

*Regions and European Union Governance :
Lessons from Scotland?*

Inaugural Lecture

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1. General

My topic today is the role of the region in EU governance, and lessons that can be learned from Scotland's experience in this. There are therefore two components to the talk. One is the arrangements for EU governance - arrangements which are currently under review as a result of the Draft Constitutional Treaty that was produced by the Future of Europe Convention last July. The second component is Scotland's relatively new governance arrangements, and how these arrangements are implicated in the issues that were being considered by the Future of Europe Convention. That is, the extent to which there is a European dimension to Scotland's governance, where that dimension comes in to Scotland's governance, and how Scotland's governance might respond to the proposals made by that Convention – proposals that are almost certain to be included in a new EU constitutional treaty.

When I come to discuss the views of Europe from Scotland, I will not be making any hard proposals as to how to address the problems I will outline in the lecture. That really is properly the job of politicians. Rather, what I hope to have done is to set out the terms of a EU legitimacy problem that I consider is in part attributable to defects in the regional dimension to EU governance and why in my view Scotland's governance – in itself but more importantly along with both UK and EU levels of governance – has a key part to play in the resolution of that deficit.

Many of thoughts and ideas that I will include in the “lessons from Scotland” part of this lecture have been formed in the context of a joint research project that I have been involved in over the past 3 years, along with Simon Bulmer, Caitriona Carter, Martin Burch, Tricia Hogwood and Ricardo Gomez. Such has been the length and depth of our collaboration that I find it difficult to remember who said what when. So they are all implicated in that segment!

2. Introduction

I want to start by making clear how I intend to make the link between Scotland, the Draft Constitutional Treaty presently under discussion, and the governance of the European Union.

One of the key issues that the Future of Europe Convention was asked to consider in coming forward with proposals for the reform to EU governance was, and I quote its mandate,

“...how to bring citizens closer to the European design and European Institutions.”

Now why was it so charged? What was the problem which this “bringing closer” was expected to resolve?

The widely perceived problem was that EU governance was suffering from a legitimacy deficit – indeed there was a legitimacy crisis in EU governance. I'll define this a bit more closely in a minute, but the general sense of what is meant is that, for one reason or another, the peoples of the EU had lost confidence in, and/or had become disengaged from, the EU as a form of governance over their lives. This was more than simply resentment at the content of particular policies where the EU level had competence to

pass binding law – for instance farm policy or fisheries policy – though that was an element in it as well. But it went much deeper than this, and surrounded fundamental questions of the underlying moral authority – the justness – the appropriateness – by which the EU had claim to govern us over an increasingly wide range of policies that previously were national or even regional competences. And it reflected a loss of contact between us – the people being governed – and them, the governors. To quote John Palmer

“Whatever the balance between ‘good news-bad news’, it is clear that the European Union really is now at a crucial turning point. This is about more than the details of existing or future policies. It is ultimately about whether the political commitment exists to allow the Union to function effectively and which actively encourages a political culture that can provide it with demonstrable democratic legitimacy. Failing that, it is very difficult to see how the European Union can achieve the (ambitious) goals already set for it by the Member States.”

Now it is clear that for some groups in all member states these doubts had always been there – the Euro-skeptics in the UK for instance; the Gaullists in France, and so on. But during the 1990s this sense of lack of legitimacy in EU governance spread much more widely, and was manifest in a number of different ways. Turnouts at elections to the European Parliament – already low – fell even further: severe difficulties were experienced in persuading the publics or the parliaments of hitherto ardent supporters of the EU to ratify new EU treaties which gave more competences to the EU such as the Maastricht Treaty, and even much more modest revisions to EU governance such as those contained in the Treaty of Amsterdam and the Treaty of Nice. Even the role of the European Court of Justice came under closer scrutiny and a feeling emerged that it was found wanting in terms of the “legitimacy” of its actions.

During the 1990s many articles were written by academics trying both to explain the underlying reasons for the emergence of this legitimacy deficit or crisis, and proposing ways that it might be addressed. For example Joseph Weiler suggested – in effect – that by the end of the 1980s the European Union had achieved more or less what it had set out to achieve, and had therefore simply run out of steam. The post-war “ideals” of peace, prosperity, and constraining the excesses of nationalism upon which the project had been founded had, for the most part, been achieved. Some authors even suggested that the onset of the legitimacy crisis of EU governance began with the ending of the Cold War – the external threat to Western European peace and security was over, and European integration had served its purpose. In these accounts the peoples of the EU simply saw no compelling reason for moving the integration project any further. It could rest where it lay. Maastricht was, as Mrs Thatcher said, “...a treaty too far”. There was no longer an appetite – if ever there truly had been – for moving forward to try and create a United States of Europe.

For others, the problem wasn’t in a lack of will on the part of the EU peoples to keep going, rather the problem lay in the way the EU was governed. Improve its governance by making it more democratic, by making it more transparent, by making its laws and procedures more understandable, by setting out clearly just what this thing called the EU was about, by preventing the slowest ship dictating the speed at which the convoy moved – do all this and the peoples of the EU will once again rally to the cause and the project could continue.

Be clear, I am not saying that the EU has, or has had, a democratic deficit. In my mind, much of the debate about the “democratic deficit” of the EU is simply mis-specifying the problem. Indeed, the usual answer as to how to close this democratic deficit – by increasing the powers of the EU – is likely instead to deepen what I will describe as the legitimacy deficit or the legitimacy crisis.

It was to try and produce proposals that might begin to alleviate these concerns reflected in Palmer’s comment that became one of the aims of the Future of Europe Convention.

(a) Legitimacy

But let me set out what I mean by legitimacy – at least in the context of governance. This is a subject about which Joseph Weiler has written at length.

A policy – a law – is said to have legitimacy in the formal sense provided that the arrangements whereby the policy was enacted conformed to the proper constitutional or legal procedures, and provided the content of that measure does not violate any fundamental rights that are formally constituted. And we can safely assert, I think, that all policies enacted in the UK or indeed the EU command formal legitimacy. The proper rules and procedures are followed, and those who enact the measures have the requisite authority to do so.

However, such a policy or law may nonetheless be deficient in social, or what we might call political, legitimacy. That is to say, notwithstanding the legality of the law enacted, it may nonetheless be resented because either the law itself, or the procedures used to enact the law (including who – what legislature – did the enacting) may violate some more profound values held by society. Is the law itself fair? Do the procedures under which the law was enacted conform to our deeper sense of just and proper process? And if the answer to these questions is “no”, then regardless of the formal legitimacy that a policy or law may command, it will nonetheless lack social legitimacy. A legitimacy ‘deficit’ so created will fuel popular and political opposition to the measure, and, quite possibly, to the government(s) which enacted it.

We all recall the poll tax. That is an excellent example where a law properly enacted lacked social legitimacy as to many people it appeared to be ‘unjust’ because it was, in effect, a regressive tax which disproportionately penalized the poorer sectors of society. Similarly, a measure may lack social legitimacy if there is a sense in which it was imposed by procedures or institutions that were perceived to be defective in some democratic sense – even though these procedures or institutions were formally valid. And this argument may operate in reverse. That is, even what is to the majority an unpopular law or policy may acquire a social form of legitimacy if its enactment follows widely accepted as ‘proper’ or ‘appropriate’ democratic procedures, or corresponds to underlying norms of what is permissible on the part of a government within a democratic system.

My argument is that what commentators were detecting increasingly during the 1990s was a growing sense that EU governance lacked legitimacy in this social aspect. No one has seriously claimed that EU governance is illegal or that in making law it is violating the international treaties from which its competence to govern is derived. It is, unquestionably, formally valid in what it does, and in how it does it. But what we do often hear, are comments about the appropriateness both of that governance itself, and of the policies it produces.

(b) Constitutional and Europeanisation aspects to the Legitimacy Crisis

In fact, there are two distinct elements to the deficit in social legitimacy which I suggest is presently afflicting the EU. The first is deficit rooted in constitutional considerations concerning the sovereignty of the member states, and the effect of EU membership on state sovereignty. The second is a deficit rooted in the Europeanisation aspect of the EU, and this addresses what the EU does – the policies over which it has competence to legislate, and the procedures that it follows in discharging its legislative activity.

I will have little to say on the Constitutional dimension to that crisis tonight. But it revolves around comments such as:

- EU laws are enforced by an all-powerful ECJ which is the final arbiter where disputes arise. Judgments of that court bind member states, who have no right of appeal, and take precedence over judgments of all national courts, including national supreme courts: the EU has undermined the principle of national sovereignty;
- This EU is becoming a super-state and in so doing is destroying my sense of national identity and encroaching on my ability to be a national of country X.

Instead I will focus on the Europeanisation dimension to this legitimacy crisis – as this is to my mind the agenda that the Convention set itself, and to which its proposals are addressed. By the Europeanisation element, I am thinking about responses to the type of comments one frequently hears:

- The EU level of governance is acquiring ever more legislative power and passing more and more laws that are simply not justified; it is meddling in things it shouldn't;
- Because the EU level of governance is extending its reach into policy areas which were previously under the authority of regional governments in member states, government is increasingly being taken away from the people and giving it to a remote place called Brussels;
- Because EU legislation increasingly is being enacted by QMV in the Council and by co-decision in the European Parliament, the nation state is progressively losing control of the laws that govern its citizens and corporations and of its ability to defend their interests;
- The citizen is simply unable to engage with this remote EU governance process which is controlling an ever greater part of our lives: the European Parliament is a poor substitute and so offers little comfort in this regard.

But as will become clear in due course, the proposals made by the Convention in this regard will not in and of themselves close the social legitimacy deficit I have suggested characterizes the EU. Rather, the proposals merely *provide us with the opportunity* to address the Europeanisation aspect of the EU's legitimacy deficit.

3. Deriving Legitimacy at the Three Levels of EU Governance

EU governance does not exist as a single – Brussels – level. It is, as we say, a system of multi-tiered governance which involves a supranational, national, and sub-national component. It is therefore better described as an interlocking governance system comprising three levels, with each level playing a part in overall EU governance.

Therefore when we are considering the source – the cause – of the Europeanisation legitimacy deficit of that governance, we might want to consider it as primarily residing within one or more of these three levels, or we might want to locate it as being a product of the interaction between these three interlocking elements in the overall system.

In the Europeanisation element of the legitimacy debate, I have already stated that I do not consider the EU defective in legitimacy as a formal matter. Rather, the deficit arises principally in the social aspect to the legitimacy of EU governance.

I will go further in stipulating my argument. While I do think there are legitimacy problems at the EU level of governance, and I'll mention that in a moment, my strong conviction is that the crisis of social legitimacy which has overtaken the EU is rooted *principally* – though by no means exclusively – in the interaction between the three governance elements – supranational, national, and regional. This suggests to me, and it is a theme I will pursue, that the overall complexion of that crisis can be tackled by reforms *both within and between* any two – or indeed all three – of these levels of EU governance.

Let me set out this EU system of governance and try and give some substance to these statements.

(a) Supranational

Self-evidently the legitimacy of EU governance has much to do with the arrangements for and organization of the passing of laws at the *supranational* EU level. Here the focus falls on the EU policy process itself, and the role of the principals in that – the European Commission as the ‘proposer’ of EU legislative measures, and the Council of Ministers and the European Parliament as co-legislatures. And these arrangements arguably are a source of the legitimacy deficit;

An example I borrow from Weiler should make this point clearer. The legislative powers of the European Parliament have been extended considerably over the past two decades to the extent that it has an almost equal status as the Council of Ministers in the legislative process at the EU level. To many, this is applauded as the members of that Parliament are directly elected by the peoples of the EU, and so have a clear democratic mandate to govern, to make laws, which it does by a simple majority of those members present at the vote. But, despite the obvious appeal of this in straightforward democratic terms, we cannot deny that many citizens may resent this power being given to the EP in that although it increases their voice as citizens of the EU, it greatly weakens their voice as citizens of a member state.

Precisely the same argument applies to the extension of the qualified majority voting (QMV) rule in the principal legislative arm of the EU – the Council of Ministers. Many welcome the fact that a national veto *cannot* be used to block EU legislative proposals over an ever-wider range of EU policy competences. Not only does QMV ‘oil the wheels’ of the EU governance system; it also appeals to the *idealized* view that the supportive majority of member states should not be held back by a recalcitrant few. But again, this may well be regarded as undermining the legitimacy of the results of such governance in some member states.

The underlying problem with the EU legislative procedures from the perspective I am offering here is that while as citizens of a nation state we *do* accept the *idealized* view of majority rule from within the nation state, we may *not* extend this acceptance to majority rule from without the nation state – from the EU governance level. As national citizens we accept both the principle and the practice of ‘majority rule’ on the basis that our electoral process works in such a way as to ensure that we will all have a chance to be in the majority at some stage, and therefore in the position to rule. We are content to wait our turn in the democratic cycle. We also accept the majority-rule because, despite being in the minority, the elected government of the day will govern in the interests of all its citizens and will be *accountable* to all its citizens for its actions through the institution of the parliament. If we ‘lose’ from a particular policy of this government then nonetheless we expect this government to look after us. That is, if you like, the implicit (social) contract that has evolved since the founding of the modern nation-state in the 17th Century – and of course precisely such aspects of this contract were vital self-constitutive elements in the creation and viability of the nation state.

I would suggest that this implicit contract does not have any correspondence at the EU governance level, and this may contribute to the social element in the legitimacy deficit of the EU, and of EU governance. To bring matters closer to home – to what extent is the EU level of governance able to compensate the fishing communities of Scotland who stand to lose because of EU-level decisions? After all as a consequence of the preservation of maritime stocks being an exclusive competence of the EU, it is this level of governance at which the ‘pain’ is inflicted, but equally it is this level of governance that no substantive capacity exists to offer compensatory support. I would suggest because they are not so able, greatly weakens the social legitimacy of their actions.

This is not a matter to welcome or to resent. It is simply a reflection of the fact that for over 350 years the governments of the European nation states had been engaged – successfully in the main – in a process of ‘nation-building’. A process that had at its central aim creating a common sense of ‘belonging’ and ‘identity’ between the multiple ethnic, cultural, and linguistic communities which lived within this spatial area called the ‘nation state’. The European nation state is, therefore regarded – in Benedict Anderson’s rightly applauded phrase – as an *imagined* community. The nation states of the EU are not co-terminus with nations: in Europe there are nations without states – and for the most part the states comprise multiple nations. This process of nation-building has had many elements, although one key feature has been to foster a common sense of nation-hood by first defining and then excluding ‘the other’, ‘the outsider’ from membership of that community – a process that continues to this day. And the ‘other’ will be other nationals. So the idea of democratic processes at the level of the EU – which self-evidently involves ‘outsiders’ or ‘others’ in this nation state sense – that can readily imitate democratic processes at the level of the nation state is, I would contend, a problematic one. There are therefore good reasons for doubting that EU governance legitimacy at the level of EU government can be enhanced by applying at that level the same rules, and implicit normative propositions, under which national democracies operate.

(b) National

At the national level, the legitimacy of EU governance question clearly arises because national governments occupy the dominant position in the EU. It is they who are the signatories to the treaties from which the EU tier of governance derives its authority to govern and stipulate the policy areas over which the EU acting collectively has competence to legislate. It is they who convene inter-governmental conference through

which subsequent treaty revisions emerge, and it is they who have competence to enter into other types of inter-state bargains on our behalf. And, finally, it is the national government that is ultimately bound to ensure that EU laws are implemented within their member state.

Significant as the nation state is in the process of EU governance – and of course it is overwhelmingly so – I will have little directly to say about legitimacy issues at that specific level, although I will have something to say about legitimacy issues that derive from its interaction with the sub-state level. This is because, the bulk of the discussion about the role of the nation state in discussions about EU legitimacy falls within the Constitutional element of that debate, not the Europeanisation element. That is to say, much of the national-level debate revolves around the perceived erosion of national sovereignty as a consequence of membership of the EU. This is not an erosion arising from the adoption of particular voting arrangements, but rather because in a strictly legal sense the member states of the EU have lost *as a consequence of EU membership* both internal and – to a lesser extent – external sovereignty. As many in this room know, this debate is grounded in the role of the ECJ and the emergence of the EU as a separate and distinct legal order – an legal order that has been established by the ECJ through a series of judgments that have established the doctrines of supremacy, direct effect, implied powers and the application of human rights in ECJ judgments.

As Lord Cameron, former Chair of the Europa Institute stated:

“The word sovereignty could no longer serve as a synonym for a condition of complete independence based either on the capacity for self-defence or even of complete freedom of political action within the boundaries of the State and subject to no external constraints”,

A situation that, in the final instance, was established because, as former Judge David Edward, and present Chair of the Europa Institute recently put it,

“...the ECJ’s constantly-evolving job was to faithfully *interpret* the treaties.”

Interpret as well as implement. The constitutional debate which arises from this then engages the question as to what implications does this erosion of national sovereignty have for the credentials – the credence – of the nation state as, in Tony Giddens phrase, a “form of governance maintaining an administrative monopoly over a territory” called the nation state. Neil MacCormick describes the impact on national sovereignty of EU membership in even more direct terms in his collection of essays, *Questioning Sovereignty*, when he says;

“Western Europe’s successful transcendence of the sovereign state and of state sovereignty is greatly to be welcomed...”

A situation which, tantalizingly, he considers offers an opportunity for;

“...further levels of system differentiation...”

From an even cursory reading it is quite clear that MacCormick regards the progressive demise of the European nation state as an opportunity for different types of territorially representative and/or political entities to emerge in the place of the nation state – at least

to the extent that these other entities themselves are constituted under proper and acceptable democratic processes and adhere to the underlying normative order of the EU.

It is worth noting also that this broadly constitutional debate to the future role of the nation state is not confined to legal theorists, but has a resonance in much recent work on globalization being done by political theorists – such as Kenichiro Ohmae and David Held in particular – who argue that the nature of the nation state is shifting *in any event* as a result of the impact of globalization in effectively creating a ‘borderless economy’. And in the borderless economy the very notion of something called nation-state government as a national economic and political authority is effectively rendered redundant, and this helps loosen the ties that bind the different – and perhaps disparate – nation together. Accordingly, we see the de-linking of identity from national territory and the gradual emergence instead of new – sub-national – territorial identities that conform to some aspect of socio-economic identity that is not rooted in the nation state. Nation states are being challenged from above – the dynamic of globalization – and below – the emergence of sub-national economic and political groupings. This is suitably captured in Daniel Bell’s famous dictum – “*the nation state is too small to solve the big problems and too big to solve the small problems*”.

(c) Sub-national – Regional

Let me turn to the third level in this multi-tiered governance system and consider how regional government is implicated in my story. Clearly this only applies in member states with legislatively empowered regional governments, such as the post-devolution UK, and even then the degree of empowerment will vary from country-to-country. The general issues relating to the sub-national dimension of the legitimacy deficit are illustrated when we consider the situation of Scotland.

Here, as in other analogous EU member states, we can identify three channels that link Scotland’s governance to EU governance in this interlocking system.

(i) Legislative role

The first arises because the Scottish Parliament, as is true for many other sub-national legislatures across the EU, has both (i) the competence to pass laws for Scotland as provided in the Scotland Act, and (ii) an obligation to implement EU law in Scotland where EU laws pertain to a devolved policy matter. Let me expand slightly on this.

On the issue of legislative competence, the Scottish Parliament’s freedom, or autonomy, to legislate is in fact bounded not solely by the terms of the Scotland Act, but additionally by the requirement that Scottish legislation cannot violate EU law. This issue arises because – as is often cited – something like 80% of the legislative competences that have been devolved to Scotland have an EU legislative aspect to them, and consequently are constrained by that aspect.

This is the problem of concurrent powers, meaning that two distinct legislatures – in this case the EU and Scotland’s – share competence to make law in a particular policy area. Because of the doctrine of supremacy, which states that in the event of a conflict between EU law and national or regional law, EU law prevails, Scotland’s governance is constrained by the EU, and this inevitably implicates Scotland in EU governance. And, of course, this also implicates the European Union in Scotland’s governance.

On the question of implementation, the Scottish Parliament is required to enact any secondary legislation necessary to give effect to EU law in Scotland, and if it fails to do so then – under the Scotland Act – Westminster is authorized to legislate for Scotland in that matter. In this case the appropriate way to look at the Scottish legislature is as an agent of the EU legislature – an agent charged with the task of giving local effect to EU law. Moreover, our courts are charged with upholding EU law. All of this implicates governance at the sub-state level, as in Scotland, in governance at the EU level.

(ii) Relations with UK Government

The second channel by which Scotland is involved in EU governance and this arises as a consequence of the relationship that Scotland has as a devolved administration, and as do the other UK devolved administrations, to UK government in the matter of EU policy issues.

Under the UK devolution legislation, including of course the Scotland Act, EU matters are reserved to the UK Government – reflecting the fact that the EU is a union of nation states in that only the nation state is competent to cede authority to the EU. This is not a position that is seriously challenged, and therefore commands formal legitimacy.

The nation state is, as well, the principal player in the overall EU legislative arrangements that produce laws that bind the nation state, and is held to account before the ECJ should it fail to observe these laws.

However because such a large swathe of the powers devolved to Scotland have an EU dimension – the 80% figure I just gave – it was agreed that one element in the post-devolution arrangements in the UK would be that the UK Government would consult the devolved administrations about the position it – UK Government – should adopt with respect to an EU legislative proposal that touched on devolved competences before it finally settled on its position on the pros and cons of that proposal – a position it would then represent in the Council of Ministers.

For perfectly understandable reasons, the results of this consultation process could not be binding on UK Government. Even the UK Parliament cannot do this, albeit it can try through the scrutiny reserve procedure. But of course, subsequently the UK Parliament can and does hold its Government to account for its actions, and the readiness of the Parliament to do this will certainly influence the policy line that the Government initially adopts. Accountability is therefore an important aspect in enhancing social legitimacy: it is a central element of the procedures which together form the basis from which legitimacy is constituted.

The consultation on EU matters between devolved administrations and UK Government indeed does take place, and is conducted under terms and conditions set out in a series of inter-administration agreements called concordats signed by both UK Government and the devolved administrations. As Donald Dewar famously quipped about these fabled documents – they were to be regarded as “road maps for bureaucrats”, and nothing else. However, by providing for a Scottish (and Welsh and Northern Irish) voice to be heard, albeit indirectly, at the top table of EU decision making, these internal UK arrangements implicate the devolved administrations in the EU policy process; in EU governance.

But, under the provisions of the concordats, and as a matter of practice, almost all of the discussions between the devolved administrations and UK government take place outside the public domain. No minutes of meetings between Scotland's officials or relevant Ministers and their UK Government counterparts are published, and the Scottish Parliament is largely ignorant of what is being said by whom, and what responses are being made. The concordats also provide for a mechanism to resolve disputes between UK Government and a devolved administration – the Joint Ministerial Committee (JMC) comprising of the relevant UK Minister and counterparts Ministers from the Devolved Administrations. And there is a JMC which oversees EU matters. But again, and this may be *to an extent* necessary, its deliberations are conducted in private. The problem this raises is that these processes – which could be self-constitutive of social or political legitimacy – have no opportunity to be so because of their lack of transparency.

Over many, many issues these arrangements pose no legitimacy problems, and a UK consensus line is negotiated with which the Scottish (and other devolved) polity concurs. But inevitably there will be instances when Scotland's interests will differ from the UK's overall interests, and it is in those cases that problems arise. At that point the social legitimacy of EU governance and of the EU-dimension to Scotland's governance becomes a live issue.

And it is not an issue that – in our dominion at least – the Scottish Parliament is readily able to address. While the Parliament does have an European and External Relations Committee whose remit includes considering and reporting on,

- (a) proposals for European Communities legislation;
- (b) the implementation of European Communities legislation;
- (c) any European Communities or European Union issue;

the degree to which the Parliament is able to hold to account its government is inherently limited by the lack of information that the government is either prepared to make available to it, or indeed is permitted under the terms of the Concordats to make available to it. Accountability is defined in the Oxford English Dictionary as:

“...obliged to give a reckoning or explanation for one's actions: responsible”.

If a Parliament is unable to properly hold to account its Executive, then I would suggest the likelihood is high that that governance system will, as a whole, come to lack social – or political – legitimacy. In the arena of EU policy, and Scotland's position in EU governance, I think that problem has emerged.

This is not to be taken as a direct criticism of either the Scottish Executive or the Scottish Parliament. Rather, it is the consequence of a set of arrangements that accompanied devolution, and which may be understandable in some degree, but which nevertheless weaken the capacity of the Parliament to act as an agent providing Scotland's governance system as a whole with a crucial element of social legitimacy of the actions of that governance system.

A few years ago I did suggest that in denying to the Scottish Parliament the competence to authorize and re-negotiate the concordats which govern Scotland's engagement with UK Government on – among other matters – EU policy issues, social legitimacy

problems could be being created that may cause political problems further down the line. The reason was simple – if Parliament had not endorsed and signed these agreements, then they could not be part of the social legitimacy exercise of that part of the overall governance structure. I see no reason to change my mind on that matter. Indeed, I see no reason in principle why – as happens in Denmark – a Scottish Executive could not hold – in private if required – meetings with the relevant Committee of the Scottish Parliament to discuss sensitive issues, including bargaining strategy, ahead of the Executive’s discussions with UK Government on EU policy matters. Although private, by involving the Parliament more directly and meaningfully in Scotland’s dimension to the EU governance process, the ultimate outcomes from Scotland’s engagement with UK Government would in all likelihood carry greater social or political legitimacy – win, lose or draw.

(iii) Committee of the Regions

The third channel is that which links Scotland, as a region, directly to the EU level of governance because it is a member of the EU-wide Committee of the Regions (CoR). That Committee was created in 1993 by the Maastricht Treaty, and it is able to issue Opinions on those EU legislative proposals which affect particular policy areas that generally are competences of the regional level of government in the member states rather than the national government. As matters presently stand, and from the Draft Treaty at least this seems set to continue, the CoR is solely advisory, and has no role other than that in the EU legislative process. Therefore, despite its existence, the legitimacy deficit cannot logically be placed at its door in that it has no role in the EU legislative process.

4. The Legitimacy Aspects of the Future of Europe Convention

Before I come to review and reflect on the Convention’s proposed changes to the Treaty that impact on the regional aspect of legitimacy, I want to pose the “so what?” question. So what if EU governance is deficient in some sense of popular legitimacy? So what if the turn-out at European elections is falling? Why should we concern ourselves with this?

(i) The “So-What?” Segment

Everyone in this room would have roughly the same answer to this “so what?” question, which would probably revolve around the essential nature of democracies, democratic engagement and participation, and democratic government. But let me leave that to one side, and consider a more direct answer.

And that answer is because it is the demonstrably held view of the governments of the EU member states that the European Union as a governance system should survive. If deep doubts of the kind I have been setting out in this lecture become universally held truths in one or more member state, then it is likely that anti-EU political parties will win ground in national elections and the process of European integration will be slowed, halted, reversed, or – for some countries – may even cease to exist if they leave the Union. So what?

In my view the answer to this “so what” question can be found in an almost perfect form in Alan Milward’s *The European Rescue of the Nation State*. What Milward does in that volume is to articulate a thesis of European integration in which economic integration

was a strategy for restoring – and thereafter maintaining – the credibility and the viability of the European nation state.

The core idea in Milward, of course, is that European integration was conceived by the six founding members as a device to rehabilitate the nation state as the preferred post-war form of territorial organization – economic organization, social organization, and political organization. Moreover, all that has followed since then – and here I mean the competences that the Union has acquired as well as the development of, and reforms to, the legislative arrangements that are used to exercise these competences – ultimately can be explained in terms of the national interest of EU member states, singly, severally or collectively.

The appeal of integration lay in the recognition that it was a framework capable of delivering economic gains for the participating countries that none could realize on their own. In particular, economic integration would boost economic growth rates within the six, thereby raising the material living standards that their citizens could enjoy. This would assist the nation state to adhere politically, and from this the nation state would once again emerge as a viable form of political organization.

The argument is straightforward. Milward takes it as read that by 1945 the European nation state was in need of “rescue”. As a form of economic organization it had failed to prevent the depression and associated mass unemployment and poverty of the inter-war years, and as a form of political organization it had failed internally to maintain democracy and to protect its citizens – especially in Germany. Finally, and most calamitously, the European nation states had failed to prevent the outbreak of another war on the continent of Europe. Thus the post-1945 credentials of the European nation state that dated from 1648 and the Peace of Westphalia were greatly damaged. And the underlying doctrines on which that nation state had been founded – respect for the internal and external sovereignty of the nation state, and the capacity of nation states to maintain continent-wide peace through a balance-of-power – had been found wanting with disastrous results.

Restoring the economic credibility and political viability of the European nation state, thereby so preventing a descent into some kind of pre-modernist chaos, depended on its ability to fulfill the economic and political aspirations of its citizens. Economic integration was the only strategy that could achieve this.

The evidence from the inter-war years was that when countries individually followed protectionist trade policies – including competitive currency devaluations – the collective outcome was simply an ever deeper degree of economic misery. And with economic misery could come a potentially catastrophic degree of political and social radicalization within the polity – inter-war Germany.

The free trade based Treaty of Rome, and currency stability European Payments Union, together provided a framework for a continent-wide expansion in trade, which would raise rates of economic growth. In turn, this growth would be used to finance measures to stabilize the domestic polity. Rising national prosperity would finance welfare programmes that would favour the hitherto excluded lower-to-middle income groups. Equally, free trade would benefit commerce by increasing profits. And, as the final piece of the jigsaw, the new Keynesian macroeconomic orthodoxy gave governments a way of

avoiding any temporary economic downswing being transformed into an outright recession without taking recourse to protectionist trade policies.

The utterly compelling notion that Milward offers from this account is, rather than the EU and the nation state being in a situation of permanent antithesis, with each engaged in a zero-sum struggle for the right to govern – one road leading to a union of nation states the other to a United European super-state – one of two governance arrangements which were designed co-exist in an essentially mutually reinforcing, indeed symbiotic, relationship.

For the record, Milward expresses little patience for accounts of European integration that rest on the actions of those he describes as the “saints” of European integration – Monnet and Schuman. Similarly, he denies that the German question – including continent wide peace – can explain much other than some parts of the 1950 Treaty of Paris. The Treaty of Rome rests on different motivations.

This point is strongly echoed in a recent piece by Robert Cooper. Although not writing in the context of this discussion, Cooper did make the observation that:

“The dream of a European state is one left from a previous age. It rests on the assumption that nation states are fundamentally dangerous and that the only way to tame the anarchy of nations is to impose hegemony on them. But if the nation state is a problem then the super-state is certainly not a solution.”

To put it even more bluntly, I would suggest that to frame throughout the progress of and motivation for European integration in what Helen Wallace once memorably referred to as “the shadows of the past”, it to present the history of European integration as some long-running and wholly unlikely morality tale about the need forever to guard against another intra-European war. Other than in the very early post-war period, I tend to side with Milward that we have to find – then as indeed now – a more germane series of explanations. In that regard, Milward’s own take on the EU is more persuasive:

“We...assume the European Community to be an international framework constructed by the nation-state for the completion of its own domestic policy objectives – a hypothesis that allows for an episodic development of European integration reflecting changes in domestic politics rather than the incremental progression postulated by other integration theories.”

What we might describe as the “regional turn” at the EU level of governance – for instance, the creation of the Committee of the Regions – can be explained wholly as a response by the EU nation states to matters of domestic politics. The widely accepted reason why the member states decided to provide for that Committee in the Maastricht Treaty was because the German Lander were agitating for an EU-level involvement by regions because, increasingly, EU policy competences were reaching into matters which under the German Constitution – the Basic Law – was assigned to the Lander. The domestic pressure this placed on the German government was such as to persuade the member states collectively to agree to the creation of that Committee. In that sense the CoR was a device to buttress the legitimacy of the EU that emerged from a domestic politics debate, and by doing maintained the integration framework on which Germany as a viable nation-state depended.

Indeed, when we come to consider the proposals made by the Convention regarding the representation of regions at the EU level, as well as the possible role for regions within member states themselves, then I do think we will find a strong echo of this type of reasoning. That is, a type of reasoning that says the fundamental motivation for the member states to reform the arrangements of the governance and the competences of the European Union ultimately comes down to doing what is required to maintain the credibility of the nation-state – singly or severally – as the preferred territorial form of economic and political organization in Europe. Discredit the EU, and you damage the only structure within which the European nation state ultimately will remain viable.

The Convention’s focus on the regional element in EU governance, though indirect, and the proposals that emerged from the Convention, might better be seen *not* as a result of reflecting on abstract categories of democracy and legitimacy, but rather as an instrumental attempt to counter the ground-swell of territorial politics at the level of the regions which had emerged over the 1990s with such force as it could conceivably mount a serious challenge – at least in some member states – to the monopoly of the nation state as the legitimate representative of the citizens of the nation state at the EU level. This was not an implausible scenario.

By the end of the 1990s a forceful and probably irreversible *territorial* dynamic to the politics of the EU had arisen from within the nation-state; one that included political elements that reached out far beyond the relatively few stateless nations of the EU such as Scotland and the Basque country who, of course, had long-standing claims to a status of independence from the nation-state – within Europe or outwith. The 1990s had seen the emergence of coalitions of powerful regions – especially the Regions with Legislative Powers (RegLeg) group that now comprises 73 regions from across the EU – who, by virtue of their *domestic status* as powerful regional governments, were demanding a greater say in how Europe was governed – simply because the EU was having an increasingly greater say in what *they* could, and could not, do. So while the regional turn in EU governance was initially confined to Germany, by the end of the 1990s it had grown to embrace all member states with powerful regional governments, and had become an independent political force that the member states had to reckon with.

So, the answer to the “so what” question is that the legitimacy crisis is one that not only weakened the credibility of the EU as a governance system, and so integration as a framework that could deliver gains not otherwise available, it was a crisis that could well end up challenging *from within* the viability and preservation of the nation state.

At this juncture two points are worth making in passing. First, I do consider that the EU continues to offer a framework through which the nation states recognize they might best address current challenges – for example:

- Continued growth and prosperity – that is, avoid what Lord Cameron called when reviewing Britain’s choices in the 1960s – “a retreat into an unprofitable and impracticable insularity without economic or political advantage or benefit”;
- Tackling the challenges of globalization through European integration in order to sustain something called the public good in a “...a world where so many issues and so many problems do not originate within the sphere of nation government” (Giddens) – and cannot be solved within that sphere;

- Co-operating to maintain the internal security of the EU against the threat of terrorism;
- Enhancing the prospects of external economic and political stability – especially along the eastern borders of the EU of 25.

Second, the state-centric account of the EU that Milward advances does explain why the Convention on the Future of Europe resisted calls for the Regions individually to have the right to bring before the ECJ proceedings to protect their legislative rights being weakened as a consequence of EU legislative proposals – a call that was first made in the Napolitano Report. The difficulty with that proposal from the state-centric perspective is that it would have weakened the position of the member states in EU governance, and in so doing could have unlocked a very troublesome box of tricks in the form to even greater recognition being given to the “nations” and legislative regions *within* member states in the EU policy process.

(ii) The Draft Treaty Provisions

With the Milward story, suitably up-dated, as the backdrop, let me now come to discuss what the Convention proposed as included in the Draft Treaty which addresses the regional dimension to EU governance, and which offer *opportunities* for that part of the Europeanism dimension to the social legitimacy deficit to be narrowed.

Indeed, it would not inappropriate to suggest that the entire Convention exercise – inclusive of many representative groups, open and transparent, offering an opportunity for members of the public to become involved, comprehensive publications of the many documents it produced - was in and of itself intended to imbue the EU treaties with a greater degree of social legitimacy. If we all had the ability to follow this process and even to comment on it, we may regard the outcome as somehow better for that reason alone. But my point is that almost does the Draft Treaty does it really focus on the constitutional aspect of the legitimacy deficit – and for reasons that will become clear this is not surprising.

There are three aspects to this: first, *very modest* proposals relating to the role of the Committee of the Regions in EU governance – i.e. at the level of EU governance: second the Protocol on the Role of National Parliaments in the EU, and third the Protocol on the Application of the Principles of Subsidiarity and Proportionality.

Rather than go through these Protocols, I want to mention the core themes they touch upon. Moreover, I will certainly not be offering prescriptions as to what precise arrangements should be devised in the UK or Scotland to take advantage of the opportunities for the “better” governance of EU matters in Scotland or the UK. That is a matter for politicians.

(a) Protocol on the Application of the Principles of Subsidiarity and Proportionality

I will talk solely about the Subsidiarity aspect of the Protocol, and not at all on Proportionality.

Despite what the treaties might imply, subsidiarity properly cannot be considered either to be a principle, nor a general rule. It is instead an idea, and an idea that has a number of different aspects.

The basic idea of subsidiarity is that the legislative powers of a governance system should be assigned to one or other level of governance according to some underlying criteria. In other words, there should be no presumption that this or that policy automatically should be the competence of the EU, national, or regional levels. Although we inherit the status quo in which certain policies are assigned to each of these three levels, and we might want to leave that as it is, when we come to look at how each level exercises its competence, or tries to acquire new competences, then there should be some evaluative criteria which says – yes, it is necessary that the EU level legislates in this matter even though by doing so it will weaken the authority of the national or the regional government.

Equally, the idea of subsidiarity can be used to say no – we do not consider that it is appropriate or necessary for the EU level of governance to legislate in this matter. We, the regional governments, or we, the national governments, are perfectly capable of achieving the objectives which inform the proposed EU legislative measure ourselves. It is neither necessary nor appropriate for the EU to legislate in this matter.

This type of reasoning appeals in straightforward common sense terms, and of course has a close connection to the notion of social legitimacy. However, the problem is to agree on the criteria that should be used in deciding what level of governance “is the most appropriate” – that is, deciding on some policy assignment rule.

This is, of course, where subsidiarity falls down as an operational principle. It is easy to show this.

An economists’ perspective on subsidiarity would be framed in terms of efficiency considerations. At what level of governance can this policy most efficiently be implemented? The appeal of the higher tier is, firstly, that a single rule covers the entire jurisdiction and so we get a uniform policy rather than a possibly differentiated policy if it were left to the lower tiers individually to legislate. Differential policies will generate economic distortions. Second if the policy is assigned to the higher tier, administration costs are minimized. There will be no need to assign resources to policing and monitoring the lower tiers to ensure their regulations are meeting the stipulated targets. But there is a downside to assigning competences to the higher tier, that mainly take the form of the loss of scope for regional differences in conditions to be recognized by slight differences in policy design. Indeed, if these local variations are significant, then the true cost of achieving the overall objectives of the policy administered by the higher tier could be considerably higher than any costs otherwise arising from differential implantation.

That would be the economists’ take on subsidiarity, and some type of case-by-case outcomes could be produced by an appeal to these guiding principles.

For the political scientist, however, these economic guidelines are inadequate. In addition, some criteria appealing to the quality of governance associated with each tier has to be factored into the equation, and indeed may well trump the economic arguments I’ve just outlined. The default for many political scientists, and this is the default in the EU treaties, is that governance over any policy instrument should reside in the level of governance “as close to the citizen as possible”. This, it is argued, will ensure that the principles of good governance are adhered to – accountability to the citizens,

responsiveness to the changing aspirations of the citizens, and including all citizens in the process of governance.

It should be clear from even this extremely cursory review of subsidiarity that it is bound to play an important role in the social legitimacy of governance, and indeed it does play such a role in the legitimacy of EU governance. Indeed, as will be clear by now, because the idea of subsidiarity is useful in determining which of the 3 tiers of EU governance should have the competence to pass this or that law, subsidiarity has considerable potential to assist closing the legitimacy deficit of that governance.

The debate over subsidiarity entered EU discourse with the Maastricht Treaty of 1993. Article 5 of that treaty stipulated that the Union level of governance shall take action;

“... only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”

In other words, henceforth in developing new legislative proposals in areas of shared competence, the European Commission should be able to demonstrate why, in subsidiarity terms, the EU level of governance was the better legislature in this matter and not the national (or even regional) level.

And, of course, the more able was the Commission to demonstrate this, then the greater would be the (social) legitimacy of their taking the measure. Further, because this subsidiarity requirement was in the treaty, it was justiciable and member states would have the right to refer a Union law to the ECJ on the basis that it violated the principle of subsidiarity. And, indeed, a number of such actions have been raised though none has been successful.

Since 1993 the subsidiarity provisions of the treaties have been strengthened by progressively imposing tougher requirements on the Commission to justify why an EU measure is to be taken in preference to leaving it to the member state or its regions to legislate. The terms of what we might call the subsidiarity test have become increasingly onerous on the Commission. The most recent of these was the Treaty of Amsterdam Protocol on subsidiarity.

If we now turn to the Draft Treaty presently under discussion, we find that this trend continues. Indeed, it is around the matter of the tougher subsidiarity tests that the Draft treaty's potential contribution to closing the social legitimacy deficit of the Europeanisation element is to be found.

The Protocol on Subsidiarity and Proportionality makes the following proposals:

- the obligation for the Commission to attach a much more exacting subsidiarity sheet to legislative proposals after consulting all relevant players affected by the proposal – including local and regional authorities;
- setting up an early warning system whereby national parliaments are able to give their opinions about the subsidiarity question before legislation is enacted, and encourage national parliaments to discuss the subsidiarity question with sub-national parliaments;

- giving national parliaments which activated this early warning system a right to appeal to the ECJ after the adoption of a legislative act which it considers violates subsidiarity, provided that one-third or more of national parliaments had so indicated;
- entrenching the right of the CoR to be consulted on the matter of subsidiarity, but NOT giving the CoR the right of referral to the ECJ legislative texts which it considers breach subsidiarity.

All of this is to be welcomed, and these strengthened subsidiarity provisions do provide an opportunity to close the legitimacy deficit.

The central point, of course, is that none will so do simply by virtue of being within the treaty. In large part, the Draft Treaty provides opportunities that have to be taken within the member states by national and regional governments and parliaments re-configuring their domestic arrangements for engaging in EU governance. Only then will these provisions have a chance enhancing the social legitimacy of EU governance.

It is not my intention here to propose ways in which this might be tackled in the UK or in Scotland. That properly is a matter for governments and parliaments. And, indeed, discussion on these matters has already started, certainly within the Scottish Parliament and the Scottish Executive. And, at least if the former UK Minister for Europe, Peter Hain, submission to the Convention is to be believed, the UK level of governance is intent on playing its role.

But let me make one point. And it is a point that I develop from an article on Subsidiarity by George Bermann, an American legal scholar.

We have to envisage subsidiarity as a procedure for managing competing claims for managing policies that whose competence is shared between different levels of governance – in this case EU-to-national, or EU-to-regional. To do this, subsidiarity has to *directly engage the legislatures* concerned and not only the governments. And this engagement has to be meaningful. And it will undoubtedly generate disputes. But in the resolution of these disputes resides a key mechanism for enhancing the legitimacy of the ultimate outcome, regardless of what that outcome is.

Subsidiarity is therefore not only about outcomes: additionally it is about the nature, transparency and the quality of the interaction between the three interlocking levels of governance within the EU governance system. The struggle between these alternative legislatures will, in and of itself, imbue the outcome with a greater degree of social or political legitimacy.

It is the legislatures' authority to legislate, and not only the governments' authority to govern, which is at stake in this debate. And if the outcome of this process is to command social legitimacy, then it must be open and transparent, and it has to involve all elements of the governance system and at each level of governance. These are local matters, as much as national or supra-national matters, and their resolution resides principally in the interaction within and between national and regional governments and parliaments.

Conclusion

Let me here offer some observations regarding the current Scottish dimension to EU governance, and the legitimacy issues I think are raised. As I hope I have shown, the argument that says because the regions have no *formal* legislative role in the EU governance arrangements then they cannot be implicated in the deficit of legitimacy in that governance, simply does not hold. Indirectly the regions are closely involved in this interlocking system of EU governance, and are therefore directly implicated in the deficit in the social legitimacy of that governance.

I would argue that accountability is a key ingredient in determining the social legitimacy of governance, both at any level at which governance takes place, and through the arrangements that link together the different levels of governance in the type of interlocking system that we have in the EU.

While I accept that accountability is a grey area – governments might want to avoid it for reasons such as national security – and is not an “either you have it or you don’t” type of commodity. But nonetheless I think it is a reasonable question to ask of any government – are you doing the very best you can to be accountable for your actions? Indeed, I would go further and ask of the members of the relevant parliaments, are you discharging your obligations to your constituents by demanding accountability of your government?

If not, then is that a factor in this legitimacy deficit and if it is, then you indeed can make a contribution to closing that deficit.

I would therefore ask three questions:

- Are you sufficiently accountable to the people of Scotland and their representatives for actions you take either when acting as the agent of the EU, or as the “voice” of Scotland when you engage in discussions with UK Government and put Scotland’s case? Can things be improved?
- Are MSPs sufficiently energetic in demanding accountability from the government? Can matters be improved?
- Do you not think that the concordats are properly a matter for the Scottish Parliament to have standing over, and an opportunity to change, in that these documents play a key part in the role of Scotland in EU governance? The arrangements as these presently exist simply do not provide an opportunity for the social aspect of the legitimacy of even unfavourable outcomes to be enhanced, because the inter-administration process is confidential and thus cannot be constitutive in providing social legitimacy.

If we look at the content of the Draft Treaty then there certainly are clear indications that the Convention at least was seeking to encourage member states to considerably widen the territorial scope of EU governance beyond national capitals. If these opportunities are taken within the UK, then it seems to me the some part of the legitimacy deficit of EU governance will be closed.

Of course, this can happen without the permission of the Treaty. It is for member states to decide how to engage the EU debate within their own nation state, and with whom that debate should be engaged. But the encouragement is there, but it will be for the domestic players to take up these opportunities and use them in a way that will enhance

the legitimacy of EU governance – that will bring that governance closer to the citizens of the EU.

My interpretation is that this Draft text goes very far in the direction of seeking to involve parliaments in addition to governments – both national parliaments and sub-national parliaments. But it will be for these parliaments to devise ways of interacting in a manner that raises legitimacy. They will need to do something. But the task in my opinion does not end there. We have, I think, to re-consider how the EU policy debate is conducted within the institutions of Scotland’s governance.

Let me conclude with two assertions:

- a. If Scottish governance as a whole is involved and is seen to be involved in those aspects of EU governance in which properly it is a stakeholder, then the social legitimacy of EU governance, and the laws it produces, is likely to be enhanced;
- b. If Scottish governance as a whole is seen to be implicated in EU governance, but through non-transparent procedures and lacking in accountability, then Scottish governance as well as EU governance stands to lose social legitimacy.

To cite Garret Fitzgerald:

“One of the matters that requires urgent attention is the inadequate linkage between the Community’s activities and democratic opinion within member states...

Successive Irish Governments...have been happy enough to allow this form of democratic deficit to persist, fearing that a greater involvement of the [Parliament] in the Community decision-making process might reduce the margin of manoeuvre of government in subsequent negotiations and lead to Government/]Parliament] clashes...

This has been a shortsighted view, and persistence with it could intensify the alienation of the Irish electorate from the European process...”

This is a sentiment with which I wholly agree.