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REFLECTIONS ON THE LEGAL ROLE OF THE
IRISH PARLIAMENT (OIREACHTAS) IN EU AFFAIRS
AFTER LISBON

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Abstract

The process of the first failed referendum in 2008 on the Treaty and the extensive political campaign to ratify the Treaty of Lisbon a second time around brought with it a tremendous period of reflection not merely for the Irish State, but also Irish institutional actors, scholars and civil society alike incomparable to any time in previous history. Many recommendations were made in this period by this broad church of entities to reform Irish “Euro-affairs,” re-evaluating several fundamental and broad ranging themes such as the Government referendum spending rules, referendum broadcasting rules and critically, the role of the Oireachtas (Irish Parliament) in European Union affairs.

The new powers bestowed upon National Parliaments by the Treaty of Lisbon are then considered, as are the activities and report of the Sub-Committee of the Houses of the Oireachtas on Ireland’s Future in the European Union. The initial proposals of the Oireachtas to accommodate the Treaty of Lisbon changes are then assessed, followed by an analysis of the provisions of the European Union Act 2009 and the changes to the role of the Oireachtas after the Treaty of Lisbon. Then the Joint Report on the Implementation of the Lisbon Treaty: Provisions on the Enhanced Role for National Parliaments is outlined, as are the changes to the legislative scrutiny regime effectuated by the European Union Act 2009.

Keywords

EU Institutional law- National Parliaments- Treaty of Lisbon

Introduction

The process of the first failed Treaty of Lisbon referendum in 2008 and the extensive political campaign to ratify the Treaty of Lisbon a second time around brought with it a valuable period of reflection, not merely for the Irish State but also Irish institutional actors, scholars and civil society alike, incomparable to any time in the previous history of Ireland.¹ Many recommendations were made in this period by this broad church of entities to reform Irish “Euro-affairs,” re-evaluating several fundamental and broad ranging themes such as the Government referendum spending rules, referendum broadcasting rules and critically, the role of the Oireachtas (Irish Parliament) in EU affairs.² The role of the Oireachtas is evaluated here and an effort is made to assess the large question of its place in European affairs and how this bears upon EU law in Ireland, a comparative institutional question not usually raised. However, major changes are now posed by the Treaty of Lisbon as regards National Parliaments in European affairs. Also, European affairs raise unique and curious questions as to what the legislature should and could do within a national legal system. Substantively, it is questioned here whether the position of the Parliament in Ireland post-Lisbon results in any more of a substantially effective body than that already in existence. It is contended here that the absence of constitutional provision in domestic law for a distinct role for the Oireachtas in European affairs has substantially diminished its role as a result and that institutionally, the minimalist role played by it and another major institution in Ireland, the judiciary, results in a dearth of institutional contributions to a dynamic European legal order.

I assess the role of the Oireachtas in European affairs first as to its legislative scrutiny powers, then second as to the aftermath of the first failed Treaty of Lisbon referendum. The new powers bestowed upon National Parliaments by the Treaty of Lisbon are then considered, as are the activities and report of the Sub-Committee of the Houses of the Oireachtas on *Ireland’s Future in the European Union*. The initial proposals of the Oireachtas to accommodate the Treaty of Lisbon changes are then assessed, followed by an analysis of the provisions of the European Union Act 2009 and the changes to the role of the Oireachtas after the Treaty of Lisbon. Then, the Joint Report on the *Implementation of the Lisbon Treaty: Provisions on the Enhanced Role for National Parliaments* is outlined, as are the changes to the legislative scrutiny regime effectuated by the European Union Act 2009. Domestic constitutional changes to role of Oireachtas to implement the Treaty of Lisbon are then briefly outlined.

The Role of the Oireachtas in European Affairs pre-Lisbon: (mainly) Legislative Scrutiny³

Research to date on the Oireachtas in European affairs is limited to its role in scrutinizing European legislation only. The Oireachtas has not been the subject of comparative analysis with other branches of Government or with other parliamentary bodies in European states. As the Government has enjoyed

¹ The failure of the first Treaty of Nice referendum resulted in much more modest gains: witness the establishment of a National Forum on Europe in 2001 and the advent of a more enhanced legislative scrutiny regime for legislation resulting from the EU: see European Union (Scrutiny) Act 2002 (subsequently amended, the content of which is discussed above); Travers “The Reception of Community Legislation into Irish law and Related Issues Revisited” (2003) 37 *Ir.Jur.* 58 and Costello “Peoples’ Vengeances: Ireland’s Nice Referenda” (2005) 1 *EuConLRev.* 357.

² Sub-Committee on Ireland’s Future in the European Union *Ireland’s Future in the European Union: Challenges, Issues and Options* (Oireachtas, November, 2008); Houses of the Oireachtas Joint Committee on European Scrutiny *Special Report on the Enhanced Role for National Parliaments in the Lisbon Reform Treaty* (Prn. A8/0660, May, 2008); Barrett, Laffan, Thom, Thomas & Tonra eds., *Ireland’s Future in Europe: Scenarios and Implications* (UCD Dublin European Institute, November, 2008); Barrett “Building a Swiss Chalet in an Irish legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court jurisprudence” (2009) 5 *EuConLRev.* 32; Kingston “Ireland’s options after the Lisbon Referendum: Strategies, Implications and Competing Visions of Europe” (2009) 34 *ELRev* 467; Hogan “The Lisbon Treaty and the Irish Referendum” (2009) 15 *EPL* 163; Broadcasting Commission of Ireland *Guidelines in respect of coverage of the referendum on the Treaty of Lisbon and related constitutional amendments* (7 June 2009) see www.bci.ie.

³ See Fahey “Reflecting On the Scope of the European Union (Scrutiny) Act, 2002 ”(2007) 13 *European Public Law* 85.

a parliamentary majority for some time now, the role of parliament in European referenda has not been the subject of scholarly analysis. Since the failed referendum on the Treaty of Lisbon in 2008, Parliament has played a more significant role in considering European matters and in setting a European-related agenda but the achievements to date thereof are modest. No specific constitutional provision has been made for parliamentary analysis of European affairs in Ireland and no constitutional or legislative provision exists to govern the relationship between the Irish and European legislatures until the Treaty of Lisbon. While a modest form of parliamentary legislative scrutiny had originally been in place at the inception of Community membership, in the form of the European Communities Act 1972, it was amended on the grounds of criticism as to its deficiencies.⁴ This resulted in the European Communities (Amendment) Act 1973, nonetheless still constituting a framework to analyse legislation, lacking rigour or a real resource commitment.⁵ The European Union (Scrutiny) Act 2002 was enacted to ensure greater scrutiny of EU legislation by the Houses of the Oireachtas, so as to scrutinise proposed measures more rigorously and to amend the European Communities Act 1972. However, the newer Act of 2002 has origins in desires more to redress the anti-European electoral feeling after the first failed Treaty of Nice referendum rather than any benevolent pro-European governmental sentiments.⁶

The European Union (Scrutiny) Act 2002 established the legislative basis for the EU scrutiny process in the Houses of the Oireachtas. The Act provides that Ministers shall forward to the Oireachtas each draft EU legislative measure, together with a statement outlining the content, purpose and likely implications for Ireland of the proposed measure; submit overall reports to the Oireachtas every six months giving details of “measures, proposed measures and other developments in relation to the European Communities and the European Union.”⁷ More recently, a Dáil Select Committee on European Affairs was established by Order of Dáil Éireann of 23 October 2007. The Dáil Select Committee was joined with a Select Committee of Seanad Éireann, established by Order of Seanad Éireann of 24 October 2007, to form the Joint Committee on European Affairs. The Joint Committee on European Scrutiny was first established by both Houses of the Oireachtas in October 2007.⁸ These two committees, the Joint Committees (of both Houses), are the key parliamentary actors in EU Affairs in the jurisdiction.

The output of the Committee system is far from satisfactory and its relationship with other State institutions drafting EU law appears limited. Some EU based legislation has been the subject of trenchant criticism from the Supreme Court for its lack of clarity and poor drafting. For example, the Supreme Court in Ireland has stated that the European arrest warrant Act 2003 is an example of extremely poor legislative drafting and is most unclear in key passages. As a result of errors in

⁴ See Robinson “The Irish European Communities Act, 1972” (1973) 10 CMLRev. 352 and 467. Professor Robinson, former President of Ireland, a Senator then in the Seanad (the Upper House of Parliament) was instrumental in the changes wrought, but nonetheless still critical of the less than full-blooded system of parliamentary scrutiny introduced in the amending legislation in 1973. s 5 of the European Communities Act 1972 provided that:

“The Government shall make a report twice yearly to each House of the Oireachtas on developments in the European Communities.”

⁵ *ibid.* Originally, only 2 annual reports and 4 annual debates would have been produced, contended to be inadequate by Robinson, *supra*. However, in the amended Act of 1973, express mention was made in statute for a Joint Committee on European Affairs. By 1992, this Committee (previously entitled the Joint Committee on secondary legislation of the European Communities), had produced 14 reports.

⁶ The Government adopted, with much modification, an Opposition Bill, the European Union Bill 2001, introduced by Mr Ruari Quinn T.D. See Travers “The Reception of Community Legislation into Irish Law and Related Issues Revisited” (2003) 37 *Irish Jurist* 58 and Hogan & Whyte Kelly: *The Irish Constitution* (4th ed., Lexis-Nexis, Dublin, 2003), para. 5.3.103, where it is noted by the latter that the Act of 2002 was enacted to abate concerns about any democratic deficit in European affairs being perceived by the electorate.

⁷ See Fahey “Reflecting On the Scope of the European Union (Scrutiny) Act, 2002” (2007) 13 EPL 85 and Walsh “Parliamentary Scrutiny of EU Criminal Law in Ireland” (2006) 31 ELR 48. See generally, Barrett *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Clarus Press, Dublin, 2008).

⁸ Before that, the work of scrutinising draft EU legislation had been done by a Sub-Committee of the European Affairs Committee. The Committee’s core function is to consider all new EU legislative measures and assess what level of scrutiny is required by the Oireachtas.

legislative transposition, the primary Act has been amended on a number of occasions. There appears, then, to be some “disconnect” between the activities of the legislature as regards EU affairs. Prior to considering the role of the Oireachtas after the Treaty of Lisbon and the legislative changes proposed by the Oireachtas to accommodate the Treaty of Lisbon, the relevant provisions of the Treaty were first be recounted here and assessed.

The Treaty of Lisbon and National Parliaments

The Treaty of Lisbon effectuates a number of important changes, so far as National Parliaments are concerned, which have been outlined in much detail elsewhere and are not the principal subject of analysis here.⁹ Major innovations in the Treaty of Lisbon relating to National Parliaments include a Protocol on National Parliaments and a Protocol on the application of the principles of subsidiarity and proportionality, which gives a role to National Parliaments to ensure decisions are taken at the appropriate level in the EU and that competence is respected. Article 5(3) TEU now gives National Parliaments the responsibility for ensuring that EU institutions comply with the principle of subsidiarity. Moreover, Article 12 TEU now explicitly details how National Parliaments can contribute actively to the good functioning of the EU and enumerates their information powers, their role as to subsidiarity, their monitoring functions, their functions as to the revision of the Treaties, applications for accession and inter-parliament cooperation between National Parliaments and the European Parliament, is now expressly provided for.

The most striking issue to note is that National Parliaments are now *explicitly* referred to the Treaties in a Title on Democratic Principles, as well as in two Protocols: on the role of National Parliaments in the EU and on the application of the Principles of subsidiarity and proportionality. The first Protocol is predominantly an information-based rights charter, while the second Protocol is a more procedure-based compliance monitoring system, giving teeth to the rights in the first Protocol. At a practical level, Commission consultation documents will now be forwarded directly to the National Parliaments by the Commission and their scrutiny reserve is extended from six to eight weeks. They are given an enhanced role in the area of Freedom, Security and Justice and a formal inter-parliamentary relationship between National Parliaments and the European Parliament is provided for in the Protocol on the role of National Parliaments. National Parliaments will also be involved in future Treaty changes and enlargement applications.

Of most importance, however, is their negative right in the newly extended Article 7(3) of the Protocol on application of the Principles of subsidiarity and proportionality. Thus, National Parliaments gain significant rights in the area of subsidiarity to send a reasoned opinion within eight weeks of the transmission of a draft legislative act that the act does not comply with subsidiarity, which may result in the review of the proposal: the new so-called “yellow” and “orange” card mechanisms entail that a draft proposal has to be reviewed. Much has been written about the rights for National Parliaments as provided for in these Protocols and, in the latter provisions in particular, the content of which is outside of the scope of this current work.¹⁰ Suffice to say that opinion is divided as to whether the revised content and procedures relating to subsidiarity in the Treaty of Lisbon is so inherently complex and political, more than legal, that it may not be effective or that the procedures themselves are fraught with such difficulties that they may not work, such as obtaining the necessary institutional blocking vote.¹¹ For example, Barrett suggests that while it may become excessively difficult to block legislation in practice on account of the complexities of the revised Protocol rights,

⁹ Louis “The Lisbon Treaty: The Irish ‘No’: National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits” (2008) 4 *EuConLRev* 429; Barrett “The King is Dead, Long Live the King: The Recasting by the Reform Treaty of the Provisions of the Constitutional Treaty Concerning National Parliaments” (2008) 33 *ELR* 66; Barrett ed. *National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Clarus Press, Dublin, 2008).

¹⁰ Barrett “The King is Dead, Long Live the King: The Recasting by the Reform Treaty of the Provisions of the Constitutional Treaty Concerning National Parliaments” (2008) 33 *ELR* 66.

¹¹ See the evidence of Prof. Dashwood and Prof. Hix outlined in House of Commons European Scrutiny Committee *Subsidiarity, National Parliaments and the Lisbon Treaty* (HC 563, 33rd Report of Session 2007-2008), Ch. 3 See Dougan “The Treaty of Lisbon 2007: Winning Minds, not Hearts” (2008) 45 *CMLRev.* 617, 657-661.

that the greatest benefits of the new procedures will be indirect in nature and rather the motivation and input entitlements of National Parliaments will color the complexion of their activities. Equally, the House of Commons European Scrutiny Committee has expressed the view as to whether the revised role for National Parliaments would make much practical difference to the current status quo.¹² The “light” implementation of these provisions in Irish law suggests that their operation may not be unproblematic, discussed above.

The Aftermath of the First Failed Treaty of Lisbon Referendum

In June 2008, for the first Treaty referendum, the Irish electorate rejected the Treaty of Lisbon for reasons adverted to earlier, shortly after a new Taoiseach (Prime Minister) came to power.¹³ The role of the Oireachtas as an entity, including the Government parties and opposition parties, in the period before the first referendum was arguably quite limited and not substantive or active, in either the civic or political sense, and the referendum was conducted largely on party lines, with the non-Government opposition parties that supported the referendum making a modest effort to pass the referendum and the limited opposition to the referendum largely leading the public debates, assisted by Libertas, a party formed to oppose the Treaty of Lisbon by a businessman, Mr Declan Ganley. The Irish media were criticised at the time by the European Commission on the grounds that they were becoming increasingly Euro-sceptic, although the influence that they had on popular opinion presents a causal challenge.¹⁴ The period of reflection which ensued after the first referendum coincided with a global economic recession, a severe downturn in the Irish economy as well as the unprecedented unpopularity of the Irish Government. Extensive Government research was commissioned so as to explain the negative vote and, from the findings, distinct trends were discernable concerning class and gender in voting patterns. Ultimately, many respondents pointed to an information deficit.¹⁵

By the time that the second Treaty of Lisbon referendum took place, a party founded principally to oppose the Treaty of Lisbon, Libertas, disintegrated following an abysmal performance in the MEP elections in 2009.¹⁶ For the second referendum, the State’s broadcasting rules were amended so as to facilitate the reality of the politics governing the referendum campaign, where all the major political parties supported the Government in their desire to procure a successful referendum result.¹⁷ Previously, broadcasters had been obliged to provide equal airtime to those campaigning for and against the Treaty referendum result, despite the weight of elected representatives and campaigners in favour of the Treaty. The National Forum on Europe was effectively abolished by the Minister for the Environment for the second referendum campaign, Parliament again not acting here as the instigator of such actions.

The numerous reports of the Oireachtas published in the last two years reflecting on how to accommodate the Treaty of Lisbon in Irish law are considered here now in chronological order.

¹² *ibid*, para. 37.

¹³ Mr Brian Cowen T.D., formerly Tánaiste or deputy leader, replaced Mr Bertie Ahern T.D. as Taoiseach (Prime Minister) in 2008.

¹⁴ The “changing media landscape” between 2002 and 2008 is identified as an important determinant of changes in public opinion which influenced the Lisbon referendum: see “Irish media more Eurosceptic, warns EC report.” See *The Irish Times*, (2 September 2008).

¹⁵ *Post-Lisbon Treaty Research Findings* (Dublin, Millward Brown IMS, September 2008), <http://www.imsl.ie/> (last visited 27 November 2009), conducted on 2,101 adults.

¹⁶ Founded by a millionaire Irish businessman, Mr Declan Ganley. The party attracted considerable controversy in respect of its funding. The Forum on Europe, a body established by the Government prior to the first referendum campaign to promote discussion on Ireland’s membership of the European Union, was not re-established for the second referendum: see <http://www.forumoneurope.ie/> (last visited 28 December 2009). A Referendum Commission, an ad hoc body established by Government to outline the “Yes” and “No” arguments in the referendum campaigns, chaired by a High Court judge, was part of the landscape of the first and second referenda. See Referendum Act 1998 and www.refcom.ie (last visited 28 December 2009).

¹⁷ See Broadcasting Commission of Ireland *Guidelines in respect of coverage of the referendum on the Treaty of Lisbon and related Constitutional Amendments 2009* (7 August 2009), see www.bci.ie.

I: Oireachtas Reports Preparing for Lisbon

(A) Initial Report of the Oireachtas to Accommodate the Treaty of Lisbon Changes

In advance of the first Treaty of Lisbon referendum in June 2008, the report of the Joint Committee on European Scrutiny was published before this event in May 2008 (*Report on the Enhanced Role for National Parliaments in the Lisbon Reform Treaty*) as to how the Irish legislature should respond to the Protocol attached to the Treaty of Lisbon as to National Parliaments. The report contained in reality few substantive recommendations and suggested that bye-laws be employed in the main to cope with the revised procedures contained therein.¹⁸ The Special Report recommended that an extra sitting day per month be allocated to both Houses for EU business, where the reports of the European Scrutiny Committee on important EU draft laws would be considered, as would the ongoing work programme of the Joint Committee on European Affairs, the implementation of the Treaty of Lisbon, briefings by Ministers on major policy matters being considered by the Council of Ministers and proposals by National Parliaments to have draft laws struck down on subsidiarity grounds. The Joint Committee also considered how the Houses might implement their new powers by way of a system of delegation, by the use of Standing Orders to underpin the yellow and orange card procedures, how the Order of Reference of the Joint Committee on European scrutiny could be revised and how the resource implications of its new powers could be assessed.

The report, nonetheless, was “light” on substantive recommendations on how to actually manage the rights and duties contained in the Protocols, despite the looming changes in the event of the successful ratification of the Treaty of Lisbon, and the political reality of a second referendum campaign appears to have stymied further developments in this regard. After this Report, then in 2008, the people rejected the Treaty of Lisbon in a referendum and the political system was plunged into a deep period of soul-searching as to how to proceed.

(B) Sub-Committee of the Houses of the Oireachtas on Ireland’s Future in the European Union

After the first failed referendum, a Sub-Committee of the Houses of the Oireachtas was established in early October 2008, *Ireland’s Future in the European Union*, which then heard extensive evidence from a range of experts and bodies on Ireland and the EU and, it is suggested here, made a number of limited and generalised recommendations in its final report in November 2008.¹⁹ The time mandate given to the body was particularly short, despite the magnitude of its brief. Notwithstanding, this is, by far, the most substantive role ever played by Parliament in European affairs, more so than after the first failed Treaty of Nice referendum. The Sub-Committee Report on *Ireland’s Future in the European Union* contained many suggestions to enhance the role of the Oireachtas, to increase accountability, to introduce a scrutiny reserve, to have more structured meetings with Ministers before Council meetings, to focus more on non legislative documents and to alter the internal procedures of the Oireachtas to give effect to the recommendations of the Committee.²⁰ The Report specifically criticised the lack of influence of the Oireachtas in EU decision making processes, the procedures giving effect to EU law in Ireland, the way EU business is handled in the Oireachtas and sensitive policy areas such as workers rights and socio-ethical issues.²¹ The Sub-Committee concluded that the Houses of the Oireachtas should play a leading role in Ireland’s engagement with the EU. Despite these high-minded goals, to the present day, no long-term vision, policy or constitutional change has

¹⁸ Joint Committee on European Scrutiny *Report on the Enhanced Role for National Parliaments in the Lisbon Reform Treaty* (23 May 2008). See Barrett supra.

¹⁹ Sub-Committee on Ireland’s Future in the European Union *Ireland’s future in the European Union: Challenges, Issues and Options* (November 2008). The more specific recommendations include (at para. 31 onwards) the adoption of a formal scrutiny reserve system and an EU Affairs panel in the Seanad but other recommendations include encouraging TD’s to gain expertise in EU affairs (para. 40).

²⁰ See Houses of the Oireachtas *Sub-Committee on Ireland’s Future in the European Union Ireland’s future in the European Union: Challenges, Issues and Options* (November, 2008).

²¹ At p 69.

been made to accommodate the multi-layered democracy envisioned by the Treaty of Lisbon, discussed below in greater detail.

However, it is contended here, that even these more forceful criticisms fail to adequately address the root and branch reform of parliamentary activities as to European affairs in Ireland and that the adequate resourcing as well as the constitutional position of such committees and activities needs fundamental reevaluation. The report, while a most significant intervention in European affairs as regards the Oireachtas generally, nonetheless pales in comparison with its UK and German counterparts, where substantial reports and evidence gathering exercises are more common parliamentary activities.

During 2009, the first part of the year was largely spent by the body politic in preparing for the second referendum on the Treaty of Lisbon which was held in November 2008.

(C) Joint Report on the Implementation of the Lisbon Treaty: Provisions on the Enhanced Role for National Parliaments

Finally, however, in 2009, the Joint Committees on European Affairs and European Scrutiny published the *Joint Report on the Implementation of the Lisbon Treaty: Provisions on the Enhanced Role for National Parliaments*.²² This Joint Report represents a very important attempt on the part of the Oireachtas to outline holistically how the Houses will cope with the challenges that subsidiarity presents to them, as well as the opportunities afforded by it. The report is particularly detailed and well-written and a sense of engagement with responsibilities is evident from the report. The delay in producing such a work, however, is noticeable and the EU Affairs website on which the report is so prominently displayed as “new” while dynamic and filled with images and links, is in fact rather outdated.²³

The main recommendations of the Joint Report are that on an interim basis the new system should operate, that the Joint Committee on European Scrutiny should have responsibility for the day to day operation of s. 7(3) of the Act of 2009 (the “yellow” and “orange” card procedures, discussed next). It recommended that the Committee should employ its existing powers under the Act of 2002 to assess subsidiarity compliance and that the Select Committees of both Houses should have the right to work independently. It recommended further that Government Departments should provide the highest level of cooperation, eg. advance notice, so as to meet prospective deadlines,²⁴ that inter-parliamentary cooperation is critical and that the Joint Committees on European Affairs and European Scrutiny are to become the actors to litigate subsidiarity for the purposes of Article 8 of the Protocol on the application of subsidiarity and proportionality.

The Joint Report notably states that the resource implications of the new role for National Parliaments under the Lisbon Treaty were not clear and that both committees agreed that arrangements and procedures would be put in place pending the completion of a comprehensive consultation by the Joint Committee on the future role of the Houses of the Oireachtas on EU affairs, suggesting an uneasy and uncertain view of the future, for all the positive assertions of the value of the two new Protocols.²⁵

²² Joint Committees on European Affairs and European Scrutiny published the *Joint Report on the Implementation of the Lisbon Treaty: Provisions on the Enhanced Role for National Parliaments* (Joint Committees on European Affairs and European Scrutiny, December 2009), see www.oireachtas.ie (last accessed 23 February 2009).

²³ For example, <http://euaffairs.ie/> (last accessed on 22 February 2010) while containing photos of business of the Committees up to the present time, still has an icon emphasizing or advertising the Swedish Presidency of the EU in 2009. An advertisement seeking submissions on the European Citizens Initiative is located at the top of the same page, seeking submissions by 28 January 2010.

²⁴ The report notes (p. 19-20) that the Joint Committee on European Scrutiny had actively participated in the COSAC pilot project on subsidiarity checking and had met all of the relevant time deadlines.

²⁵ At p 8. See more recently Houses of the Oireachtas Joint Committee on European Affairs *EU Scrutiny Report No. 6 Report on the Joint Committee on European Affairs' Contribution to the European Commission on its Green Paper on a European Citizens' Initiative* (Houses of the Oireachtas, February 2010).

Next here then, the legislative and constitutional changes made to Irish law so as to implement the Treaty of Lisbon, are considered here.

II: Legislative and Constitutional Changes made to Irish Law to Implement the Treaty of Lisbon

(A) European Union Act 2009: Changes to the Role of the Oireachtas After the Treaty of Lisbon

The amendments made to Irish statutory law to incorporate these changes effectuated to the role of Parliament by the Treaty are far from striking and represent a lowest common denominator type of incorporation. For a start, the amendments are made by way of statute and are not constitutional in nature. Section 7(1) provides for the operation of the procedures for the revision of the Treaties in accordance with Article 48.7 TEU, while s. (2) provides for the operation of the procedure in accordance with Article 81.3 TFEU as to proposals on judicial co-operation in civil matters. The Act provides generally for the procedure as set out in Article 7(3) the Protocol on the application of subsidiarity and proportionality, which extends the subsidiarity control applying under the ordinary legislative procedure which operates when reasoned opinions from majority of votes allocated to National Parliaments comes into play. The yellow and orange card procedures are more generally provided for in s. 7(3) of the Act of 2009, specifying the general time limit as set out in the Treaties of 8 weeks for the issuance of a reasoned opinion on draft legislative acts. Thus it is stated that:

Either House of the Oireachtas may, not later than 8 weeks after the transmission of a draft legislative act referred to in Article 6 of Protocol No. 2 to the Treaty on European Union and the Treaty on the Functioning of the European Union, send to the Presidents of the European Parliament, the Council and the European Commission a reasoned opinion in accordance with that Article if the House concerned passes a resolution in respect of the draft legislative act concerned authorising the House to so do.

Section 7(4) of the Act of 2009 makes provision for the justiciable rights accorded to National Parliaments by the Treaty of Lisbon where an ex ante breach of subsidiarity is asserted by either House of the Oireachtas. The Act thus provides that:

where either House of the Oireachtas is of opinion that an act of an institution of the European Union infringes the principle of subsidiarity provided for in the treaties governing the European Union and wishes that proceedings seeking a review of the act concerned be brought in the Court of Justice of the European Union in accordance with Article 263 of the Treaty on the Functioning of the European Union, it shall so notify the Minister in writing for the purposes of Article 8 of Protocol No. 2 to that treaty and the Treaty on European Union and the Minister shall, as soon as may be after being so notified, arrange for such proceedings to be brought.

Section 7(4) then sets out the procedure relating to Article 8 of the Protocol whereby a perceived justiciable breach pursuant to the Protocol is litigable by the relevant Minister for Foreign Affairs upon receipt of a reasoned opinion of either of the Houses that an act of the EU institutions infringes subsidiarity (and not any composition of Parliament), albeit that this much is provided for in the Treaties. Nonetheless, a more substantive constitutional provision would arguably be more appropriate to provide the core of the subsidiarity powers, set out above, given their inherent importance. It must be said that the legislative changes made to implement the Treaty of Lisbon as a matter of law are sparse and simplistic and arguably fail to capture the change of tone that the Protocols attached to the Treaty of Lisbon set, i.e. they are rudimentary changes that are made. The consistently piecemeal manner in which European affairs as to parliament are dealt with by statute is disappointing and while it cannot be said that the provisions of the Act of 2009, as outlined above, are legally incorrect and they certainly do not represent a wholesale effort to reform parliamentary affairs as to EU law.

(B) Changes to the Legislative Scrutiny Regime Effectuated by the European Union Act 2009

However, the range of measures subject to legislative scrutiny under the Act of 2002, in fact, are now technically reduced as a result of the destruction of the pillar structure of the EU in the Treaty of Lisbon. Thus, the range of instruments employed will be reduced and joint actions and common positions are no longer within the remit of the Scrutiny Committees. However, the number of instruments which the Oireachtas receives of a variety of forms is, of course, dramatically increased in light of the content of the Protocols and the new information-based rights therein. Hence, s 6 of the European Union Act 2009 now provides that:

Section 1 of the European Union (Scrutiny) Act 2002 is amended by the substitution of the following definition for the definition of “measure”:

“ ‘measure’ means—

- (a) a regulation or directive adopted under the Treaty on the Functioning of the European Union,
- (b) a decision adopted under Article 28 or 29 of the Treaty on European Union, or
- (c) an act (other than a regulation, directive or decision referred to in paragraph (a) or (b)) requiring the prior approval of both Houses of the Oireachtas pursuant to subsection 7° or 8° of Article 29.4 of the Constitution.

Despite this apparent reduction, the role of the National Parliaments is in fact substantially enhanced and complicated by their new range of mainly negative powers.

(C) Domestic Constitutional Changes to the Role of Oireachtas to Implement the Treaty of Lisbon

Article 29 of the Irish Constitution has provided for the constitutional super-structure relating to EU membership. It has been amended in the wake of each referendum in Ireland but the amendments made have been largely minimalist and each alteration has included references to the new Treaty being ratified. The former provisions of Article 29.4.6° and Article 29.4.8° of the Constitution, as inserted by recent referenda in 1998²⁶ and 2002²⁷ respectively, put in place formally and structurally, mechanisms by which the State was able to decide to exercise particular options contained in the Treaty of Amsterdam and the Treaty of Nice: the so-called “variable geometry” clauses. Article 29.4.6° provided as follows:

The State may exercise the options or discretions provided by or under Articles 1.11, 2.5 and 2.15 of the Treaty referred to in subsection 5° of this section and the second and fourth Protocols set out in the said Treaty but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.

The provisions of Article 29.4.8° provided that:

The State may exercise the options or discretions provided by or under Articles 1.6, 1.9, 1.11, 1.12, 1.13 and 2.1 of the Treaty referred to in subsection 7° of this section but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.

Most remarkably, it has been legally and constitutionally beyond dispute since 1998 (i.e. since the Treaty of Amsterdam) that there were aspects of membership of the Communities and Union contained in the Irish Constitution that were not objectively necessary and were legally considered to be discretionary. Articles 29.4.6° and 8° were formulated to protect State sovereignty by allowing the discretion to be exercised, conditional upon the approval of both Houses of the Oireachtas being obtained, thereby adopting an attitude of tremendous flexibility and pragmatism towards European affairs. However, the concentration of this protection is in the hands of the State in times of

²⁶ The Eighteenth Amendment to the Constitution.

²⁷ The Twenty-Sixth Amendment to the Constitution.

parliamentary majority, a factor meriting some consideration. The difficulty here, as commentators have noted, is that at what point does the prior consent of the Houses of the Oireachtas become necessary?²⁸

Of the recent constitutional changes made to ratify the Treaty of Lisbon, this formula is repeated. Article 29.4.7° permits the State, with only the approval of Parliament needed and not a referendum, to engage in enhanced cooperation and to take part in the Schengen Area and the Area of Freedom, Security and Justice. This permission is the constitutional background to Protocol (No. 21) considered above. Article 29.4.7° provides that:

The State may exercise the options or discretions—
i to which Article 20 of the Treaty on European Union relating to enhanced cooperation applies,
ii under Protocol No. 19 on the Schengen *acquis* integrated into the framework of the European Union annexed to that treaty and to the Treaty on the Functioning of the European Union (formerly known as the Treaty establishing the European Community), and
iii under Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, so annexed, including the option that the said Protocol No. 21 shall, in whole or in part, cease to apply to the State, but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.

Irish parliamentary approval is then needed to opt in pursuant to Article 8 of the Protocol, as a matter of domestic law.²⁹ This falls short of a possibly more rigorous and systematic approach, such as that being contemplated in the UK at the time of writing.³⁰ The European Union Act 2009, which amends Irish statutory law to incorporate the enhanced role for National Parliaments as to the new Protocol on subsidiarity, as contained in the Treaty of Lisbon, is equally devoid of any system to deal with the implications of Article 4a or the remainder of the Protocol.³¹ It could be contended that the constitutional amendments made recently authorise the State, by way of parliamentary authority only, to elect to opt into the Area of Freedom, Security and Justice, pursuant to the terms of the relevant Protocol or to also join the Schengen Area. The difficulty with the simplicity of the constitutional provision drafted is that it fails to enumerate other related issues arising in the event of the State exercising such choices.

However, beyond this, the activities on a public level of the Oireachtas European affairs committee have increased several fold and the proceedings of the Committees employ a range of technologies and use more effectively their websites to disseminate their activities. On a visual level, there appears to be more evidence of engagement with the public with the inception of the new website for the parliamentary EU Affairs activities generally.³²

III: A Comparative Perspective on the Role of Parliament in European Affairs: The Case of the German Federal Parliament Before and After Lisbon

As stated above, no constitutional or legislative provision exists to govern the relationship between the Irish and European legislatures. This is in marked contrast to Articles 23(2) and (3) of the German Constitution (GG) prior to the Treaty of Lisbon,³³ which provided as follows:

²⁸ See Hogan & Whyte *op. cit.*, para 5.3.86.

²⁹ Twenty-Eighth Amendment to the Constitution (Treaty of Lisbon) Act 2009: see www.oireachtas.ie.

³⁰ See House of Lords European Union Committee *Enhanced scrutiny of EU legislation with a United Kingdom opt-in* (2nd Report, Session 2008-09, HL Paper 25).

³¹ Practice suggests that Irish MEP's do not vote in the plenary where Ireland has not opted into a measure: see generally House of Lords Select Committee on European Union *The Treaty of Lisbon: an impact assessment* (10th Report, Session 2007-08, HL Paper 62). This, arguably, is a worrisome development in the long-term, particularly if Ireland reviews its opt-out in the future, as per the terms of Declaration (No. 56) considered above.

³² See <http://euaffairs.ie/>.

³³ The details of the Bundestag's role in German European policies are set out in the Federal Statute on "co-operation between the Federal Government and the German Bundestag in European Union affairs". See further below.

(2) The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. The Federal Government shall keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time.

(3) Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law.

However, as Hofmann notes, Article 23 GG distinguished between information and hearing. The Bundestag has the right to be informed by the federal government about *all* matters concerning the EU (Article 23 (2) GG) but has the constitutional right to be heard expressly *only* with respect to the EU's "legislative acts" (Article 23 (3) GG).³⁴ Scrutiny is placed in a context where it presupposes information and both aspects of the Bundestag's involvement (information and control) are regulated by the Constitution. An Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the EU of 12 March 1993 and a further Agreement on aspects of the Act was reached in 2006.³⁵ These rights, of the Bundestag, date from as far back as 1957, at the inception of the Treaty of Rome. Within the Bundestag, there is also a constitutionally prescribed European Affairs Committee, enjoying the highest prominence of all committees with a membership of 50, which meets on a weekly basis.³⁶

The German example is a particularly fine one of rigorous scrutiny constitutionally mandated, distinguishing itself considerably from the Irish model because of its constitutional origins and prescribed rights and correlative obligations. It is, however, arguably the most inherently empowered of all of the parliamentary bodies of the European States³⁷ by virtue of its notable constitutional position and the affirmative constitutional obligations owed to it by the State: its counterparts in Austria,³⁸ Belgium,³⁹ Denmark,⁴⁰ Finland,⁴¹ France,⁴² Greece,⁴³ Italy,⁴⁴ Luxembourg,⁴⁵ the

³⁴ Hofmann "Parliamentary Representation in Europe's System of Multi-Layer Constitutions: A Case Study of Germany" (2003) 10 Maastricht Journal 1.

³⁵ Agreement between the German Bundestag and the Federal government on cooperation in matters concerning the EU in implementation of section 6 of the Act on Cooperation between Federal government and the German Bundestag in Matters concerning the European Union (28 September 2006).

³⁶ There are also European Affairs Committees in the Länder.

³⁷ As to which and hereafter for an outstanding comparative survey, see the House of Lords Select Committee on the European Union *Review Of Scrutiny Of European Legislation* (First Report, 2002-2003, HL Paper 15, Appendix 4).

³⁸ As in Germany, the members of the Austrian Bundesrat are representatives of the Austrian Länder delegated by the Länder parliaments. The Austrian Bundesrat, however, has more limited constitutional rights than its German counterpart.

³⁹ The Belgian Parliament deals with European matters through its Joint Advisory Committee on European Affairs, which involves MEP's.

⁴⁰ In Denmark, the European Affairs Committee (Europaudvalget) was created in 1972 and meets throughout the year, except for August. It has 17 permanent members and 11 substitutes. The parties are allocated places on the Committee according to their strength in the Folketing.

⁴¹ The Grand Committee (Suuri valiokunta/ Stora utskottet) was given its task to scrutinise EU policy in 1994 (the Committee was formed in 1906). It has 25 members and 13 substitutes. The Eduskunta/Riksdag selects committee members to reflect party strength. However, even the smallest party normally has at least one substitute place on the committee. The Grand Committee meets twice a week.

⁴² The mechanism for examining EU legislation by the National Parliament has not been in place for very long, only around 10 years. It involves a "delegation" of each chamber. The objective of the French system is to allow the National Assembly and the Senat to adopt a position on legislation in preparation. The delegations in the Assembly and the Senat are at the centre of the process, and are like committees but not called that as the latter are only for working on French law. The delegations of the Assembly and the Senat each comprise 26 Parliamentarians, representing all the political groupings, in the proportions of the plenary. Each of the 26 is a member of one of the specialist permanent committees dealing with national law. The Government sends around 1000 texts per year for scrutiny.

⁴³ The composition of the Committee of European Affairs is mixed, consisting of national MP's and MEP's. The Committee has an advisory role but does not meet regularly. It can be convened by its Chairman, by a third of its members or by the Government. In general, the Chairman chooses topics for consideration but the Parliamentary Speaker may also do so.

⁴⁴ In the Senate, the relevant Committee is the "Giunta per gli affari delle Comunità europee", and in the Chamber of Deputies, the "Commissione le politiche dell'Unione Europea"—also known as the XIV standing committee.

Netherlands,⁴⁶ Portugal,⁴⁷ Spain,⁴⁸ or Sweden do not compare favourably as to its general constitutional powers or otherwise, nor as to its specific constitutional rights relating to the provision of information from the European legislature.⁴⁹ Many modes of practice of the House of Lords European-related affairs committees are being adopted in Ireland, such as the taking of expert evidence and the public and high-profile conduct of proceedings, although these practices are ad-hoc and not systematic and the limited staff of the Irish parliament for such matters remains less favorable than in the case of the UK. Moreover, in contrast with Germany, all other comparable parliamentary bodies are liable to be regulated by way of statute and are thus subject to ad hoc arrangements that may be altered by incoming regimes, for example, unlike the more permanent constitutional position enshrined in the German text, with transparent and affirmative rights accruing to the parliamentary body.

Lord Mance, in a recent lecture where he endeavored to defend the opt-in opt-out positions negotiated by the UK in the Treaty of Lisbon and the role of Parliament to be played as a result,⁵⁰ suggested in a wider reflection, that the UK parliamentary regime as to European affairs was less comprehensive and less transparent than the German regime, that the proposals considered by Parliament were narrower in the UK, that confidentiality was more readily invoked in the UK in Parliament, that the position taken by Parliament was not the basis for negotiations unlike in Germany and that the UK Parliament did not formally take account of devolution in European affairs. These comparisons with the German position may be applied with equal, if not more, force to the Irish context and the Irish Parliament to a degree has been playing “catch up” with the House Lords *modus operandus* until recently.

In the decision of the German Federal Constitutional Court on the constitutionality of the ratification of the Treaty of Lisbon,⁵¹ the Court annulled the accompanying legislation and obliged the

(Contd.) _____

Traditionally in both Houses of the Italian Parliament direct competence on EU matters is the responsibility of standing committees, the EU Committees having a consultative role. In 1999 the Chamber of Deputies reformed its rules of procedure, giving the Chamber's EU committee standing committee status, with specific tasks. The Giunta of the Senate, however remains solely consultative, with the primary competence falling to the Constitutional Affairs Committee. This is felt to have created an imbalance between the two.

⁴⁵ Luxembourg's Chamber of Deputies has a Committee for Foreign and European Affairs and Defence, which scrutinises, investigates and reports on EU documents, sometimes after taking evidence, and the Committee's opinions are sent to Government. The Committee has 16 members, reflecting proportionate strengths of part groups. Luxembourg MEP's may attend in advisory capacity.

⁴⁶ In the Tweede Kamer, membership of the Committee reflects the political weighting of the second chamber. The Tweede Kamer EU Committee broadly functions under the same terms as the Commons EU Committee, though in a more ad hoc manner. The Committee in the Eerste Kamer conducts general work on EU affairs, and refers particular issues to specialised committees. It plays a particular role in transposition.

⁴⁷ The Committee of European Affairs is the specialist committee for all matters related to the EU. The Committee has an umbrella responsibility, distributing the issues among the relevant Specialist Committees. The Committee may then request Opinions from the individual Specialist Committees on which it bases reports to the Government. These reports, whether based on other Committee opinions or not, may lead to the presentation of resolutions to the plenary. The European Affairs Committee is the only Committee with such a power.

⁴⁸ Spain's bicameral parliament has a single Joint European Affairs Committee of 32 members (based on proportional representation) with some alternates and a series of sub-committees. The Committee scrutinises and ranks proposed laws, and makes reports to the plenary and the government. Joint meetings are held with Spanish MEP's. There is currently a sub-committee on the 2004 IGC.

⁴⁹ The Advisory Committee on EU Affairs of the Riksdag (EU-Nämnden) was established in 1995. It has 17 permanent members and 30 substitutes. The Advisory Committee on EU Affairs reflects the parties' strength in the Riksdag. The Committee meets weekly throughout the year, except in August.

⁵⁰ “Opting into Community law and interpreting Convention rights: is the United Kingdom more or less committed?” (2009) July (3) PL 544, 553-558.

⁵¹ 30 June, 2009; *Judgment of the German Federal Constitutional Court on the Treaty of Lisbon* B VerGE 2 Bv E 2/08: see www.bverfg.de/en. See Editorial comments (2009) 46 CMLRev 1023; Thym “In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court” (2009) 46 CMLRev 1822, 1806; Tomuschat “The ruling of the German Constitutional Court on the Treaty of Lisbon” (2009) 10 GLJ 1259; Doukas “The verdict of the German Federal Constitutional Court on the Lisbon Treaty: not guilty, but don't do it again!” (2009) 34 ELR 866; Kokkott “The Basic Law at 60: From 1949 to 2009: The Basic law and Supranational integration” (2009) 11(1) GLJ 99.

Federal president not to ratify the Treaty of Lisbon before the powers of Parliament were specified. However, the transparency of the reasoning of the Court has been criticised on this particular point.⁵² The Act Extending and Strengthening the Rights of the Federal Parliament and Federal Council in EU matters⁵³ was held by the Court to be in breach of Article 38 (1)⁵⁴ of the Basic Law read with Article 23.⁵⁵ So, the Court held that the Act did not provide the two Chambers with the necessary and sufficient degree of participation rights and the Treaty could not be ratified until this Act was amended in line with the requirements of the Court.⁵⁶ The amended legislation was passed by two Chambers in September 2009. The importance which the Court placed upon the role of Parliament in its important decision is notable. Thus, the position as to the German parliament is particularly significant and most remarkable and operates as a useful precedent for other parliamentary scrutiny models and for considering the proper place of parliament in European-related affairs after the Treaty of Lisbon.

The Role of the Irish Courts in European Affairs as an Institutional Actor

Parliaments are but one form of actor in European affairs and the judicial branch has been comparatively much more active in European affairs over three decades in the Irish legal order. The legislative branch receives less attention in legal literature on the operation of the EU law in the Irish State than the judiciary does. The Irish Supreme Court has yet to deliver a decision on substantive EU constitutional issues, similar to the German Constitutional Court, on the inherent legitimacy of the European project. The leading decision of the Irish Supreme Court on EU-related affairs is as to European referenda. The Supreme Court decision in *Crotty v An Taoiseach*⁵⁷ has entailed that a referendum on European Treaty ratification has been held consistently since that decision, which decided that a Treaty had to be submitted by referendum to the people where a proposed Treaty altered the scope and objectives of the Union such that the initial popular consent to EU membership had been exceeded. Conservative analysis of the decision has entailed that all Treaties subsequent to the Single European Act have been submitted by plebiscite to the Irish people. *Crotty* has been the subject of much far-reaching criticism⁵⁸ and, while its re-examination remains unlikely in the short-term, it increasingly is at odds with scholarly views and its un-nuanced outcome has forced a referendum upon the Irish people without qualification since the Single European Act.

The Irish Supreme Court played no substantive role in the Treaty of Lisbon and the decision to hold referenda on two occasions arose largely from political interpretation as to the impact of *Crotty*. No substantive legal challenge was mounted as to the two referenda.⁵⁹ One judge spoke extra-judicially on the importance and significance of the Treaty of Lisbon to the role of national courts in the Member States.⁶⁰ Arguably, the role of the Supreme Court in European affairs is ripe for re-consideration, as is *Crotty*, and the reflective or cloistered environment of the Four Courts so as to narrow constitutional issues may provide an important forum to distil legal issues to then be put to the

⁵² See Thym “In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court” (2009) 46 CMLRev 1822, 1901.

⁵³ *Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*.

⁵⁴ “Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience”.

⁵⁵ An Act extending and strengthening the rights of the Federal Parliament and Federal Council in European Union matters Publications of the Federal Parliament No. 16/8489.

⁵⁶ 30 June, 2009 *Judgment of the German Federal Constitutional Court on the Treaty of Lisbon*, B VerGE 2 Bv E 2/08: see www.bverfg.de/en [273] [406] and [409].

⁵⁷ *Crotty v An Taoiseach* [1987] IR 713.

⁵⁸ Barrett “Building a Swiss Chalet in an Irish legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court jurisprudence” (2009) 5 EuConLRev 32; Hogan “The Supreme Court and the Single European Act” (1987) 16 Ir. Jur. 55 and Temple Lang “The Irish Case Which delayed the Single European Act: *Crotty v An Taoiseach*” (1987) 24 CMLRev 709. See also Casey *Constitutional Law in Ireland* (3rd ed., Round Hall, Dublin, 2000) p 214 *et seq.*

⁵⁹ A challenge to the constitutionality of the Twenty-Eighth Amendment to the Constitution Bill 2009 was rejected in the High Court (Ryan J) on 13 October 2009 as unmeritorious.

⁶⁰ Ms. Justice Susan Denham, delivering the Annual Brian Walsh Memorial lecture to the Irish Society for European Law in December 2009: www.isel.ie.

people in referendum. The likelihood of such a development remains questionable but yet desirable. Ireland has an imperfect and fused Separation of Powers, where the Executive is drawn from the Parliament.⁶¹ There is little case-law juxtaposing the Executive and Parliament against one another. The internal workings of the Oireachtas are largely treated as privileged by the Supreme Court and immune from constitutional review but the Oireachtas has also been held to lack significant inherent powers by the Court and a reasonably strict construction of its Constitutional powers prevails.⁶² A largely conservative Supreme Court has in the last decade favoured a purist and Executive-centred Separation of Powers.⁶³

Conclusion

What is the effectiveness of the Oireachtas as an institutional actor in the past, present and future, in light of its enhanced role as provided for in the Treaty of Lisbon? It appears that any answer to this question, of itself or in comparative terms, of necessity must conclude that the institutional consideration of EU affairs is limited and piecemeal and that a failure to adequately engage with challenges as they arise has resulted in rather haphazard engagement with European matters. It is suggested, here, that the Oireachtas has failed to adequately grasp and employ the full range of its new powers under the Treaty of Lisbon. As a body, it has made a limited contribution to European affairs. The absence of constitutional provision for the Oireachtas has substantially diminished its institutional role. The legislative and constitutional provisions passed so as to ratify the Treaty of Lisbon are both modest and disappointing. But the problem is systemic for the Irish Supreme Court, another important institutional actor, which has played no meaningful role in European integration, in whatever way or to whatever degree. The German example is particularly striking and, while it may not form a realistic goal yet as to parliament given the complexities in amending the Irish Constitution, nonetheless, the contribution of dynamic and well-organised debate and actions on European affairs has the potential to strengthen an institutional actor.

The crisis instigated by the first failed Treaty of Lisbon referendum brought with it a valuable period of reflection but the legal outcomes from the point of view of the role of parliament are limited. The legislative provisions passed so as to take into account the new role for National Parliaments in the Treaty of Lisbon has not been embraced adequately and the new role has been incorporated only by way of legislation and not in the domestic constitutional order. Equally, the Irish Supreme Court has yet to play a substantive role in EU affairs in Ireland and has not contributed to a pan-European scholarship on European integration.

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⁶¹ Gwynn Morgan *The Separation of Powers under the Irish Constitution* (Round Hall, Dublin, 1997).

⁶² *O'Malley v An Ceann Comhairle* [1997] 1 IR 407; *Maguire & Ors v Ardagh* [2002] 1 IR 447; *Leontjava v DPP* [2004] 1 IR 591; *Howlin v Morris* [2006] 1 ILRM 440; *Curtin v Dail Éireann* [2006] IESC 14; *Ahern v Judge Mahon* [2008] IEHC 119.

⁶³ See *Sinnott v Minister for Education* [2001] 2 IR 545; *TD v Minister for Education* [2001] 4 IR 259.

Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press, Dublin, 2008); Hogan and Whyte, *Kelly: The Irish Constitution* (4th ed., Lexis Nexis Butterworths, Dublin, 2003.); Keane, "Judges as Lawmakers- The Irish Experience" (2004) 4(2) JSIJ 1; Hardiman J (extra-judicially) "The Role of the Supreme Court in our Democracy" in *Political choice and Democratic Freedom in Ireland: 40 Leading Political Thinkers* (Mulholland ed., 2004); Whyte *The Role of the Supreme Court in our Democracy: A Response to Mr Justice Hardiman* (2006) 28 DULJ 1.

