

# THE FUTURE OF SUB-NATIONAL GOVERNMENTS IN A SUPRA-NATIONAL WORLD – LESSONS FROM THE EUROPEAN UNION

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*The development of the EU over the last 50 years is not the only revolution to have taken place in Europe. There has also been the emergence of sub-national entities and autonomous regional governments to represent them. These are accommodated in various constitutional arrangements throughout the EU. This paper argues that the development of supra-national governance must be recognised as a structure requiring a different approach from those of the executive dominated structures of international law. This paper examines in particular sub-national governments and their role in the EU and considers the capacity of supra-national structures to incorporate sub-national institutions and interests.*

*Le développement de l'Union Européenne durant ces 50 dernières années n'est pas la seule révolution que l'Europe ait connue.*

*Cette période a également vu l'émergence d'entités infranationales et de gouvernements régionaux autonomes chargés de les représenter, situation qui sur le plan interne, a été transposée dans nombre d'accords constitutionnels intervenus partout en Europe.*

*Cet article tend à démontrer que la mise en place d'un gouvernement supranational européen ne peut se faire qu'au prix d'une approche différente de celle qui prévaut actuellement dans des structures classiques issues du droit international public.*

*Pour étayer sa démonstration, l'auteur étudie en particulier les fonctions remplies par ces gouvernements infranationaux et leur rôle dans l'Union Européenne et il s'interroge sur la capacité des structures supranationales actuelles à pouvoir valablement prendre en compte ces institutions infranationales et leurs aspirations.*

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## ***I INTRODUCTION***

The past half century has been a time of peace and prosperity in Western Europe. To a large extent this unprecedented period of success can be attributed to the vision of those whose work led to the signing of the Treaty of Rome and establishment of the European Community fifty years ago. The impact of this document, in its many amended guises continues to have an impact not only across the European continent as the European Union (EU) expands its membership further east, but also far beyond European shores as international regional organisations attempt to emulate its success.<sup>1</sup>

However, the creation and development of the EU is not the only revolution to have taken place over the past fifty years on the European continent. The past half century has also seen the emergence of sub-national identities and most importantly for this article, autonomous 'regional' governments to represent them. These are accommodated in a number of domestic constitutional arrangements across the EU. From the formal constitutional structures of the German Federal Republic to the de facto federalism of the United Kingdom's devolution arrangements, these entities now exercise extensive autonomy within their constitutional systems. It is not inconceivable that this second constitutional revolution was brought about as a consequence of the first. As the EU created the political atmosphere where non-national identities felt confident in expressing their views, national elites were felt more able to offer such autonomy in the context of a peaceful and prosperous Europe.<sup>2</sup> Whatever, the reasons for Europe's regional revolution, there can be no doubt that the development of the regional tier and that of the EU have implications for each other.

The expansion of the EU has been the focus of much debate in recent months but this article is less concerned with this aspect of the European project. Instead, it is the deepening of the EU and its impact upon national constitutional structures that is its focus. The deepening of the EU has had a profound, and often misunderstood, impact upon the constitutional structures of Member States. Decisions that have traditionally been the stuff of domestic politics have increasingly been subject to the EU decision making process. This has created particular issues for constitutional law as it is currently understood. In particular, it has been clear that the development of regional supra-national entities such as the EU has blurred the traditional distinction between domestic and international matters. The common practice which sees international matters left in the hands of the national executive has become increasingly untenable in the European context. Such an approach has seen an increasing concentration of power at the executive level without the level of domestic scrutiny that would be expected of such decisions had they been taken in a purely domestic context.

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1 R Kirkham and P J Cardwell ""The European Union: A Role Model for Regional Governance?"" (2006) 3 EPL 403-432.

2 See C Harvie *The Rise of Regional Europe* (Routledge, London, 1994).

To some extent the development of the European level without the necessary re-adjustment of traditional constitutional practice has seen the bypassing of domestic constitutional arrangements. This phenomenon should not come as much of a surprise. The European project has remained focussed on the functional approach to integration advocated by its early architects. Although the European Parliament has continued to see its role increase and there have been various limited attempts at increasing the openness of the EU's institutions, these have rarely been the priority for Member States: national executives have been quite happy to enjoy the power that the Europeanisation of decision-making has given them, while focussing on the functional aspects of the European project. The most obvious example of this phenomenon has been the so-called 'democratic deficit' at the heart of the EU. Such a failure to recognise the unique nature of the EU has led to a rise in the power of European executives and a growing sense of disconnection between European citizens and the EU itself. This has been most evident in the recent rejection of the European Constitutional Treaty (ECT) by the voters of France and the Netherlands. This has plunged the EU into a constitutional crisis as it struggles to cope with the realities of an enlarged Union while operating under structures which are essentially variants of traditional international diplomatic models.

The EU, as the most advanced supra-national organisation on the globe has faced these problems first. However, the popularity of regional integration, inspired by the success of the EU model, means that it will not be last to do so. As governance increasingly becomes an international issue, even in the Pacific, the growing pains experienced by the Union will become common to us all. In particular the development of supra-national governance needs to be recognised as a new form of structure which will need a different approach to those of the executive dominated structures of international law. It will, in particular, need to take into the account its impact upon domestic constitutional structures and non-national interests. This article will examine only one of these, namely sub-national governments (in particular the regional tier) and their role in the EU. However, the issues raised by this particular example are relevant to the representation of other non-national interests. Just how capable are supra-national structures of incorporating sub-national institutions and interests?

The experience of Europe's sub-national governments has been mixed. Their original positive approach to the Union has in many cases been replaced with a more sceptical view. Their failure to gain effective access to the European decision making process has led many, particularly in the more powerful regions, to adopt a more defensive approach to the European project. This shift by the regions from an attitude of 'let us in' to one of 'leave us alone' has significant repercussions for the future of the Union as a whole.<sup>3</sup>

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3 I Duchacek *Comparative Federalism: The Territorial Dimension of Politics* (Modern Comparative Politics Series, Holt, Rinehart and Winston, 1970) as paraphrased by C Jeffery ""Regions and the European Union:

## II EUROPE'S REGIONAL REVOLUTION

The development of Western Europe's regional tier has been, in constitutional terms, a recent and remarkably swift phenomenon. In contrast to the situation prior to 1939, the post-war period saw a burgeoning of autonomous regions and varieties of sub-national autonomy in the European continent. Sub-national autonomy and federal forms of government have a chequered past in Europe and in the period between the wars the *Länder* of Austria and Germany, the ill-fated Spanish regions and the Irish Free State were the only examples. None of these were particularly successful and with the exception of Eire, the lights went out on these democratic governments well before they started going out over Europe as a whole.

The reasons for the resurgence in European regionalism are too complex to go into in any detail here. However, a combination of post-war democratisation, the emergence of micro-nationalism and the requirements of economic and social development planning led to the development of a number of sub-national 'regional' governments charged with varying degrees of policy autonomy. Created by a variety of specific national and regional drivers, the resulting regional institutions were very different in their organisation, powers and constitutional status.<sup>4</sup> This was to prove a particular problem in the years to follow.

The initial impetus for the creation of sub-national regions in post-war Europe came from that conflict and the perceptions of its causes. In American eyes in particular, the rise of fascism and Nazism were perceived at least partially as a failure of constitutional design. For this reason, as well as domestic pressures, Germany and Austria were re-created as federal states with the German *Länder* in particular enjoying competences in areas perceived as crucial in entrenching democracy, including policing, education and culture. In Italy too, the regional nature of resistance to the authoritarian regime and the perceived advantages of dividing power between central and regional governments led to a strongly regional post-war Italian constitution. However, in practice, only the constitutionally specified special regions on the Italian periphery were created as the central government re-established itself and successive centre-right governments failed to pass the necessary enabling legislation.<sup>5</sup>

After this initial flurry of regional developments, the impetus towards sub-national autonomy faded until the 1970s. This time the developments were less concerned with entrenching democracy and more concerned with practical issues, first of economic development and later of micro-national identity. The former issues were of more concern in France, Italy and Scandinavia, where political changes and the move towards regional planning in the economic and social fields led to the need

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Letting them in and Leaving them Alone"" Federal Trust Paper available at: <<http://www.fedtrust.org>> (last accessed 1 February 2007).

4 W J Hopkins *Devolution in Context* (Cavendish Publishing, London, 2002).

5 R Leonardo and RY Nanetti ""Devolution as a Political Process: The Case of Italy"" (1981) *Publius* 95-117.

for a regional administrative level. It proved difficult to retain such structures without democratising them, particularly as these economic developments occurred at a time when sub-national identities were becoming stronger.<sup>6</sup>

This unexpected rebellion of sub-national identities gave further impetus to the regionalist movement and led to the establishment of further regional governments in Spain, Portugal, Belgium and finally the United Kingdom (UK). These developments have left Western Europe with a variety of sub-national regional structures, which can broadly be classed as federal, constitutional/legislative and local government regions (see table).<sup>7</sup> After a period when regionalisation of the whole of Europe seemed possible and almost inevitable, it now appears that this maybe the end of the road for the creation of new regional governments in Europe, at least for now. In 2004, the UK government placed a much diluted form of regional government before the voters of North East England. The result was an emphatic rejection of the plans and the shelving of further plans for English devolution. This, coupled with a rejection in Portugal of mainland regions in a national referendum<sup>8</sup> seems to have brought a halt to the creation of regions in the Western Europe. Given the lack of regional structures in the new Member States of the East, the EU is likely to remain partially regionalised at least for the foreseeable future. This combination of the variation between the regional structures and the variable coverage of regionalism has caused significant problems for addressing regional involvement in the European system.

<b>Federal Systems</b>	<b>Constitutional/Legislative Regions</b>	<b>Local Government Regions (examples)</b>
Germany	Spain	France
Austria	Italy	Sweden
Belgium	Scotland, Wales & N Ireland (UK)	Denmark
	Aland (Finland)	Poland
	Açores and Madeira (Port)	

### **III REGIONS AND THE EUROPEAN UNION**

For Europe's regional governments, access to the EU decision making processes has been a perennial cause of discontent. This should come as no surprise as international affairs are

6 See C Foster (ed) *Nations without a State: Ethnic Nationalism in Western Europe* (Praeger, New York, 1980).

7 The concept of a legislative region (which included federal regions) was formally recognised in the European Council's declaration of Laeken, 15 December 2001 and Declaration No 54 of the Treaty of Amsterdam (signed by Germany, Austria and Belgium).

8 A X L Mira "Portugal: The Resistance to Change in the State Model" (1999) 9 *Regional and Federal Studies* 98-105.

consistently a point of conflict in federal systems and their resolution is often crucial to how the system actually works. The basic problem is that policies that are within the domestic powers of a regional (or local) government can be decided or even removed from regional responsibility through international negotiations at which they are unlikely to have a formal role. International law is traditionally perceived as the game of states and political entities that do not have nation-state credentials have no place at the international table. There are exceptions to this rule, but they are few and their acceptance in the international arena has been problematic. This phenomenon is well documented in federal literature and need not be discussed in detail here, however in a regional supra-national structure such as the EU, the problem takes on a new dimension.<sup>9</sup>

The powers and competencies of the EU are far greater than any other supra-national entity and reach deep into the domestic legal systems of its member states. For sub-national political entities EU decisions have a direct impact upon their areas of autonomy and the areas in which the EU is most active are often those which lie in areas of regional competence. For example, agriculture, environment and economic development are just three areas in which most regions have significant powers yet the EU is the dominant player in policy making. The problem for the regions is that European decision making remains primarily a European and Member State activity. The Council, the main decision making body of the Union, comprises national representatives while in relation to the Commission and the European Parliament regional governments are reduced to the status of just another lobby group.

The development of this phenomenon is common to all sub-national units, although the legal impact is greater when one considers the constitutionally-protected or legislative regions. In these cases the constitutionally-entrenched powers of the sub-national tier can in effect be subverted by the transfer of powers to the EU, without the regions either being involved in the transfer or the subsequent collective European policy decisions.

The German *Länder*, as the oldest regional governments in the EU, were well aware of the consequences of European competences being exercised in their fields of autonomy and coined the term "the open flank" to describe them. However, despite the recognition of the problem their attempts to resolve it were largely unsuccessful, aside from a few voluntary agreements entered into by the *Bund* to provide information.<sup>10</sup>

The problems experienced by the German *Länder* are common to all sub-national governments who increasingly saw their powers being limited by European Union decision making. For

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9 See for example, W J Hopkins "Foreign Relations of Sub-National Units" in R Blindenbacher and A Koller (eds) *Federalism in a Changing World* (International Conference on Federalism, St Gallen (Switzerland), 2003) 149-158.

10 C Jeffrey "The Länder strike back: Structures and procedures of European integration policy making in the German federal system" (Leicester University Discussion Papers in Federal Studies F/S 94/2, Leicester, 1994).

legislative regions in particular the deepening of the EU's role made dealing with this issue a priority. The question was how to respond? Should they argue to be "left alone" or for the European decision making process to "let them in"? The growth of a tier of European regions certainly gave opportunities for the latter approach in the 1990s.

#### **IV CLOSING THE OPEN FLANK - THE SINGLE EUROPEAN ACT**

The Single European Act of 1986 gave Europe's regional tier, and in particular the German *Länder* their first opportunity to flex their muscles on the European stage. The Single European Act (the SEA), despite its name, was actually a set of amendments to the EC Treaties designed to speed up the creation of the Single European market. The novelty of regions in most European countries meant that the German *Länder* were the only ones capable of exerting meaningful pressure in relation to the SEA. This was aided by the fact that the nature of these changes demanded that they be passed through the German *Bundesrat*, the upper house of the German Parliament.<sup>11</sup> This chamber includes the executives of the *Länder* and the requirement gave the German regions a rare chance to force the federation to listen to their demands.

However even the German *Länder* were late in realising their potential influence in the process. This meant that their campaign was focussed only on the threat of a veto of the SEA in the *Bundesrat* rather than influencing the nature of the SEA itself. There was also the problem that the *Länder*, despite their protestations, were generally supportive of the SEA and had traditionally been pro-European in their policies. In effect they wanted to be "let in" but their only card was to threaten to derail the European project.

The campaign itself focussed on the fact that European decision-making was not international in the traditional sense but was in fact a form of domestic law. As such, like other areas of domestic decision making, there should be regional involvement. The result of the standoff was a package of measures which gave the German *Länder* greater involvement in developing the *Bund's* negotiating position and a limited presence on a number of German European delegations. In particular, the post of *Länder* Observer on the Council of Ministers was given formal status, *Länder* Civil Servants were given positions on various Comitology Committees and the *Bund* gave a commitment to accept agreed *Länder* positions as German positions on certain matters in the Council of Ministers.

These measures proved far less effective than the *Länder* had hoped, primarily as the *Länder's* nationally focus campaign could only deliver changes at the national level. In particular, the *Bund's* agreement to accept *Länder* positions in particular areas of competence proved difficult to implement in practice as unanimous agreement between the regions proved impossible within the tight timeframes of European negotiation. More generally, the problem was that the aspirations for input into the European decision making process of the various German regional governments could

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<sup>11</sup> Legislation which affects the powers of the *Länder* and constitutional amendments must pass through this chamber.

not be fitted within the national framework. Effective delivery of a "let us in" EU strategy would need to be achieved at the European level itself.

#### **V THE RISE OF THE THIRD LEVEL – THE TREATY ON EUROPEAN UNION**

Although the SEA episode did deliver some important concessions for the German *Länder* it was very much the warm up act for the main event at Maastricht six years later. It was in the run up to the signing of the Maastricht Treaty on EU in 1992 that Europe's regions now styling themselves as Europe's 'third level' of government really emerged as a significant force. Learning from the efforts of the German *Länder* in 1986, Europe's regions now began their efforts much earlier. Again the German regional governments took the lead but this time they had willing and able allies. Together, the regional tier used the nature of the TEU and its drawn out negotiation to press for concessions in the Treaty itself.

The key to the campaign were the so called 'ten Munich theses' which had emerged from the Conference on European Minister-Presidents, a German inspired group of regional government executives which met regularly during the negotiation process.<sup>12</sup> These received the blessing of several pan-European organisations, including the Association of European Regions and were eventually boiled down to four regional demands that were portrayed as the price for regional support for any Treaty.<sup>13</sup>

Key to these was the establishment of a EU institution that would represent the interests of the Europe's regions. This in the eyes of the *Länder* would be the embryonic beginnings of a European senate to represent the 'third level' of European government beneath that of the Union/Community and the Member States.<sup>14</sup>

In addition to the regional institution, Europe's regions demanded a subsidiarity clause which would recognise that powers should only be transferred to higher levels of government such as the EU, when smaller units of government were unable to deliver the desired policy outcomes.<sup>15</sup> They also desired direct access to European Court of Justice, (as accorded to Member States) or failing that, through the collective Regional Institution, particularly to defend the subsidiarity clause. Their final demand was an amendment to the Treaty of Rome to allow regional ministers to sit as official

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12 Jeffery, above n 10.

13 Jeffery, above n 10.

14 "The long-term goal remains the further development of the Committee of the Regions into a "third chamber", alongside the European Parliament and the Council of Ministers...", Erwin Teufel, Minister-President of Baden-Württemberg *Institutional Reform* (Committee of the Regions, Brussels, 1995).

15 The concept of subsidiarity is highly contested. The fact that both Pope Pius XI and the anarchist writer Prudhomme were able to agree on the concept perhaps gives some indication of its nebulous nature. The European Commission actually offered offered a prize in 1992 for a satisfactory definition, but it was never awarded.



members of national delegations at the Council of Ministers when Member States deemed this appropriate.<sup>16</sup>

In the negotiations that followed the regions managed to achieve three of their four demands, at least in some form, with only direct access to the ECJ proving too much for the Member States to accept. This was achieved both by the operation of the pan-European alliance encouraged by the German *Länder* but perhaps more so by the specific veto powers held by the German regions and their Belgian allies and the presence of regional members on the national delegations of these two Member States. In fact both the Subsidiarity clause and the formal involvement of regions in the Council were adopted after Belgian initiatives.<sup>17</sup>

On the basis of this success it appeared that the "Third Level" was indeed a reality and it was not long before academics had coined the term a "Europe of the Regions" to describe the phenomenon of the rising pan-European regional tier.<sup>18</sup> There was even the suggestion among the more extreme proponents of the thesis that the regions could even replace the Member States as the sub-European building blocks of the EU.<sup>19</sup> Such claims were never made by most of the regional governments and the *Länder* notably shied away from such comments. Nevertheless the creation of a true Third Level appeared to be at least a possibility in the brave new world of the EU.

## **VI THE FALL OF THE THIRD LEVEL**

History has proven such predictions to be inaccurate. Far from being the beginnings of a "Europe of the Regions", the success that the regional governments achieved in securing concessions from the Treaty on EU was to prove the high water mark of this particular idea.<sup>20</sup>

The fall of the Third Level and the whole Europe of the Regions idea was swift and occurred primarily because those who had championed it soon became disillusioned with the reality of what they had achieved. The catalyst for the demise of the regional idea was the failure of the Committee of the Regions (CoR).

In part this was due to the weak nature of the Committee which was far removed from the European Senate imagined by the German *Länder*. The CoR was consultative only and although its

16 Prior to the TEU the Council of Ministers could only comprise national Ministers, even though in some states (notably Belgium) the national level had no responsibilities (and thus no expertise or authority) in the areas under discussion.

17 See Jeffery, above n 10.

18 The exact genesis of this phrase is open to some debate, although certainly, with Gary Marks sometimes given credit for the concept, however, his concept of "Multi-Level Governance" is slightly different.

19 K Ohmae *The End of the Nation-State: The Rise of Regional Economies* (The Free Press, New York, 1995).

20 C Jeffery "Farewell the Third Level? The German Länder in the European Policy Process" (1996) *Regional and Federal Studies* 6.

opinion was required in a number of key European policy areas, such opinions could be ignored without any reference to them by the Commission and the Council. The influence of the Committee would depend only upon the quality of its decisions. In the event the quality of the opinions proved to be poor and overly generalist, failing to give the detailed comments that might have given the committee a degree of respect.

The reasons for this can be traced back to the creation of the regional tier itself and exposed the fact that far from being a coherent 'Third Level' the regions of the EU remained trapped in their national contexts. The harsh truth for more powerful regions in particular was that, despite their encouragement, all regions in the EU were not equal. They have a variety of powers and responsibilities and continue to operate primarily within a national context. This reality came into sharp focus during the early days of the Committee of the Regions.

Although the 'Europe of the Regions' thesis focussed on the powerful German, Belgian and Spanish regions, in doing so it glossed over the fact that regions in other parts of the EU perform a far less important constitutional role. Indeed, in a number of countries, notably the UK (prior to 1999) there were no regional governments at all. The various sub-national structures of the European Member States and the jealousy of the national executives also led to the Committee's members being appointed according to nationally agreed processes. The extent to which the national delegations actually comprised regional representatives was thus in the hands of the national governments. In practice, only those regional governments with sufficient national political or constitutional power were able to ensure their presence on the committee. The result was a committee with a huge variety of local, regional and national representatives. The idea that a Minister-President of Bavaria could talk meaningfully with a local councillor from the UK was farcical and there was soon a major split in the committee. On the one hand there were those who perceived the Committee as a technical body, charged with delivering opinions on the practical impacts of delivering proposed EU policies and on the other hand those who regarded it as having a policy advisory role. The latter view was held by the more powerful, legislative regions who performed such a policy role in their domestic systems while the local government representatives whose role was far more one of policy delivery favoured a much more technical approach.

Compounding the problem of the local/regional divide was the tendency of the Committee to split on geographical grounds between southern and northern representatives. This was further exacerbated by the practice of some delegations, particularly in the south, to see themselves as national delegations rather than representing individual regions or regional interests. As a result of all these factors, the opinions of the Committee were often poorly considered and added little to the decision making process of the Union. In almost all cases they were ignored. With the Committee proving a huge disappointment (along with some of their recent regional allies) the powerful regions and the *Länder* in particular, abandoned the "Europe of the Regions" idea and instead retreated into a nationally focussed approach to EU policy.

The consequences of this were clearly visible in 1997 when the next phase of the EU's development culminated with the Treaty of Amsterdam. In contrast with the regional influence at Maastricht, Amsterdam was notable largely for its absence. Little, if any, regional influence was discernable in the Treaty itself, despite the regional governments and particularly the Committee of the Regions presenting various demands to the Member States. The reasons for this were that the powerful regions had abandoned the idea of a "Third Level" of government in the EU, and had instead began to focus their efforts on gaining domestic influence on European policies through the medium of the national government.

In doing so they no longer backed the demands of the regional tier as a whole, leaving the Committee of the Regions and the "Europe of the Regions" as something of a busted flush, lacking any leverage over the Member-States.

## ***VI THE EUROPEAN CONVENTION AND THE EUROPEAN CONSTITUTIONAL TREATY***

The failure of the Regional tier to influence the negotiations at Amsterdam heralded the end of the Europe of the Regions idea but not the role of the regions in the EU. As has already been noted, Europe's regional governments had little choice but to continue their efforts to influence policy at the European level, such was the role of the EU in their affairs. However, the post-Maastricht experiences of the regions did convince them of the need to change strategy. Instead of presenting themselves as a pan-European Third Level of government in the EU, or even an alternative to the Member State, the stronger regions now recognised that they had greater influence through influencing their respective Member States' governments. They also began to at least partially retreat from a "let us in" approach to European policy and began to approach the Union with more emphasis on a "leave us alone" approach. This was to prove important in the next phase of the regions' interaction with the Union.

This strategy, coupled with the development of a selective grouping of powerful 'legislative' regions was to reap significant rewards for some regions at the European Convention and the subsequent European Constitutional Treaty.

## ***VII THE RISE OF THE LEGISLATIVE REGIONS***

In 2000 a group of legislative regions agreed to a Common Position in advance of the negotiations for the Nice Treaty.<sup>21</sup> In the event the Barcelona declaration came to nothing, largely because the minimal amendments agreed at Nice left the difficult constitutional questions raised by

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21 The signatories were; Catalonia, Euskadi, Lower Austria, Upper Austria, Salzburg, Steiermark, Vienna, Baden-Württemberg, Bayern, Brandenburg, Bremen, Burgenland, Hamburg, Hessen, Mecklenburg-Vorpommern, Lower Saxony, Rheinland-Pfalz, Saarland, Thüringen, the German-speaking Community, the French-speaking Community, the Walloon Region, the Brussels Capital Region and Flanders. See <<http://www.regleg.org>> (last accessed 1 February 2007).

enlargement to a European Constitutional Convention. Nevertheless, the Barcelona declaration did signal a re-engagement by Europe's stronger regions with gaining access to the European decision making process directly. It also gave a clear indication of the increasing scepticism shown by the regional tier:<sup>22</sup>

We take a keen interest in this Conference, and watch with a wary eye the development of the negotiations.

In 2001 the governments of a group of legislative regions, some of whom had signed the earlier Barcelona document, signed the Flanders Declaration.<sup>23</sup> This document again stating the desire of legislative regions to enter the debate on EU constitutional change, laid down a series of practical demands and issues that they believed needed to be addressed in any future constitutional reform of the EU. Most notable amongst these was a demand for clearer recognition of the concept of subsidiarity within the EC Treaty, explicit recognition of the place of the legislative regions within a subsidiarity framework and access to the ECJ for the legislative regions to enforce such a principle.<sup>24</sup>

The Flanders declaration received widespread support from regions far beyond the original seven signatories. In the wake of its signature and building on commitments in the Barcelona Convention, the Conference of European Regions with Legislative Powers (REGLEG) was established in November 2001. Its aims were consistent with the demands of the earlier declarations and were focussed, in particular on the European Convention process:<sup>25</sup>

The aim of REGLEG is to strive for an enhanced role of those regions in the European Union. This means an increased political and legal status of the regions with legislative powers in all domains of EU-governance (legislative, executive and judicial power), according to their competences and responsibilities. This implies inter alia an enhanced role in the Council, a better involvement of the regional Parliaments and the right to bring an action before the European Court of Justice so as to preserve their prerogatives.

This organisation claims 73<sup>26</sup> members representing 46% of the EU population and most importantly includes a number of regions with the ability to influence the ratification process in their

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22 Committee of the Regions "'Common Position Paper of the Constitutional Regions Regarding The IGC"' (Barcelona, 2000) Introduction.

23 Political declaration by the constitutional regions of Bavaria, Catalonia, North Rhine-Westphalia, Salzburg, Scotland, Wallonia and Flanders, 28 May 2001.

24 Political declaration, above n 23.

25 Taken from the REGLEG statement of purpose, see <<http://www.regleg.org>> (last accessed 1 February 2007).

26 It is not altogether clear, however, how many are active in their membership.

domestic systems, either through constitutional means<sup>27</sup> or political ones.<sup>28</sup> This re-emergence of a co-ordinated regional approach is significantly different from the "Europe of the Regions" idea that emerged so briefly in the early 1990s. There is no argument for a pan-European approach anymore: instead the demands are focussed specifically on the members of REGLEG. The regional front of 1992 has disintegrated, to be replaced by a partial third level.

This more concentrated approach of the legislative regions delivered significant gains in the Constitutional Treaty for the regional tier in contrast to their failure at Amsterdam.

A number were achieved primarily at the instigation of the REGLEGs. These built upon those achieved at Maastricht, including the acceptability of a regional presence on the Council being explicitly confirmed.<sup>29</sup> More importantly, the Constitutional Treaty now included an expanded concept of subsidiarity which explicitly included reference to the regional levels.<sup>30</sup> In addition to this, the regions finally achieved their long cherished aim of securing the right to gain access to the European Court of Justice, albeit through the collective institution of the Committee of the Regions.<sup>31</sup>

In tandem with these major gains a series of minor and more symbolic regionalist demands were also conceded, including the recognition of cultural and linguistic diversity within the EU as a core value, recognition of regional and local governments as 'fundamental structures' expressing an identity which the Union must respect and finally the recognition of the principle of territorial cohesion.<sup>32</sup>

However, perhaps the most interesting demands that the regions were able to achieve were those met in conjunction with Member States. There were three in particular that deserve noting here. Firstly the Treaty included an Early Warning System for Member State Parliaments, including regional ones. Secondly, in what was a crucial point for most regions there was increased clarity of

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27 As in the Belgium and Germany, for example.

28 Such as in Spain when the national government is relying on micro-nationalist parties for support.

29 There had been a call for art 203EC to be amended in a way which would have excluded the presence of the regional Ministers from the Council thus making this issue a surprise priority for the regions.

30 European Constitutional Treaty, art I-9, Preamble Part II and Protocol no 2 (on Subsidiarity and Proportionality) [ECT].

31 Although the REGLEG group wished to have an individual right to take cases before the ECJ, this proved a concession to far. In any event many of the stronger regions agreements are in place with the Member-State governments which allow access for the regions through a national proxy.

32 See ECT, arts I-3 and I-5.

EU competences, in an attempt to stop Euro-creep into regional autonomy.<sup>33</sup> And finally, the German regions in particular succeeded in their aim of keeping the Treaty as a single document rather than allowing it to be divided into separate documents. This was crucial to their future strategy of retaining influence on the development of the EU. Breaking the Treaty into sections may have allowed some parts to be amended without reference the *Bundesrat* in Germany or equivalent regional approval processes in Belgium.<sup>34</sup> This would have seriously reduced the ability of the regions to leverage any more concessions from future Treaty negotiations.

These latter concessions, which appear to have been the crucial demands for the REGLEGs, expose a changing attitude by the regional tier towards the EU. These demands seem far less positive towards the EU than the aims expressed in 1992 and would be closer to the attitude of "leave us alone" mentioned by Jeffrey rather than the "let us in" aims so prominent in 1992.

### **VIII THE FUTURE OF SUB-NATIONAL GOVERNMENTS IN THE EU**

That the REGLEG group were able to influence the future direction of the EU is undeniable. However, the limited concessions they were able to gain appear to have come almost entirely as a result of individual regions or groups exerting pressure on individual Member-State governments. The success of this strategy can be contrasted with the failure of a more collective approach. In contrast to the REGLEG group who acted individually although (with RELGLEG as a co-ordinator), the Committee of the Regions representatives were almost completely ineffective.<sup>35</sup> This has created a strange dichotomy. The concessions won by the regions were achieved by stronger regions using their powers in a national context, but the concessions themselves are often collective and pan-European in nature (most notably an increased role for the Committee of the Regions). The stronger regions are therefore faced with the choice of continuing with their successful domestic agendas, or attempting to re-invigorate the Europe of the Regions idea and work collectively at the European level. In practice they are likely to do both.

The success of the European regions when they have targeted their efforts against their Member States exposes a simple truth. The EU remains a Member State club run on a variation of traditional international law lines. The ability of sub-national units to involve themselves in the European decision-making process remains linked to the domestic constitutional structures. Despite the supra-national credentials of the EU, the failure of the Committee of the Regions in the post-Maastricht era confirmed that, for now at least, European governance remains national in focus.

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33 M Bauer "The German *Länder* and the European Constitutional Treaty: Heading for a Differentiated Theory of Regional Elite Preferences for European Integration" (2006) 16(1) *Regional and Federal Studies* 21-41.

34 Bauer, above n 33.

35 A K Bourne (2006) 16(1) "Bringing Europe Closer to the Citizen? Regions, Stateless Nations and the European Convention" *Regional and Federal Studies* 1-20.

This obviously continues to present a problem for the sub-national governments as they attempt to have their voices heard in the European policy process, but it also creates a problem for the EU. The change of tactics employed by European regions in the post Maastricht era has been matched by an increased scepticism toward the EU as a whole. This is understandable. If regional governments' strength remains domestic in nature then they are unlikely to support transfers of power to the European level, where their influence continues to be so weak.

The Constitutional Treaty concessions offer a chance to change this and re-engage the stronger regions with the European project and its failure has serious repercussion in this area. Given the political difficulties in implementing the Treaty (and that it is likely that only aspects of it will be implemented) it is questionable whether the regions will be able to exert sufficient influence to ensure their gains are achieved.

The regions would then be left with the current situation where those with domestic constitutional or political leverage are able to influence the EU through their Member States and those lacking such abilities will not. Instead of Europe's regions engaging in the European policy process and thus potentially adopting a pro-Europe stance, their failure to achieve access will leave them further inclined to adopt the defensive "leave us alone" approach. The EU would then have to accommodate another group of sceptics in the European policy firmament, something the Union, as a sensitive time, could really do without.

The lessons of this tale for the EU and beyond are simple and obvious in retrospect. The drive for international regionalism although driven by laudable functionalist goals must never lose sight of the constitutional nature of the enterprise. Supra-national institutions are different from anything international or domestic law has seen before. Their impact upon domestic law and domestic institutions is far greater than that of any traditional international organisation. Their success therefore requires greater involvement of non-state actors, traditionally seen as outside the international policy process. Domestic arrangements will never suffice in achieving this and change must come within the organisations themselves. Whether Member State governments will be able to accept this and give up their traditional monopoly of influence at the international level remains to be seen, but if they do not, the growth of scepticism amongst sub-state actors will grow. In a state-centric world order, supra-national entities are a fragile concept and if they are to succeed they will need all the support they can get. In the end, failure to involve sub-national actors in the supra-national process will thus prove detrimental not only to the regions but also to the supra-national institutions and the Member States themselves.

