

THE COMMITTEE OF THE REGIONS AND SCOTTISH SELF-GOVERNMENT: A GERMAN PERSPECTIVE

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With the creation of a Committee of the Regions in Article 198 of the Maastricht Treaty, substate government was for the first time officially acknowledged as part of the European Union decision-making system. Apart from this general perception, the discourse on any specific implication of this new body has remained very much fragmented. This is mainly due to the heterogenous structures of substate government in EU member states.

THE SCOTTISH CONTEXT

In Scotland the perspective is shaped by an important additional dimension. Since the late 1980s the debate on the European integration process has increasingly been related to the constitutional question (Keating and Jones 1991). The European Union has frequently been envisaged as an alternative multi-national framework allowing for Scottish self-government, either in the form of an independent state or in a Europe of the Regions, where the nation-state has lost its hegemonic power.

In the emerging multi-level system of governance (Marks 1993), Scotland, as a territorial substate unit, is subjected to a double integration by the United Kingdom and the European Union. As empirical evidence shows, this system has by no means fully eroded the political capacity of the nation-state, but it did lead to the theoretical insight that territorial self-government can no longer be measured in terms of absolute sovereignty. In a globalised and highly interdependent world, the relative degree of territorial self-

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government, whether on the state or substate level, will be determined by two analytically distinct components:

- a shrinking set of policy fields with (nearly) full policy autonomy
- access to and participation in higher-level decision-making

As this applies both to state government and substate government, the distinction has to be kept in mind when examining the potential impact of the Committee of Regions on Scottish self-government aspirations.

In the Scottish national movement the Committee of Regions has been warmly welcomed. Labour's David Martin, for example, saw the creation of the Committee in the context of a general post-Maastricht development, which would 'benefit the people of Scotland' (Martin 1992, p.90). According to him, the Committee of Regions could 'assist in the regionalisation of the Community and increase the influence of sub-Member State units' (p.93). It is promoted as part of a centrally driven process in which, 'by giving the regions more responsibility in their own affairs the Community has managed to enhance the regional voice at the European level' (p.95). Having been advocating the Europe of the Regions vision as the long-term solution to Scotland's constitutional question, Martin's judgement is hardly surprising.

Rather more remarkable is the attitude of the SNP. Although this is not the space to elaborate in any detail on the much discussed deal with the Government in March 1993, the very fact that a *nationalist* party makes any concession for an improved Scottish representation in a committee of the *Regions* is quite significant. This is endorsed by Alex Salmond's defence of his voting behaviour, in which he described the enlarged Scottish representation as a 'real medium-term gain for Scotland on a committee which will play an important part in the future of Europe' (**Scotland on Sunday**, 14 March 1993)

These political considerations of the Scottish opposition are supported by the current academic debate about the prospective Europeanisation of the British constitution. Using the, then forthcoming, selection of the members of the Committee of Regions as an example, Paterson et al argued that it is the very need for compatible territorial structures in a regionalising European Community 'that continues to make Scottish self-government highly likely in the medium term' (Paterson et al, 1992, p.638).

A similar conclusion is reached by Scott et al, in their analysis of the subsidiarity concept. While the notion as such has rightly been delineated as highly ambiguous, the EU's tendency towards co-operative regionalism -

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manifested in the creation of the Committee of Regions - was embraced as 'a means for reconciling substantive with procedural subsidiarity' (Scott et al 1994, p.59):

A powerful Committee of the Regions or a new Regional Chamber are perhaps the most obvious method by which the governance of the Community could develop without undermining subsidiarity in the sense of 'government close to the citizens' (p.62).

In such a development, the lack of a regional tier of government in the UK would be a vacuum highly vulnerable to an institutional 'pull' by the emergence of 'a legitimate Community interest in the architecture of 'internal' British governance' (p.62).

In the Scottish context this hypothesis may sound both attractive and plausible. Yet, a comparative look at German federalism might help to evaluate the potential impact of the Committee of Regions from a more cautious perspective.

THE COMMITTEE OF REGIONS AS AN ELEMENT OF CO-OPERATIVE FEDERALISM IN THE EUROPEAN UNION

The establishment of a Committee of the Regions is not a miraculous materialisation of the Europe of the Regions vision, but the outcome of a rather lengthy bargaining process. Its final result reflects a minimal consensus between European concepts of regional partnership, subnational demands for participation and more or less reluctant nation-states (Fechtner/Hannes 1993, p.136). While it is widely known that the main advocates for the erection of a regional chamber were to be found in Germany, more particularly in the Länder governments, the rationale behind this move is sometimes misrepresented. In the following, I will argue that the Länder's European activity represents a general tendency in the German domestic political system: the move towards co-operative federalism.

The main characteristic of a federalist system is the existence of subcentral territorial governments with constitutionally entrenched competences. Certain policy fields will be exclusively under the jurisdiction of these federated governments; others will be handled on the federal level. In the German Basic Law a residual clause (Art.30 GG) constitutes statutory Länder competence for all political decisions not explicitly prescribed to central government. This constitutional provision has been frequently called the embodiment of the principle of subsidiarity. Its essential feature is the high level of 'policy autonomy' for the federated tier of government, providing for

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a territorial division of authority and a decentralised polity. While this model still applies to USA federalism, in Germany constitutional reality has, however, changed.

Since the origin of the Federal Republic of Germany, new state functions, mainly in the fields of foreign policy and macro-economic management, have been acquired by the central state. In the course of this alteration of the territorial power balance, the main function of the Länder has shifted from policy-making to implementation of central policies. What has emerged is therefore best described with the term 'co-operative federalism'. However, the Länder have compensated for their loss of policy autonomy with improved participation in central decision-making. The Bundesrat, second chamber of the Parliament and collective organ of the Länder, has become a major player in the legislative process at the federal level. Nowadays more than half of the parliamentary bills need its approval. Other informal, ad-hoc gatherings of Länder officials influence the legislative process even before its parliamentary stage. So the main feature of German federalism is not a separation of the two tiers of government but their mutual interdependence in a sequence of joint decisions.

In the 1980s the German political scientist Fritz Scharpf analysed this development and argued that it would lead into a so-called 'joint-decision trap' (*Politikverflechtungsfalle*). According to his study, the institutional logic of a political system where central decisions depend on (nearly) unanimous sub-central approval produces serious pathological deficits in problem-solving. The vested interests of substate governments to maintain competences and resources will lead to inefficient and inadequate outcomes preventing even the most rational innovations. The worst effects of this preference for the status quo, it was argued, were only prevented because of general prosperity and the relative socio-economic homogeneity within Germany.

The second stage of this process was reached when the creation of a Single European Market required the German federal government to transfer Länder competences to the Community. The Länder reacted in the same compensatory manner as before: demanding participation in higher-level policy-making. This time two different strategies had to be pursued. First the Länder secured their influence in the federal government's European activities through a complex system of co-operation, the so-called *Bundesratsbeteiligungsverfahren*. At the same time, they started to press for direct representation at Community level. The promotion of a strong regional chamber in the EU has to be seen in this context. Representation in the Committee of Regions has never been designed as an attempt to (re)gain

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Länder competences on the grounds of subsidiarity, but rather as a compensation for their final loss.

So, despite all rhetoric, the creation of the Committee of Regions should not be mistaken for subsidiarity. It offers participation in central decision-making, rather than decisions 'taken as closely to the citizen as possible'. Yet, as in the Federal Republic of Germany, the addition of further participants is very likely to have an adverse affect on the capacity of decision-making systems. Already the European Community has faced the problems of a double joint-decision trap. While the obstructive powers of the member states are often solely held responsible for inefficient package-dealing and situations of blockage, member state obstruction has in itself been heavily determined by the obstructive powers of substate governments (in some cases coming from backbench rebels). An additional direct involvement of the third level now bears the potential of a multiple joint-decision trap. And in fact, why should representatives from over a hundred European regions agree more easily on Regional policy than twelve state governments? Given the socio-economic heterogeneity of European regions, this problem is far greater than in the Federal Republic of Germany.

However, with respect to the Committee of Regions in its present form, there are two elements which prevent the EU from the worst expected deficiencies. Firstly, unlike the Länder-Bundesrat relation, the Committee of Regions works on the basis of representatives not delegates. The formal mandatory independence of its members should leave considerable scope for compromise and consensus within the Committee. At least there is no easy way out. Strict orders of some remote government are no excuse for failing to co-operate in problem-solving.

Secondly, and even more important, the Committee's rather weak position within the decision-making system will prevent it from widening the joint-decision trap in the EU. By asking for advice rather than unanimous consent, the EU legislators are withholding any obstructive powers from the Committee. As most of the EU regulations are implemented at local government level, the input of local and regional expertise at an early stage of the policy-making process will certainly help to make the outcome more compatible with the actual conditions of implementation. So, paradoxically, it is its very advisory status, so much contested by European regionalists (especially in the German Länder), which could make it an efficient instrument of co-operative federalism. As long as this off-loading strategy brings efficiency gains in central policy-making, it is certainly also in the genuine interest of subcentral governments.

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However, this article is more concerned with the effects on autonomous substate policy-making, generally referred to as subsidiarity. While the very existence of the Committee of Regions cannot be seen as a manifestation of the subsidiarity principle, it might nevertheless develop a role in its procedural interpretation. As the collective organ of substate governments it might campaign for the preservation or even the expansion of substate territorial autonomy. With the right to 'issue an opinion on its own initiative in cases in which it considers such action appropriate' (Article 198c), this lobby function is officially acknowledged, though its actual impact will probably remain very limited. Whether the Scottish claim for self-government might one day become such an appropriate case is hard to foresee.

'REGIONAL' REPRESENTATION IN THE COMMITTEE OF THE REGIONS

The second potential aspect of territorial self-determination is representation. The very process of selecting representatives on the Committee of Regions can be seen as a European-wide testing case for the application of subsidiarity beyond the nation-state.

According to Article 198a the Committee consists of 'representatives of regional and local bodies', proposed by member state governments, finally appointed by the Council of Ministers. Unbound by any mandatory instructions, 'they shall be completely independent in the performance of their duties, in the general interest of the Community'. Even a short glance at its legal basis shows the flexibility of representational provisions for the so-called Committee of Regions. The controversial questions are left to be solved at member-state level.

In principle, two distinct forms of representation are possible. Either territorially defined units (Regions, in Euro-speak) will be directly represented by 'their' representative(s), or the function of sub-central government will be represented collectively within each member state's delegation. Following its own constitutional logic, each member state has to decide which principle is appropriate. Of course, this decision will very much determine the actual selection process and the political quality of the representative's mandate.

In Germany, unlike the UK, the selection of members of the Committee of Regions has not produced conflict between central and sub-central tiers of government, but rather within the latter. As mentioned above, the Länder have always seen the Committee of Regions as an important qualitative step

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forward in their claim for direct 'third-level' participation in the EU. In this perspective, the words 'representatives of regional *and local* bodies' (my emphasis) were merely taken as a reflection of the heterogeneity of third-level structures, allowing those member states that have no regional tier to nominate local-government representatives. Where regional government exists, nothing less than its direct territorial representation would do.

Contesting this view, the German municipalities argued that the Committee is far away from the envisaged full-blown regional chamber, and there would therefore be no need to abolish the successful mixed participation of its predecessor body, the Consultative Council of Regional and Local Authorities. More generally, they accused the Länder of hypocrisy, expanding the principle of subsidiarity beyond the realm of the member state, but stopping where their own competences are at stake (Hoffschulte 1992).

The following controversial negotiations finally resulted in a compromise that would probably be more characteristic of the pragmatic British approach to politics than it was of the strict constitutionalism the German system is usually known for. In Section 14 of a federal government act on the co-operation of Bund and Länder in EU-affairs (EuZBLG 12 March 93), the Länder were given full autonomy to select their representatives, provided their nomination included three elected local councillors, proposed by the respective peak associations. On this legal basis the conference of the heads of Länder-governments (*Ministerpräsidentenkonferenz*) reached agreements to allocate Germany's 24 seats as follows:

- each of the 16 Länder will send one representative and one alternate
- each of the three local government peak associations will send one representative and one alternate
- the remaining 5 seats (+ alternates) shall be taken by the Länder in order of their population

This outcome shows several anomalies and has been seen as inconsistent with general constitutional thinking in Germany. First, while amendments to Art.23 and Art.50 of the German Basic Law have recently acknowledged the Länder's right to participate in European activities, local government has not been mentioned in this context. In fact, except for the constitutionally entrenched principle of local self-government (*kommunale Selbstverwaltung*), local government falls exclusively within the constitutional competence of the Länder. Any central-government intervention in their internal relations is therefore highly questionable.

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Second, the federal government decided very early that the selection competence would be given to the Länder individually, rather than to the Bundesrat. Given the fact that Länder participation in federal affairs and in federal-EU policy is constitutionally restricted to their collective organ (the Bundesrat), this move suggests an explicit choice of the territorial form of representation for the Committee of Regions. However, with the addition of three councillors, each representing a particular tier of local government, the legitimacy base of the German delegation will be split. While the mandate of the local government representatives is based on criteria of functional representation, Länder members are directly representing a territorial unit. Unlike Länder delegates in the Bundesrat, these representatives are not bound by instructions of their respective governments, though their activities can nevertheless be made the subject of parliamentary debate.

Compared to these inconsistencies, the British selection process is fully in line with its basic constitutional principle. The right to nominate members has been devolved to the territorial ministries, and thus the British government has acknowledged the multi-national structure of the UK in its traditional way. As a result, Scottish members of the Committee of Regions were selected by the Scottish Secretary, accountable to the unitary parliament but not to the Scottish people. Thinking in terms of territorial representation this selection process is hardly in accordance with the principle of subsidiarity. But the astonishing fact is, neither Scotland, nor any single Scottish region or district, are territorially represented in the Committee of Regions at all. What the five Scottish members of the Committee of Regions and their alternates do represent is local government in Scotland, an administrative function devolved from a sovereign parliament. The British constitution has remained unchanged.

From a pragmatic point of view, the Scottish representation seems nevertheless well equipped. Compared to the German Länder, the most striking feature is certainly its numerical strength. While the five Scottish members represent a tier of government responsible for roughly five million people, sixteen-million-strong North Rhine Westphalia is represented by only two members. With regard to their advisory function, the long-time local-government experience of Charles Gray and his colleagues might prove a better qualification to safeguard against insensitive European legislation, than the political weight and institutional resources of the Länder representation. (The German delegation consists of four Prime Ministers, nine Euro-ministers and four other ministers of Länder governments). In the absence of real bargaining power, the strength of the Committee of Regions will have to be the quality of its expressed opinions. As to the political function of promoting a regionalist perspective in the European Union, the lack of a

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regional government will certainly not prevent Scottish members from fulfilling this task. Hand-picked by the Scottish Secretary and without a formal territorial mandate, their ability to represent the Scottish demand for self-government can still rest on their personal conviction and on their legal independence from any mandatory instructions (after all, four of them are officially supporters of some form of self-government, and the Conservative member - Brian Meek - is well-known for going against his party on this matter).

CONCLUSION: POTENTIAL IMPACT ON SCOTTISH SELF-DETERMINATION

So, what is left of the great expectations in the Scottish national movement? As the excursion into German federalism has shown, the creation of a Committee of Regions is, per definition, no manifestation of subsidiarity. It is concerned with central decision-making and does not have any immediate impact on substate autonomy. With regard to participation, the comparison with the German Länder highlights the lack of territorial accountability of the Scottish representation.

However, this does not mean that the Committee of Regions is totally meaningless for the current constitutional conflict between Scotland and the UK. Like the European summit in Edinburgh two years ago, it does offer a window of opportunity to spread the campaign for Scottish self-government out into Europe, and, more important, it might also strengthen that campaign back in the UK.

In Europe, the chances for any positive effect are minimal. The first years of office will hardly be used to address the single grievance of one region, given that this will be a time of institutional probation. After the re-negotiation of the Maastricht Treaty has finally determined its position in the European decision-making system, the Committee's agenda might become flexible enough to include Scotland's constitutional status. But the effect of such a debate on an otherwise unchallenged system of unitary parliamentarism would probably be negligible. It is only when the antagonism of Scottish society and British state does accelerate into an open conflict of authority that the behaviour of the European Union and its member states would become a matter of essential relevance to the United Kingdom. By then, thanks to the Committee of Regions, another independent Scottish voice has been put in place in Europe. Its mobilisation might be a valuable strategic element in an acute constitutional crisis. I suspect this is the reason why the SNP was so keen to be represented in a Committee of Regions.

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As this scenario is based on many speculative assumptions, there can be no doubt that the real battle ground for Scottish self-government remains at home. Here, the Committee of Regions has not yet played a significant role in the 'permanent re-negotiation of the Union' (Paterson 1991). Exaggerating potential political gains in Europe, the Scottish national movement has so far turned a blind eye to the more realistic opportunities in their domestic campaign. Neither Labour's parliamentary amendment, nor the Nationalists' extra-parliamentary action, did challenge the 'sovereign' right of central government to nominate substate representatives. In their squabbling about numbers, party affiliations and the 'elected' status of prospective Scottish local government representatives, it was overlooked that in the course of this European 'regionalisation process' another function was added to the central UK state.

For a movement that has been praised for its concern with popular sovereignty and democratic reform (Paterson 1991), this is somewhat surprising. While it has been said, that, first, the Committee of Regions is not all that important, and second, the Secretary of State didn't use his patronage power in a totally insensitive way, the fact remains that the competence to select members of the Committee of Regions represents the strategic link between autonomous decision-making powers and self-determined participation in supranational decision-making. Thus the UK solution highlights the failure to integrate Scotland as a distinct territorial component in Europe's tentative move towards a system of multi-level governance. In European terms the stateless nation is even denied regional status.

It is for that reason that one would expect the Committee of Regions to be a focus of the Scottish opposition. In fact, the very members picked might play a crucial role in redefining their mandate from below. Enjoying legally sanctioned independence in the performance of their duties, they might choose to consult with and report back to the Scottish people, thereby creating a kind of democratic accountability not envisaged by the UK government. Such a public forum, debating Scotland's relations with the European Union, could probably be linked to the newly established Scottish Senate. And if, by the time of the re-selection of members of the Committee of Regions, Scotland is still ruled by a government intransigent to its demands, then this could be turned into a central issue in the constitutional bargaining process. There is still a whole range of options - from boycott to unofficial elections - that were never really tried in the UK arena because of the high political costs ascribed to them. With respect to the privilege of access filtered by patronage to an advisory European body, non-cooperation is certainly less costly. No doubt, the scope of these additional strategic resources made available by the Committee is fairly limited, but from the

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perspective of a pragmatic self-government movement it is perhaps more useful to direct one's imagination to these considerations, than to wait for the European rescue.

In his Edinburgh 'sovereignty lecture' Neal Ascherson portrayed an anachronistic British state, stumbling over the European principle of 'subsidiarity'. 'When European Union advances, so does regional autonomy', he said. Ascherson's 'law of politics' is wrong. The selection of substate representatives through central government clearly shows the fundamental dilemma of an attempt to enforce the principle of subsidiarity in a top-down rather than a bottom-up approach. There is no European automatism at work that could compensate for substate pressure.

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