordination regulatory institutions governmental authorities, model 2, while in other countries, like the Anglo-Saxon countries and the EU, there is an administrative tradition for giving preference to regulatory state institutions, named here as model 3 (Knill 2001, Veggeland 2007). What it is all about is giving preference or not to government by the people or New Public Management (NPM) based governance. For example the European community in its very beginning, i.e. from 1952 until its first direct election of representatives to the Parliament in 1979, was essentially based on an autocratic system, as model 4 indicates. The not elected representative of the Council of Ministers decided regulations, regulations which were implemented by the regulatory institution of the Commission of the Community (Kjær 2004, Veggeland 2010).

After the Maastricht Treaty of 1992 the EU was transformed by reforms to be characterized by model 3, and a new form of democracy was introduced (Veggeland 2003).

2. Subsidiarity; Democratic Approach or Just Distributed Public Governance?

We can recognize the principle of subsidiarity in the Treaty of Lisbon in 2007, or the ‘Reform Treaty’, (which should not be confused with the Lisbon Process of 2000), which member states signed and ratified in 2008. The Treaty of Lisbon entered into force on 1 December 2009. The Treaty should in our context be look upon as a contribution to more democracy in the EU- The Reform Treaty pursues the statement of the principle of subsidiarity in the Treaty of Maastricht. In the Treaty of Lisbon, the principle of subsidiarity is supposed to become legal in the sense that member states may appeal the decisions of the European Commission to the European Court of Justice if they find reasons for there have been a violation of this principle; supranational decision-making on a certain issue has been unnecessary and un-legal. The decision-making competence is meant to belong to a national level of administration. This treaty proposes certainly, in its context, both an administrative and a democratic reform endorsed by the EU, and promoted within the framework of the regulatory state (Veggeland 2010).

The principle of subsidiarity was formally introduced as a principle of intention in the 1991 Treaty of Maastricht that recognized the devolution of competence, i.e., ‘decision-making to be performed at the lowest possible effective administrative level’ in the European multi-level system of governance. The rhetoric deployed on behalf of the principle of subsidiarity elaborated it and strongly suggested that it was, as it were, a principle of ‘nearness’ to the people, implying a more bottom-up form of governance and a more democratic mean of voicing opinions (Weiler 1999).

But in what kind of framework should ‘nearness’ take place? Should it take place within the framework of the devolution of competence to elected national assemblies and the emancipation of constituencies? Or should it be applied within the framework of distributed governance that makes use of national arm’s-length agencies and other governmental bodies (OECD 2002)? Or could it be that nearness should really be in the framework of public-private-sector business actors meaning more free economic competition in the Single European Market?

Actually, the Maastricht Treaty did not precisely define the status of the principle of subsidiarity. It is clear enough, however, that the principle from its very beginning was not announced as a regulation endowed with judicial status. Despite this, political plaudits and promising panegyrics attended the announcement of this principle, a principle of administrative governance intended to champion the advancement of democracy by authorizing national levels and tiers (Veggeland 1995, Commission of the European Communities 1997). However, this latter goal was not at all clear given. The Treaty has only an evasive answer to the question of which framework is ‘nearness’ supposed to flourish. Does subsidiarity really indicate the commonly believed ‘downwards’ devolution of authority to national parliaments and to locally and regionally elected councils? If so, then it clearly

indicates an intention to promote democratic practices in the EU through the administrative reform of subsidiarity, and in accordance with model 3 in Table 1.

Or does the intended democratic reform simply indicate an ‘*outwards*’ distribution of public-governance authority? An ‘*outwards*’ distribution, as defined by the OECD (2002), is one that confers governance to independently organized public agencies, unelected authorities, and other regulatory governmental bodies and is a sign of democratic deficit because they are only under indirect democratic control. Outward distribution of governance relates to the model 4 in Table 1.

Another possibility is it that the only intention of the Maastricht Treaty was to make subsidiarity a regulative idea for how decision-making processes in the EU ought to function, and thus its status is really not one of democratic reform in an institutional sense (Weiler 1995). The introduction of this principle could have been, as we shall see, a response to the need to accommodate conflicting administrative traditions, like the Continental and the Anglo-Saxon traditions (Knill 2001); the role of subsidiarity was to prevent the wearing away of the diversified administrative practices within the EU. Consequently, the idea of subsidiarity had to be defined in an equivocal and vague manner. Inter-governmentalists would probably claim that this intended obscurity was aimed at avoiding conflict, while neo-functionalists would perhaps interpret this vagueness as a way of letting ‘*spill-over*’ effects determine the progress of the idea in actual practice (Rosamond 2000).

3. Making the EU Competence more Democratic through Subsidiarity

Anyway, during the 1990s the EU member states acknowledged the principle of subsidiarity as an official term, which most likely occurred merely because of the diffuse status of the principle. However, in the new EU regional policy framed by the Maastricht Treaty, and seemingly without any connection to the principle of subsidiarity, the member states were enforced to institutionalize and authorize an independent sub-national tier between the state and the local level (Williams 1996). The introduction of this new tier was secured through dictates that made this sub-national involvement in development initiatives a compulsory condition for member states’ receiving money allocated by the EU’s Structural Funds. This was not really a conflicting reform issue, because there was no talk about the devolution of democratic authority downwards to an elected assembly; it was simply a supranational assertion to participate in the regional administrations.

We have indicated that the member states had different understandings of the policy implications of subsidiarity, but they also had conflicting conceptions about regional institutions and administrations, owing to the competing ideas of federalism versus inter-governmentalism, nationalism versus regionalism, and governance by governments versus governance by unelected arm’s-length bodies (Vibert 2007). However, they all shared a common interest in making the increasing supranational EU competence more palatable and more democratic legitimate for their respective populaces. Subsidiarity as a marketing device linked the notion to a political agenda focusing bottom-up governance together with the strengthening of governmental agencies and bodies but also with the administrations for regional development.

In the signed Treaty of Lisbon, the status of subsidiarity in relation to the future regulatory governance of the EU continues to elude a concrete definition, despite its upgraded status to that of a legal regulation. There is only a suggestion of a new, diffuse mechanism to monitor acts of subsidiarity, accompanied with the stronger encouragement for citizens to bring forward new policy proposals and a clearer categorization of tier competences. What follows is ‘a glance’, provided by the EU, of these competencies:

- ‘*A strengthened role for the European Parliament: the European Parliament, directly elected by EU citizens, will see important new powers emerge over the EU legislation, the EU budget and international agreements*’.
- ‘*A greater involvement of national parliaments: national parliaments will have greater opportunities to be involved in the work of the EU, in particular thanks to a new mechanism to monitor that the Union only acts where results can be better attained at EU level (subsidiarity). Together with the strengthened role for the European Parliament, it will enhance democracy and increase legitimacy in the functioning of the Union*’.
- ‘*A stronger voice for citizens: thanks to the Citizens' Initiative, one million citizens from a number of Member States will have the possibility to call on the Commission to bring forward new policy proposals*’.
- ‘*Who does what: the relationship between the Member States and the European Union will become clearer with the categorization of competences*’.

(www.europa.eu/lisbon_treaty/glance/index_en.htm - the italics are the author's)

Probably for the same reasons as was the case regarding the Treaty of Maastricht, we may interpret this vagueness as stemming from different national democratic traditions and fundamental policy disagreements over the issue, see Table 1. Accordingly, the Treaty of Lisbon continues this trend. Thus, the implications of the EU principle of subsidiarity for democratic and administrative organization at the national level are unclear, while related measures, arrangements, and organizational forms for reducing the EU deficits of democracy and legitimacy are heavily biased subjects (see quotation above). Yet, organizational adjustments of national governance to new administrative conditions in the EU are left as an area of competence for each member state to decide.

Moreover, if member states are to be able to determine whether or not subsidiarity is practiced properly, i.e., whether a practice has ‘successfully’ promoted democracy and legitimacy or has been a ‘fiasco’ resulting in less efficiency and transparency (Scharpf 1999, Veggeland 2009), say, in relation to the monitoring mechanism, then there is a need for criteria against which they can assess whether a practice has been legal or illegal, successful or deficient, ethically acceptable or unacceptable. Or will these criteria be formed and implemented through ad hoc decisions made by the EU Court of Justice on Law and new regulations? The answer may very well be yes, for it would be a style in keeping with regulatory regimes like the EU, a style marked by democratic deficit (Kuper 2006).

From another point of view, it may seem incredible that the Treaty of Lisbon neither focuses on nor issues any statements on the national conditions for sub-national, bottom-up democracy, if we consider the fact that in this context it is almost impossible to make a clear distinction between member states' internal hierarchical systems and the EU multi-level system of governance (Veggeland 2003). The distinction is so unclear as to make the distinction between a country's central-state governance and sub-national governance difficult. Structures of governance at the tiers reflect each other in one or another way because of democratic and administrative traditions and networking games, which create institutional multi-level coherence with many of the actors' networks, though they are influenced by administrative traditions (Veggeland 2003). Fritz Scharpf calls this 'Politikverflechtung' (Scharpf 1999).

In the context of subsidiarity, let us explore two democratic and administrative traditions, the Continental and the British traditions, in two EU member countries, the former tradition exemplified by France and the latter by Great Britain.

The Continental European democratic tradition, with France as an example, gives credence to the idea of the state as an abstract identity, as something different from society, bearing the inherent responsibility for the performance of public functions or being the collective actor representing the society as a whole. Table 1, model 2, is here a relevant reference. Further, in this perspective of being a collective actor, even the representative democratic state could preserve its exclusive responsibility for the common best only by introducing certain constitutional modifications. The state's intervening into societal developments 'from above' should, however, be constrained by the safeguarding laws and regulations of subsidiarity, and first and foremost by a written national constitution (in German 'Rechtsstaat').

In this context the British tradition is different and closely related to the historical evolution of state identity, which is said to reflect 'an aberrant case' (Dyson 1980:36). Rather than ideologically looking upon the state as a top-down authority responsible for the common best, this tradition conceives it as an instrument of mediating between politics and societal interests, for instance, market forces in a bottom-up order of subsidiarity (Knill 2001). Table 1, model 3, is the relevant reference here. The mediating function of the state probably explains why the unitary nation-state of the United Kingdom (UK) lacks a written constitution; political institutions and civil society are instead perceived as the constraining elements, concretely and continuously correcting the state through bargaining processes.

4. Confirmation of Two Hypotheses

Thus, *the first hypothesis* might be that different state administrative traditions have profound organizational effects on related sub-national institutional order owing to path-dependence (Pierson 2004). The implementation of subsidiarity in the Continental administrative tradition manifests as a downwards devolution of competence to elected assemblies (Pindar 1993), in the Anglo-Saxon tradition it translates into distributed public governance in the form of the outward transfer of competence to arm's-length public administrations and other governmental bodies (OECD 2002). This hypothesis seems to be confirmed to some extent by the following two cases.

In France, the administrative reform of 1982 fused 100 central state controlled ‘prefectures’ into 22 regions (plus 4 overseas units). The new regions were organized democratically, with elected assemblies in superior political positions, in accordance with the Continental administrative tradition. They became formally responsible for regional economic development and were accorded the necessary legal status to negotiate partnership with state representatives. Their regional governments attained the function of governance and administrative capacity anchored in mutual public-public partnership, with the central state as the partner. Each regional partnership was regulated by an arrangement of ‘contracts de plan État-Régions’ defining the devolution of authority and budgetary allocations from the central state (Balme and Bonnet 1995). The regional authorities on this regulatory foundation attained and still maintain the political status as principal democratic authorities controlling own territorial affairs and the state subsidiaries, the arm’s-length state agencies. This case of French reform illustrates the implementation of the principle of subsidiarity in practice as the downward devolution of democratic authority and power to the sub-national tier. As a case, it indicates so far a confirmation of our hypothesis on the administrative reform of subsidiarity and mode of sharing competence.

The UK reads and translates the principle of subsidiarity differently. The UK is a liberal democratic state where democracy is exercised in the context of the sovereignty of parliament, but there is no ‘state’ equivalent of the French état. It is not based on the sharing of power in a hierarchical tier-system of elected assemblies, but is based on the liberal concept of the primacy of the individual, conceived as someone in possession of a bundle of interest and rights, in particular the right to conduct its business of maintaining the security of the realm and international order. The central state has a sort of a mediating constitutional status in the establishment of private-public partnerships and reform activities (Moran 2003). We can clearly recognize this status in the authorization of the state subsidiaries of the UK, in the form of the fragmented unelected arm’s-length administrations and bodies, which emerged with the ‘Next-Step Reform’ of the 1980s, as sub-national principal authorities. Following the Anglo-Saxon administrative tradition, these subsidiaries received a mediating function in development policies and in negotiating forward sub-national, public-private partnerships (Loughlin 2004). Elected sub-national assemblies are in this context non-existent. The British reform case demonstrates the implementation of the principle of subsidiarity in practice as an outward devolution of authority and power and follows the path of democratic deficit entrenched in the regulatory state. Also this case indicates a confirmation of our hypothesis on diversity regarding the administrative reform of subsidiarity and the mode of distributing governance at sub-national levels (Loughlin 2004).

The first confirmation: Like all modernizing reform activity, the democratic and administrative reform of subsidiarity is also dependent on context. The OECD, therefore, states (2005: 22) that, ‘OECD countries’ reform demonstrates that the same reform performs differently and produce very diverse results in different country contexts’. This leads to the second hypothesis.

The second confirmation is that state administrative traditions explain to some extent different problems of democratic governance, such as deficits of democracy, legitimacy, accountability,

and inefficiency as well as increasing transactional costs, connected to both outward and downward administrative reforms of subsidiarity.

‘Many governments’ as an OECD report states (2002:10), ‘now realize that managing from distance has created specific accountability and democratic control issues, and have started focusing on improving the governance of these bodies’. The OECD report of 2002 also confirms that only in the Continental countries of the nine member states analyzed is the outward form of subsidiarity really considered problematic, and, therefore, these countries have, to a certain degree, avoided implementing them. The OECD report of 2005 goes further and gives the following statement: ‘Nevertheless, the reality of reform has not lived up to the rhetoric. In many cases, the changes made to rules, structures and processes have not resulted in the intended changes in behavior and culture. Indeed, in some cases reforms have produced unintended or perverse consequences, and have negatively affected underlying public sector and democratic governance values’. Counteracting measures are put into play in relation to creating new policies that grant greater steering capacity to the governments and for making the arm’s-length independent and unelected agencies more transparent and coherent. In the UK it has long been recognized that the doctrine of parliamentary responsibility and steering ability has become a fiction. As mentioned in a previous chapter, some British scholars have concluded that ‘the sheer institutional diversity of government makes the doctrine obsolete and its complexity obscures whose is accountable to whom for what? (Beetham & Byrne & Ngan & Weir (2002:133).

Good democratic governance in the framework of subsidiarity depends on bottom-up arrangements, which create the space for governmental planning and action, the involvement of the civil society, and the arenas for public discourses on politics and ethics, and institutions of accountability in order to make democracy work. The Treaty of Lisbon barely mentions this bottom-up issue in the context of subsidiarity, and we know the issue is a conflicting one because of the diversity of national administrative traditions and paths (Veggeland 2007). Therefore, the Treaty still seems to be exploring good governance, democratic governance, and subsidiarity as effective administrative reform as both ‘downward’ and ‘outward’ devolutions of competence to both public and market actors and making it thereby a ruling social-institutional paradigm, ‘negatively affecting underlying public sector and democratic governance values’.

5. State Formation and Democratic Traditions

The national state in Europe was created at the end of the seventeenth century when the traditional state system was established; the Westphalian order (Krasner 1988). In France, the Revolution of 1789 reversed the absolutist dominance of society by the state order. The state did not lose its monopoly of coercion, but society itself determined the use of state power (Knill 2001). Also the notion of state and the notion of democracy were first expressly linked ideologically. National representative assembly of Parliament, the elected representation of society, built the linkage between the citizens and the common interests, i.e., the state, and constituted the input democratic legitimacy (Veggeland 2003). To Europe, this new epoch

meant the emancipation of the people and a new way of governing a bounded territory with its citizens democratically (Rogowski and Turner (eds.) 2006).

The ‘people’ (*demos*) of a defined national society became the only appropriate foundation for democracy, and the national state comprising governmental institutions became the only principal authority with internal sovereignty, with power on behalf of the ‘people’. We should, however, note two different conceptualizations of the state function. We have already seen that the Continental European democratic tradition gives primacy to the idea of the state as an abstract authority, as something different from the society. The state, including its subsidiaries, bears responsibility for the performance of the functions of the welfare state and is a collective actor representing the society as a whole. Being responsible for the common weal, the state authorities receive their legitimacy from the parliament whose power is only restricted certain modifications laid down in the national state constitution. The parliament receives its legitimacy from the ‘people’, who represent the market of voters and whom politicians must entice.

In this context, the UK democratic tradition is different and somewhat related to the historical evolution of the regulatory state (Loughlin and Mazey 1995, Loughlin 2004). Rather than constitutionally looking upon the state as something different from the society, an authority responsible for the common good, it was conceived as a part of society and as such an instrument of regulating interests, for instance private and public actors competing in the market. State subsidiaries of the arm’s-length type have, on one hand, a mediating responsibility, but on the other hand, they are also regulated as Public-Law Administrations (PLAs) or Private-Law Bodies (PLBs).

The conception of the traditional Continental states, and the Nordic states via their historical connections to this tradition (Gidlund 2000, EPC Working Paper 2005), is shaped by layers, which in part counterbalance each other. As pointed out by Christoph Knill (2001:62), the ideological conception of a state authority’s viewing the democratic state institutions as superior to society has social-model background. Today, several organizational aspects, rooted in the historical development of statehood and society are identified as context-dependent. Both constitutional unitary and federal states belong to the concept (Pindar 1993). Organized as administrative hierarchies with sub-national local and regional levels, and normally with elected councils governing on behalf of central authorities, ‘the unitary territorial state’ became a notion standing for a fully ‘complete’ and finalized nation-building process (Rokkan and Urwin 1983). There was only one central state power ruling one nation; the competence of the sub-national elected councils was circumscribed to only deciding roadmaps for implementation of state policies. In contrast, in the federal state, the power was shared with the members of the federation as national associates. For that reason, from a unitary-state perspective, the federal nation-building process was perceived and given a status as ‘incomplete’ because of this lack of unity (Balderheim 2000).

We may see, in this context, the EU principle of subsidiarity as a pursuit of the federal idea that layers should counterbalance each other (Keating 1998, Hooghe and Marks 2001). In accordance with the principle of subsidiarity, the devolution of competence upwards to the

supranational European tier through agreements is recommended when greatest policy outcome and effectiveness is expected on that level. This is a federal idea. Similarly, the downward devolution of competence to regional and local authorities as a consequence of subsidiarity is also a federal idea of sharing power and authority between tiers (Veggeland 2000, Wallace 1998).

Actually, we may view the concept of the French regional reform in 1982 made by a unitary state, the aforementioned ‘Contrat de plan État-Régions’ in this context. The reform is a regulatory one, i.e. a contractual and regulatory sharing of competence between tiers. Seeing the reform as context-dependent, we may see the idea as rooted in the federal tradition of counterbalancing level authorities. There is in this modern case of reform the conceptualization of subsidiarity, performed through bargaining processes and consensus-making and legalized as an order of binding regional contracts (Balme and Bonnet 1995).

Often, the performance of the OECD-defined ‘Distributed Public Governance’ of the Western Europe states of today gets its legitimacy from the EU-defined principle of subsidiarity. The ideological reference is the value of sharing competences between a plurality of public authorities and institutions as an alternative to a hierarchical order of government (Neyer 2002, Veggeland 2003). However, in reality, it concerns the protection of public interests from both the increasingly wide variety of public organizational forms and a deficit of democracy (Habermas 2006, OECD 2002). Democratic institutions and their channels of communication and their function to protect political, social, and civil rights, stand against the new (more output effective?) technocratic or quasi-technocratic executive authorities that provide public services (Majone 1997, Weiler 1999). What institutions, then, serve the public interests best?

In the Continental European democratic tradition, it was economic backwardness and the idea of more fair social and regional distribution of the common weal that led to the creation of a democratic but strong state as a part of the welfare-state building processes (Flora et. al 1999). Today, institutions of ‘Distributed Public Governance’ mean a restructured state hierarchy and public sector in general and reflect policies for exposing public services to more market competition. In some cases, it even means organizational reforms whereby public-service institutions are not regulated by public law but instead by private law as enterprises.

Even so, the Continental (and the Nordic) thinking of the role of the democratic state still seems to emphasize the view that market functionality and competition do not automatically achieve social and regional fairness (OECD 2002, Badie and Birnbaum 1983). There is a widespread concern on the topic; ‘distributed state governance’, anchored in agencies and other authority bodies at arm’s-length from parliamentary control, on all levels creates a democratic deficit if not counteracted (Eriksen and Fossum (eds.) 2000, Veggeland 2001, 2009). Therefore, in relation to subsidiarity, the redistribution of state governance to independent tier agencies and other New Public Management (NPM) authorities is normally delimited in Continental countries. The distribution tends to be more in accordance with a model emphasizing the supremacy of representative democratic assemblies as lawmakers and regulatory authorities, including at all sub-national levels of governance, in relation to technocratic agencies and public enterprises (Majone 1997, Schmitter 2000, OECD 2002).

The UK tends to be different. The country is described, as we have seen, as a ‘stateless society’ in a restricted sense, or ‘government by civil society’ (Badie and Birnbaum 1983:121). Here ‘it was the very rapid growth of capitalism and the market that resulted in the backwardness of the state, with civil society maintaining its position of dominance ... the market reigns supreme, not the state’ (Badie and Birnbaum 1983:123-4). The term ‘state’ was and still is only referred to at the level of international relations or as the “welfare state”. ‘Government’, ‘country’ and ‘nation’ became interchangeable terms.

Consequently, when the public sector became restructured in the 1980s, ‘the Next-Step Reform’, terms as ‘output governance’, ‘result measuring and financing’, ‘institutional competitiveness’, ‘benchmarking’, ‘institutional capacity’, ‘public-private partnerships’ dominated the thinking on reform, reflecting the wish to achieve market advantages. Subsidiarity as a form of downward devolution of political power from the central government to sub-national tiers and supreme democratic assemblies was not on the political agenda (Jessop 1994, Amin and Thrift 1995a, Veggeland 2003). Also, the original view of the state as a mediator dictated British thinking on administrative reform. Here the Distributed Public Governance style acquired its legitimacy from a constitutional model that emphasizes *functionality* more than parliamentary legitimacy. Thus, with regard to subsidiarity, the growing number of independent arm’s-length state agencies appear as mediators on all sub-national levels of governance, conceptualized as the institution of functional ‘public-private partnership’ (Amin (ed.) 1994). Bob Jessop has, therefore, concluded about the UK that “in this sense we can talk of a shift from local government to local governance. Thus local unions, local chambers of commerce, local venture capital, local education bodies, local research centers and local states may enter into arrangements to regenerate the local economy” (Jessop 1994: 272).

But since then, the number of local partnerships has been growing to an undesirable critical number with regard to fragmentation and to making democratic control feasible and governance effective. In the separate territorial unit of England, distributed public governance in the form of partnership institutions now are exacerbating the trend of democratic deficit, raising transactional costs, and actually worsening ineffectiveness because: ‘The (central) government has sponsored a bewildering known total of over 2 375 multi-agency partnerships...at the local level in England – for example, on education, regeneration, neighborhood renewal, community safety, older people, crime, town centre, management, health, cultural activities, etc. Another 400 local strategic partnerships are being set up to play a key role in local governance, bringing together local councils, local agencies, police and health authorities, etc.’ (Beetham & Byrne & Ngan & Weir 2002:270).

6. Territorial Size and Distributed Public Governance within the Framework Of Subsidiarity

Ideologically, the year of 1992 symbolizes the anticipated death of the state in Europe and traditional national democracy, or at least a decisive moment in on their road to expected transcendence (Brubaker 1999). Chosen by the former EU Commission president

Table 2. Basic historical transformations of the term of ‘democracy’

| Periods of time – regimes | Territorial size | Democracy forms |
|---------------------------------------|-------------------------|--|
| <i>Ancient Greek</i> | Small urban societies | Direct representative democracy |
| <i>Roman and Middle Ages</i> | Large empires | Downwards devolution; subsidiarity |
| <i>Westphalian order</i> 1648-1992 | (Nation) states | Indirect representative democracy |
| <i>European Union</i> subsidiarity | Borderless Europe | Downwards and outwards devolution; subsidiarity |

Jacques Delors as the target date for the completion of the Single Market, ideologically, 1992 came to stand for the abolition of national frontiers and the manifestation of a “borderless” Europe in relation to networking institutions, firms, and trade markets (Kuper 2006).

Table 2 connects historical periods with territorial size of predominant regimes and illustrates the actual forms of democracy as occurrences related to the latter, the territorial size of the polity. In the small Greek city societies of the ancient world, it was feasible to have direct representation (of free men) in the democratic assemblies. But when the Roman Empire and later other empires during the Middle Ages took over as the hegemonic entities of European, the downwards devolution of framed regulatory authority to dukes, vassals, and other subsidiaries took over as part of a democratic system of delegation, while the direct democracy ceased. It was rather like what we have elaborated as outward subsidiarity, because elected assemblies were missing.

With the introduction of the Westphalian order of 1648 until 1992, which symbolized the anticipated death of the state, middle-range territorial polity units ascended that were too large for practiced direct democracy and thus indirect representative forms of democracy became the solution. Later on, this indirect form of democracy became to some extent identical with the concept of the national state. The European Union, regulating a borderless Europe, represents a territorial unit of size making the state-level democracy unrealistic. Therefore, the new focus on subsidiarity in the EU has arisen as a strategy for the development of a participatory democracy of Europe. However, as pointed out, this time subsidiarity in the sense of both downward and outward distribution of government and regulatory governance began, and bottom-up capability and responsibility for domestic development were built (Wallace 2005). Not surprisingly, with reference to Tab. 5.1, when the Treaty of Maastricht introduced the principle of subsidiarity in 1992, scholars commented on the term and related it to the parallel concept of the Middle Ages, in particular as a concept of delegation of authority used by the borderless, universal Roman Catholic Church.

The 1992 came also to stand for the emergence of European citizenship and – with the signing of the Maastricht Treaty in 1991 – the erection of the ‘Committee of Regions’ and the

introduction of the ‘principle of subsidiarity’. Together with economic and political theories on growth and democratic advantages of the coming new European regionalism in the wake of globalization, the Maastricht Treaty enforced the prospect of an arising “Europe of regions” (Anderson 1994, Keating 1996, Veggeland 2000). It came to be the wide range of institutions of Distributed Public Governance that featured and issued this complex prospect during the 1990s.

However, the idea was to make distributed public governance work effectively and democratically by bringing to the fore subsidiarity as the regulative principle for organizing and strengthening the democratic capacity of the political, economic, and cultural regions of Europe (Keating and Loughlin (eds.) 1997, Keating 1998). So far, the main issue in European integration had been the devolution of decision-making competence through negotiations and bargaining processes among member states *upwards* to the EU. The Maastricht Treaty not only challenged the member states by introducing more supranational competence but also by challenging the state to perform *downward* devolution to the regions (Neyer 2002).

Of course, for Jacques Delors, the French regional contract model for devolution and decentralization, as he knew very well as former minister of finance in France, represented both an option and a concept for redistribution of public governance, institutionalized as public-public partnership (Loughlin and Mazey 1995). It concerned the establishment of an agreement-based multi-level system of governance functioning in accordance with the principle of subsidiarity. The model conceptualized a sub-national tier with agreement-based political competence, with the necessary capacity to function in the EU intended multi-level system of governance featured by subsidiarity. From that point of time, the Union required an organized level with regional authorities and effective executives as actors and responsible negotiators in partnership with other authorities working out development programs. Without such authorities, the regions and the states were excluded from benefiting from the Structural Funds and other EU Commission regional policies.

The EU was not, however, given any supranational competence to regulate how the member states ought to organize and institutionalize distributed public governance and to practice democratic government at regional levels. The choice of organizational style remained a national state matter of responsibility (Veggeland 2004). Consequently, organizational and administrative traditions and paths came to influence the restructuring processes in the member states when public governance was distributed downwards and new institutions were built. Recent studies show that what the OECD (2002) designed as ‘Distributed Public Governance’ has become an immense issue because of the wide variety of state authority organizational forms at the regional level, such as agencies, service enterprises, partnership, and other governmental bodies. Besides these institutions’ relations to regional democratic assemblies are very complex in the Continental western countries where such assemblies still exist in accordance with their administrative tradition (Scharpf 1999, Veggeland 2007).

The contributors of the OECD report (2002) have observed that institutions of distributed public governance challenge the democratic order and sustainable development on all administrative levels in three ways (2002):

- Elected tier assemblies and governments have become politically weakened, while technocratic executive authorities have gained more power. Accordingly, the abdication of representative political authorities creates a deficit of input democracy, accountability, and legitimacy (see also Scharpf 1999).
- The regulatory state agreement-based contract governance and partnership institutions are replacing representative governmental institutions. As Michael Keating (1998:47) has negatively and pithily commented, ‘governance is what exists when government is weak and fragmented’, meaning fragmented governance performed by independent authorities replaces holistic government.
- Policies acquire their legitimacy first and foremost from functionality, output efficiency, and benchmarking reports, i.e. from the output or outcome of executives, and from comparative competitive advantages, which benefit from ‘locked-in’ and non-transparent management (Pollitt and Bouckaert 2004: 8). That challenges the liberal democratic principles of openness, transparency, and deliberation (see also Eriksen and Fossum (eds.) 2000). Let us look at a figure illustrating the principles of both input and output democratic challenges (Veggeland 2003).

7. The New Democracy and Its Mechanisms

The EU was in the process of establishing a Constitution Treaty (Habermas 2006) in 2004 but failed (. The member states seemed to be very well aware of the challenge of meeting the threat of the democratic deficit by constitutional reforms and restructuring actions (Van Gerven 2005). Even though there are historical traditions of state governance that are fundamentally different in their origins – the state as superior to the society (Continental tradition) or more functional as a societal mediator (British tradition) – the finding of appropriate solutions is imperative. A new trial of compromise has been made in the Treaty of Lisbon, in which more both input-side and output-side democracy stands as pressing issues high up on the agenda.

Not strangely at all, with the collapse of the Constitution Treaty as the background and the research from the OECD, we already have commented about changing priorities. The OECD report (2002) observed nine countries, including the EU member states France, Germany, the Netherlands, Spain, and Sweden on reforms of ‘distributed public governance’. It is of wide ranging interest when it concludes that there is a change of policies occurring, which the later report of 2005 confirmed (OECD 2005): ‘from the drive to create agencies, authorities and other government bodies to the challenge of achieving *good governance*’ (2002:21). Further, as previously concluded, the creation of specific Public-Law Administrations (PLAs) and their twins, Private-Law Bodies (PBLs), seems to have come to a stand-still in many countries. That also implicates a change of the subsidiarity concept, from outward devolution to more downward devolution of political authority in the EU member states. This is the new trend in Europe that the Treaty of Lisbon seems to build upon.

Here are some of the paragraphs from the OECD report (2002:21-26) that draws its conclusions. The following facts from the studied countries are issued, and the facts also mirror the situation of the 2010s:

- The independent bodies are seen as functioning outside the political debate with little oversight from ministers and ministries and weak accountability arrangements. The parliaments are neglected, and so are individuals and the institutions of the civil society. Conclusion: Weak accountability mechanisms undermine the legitimacy of governments and parliaments.
- Weak co-ordination mechanisms and coherence failure are threatening effective public service production in terms of ‘best value’ to individuals, social groups and corporate interests, because of fragmented governance.

To explain the last paragraph on ‘weak co-ordination mechanisms’, we may refer to what we have already referred to as the Scharpf’s Law (Hooghe and Marks (2001:5): ‘As the number of affected parties increases negotiated solutions incur exponentially rising and eventually prohibitive transaction costs’ (Scharpf 1997:70). In the system of Distributed Public Governance, the problems of technical, communicative or legal co-ordination of the many actors and bodies escalates immensely with the growing numbers, and transactional costs will ultimately be excessive according to Scharpf’s Law. It threatens the sustainability of the development of the economies, and today we observe a deep-rooted economic and political crisis arising in Europe. True, the rise of the unelected bodies implies a new separation of public powers, which could theoretically have been advantageous, as argued by Frank Vibert (2007). Empirically it turns out differently, however.

In this perspective, the costly and failing co-ordination mechanisms of the reporting OECD countries are not a failure directly related to the poor performance of public governance, but they are a *consequence* of the system of distributed public governance and the unelected bodies of the regulatory state itself (Veggeland 2008). Accordingly, there is a growing focus in the OECD member states on bringing governments and administrations closer to the people, and people closer to the state in the sense that they have become and being managed more than being active and participatory citizens (Loughlin 2004). Further, there is focus on *good governance, ethics, sustainability, democracy, and more coherent public services*, i.e., on policy and solutions for structural coherence. Moreover, the focus endeavors to involve civil society and the governments more in governance on all tiers of the European multi-level system of governance. Further to improve parliamentary control over activities for the sake of more holistic responsibility.

On the one hand, there is a growing political intention to make the overall system more legible, accessible, and participatory to people, and the accountability mechanisms, activities, and performance made more easily controllable by parliaments, on all tiers and in accordance with the proper democratic administrative style according to the principle of subsidiarity, i.e., the downward devolution of power and authority. However, in the European multilevel governance system it is a challenging policy with many barriers ahead. The greatest barrier of today is the actual financial and credit crisis that ravage Europe and the EU.

We asked: The Regulatory State: How Democratic? We have elaborated the principle of subsidiarity and found that downwards devolution of government capacity in a multilevel governance system might promote a sustainable new democratic order, if institutions. While

outwards devolution of power features independent arm's-length institutions and thereof growing indifference and decreasing participation of the people in elections that undermines the input-side democracy. 'Locked-in' management undermines the liberal principles of openness and transparency, i.e., output-side democracy. The 'locked-in' management triggers social and economic disorder because overall representative government control gets withdrawn from decision-making arenas, and the consequence is growing democratic deficit.

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