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THE COR AT 16: GROWING UP OR STILL UNDER AGE?

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Introduction

The Committee of the Regions (CoR), which celebrated its 15th anniversary in 2009, is a comparatively young institution in the EU set-up. Since having been created by the Maastricht Treaty in the image of the European Economic and Social Committee (EESC) as an advisory body, the CoR has sought to develop its role as the most visible institutional expression of the sub-national level of governance in the emerging 'multi-level governance' system in the EU, in order to establish itself as a player in the legislative process and to strengthen its role vis-à-vis the other institutions. It has continuously pushed for an increase in the scope of its advisory function and has also taken important steps to broaden the range of its activities. In this sense, the CoR has seen considerable change to its institutional structure and role over the period of its existence.

The present paper seeks to establish, what the reasons for, and dynamics of this development may have been, and what they tell us about the kind of democracy that is emerging at the European level. The question is, where the Committee of the Regions stands with regard to the development of a multi-level polity with its own, unique democratic structures which in

¹ This paper is based on an earlier work 'The Committee of the Regions - the RECON Models from a sub-national perspective', RECON Online Working Paper 10/2010, available at www.reconproject.eu/publications

an innovative way organise the cooperation and increasing integration between different levels of democratic representation. The development of the EU as a governance structure is continuously challenged from different perspectives for its dispersed and, some argue, insufficient democratic legitimacy. The question is which contribution, if any, a structure like the CoR can make to improve this situation and whether changes to the Committee over the first decade and a half of its existence give indications as to the direction in which the CoR is moving.

From a brief overview of some key changes to the CoR's institutional standing as defined by the Treaties, the role and composition of its membership, the political forces at work and its relations with other EU institutions and bodies, it will emerge that the Committee of the Regions is subject to different and sometimes opposing pressures as far as its role and position in the system is concerned. The second part of the paper will look in particular at three areas of the CoR's activity which have recently become more important, and which may give suggest some trends in the Committee's development, which in turn reflect changing emphasis in the wider EU debate. Beyond the fact that an overall consolidation of the sub-national element in EU decision-making in the form of the CoR seems observable, while dramatic changes to its institutional role (through Treaty change, for example) are not to be expected in the medium term, any future extension of the CoR's role has to be based on the existing structures and, possibly, new activities. In terms of the European Union as a whole, this suggests that there is realistic scope to make multi-level governance more interactive and concrete, and this could in turn have a positive effect on the ongoing debate about the Union's legitimacy.

The Origin - Creating a Sub-National Voice at EU level

The Committee of the Regions was *prima facie* created to placate the fears of some of the more powerful regions in particular in the decentralised/ federal member states (notably Germany) that European integration would lead to an erosion of their (the regions') powers. Given the weak enforcement powers of the European Union, coupled with the gradual development of an independent legal order at EU level (notably through the doctrines of supremacy and direct effect of EU law), meant that regions with strong executive powers within their national contexts found themselves more and more often having to implement EU-legislation which had been agreed to by their national governments, but which had not been agreed to formally by the regional level. The German Länder (together with regions

from some other de-centralised member states, notably Italy and Belgium), therefore put pressure on their governments in the run-up to the 1990 Intergovernmental Conference to create a channel for regional input into the EU law-making process in order to counter-balance this loss of influence, and, as they saw it, democratic control. What they had in mind was a structure in many ways like the second chamber of the German Parliament, with veto-powers for the regions in areas of constitutionally or politically defined competence.²

If, as these ideas suggested, the sub-national entities would have been given a genuine 'third legislative chamber' at EU level (next to the Council of Ministers and the European Parliament), with real power to shape or even veto EU legislation, this would have put them of course in a position of central importance, because sub-national players would have been in a position to influence how much and which kind of sovereignty would have been transferred or at least exercised at the supra-national level- together with the member states themselves and the European Parliament.³

Yet one of the key problems of involving the sub-national level in EU decision-making became apparent very soon and was ultimately one of the reasons why these far-reaching ideas did not win the day despite the general support for a Europe of Regions: the heterogeneity of the existing structures across the EU member states. The concept of 'region' (as well as other categories of sub-national governance such as 'province', 'local community' etc.) is used historically and politically in very different meanings in different countries, political traditions, and concepts of democratic organisation. In that sense, bringing sub-national structures into the EU's political process in any formal way was bound to raise very basic problems of democratic equality and representation. It is therefore not surprising, that many member states (during the negotiations of the Maastricht Treaty) were very critical of the proposals advanced by the German Länder - using formal and democratic arguments, but clearly also defending in many cases the vested interests of national-level administrations who were, for reasons of domestic power relations, far from keen to give influence to sub-national players in the supra-national arena.⁴

² Wolfgang Clement: *Der Ausschuss der Regionen: Kritik und Ausblick - eine politische Bewertung*, in C.Tomuschat (ed.) *Mitsprache der dritten Ebene in der europäischen Integration: der Ausschuss der Regionen*, Europa Union Verlag, Bonn, 1995.

⁴ A. Warleigh, *The Committee of the Regions - Institutionalising Multi-Level Governance*, London: Sage Publications, 1999, p. 12-13.

In the event, a 'compromise' solution emerged in the shape of a Committee which does not just represent 'regions' but also other sub-national entities of governance (to take account of the different existing systems in the member states), and which only has consultative powers. This structure has in fact marked the CoR and its development from the beginning, because the different standing of CoR members (some are mayors of small towns, while others are representing powerful regions with legislative powers) was seen to weaken the overall impact of the body and was even expected by some to become the most important cleavage within the new institution.⁵ The debates surrounding these questions continue in the Committee with respect to the mandate of its members (see below), but also with regard to the extension of the CoR's institutional prerogatives in successive rounds of Treaty change, and most recently with regard to the Committee's role in 'policing' the application of the principle of subsidiarity (see below).

At the same time, it is interesting to note that right from the CoR's inception, another dynamic was observable: rather than being opposed to the creation of yet another institution with the potential role to curtail the autonomy of the supranational executive, the European Commission was a keen supporter and one of the key champions of the CoR in the 1990-91 IGC.⁶ The motivation for the support by the European Commission at the time was the idea that bringing regions as direct interlocutors into the EU level policy formation processes would improve the implementation of some of the key EU policies, notably the cohesion policy instruments. In administering these policies, in particular after the reforms of 1988, the Commission increasingly tried to engage in direct partnerships with the regions concerned - not least because it had experienced difficulties with some national level actors in implementing EC guidelines in the way they distributed the funds from the European budget.⁷

The idea to create a European-level representation of the sub-national level of governance therefore was seen as a way of co-opting the latter into the development of EC policies, to increase the chance of their effective implementation on the ground, and last but not least to improve their democratic legitimacy. In this sense, the European Commission was helping to create an additional channel of communication and potentially of influence, as part of an

⁵ T.Christiansen, 'Second Thoughts on Europe's "Third Level": The European Union's Committee of the Regions', *Publius: The Journal of Federalism*, 26 (2), 1996: 93-116.

⁶ A. Warleigh: *The Committee of the Regions*,..., op. cit. p 11.

⁷ Hooghe, L. (ed) *Cohesion Policy and European Integration: Building Multi-Level Governance*, Oxford, Oxford University Press, 1996; or Jeffrey, C. 'Sub-national mobilization and European integration: does it make any difference?'. *Journal of Common Market Studies*, Vol 38, No 1, (2000), pp 1-23.

emerging multi-level structure. Whether it did so purely for reasons of policy effectiveness and efficiency, or with a clear federalist blue-print in mind, is difficult to establish - but it is clear that the element of democratic legitimacy was at least used as an argument: After first having set up a 'Consultative Council of Regions' in 1988, the Commission, in the context of the preparations for the intergovernmental conference starting in December 1990, submitted the proposal for a consultative Committee of the Regions with the following reasons:

Lastly, the Commission considers that the Intergovernmental Conference must take account of the demand for the creation of a body to represent the Community's regions. This is an important parameter of subsidiarity. The wide variety of regional structures in the Member States precludes and will probably continue to do so, the involvement of such a body in the decision-making process. The Commission's suggestion therefore is that pending fresh developments, it should hold regular consultations with a body representing all the regions of Europe.⁸

It is interesting to note here that the Commission anticipated problems because of the diversity of sub-national structures in the member states. Moreover it is significant that the proposal is framed *not* in the context of regional policy or improved implementation, but as an issue of subsidiarity, and that it comes under the general heading 'Strengthening democratic legitimacy: Relations between the institutions and the people of Europe'. The role of sub-national agents in the EU decision-making process had therefore been elevated to a constitutional level, in the overall context of democracy for the EU. At the same time, this was also the point of departure for a structure, which has ever since found itself 'in between' the roles (and related expectations both from within, and from outside) of being an 'expert body' to bring in sub-national level knowledge and experience on the one hand, and the pretention to be a 'political assembly' which has a unique representative contribution to make to EU law-making, on the other.⁹ The challenge for the CoR was thus from the beginning to balance these two aspects and re-adjust this balance in response to its institutional trajectory.

The CoR in operation

The Committee of the Regions, based more or less on the Commission's proposals, was thus included in the Maastricht Treaty and based on the formula of a fixed number of

⁸ COM(90)600 final)

⁹ Carolyn Rowe "15 years on the sidelines? The role of the EU Committee of the Regions reassessed" draft paper, available at http://euce.org/eusa2009/papers/moore_07C.pdf

representatives per member state, corresponding to that of the European Economic and Social Committee,¹⁰ with the member states deciding how to distribute them between different sub-national actors. It is interesting that the formula on the CoR members' democratic mandate in the Treaty came to be *weaker* than originally proposed by the Commission. The Commission (one could suppose in the attempt to give as strong as possible a voice to the sub-national level) had argued that CoR members should be only 'democratically elected representatives' of their respective levels of governance. Especially the German Länder, however, wanted to open the Committee for officials representing high-level politicians.¹¹ This initial lack of a clear requirement for democratic representation did, however, create problems of credibility, in particular in the member states with generally weaker sub-national levels of government.¹² Subsequently, namely with the Treaty of Nice in 2000, the CoR provision in the Treaty was changed so that members now have to be 'democratically elected or [at least] be responsible to an elected body'. This change not only served (in the inter-institutional development of the EU system) to distinguish the CoR from its sister-organisation EESC, but was also seen to strengthen its legitimacy as a 'political assembly' overall.

The CoR members are appointed in the Council, upon proposal by their member state, originally by unanimity, though this was changed with the Treaty of Nice to qualified majority voting. As a testimony to the somewhat curious and certainly ambiguous role of the CoR between the logic of an expert body on the one hand, and the more representative aspirations of the federal member states and their regions,¹³ the CoR members like their EESC counterparts, are appointed on a free (independent) four-year mandate, i.e. the relevant Treaty provision in Art. 300.4 TFEU stipulates that the '*...members of the Economic and Social Committee and the Committee of the Regions may not be bound by any mandatory instructions. They shall be completely independent in the performance of their duties, in the*

¹⁰ The reasons for this parallelism are identified as both political and administrative 'convenience': creating the CoR in the image of the EESC was on the one hand "...a way of dealing quickly with one of the less important items on a crowded IGC agenda. [But] it was also a clear political decision on the part of those outside the group of CoR advocates who did not wish to see the CoR, or the sub-state level more broadly, develop into genuinely influential policy actors." C. Jeffrey 'Social and Regional Interests - the Economic and Social Committee and Committee of the Regions', in J. Peterson & M. Shackleton *The Institutions of the European Union*, Oxford University Press, Oxford, 2006, p 316.

¹¹ R. von Ameln: Die Entstehung des Ausschusses der Regionen: die Festlegung der Modalitäten für die Auswahl der Mitglieder in den EU Staaten, in C. Tomuschat (ed) *Mitsprache der dritten Ebene in der europäischen Integration: der Ausschuss der Regionen*, Europa Union Verlag, Bonn, 1995.

¹² Interestingly, in the German law on CoR membership of 1993, an elected mandate was required for the representatives of the local level, but not of the regional level - see: W. Kaufmann Bühler: Entstehungsgeschichte des AdR', in C. Tomuschat (ed) *Mitsprache der dritten Eben in der europäischen Integration: der Ausschuss der Regionen*, Europa Union Verlag, Bonn, 1995, pp 33-34.

¹³C. Jeffrey 'Social and Regional Interests...' op. cit. p 318.

general interest of the Union'. This text, which bears a certain resemblance to the mandates of EU Commissioners, raises some questions with regard to the CoR's democratic role within the EU system because it gives the Committee members a degree of freedom which seems somewhat difficult to reconcile with an idea of their accountability within their respective national or regional structures. This status would thus suggest a role of independent experts rather than democratic representatives for the CoR members.

Interestingly from the point of view of representativity, however, the Lisbon Treaty brought a further potentially important change in this respect: the newly formulated article on the CoR (now Art. 305 TFEU) does *not* spell out the distribution of CoR members between member states anymore, but foresees that a unanimous Council decision based on a proposal by the European Commission will fix the Committee's composition. This has already opened a highly controversial, and so far inconclusive debate within the CoR on a possible re-balancing of membership (within the parameters set by an upper limit of 350 members in the Treaty). The positions are clearly divergent between the defendants of the status quo (mainly the 'over-represented' smaller member states), and those, notably the German members who would want to bring the CoR more in line with the EP membership structure based on the principle of 'degressive proportionality'. This, it is argued, would make the CoR 'more' of a representative body and at the same time distance it further from the Economic and Social Committee by emphasising the territorial nature of its representation.¹⁴

Apart from these important changes to some of the constituent features of the CoR, the new body, once it had been set up and started operating (from 1994), had to find ways to define its own working methods and through this, try to maximise its influence within the narrow limits set by the Treaty provisions. The one and half decades of the CoR's operation have indeed seen quite far-reaching and interesting developments with regard to the institutional position and the activities of the Committee, but it is still an issue for debate whether the CoR has realised its full potential and whether overall it has managed to significantly bolster its influence and standing.¹⁵

Given the fact that the formal role of the Committee as defined by the Treaties was purely consultative, one of the key concerns of the body from the beginning was how to maximise

¹⁴ See document CdR 135/2008, item 8 (document for the CoR bureau meeting on 17.06.08)

¹⁵ For a critical view, see C Rowe: "15 years on the sidelines? The role of the EU Committee of the Regions reassessed", *op. cit.*

the influence of its work on the other institutions and on the EU legislative process in general. The provisions of the Treaty set out the areas in which the CoR would have to be consulted obligatorily, namely education, vocational training, youth, public health, trans-European networks, economic and social cohesion, and structural funds. This functional definition of the CoR's role in itself suggests indeed a rather limited understanding of what the new structure was supposed to contribute to the EU legislative process: giving the CoR the possibility to 'advise' the EU legislators in the areas most directly affecting sub-national competencies in (most) member states was a way to ensure that the Union would not overstep its remit and thus create unnecessary political conflict. It was also hoped it would facilitate the implementation of EU policies in these fields. At the same time, however, the Treaty did open the way for a degree of institutional 'activism' by giving the Committee the possibility to issue opinions on areas where it was *not* consulted, under certain conditions. It thus allowed the CoR to explore a more 'political' function not so much based on expertise and formal competence in a particular policy area, but on a more general logic of representation.

At the same time, however, the Committee was denied (and has not achieved up to today) the status of an EU 'institution'¹⁶ even though it got the right to draw up its own internal rules, and while these rules were originally subject to approval by the Council, this requirement was abolished with the Treaty of Amsterdam. In this context it is interesting to see that the CoR has indeed used this freedom to develop its own internal rules and has done so purposfully to increase the 'political' element of its activities and give more political flexibility to its members. The Committee has also managed to conclude a 'bilateral' agreement with the European Commission (and is seeking a similar one with the European Parliament) to organise cooperation within the EU political process. All these steps can be seen as signals of a gradual emancipation of the Committee of the Regions from direct control by the member states or the Council and in that sense indicative of a move towards a self-perception of the CoR as an independent player with its own legitimacy in the EU system.

One important factor in this regard has been the gradual and continuous 'politicisation' of the CoR: in its working methods, the appointment of members to key positions, its relations with other institutions and in its internal structures, the political groups have become increasingly influential over the years. Analysts seem to agree that this has contributed to the consolidation of the CoR's standing as a player in the EU's legislative process, and it has clearly facilitated

¹⁶ This status is reserved for the European Commission, Parliament, Council of Ministers, European Central Bank and European Court of Justice

closer cooperation with the other institutions.¹⁷ Yet, in itself this development has not been enough so far to resolve the tension between the different logics present in the Committee's initial set-up.¹⁸

In parallel, already with the Treaty of Amsterdam, the process of widening the scope of Committee's activity started and the formal areas of mandatory consultation have in fact been increased in successive rounds of EU-Treaty (re)negotiation: Amsterdam added cross-border cooperation, employment, social policy, environment and additional parts of transport, vocational training and public health policies.¹⁹ It also gave the European Parliament the possibility to consult the CoR directly, an important element not just because of its immediate impact in terms of referrals, but because of the initially strained relationship between the two institutions both vying for (admittedly different kinds) democratic legitimacy within the EU system. With the setting up of the Convention on the Future of Europe (2002-2003), which included six representatives of the Committee with official observer status, the CoR further advanced its 'institutional' position. This was in part based on the earlier recognition, in the 2001 White Paper on European Governance²⁰ of the need to improve dialogue with local and regional actors in order to increase the quality and the acceptance of EU policy. The White paper made specific recommendations to the CoR in terms of its role as a network and dialogue facilitator, but without concrete changes to its legal or institutional standing. The Commission's White Paper was of course part of the recognition that the Nice Treaty had failed not just to prepare the EU for enlargement, but also to solve the Union's democratic deficit problem. It also laid the foundation for subsequent attempts to improve the EU's legitimacy through more public debate and encouraging deliberation and the overall tendency to move the Union in a more 'federal(ist)' direction with the subsequent debates on a European Constitution.

Significantly in this context, the 2001 Laeken mandate and its more than 60 questions²¹ which set the stage for the debates in the Convention, did *not* refer to the role of local or regional government levels in the overall attempt to improve European governance or give shape to a

¹⁷ C.Hönnige & A. Kaiser: Opening the Black Box: Decision-Making in the Committee of the Regions, in: *Regional and Federal Studies*, Vol 13, 2, Summer 2003, pp 1-29, quoting Farrows (1997), van Ameln, (1996).

¹⁸ C. Rowe, "15 years on the sidelines?.." op. cit.

¹⁹ A. Warleigh: *The Committee of the Regions ...* op. cit., p 17.

²⁰ COM(2001) 428

²¹ European Council, 2001, Presidency Conclusions of the European Council Meeting at Laeken, 14/15. December 2001, Annex I

new kind of 'multi-level structure'.²² If one takes the Laeken summit, and its mandate to draft a document that would eventually lead to European Constitution, as the 'high point' of the more federalist inspired visions of a future European democracy, the fact that the levels of governance below the nation state were not mentioned explicitly is quite astonishing. Nevertheless, the active participation of six CoR observers in the Convention, in close cooperation with the European Parliament and many national Parliament representatives, proved to be rather successful both in terms of the visibility gained for the CoR, and in terms of the inclusion of certain key demands in the draft Constitution.²³ Unlike in previous rounds of Treaty negotiation, the emphasis this time was not just on strengthening the institutional role of the CoR, but also on a wider recognition of the role of local and regional levels of governance in the emerging multi-level EU policy. In fact, the CoR's own assessment of the draft constitutional process,²⁴ in which the assembly also expresses its wishes for the IGC following the Convention, contains an interesting list of elements of the draft Treaty which are considered to be achievements for the sub-national levels of governance:

- 1) the recognition of local and regional self- government as an element worth preserving of Europe's diversity;
- 2) the recognition of linguistic and cultural diversity; the elevation of territorial cohesion to the status of 'objective' of the Union;
- 3) the reference to elements of direct democracy (albeit without a clear link to the local/regional level);
- 4) the new definition of subsidiarity (see below, which gives the CoR a role, though not very clearly defined, in the ex-post monitoring of subsidiarity compliance);
- 5) the extension of the CoR mandate from 4 to 5 years, thus bringing it in line with the 'other' institutions (EP and Commission);
- 6) and last not least the right of the CoR to access to the European Court of Justice in order to defend its own prerogatives and against presumed violations of the subsidiarity principle.

It has to be noted, however, that these 'achievements' of the Convention for the Committee (which were transferred apparently without further debate both into the draft Constitutional Treaty and then into the Lisbon Treaty), rather than resolving the fundamental indeterminacy

²² see also: J.Schönlau: The Convention on the Future of Europe and its Antecedents, in D.Castiglione et al. Constitutional Politics in the European Union - The Convention Moment and its Aftermath, Palgrave-Macmillan, Basingstoke, 2007, pp 67ff.

²³ See CoR Study 2004: The local and regional dimension in the European constitutional process, Brussels, 2004

²⁴ CdR 169/2003 of 13.10.03

regarding the CoR's precise role and function for EU democracy, have re-enforced parallel tendencies in the development of EU democracy, which characterise the whole Union structure and leave the debate wide open: the recognition of the autonomy of member states in organising sub-national levels of governance reinforces diversity and makes representation of the sub-national level in the central decision making more difficult. At the same time, the CoR is given a role in policing subsidiarity via the federal level ECJ. Direct democracy is introduced in parallel with also strengthening executive decision making. With the backlash against the constitutional project after the failed referenda in France and the Netherlands in 2005, and in Ireland 2008, and subsequent debates about the Lisbon Treaty, these issues continue to influence the day-to-day functioning of the EU's institutional system and the CoR within it.

The CoR develops its profile

While the general 'constitutional' debate thus has gone on, the CoR also continued to develop itself through concrete activities, which clearly reflect different political visions over time, interact with the overall development of the European Union and contain elements which suggest different possible trajectories for the EU as a multi-level democracy and the CoR within it. The following section will present three different areas of recent CoR activity as examples of three different tendencies and look in more detail, which political and institutional dynamics influence their evolution and what they indicate as to the position of the sub-national element in the EU, and the CoR as its most prominent political expression.

The first case study in this respect is the field of 'subsidiarity control' where the CoR recently made some moves already in 2008 in anticipation of the changes under the Lisbon Treaty and which may constitute potentially a very significant part of its future remit. According to some within the Committee, from this perspective the CoR could be developed as a tool for sub-EU level interests (most likely national or regional) in trying to control and, if necessary, reign in the supranational institutions.²⁵

The second case to be studied here is the debate in the Committee around the CoR's own initiative to draft a 'White Paper on Multi-Level Governance', which was one of the political priorities of the mandate of the 2008-2010 CoR president. This initiative, which was branded as a 'follow-up' to the recommendations of the 2001 Commission White Paper on

²⁵ This is based on an internal report 'Connecting Europe: the Future of the CoR', prepared in the context of the drafting of the CoR mission statement in 2008-2009, including survey data of CoR members and their preceptions of the institution.

Governance, can be seen as an attempt of the Committee to be in the forefront of the debate on how to build a federal multi-level polity with a strong local and regional voice in *both* policy shaping and policy implementation, and thus represents also an attempt to resolve the internal tension between the Committee's parallel roles as expert body and political assembly. The third case study looks at a number of CoR activities aimed at spreading the values underlying European integration beyond the borders of the. Particularly the active role of the CoR in engaging with sub-national levels of government of future member states in preparation for their accession to the Union, and the recent move to establish a sub-national dimension to the proposed 'Union of the Mediterranean' are interesting examples of the Committee reaching beyond the Union.

Subsidiarity Control

The concept of 'subsidiarity' is clearly of key importance in trying to determine which decision should be taken at what level and, by reference to the twin principle of proportionality, which scope these decisions should have is crucial in establishing which democratic mechanisms at what level are needed to legitimate these decisions or, if they cannot be legitimated, to challenge them. In this context it was probably not a coincidence that both the Committee of the Regions and the concept of 'subsidiarity' made their entry on the EU (Treaty) stage at the same time, with the Treaty on European Union in 1992. Even though the link between subsidiarity and the role of multiple layers of governance is not postulated very clearly in the Treaty text, subsidiarity, in an ideal world, should be working as a guiding thread to distribute decision-making in a functioning multi-level democracy.

The problem is, however, that the understanding of what exactly subsidiarity means, what political consequences it could have, and how it should best be put into practice, remain contested within the EU system. In fact, the concept its 'operationalisation' (in the Treaty of Amsterdam), and also subsequent debates in the Convention on the Future of Europe on the division of competencies, have not been able to resolve 'once and for all' the complex questions of 'who does what'. Moreover, as Grainne de Burca points out, indeed "..., the range of questions arising in relation to the role of different levels of government and of the various institutions, actors and tiers of political authority go well beyond what is expressed in the various legal formulations of subsidiarity in the EU treaties".²⁶ This observation points to

²⁶ Grainne de Burca: Reappraising Subsidiarity's Significance after Amsterdam, Harvard Jean Monnet Paper 07/99, Cambridge (MA), 1999 (last page, page numbers not available)

the difficult distinction and interaction between the 'legal' definition and implementation EU-level policies, on the one hand, and the 'political' decision which have to underlie and justify these actions, on the other. In fact, to some subsidiarity precisely became a successful concept because it did not fix any given distribution of competencies or tasks, but rather served to 'cover' certain disagreements of principle and thus allows for pragmatic case-by-case solutions to be found.²⁷ Yet subsidiarity for the same reason became one of the contested elements of successive Treaty reforms, as well as providing a battleground for some institutional competition as to who should be at the forefront of operationalising the vague concept.

In any case, it is significant that the original framing of subsidiarity at EU level only made reference to two levels of governance, namely the national and the EU level. Questions regarding 'more subsidiarity', i.e. within the member states in relation to the sub-national levels of governance, were not touched upon - paradoxically for fear of violating the very principle of subsidiarity by interfering with the internal structure of the member states. This fact did also not escape the Committee of the Regions, which proclaims (on its web-site under the subsidiarity heading) to have made 'explicit and constant political requests for the subsidiarity and proportionality principles to be better applied in the Community decision-making process' since it started its work.²⁸ These calls were finally heard during the Convention on the Future of Europe, which drew up a new, widened definition of subsidiarity, including a reference to the local and regional dimension, and gave the right to the CoR of defending its own prerogatives in this respect before the ECJ.²⁹ The new subsidiarity protocol also gives a role to national parliaments in 'policing' the principles of subsidiarity and proportionality, and thus contains the seeds for the development of a whole new 'system' of interlocking political debates on which decisions should be take at what level.

In response to this new provision in the Treaty, the Committee of the Regions has for a number of years been trying to explore the role it could and should play concretely in the implementation of the still somewhat vague principle of subsidiarity. Since 2004 the CoR has organised a series of high level conferences in cooperation with a number of national and regional parliaments called 'subsidiarity assises' (in Berlin, 2004 with the German Bundesrat, London with the House of Lords in 2005, Paris with the French Senate in 2008, Milan, in

²⁷ J.H.H. Weiler, U. Haltern & F. Mayer: European Democracy and its Critique: Five Uneasy Pieces, EUI Working Paper RESC 95/11, Florence 1995.

²⁸ <http://www.cor.europa.eu/pages/EventTemplate.aspx>

²⁹ Protocol No 2 on the application of the principles of subsidiarity and proportionality.

cooperation with the regional parliament of Lombardy in 2009), in which both the general implications of a 'strengthened subsidiarity culture in the EU' and the concrete tasks of the different players were discussed. At the same time, recognising that already the national Parliaments (let alone the regional ones) would find it difficult to ensure the necessary coordination among themselves in order to become effective in using the so called 'yellow-card system' of the draft Constitutional Treaty,³⁰ the CoR embarked on setting up its own structures for the control and implementation of the subsidiarity principle.

The approach adopted by the Committee of the Regions is two-fold: on the one hand, the aim is to mainstream an evaluation of the impact of a given Commission proposal from a subsidiarity point of view, into all CoR opinions. This is supposed to help focus the Committee's official (institutional) role of commenting early in the legislative process on new proposals from a sub-national perspective, on the dimension of subsidiarity. To this end, an internal set of guidelines (adopted by the CoR bureau in September 2008)³¹ sets out the criteria and procedures according to which the Committee administration, in preparing the background material for a rapporteur drawing up an opinion, is supposed to tackle the subsidiarity issue. Clearly, the responsibility of including or not any concerns raised in the final document is a political one and will remain with the rapporteur, while the decision whether to launch a legal case before the ECJ remains the prerogative of the CoR plenary. It remains still to be seen so far, how cooperation with either national or regional parliaments will work concretely in this domain, given the tight 8-week deadline and the lack of a formal role for the CoR in the 'early warning' procedure for national parliaments under the Lisbon Treaty.

The second approach is therefore focussed more on the CoR's role as a platform of information exchange and networking between different regional and local actors. The Committee has set up a subsidiarity monitoring network, in which local or regional governments, Parliaments, or national Parliaments can volunteer to participate and feed their

³⁰ Under Protocol No 2 on the application of the principles of subsidiarity and proportionality (Art 6), any national Parliament may, within a period of 8 weeks after it has received a draft legislative act of the Union, send a 'reasoned opinion' to the EU institutions, stating why it thinks that the proposed act violates the principle of subsidiarity or proportionality. If such reasoned opinions are received from at least 1/3 of national Parliaments (1/4 for certain legislation in area of freedom, justice and security, deemed more 'subsidiarity sensitive'), the act must be 'reviewed' (Art 7.2) and a reasoned decision must be given by the EU institutions on whether to maintain, amend or withdraw the proposal. Under the 'ordinary legislative procedure' (co-decision with qualified majority voting), the threshold for the national Parliaments intervention is 'a simple majority' (Art 7.3). It is interesting, that Art 6 of the same protocol refers specifically to the consultation, 'where appropriate, [of] regional parliaments with legislative powers'.

³¹ CdR 229/2008.

own subsidiarity evaluation on a new proposal into the process. The Committee provides to this end a 'subsidiarity grid', that is, a catalogue of questions which members of the participating local or regional authorities should answer and return to the CoR. The latter endeavours to provide linguistic as well as logistical support to make these contributions available to all partners in the network, to produce a final report on the basis of the contributions and internal discussions of the network partners, as well as exchanges between the partners and the CoR rapporteur on the same proposal. After a number of 'test-runs' in 2006-2007, the subsidiarity network became operational in 2008 on a more permanent basis. The network by now counts more than 100 regional and local authorities, associations of sub-national governance actors, including a number of regional and also some national Parliaments (i.e. the French Senate, the Italian Senate, the Greek Parliament). Given the short time frame and the linguistic and cultural diversity in the ways in which different Parliaments work, again it remains to be seen, however, how sustained and sustainable the network and its efforts will be and what impact its deliberations will have.

Recently (mid-2010) the subsidiarity monitoring platform has proceeded to set up thematic working groups by policy areas (such as immigration, health or regional policy) and to produce reports on the consultations carried out among its members on specific Commission proposals (see SMN-web-site)³². Yet, apart from the considerable challenge of organising this kind of network activity among a large number of diverse partners, working in a number of different languages, and respecting the already rather short time-limits for the elaboration of a CoR opinion, the main question remains one of political responsibility, i.e. how the (self-selected) network partners will and should interact with the rapporteur, the responsible CoR-Commission and ultimately with the CoR plenary. There also seems to be a certain risk of duplicating structures and procedures if and when national Parliaments (for example via the COSAC) also build up their structures to organise their input, and a further question remains what effect such a structure is going to have on the overall coherence of CoR opinions.

On the other hand, in terms of the role of the CoR, this network is of course interesting: firstly, because it raises potentially very sensitive issues about the relationship between different levels of governance, as well as between executive and legislative powers *within* many member states with regard to European affairs.

³² <http://subsidiarity.cor.europa.eu>

What impact, if any, would even a large majority of subsidiarity concerns expressed by sub-national Parliaments across the EU (some of which might have legislative powers, others not) have on a proposal that has been demanded by a qualified majority (or even all) member state governments in the Council?

Will national parliaments be able to come to coherent positions on proposed new EU legislation 'in time' to influence the law-making process, and which role could the CoR play in this, rather than just being a facilitator - but without risking to be caught in the middle?

Also the dynamics which the CoR subsidiarity network might set in motion between regional governments and their parliaments are potentially very significant, but cannot be explored here.

Finally, how will the European Court of Justice react if, ultimately, the CoR would try to take a subsidiarity-based case before it - would the Court pass sentence on the 'political' decision which level should do what, or just on procedural and legality matters - and where would this leave the CoR as a 'political' actor?

All these questions cannot be answered at this moment and in the scope of this paper, but they are certainly of key importance for the future of the CoR, and maybe even for the political process in the EU.

Multi-Level Governance and Shaping EU Policy

Another area of activity of the CoR is its recent move (in the autumn of 2008) to propose its own 'white paper on multi-level governance'. It did so with a clear reference to the 2001 Commission White Paper on Governance, which at the time of its publication sparked quite a lot of debate within the EU institutions and in academic circles because it claimed to address some of the key problems of legitimacy, transparency and implementation of EU policy. Coming, as it did, in the context of the failure of the Nice Treaty to solve fundamental institutional issues (2000) and of the ensuing debate about re-founding (re-constituting) the EU, the white paper was an important contribution to the debate about *how* to organise and run a multi-level system of governance (even though it did not give all the definitive answers and in fact was criticised by many as not going nearly far enough).³³ The fact that in 2008-09 the Committee of the Regions assumed the task of proposing its own 'white paper' is in itself an interesting expression of institutional self-confidence, if not hybris.

³³ Joerges, C., Mény, Y. and Weiler, J. H. H. (eds) (2001) 'Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance', on-line symposium on the Commission White Paper on Governance. Available at www.jeanmonnetprogram.org.

The Committee of the Regions explained its initiative with reference to "...the 'Berlin Declaration' adopted by the Heads of State and of Government on 25 March 2007, which mentioned the common challenges and tasks "...shared between the European Union, the Member States and their regions and local authorities'. By drafting its White Paper (which politically was carried by then CoR president Luc Van den Brande, EPP, and then 1st Vice-President Michel Delebarre, PES, to emphasise the cross-party nature of the undertaking) the CoR underlined its aspirations to contribute to the development of a functioning multi-level system where the latter was taken to mean "...coordinated action by the European Union, the Member States and regional and local authorities, based on partnership and aimed at drawing up and implementing EU policies. It [MLG] leads to responsibility being shared between the different tiers of government concerned and is underpinned by all sources of democratic legitimacy and the representative nature of the different players involved".³⁴

This understanding of the system, and the CoR's role in it, clearly echoes an idea of the EU as a multi-level democracy in which the distinct levels have autonomous claims to legitimacy, and where the interaction between the levels (from the local via the regional to the national and European levels) has to be based not just on some kind of hierarchical understanding of 'derived' legitimacy. In this understanding, the principle of 'partnership' as developed originally by the European Commission for its cooperation with regional actors in implementing EU regional policy³⁵ has to be extended to all spheres of policy making in the interest of democratic legitimacy. The tool (or at least one of the key tools) for this, it seems to be implied, is the Committee of the Regions with its role in the EU law-making process. Of course this role would need to be strengthened in order to make multi-level governance function better, because one of the constant messages of the CoR in its consultative input is that the role and concerns of the local and regional level are not being given sufficient consideration by the EU level, both at the policy making and at the policy implementation stages.

What is more problematic, however, and has surfaced on several occasions in the debate about the multi-level governance white paper within the CoR, is the fact that most of the real problems in involving sub-national actors in policy making are not *European*-level, but occur

³⁴ CdR 371/2008 rev 1, pp 2-3

³⁵ L. Hooghe, (ed.) (2006) *Cohesion Policy and European Integration: Building Multi-Level Governance*, Oxford: Oxford University Press

in the member states. Whether due to constitutional structures that do not give much power to local communities or regions, or due to executive arrogance at the national level, it is often the national governments which do not want to involve 'their' sub-national actors: neither in European, nor in domestic affairs. Clearly, given the principle of subsidiarity and the respect for the member states' internal structures (made even more explicit in the Treaty of Lisbon), there is very little that the European level, including the Committee of the Regions can do about this. Apart from, that is, supporting the slow and unspectacular development of practices which do bring even the weakest local/ regional authorities into the process at least in those policy areas over which the European level has influence, and thus strengthening their position even vis-à-vis their national 'masters'.

While it is not a new observation that some sub-national actors do see the European level precisely as a way to by-pass their national governments on a number of issues, and therefore use the policies and debates in Brussels to build partnerships and positions which then are more autonomous from central (national) intervention, it is debatable how profound and lasting the effects of these developments are. The once very fashionable idea of a 'Europe of the Regions' seems to have lost some of its force recently, probably not least due to the influx, with the 2004 enlargement, of basically centralised member states where regional entities have only been recently set up (or re-established) in order to absorb EU funds. Whether this in due course will lead to the emergence of more powerful regional players, which in turn would also give more weight to the CoR in the institutional system of the Union, remains to be seen. It is, however, significant that on this level the debate about the 'white paper on multi-level governance' shows that the Committee tries to promote a model of European democracy which would give greater weight to the democratic legitimacy of the level(s) below the nation state.

The CoR beyond the EU

The third area of interest to be discussed here are the CoR's 'external' activities, i.e. its involvement in cooperation with non- (or not-yet) member states. This is significant because the increasing activity once again points to a role 'beyond' a mere advisory body for (primarily internal) EU policy, in particular because much of the external action comes in the context of 'exporting' European values. In fact, in very basic geographic and political terms, the Committee of the Regions has been trying to 'reach beyond' the EU borders, and export its own model, in the same way as the Union does as a whole, from very early on. One way of

doing that is of course through the ongoing process of EU enlargement, which does include the 'spreading' of democratic 'values' (which are defined as European, but in most cases are universal) to the accession countries. The CoR has always seen itself as playing a role in supporting enlargement, and thus as an agent of the diffusion of these European values to non- EU member states, either by organising and promoting direct contacts between local and regional authorities inside and outside the Union, by including observers from prospective member states among its members, and by setting up so-called Joint consultative committees or working groups (as in the case of Turkey).³⁶

More recently, this kind of activity has been taken a significant step further with the CoR's initiative to set up an assembly of local and regional representatives as part of the proposed 'Union of the Mediterranean' (ARLEM).³⁷ The idea behind this initiative, as well as with other activities reaching beyond the EU 27 member states, is not only to 'follow' the EU's foreign policy, but to be involved actively in the diffusion and promotion of the very idea of multi-level democracy in which the local and regional level has an autonomous and important role to play. This might come in the shape of concrete policy issues (such as the reduction of CO2 emissions, to which the 'Covenant of Mayors' brought together more than 400 cities from all over the world, with the assistance of the CoR), or it might be in the shape of opinions like the one on adopted in February 2009 on 'city diplomacy' or on specific countries which usually stress the key role that twinnings and other direct contacts between local and regional authorities can play in peace building and the development of a global culture of democracy.³⁸

Another element of what the Committee does in this sense is its support for a new instrument of direct multi-lateral, cross-border interregional cooperation. In the attempt to help implementing the EU's new legal instrument for a 'European Grouping for Territorial Cooperation', the CoR has decided to set up a EGTC expert group, with the aim of creating a central pool of information, to allow for best practice exchange and support regions in their

³⁶ The case of cooperation with Turkey is particularly interesting because the proposed setting-up of a Joint cooperative Committee (JCC) with the country has repeatedly been delayed because of disagreement between the CoR and the Turkish (national) authorities with regard to the 'appropriate interlocuters' for the CoR members: while the Turkish authorities wanted to send government officials, the CoR insists on having 'elected' local or regional politicians as members of the JCC, thus underlining its support for the development of genuinely democratic sub-national structures. This is particularly sensitive with regard to a number of ethnic Kurds who are mayors of towns and cities in South Eastern Turkey.

³⁷ CoR Bureau Document R/CdR 15/2009 point 10 a) (Feb. 2009)

³⁸ CoR opinion CdR 235/2008, adopted Feb 2009.

individual projects of cooperation.³⁹ While this might look at first sight like a rather technical element of the CoR's activity, it deserves close attention as the instrument develops, because the direct linkage of third, and possibly even fourth level governance actors from different member states with each other and possibly with third countries, without involvement of national foreign ministries, might lead to new structures which could change the nature of (democratic) governance profoundly: by allowing to create legal entities which straddle national borders (in order to achieve concrete aims in terms of cooperation), it raises a number of issues concerning accountability, control and representation.

Last but not least it should also be born in mind that many of the local entities and regions represented in the Committee of the Regions are also part of a multitude of other inter-regional networks and associations, many of which do include members from outside the EU. The CoR tries to act as a hub and primary channel for the contact of these networks and associations in their interactions with the European Union institutions. The CoR's activities in this respect reach from giving the associations a 'space in Brussels' for their events, and logistical support, to the organisation of the so-called 'structured dialogue' between regional associations, CoR members and representatives of the European Commission. These associations range from those based on very specific issues (such as the regions and cities affected by the crisis in the car-industry, or the wine growers) to more general and comprehensive or geographical groups such as the Black-Sea, Danube or Baltic-Sea regions,⁴⁰ and the degree of contacts and cooperation with the non-EU world vary greatly. It does seem, however that these structures, which have grown in number, size and strength over time, could indicate the development, at European level, of a kind of functionally and territorially differentiated political system which would also require new forms of democratic control and legitimation.

Conclusion:

The European Union is facing serious challenges to the legitimacy of its action. If the citizens in their majority cannot be convinced that the activities of the EU are based on democratic decisions and procedures, and that these decisions are ultimately beneficial to a majority within the Union, then the system as it exists cannot be sustained. It is therefore crucial for

³⁹ The EGTC was created with EC Regulation 1082/2006/EC in order to "...To organise and manage cross-border, transnational or interregional cooperation measures, with or without a financial contribution from the EU" (quoted from the CoR's own dedicated web-site on EGTC cooperation at www.cor.europa.eu/activitiesandevents/territorialcooperation

⁴⁰ for a list of regional associations and contacts, see www.cor.europa.eu.

the Union to find solutions how to organise a large-scale, multi-cultural polity, with very diverse constituent elements, in a way that is both sufficiently democratic and sufficiently efficient/effective to deliver the desired results. In doing so, it has to consider the existing structures of governance, which include not just the member states and their claims to political control and legitimacy, but also, everywhere in the Union, sub-national levels of governance with varying degrees of influence and standing. At the same time, the scale of the Union and some of its structural features make it particularly difficult to establish the necessary links between the political institutions and the citizens, which are necessary to build and sustain legitimacy. Also in this respect, the EU needs to engage with the sub-national level of governance.

The Committee of the Regions is the most visible institutional expression of the attempt by the European Union to take this factor into consideration. Therefore, looking at the CoR and how it has developed provides one perspective on the ongoing debate about the future of the EU. The question 'what kind of democracy can be envisaged at EU level' and what would be necessary to get there, can be examined through the prism of the evolution of multi-level (democratic) governance structures, including the relatively new CoR. The institutional and political structures of the European Union after more than 50 years of development bring together elements of very different kinds of democracy, and they function as a (more or less stable) compromise between them. The Committee of the Regions is no exception to this rule, on the contrary: because of its relative novelty on the EU scene, it may be to some degree a sort of laboratory where the conflicts between different tendencies and visions and the search for compromises to balance them, can be observed.

The present investigation has looked at the CoR and how it tries to maintain the balance between two visions, i.e. a more technocratic vision of the Committee as an expert body, which helps to ensure the effectiveness of EU policy making and implementation on the one hand, and a more political vision of the CoR as a political assembly which brings a particular kind of representative legitimacy to the policy process. It has focussed on three different case studies, in which the need to balance these two visions is being crystalized: The debate about 'subsidiarity' and how to control its application, the initiative to take ownership of the concept of multi-level governance through the drafting of a white book, and the efforts to become an active player in spreading the idea of sub-national involvement in international policy making beyond the EU's borders. From this analysis it becomes clear, of course, that the CoR cannot

resolve the tension between the different visions but rather has to find pragmatic ways of being credible at both the expertise, and the political level.

The Committee of the Regions has thus a case to make for its own role in trying to make 'subsidiarity control' more concrete and meaningful with the help of those actors who have the experience on the ground, and feed this information into the policy process. The problem, however, is that the CoR brings together a diversity of actors whose view on European decisions are not necessarily coherent, and may also not be 'representative (enough)' to make the decisive contribution to the debate on 'who should do what'. The subsidiarity network bringing together not only local and regional players, but also executives and legislators, those with and those without relevant competencies, plus even *national* Parliaments, faces not only substantial practical challenges, but also conceptual ones in trying to make such contributions at the right moment, and in a form which other actors can take into account.

Secondly, the example of the ambitious CoR initiative of drafting a white paper on multi-level governance shows that the body, at the age of 15, had acquired sufficient European self-confidence to engage to launch a project like this, and the ideas contained in the white book clearly show that most CoR members support the understanding of the EU as a multi-layered system of autonomously legitimate levels of governance. The problem remains, however, that this understanding to a large degree hinges on the member state level accepting it, and putting in place the structures domestically to allow the sub-national level to build and maintain its own legitimacy. The European integration process has opened up an additional arena for these debates, and the CoR is trying to assist its member entities in their individual endeavours, but it is clear that any fundamental change in the power balance between the national and sub-national levels vis-à-vis the EU will only come very slowly through new practices of cooperation and partnership, which the CoR has only limited possibilities to support. Until such time, also the role of the CoR in 'connecting' the EU with the grass roots of European citizens is limited.

Finally, the formal role of sub-national entities and the CoR in EU external policy is also limited, but it is true that the Committee and its members are engaging with the 'outside world' in numerous ways. The reasons behind such engagements might in many cases be rather pragmatic (such as better trade relations or the more effective management of migration) and often the initiatives are ad hoc, but like the EU as a whole, also sub-national

actors like to employ the language of (universal) values such as human rights, democracy and good governance, when embarking on cooperation projects. In this sense, the Committee is involved in spreading values beyond the EU borders, so far mainly to prospective EU member states, but with the new initiative such as the Euro-Mediterranean cooperation also to other neighbouring countries. While much of this takes place under the watchful eyes of national administrations, it is also true that the export of certain values via concrete projects of twinning, exchange and shared experience at regional or even local levels, is often much more effective than grander projects at higher level.

These three elements testify that the CoR has clearly moved beyond the original, very limited advisory role given to it by the Maastricht Treaty. By exploring both the room for manoeuvre to extend its formal mandate and improve its role in the legislative process, and embarking on additional initiatives in the areas described above, it has carved out a somewhat greater space for itself. In this process, it has so far avoided having to decide 'once and for all' between the role of an expert body, or a political assembly. At the same time, there is a certain risk that continuing the two-track approach could lead to overstressing the available resources, or dispersal of efforts. At the age of 16, the CoR seems to have managed to keep various opportunities open - it remains to be seen, which ones it can fully exploit on the way to 'adulthood'.