

LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT (INCORPORATION) (SCOTLAND) BILL

SUBMISSION FROM DR SERAFIN PAZOS-VIDAL

The author writes on a personal capacity as a researcher on comparative decentralisation in Europe and this submission cannot be understood as being made on behalf of his employer.

Answer to Q1 on Sections 1 and 2

This Bill seeks to address a historical anomaly. One that runs contrary to Scotland's alleged European credentials.

Indeed, in the Congress of Local and Regional Authorities of the Council of Europe most recent comparative assessment of the 1985 European Charter of Local Self Government (Council of Europe 2017) has found that the three UK municipal jurisdictions are just about the only ones not having incorporated the Charter in its domestic legal framework. This is the present state of play after Norway having finally introduced on 31st March 2016 a constitutional amendment to include recognition of local self-government into Art. 49 of the Constitution. Hungary is a distinct case for it has not done so but its legal order contains one of the most radical interpretations of the Charter, with potentially any local community having the right to legally constitute itself into a municipality.

It can be argued that the Charter runs against the "British tradition" of local government. The Charter presupposes local self-Government being a subnational, local version of national sovereignty or regional autonomy (Boggero, 2018). Indeed, it can be argued that the Charter philosophical groundings conceive local autonomy as a human right. Together with that, the notion of "Charter" fits more comfortably on the legal traditions of (Roman-law) mainland Europe than in the Common Law tradition (or Common Law-influenced as the case of modern Scots Law). In Roman Law tradition a community of citizens has legal personality (Dyson, 1980), whereas such notion of legal personality is completely alien to the more utilitarian Common Law thinking (Johnson, 2000).

However, as Wollmann (2006) described the differences in local government across the North Sea became only really evident with the emergence of the Welfare State. In fact, Scottish *local authorities* were not that different from mainland Europe *municipalities* until the 1975 Wheatley reforms operated nothing short of a revolution for it did away centuries-old "Burghs" were abolished and new Local Authorities were created *ex novo*, clearly a form of *avant la lettre* New Public Management: centrally defined and greater in size and defined according to managerial capacity to deliver services (McConnell 2004).

At a deeper level, the British reservations reflect the dualist conception of International Law whereby any ratified treaty must be incorporated as an Act of Parliament to become enforceable domestically. We see this issue at this very moment with the interaction Withdrawal Agreement Act 2020 and the Internal Market Bill.

However, tempting as it might be to caricature this as an isolationist form of handing international commitments there is a very democratic angle to it: to rigorously examine the implications of international commitments in the domestic order. Therefore, the resistance of the UK and its subdivisions to transpose the Charter can also be understood as a very legitimate fear of the law of unintended consequences as a result of incorporation.

Hence the relatively limited ambition of this Bill, which seems a sensible approach, conceiving the Bill as driver for much broader and longer-term cultural change on central-local relations but also on how local democracy sees itself.

Answer to Q3 on Sections 4, 5 and 6

The argument that central-local relationships do not require legal underpinning that has been echoed by both the Scottish Government, the Scottish Parliament and most certainly by the UK Government's own statement on the Charter (2014).

Indeed, as the above-mentioned 2017 Congress report also noted agreeing and even formally complying with the concept of local self-government as in the Charter does not a guarantee its application (also Himsworth, 2015). The Netherlands and Ireland have rather weak recognition of the principle, but the former is having of the most advanced municipal systems and the latter one of the weakest (Heinelt and Hlepas, 2006).

However, the Charter incorporation has been a useful device to prevent the government of the day coming up with supposedly brilliant ideas without considering the impact on local democracy.

A most notable example is the Finnish Constitutional Law Committee (equivalent to a constitutional court) ruling of 2015 drawing on the Charter provisions to ask the Finnish Government to think again when implementing a post 2008 recession austerity driven wholesale reform of local public services. Which it subsequently did by introducing reforms that were more respectful with local decision-making.

Therefore, Sections 5 and 6 of the Bill broadly aim to introduce the same safeguards in Scots Law.

Answer to Q5

As Smith (2013) notes for England's own compliance with the Charter, while in their policy delivery, budgetary, human resource powers and assets local Authorities compare very well with other countries, local government in that part of the UK clashes with the Charter on the its fundamental assumptions as regards to right of self-government, fiscal autonomy, discretion and control from the centre. This was broadly echoed for the whole of the UK by the Charter monitoring report (CG(26)10FINAL) of the Congress agreed in March of 2014.

Therefore, the most practical and substantive development since the present local government settlement was defined pre-Devolution by the UK Government is a preference for optimising current structures than wholesale reform.

In Scotland this is evidenced by the Community Empowerment (Scotland) Act 2015 and the Scottish Islands Act 2018. The Scottish Parliament own local government

review of 2014 puts the onus not on local government empowerment but on Community empowerment as the 2015 Act enacted, but not in the way of creating any form of statutory sub municipal government as in Portugal, Spain or Italy. On reality as Pugh (2016) rightly remembers such participatory arrangements have been commonplace in Scottish local government since at least 1832. However, as Mowbray (2011) highlights Community empowerment might easily be a disguised form of technocratic control where participation acts a form of legitimation without real empowerment. In such processes local democracy tends to be subservient to centrally driven aims of performance and added value (Cowell, 2004; King and Cruickshank, 2012).

By contrast. the Islands Act 2018 does provide for some additional reinforcement of local government in those areas so the question is whether this is an outlier of the harbinger of a more normalised constitutional status for local government that the Bill seeks to encourage.

The Bill is itself the start of a much longer constitutional and democratic journey that should redress issues such as the fact that Caithness, Sutherland and Ross MSP constituency (adult registered population 55,136) and Ross, Skye and Lochaber MP constituency (adult registered population 54,229) are considered perfectly valid communities to send representatives to national legislatures but then they have no statutory form of local government on their own, despite the fact that their size compares very well with the European average. Or the fact that the Council boundaries are out of sync with the real geographies (defined as Travel to Work Areas by ONS or Transport Scotland) where people really live.

The argument of cost of local government reform (McConnell 2004) presumes that change or indeed eventual increase the number of Councils (Scotland at 164,000 inhabitants on average has the smallest number of Councils in relation to population in the developed world) would replicate the Scottish Councils as they currently exist. Scottish Local Authorities are very different creatures in their size, in the way decisions are done, in the lesser the degree of local discretion, in the larger financial resources they have than the *municipalities* of mainland Europe.

Therefore, transposing the Charter into Scots Law is a clear test on the European credentials of Scotland and own whether Scottish Devolution is prepared to deal with the unfinished business of making local government more democratically accountable, more autonomous and more representative of the human communities they serve.