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**Mountain or Molehill ?:
A Critical Appraisal of the Commission White Paper on Governance**

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A Comment on the Governance Paper

Neil MacCormick¹

Introduction

My comment on the White Paper is in the form of a statement of opinion originally offered to the Scottish Parliament's European Committee on issues of European Governance raised by the Commission's paper. I did so in a personal capacity as a Member of the European Parliament (and of its Legal Affairs and Constitutional Affairs Committees). My position is of course informed by my stance as a member and office-bearer of the Scottish National Party, but it should not be read as in any way stating an official party position. Rather, I offered it as an individual MEP in the spirit of seeking to contribute one element to closer interaction between the European and the Scottish Parliaments, through the committee process.

Perhaps it is the case that an attempt to contribute to mutual understanding between two significant levels of governance in Europe will be of wider interest, for example in the context of this symposium.

The issue of governance deserves critical scrutiny in the light of Scotland's current constitutional position, and future constitutional options. Seen from here, current constitutional discourse in Europe is inadequate in several respects. This is because debate is far too exclusively focussed on the relations between Union and Member States. This is seriously detrimental to those parts of the Union that are internal nations of 'union states'. Union states such as the United Kingdom, Spain, Germany, Italy and even (though this is easy to forget) France came into being by various processes through historical unions of previously independent and self-governing parts.

These parts lay claim to continuing nationhood to the extent that they retain a cultural and civic consciousness of the kind that is constitutive of nationality. In some cases this is buttressed by continuity of civic and ecclesiastical institutions (compare Scots Law, and the Church of Scotland or the continuing or restored Scottish hierarchies in Episcopal and Roman Catholic churches). Hence they are appropriately considered to be internal nations of union states, or 'stateless nations' (though both before and after constitutional devolution they have in truth amounted to nations with incomplete institutions of state, rather than nations with none at all).

Most aspire to, and many have achieved, the status of constitutionally self-governing countries within their respective Member States. As such, they have constitutional powers of government normally covering all three main branches of state, judicial, executive and legislative; though in some cases not all branches are present. In all cases there are external constitutional restraints that entail non-sovereignty of the internal nations' institutions of state. These restraints do not contradict the fact that their people may (either directly, or through representatives, as in the case of the Scottish 'Claim

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of Right' of 1988) claim sovereign rights of self-government, and can ground these in ancient constitutional tradition. So long (but only so long) as the majority of the people in question upholds the present constitutional dispensation, the devolved or federal dispensation in question is compatible with that claim of sovereignty.

In the perspective of the Member State's constitution (for example, that of the UK), the powers of these internal nations (Scotland and Wales; Northern Ireland is a special case, while England as a nation is represented only through UK institutions) are subordinate powers from a legal point of view. Politically, however, they appear to be so solidly entrenched in the popular will of the internal nation as to be in practice irrevocable, save in barely foreseeable circumstances that would be quite extraordinary in kind.

The position of such self-governing internal nations within states is in some respects comparable with that of the *Länder* of a federation such as Germany or Austria (indeed, some *Länder*, most obviously Bavaria, are clear instances of what are here called 'internal nations'). Recent contributions to the European constitutional debate have used the term 'constitutional regions' to denote entities such as internal nations or nationalities and federal lands or provinces with substantial constitutionally guaranteed or politically entrenched powers. The constant use of the term 'nation state' as a description of EU Member States, whether unitary states or union states, entails, however, that the term 'region' is ideologically loaded in favour of the nation-statist pretensions of Member State governments. I use it here with reluctance and subject to this *caveat*.

1. Subsidiarity

As a general principle of political philosophy, the principle of subsidiarity states that all governmental tasks are to be carried out at a level as close to the citizens affected as is consistent with equity and with efficiency in the pursuit of common goods. This implies that, for example, environmental legislation needs at least a European if not also a global reach in the setting of common standards. But the local and detailed elaboration and application of these common standards needs sensitivity, well-measured discretion, and a great deal of local knowledge if the overall scheme is actually to achieve its objectives. We are therefore fated to live with multiple levels of government, and we certainly have a multiplicity of levels in the Scotland of today. It is important that European-level legislation, typically in the form of Directives, should leave as broad a scope for local discretion in filling in details and in satisfying legal requirements as is compatible with a genuinely and fairly maintained generality of legal principle throughout the Union. The qualification is especially important in those domains in which competition may be unfairly distorted through effective evasion of common standards.

The powers that are exercised by the legislatures and the executive governments of constitutional regions need to be guarded against erosion by the Union's institutions no less than do those exercised by central governments and legislatures. Greater vigilance is needed in the case of the constitutional regions, to the extent that they have no place as of right in the Council of Ministers. The mutual definition of powers between states and their internal nations and constitutional regions needs to be reflected in the constitutional design of the European Union. The judicial policing of boundaries (see section 7 below) could be handled in ways that are sensitive to this.

In this respect, internal nations and constitutional regions differ in kind and in right from geographical or administrative regions.

The Council is at present the Chamber that represents the states as such. Parliament is said to represent the people or peoples of Europe. Yet Parliament is constituted in the Treaties on the basis that it consists of “national” delegations, in proportions that reflect imperfectly the populations of the states. To secure adequate representation of the internal political diversity of smaller states, these enjoy greater per-head representation than larger ones, under what is sometimes called the principle of “degressive proportionality”. It follows that small states find themselves with proportionally larger numbers of MEPs than similarly sized regions (whether constitutional regions or geographical/administrative ones).

Moreover, some Member States, even large ones, treat the whole state as effectively a single electoral constituency, with state-wide party lists in use to achieve d’Hondt proportionality among parties seeking election to the European Parliament. This entails that citizens of constitutional regions in these states (including internal nations) are deprived of any clear opportunity for representation as such in the European Parliament.

In the interests of subsidiarity, at least the constitutional regions, whether or not also internal nations, ought to be recognized as electoral units for the purposes of election to the Parliament. It would be desirable to see other states follow the United Kingdom example in this matter. Indeed, as in the UK, merely administrative or geographical regions should be used alongside internal nations as electoral constituencies.

Otherwise proportionality of party representation from the Member States is achieved at far too high a cost in dissociating representatives in the European Parliament from any effective link of local accountability to the electors whom they represent, while on the other hand increasing immoderately the power of party hierarchies. The introduction of all-Europe party lists proposed in the Nice Treaty makes this point yet more urgent. For again party power will be enhanced in proportion to diminution of real electoral accountability, with the aim of enhancing all-Europe sensibilities among electors, an aim that is worthy in itself but doubtful of achievement by this means.

In the longer run, the democratic principle of equally weighted votes for all citizens should be more nearly implemented than at present (e.g., Luxembourg has far larger representation than Euskadi; Denmark has twice as many representatives as Scotland for the same population (5m, 16 and 8 Members respectively). Degressive proportionality has a certain justification as a counterweight to the effects of Qualified Majority Voting in the Council, but this in turn requires scrutiny of the present contribution of Council procedure to the European Democratic Deficit.

Is the **Committee of the Regions** then the answer? An institution that is supposed to enable ‘regions’ to have a voice in the processes of the Union should in some measure reflect the relative populations of its constituencies. By this test, the Committee of the Regions is at present radically defective in its design. For it simply replicates with proportionately reduced numbers the shares of the states in Parliamentary seats. Absurd comparisons result from this. Luxembourg, for example, has more members than Wales, though Wales has seven times the population of Luxembourg. Again, the regions of Denmark are more generously represented than is Scotland as a single ‘region’ of the UK, though Scotland and Denmark have the same population and the internal regional diversity of Scotland is by no means less than that of Denmark.

So far from giving the internal nations and constitutional regions a forum that enables them to compensate for disproportional under-representation in other institutions, the Committee of the Regions simply reinforces the existing lack of proportionality. As an institution, despite the excellent work its members do, it has constitutional deficiencies that discredit the concept of a true regional element in European government. The Committee is radically ambiguous in role as between providing a forum for local government and providing one for regional governments, and the method of nomination of members entails that the Committee has negligible democratic legitimacy either locally or regionally. Radical structural reform is urgently needed.

By way of a *purely illustrative* example, one can figure principles that would make possible something closer to proportional representation, without excluding very small states. In a union of 367 million citizens, one might contemplate a median population size for 'regions' at about 2.5 million citizens. An allowance of three representatives (with three substitutes each) per notional region would yield a Committee with 450 members. Member states having 2.5 million or fewer citizens would be entitled to elect a full set of three members. Other states would be entitled to denominate regions, and to allocate numbers of representatives to them based on relative population size, subject perhaps to some local application of degressive proportionality in the interest of small but highly distinctive regions. The total per member state would be calculated on the basis of three members per 2.5 million citizens, rounded up or down as might be appropriate. The system of election or selection of members to the Committee could in that framework be determined by 'constitutional regions' for themselves. For administrative or geographical regions lacking legislative and executive powers of their own, this would have to be done, after appropriate consultation, by the relevant Member State Parliament. The size of a Committee of the Regions so constituted would grow step by step with the admission of new member states, but even with an aggregate population of 500 million, the total would only marginally exceed 600 members, taking account of the presence of some Member States with very small populations.

If, by the illustrated means or something similar, the Committee of the Regions achieved real democratic legitimacy in the regional setting, it could become a candidate for the status of a second or third chamber in the European legislative scheme. Certainly, it would seem more persuasive than any of the ideas considered in section 3 below.

2. Distribution of Powers

One can distinguish the idea of a constitution in a functional sense from the idea of a constitution in the formal sense. Where there are legally determinate rules that define and allocate the powers of agencies of collective self-government, there is necessarily a functional constitution, and its rules are the rules that define, allocate, and limit governmental powers. A formal constitution is a legal text explicitly drawn up to perform the functions of a constitution in the functional sense, and expressly adopted by the citizen body to that end.

The European Union does not at present have a constitution in the formal sense but the Treaties do contain all the essentials of a constitution in the functional sense, and have been acknowledged by the Court as a "constitutional charter" of the Union.

It is urgent to re-cast the Treaties so as to make clearer the way they already function as a kind of European constitution. The existing ill-ordered and apparently jumbled set of rules ought to be re-

ordered into a structured body of constitutional law, separating out fundamental constitutional principles and institutional competences, and differentiating these from essentially regulatory elements dealing with specific policies such as the Common Agricultural Policy. This can be done in the first instance without substantive change in the content of the Treaties, as has been shown through the exercise to this end carried out for the Commission by the Robert Schumann Centre of the European University Institute in Florence. Any further process of constitutional reform should start from a simply re-structured text of this kind.

One leading fallacy about the present constitutional structure is that it does not contain an explicit distribution of powers between Union institutions and Member States. In fact, there are several express provisions conferring competences on Union institutions, and several reserving competences and functions to Member States. Other competences, which are shared competences, are governed by the principle of subsidiarity. But the provisions on attribution of competence are stated with confusing differences of detail, and subject to a variety of different decision-making procedures involving in different ways the Commission, the Council of Ministers, the European Council, and the European Parliament.

The most satisfactory procedure in terms of clarity and democratic control is that under the so-called “Community model” (operative in the First Pillar, though not universally so). Here, the right of legislative initiative rests with the Commission. But the enactment of laws proposed by Commission is for the Council and the Parliament, the latter acting as a full legislative partner in the case of the process of legislative co-decision involved in the enactment of Directives in most but not all domains of law-making of this kind. In other cases, the Parliament has a merely consultative role, and the principal legislative power rests exclusively in the hands of the Council.

The existing European constitution is thus effectively that of a confederal union of sovereign states, not a centralized superstate. The fundamental basis is a unique form of constitutional pluralism. That is to say, the constitutions of the states, and those of their internal nations and constitutional regions exist independently of the Union constitution. They do not depend on it for their validity and they cannot be cancelled or overridden by legislative action on the Union level. This is the logical corollary of subsidiarity in the strong sense that currently prevails.

It must remain the case that constitutional changes at European level cannot take place so as to change state constitutions without the consent of the state, determined by the appropriate process of constitutional amendment within the state. This should be interpreted, in accordance with the principle of subsidiarity, as also protecting constitutional powers of internal nations or constitutional regions against revocation as a collateral effect of Union legislation. In turn, Union legislation always involves the governments of the Member States as such, acting in the Council.

The present judicial powers of the Union are not fully adequate to dealing with this, despite the remarkable success over many years of the ECJ. This is discussed below in Section 7.

This idea of constitutional pluralism entails a strongly decentralized conception of the Union. That is, the Union is not now and need never become the site of a single overriding sovereignty exercised in the name of the whole body of citizens of the union as a single totality. There is a divided and balanced sovereignty such that the citizens of each state remain masters of the state constitution while collaborating with others under a common union citizenship to establish a limited sovereignty at Union level. Constitutional regions, in particular internal nations, should be accorded similar regard

within member states. The debate about ‘federalism’ should take full account of the Union’s strongly decentralized character. Indeed, this feature of the constitutional architecture makes “confederation” a much more appropriate term than “federation”.

3. Democratic Deficit: New Chamber?

What has just been argued puts in proper perspective the currently fashionable thesis that the European Parliament needs a second legislative Chamber. Given that all legislation requires approval by the Council, representing the State governments, one legislative chamber is already in being. Under co-decision (and, to a more restricted extent, consultation) procedures the European Parliament plays the role of a second chamber. Therefore any new legislative body would function as a third chamber, unless an existing one were to be abolished, or be deprived of legislative competence.

One possibility by way of a so-called “second”, but actually third, chamber of the European Union legislature, would be to establish a new legislative chamber by nomination from Member State parliaments. A three-chamber legislature would not, however, seem readily workable and would yield a doubtful democratic gain.

This, in effect, follows from critical scrutiny of the considerations that have been taken to point towards the additional legislative chamber:

On the one hand, electoral turn-out for European parliamentary elections tends to be low in all member states relatively to parliamentary elections at the level of the state or its internal nations and regions. Turnout has been declining election-by-election since the introduction of direct elections to the European Parliament. The Irish Referendum on Nice has given out another danger signal about detachedness from the Union among the citizen body.

Again, there is an ever-increasing volume of law and regulation that has its origin at Union level, and this has reduced the real scope for law making in what remain at least in theory sovereign legislative bodies of the member states. Member State Parliaments may find themselves obliged to transpose large bodies of law that their members were unaware of during the European legislative process, and of which they may not approve, while their legislative discretion in other domains is limited by the obligation to respect the community *acquis*.

The same applies to a devolved parliament, such as the Scottish Parliament under the present constitutional dispensation. We belong in one of the several member states where federal or quasi-federal forms of government exist that allocate to internal nations or regions legislative and executive power in relation to important domains, such as home affairs and justice, education and research, cultural affairs, industrial development, and internal transport. It is extremely important to ensure that there are clear lines of communication in both directions connecting legislatures at this level to the Union legislative process in a way that makes possible prior scrutiny of and comment upon legislative proposals at sufficiently early stage in the process. It is no less true of these legislatures that they are bound by the *acquis communautaire*, and that in many domains their legislative activities are affected by the obligation to transpose relevant Directives in a locally appropriate way.

This relative overshadowing of parliaments (central, devolved, or federal) in Member States is at its most alarming in those areas which are subject to qualified majority voting in the Council of Ministers, but not to co-decision with the European Parliament. Democratic self-government requires

legislative decision-making to take place in public after public deliberation by elected legislators. The Executive branch of government has properly the role of preparing legislative programmes and bringing these before the legislature. The legislature, as a democratically elected parliament has then its proper task of deciding whether to reject or to adopt the executive's proposal, with or without amendment.

In the domains that are now subject to decision by the intergovernmental method in the Union's second and third pillars (and even on crucial matters including agriculture and fisheries in the first pillar), legislative democracy is therefore severely compromised. Members of the Executive Branch of the several states deliberating in secret become the effective legislature for the Union, without adequate answerability either to the Parliaments of the member states or to the European Parliament.

Even where co-decision prevails, deliberation in the Council proceeds in secret, not least at the stage at which legislation is finally being adopted by way of a 'Common Position'. This also applies where there is a difference between Parliament and Council that goes to the final legislative stage, that of a 'Conciliation Committee', whose report (if an agreed report can be achieved) must be given a final reading in each of Parliament and Council. Hence the Executive government of each Member State makes its own input to the community legislative process in a way that precludes real answerability to any domestic legislature. The power (often in practice no more than a theoretical power) to dismiss a government or to censure a minister after the event is no substitute for the power to control or at least influence the process of law making in its detail during the law-making process.

Rather than seek to remedy all this by having a third chamber, it would be better to amend the Treaties so as to make the Council as a legislative chamber open and public in its deliberations. By this means alone would it be possible to increase the opportunity for pre-legislative scrutiny both by Member State parliaments and by internal-national or constitutional-regional parliaments within the states. It is also urgent to extend the co-decision procedure to all domains of law-making in which Qualified Majority Voting prevails in Council.

Alternatively, it has been suggested that the Council should abandon its law-making role and assume the totality of executive power, including the power of legislative initiative. This would displace the Commission from its present role and demote it to being essentially a superior administrative college.

Along side of that, the European Parliament would be transformed into a two-chamber legislature. The present Parliament would retain its present composition and functions, but a new upper house would be added on the basis of secondment of members of national parliaments, to exercise the revising and stopping power traditionally possessed by a senate. This, it is argued, would secure that laws binding on national parliaments would come into existence only by the consent of representatives of those parliaments. Democracy would be better served at both community level and member state level under such an arrangement.

There are two serious objections.

First, as an executive, the Council would be one that is effectively unanswerable to any democratic authority. For its members each hold office by retaining confidence in their own member state parliament, and there can be no collective accountability of the Council as such either to the state parliaments or to the European Parliament, whether in an upper or in a lower chamber. The real

transfer of executive power would effectively be to senior civil servants in the Committee of Permanent Representatives, and Ministers acting on their advice. Recent changes, dramatically exemplified by the dismissal of the Commission in March 1999, have by contrast secured that the Commission has become substantially and effectively answerable to the European Parliament.

Second, on the legislative front, those seconded from member state parliaments would bear such heavy legislative responsibilities that it would be difficult for them to remain closely in touch with the work of the domestic parliament. How then would the seconded members keep their colleagues at home genuinely alert to, or committed in a well-informed way to, legislative developments at community level? Or should seconded members be subject to *ex ante* instructions from the home parliament, and, if so, how well-informed could these instructions be?

In short, this arrangement would replicate the very same problem as exists at present concerning *ex ante* scrutiny by national parliaments of decisions by ministers in Council.

Moreover, in relation to all proposals of this kind, it may be questioned on what democratic basis a selection would be made from among members of national parliaments. After all, members of these parliaments have primarily a mandate to represent their own constituents in the state Parliament, to hold the state's government to account, and to participate in law-making there. For a 'second chamber' to take on more than an advisory role would be difficult to justify as a way of diminishing a 'democratic deficit'. For any system of appointing or electing a subset of MPs would raise as many questions of democratic legitimacy as it would solve. Each Parliament would presumably retain the right to devise its own scheme of selection or election, with consequential problems about the genuinely representative character of the whole assembly.

Above all, in the Scottish context, one must say that the cure would be worse than the disease. No more would be done than to find some way of establishing an additional chamber comprising persons elected or appointed from Member State Parliaments. Unless in the UK there were an alteration to the Upper House such as would give it a "regional" representative character like that of the *Bundesrat*, the interest and the legitimate concern of the Scottish Parliament would continue as far from any satisfactory resolution as at present. Even if this did happen, Scottish representation in the reformed upper house would be as much in a minority as in the lower house. The overall size of a 'second chamber' would become severely problematic, to say the least, if an attempt were made to accommodate delegations also from national and regional parliaments as well as from those of Member States. This is simply a function of the very large number of regional parliaments there now are in the Union.

It therefore appears that this model would generate greater problems than those (if any) that it would solve in the way of democratic deficits.

To repeat a point made already: What is most urgent would be to make Council as a legislative chamber open and public in its deliberations, and by this and other means increase the opportunity for pre-legislative scrutiny both by Member State parliaments and by national and regional parliaments within them. The avenues of influence are then through the different links that obtain between parliamentarians at all levels inside the state. Much can be achieved by active mutual engagement of colleagues, especially colleagues of the same party affiliation sitting in different parliaments. It is also important to make use of links (whether of affinity or of opposition) between parliamentarians and Ministers who take part in Council meetings.

At the preparatory stage of proposals, active links to the Commission have great value, and will continue to do so long as it retains the right of initiative (for which it is so much better fitted than the Council). Wherever there are effective alliances of governments or parliaments on the level of the constitutional regions in relation to specific issues of concern, it can be presumed that collective pressure on the Commission will typically receive a yet more attentive hearing than isolated approaches. It is welcome to note in the White Paper the extent to which the present Commission's stance is cordial towards the "regional" input, especially from the constitutional regions.

At the deepest level, the only effective answer to a democracy deficit in the European Union is alleviation of the information deficit. Citizens need as much and as clear information as possible about all the parliaments and executive bodies that contribute to the overall frame of government. This applies particularly but not only to matters affecting the economic, employment, cultural and environmental interests of citizens. Collaboration among the Parliaments of the Union, in the setting of the present scheme of institutions, can only be brought about through establishing optimal conditions for information-exchanging and for mutual understanding of each others' competences and activities. Recourse to new technologies and establishment of stronger and more systematic working relationships between parliamentary committees and political groups could help to generate greater synergy than exists at present.

The Conference of the Community and European Affairs Committees of the Parliaments of the European Union (COSAC) is most intensive form of collaboration that has been achieved so far. It was brought to the forefront of attention through the Protocol on the role of the National Parliaments in the European Union, annexed to the Treaty of Amsterdam. COSAC came into being in May 1989 when Presidents of Parliaments of Member States agreed in Madrid to reinforce the role of member state parliaments in the Community process by bringing together from the Member States the committees specializing in European Affairs. Over the years there have been several important developments in this structure. In 1991 Rules of Procedure were adopted.

However, COSAC can only reach decisions by unanimity. This is a profound obstacle to its broadening the scope of its work. Unless there are changes to the capacity of COSAC to adopt decisions, the aims set out in the Amsterdam Protocol are not realistically achievable. But such changes would involve conferring a questionable degree of power on the members of the Committees who come together in COSAC, and the Scottish and other like interests would figure no better. In summary, COSAC has almost insurmountable difficulties in dealing with concrete legislative proposals, since it is adapted by its character chiefly to giving its opinion on questions of a general institutional kind.

4. 'Regional' Input to Council Deliberations

The mechanisms for intergovernmental consultation established by the Concordat between different levels of government in the UK govern the possibility of direct Scottish Executive input in the development of UK policy on EU issues. As intergovernmental practices, they are not open to detailed public scrutiny, but the known facts concerning, *e.g.*, Scottish ministerial participation at the Council, reveal an unsatisfactory level of involvement. Similar intergovernmental, or intragovernmental, practices presumably exist in other states. The present understanding of subsidiarity is one that leaves it to each state to make its own arrangements in such matters.

One advantage of transforming the Council into an open and public form of legislative debate (though, of course, not necessarily of pre-legislative consultation) is the leverage this would give to the Scottish Parliament in relation to important issues of European policy. Especially through the Committee system, but also by parliamentary questions and other modes of calling to account, MSPs would be in a position to establish what influence the Scottish Executive had achieved in the determination of policy. Where distinctive Scottish concerns could be signalled clearly in advance, it ought to be possible to take some steps to have these dealt with or alleviated. For example, if something like the Maritime Cabotage Regulation of 1992 were taking shape, the issue of the appropriateness of such a régime to the circumstances of Scottish island and peninsular ferries could be raised early enough to make possible the insertion of suitable qualifications or exceptions. If the UK government refused to take appropriate action in the Council, the allocation of responsibility would be clear.

5. “Active Involvement”

Parliaments of constitutional regions, being endowed with legislative power, must be included in any future scheme of collaboration between the European parliament and Parliaments of the Member States. The totality of the Parliaments of the Union, each working within its particular sphere of competence, constitutes a set of complementary mechanisms enabling citizens to exercise effective control over the exercise of public power at all levels.

However, when it comes to a body such as a “Convention” deliberating in the run-up to an Intergovernmental Conference such as that of 2004, it is difficult for even constitutional regions to make out a case for some special right of participation. The Convention seeks to represent the States’ parliaments and their governments, the European Parliament, and the European Commission, and to give involved observer status to candidate countries. There is a limit to how large a viable Convention can be, and there are many parliaments with legislative power at the regional level throughout the Union.

It has already been noted, however, that the larger Member States have proportionally smaller representation in the Parliament than smaller ones, and this creates distortions as between constitutional regions (especially internal nations) within large states and independent member states that are similar in size to them. In this context, it could be argued that member states having a population larger than some given threshold should be entitled to two government representatives, provided that the second representative was a nominee of regional rather than of central government. Alternatively, the parliamentary representation could be structured with a view to playing this role, and would probably be the case, in e.g. Germany or Austria. But this would not obviously fit the current structure of the UK Parliament, and it is not on the face of it likely that special arrangements will be made.

This poses sharply the issue whether regional status is adequate in the case of Scotland or similarly situated countries. It is at the heart of Scottish constitutional debate whether a nation that currently has the status of a constitutional region within a union state gains adequate advantages within the European Union from its present situation. In particular, are such (alleged) advantages sufficient to outweigh the disadvantages such a nation has in comparison with similarly sized nations that are Member States of the Union? National parties in several internal nations, among them the SNP, have it as their explicit political goal to achieve national independence within the European

framework. In the nature of the case, the internal nations are entities that substantially satisfy already the 'Copenhagen criteria' that apply to countries seeking entry to the EU from the outside. If they were external states applying for admission as candidate countries, their path would be a clear one. It would be desirable for all parties to constitutional debate in Scotland and similarly situated nations to work towards establishment of clear doctrines concerning pathways to 'internal enlargement'.

6. Regional Rights

In addition to the ideas concerning a second or third chamber of the European Parliament discussed above, one might note a suggestion put forward by *The Economist* (Draft Constitution for Europe, 28 October – 3 November 2000, pp. 17-22). This would establish a representative body of members of national parliaments to act not as a regular house of the legislature but as a kind of constitutional council. This body's function would be to control legislation by Council and Parliament according to the criteria of subsidiarity and proportionality. These criteria being matters as much for political as for strictly legal judgement, a politically constructed constitutional council of this kind would, it is said, be a better guardian of the overall constitutional framework than a Court such as the ECJ.

There would, however, be a serious risk of conflict of jurisdictions between such a body and the European Court of Justice. Nor is it clear that a party-political body of this kind would function as anything other than a third house of a legislature comprising Council and Parliament with the Commission continuing to play the part of the executive branch of community government.

It is true, however, that there can be risks of conflict between a State's Constitution as interpreted by its highest constitutional court, and the requirements of the Union's 'constitutional charter' as this is construed by the European Court of Justice. The existing constitutional pluralism that characterises the Union is one of its highly desirable features. Therefore there is need for some form of special constitutional court or tribunal of conflicts to deal with problems of this kind, and to secure that conflicts concerning the proper interpretation of competences at all legislative levels within the Union can be resolved satisfactorily. A special tribunal comprising judges from a panel representing both the ECJ and judges from highest constitutional courts of member states would be much more appropriate to a task of this kind than would a Council drawn from parliamentarians with the party affiliations proper to elected representatives.

The governments and parliaments of constitutional regions should, for obvious reasons, have an independent right of recourse to such a constitutional court. In the meantime (and in any event) it would also be desirable for constitutional regions to have access directly to the European Court of Justice in case of controversies concerning the lawfulness or validity of governmental or legislative action at the level of the internal nation.

7. Charter of Rights

The Charter of Fundamental Rights of the European Union should be a part of the constitution of Europe. It would certainly be redundant or objectionable if it were adopted or implemented in a way that purported to override the constitutional or legislative provisions of the Member States concerning guarantees of fundamental rights. Nor would it be acceptable to undermine in any way the standing of the European Court of Human Rights or the European Convention of which it is the final arbiter and interpreter. However, the Charter expressly guards against both these points of objection. For it

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explicitly restricts its own application to the activities of the institutions of the European Union, and the Member States when they are acting to implement Union law, and thus acting as organs of the Union. And it explicitly saves the jurisprudence of the Human Rights Court, and the authority of the Convention, for the Charter may not be interpreted in such a way as to cut down or restrict any Convention right, though Charter Rights within the Union may have more extensive scope than Convention Rights

It seems absurd that a Charter containing such safeguards against abuse should be restricted to being a political declaration rather than being given legal effect subject to the safeguards as part of the European Constitution. For it would not override national law, and would be implemented in a way that respects the framework of the European Convention on Human Rights, and the established jurisprudence of the Human Rights Court.