

The Lisbon Treaty: The Irish ‘No’. National Parliaments and Subsidiarity: An Outsider’s View

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Comparative perspective – Guardians of subsidiarity in United States? Not senators, not state legislators – Contrast with EU – EU parliaments do double duty – COSAC – Re-entry of federal courts on the scene – In EU: possible lessening of pressure on European Court – Insufficient time

The Treaty of Lisbon continues, among other things, the long march to ever greater opportunities for national parliaments to exert political influence over the fate and fortunes of the subsidiarity principle in EU law-making. In his contribution, Jean-Victor Louis has clearly and accurately described what the Lisbon Treaty seeks to do in this regard, with particular reference to the Protocol on the Role of National Parliaments in the European Union¹ and the Protocol on the Application of the Principles of Subsidiarity and Proportionality.² My role is to view the Treaty’s objectives for the national parliaments from a distinctly comparative perspective.

The comparative viewpoint I have adopted raises three broad questions: First, and most simply, how does what Jean-Victor Louis describes look from a US perspective? Second, what might we learn from the US’s own experience in seeking to enlist the state legislatures in the vindication of federalism principles. Third, what special challenges does the system contemplated by the Lisbon Treaty pose?

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¹ *OJ C* 306/148 (17 Dec. 2007).

² *OJ C* 306/150 (17 Dec. 2007).

I. WHAT DOES IT LOOK LIKE FROM ABROAD?

The drafters of the Lisbon Treaty, and its predecessors, could certainly have devised more ambitious institutions than they did for safeguarding subsidiarity and other values of federalism. At least some consideration had been given to creating specialized chambers of the Community courts (or maybe even a separate EU-level court) charged with enforcing the subsidiarity principle. Even something more modest could be imagined, such as a special committee of national parliamentarians or a member of the Commission charged with ensuring respect for subsidiarity. As for means and mechanisms, more energetic ones could likewise have been devised, such as a true ‘red-light’ or veto system in the hands of the national parliaments.

And yet, while the Lisbon Treaty could have been more aggressive in this regard, it is difficult to imagine the United States putting into place institutions or means that even begin to resemble what has emerged in the Treaty. To do so would presuppose a more or less firm understanding of what federalism means, a set of institutions that may plausibly be entrusted with ensuring respect for the relevant principles and a set of reliable mechanisms at the disposal of those institutions.

We do not in the United States have even a working definition of federalism, much less a working definition of a federalism-driven proposition such as subsidiarity. However rudimentary European observers may find the Treaty’s definition of subsidiarity to be, it offers a good deal more than US decision-makers have at their disposal. It posits a requirement that the necessity for EU-level action be demonstrated, and does so in terms of efficacy and relative efficiency. By contrast, it is safe to say that we in the United States have merely a generalized sense – even an intuition – as to the matters that are somehow, by their nature, inherently ‘local’ and those that are not. In place of what Europeans can present as a ‘subsidiarity analysis’, we have only a ‘federalism impulse’ to offer. Indeed, federalism values have tended simply to be folded into the policy-making process at the federal level, inextricably mixed in with the merits of the legislative or regulatory proposal at hand (as if, in European parlance, subsidiarity and proportionality could simply not be dissociated).³ It would be necessary to go back well before the Civil War – perhaps to the era of John C. Calhoun and the doctrine of ‘state nullification of federal law’ to find a rigorous and principled defense of federalism put into operation.

Turning to institutions, Europe has looked to the national parliaments for a defense of subsidiarity, to the extent, that is, that the EU institutions themselves

³ See Bermann, ‘Regulatory Federalism: European Union and United States’, in 263 *Recueil des cours* (Hague Academy of International Law 1997).

may have failed to exercise the requisite self-restraint. What institution or institutions on the US political landscape might be the natural guardians of federalism? It was at one time argued that the American system contained, by its very nature and workings, 'political' safeguards of federalism, notably the United States Senate.⁴ This is because the States were meant, at least originally, to be represented as such in Congress. The proposition that senators perform that role has proven, however, to be essentially unverifiable and has become largely discredited.⁵ But I also seriously doubt that any knowledgeable observer would put the state legislatures on the 'short list' of candidates for being the natural institutional guardians of federalism. I am not sure there is any institution on the federal or state scene that would be seen as 'naturally' performing that function.

Perhaps it is thought less urgent that localism be specifically protected in the American system, and its 'natural' advocates may be less easy to identify. Perhaps state legislators have few electoral or other incentives to vigorously champion state and local policy prerogatives. They will almost certainly be busier promoting the policies in which they happen to believe, or those on the basis of which they hope to be re-elected.

The contrast with the European Union is palpable. While the choice of national parliaments as the agents of subsidiarity may not have been inevitable, it was nevertheless highly attractive because not only are national parliaments presumably sensitive to subsidiarity values, but they also do 'double duty' in that, while advancing subsidiarity, they also – being, for the most part, directly elected representative bodies – advance democratic legitimacy.

Let me turn then to the question of mechanisms. If the United States lacks a working or operational definition of federalism (even one as rudimentary as subsidiarity), and if we have no evident institutional champion for that cause, then it should occasion little surprise that the United States also has not developed discrete legislative process techniques or mechanisms for promoting local governance.⁶ Viewed from the United States, the current situation in the EU is remarkable for the evident commitment to finding means as well as principles.

I would suggest that the EU experience shows how investment in things like subsidiarity tends to produce still further investments. Not only has the EU established a working principle of federalism, but it has established a serious and rule-

⁴ See Wechsler, 'The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government', 54 *Colum. L. Rev.* (1954), p. 543.

⁵ See Rapaczynski, 'From Sovereignty to Process: The Jurisprudence of Federalism after Garcia', *Sup. Ct. Rev.* (1985) 341, p. 419; Kaden, 'Politics, Money and State Sovereignty', 79 *Colum. L. Rev.* (1979), p. 847, 897.

⁶ See Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', 94 *Colum. L. Rev.* (1994), p. 331.

bound monitoring system (let us call it ‘early warning’, for short) to measure its success. But there is more. Now the EU appears to be developing a serious system for monitoring the subsidiarity monitoring system itself (something I would call ‘subsidiarity-monitoring monitoring’), whereby one studies, one compares, one benchmarks, one develops ‘best practices’ and maybe even forms of ‘soft law’ essentially on how to monitor both subsidiarity and the monitoring of subsidiarity. This is precisely the vocation of COSAC’s bi-annual reports on ‘Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny.’⁷

Such further investment is by no means irrational. The incentive to benchmark, information-share and monitor the monitoring is great, since the very utility of the early warning system depends on its effectiveness. Essentially, the ‘yellow light’⁸ and ‘orange light’⁹ procedures on which that system relies enable a national

⁷ Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC), Eighth bi-annual report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny (Oct. 2007).

⁸ The ‘yellow light’ procedure is set out in Arts. 6 and 7 of the new Protocol on the Application of the Principles of Subsidiarity and Proportionality:

‘Art. 6. Any national Parliament or any chamber of a national parliament may, within eight weeks from the date of transmission of a draft legislative act ... send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity...’

‘Art. 7. The European Parliament, the Council and the Commission ... shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.’

⁹ The more potent ‘orange light’ procedure is set out in Art. 7(2) and 7(3) of the same Protocol: ‘Art. 7(2). Where reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments ..., the draft must be reviewed....’

‘After such review, the Commission ... may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.’

‘Art. 7(3). Furthermore, under the ordinary legislative procedure, where reasoned opinions on the non-compliance of a proposal for a legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national parliaments..., the proposal must be reviewed. After such review, the Commission may decide to maintain, amend or withdraw the proposal.

If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national parliaments, will have to be submitted to the Union legislator, for consideration in the procedure:

(a) before concluding the first reading, the legislator (the European Parliament and the Council) shall consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission;

(b) if, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.’

parliament not only to influence and possibly mandate its *own* government, but also to target the European institutions themselves. In order to accomplish that, the national parliaments must act collectively so as to attain the necessary threshold number of national parliaments or national parliamentary chambers. The very existence of these mechanisms furnishes yet additional incentives to invest substantially (as in monitoring the monitoring), in the interest of protecting the member states from overreach by the European institutions. The contrast with the relatively low level of investment in federalism-protecting institutions and mechanisms in the United States – based in turn on a relative absence of systematic thinking about federalism doctrine – is striking.

II. WHAT DOES US EXPERIENCE SHOW?

What, we may ask, is the consequence of having, as the United States tends to, a vacuum – rhetorically rich but analytically weak – where the EU has an elaborate protocol based on a system of national parliamentary scrutiny of EU-level measures from a subsidiarity perspective? The consequence in the United States has been a vigorous re-entry of the federal courts onto the scene, facilitated by the appointment of a majority of Supreme Court justices for whom states' rights and state political autonomy appear to represent compelling values. Indeed one reason why the Rehnquist and Roberts Courts have done so much on the federalism front is precisely because they discern a profoundly weak set of political safeguards of federalism. The result includes reinvigoration of the notion that Congress may not act legislatively under the interstate commerce clause unless interstate commerce is demonstrably implicated,¹⁰ that Congress may not enact federal legislation pursuant to the Fourteenth Amendment in the absence of an underlying problem to which such legislation represents a 'congruent' and 'proportionate' response,¹¹ and that Congress may not legislate so as to 'commandeer' the States into the business of carrying out the application of federal law.¹²

Herein lies some possible learning for the EU. The question has been raised as to whether strengthening the national parliamentary instruments to advance subsidiarity may cause the European Court of Justice to do more – or, conversely, to do less – by way of direct judicial enforcement of the principle of subsidiarity as compared to what it has thus far done.¹³ It may be argued that a vigorous national parliamentary scrutiny will lighten the pressure on the Court to 'do some-

¹⁰ See, e.g., *United States v. Lopez*, 514 US 549 (1995).

¹¹ See, e.g., *City of Boerne v. Flores*, 521 US 507 (1997).

¹² See, e.g., *Printz v. United States*, 521 US 98 (1997).

¹³ The leading judgments thus far are *Germany v. Parliament and Council*, Case C-233/94, [1997] ECR I-2405; *United Kingdom v. Council*, Case C-84/94, [1996] ECR I-5755.

thing'. On the other hand, the subsidiarity review called for by the Protocols will leave an analytic and documentary trail that could be of great use and value to the Court of Justice if it were inclined to take a 'harder look' at compliance with the subsidiarity principle. The US experience lends some support to the former thesis. A widespread belief in the failure of federalism's political safeguards – coupled with a disbelief that they could effectively be constructed – operated as a stimulus to greater judicial activism on the federalism front, fueling the further belief that if federalism matters, the courts must take up the challenge since few other realistic safeguards of federalism exist and the difficulty and unlikelihood of creating them are so great.

III. WHAT CHALLENGES DOES THE EARLY WARNING SYSTEM FACE?

That creation of political safeguards of federalism in the EU, in the shape of the Subsidiarity Protocol and the Protocol on the National Parliaments, is peculiarly possible within the Union does not mean that those safeguards will necessarily achieve their purpose. Numerous difficulties remain, having to do, notably, with timing, with materials, with mechanics and with the challenge of co-ordination among the member state polities.

As to timing, the move from six to eight weeks for subsidiarity scrutiny¹⁴ may simply be insufficient in light of the need to consult sectoral parliamentary committees and regional parliaments, not to mention stakeholders and, of course, parliamentarians in other States. The solution may lie in beginning the process of scrutiny in the pre-legislative period, that is to say, in the period of green papers, white papers, communications and consultation documents, all of which precede the formal making of legislative and regulatory proposals.

A further question relates to the adequacy of the materials furnished by the Commission as the basis for national parliaments to conduct their subsidiarity scrutiny. The materials must not merely address policy aspects of the measure proposed – including but not limited to their proportionality, their conformity to the treaties and general principles of law, or to their wisdom and opportuneness as a matter of public policy – but specifically address the 'level of government' issues that subsidiarity implicates.

There is also a question of mechanics. It is fair to ask whether 50% of national parliamentary votes¹⁵ represents the right threshold for triggering the 'orange light' device, for if 50% of them object, it is very likely that the majority of government votes needed in the Council to enact legislation at the EU level is already lacking.

¹⁴ Protocol on the Application of the Principles of Subsidiarity and Proportionality, Art. 6.

¹⁵ *Id.*, Art. 7.3.

Finally, it may prove difficult within this single eight-week period for parliamentarians in any one member state to know in sufficient time the results of the subsidiarity scrutiny taking place in the other member states, and yet such co-ordination may be critical to the success of any ‘yellow light’ or ‘orange light’ strategy. In the pilot project conducted by COSAC on the Third Railway Package, parliamentarians in different member states objected to different instruments within the legislative package. Significantly, though opposition based on subsidiarity was widespread, there was not one single instrument within the package as to which the required threshold for disapproval was met.¹⁶ The ‘collective action’ problem may be considerable.

Despite the challenges, I would argue that a system of subsidiarity policing based on national parliamentary scrutiny is not only an appropriate one, but one that it would be a major and real lost opportunity to fail to harness and exploit. This is not only because of the aptness of a mechanism that is built upon structures, like national parliaments, that constitute truly plausible guardians of subsidiarity, but also because these same institutions have at the same time a unique potential for mitigating the perceived democratic deficit against which the EU continues to struggle.



¹⁶ See *supra* n. 7.