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WORKING PAPER NO. 2



Local Governance Research Unit

Codifying the Relationship between Central and Local Government

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Introduction

The second paper in the De Montfort University, Public Policy Department, Policy Impact Working Paper Series, is the evidence as it was presented to the House of Commons, Political and Constitutional Reform Committee, Inquiry into Codifying the Relationship between Central and Local Government. The paper addresses the following eight questions set by the committee:

1. Should the relationship between central and local government be codified? Should codification of the relationship between central and local government be considered in the context of a wider constitutional codification?
2. If codification is appropriate, what degree of independence from central government and what powers should local government be given?
3. How, if at all, should the status of local government be entrenched, or protected from change by central government?
4. What consequences should codification or other change in the relationship between central and local government have on the accountability of local authorities to elected local politicians, local people and central government?
5. Does the devolution settlement provide a relevant model for a possible codification of the status of local government?
6. Are there examples of constitutional settlements between central and local government in other countries that are relevant to an appropriate model for the UK?
7. What is the value of existing attempts to codify the relationship between central and local government, through: the Central-Local Concordat or the European Charter of Local Self-Government? Should this Charter be placed on a statutory footing?
8. How would the “general power of competence” for local authorities proposed by the current Government affect the constitutional relationship between central and local government?

House of Commons, Political and Constitutional Reform Committee: Inquiry into Codifying the Relationship between Central and Local Government.

Response to Issues and Questions Raised by the Committee

Introduction to the Evidence

In constructing any form of codified relationship between the centre and the localities an assumption is required that the codification will be designed to:

- establish a positive relationship between tiers of government
- explicitly recognise and establish the value and role of local government
- formalise some degree of political and governing autonomy for local government
- protect and establish a continued existence for local government and provide protection to local government boundaries from central interference and control
- demonstrate trust in councils, councillors and officers
- share political and governing powers and responsibilities
- provide the framework for a relationship between councils and their citizens

Given the current constitutional arrangements and relationship between central and local government, any agreement which sets out to strengthen the centre would simply be pointless. So, what can be seen from the assumptions above is that any 'agreement' between the centre and local government, will limit central government power and room for manoeuvre and see a shift from notions that all power and supremacy rests in Parliament (see Bogdanor, 2009, Copus, forthcoming).

Even if a codification of central-local powers and responsibilities were based on the assumptions above, any voluntary agreement is only as good as the willingness of the volunteers to continue to agree. Moreover, the relationship codified has to be that between local government and the entire centre, not just with the DCLG. The recent discussions around the introduction of academy Schools, for example – whatever the merits or otherwise of the idea itself – does not display an adherence to concordat principles, other than the ones reminding us of the primacy of the centre, which are referred to below in response to question five.

It is not just the process of broad national policy-making that needs to be included in a codified relationship between central and local government, but also the depth to which the centre penetrates the localities. Is it really necessary, for example, that central government set the upper-limit of parking fines to be levied by local councils? Can councils not set these amounts themselves to be judged on this and other policy decisions by their local voters?

Yet, ultimately the centre decides the shape, population, responsibilities, powers and functions of councils in England. It is the centre which can, and does, abolish councils or entire layers of local government and the centre can do this because local government lacks even the most basic constitutional protection, including the right to continued existence.

While the centre will consult with councils and communities about the nature and shape of local government, it is not bound by such consultation, nor are citizens given the final say over what happens to their councils (or what those councils do) via a binding referendum. The British unitary system is based on top-down Parliamentary sovereignty, not a bottom-up citizen democracy. Moreover, English local government looks to the British Parliament and Government, unlike local government in Scotland and Wales which looks firstly and directly to their devolved regional chambers.

Codification must see central government cede power and responsibility to local government, otherwise it is without merit. Moreover, codification has to recognise that local government has a political and representative responsibility, with a mandate deriving from the same source as central government. Local government must be seen as more than a set of institutional arrangements for delivering, or overseeing, public services.

The only purpose of codification is to improve the constitutional position of English local government. It is with this in mind that the questions set by the Committee will be addressed. The questions will also be addressed from a strong localist assumption.

1. **Should the relationship between central and local government be codified?**

Should codification of the relationship between central and local government be considered in the context of a wider constitutional codification?

The relationship between central and local government should be codified but only so as to enhance the status, powers, responsibilities and role of local government within the governing structure of England; and, to set out the way in which central and local government will operate together. Any codification must be binding on across government and require all ministers and departments to take cognisance of the code when considering policy and legislation. Codification however, should only deal with the relationships between tiers of government and set out clearly what those relationships are and how they should work, with a presumption in favour of strengthening the localities so as to enhance localism and decentralisation. A code is not the place for details and if local government and localism is to flourish than detailed guidance and regulation must be avoided.

Any codification should be constructed with genuine negotiations with local government itself, not just the Local Government Association; rather, with individual councils, so as to give commitment and ownership to all English councils. Equally, all government departments (even if they perceive they have no dealings with local government) would need to be involved in the construction of the code, again to emphasise commitment as well as knowledge of the code and to enhance the status of local government.

There is most definitely a wider constitutional context within which any code would sit and as can be seen from the response to question six (below) many countries codify the relationship between the centre and the localities within a written constitution – even other unitary states.

The absence of a written constitution need not mean the lack of a constitutional safeguard for any codification. Some legislation is granted ‘constitutional’ status such as devolution legislation to Scotland and Wales and this ‘constitutional’ status results in different treatment by government and Parliament. The Fixed Term Parliaments Bill provides a model in which the aspects dealt with by any code could be protected; a two-thirds majority of the House of Commons, or indeed both Houses, could be required to change the code or take any government action that offended against the code. Indeed, such qualified majority protection could be extended to any legislation that affected local government and what it does.

2. If codification is appropriate, what degree of independence from central government and what powers should local government be given?

Many responses to this question will focus on the service responsibilities of local government and how local government could have greater policy autonomy around the provision / oversight of services. The response here will focus on local government as a politically representative institution that governs its area. J.S.Mill (1948: 282-283) could be interpreted as not only arguing for local government as a school for politics but also as a forum for wider democratic engagement than central government can provide; and, as a governing body in its own right. Toulmin-Smith (2005) went further than Mill and derided both Parliament and statute law for offending against and usurping the institutions and practices of local self-government and the Common Law. Thus, there are well-founded and historical arguments to see the political role of local government strengthened and recognised in law.

Political and legislative power for councils

To strengthen and entrench local government as governing and politically representative institutions, councils should have devolved legislative powers within their own boundaries. Thus, councils should be able to pass ordinances (local laws) that have the same status as primary legislation – not by-laws. Rather than going into specifics of those powers, a general example is outlined.

There is no test in a unitary state for what can be legislated about: every thing is legislatable. For example, there were three groups of people concerned about the abolition of fox-hunting: those that wanted it banned everywhere; those that wanted it allowed everywhere; and, those – arguably the biggest group – who really did not mind either way, unless pushed. So, why was a nationally imposed solution thought to be the only answer? The same case could be made about smoking in public places, the age at which alcohol can be purchased and consumed, how schools are run and a whole range of issues, which could rightfully and properly be the property of local not central government: true localism. Councils should have the right to deal with a raft of devolved legislative issues. Then, after a series of many local debates, many local solutions can be implemented locally; thus, while fox-hunting may be banned by some councils across their boundaries, it will be permitted in others.

In emphasising the ‘governing’ aspect of local government the scope of council control over a range of public bodies and quangos should be extended to include powers to direct such bodies to act in certain ways within the boundaries of the council. Thus, bodies that while having boundaries that are not coterminous with councils but which make public policy decisions and spend public money, would have multiple points of accountability and direction and be responsible to all councils within which they operated. Council oversight of other public bodies would ensure a localist approach to the activities of powerful regionally orientated organisations.

Boundary Protection

There would be no better way of enshrining the independence of local government than that the centre relinquished its power over local boundaries. The 2009 creation of new unitary councils resulted in:

- A reduction of 44 councils to 9
- A reduction in councilors from 2,065 to a mere 744

(See, Chisholm and Leach, 2008)

Re-organisation of local government boundaries should no longer rest with the centre but be the property of councils and their citizens. Should councils wish to merge, or for that matter disaggregate they should be allowed to do so on their own initiative or the initiative of their citizens. Binding local referendum should be required before any boundary changes can be introduced. Councils can not be place-shapers if they can not shape their own places. Protection of council boundaries should form part of any codification and safeguards against future governments overturning such protection provided in legalisation.

3. How, if at all, should the status of local government be entrenched, or protected from change by central government?

Some ways in which local government could be protected from central government have already been mentioned, such as:

- The status of local government to be protected by constitutional legislation
- A two-thirds majority in both Houses of Parliament required for Bills affecting local government
- Councils granted devolved primary legislative functions within their boundaries
- Local government boundaries to be controlled by councils and their citizens – not central government

In addition, the position of English local government would be further protected thus (by no means an exhaustive list):

- The creation of an English Parliament which would be the first point of contact for local government and as in Scotland and Wales, would provide a layer of Parliamentary protection to local government against central government (at Westminster and Whitehall)
- The introduction of a radically reformed financing system, in which councils had a far wider range of tax-raising (and spending) powers, which could not be limited or altered by central government – but may be subject to approval by local referendums. Councils could secure financial freedom by generating tax income from not only property taxes but also for example:
 - Local Income Tax
 - Corporate Income Tax
 - Sales Tax
 - Tourist Tax
 - Car tax
 - Inheritance tax

(Each of these taxation powers and others exist for local government across Europe and beyond)

- All councils (of any tier) to be headed by a directly elected mayor. The direct and personal mandate given to elected mayors would enable the mayor to argue from a position of political strength and to demonstrate wide support, from across the voters, for his or her policy positions
- Substitution of the *Ultra Vires* principle by an *Intra Vires* assumption (which is implied by a general power of competence).
- Councils granted freedom to co-operate with any other council(s) for any purpose or purposes and to form partnerships, associations and co-operations, etc, without guidelines, approval or interference from central government
- The power for councils to challenge any government proposed primary or secondary legislation, guidance or other proposals, through a mechanism which binds councils and government to the outcome of the challenge
- Enhanced scrutiny powers to hold local officers and decision-makers from other public bodies, outside the council, to account.

- Enhanced hire and fire powers over officers and senior executives of other public bodies for councillors / leaders and particularly for elected mayors (see response to question 2).

4. What consequences should codification or other change in the relationship between central and local government have on the accountability of local authorities to elected local politicians, local people and central government?

If codification is designed to strengthen local government in relation to central government, then a new line of political responsibility and accountability is opened up: that to local citizens. A strong, politically powerful, independent local government should be accountable to an equally strong and politically powerful local citizenry. Simple mechanisms could be put in place to ensure accountability and citizen sovereignty, for example (and not an exhaustive list):

- the right of citizens to petition for re-call elections for any council leader, councillor or elected mayor
- a similar right to recall an entire council and for new council elections to be held
- shorter terms of office for councillors to provide the electorate with opportunities to cast a judgement on the council and councillors
- term limits for councillors
- council laws and policies subject to binding referendum
- power for local citizens to call referendum on any issue or put forward citizen initiatives for public ballot, the results of which would be binding on the council
- a public power for citizens to call senior council officers to account and to challenge and demand public explanation and justification for advice given and decisions take by senior officers

5. Does the devolution settlement provide a relevant model for a possible codification of the status of local government?

Two common themes have emerged, to varying degrees, in the central – local concordats, existing in the UK (Scotland 2007, Wales, 2008 and Britain, 2007). The first is to see local government primarily as a service providing institution rather than as an autonomous politically representative and governing institution and hereby rests a major problem. Two important questions have not been seriously asked or addressed: what do we want local government to do; and, what do we want local government for? Codification needs to answer those questions and that has not been done with the existing codifications under devolution. The underlying assumption of recent debates around central and local government relationships has been that the purpose of local government will stay as it is without fundamentally reassessing purpose and role.

The second common theme, again to varying degrees, in central – local concordats, in the UK is a top-down perspective, either in tone or content. Indeed, the central-local concordat signed by HM Government and the Local Government Association, explicitly displays the subservient nature of English local government within the constitutional arrangements (2007: 1, para: 3; 2, para 5; 3, para 8).

As there is no English Parliament the relationships for English councils is with the British centre; English local government is in a doubly constitutionally subservient position, unlike that in Scotland and Wales and only an English Parliament can rectify that situation. The model here is that English local government requires an English Parliament with whom to interact and with whom to construct a set of codified working relationships.

6. **Are there examples of constitutional settlements between central and local government in other countries that are relevant to an appropriate model for the UK?**

Across most of Europe the relationship between central and local government is codified in some way— either through a written constitution, or through what might be seen as constitutional legislation. Such settlements – while not always providing local government with general competence or strengthening its constitutional position - do provide lessons for the current investigation. Indeed, it is suggested that the committee commission a thorough review and analysis of how central-local relationships have been codified across the globe, to examine the nature of that codification and to draw out the lessons appropriate for changes in this country.

One point needs to be emphasised, and that is that the unbalanced constitutional and devolution model existing in Britain, where one nation within the state (England in this case) is denied or excluded from a devolution settlement, is unique. That situation would not be rectified by creating regional assemblies – as it would deny and worsen the question of national recognition for England and fracture the relationship between local government and any overarching governing arrangement. Rather, it can only be rectified through the creation of an English Parliament to re-balance the constitution and ensure a coherent point of reference for all of English local government.

Examples of appropriate models of constitutional settlements are set out below (others are provided in a document submitted alongside this paper):

- **France's** written constitution, states: 'Territorial communities may take decisions in all matters arising under powers that can best be exercised at their level.' (Article 72 du Titre XII). The principle of free administration and general competence has been reinforced under the 2003 constitutional reform.
 - The general competence described in France is one of the criteria for defining 'collectivités territoriales', along with elected councils, as opposed to all types of joint bodies (intercommunal bodies) that only have delegated competences from their member-communes.
 - A current reform being considered in France however, is for departments and regions to lose their general competence and only have dedicated responsibilities so as to avoid joint (or mixed) financing. Only communes (the smallest level of sub-national government) will keep their general competence - they have since the 1884 Municipal Act.

Article 28 of the **German** constitution stipulates that local authorities regulate community affairs on their own authority and requires that local government is provided with an independent revenue stream for doing this. The details are regulated by the Lander and all 16 Lander constitutions set out their own frameworks that guide local authorities. There are three basic principles underpinning the system:

1. Local authorities are expected to fulfil a national-constitutional obligation to 'regulate'; they must act, and they must preserve their capacity for action.
 2. There is a clear obligation to enable democratic participation in local politics.
 3. Authorities are expected to do their jobs efficiently and economically.
- The autonomy of German local authorities in conducting their tasks is legally guaranteed but so is the strict oversight of their operations.

- There is a significant body of rulings by the Federal Constitutional Court (as well as by the constitutional courts of the Länder) which have defined a 'core' of local autonomy (including the scope of the 'general competence clause') immune from legislative encroachment. Councils have been provided (by the Federal Constitution as well as the Länder constitutions) with the right to file appeals to the Constitutional Court, both Federal and Land (so called municipal constitutional complaint, Kommunale Verfassungsbeschwerde) for defending, inter alia, the scope and content of the 'general competence clause'.

Article 137 of the **Spanish** Constitution (1978) states that: The State is organised territorially into municipalities, provinces and the Self-governing Communities that may be constituted. All these bodies shall enjoy self-government for the management of their respective interests (see, document submitted with this paper)

- The 1985 Local Government Law (LBRL) specifies general principles regarding the territory, internal organisation and functions of local government; details are left to regional legislation. Each Autonomous Community can determine its own local government arrangements, but respecting the existence of municipalities and provinces, which have constitutional recognition.
- Article. 25.1 of the 1985 law includes a general competence clause which states 'municipalities can promote any activity or deliver any services that contribute to satisfy the needs and expectations of the citizens'.

Further examples can be found in the document submitted alongside this paper and they demonstrate a range of approaches towards the constitutional position of local government and the nature of the relationships between central and local government. A presumption in favour of localism is displayed across many of these examples (although not exclusively so) and governments have accepted limitations (to varying degrees) or their powers over, or in regard to, local government.

7. What is the value of existing attempts to codify the relationship between central and local government, through: the Central-Local Concordat or the European Charter of Local Self-Government? Should this Charter be placed on a statutory footing?

A statutory basis to the relationship between central and local government would overcome the perception that the current concordat is between local government and the DCLG only, rather than the whole of government. Central government's willingness to be bound and to be limited is contained in the first article of the 1985 European Charter of Local Self-Government, as follows:

- The Parties undertake to consider themselves bound by the following articles in the manner and to the extent prescribed in Article 12 of this Charter.

Placing the Charter on a statutory footing would strengthen the position of local government, but the Charter itself contains ways around its own provisions.

It is undoubted that giving the Charter, or rather a specifically designed version of it, a statutory basis would strengthen local government, although it may also lead to numerous legal challenges by and against local government.

Governments, of all political colours, have dealt with local government as a thing to be regulated, manipulated, controlled and used to pursue central government policy. The fact remains that a statutory basis would require central government to permanently relinquish its power over local government and adhere to a fundamentally different role for councils than has hitherto been the case.

8. How would the “general power of competence” for local authorities proposed by the current Government affect the constitutional relationship between central and local government?

A general power of competence for English local government would mean a reappraisal of the relationship between the centre and the localities and a rebalancing of the relationship between Westminster / Whitehall and local government. It would underpin a localist presumption in central / local relationships. Central government would be faced with alternative centres of governing capacity that could act on their own merits.

As general competence would reverse the legal environment of local government, allowing councils to act so long as those actions were not directly prohibited by law, the real test of general competence for councils is less with government and more with the courts. The judiciary would have to accept a limitation to their power and accept that they were no longer the final arbiter of all councils' actions.

Government would have to take action to prevent councils, with a power of general competence, from doing those things central government wished to stop or change in some way, rather than rely on councils not being able to act without specific permission. Government or Parliamentary time would have to be invested in a negative and prohibitive Act to stop councils that attracted central disapproval. Government should, given general competence, resist the temptation to pass a series of general and prohibitive Acts that restrict general competence, otherwise its introduction becomes pointless. The very act of granting general competence rests on central government willingness to cede some power. But, given the safeguards of a strengthened local citizenry, with the democratic tools available outlined in response to question 4, councils could be prevented from taking action with which citizens – not necessarily government – disagreed or disapproved and in a localist context, citizens are the final point of power and accountability.

General competence would remove the need for the expensive and time consuming process of councils securing Local (Private) Acts of Parliament, thus freeing Parliamentary time for other business.

We can see from the position of councils in other countries that general competence, coupled with the binding codification of central and local relationships, based on a presumption of devolution and localism, provides councils with a strong position in the constitutional arrangements. The challenge of general competence is that of a shift in attitudes and practices at the centre in regard to local government.

Conclusion

Codification of central local relationships should be based on a strong localist assumption and designed to grant constitutional protection to councils. Local government needs to be seen as a political representative and governing institution and not just as public service agency. Additional powers – particularly devolved legislative powers - granted to councils, should come with safeguards created though providing citizens with the ability to recall councils and councillors and use binding referendums.

A thorough review should be conducted of the constitutional relationship between central and local government existing overseas and how written constitutions have been used to set a balance between the centre and local government.

References

Bogdanor, V., *The New British Constitution*. Oxford and Portland, Oregon, Hart, 2009.

Chisholm, M., and S. Leach, *Botched Business: The Damaging Process of re-Organising Local Government, 2006-2008*, Douglas McLean, 2008.

Copus, C., (forthcoming) English Local Government: Reflecting a Nation's Past or Merely an Administrative Convenience? In Aughey and Berberich (eds), *These Englands*, Manchester University Press.

H.M. Government and the LGA, Central-Local Concordat, 2007

Mill, J.S., On Liberty and 'Considerations on Representative Government' McCallum (ed), Basil Blackwell, Oxford, 1948.

Scottish Government and COSLA, Concordat, 2007

Toulmin-Smitih, J., *Local Government and Centralisation: The Characteristics of Each; and its Practical Tendencies, As affecting Social, Moral and political Welfare and Progress, Including Comprehensive Outlines of the English Constitution*, Elibron Classics Series, 2005.

Welsh Assembly, Local Government Partnership Scheme, 2008



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