The Role of National Parliaments in EU
Decision-Making Processes

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The Viability of Political Safeguards for the Maintenance of the EU Federal Balance

In my contribution to the conference, I wish to highlight a question implied in the regulation of the new "early warning mechanism" whereby the national parliaments could check compliance with the principle of subsidiarity in the pre-legislative and legislative phase of the EU legislative process: the question of whether the political process itself can sufficiently maintain the respect for the subsidiarity and then the federal balance between the Union and its Member States. Note that I speak of "highlighting" this question rather than answering it, since explaining the question is all I will try to achieve in the limited time of this talk. Perhaps, the title itself warrants a brief comment for the use of the term "federal balance". I will

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not enter into the watershed debate on the extent to which the term "federal" can appropriately be used to describe the European Union.[1] For the present purposes, it should suffice to acknowledge the Union as a federal-like polity in the sense that makes its constitutional set-up and legal order amenable to comparisons with those of the federal states, and that the notion of subsidiarity is its code to describe its own need for an appropriate federal balance. In other words, the task before the Union in balancing the integrative pull of the "ever closer union" of its peoples with the need to respect the national identity and autonomy of its Member States is the same as that faced by the classic federations, and I will very briefly draw upon the experience of two such federal polities in illustrating the issue.

The issue, simply, is this. In the development of the mechanisms to ensure the proper application of the principle of subsidiarity and thereby the federal balance, a significant focus is placed on the political process, on the political branches of government. We just need to look at the mechanism provided in the Protocol on the application of the principles of subsidiarity and proportionality, attached to

[1] This is not to say that I wish to dodge the question. For my treatment of the topic, see Matej Accetto, Sodni federalizem Evropske unije [Judicial Federalism of the European Union] (Uradni list RS, Ljubljana 2007), 49-65.

the last two refurbishments of the EU legal order,[2] to see that this is so. The Protocol provides, to offer the abridged version, that the draft legislative acts are to be forwarded by the EU institution concerned to the national parliaments which may issue their reasoned opinions as to the compliance with the principle of subsidiarity, whereupon the institution may be required to review these acts and state reasons for its ultimate decision on whether to maintain, amend or withdraw the draft.

One may question, which I am certain others at this conference will, whether such a mechanism really gives the national parliaments a practical bite to supplement its rhetorical bark, especially since the European institutions are still perfectly free to override the opinion of the required one third (or one fourth) of all national parliaments. It was perhaps in this vein that the Treaty of Lisbon has reinforced the largely copied Constitutional Treaty version of the protocol, not merely by expanding the six weeks of reflection offered to the national parliaments to eight, but also by adding a further provision that if the Commission wishes to persevere with a proposal for a legislative act despite the majority of the national parlia-

[2] Both the failed Constitutional Treaty and the better-poised Treaty of Lisbon (OJ C306, 17 December 2007).

ments' votes alleging its infringement of the principle of subsidiarity, it has to adopt a reasoned opinion on its decision which will, along with the reasoned opinions of the national parliaments, duly be reviewed by the Union legislator.

All in all, if one is to embrace this mechanism, a lot of reasoning by the political branches of government of the EU and its Member States is what will satisfy the requirements of subsidiarity and maintain a healthy federal balance in the EU. But what of the legal branch of government, the courts? One can note that the protocol does include an article stating that the European Court of Justice will have jurisdiction to review the infringement of the protocol of subsidiarity by a legislative act. But that is simply a restatement of an old truth, because the Court has had such a jurisdiction ever since subsidiarity had been introduced as a governing principle of EU law by the Treaty of Maastricht. The protocol simply does not deal with the role of the courts in maintaining the principle. In trying to see why that is so, one is helped by the conclusions of a special working group on the principle of subsidiarity, established by the Convention on the Future of Europe, which drafted what still remains the core of the early-warning mechanism. As stated in its conclusions, the Working Group

> considered that as the principle of subsidiarity was a principle of an essentially political nature, implementation of which involved a considerable margin of discretion or the institutions (considering whether shared objectives could "better" be achieved at European level or at another level), monitoring of compliance with that principle should be of an essentially political nature and take place before the entry into force of the act in question.[3]

It also specifically addressed the role that the Court of Justice could play in supervising and enforcing compliance with the principle of subsidiarity.

> The Group agreed that the *ex post* judicial review carried out by the Court of Justice concerning compliance with the principle of subsidiarity could be reinforced. To take account of the primarily political nature of monitoring subsidiarity, it was important to link the possibility of appealing to the Court against violation of the principle of subsidiarity with the use by national parliaments of the early warning system proposed above. Recourse to judicial proceedings must be able to

[3] Conclusions of Working Group I on the Principle of Subsidiarity, CONV 286/02, 23 September 2002 (WGI 15), 2.

> occur only in limited and probably exceptional cases, when the political phase has been exhausted without any satisfactory solution being found by the national parliament(s) involved.[4]

In the cited passages, one can find at least three clear statements on the comparative viability of a legislative-political and judicial-legal method of enforcing subsidiarity: first, that subsidiarity is a political, not a legal concept; second, that it thus properly belongs in the political realm; and third, that this political realm will almost always come to an amenable solution. However, if read critically, these three statements also warrant the following three observations: first, that even though they may try to work as a self-fulfilling prophecy, the question of whether subsidiarity is a political or a legal concept depends on how we set about defining it, and that both the claim of its political nature and the statement that it belongs in the political realms are suggested understandings rather than facts; second, that they are statements put forward by the very political branch(es) which stand(s) to gain by them; and third, that while reluctant to attribute any significant legal import to the politically enunciated principle of subsidiarity, they are simply full of optimism for the viability of the political process.

[4] *Ibid.*, 7.

Now, importantly, one may note that the past jurisprudence of the Court of Justice on subsidiarity is also seriously lacking in bite: the Court has rarely addressed the arguments of subsidiarity and even when it has, it has failed to use it as a full-fledged legal principle that could serve as a proper criterion for the review of validity of Community legislation. Rather, its rulings tended to either virtually ignore the submissions made in this regard[5] or pay them very little heed in reaching its decision.[6] In the rare cases when it did undertake an analysis of subsidiarity, it either took the political institutions on their word that the principle had been abided by[7] or very amiably found so of its own motion.[8]

This may well be a reflection of the Court's general historical wariness of delving into politically contested issues for fear of weakening its fragile authority as the ultimate legal arbiter of Community law, where the decision in either direction would seemingly damage its position: either it would appear institutionally encroaching by striking down political decisions or it would appear constitutionally weak

[5] See Joint Cases C-96/03 and C-97/03, *Tempelman and van Schaijk*, [2005] ECR I-1895, recital 23; Case T-168/02, *IFAW Internationaler Tierschutz-Fonds*, [2004] ECR II-4135, recital 49.
[6] Case C-110/03, *Belgium v. Commission*, [2005] ECR I-2801, recitals 56-58.
[7] Case C-84/94, *United Kingdom v. Council*, [1996] ECR I-5755, recitals 46 and 47; Case T-65/98, *Van den Bergh Foods*, [2003] ECR II-4653, recital 197.
[8] Case C-233/94, *Germany v. Parliament and Council*, [1997] ECR I-2405, recitals 24-28; Case C-491/01, *British American Tobacco and Imperial Tobacco*, [2002] ECR I-11453, recitals 177-185.

by affirming them.[9] As it happens, however, the Romans have already taught us that silence may sometimes be understood as affirmation, and in this case not reviewing political decisions also tends to affirm them.

Perhaps this could be taken as one part of the reason for the distrust of the Court's possible role in safeguarding subsidiarity, the other being that, even when it did adopt politically significant decisions, it almost inevitably sided with the integrationist pull of the transfer of competences to the Union level. How can we trust the partisan integrationist judiciary in Luxembourg to serve as protector of subsidiarity when its track record shows that it would normally trample on it in the name of more centralisation? If that were the case, then the political process might well be the safer bet. This was the position taken by many proponents of the republics' rights in former Yugoslavia who welcomed the fact that the federal Constitutional Court was not competent to rule on the constitutionality of the members' constitutions but to merely state an opinion on the issue to the Federal Assembly and that the issue ultimately had to be solved politically, not legally.[10]

[9] On the breadth and the limitations of the "political" role of the Court, see Graínne de Búrca, "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor", *Journal of Common Market Studies* 36(2) (1998) 217, at 220-34.

[10] For more on the experience of former Yugoslavia in fashioning a working federal balance between the federation and its constituent units, as well as the role of judiciary in the process, see Matej Accetto, "On Law and Politics in the Federal Balance: Lessons from Yugoslavia", *Review of Central and East European Law* 32 (2007) 191, at 210-215.

But then we come back to the weakness of the mechanism in place for the national parliaments – for the truth is that, no matter how many national parliaments oppose a particular draft for its alleged infringement of subsidiarity, they can be overridden by the Union institutions which are vested with the ultimate decision. So, the question to be asked is this: are these political institutions capable of maintaining the balance between their understandable desire for Union legislation and the need for the respect for subsidiarity?

To try and answer this, another short aside is in order. One of the more popular theses to come out of the modern theories of federalism is the distinction of two types of federal polities as most prominently promoted by Alfred Stepan.[11] Stepan disputed the predominant classical view, devised by Riker on the example of an almost mythified US experience, whereby all federal polities would come about as a result of an aggregative, "coming together" federal bargain whereby previously independent polities voluntarily pool their sovereignty to form a federal polity. Instead, he claimed that there was a major alternative, a devolutionary,

[11] On this, see Alfred Stepan, Arguing Comparative Politics (Oxford University Press, New York 2001), 315-361.

"holding together" federal bargain whereby a previously unitary state devolves some of the power to its constituent units in order to "hold them together". As prime examples of such a devolutionary path to a federal order, Stepan cited the recent experiences of Belgium and Spain. I like to build on that by adding a qualification to Stepan's thesis: while he talks about the *creation* of a federal polity, I believe the distinction is also relevant for the *functioning* of such a polity; with the distinction that in this case, the polity simultaneously needs to perform both the "coming together" and the "holding together" functions in trying to maintain the proper balance of the federal bargain. If we accept this argument, then the interrelationship of law and politics or, more precisely, the legal and the political branches of government becomes so much more relevant, for it is hard to see how pursuing one of these functions can also promote the other. In other words: it is hard to imagine, for instance, that the same actors at the Union level of governance could try to successfully achieve their legitimate task of promoting common decision-making and at the same time be very careful not to trespass on the national autonomy.

This is a long-standing question in the developed federal polities such as the United States, which in particular

sparked with a famous article by Herbert Wechsler in 1954[12] and continues to this day with its modern progeny.[13] It has also featured in the US Supreme Courts internal judicial debate, as evidenced by the majority opinion and the dissent in 1985 in the *Garcia* case.[14] The opinion of the Court stated:

> Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system, and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action – the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.[15]

[12] Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government", *Columbia Law Review* 54 (1954) 543.
[13] See, e.g., Larry D. Kramer, "Putting the Politics Back into the Political Safeguards of Federalism", *Columbia Law Review* 100 (2000) 215; Lynn A. Baker, "Putting the Safeguards Back into the Political Safeguards of Federalism", *Villanova Law Review* 46 (2001) 951.
[14] *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).
[15] *Ibid.*, at 556.

Justice O'Connor penned a scathing dissent:

> The Court today surveys the battle scene of federalism and sounds a retreat. Like Justice Powell, I would prefer to hold the field and, at the very least, render a little aid to the wounded. [...] In my view, federalism cannot be reduced to the weak "essence" distilled by the majority today. There is more to federalism than the nature of the constraints that can be imposed on the States in "the realm of authority left open to them by the Constitution". [...] With the abandonment of *National League of Cities*, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint.[16]

If the capacity of the federal legislator for self-restraint is put in question in a developed federal polity, why not in a polity such as the EU which, in the words of late Judge Mancini, in terms of political polities still "suffers the growing pangs of adolescence"?[17] And if the federal court of such a polity may come to defend the rights of member states, as it has done in the past and again since the 1990s, making one commentator call the judicial term of 1998/99

[16] *Ibid.*, at 580 and 588.
[17] See G. Federico Mancini, Democracy and Constitutionalism in the European Union (Hart Publishing, Oxford 2000), 22.

"the year of the states",[18] then why should it not also happen in the Union?

As a thought experiment, I will offer just one argument advanced that may be illustrative for the European debate. It goes without saying that subsidiarity is intended to safeguard the prerogatives of the Member States, that is, each of the Member States vis-à-vis any possible excessive aggrandisement on the part of the Community legislator. In other words, if we acknowledge that the Community legislator will normally also act as, or at least reflect, the communal will of the Member States and their representatives, it is also intended to safeguard the one against the many. Now, imagine that the political mechanism functions as well as possible; that is, that the national parliaments are able to review the legislative proposals and that whenever a third (or a fourth) of them raise the subsidiarity concerns the proposals indeed are shelved or amended. Even so, that could only serve as a solution to those issues that are common to several of the Member States; but what of those cases where only a small number of them are concerned to the extent that their national parliaments engage in the warning mechanism, or even those – even if seemingly

[18] David G. Savage, "A Watershed Term for Federalism", *State Legislatures* 25 (1999) 18, at 18, cited from Susan Gluck Mezey, "The U.S. Supreme Court's Federalism Jurisprudence: *Alden v. Maine* and the Enhancement of State Sovereignty", *Publius* 30(1-2) (2000) 21, at 21.

purely hypothetical – cases where a particular measure would contravene the principle of subsidiarity but would be in favour of most Member States at the expense of one or a few? Lynn Baker aptly pointed out in the US debate that while political safeguards may often function to prevent the "vertical" aggrandisement of the federation at the expense of the federal states, they may not help with or even exacerbate the possibilities of "horizontal" aggrandisement of the majority of the states at the expense of the minority;[19] and this is one aspect of the subsidiarity debate that has not yet had enough traction in the European debate.

As stated at the outset, this contribution could not provide the answers to such questions. But I hope it did illustrate that there is a serious question to be tackled as to whether the limited involvement of the national parliaments in the political process will be enough to safeguard the proper application of the principle of subsidiarity and whether the judicial branch of government in general and the Court of Justice in particular may also deserve a more proper look in trying to ascertain the proper mechanism for ensuring a proper federal balance between the Union and its Member States. I believe that it does.

[19] See Baker, *op. cit.* note 13, at 961-962.