

## **NEW DEVOLUTION: NEW DANGERS FOR LOCAL GOVERNMENT?**

*C.M.G.Himsworth*

### **INTRODUCTION**

The late John Mackintosh opened his little classic book on devolution with a question: 'Why should the words "local government" induce a sense of boredom in even the most politically interested citizens?'<sup>1</sup> Going on, however, to analyse what he considered to be the weaknesses of local government a generation ago, he explained its importance in the broader context of regionalism and devolution within the United Kingdom.

It might, however, be thought that there is not now a continuing justification for reopening the debate about local government in Scotland. The 1996 reorganisation has happened and the new system of 32 unitary authorities is in place and it may, therefore, be thought mischievous to embark on considering its replacement or substantial reform before the new members and officials have really got their feet under the council table or the public accustomed themselves to the new names and arrangements. There is furthermore a very crowded agenda for governmental reform in the shape of the project to establish the Scottish Parliament and Executive. The structures of local government should, in the meantime, be left on one side. Even with a Parliament in place in Edinburgh there may, on this view, still be little need to pay very much attention to local government because, whatever its other merits or demerits, the newly reorganised structure of local authorities is arguably more compatible with a system of devolved government than its predecessor. Plainly this was not a consideration at the forefront of the Conservative Government's mind when it framed the proposals which led to the Local Government etc (Scotland) Act 1994, but a unitary structure may be

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*Chris Himsworth is in the Law Faculty at Edinburgh University.*

<sup>1</sup>*J P Mackintosh, The Devolution of Power: Local Democracy, Regionalism and Nationalism, Penguin (1968) p.9.*

a better basis upon which to make the transition to devolution. At the time of the Scotland Act 1978 there was a strong sense that something would need to be done about local government even though the Act itself left the then structure of local government intact and did no more than confer the power to make reforms upon the Scottish Assembly. There was the 'problem' that there would be too many tiers of government; there was the 'problem' of the big regional authorities; and there was in particular the 'problem' of Strathclyde - the danger of the threat from the political heavyweight in the West to the fragile new devolutionary institutions in the East. But now, it may be argued, these problems have been solved in the run-up to the Scotland Act Mark II by the reorganisation under the 1994 Act. Local government can safely be put on the back-burner.

This, however, was not the view taken by the Government in the White Paper **Scotland's Parliament**<sup>2</sup> in July 1997. Chapter 6 dealt with local government and 'other bodies' following devolution. The general position, as later reconfirmed on publication of the Scotland Bill in December 1997, was that the Scottish Parliament would have general responsibility for legislation and policy relating to local government. It would be able to set the framework within which local government operates and to legislate to make changes to the powers, boundaries and functions of local authorities. The Scottish Executive would be responsible for supporting local authority expenditure and for controlling capital allocations to Scottish councils.<sup>3</sup> In the language of the Bill, none of these would be reserved matters. The White Paper did, however, express some concerns about the future operation of local government:

In establishing a Scottish Parliament to extend democratic accountability, the Government do not expect the Scottish Parliament and its Executive to accumulate a range of new functions at the centre which would be more appropriately and efficiently delivered by other bodies within Scotland. The Government believe that the principle that decisions should be made as close as possible to the citizen holds good within Scotland as it does within the United Kingdom.<sup>4</sup>

The new Scottish institutions should not use their powers to seize further governmental territory out of that currently held by local authorities. The

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<sup>2</sup>*Cm 3658.*

<sup>3</sup>*Ibid para 6.5.*

<sup>4</sup>*Ibid para 6.2.*

### *Devolution and Local Government*

Government went on to declare its belief that 'the Scottish people will be served best by a Scottish Parliament and Scottish Executive working closely with strong democratically elected local government'.<sup>5</sup> The Government had demonstrated its own commitment to local government by signing the Council of Europe's Charter of Local Self-Government.<sup>6</sup> Perhaps above all, it believed that the relationship between the new Parliament and Executive and local authorities would be 'particularly crucial to the good governance of Scotland and the effective provision of services to its people'.<sup>7</sup> For this reason it proposed to establish an independent committee (later a commission) 'to study how to build the most effective relations between the Scottish Parliament and Scottish Executive and a strong and effective local government'.<sup>8</sup>

A consultation paper on the proposed commission was published in August 1997 and it was formally instituted on 23 January 1998, under the chairmanship of Neil McIntosh, former chief executive of Strathclyde Regional Council. Its remit is to:

- ◀ consider how to build the most effective relations between local government and the Scottish Parliament and Scottish Executive so that collectively they can best serve Scotland's people;
- ◀ consider how councils can best make themselves responsive and democratically accountable to the communities they serve;
- ◀ report to the First Minister of the Scottish Parliament as soon as possible after his or her election. In addition, the Commission may choose, or be asked to submit, an interim report to the Secretary of State for Scotland.

In relation to the first of these tasks, it was suggested that the Commission might wish to pay particular attention to the development of a framework within which the Scottish Parliament and local government might work together on the development of policy and legislation. It might 'propose a concordat on relations between local government and the Scottish Parliament and Scottish Executive'.

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<sup>5</sup>Ibid para 6.6.

<sup>6</sup>Ibid. For further discussion of the Charter, see below.

<sup>7</sup>Ibid para 6.4.

<sup>8</sup>Ibid.

In relation to the second task, the Commission was invited to examine best practice in how councils make themselves responsive and democratically accountable, and to examine the role of the councillor and the political management structures and electoral arrangements of councils.

Pursuant to this remit the Commission issued a consultation paper of its own in April 1998. It invited views on future relations between local government and the Scottish Parliament, on local democracy including the voting system, and on the internal organisation of local authorities. On the particular issue of a concordat, the Commission stated that:

[W]e shall have to consider how a concordat might be drawn up and what its status might be. But even more important than the process of making a concordat would be the content of it. The basic elements might be ... stating how the Parliament would exercise its roles of scrutiny and monitoring, and equally how it would undertake to consult and involve local government in discussions and decisions on matters in which local government has an interest.

Devolution and the work of the Independent Commission come at a time when local government in Scotland and in the United Kingdom is, in any event, in need of positive attention. It has been through a difficult period of its existence - both as a system of government and as a focus for specialist academic attention. Those who live and work in local authorities have good reason to feel that they have taken some fairly severe punishment in recent years; there has been a period of very poor relationships between local and central government; and there has been a loss of morale and a loss of confidence. Those who observe from the sidelines have also suffered a loss of older certainties. It is not that there have never before been fears about the structure or the financial health or the quality of the democracy of local government, but there are now wider uncertainties about what it means to have a good system of local government and what indeed are the defining characteristics of local government within a broader system of government. It is one of the results of the Thatcherite attack on local government in conjunction with wider governmental changes that, in addition to the authorities themselves, the very idea of local government has suffered.

This in turn greatly complicates the questions more directly related to devolution about the best future for local government. With many of the older certainties under challenge, the guiding principles which should inform the processes of adaptation and consolidation under a devolved system of Scottish government are very unclear.

### *Devolution and Local Government*

The purpose of this article is to discuss some of the problems which have beset relations between central and local government in recent years, to look more specifically at local government and devolution, and to consider ways forward.

## **WORRYING ABOUT LOCAL GOVERNMENT**

If fevered bed-side activity is an indication of the extent of the sickness of the patient, then local government is indeed very unwell! From 1984, central-local government relations were the focus of a research programme undertaken by the Joseph Rowntree Foundation;<sup>9</sup> since 1993 there has been an ESRC Local Governance Programme; from 1993 to 1995 the Commission for Local Democracy commissioned and published wide-searching research reports and brought its own findings together in **Taking Charge: The Rebirth of Local Democracy** (1995); and the published report of the House of Lords Select Committee on Relations between Central and Local Government, **Rebuilding Trust**,<sup>10</sup> contains a wealth of evidence from a large number of different sources.<sup>11</sup> No doubt to the embarrassment and irritation, but also the sadness, of some domestic observers, a European expert body in the shape of the Council of Europe Congress of Local and Regional Authorities of Europe was called in to say that 'local government in Britain, which most European nations used to view as a model, has in recent years been weakened to an unacceptable extent' and that the United Kingdom could draw inspiration from the European Charter of Local Self-Government.<sup>12</sup>

But to talk of cures is to jump too far ahead. It is at the point of diagnosis that opinions are most divided. The disagreements extend indeed not only to the explanation and analysis of the sickness of local government but also to how far the illness is a sign of a much wider disease of British government. Observers are unsure what local government would look like if it were

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<sup>9</sup>*The Programme produced many published reports culminating in Sir Charles Carter **Members one of another: The problems of local corporate action** (1996).*

<sup>10</sup>*(1995-1996) HL Paper 97. The Government's response to the Report has been published as Cm 3464 (1996).*

<sup>11</sup>*Evidence (both oral and written) submitted to the Committee was published in Vols II and III (HL Paper 97-I and 97-II) of the report. In addition to evidence from Government Departments and local authority representatives, the volumes contain submissions from academics (e.g. Professors George Jones and John Stewart) and a very wide range of other sources.*

<sup>12</sup>*(1995-96) HL Paper 97-II pp.60-61. On the Charter, see further below.*

restored to good health. On the other hand, there is broader (but, inevitably, not universal) agreement on the presenting symptoms.

As the House of Lords Committee reported, '[m]any in local government feel that they have been crushed and abused by central government over many years'.<sup>13</sup> This view was widely shared by those who submitted evidence and is reflected in other published views. Under the heading of 'Democracy Atrophies', the Commission for Local Democracy<sup>14</sup> listed the problems of local government under the headings:

- ◀ Finance, including restrictions on levels of spending and consequent penalties, the poll tax, systems for calculation of grant producing loss of discretion in spending, loss of local control over the business rate, and the sharp reduction in the percentage of local authority income from sources whose level is determined locally.
- ◀ Functions. Here the Commission referred to the decline of authorities as prime developers of public or social housing, a similar shift in relation to education, a decline in local control of or participation in a wide range of other services, e.g. health authorities and privatised services such as transport, and the promotion of compulsory competitive tendering - all accompanied by an overall reduction in the number of councils and councillors.
- ◀ The rise in the use of quangos.
- ◀ Adverse changes to the operation of local accountability produced by changes to the internal working of local authorities, changes in the measurement of performance, Widdicombe<sup>15</sup> reforms affecting party government and the role of officers, the impact of external supervision including judicial review.
- ◀ The decline of democratic activity.
- ◀ Adverse changes in the quality of the work of the councillor.
- ◀ A loss of public confidence.

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<sup>13</sup>Vol. 1 p.19.

<sup>14</sup>**Taking Charge** ch.3.

<sup>15</sup>*Report of the Committee of Inquiry into the Conduct of Local Authority Business (Chairman, David Widdicombe) Cmnd 9797 (1986).*

*Devolution and Local Government*

- ◀ Other issues concerning the role of political parties in local government, the quality of local authority management, and the impact of the European Union.

Overall the Commission said:

We have concluded that the present system of local government in Britain is seriously inadequate to meet the requirements of a mature democracy. It obscures and distorts what should be open and lively political activity for the majority of citizens and it fails to supply clear lines of local accountability. The system encourages political parties to continue private informal management of councils and grants them inordinate power. The basis of local administration is both secretive in itself and confusing for the bulk of local people. From that confusion arises apathy and cynicism towards local democracy. We are aware that those committed to local government as presently constituted may feel this an unfair or excessively gloomy view. If so, they are being their own worst enemies. They are sitting targets for central government scepticism. We are convinced that herein lies much of the trouble with existing local democracy.<sup>16</sup>

The reference there to 'central government scepticism' is a reminder that, although a broad consensus has built up around the sort of ideas represented in the Commission's summary, not all parties to the debate think the same way. The general approach of the Government at the time was usefully set out in the evidence of the Department of the Environment and of the Scottish Office to the House of Lords Select Committee<sup>17</sup> In summary, the DoE's view (with which the Scottish Office concurred) was that the current statutory framework of local government not only satisfactorily established the democratically elected authorities and specified their responsibilities but also fostered good local governance. By this was meant the provision of quality services offering value for money responsive to local needs, and ensuring fairness and propriety in local public life. The framework also ensured, it was argued, that local government plays its part in meeting national economic and competitiveness goals and national aims and priorities for public services.

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<sup>16</sup>*Taking Charge* pp.16-17.

<sup>17</sup>(1995-96) *HL Paper 97-I* pp.1-36 and 74-192. See also, in the same volume, the evidence of the Welsh Office, the Department of Health, the Department for Education and Employment, the Home Office and the Treasury as well as that of the Government Offices Management Board.

The Scottish Office written submissions to the Committee were interestingly supplemented by two more personal statements from the Conservative Secretary of State for Scotland.<sup>18</sup> In these he emphasised his plans for the future of local government, to which we return, but only after reasserting his belief in local government. 'Local government is', he declared, 'the mortar that binds civil society in Scotland. It is no transitory or newly arrived phenomenon. It is at the heart of Scottish community life, its traditions and functions are a reflection of our history and the means by which we forged our civilisation.'<sup>19</sup>

Brave words but insufficient, it seemed, to convince the then Government's critics. Local government may have forged our civilisation but it was in danger of becoming a forgery. Critics focused on the same list of characteristics of contemporary local government that were identified by the Commission for Local Democracy as tending to weaken the power, legitimacy and autonomy of local government to the benefit of central government.<sup>20</sup> It has also to be said, however, that some rather more complex analysis has been offered. It was represented, in summary form, in Professor Gerry Stoker's written Memorandum submitted to the House of Lords Committee<sup>21</sup> In that, he developed the case for a new 'governance perspective' which emphasises that, whatever the formal structures, the actual operation of the governmental and non-governmental networks of institutions is much more complex than often supposed; more autonomous and much less susceptible to direct central government control, and, therefore, capable of management, if at all, only in more subtle ways than are usually contemplated.

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<sup>18</sup>*In the form of a speech to the Scottish Conference of the Institute of Revenues, Rating and Valuation (interestingly published as a 'Suggested Secretary of State's Speech') and an extract from the Richard Stewart Memorial Lecture.*

<sup>19</sup>(1995-96) *HL Paper 97-I p.81.*

<sup>20</sup>*See, in particular, the evidence to the House of Lords Committee of Sir Charles Carter and Professors John Stewart and George Jones.*

<sup>21</sup>(1995-96) *HL paper 97-I pp.168-173. See also his article (and those of the other contributors) in M Chisholm, R Hule and D Thomas (eds) A Fresh Start for Local Government Public Finance Foundation (May 1997).*

### *Devolution and Local Government*

In legal and constitutional terms much the most sophisticated analysis has been provided by Professor Martin Loughlin.<sup>22</sup> A principal focus of his work has been the particular impact of law, at the hand of both Parliament and judges, on relationships between central and local government. These relationships, formerly developing against a backdrop of facilitating statutory powers but largely in the political domain through processes of inter-governmental consultation and negotiation, hardened as statutory regulation was used in a much tougher and more directly instrumental way by central government to achieve its purposes. Much more local government legislation has been passed, particularly but not exclusively in the financial area. Consultation and negotiation have faded and, in a process of what Loughlin calls 'juridification', the differences between central and local government fall to be resolved not in the political arena but in the courts. Disputes over financial restrictions have predominated but there have been other areas of conflict as well. In Loughlin's view, the courts have been unable to inject into the judicial review process any recognition of 'the political value of local self-government ... [L]ocal democracy is never asserted as a positive legal value'.<sup>23</sup> The courts may have been imaginative and creative in their development of judicial review in general. Rightly or wrongly, they may have cast off some of the shackles of a purely 'jurisdictional' approach to review enabling them to react more flexibly to claims by individual citizens for the better protection of their rights, but the courts have been unable or unwilling to weave into the richer texture of judicial review any greater protection for the value of collective and democratic decision-making by local authorities. Although there are suggestions in this account that the courts might have been in a position to react differently and thus alter the outcomes in individual cases and influence the overall relationship between local authorities and central government, Loughlin describes the general problems in central-local relations as 'reflect[ing] in microcosm certain deeper-seated problems concerning our current constitutional arrangements'.<sup>24</sup>

We return shortly to possible 'constitutional' solutions, but we should first take account of the more general suggestions for improvement of the condition of local government. For Conservative ministers and the central departments prior to May 1997, there was, as we have seen, not very much of

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<sup>22</sup>See, in particular, his *Legality and Locality* (1996) and also his Memorandum submitted to the House of Lords Committee and published at (1995-96) HL Paper 97-II pp.123-131.

<sup>23</sup>(1995-96) HL Paper 97-1 p.131.

<sup>24</sup>Ibid.

a problem, and the need was, therefore, for a strengthening of the existing 'partnership' by enhancing the roles of local government in the ways already laid down in the Government's own policies. The principal roles were those of enabler, regulator and community leader.<sup>25</sup> As enabler, local government should ensure the provision of services but increasingly by the involvement of other bodies. The Citizen's Charter principles and the increasing use of performance indicators were intended to improve standards generally, but authorities were encouraged or, by Compulsory Competitive Tendering, required to invite external tenders for service provision before in-house provision was permitted. It was envisaged that authorities would increasingly confine themselves to the strategic development of services, setting standards and determining levels of service. Regulation was the second principal role of local government, but with 'the increasing need for British businesses to be competitive in a global market' authorities must keep the impact of their regulatory role under review. Authorities must continue to develop a 'light touch'. Thirdly, authorities should continue to act as community leaders and use their position to 'bring together effective partnerships across a range of local authorities', e.g. in relation to the quality of the built environment and local regeneration.

From those on the other side of the debate, there was, of course, a completely different forward plan for local government and its structure and organisation. For them, the Conservative Government's vision of local government as 'enabler' and 'regulator' reconfirmed the threat to its future status and significance. What they would wish is a reversal of the trends which they regard as providing the main dangers in local government's recent history. Functions should be restored, along with greater freedom in how they should be discharged, greater financial freedom, and the encouragement of local democracy, local autonomy and local public confidence. Precise prescriptions do, of course, vary, and indeed many commentators would hold back from suggesting specific solutions and go no further than to insist on a substantial and systematic review of local government and the future relationship between central and local government.<sup>26</sup> Martin Loughlin has suggested that

[w]e are in desperate need of a new Committee on Ministers' Powers to examine both the forms in which powers over local government have

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<sup>25</sup>See DoE memorandum at (1995-96) HL Paper 97-1 pp.6-7 affirmed in the Scottish Office evidence at p.76. See also Cm 3464 (1996).

<sup>26</sup>One of the principal recommendations of the House of Lords Committee was to establish a new body (preferably a Parliamentary committee) to oversee central/local relations. (1995-96) HL Paper 97 pp.22-23.

### *Devolution and Local Government*

recently been acquired and the uses to which they have been put. We need to think much more creatively than hitherto about the design of institutional mechanisms for holding both local government and central government to account in respect of their administrative action.<sup>27</sup>

One source of general guidelines on the future condition of local government which has been adopted into many people's thinking has been the Charter of Local Self-Government drawn up by the Council of Europe in 1985. This is a Charter, signed so far by 36 states, which proclaims the value of the concept of local self-government as the 'right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population'. This in turn implies free elections to the authorities; powers which should normally be full and exclusive and not 'undermined or limited by another, central or regional, authority except as provided for by the law'; that authorities should be able to determine their own internal administrative structures; and that they should be 'entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers'.

Insofar as the Charter provides a catalogue of guidelines, it adds little to the sort of check-list of criteria of good local government that many have subscribed to for some time. It contains little that is new.<sup>28</sup> What has increased its attractiveness to some, however, is its relevance to securing a better constitutional base for local government. It has been urged that a new status for local government should be 'constitutionally enshrined'.<sup>29</sup> From this point of view, the main problem is not so much thinking up the principles and

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<sup>27</sup>(1995-96) *HL Paper 97-II p.131*. The original footnotes have been removed but the reference to a new Committee on Ministers' Powers recalls the role of the Donoughmore Committee and its Report on Ministers' Powers in 1932 (Cmd 4060).

<sup>28</sup>It is also the case that critical commentary on the Charter itself and its operation in other states has not yet really developed. Papers delivered at a conference in Copenhagen to celebrate the Charter's first 10 years have, however, made a start. See *Conference on the Occasion of the 10th Anniversary of the European Charter of Local Self-Government: Proceedings* Council of Europe (1997).

<sup>29</sup>See Memorandum by Scottish Local Authorities Management Centre, University of Strathclyde (1995-96) *HL paper 97-II pp.198-205 at 205*. It is interesting to note that the lack of constitutional status for the fundamentals of local government is not a newly-observed phenomenon. Sidney Webb complained in 1911 that the increasingly important system of grants to local authorities was not constitutionally recognised, *Grants in Aid*, Longmans, (1911).

rules of a new accommodation between central and local government as making that accommodation stick in such a way as to bind not only local but central government too. The problem has been the profoundly hollow nature of the so-called 'partnership' between central and local government. As a symbolic characterisation of the relationship, the use of this term has suited both sides over much of the recent history of local government. In the past, local authorities have enjoyed the apparent sense of equality the term implies. We have seen that it has been the preferred terminology of central government - even though it may be a cover for a manifestly unequal relationship. It is not just the inequality in power between centre and locality which deprives the term 'partnership' of serious content, but the near complete power to manipulate the terms of the partnership itself which is vested in the central partner. There used to be an occasional defence of the language of partnership in its reaffirmation of the formal but very thin equality in the subordination of both central and local government to the authority of Parliament - neither could act in relation to the other beyond the powers conferred on it. But this was an analysis which ignored the important reality, well illustrated in recent years, of central government's sole power to ensure that Parliament would change the law to its own advantage.

Because the government does, under normal conditions, control Parliament in this way and Parliament is unconstrained by any rules protective of local government, the problem is the inability to make any new settlement resistant to further government manipulation. Some have argued that there are principles of local autonomy embedded in the constitution which ought already to act in a restraining way but, as already mentioned, they have not managed to commend themselves to the judiciary. Designs for a new written constitution for the United Kingdom have included entrenchment for local government<sup>30</sup> but these await serious debate and, even more remotely, adoption.

Hence the interest in the Charter of Local Self-Government. The House of Lords Committee recommended that the United Kingdom should sign it.<sup>31</sup> To do so would be 'a valuable first symbol that central government trusts and respects local government'. What the Charter could not do, of course, is to reach beyond its symbolic significance and formally bind government and Parliament not to contravene its terms.

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<sup>30</sup>See *The Constitution of the United Kingdom*, IPPR, (1991).

<sup>31</sup>(1995-96) *HL Paper 97 paras.3.26 and 6.20*.

### *Devolution and Local Government*

This formal limitation will not, however, be the only difficulty. Another will be that, despite its promise of a symbolic commitment to an improved model of local government, it is written at a level of generality which would cause few difficulties to any government, however antipathetic to local government. The Department of the Environment's evidence to the Lords Select Committee claimed that the Conservative Government agreed 'pretty well with the whole of the content of the European Charter on Local Self-Government but it has not taken the view that this is an appropriate matter to be the subject of international understandings. Local government is, at best, a national matter and not an international matter.'<sup>32</sup> Lest comparisons be too readily drawn between Governmental complacency in the face of this Charter of Local Self-Government and the European Convention on Human Rights, it should be borne in mind that the Charter contains no procedures for its own enforcement, least of all by a local authority which feels that its autonomy has been infringed. Indeed, it may also be that the very concept of a rights-based form of protection for institutions is a mistake. The liberal autonomy of the individual is difficult, in any circumstances, to extend to public bodies and there is no immutable base unit to which may be attributed rights. There are no moral claims uniquely available to one class of body rather than another. But more importantly, the Charter's attempt to single out the 'local authority' as the only rights-holder on behalf of the whole state of democratic governance fails to address the sophistication of governmental conditions. If the only parties were the 'state' or 'central government' on the one hand and 'local government' on the other, the Charter might have a contribution to make but, since that is not the case, its potential impact is much diminished.

As we have seen, however, the incoming Labour Government took the view that the United Kingdom should show a new international commitment to local government, and signed the Charter on 3 June 1997. The Charter was ratified on 24 April 1998, coming into force on 1 August. The United Kingdom undertook to be bound by all provisions of the Charter but with some restrictions as to the categories of local authority to which the Charter extends. The 32 councils in Scotland are included.<sup>33</sup>

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<sup>32</sup>(1995-96) *HL Paper 97-I* p.22.

<sup>33</sup>*For the time being, however, the district councils in Northern Ireland have been excluded. In the period since signature local and regional democracy in the United Kingdom has been the subject of a Recommendation (No. 49, 28 May 1998) of the Congress of Local and Regional Authorities of Europe.*

## DEVOLUTION AND LOCAL GOVERNMENT

In the white paper which preceded the introduction of the Bills which, in turn, led eventually to the passing of the Scotland Act 1978, it was anticipated that responsibility for central government supervision of most aspects of local government in Scotland would be devolved.<sup>34</sup> The proposed devolution Act would not itself change the local government structure. Nor did the Government think that an early radical revision of structure or functions would be a good idea but this would be a matter for consideration by the proposed Scottish Assembly. Some matters relating to local government including, in particular, the electoral system and voting qualifications would not be devolved at all and these arrangements, translated into the complexities which characterised the details of its allocation of powers, were in due course built into the Scotland Act itself.

In the aftermath of the Act's repeal, the main local government focus was on the other events of the years since 1979, especially the poll tax saga and the restructuring under the Local Government etc (Scotland) Act 1994, rather than upon speculation about what might happen under any future devolution settlement. The Scottish Constitutional Convention itself held the line that the future of local government should be a matter for the Scottish Parliament itself but that, in recommendations later overtaken by the 1994 Act, a single tier structure would be the preferred option of those participating in the Convention.<sup>35</sup> In its final report, **Scotland's Parliament. Scotland's Right**, published in 1995, the Convention spoke of the value of local government and the need to include in a new Scotland Act a provision committing the Scottish Parliament to secure and maintain a strong and effective system of local government.<sup>36</sup>

There is no doubt that the process of devolution will bring with it a period of very substantial change and readjustment for Scottish local government. New structures of government in Edinburgh and new opportunities for serious policy change including new divergences from the policies of parallel departments in England and Wales can hardly fail to have an impact upon Scottish local authorities. However, although it may seem perverse to suggest this, it also seems inevitable that the problems of central-local relations will

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<sup>34</sup>**Our Changing Democracy: Devolution to Scotland and Wales** Cmnd 6348 (1975) paras.119-121.

<sup>35</sup>See *Towards a Scottish Parliament* (1989) para.15 and *Towards Scotland's Parliament* (1990) p.14.

<sup>36</sup>*Scotland's Parliament. Scotland's Right* pp.16-17.

### *Devolution and Local Government*

continue and that they will continue, in most respects, to be fundamentally the same as in England and Wales.

Historically, of course, it has been possible to argue that the constitutional position of local government in Scotland was different from that in England. When, as we have seen, the Conservative Secretary of State invoked the support of a strong Scottish tradition, there is no doubting the original distinctiveness of that tradition. King David's grants of charters to the first royal burghs and the attempted entrenchment of their status in Article XXI of the Treaty of Union 1707 together with, for instance, the distinctive involvement of the sheriff in local administration created a situation in which the system of local government could join the educational system and the role of the Church as one of the defining characteristics of Scottish political culture. Even though the structural reforms of the nineteenth and twentieth centuries brought elected, multi-functional authorities which strongly resembled the sorts of authority established south of the border, the actual structures were different; they attracted their own review by Royal Commission (the Wheatley Commission)<sup>37</sup> in the 1960s; and have remained different under the reorganisations which have since been undertaken. Much of the legislation which relates to the structure, organisation, functions and financing of local authorities is contained in Acts quite separate from the equivalent English legislation.<sup>38</sup>

Whilst much of this 'distinctiveness' has quite genuine historical origins, it would not be unfair to describe many of the retained differences as serving interests of administrative convenience rather than any more fundamental value of Scottish identity. The new system of single-tier authorities is certainly different from the current English system and, in various ways, it operates under different financial and administrative conditions, but there is nothing that identifies those conditions as deriving from any deeply ingrained Scottish tradition.

That is not to say that Scottish local government is different only in formal and superficial ways. The smaller size of the country and the greater disparity

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<sup>37</sup>*Report of the Royal Commission on Local Government in Scotland 1966-1969, Cmnd 4150.*

<sup>38</sup>*For a general account of local government in Scotland, see A Midwinter, M Keating and J Mitchell **Politics and Public Policy in Scotland**, Macmillan (1991). See also L Paterson **The Autonomy of Modern Scotland**, Edinburgh UP (1994). For a legal account see C M G Himsworth **Local Government Law in Scotland**, T & T Clark (1995).*

of physical and human conditions between the urban concentrations in the central belt and the rural (especially highland) areas produce different conditions of local government. Perhaps most importantly, conditions in the islands areas produce quite sharp differences in their demands upon both local and central government. Sparse populations and the separation of towns and villages by sea crossings produce one set of problems, and it was interesting to see that, in one of the small number of submissions made to the House of Lords Committee by individual local authorities, the Western Isles Islands Council called for the amendment of local government legislation to enable a 'meeting' to take place without the need for the participating members to be physically present together in a single place. Teleconferencing and other state-of-the-art methods of group communication could reduce the cost and improve the quality of democracy.<sup>39</sup>

A more important set of special circumstances in governmental terms are produced by the other two islands areas of Orkney and Shetland. Their distinct histories and, more recently, their centrality to oil-related developments since the 1970s<sup>40</sup> and a tendency to seek for themselves a special governmental dispensation produced the (nearly) all-purpose islands council status during the 1975 to 1996 period<sup>41</sup> and the assurance that, should devolution come, Orkney and Shetland would be entitled to special treatment. The Scotland Act 1978 made provision for a commission to review the government of the Islands (s.84) and the Scottish Constitutional Convention acknowledged the need for separate constitutional consideration of the islands areas.<sup>42</sup>

Despite these centrifugal tendencies of the islands areas which have as much to do with escaping the undue influence of local authorities in other parts of Scotland as the influence of central government itself, the general pattern of central-local relations is much the same in Scotland as in England and Wales. Although the rules differ in detail, the same broad statutory and administrative context applies. Substantially the same arguments about loss of

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<sup>39</sup>(1995-96) *HL Paper 97-II* p.242. Another reform proposed by the Council was legislation to enable to adopt the Gaelic form of the Council's name - *Comhairle nan Eilean* - as its official title. That reform, but not teleconferencing, was implemented by the *Local Government (Gaelic Names) (Scotland) Act 1997*.

<sup>40</sup>*Producing the innovative Zetland County Council Act and the Orkney County Council Act of 1974*.

<sup>41</sup>See also the *Montgomery Committee Report of the Inquiry into the Functions and Powers of the Islands Councils of Scotland*, Cmnd 9216 (1984).

<sup>42</sup>See *Scotland's Parliament. Scotland's Right* (1995) p.18.

### *Devolution and Local Government*

functions and loss of autonomy are put forward on the local authority side and, as we have seen, ministerial policies for local government have in recent years been informed by the same general philosophy - even though some outcomes such as the lack of a privatised water industry in Scotland and, on the other hand, a much more thorough-going reorganisation of local authorities themselves have been different. It must also be true that the relatively small size of Scotland, the smaller number of politicians and officials (on both sides) who are involved and, in particular, the fact that only one Secretary of State and Department are involved contribute to the relative intimacy of the relationship.<sup>43</sup> Those in the Scottish Office have a working knowledge of the issues, places and people with whom they are dealing that cannot be matched in English departments which have not only to contend with issues with which they are less familiar but have also to contend with each other. This 'intimacy' should not be overstated, especially given the sharp party divide between local and central politicians in the period between 1979 and 1997, but it must be unlikely that the 'Task Force' exercise in Scotland in 1995, involving joint enquiry by central and local officials into some important aspects of local administration, could have taken the same form in England.<sup>44</sup>

Similarly the 'single central department' argument should not be overstated. There are, of course, separate 'departments' within the Scottish Office with different junior ministers at their head. But it must certainly be the case that devolution and the creation of a separate government in Scotland will bring with it the loss of a single Secretary of State for local government matters and a much stronger demarcation between the governmental territories of the new Scottish ministers, not to mention the hiving off to UK departments of the functions residually reserved to them.

### **DANGERS NEW OR OLD?**

Although it is notoriously difficult to predict the impact of one constitutional innovation upon a system of government at large, it is inevitable that the devolution of legislative and executive power will bring changes to Scottish local government and to its relationship with the new 'central' government in Edinburgh. The need to create some governmental space for the new Scottish

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<sup>43</sup>For further views of differences in central/local relations in Scotland (and in Wales), see (1995-96) HL Paper 97 p.16.

<sup>44</sup>See Report of the Task Force on the Conduct of Local Government in Scotland, The Scottish Office/COSLA November 1995.

institutions will have an impact even before those institutions proceed to develop new programmes and policies of their own.

As we have seen, the Scottish Constitutional Convention had already responded to these concerns, and it urged a 'culture of co-operation and stability at the heart of the relationship between the Parliament and local authorities'.<sup>45</sup> The devolution Act should commit Parliament to securing and maintaining a strong and effective system of local government and 'embody the principle of subsidiarity so as to guarantee the important role of local government in service delivery'.<sup>46</sup> The (London-based) Constitution Unit in its report on the implementation of devolution - **Scotland's Parliament: Fundamentals for a New Scotland Act**<sup>47</sup> - developed these proposals at greater length. It proposed that the commitment to local government might be achieved simply by including in the devolution Act a provision stating in so many words: 'The Scottish Parliament shall secure and maintain a strong and effective system of local government'.<sup>48</sup> Drawing on proposals first made by the Commission for Local Democracy, it suggested that the idea of a 'general competence'<sup>49</sup> for local authorities should be pursued but not in a way which would conflict with the principles embodied in the surrounding constitutional framework for local authorities. It could not enable authorities to escape existing statutory limitations but might be embodied, with symbolic value, in a commitment to experiment by enabling authorities to undertake new initiatives. The principle of subsidiarity might also be represented in the new system by a new Scottish central/local concordat or agreement which would commit the Scottish government to extensive consultation with local authorities on all matters which concern them.<sup>50</sup>

An important message contained in the Constitution Unit's proposals was that an appropriately framed devolution Act with substantial powers for the Scottish Parliament in relation to local government would provide many of the circumstances for achieving a productive relationship with Scottish local authorities but that

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<sup>45</sup>*Scotland's Parliament. Scotland's Right* (1995) p.16.

<sup>46</sup>*Ibid.*

<sup>47</sup>*The Constitution Unit, 1996.*

<sup>48</sup>*Ibid* p.123.

<sup>49</sup>See also J McFadden 'A Power of General Competence - The Time has Come' *SLIGU* 1997.

<sup>50</sup>*Ibid* p.127.

### *Devolution and Local Government*

there will be limits to what a Scottish Parliament can do in a constitutional sense, even given its relative autonomy in one part of the UK. Without some support and encouragement from central government for its objectives in relation to strengthening the role of local government and in particular the system of local government finance, its impact must remain constrained.<sup>51</sup> ... There is a limit to how far an Act establishing a Scottish Parliament can also be used as the vehicle to restore the position of local government and give it a more robust role in the UK constitution. That is a question which needs to be tackled on a UK-wide basis.<sup>52</sup>

It is not completely clear what this was intended to mean. If it meant that, however broadly the powers of the Scottish Parliament were cast in relation to local government, there would be some aspects of local government of crucial constitutional importance which would remain in the hands of the Westminster Parliament, this would certainly be an important constraint, although it is not completely clear what those reserved constitutional aspects might have been. Perhaps, on the other hand, it is a comment not so much on the formal allocation of powers but on the fact that improving the status of local government is an issue which extends to the whole of the United Kingdom and might ideally attract a UK-wide review and UK-wide solutions. As already suggested, there are serious problems with the very concept of viable local government which are unlikely to be solved by reference to one part of the United Kingdom taken alone.

In this respect an exchange of views which took place within Scotland prior to the General Election of May 1997 was illuminating. In 1996 the Scottish Labour Party produced a consultation paper on the future of local government called **Partners in Scotland's Future**. The 'partnership' envisaged would be that between Scottish local authorities and the Scottish Office once it was under the political control of a Labour government and then, in due course, the relationship between local authorities and the new Scottish Parliament and Executive. The paper contained a number of proposals including setting up an independent review of local government, the return of water services to local democratic control, the improvement of the general accountability of unelected bodies (quangos) and the strengthening of local democracy. For the most part, the Labour Party's proposals were welcomed by the Convention of Scottish Local Authorities but what COSLA also urged was that the proposed review of local government should be 'guided by the need to reduce the

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<sup>51</sup>Ibid 129.

<sup>52</sup>Ibid 120.

fragmentation of Government at the local level and in that context determine which functions currently undertaken by appointed public bodies might be transferred to local government'. Responding to a proposal that councils be given a new power of community initiative to respond better to local needs, COSLA urged that

[t]here is no clear evidence that local government has been constrained by existing statute in its ability to address many community issues, for example economic development or community safety. *Local government has arguably sufficient power to help its community. What it lacks is sufficient power to influence the agendas of partner organisations in addressing wider community needs and in which local government has a legitimate and clear interest. What would be much more effective and much more powerful would be to place on councils a duty of community planning.*<sup>53</sup>

Those are the concerns of local government which has lost one role but is struggling to find another. 'Nobody is in charge'<sup>54</sup> and local government would like to be. The space which was once filled by central departments and local authorities is now crowded with other actors, and the certainties of the simple central/local dichotomy, however fraught it may have been, have gone. Reducing the institutional strength of local authorities, giving new powers to local 'consumers', giving powers to quangos, and introducing new market mechanisms have produced a fragmentation of local administration which leaves old models redundant.

Now even more discredited than ever is the idea of 'partnership' between central and local government. There may once have been a golden age when there was a sense in which the larger and more powerful local authorities dealt with central departments as partners. There was a strength and vitality in municipal self-government<sup>55</sup> which derived from local government's historic

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<sup>53</sup>My emphasis. This proposal is not dissimilar to those contained in the evidence of Professor Stoker to the House of Lords Committee. He refers to an 'enhanced status and integrating role for local government'. (1995-96) HL paper 97-I p.172. See also the report of the Committee itself at HL Paper 97, ch.4.

<sup>54</sup>This was the phrase used by Professor Stoker in his evidence to the House of Lords Committee (HL Paper 97-I p.177) and adopted into the Committee's report.

<sup>55</sup>See, in particular, H Laski, I Jennings and W Robson (Eds) **A Century of Municipal Progress, 1835-1935**, Allen & Unwin, 1935. Cf. M Loughlin, M D Gelfand and K Young (Eds) **Half a Century of Municipal Decline 1935-1985**, Allen & Unwin, 1985.

### *Devolution and Local Government*

roots and the confidence that there were jobs to be done locally which could not conceivably have been achieved by a nightwatchman central state, and that local authorities were the only contenders for the governmental space available. As so often with the language of the institutions and procedures of government, 'partnership' is a term which has continued to be used, often collusively between central and local government both of whose interests it has served, in radically different circumstances. Partnership was a misleading term to use as local power declined. At the very best it was the partnership of the rider and the horse. But now the rider is sitting astride so many other horses at the same time that a partnership with any one of them is meaningless.

### **HOLISTIC GOVERNMENT?**

One approach to these issues has recently been presented in papers by Graham Leicester and Peter Mackay.<sup>56</sup> They draw on the work of Perri 6<sup>57</sup> to encourage a perspective on government which is 'holistic'. By this is meant a style of government which abandons a focus on individual fields or functions of government. Recognising instead that the so-called 'wicked issues' for contemporary governments cannot be addressed by structures fragmented into separate functional organisations, the aim should be to establish integration and linkages between fields and functions. Problems which have remained impervious to fragmental treatment - such as crime, unemployment, poor educational achievement and ill health - demand such an 'holistic' approach.

Leicester and Mackay urge that such an 'holistic' perspective be adopted in the devolved Scotland and, as applied separately to the Scottish Office as it transforms into the Scottish Administration under the Scotland Act, to Scottish quangos and to local government, there must be merit in this analysis. There is indeed nothing very new about calls for greater institutional coordination which cuts across restrictive functional boundaries. Both the Scottish Office and local authorities are familiar with such demands.

The point, however, at which the idea of 'holistic' government becomes very much more problematic is if it comes to be applied not just to separate institutions and tiers but across the whole system. 'Holism' might appear to

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<sup>56</sup>G Leicester and P Mackay **Holistic Government: Options for a Devolved Scotland**. Scottish Council Foundation (1998). See also G Leicester 'Can we go home?' - a presentation to the COSLA Annual Conference, April 1998.

<sup>57</sup>P.6 **Holistic Government**, Demos (1997).

demand this. Perri 6, however, never seems to urge this directly but it is an idea given some apparent support by Graham Leicester. In his COSLA paper he favours the medically derived concept of holism because it implies 'the need to engage the whole person in the pursuit of well being'. He then writes that

looking at the political system as a whole, we will do well to avoid the temptation to concentrate all our attention on the basic hierarchy of Scottish Executive, Scottish Parliament and Local Government. That is a constitutionally neat triptych, it is enshrined in the remit of the Independent Commission, but it is a potentially misleading focus in the messy and complex world of real local governance.

There are, however, acute dangers in this approach, and for local government in particular. These dangers have perhaps three main aspects. First, there is a major problem inherent in the translation of 'holism' from medicine and the human body to constitutional analysis and the body politic. Whereas, in the human body, one would not set up the arms to oppose the legs, the right hand as an entity and power centre separate from the left, that is the point of political organisation and, in particular, the organisation of federalism, devolution and decentralisation. The human body may be appropriately and 'holistically' governed by the brain. In the body politic, that would be to build in the highest degree of centralism.

Secondly, as Leicester himself argues, this leads to a collapse of 'basic hierarchies'. There may be no magic in any particular 'constitutionally neat triptych' but there is a need for constitutionally assured separate power centres. If these are not so assured, one slips back into the language of negotiated relationships between central and local government without the necessary underpinning of guaranteed power and autonomy. No one will deny that, with those guarantees in place, bargaining can be conducted in their shadow. No one imagines that the formal terms of constitutions and statutes tell the full story. Equally, however, there can be no bargaining without power. It may be old-fashioned to recall the Wheatley Commission's prerequisites for local government but, before the objectives of local democracy, local involvement and even effectiveness, they placed 'power'. There needed to be 'nothing less than a shift in the balance of power and responsibility between central and local government'.<sup>58</sup> Whilst it is possible that such local power is not, of necessity, associated with big spending and major service provision, nothing can be expected to come of a role of

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<sup>58</sup>*Cmnd. 4150 para 129.*

### *Devolution and Local Government*

community co-ordinator without a powerful and legally guaranteed underpinning. Local authorities will simply be side-lined.<sup>59</sup> An improved electoral system and, in the light of recent developments, an improved ethical framework<sup>60</sup> may be necessary supplementaries but they are no substitute for power.

There is, thirdly, a specific consequence for the Independent Commission and the possible role of concordats as a contribution to the mediation of relations between the Scottish Administration and local government. If there are to be such concordats, they must be built on a foundation of strong and autonomous local government. They may lead to a recasting of the earlier formulations of partnership but they cannot escape the same essential preconditions. A concordat presupposes a strength and autonomy of the contracting parties which are not well captured by the centralised coordination and integration of holism.

### **CONCORDEMUS IGITUR?**

Thus, a concordat must be an agreement between parties both of whom would have the power to act differently if they chose to do so. In the absence of some form of constitutional entrenchment, the trick remains that of regaining for local government that power of choice by other means. It may be that, despite its formal weakness, the European Charter will help in the process of publicly proclaiming a standard of local autonomy. But perhaps the most promising prospect for Scottish local government will lie not in changes directly affecting local authorities themselves but in the capacity of the new Parliament to restrain the power of the Scottish Executive. The best conditions for partnership on the basis of a concordat would be those in which neither party could rely on the monopoly of access to legislative power and control of the Parliament that has characterised the position of central government in Britain for so long. Instead, the Scottish Parliament may have a new opportunity to hold the ring between the opposing partners.

*June 1998*

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<sup>59</sup>See also M Loughlin 'Understanding Central-Local Government Relations' (1996) *11 Public Policy and Administration* 48.

<sup>60</sup>*A New Ethical Framework for Local Government in Scotland: A Consultation Paper*, Scottish Office (April 1998).