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TAKING LOCAL GOVERNMENT SERIOUSLY: DEMOCRACY, AUTONOMY AND THE CONSTITUTION

STEPHEN BAILEY* and MARK ELLIOTT**

I. INTRODUCTION

GIVEN their democratic credentials and geographical and cultural proximity to those on behalf of whom they act, one might expect local authorities to occupy a pivotal position in the democratic life of the country, pursuing distinctive agendas appropriate to the needs and mores of their respective areas. This, in turn, might be expected to form part of a virtuous circle in which the obvious importance and responsiveness of local government incentivises the participation of individuals in local politics and elections. Within such a model, substantial intervention by the centre in local government affairs would be as inappropriate as it would be unnecessary; the quality of local democracy would both act as a sufficient control upon local authorities and render questionable the legitimacy of interference by central government.

This (some might say utopian) vision of local government is reflected in the European Charter of Local Self-Government, ratified by the United Kingdom with effect from 1 August 1998.[1] However, it is some distance from present reality. It is well-known that local democracy in the UK is far from healthy – an issue which central government (through parliamentary legislation) has sought to address on several occasions in the recent past[2] and to which it has recently returned.[3]

In this paper, we argue that attempts to strengthen local democracy are likely to be successful only if they form part of the virtuous circle sketched above. No amount of reform in relation to such matters as electoral arrangements and the structure and accountability of councils is liable to yield results if the latter have – and are perceived to

* Professor of Public Law, University of Nottingham.
** Senior Lecturer in Law, University of Cambridge.

[1] Council of Europe, European Treaty Series No 122 (1985). The provisions are summarised in S.H. Bailey, *Cross on Local Government Law*, 9th ed. (London 1996), paras. 1–82 *et seq*. The Preamble includes the proposition that democratically constituted local authorities should possess a wide degree of autonomy with regard to their responsibilities, the ways and means by which they are exercised and the resources required for their fulfilment.

[2] See section IV below.

[3] Department for Communities and Local Government, *Unlocking the Talent of our Communities* (London 2008); Cm 7427, *Communities in Control: Real Power, Real People* (London 2008); Local Democracy, Economic Development and Construction Bill and Business Rates Supplements Bill 2008–09 (currently before Parliament); draft Community Empowerment Bill.

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have – inadequate powers and autonomy. Attempts to strengthen local *democracy* must, on this view, go hand-in-hand with attempts to strengthen local *government*. We argue that central government policy has repeatedly failed to establish a virtuous circle within which strong local democracy and powerful institutions of local government enjoy a symbiotic, mutually constructive relationship. Instead, we suggest, there is a vicious circle in which extensive central control, the consequent limitations to local power and autonomy and the disengagement of individuals and communities are factors that are mutually reinforcing. Within this framework, we consider recent and proposed changes in policy, assessing their capacity to break this destructive cycle and arguing that the difficulties we identify in the paper can be fully faced up to only if important questions about the legal and constitutional role of local government are squarely addressed. In this regard, we draw particular attention to the fact that, in constitutional terms, local government is the poor relation of its devolved counterpart, and argue that coming to an appreciation of the reasons underlying this phenomenon helps to point the way forward in terms of strengthening democracy at the local level.

II. The role of local government

Underlying the foregoing discussion is an implied premise which needs to be made explicit and justified before we go any further. It is that our analysis is right to be predicated on a model featuring strong local government and strong local democracy (each being a precondition of the other). This is not to deny that it is possible to envisage a system in which the role of local government is highly marginal. On this view, local government would simply be an "executory agency for national policies":[4] local authorities would, in effect, merely be outposts of the centre, and would have no responsibility for developing distinctive policies based on the particular social, economic and cultural circumstances of their areas and inhabitants. We contend, however, both that local government in the UK *is not* and *should not be* perceived in this way – and that the critique in this paper of recent and proposed policy is therefore appropriately based on the broader and deeper view of the role of local government reflected in the European Charter.

The first point – that the role of local authorities is not actually perceived as being purely marginal – can be deduced both from how local government is organised and the way in which policy-makers have, in recent years, sought to shape it. Most obviously – but most significantly – local authorities are elected institutions; it is considered

[4] M. Loughlin, *Local Government in the Modern State* (London 1986), p. 186, suggesting that some aspects of the work of local government could be described thus.

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important that they enjoy the sort of mandate and legitimacy which the ballot box is uniquely able to confer; and, as we explain below,[5] a key goal of central government policy in recent times has therefore been to strengthen local democracy. For example, the White Paper which preceded the Local Government Act 2000 made it clear that one of the government's central aims was to enhance the "effectiveness of local democracy" because it was of the view that the "very engine of local democracy – the local election – is not working well".[6] Similarly, in his foreword to the 2006 local government White Paper, the then Prime Minister, Tony Blair, argued that, "Local government is a vital part of our democracy."[7] If the role of local authorities within our system of governance was confined to the minimalist model sketched in the previous paragraph, none of these things would be important; the need for local government to enjoy democratic legitimacy would be doubtful; and the need to expend considerable effort in attempting to strengthen local democracy would be more so. The high value which contemporary policy-makers appear[8] to ascribe to the quality of local democracy only makes sense if the role of local government is conceived of in terms which make a democratic mandate and democratic accountability necessary and desirable.

Our argument, however, goes further than the observation that central government policy *vis-à-vis* local democracy *actually* presupposes such a role for local government. We also contend that, in normative terms, local authorities *should* enjoy a substantial degree of autonomy and *should not* be seen merely as an offshoot of the centre. This is hardly a controversial view. The Widdicombe Committee, which was established in the 1980s to inquire into the conduct of local authority business, concluded that local government is valuable for three main reasons.[9] First, it was argued that local government is important because of the contribution which it makes to *pluralism* within the British constitution: the existence of local authorities has the potential to ensure that power is diffused, so avoiding the hegemony of central government. The peculiarly powerful position occupied by the central executive branch in the UK – given the at best idiosyncratic implementation of the separation of powers doctrine in Britain – makes this point a particularly important one. Secondly, local government can enable citizens to *participate* in governance more

[5] In section IV.
[6] Cm 4298, *Local Leadership, Local Choice* (London 1999), paras. 1.17–1.18.
[7] Cm 6939-I, *Strong and Prosperous Communities* (London 2006), p. 2.
[8] Whether such value is *actually* ascribed to local democracy is another matter. S. Jenkins, *Big Bang Localism* (London 2004), pp. 54–6, argues that by 2002 "Whitehall was … awash in doublethink", "suddenly declar[ing] the new localism as holy writ", notwithstanding the Blair administration's having presided over a "centralist frenzy" in the period from 1997.
[9] Cmnd 9797, *The Conduct of Local Authority Business* (London 1986).

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readily and to a greater extent than would be possible if all governance occurred at a national level. Mill placed great emphasis on the participative virtues of local government, suggesting that they help to provide citizens with an education in democracy.[10] Thirdly, the Widdicombe Committee argued that local government is valuable because of its capacity for *responsiveness*: it has the potential to make decisions and deliver services in ways which are sensitive to local mores, economic and social conditions, and so on. This point was underscored recently by a Treasury review which concluded that economic growth could best be advanced by allowing "decisions to be taken in a way which properly reflects local circumstances", meaning that "the focus should be on achieving real devolution [of power to local and regional authorities] as far as possible".[11] In similar vein, Sir Michael Lyons's recent inquiry into local government concluded that its key role is "place-shaping", meaning "the creative use of powers and influence to promote the general well-being of a community and its citizens" – an endeavour in which responsiveness, as we have defined that notion, is obviously imperative.[12]

It is our contention that if local government in the UK is to correspond to these ideals, then two key conditions must be met. First, local authorities must possess sufficient *power, independence and financial resources* to govern in a way which is distinctive, meeting the particular needs of their areas and the expectations of their citizenry, and acting as a counterweight to the power of the centre. Secondly, the *quality of local democracy* must be such as to enable the participation of individuals, vouchsafe the responsiveness of local institutions and remove the need – actual or perceived – for a high level of central interference in the business of local government. We also contend that due appreciation of the relationship between these two sets of concerns is imperative if the vicious cycle sketched above is to be avoided.[13]

III. Autonomy

A. Models of Central-Local Relations

The relationship between local government and central government has been problematic from the nineteenth century (when a pattern of elected local authorities for all areas of England and Wales was finally established) to the present day. There is a substantial literature

[10] J.S. Mill, *Considerations on Representative Democracy* (New York 1862), pp. 288–9.
[11] HM Treasury, *Review of Sub-National Economic Development and Regeneration* (London 2007), p. 64.
[12] M. Lyons, *Place-Shaping: A Shared Ambition for the Future of Local Government* (London 2007), p. 60.
[13] See, e.g., *Power: An Independent Inquiry into Britain's Democracy* (London 2006), pp. 155–8.

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analysing that relationship.[14] In the mid-twentieth century, the "conventional wisdom" was said to be that there had been a historical trend from a "partnership" model to an "agency" model of central-local relations.[15] In a partnership model local authorities are co-equals under Parliament and have considerable discretion; in an agency model, local authorities implement national policies under the supervision of central departments and have little or no discretion.[16] The trend was to be characterised by increasingly tight control over capital expenditure and increasing dependence of local authorities on central grants, and an increase in the administrative controls exercisable by central departments over local authorities.[17] Work in the latter part of the twentieth century demonstrated that this was both an inadequate framework to capture the complexities of central-local relations and not supported by the historical evidence.[18] A different perspective is provided by Rhodes, who argued that concepts of control and hierarchy were less appropriate than an analysis of the mutual power dependency of tiers of government. Here the relationships were complex and multi-faceted and each tier consisted of "pluralistic organisations with shifting political resources for power-bargaining".[19] For some writers, this "power-dependence" model, which recognises that central and local government cannot be seen as equal partners but that, nevertheless, local authorities have significant resources of their own that they can exploit, is seen as a more persuasive elaboration of "partnership".[20] Yet while the "partnership" and "agency" models are crude and neither accurately captures the position at any particular stage of the history of central-local relations, the ideas that underlie them can help explain and compare aspects of the story. Indeed, the position in any one period may be seen to be the product of the tension between these two forces, the strength of each of which has varied over time.

[14] See B. Keith-Lucas, *Redlich and Hirst, The History of Local Government in England*, 2nd ed. (London 1970); J.A.G. Griffith, *Central Departments and Local Authorities* (London 1966); Sir Norman Chester, *The English Administrative System 1780–1870* (Oxford 1981), ch. V; C. Bellamy, *Administering Central-Local Relations, 1871–1919* (Manchester 1988); M. Loughlin, *Legality and Locality* (London 1996); Jenkins, above note 8.

[15] Bellamy, above note 14, citing J. Stanyer, *Understanding Local Government* (London 1976), p. 211 and R.A.W. Rhodes, "Some myths in Central-local relations" [1980] Town Planning Review 270.

[16] Rhodes, above note 15, p. 270.

[17] Bellamy, above note 14, p. 2.

[18] *Ibid.*, pp. 2, 4.

[19] *Ibid.*, pp. 3–4, citing R.A.W. Rhodes, *Control and Power in Central-Local Government Relations* (Farnborough 1981).

[20] D. Wilson and C. Game, *Local Government in the United Kingdom*, 4th ed. (Basingstoke 2006), pp. 186–7. For further analysis of "power-dependence" see R.A.W. Rhodes, *Control and Power in Central-Local Relations*, 2nd ed. (Aldershot 1999). This study also argues that previous work focusing on "central-local relations" suggested "a bias towards *institutional* relationships"; this did not always provide an adequate account of policy systems. "'Intergovernmental theory', with its emphasis on fragmentation, professionalization and policy networks is more appropriate" (p. 135).

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B. Factors Affecting Central-Local Relations

Consideration of the history of central-local relations suggests that there are many factors that have been influential on the nature and degree of autonomy enjoyed by local government. The major ones appear to be these.

First, there is the position of local authorities in the constitutional framework. On the one hand, they are established by statute and, unlike many quangos, cannot be straightforwardly abolished by ministerial decision. However, the unitary nature of the constitutional framework means that they enjoy no entrenched legal position. Both individual authorities and classes of authority have been abolished as part of the periodic bouts of reorganisation that many governments have found it necessary to effect. There are no powers conferred on local authorities that cannot be taken away; many have been. This point is developed further below.

Second, uniquely for bodies other than Parliament, local authorities are directly elected, and by an electorate that is essentially the same as that for parliamentary elections. Local government thus enjoys a special position that has generated at least an element of respect in dealings with central government.[21] It also provides a justification in contemporary government policy for expecting local authorities to take on a role in community leadership, working in partnership with a range of statutory and voluntary agencies.[22] However, it must be remembered that until the twentieth century, suffrage for elections, both local and central, was anything but universal. It was largely focussed on the occupiers of property – the ratepayers – and local authorities could be seen not so much as representing their communities but furthering the interests of the ratepayers.[23] This was reinforced by the so-called "fiduciary duty" owed by local authorities to ratepayers, recognised as part of local government law by the House of Lords in *Roberts* v. *Hopwood*.[24] This constrained local councils from spending the rates

[21] See *e.g.* Bellamy, above note 14, p. 236, noting the resistance of the Local Government Board to allowing the professional bodies within local government to influence policy: its "constitutional rationale" was that "it could not deal with the professions over the heads of their employers, the local authorities, whose members took the political, and particularly, the financial responsibility for local government".

[22] See section VII.

[23] See generally B. Keith-Lucas, *The English Local Government Franchise* (Oxford 1952). In the 19th century, the main qualification for the local franchise was being a ratepayer; the Representation of the People Act 1918 replaced this by a test based on the occupation of property rather than the actual payment of rates. Universal adult suffrage was introduced as late as 1945 for local elections (Representation of the People Acts 1945 and 1948). *Cf.* W.I. Jennings' comment that it was "not uncommon to find councillors complaining that they do not do as their electors wish, but as they are ordered by 'Whitehall'. This is, of course a travesty of the facts. The complaint is most frequently made by representatives of Ratepayers' Associations and other persons who represent the landlord interest. Their policy is the simple one of reducing cost" (Jennings in H.J. Laski *et al*, *A Century of Municipal Progress* (London 1935), p. 450).

[24] [1925] A.C. 578. See Loughlin, above note 14, ch. 4.

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(and indeed any of their money) in such a way as to benefit particular groups[25] at the expense of the generality of ratepayers.

Third, one of the major purposes of local government has been to deliver services that central government has wished to see delivered across England and Wales, but has not wished to manage directly. Examples include police, education and social services. These may be compared with such services as the provision of welfare benefits, which are managed through the local offices of a central agency. Why one model has been adopted rather than another is not always obvious, and the pattern that has emerged is not necessarily coherent. Where functions of this kind are allocated to local authorities, a particular tension is likely to arise. If central government is in practice regarded by the electorate as politically responsible for a service, even though formal responsibility lies with local authorities, it will naturally look for ways, legal and extra-legal, to influence outcomes.[26] The centre may have the political will to implement policies it sees as desirable which is lacking (or would be lacking) in local authorities.[27] A similar pressure may arise where central government enjoys or has convenient access to greater technical expertise in aspects of service delivery than local authorities (particularly where there are a larger number of smaller authorities). A related question is how the service is funded. If it is funded by central government, it is entirely proper for central government to ensure, for example through audit, and the setting of standards as a condition of paying a grant, that the money is properly spent. Indeed, one of the themes of the struggles between central and local government in the late nineteenth and early twentieth centuries was insistence by local taxpayers that truly national services should as a matter of principle be funded from central taxation.[28]

A yet further related issue is the tension that arises where one person's claim to respect for local autonomy and diversity is another person's invocation of the image of the "postcode lottery". The latter is regularly deployed in public debate across public services, whether provided by local authorities or other bodies, most notably the NHS.[29]

[25] Here, employees of a council that wished to act as a "model employer".

[26] This is by no means confined to the relationship with local authorities. In 2008, the British Medical Association proposed an NHS Constitution for England (http://tinyurl.com/cbtvcr) in order, *inter alia*, to bring about "a marked reduction in the role of politicians in the day-to-day running of the NHS along with a greater role for Parliament in setting standards and relating choices to resources" (para. 6.3). An NHS Constitution has now been adopted (see http://tinyurl.com/8gplsm) but the BMA's proposal that the Secretary of State's role should be limited to setting broad objectives for the NHS, and that there should be a Board of Governors for the NHS and an NHS Executive Management Board, was not adopted.

[27] *Cf.* the nineteenth century debates as to the most appropriate model for administration of the poor law and the promotion of public health (see Keith-Lucas, above note 14).

[28] See Bellamy, above note 14, ch. 2.

[29] For example, in June 2007, Age Concern claimed that it had identified a "postcode lottery in continuing NHS health care" (http://tinyurl.com/5d3fmz); in April 2007 the Family and Parenting Institute criticised what it regarded as a "postcode lottery" concerning access to health visitors

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Whether people are prepared to accept with equanimity geographical variations in levels of service provision may of course depend in part on the importance of the service. For example, some writers have argued that health care is an especially sensitive matter such that divergence from national norms is particularly problematic.[30] Others, however, have observed that in many Scandinavian countries, "considerable diversity in the pattern of health care" is "accepted", because it "rests on the decisions taken by locally elected politicians".[31] This implies that whether variation in provision is regarded as a postcode lottery or in more positive terms will depend, to some extent at least, on whether local or national institutions are regarded as having legitimate "ownership" of the matter in question[32] – which, in turn, will be influenced by a range of factors, including the relative health of local and national democracy and whether the service is funded from local or national taxation. It therefore follows that, as Jenkins puts it, "[d]ivergent standards are the price of localism" which, if they are to be accepted, require "people to indulge in local politics as never before, combing, challenging, questioning, voting".[33] On this view, the so-called postcode lottery, transplanted into a vibrant, well-functioning local democracy, becomes evidence that the system is doing precisely what it ought to.[34] As the Lyons report puts it, "if the people of one area collectively choose to use the public resources at their disposal in a different way to the people of another area, it is hard to argue that this is unfair".[35] The practical point for politicians, however, is how many of the people will regard it as unfair.

Fourth, an important factor influencing the practical relationship between central and local government has been the general economic state of the country. The recent period when there was the greatest difficulty in central-local relations was during the Thatcher government in the 1980s when a major central government concern was to

(http://tinyurl.com/5gqlog); and in June 2008, the House of Commons Transport Select Committee endorsed efforts by the Department for Transport to eradicate a perceived postcode lottery in the allocation of disabled parking badges (HC475, *The Blue Badge Scheme* (2007–08), pp. 7–8). In each case, local variations in practice were perceived in negative terms.

[30] K. Banting and S. Corbett, *Health Policy and Federalism* (Montreal 2002).

[31] K. Woods, *A Critical Appraisal of Accountability Structures in Integrated Health Care Systems* (Glasgow 2002). See further J. Järvelin, *Health Care Systems in Transition* (London 2002).

[32] *E.g.* the King's Fund found that while people generally resent "large differences in the way in which different local authorities manage long-term care", there is some evidence of acceptance of "the case for some local variability in a service led by local government". See *The Future of Care Funding: Time for a Change* (London 2008), p. 11.

[33] Above note 8, p. 126.

[34] See further H. Tam, "The Community Roots of Citizenship" (2001) 72 The Political Quarterly 123 (supplement), pp. 130–1.

[35] Above note 12, p. 58. This sort of thinking may help to explain why the public appears willing to tolerate – if not celebrate – the policy divergence which exists, even in relation to front-line public services such as health care and personal social services, within the UK post-devolution (on which see M. Keating, "Policy Convergence and Divergence in Scotland under Devolution" (2005) 39 Regional Studies 453).

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control levels of public expenditure during times of global economic difficulty.[36] Relations have been easier in the last ten or more years when the economy has been generally strong.

Fifth, a further variable has been the political complexion of local and central government. There is a tendency in local elections between general elections for there to be a swing against the party in control of central government,[37] and a proportion of authorities will in practice always be Conservative or Labour and so for periods faced by a central government controlled by the opposing party. This is, however, not to say that relations are always harmonious where local authorities and central government are controlled by the same party,[38] although the most difficult times of central-local relations have been where local authorities have been controlled by very left-wing councils, whatever the party in control at Westminster.[39]

Sixth, an important point to remember is that neither local nor central government is monolithic. The interests of different classes of council are by no means identical,[40] although differences are less easily articulated on the national stage with the establishment in 1997 of the Local Government Association as the single representative body for local authorities in England.[41] At the centre, while there has been and continues to be a lead department with which local authorities interact,[42] there have always been a number of departments with which there are relationships, usually in respect of the operation of particular services.[43] It has been consistently observed that the nature of relationships with different government departments varies.[44]

[36] On the difficulties of the Thatcher era see Loughlin, above note 14.

[37] C. Rallings, *et al*, "Trends in Local Elections in Britain, 1975–2003" (2005) 31 Local Government Studies 393, 402; Wilson and Game, above note 20, p. 301.

[38] See *e.g.* the argument that one of the reasons "which made New Labour reluctant to give additional powers or credence to directly elected local government" was that "by 1997 much of local government was a bastion of Old Labour, run by activists who had kept the faith alight through 18 years of despair" (A. Coulson, Review Article, (2004) 30 Local Government Studies 110).

[39] See *e.g.* the tensions of the 1920s involving Poplar Borough Council (B. Keith-Lucas, "Poplarism" [1962] P.L. 52); Clay Cross UDC in the 1970s (C. Harlow, [1976] P.L. 116); and Liverpool and Lambeth (Loughlin, above note 14, pp. 185–202).

[40] *E.g.* urban v. rural; districts v. counties in two tier areas.

[41] Replacing separate associations for county councils, metropolitan authorities and district councils. There are separate Associations for Wales and London.

[42] Successively the Local Government Board, the Ministry of Health, the Ministry of Housing and Local Government, the Department of the Environment, the Department of the Environment, Transport and the Regions, the Department for Transport, Local Government and the Regions, the Office of the Deputy Prime Minister and the Department of Communities and Local Government.

[43] *E.g.* the departments responsible for culture, education, elections, the environment, social services and transport.

[44] See, *e.g.*, the somewhat sharp comments of W.I. Jennings, above note 23, pp. 451–4. Compare the persistent criticisms of "unjoined up" policy-making among central departments noted in J. Downe and S. Martin, "Joined up policy in practice? The coherence and impacts of the local government modernisation agenda" (2006) 32 Local Government Studies 465.

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Seventh, a variable of the utmost significance is the extent to which local authorities may (and do) raise their own income independently of central government. Historically this has largely been through locally-based property taxes (rates; community charge; council tax) and charges for services provided, where permitted by statute. However, the position has been bedevilled by two major problems. First, the local taxes themselves have been in different ways controversial and perceived to be unfair. Examples can be seen in the political struggles of ratepayers' representative bodies in the nineteenth century to limit the extent to which rates were used to support national services;[45] the political failure of the community charge (widely dubbed "poll tax") introduced by Margaret Thatcher's government;[46] and the current refusal of the government because of fear of the political consequences to implement recommendations for the revaluation of properties to ensure that the incidence of the burden of the council tax reflects the values of property today and not in 1991. The second problem is that it has never been possible for all the activities of local authorities to be funded from local taxation and charges. While initially the use of central government grants to support local services was resisted and a variety of ad hoc measures[47] adopted to achieve a rough and ready balance, the introduction of the principle of central grants was ultimately inevitable.[48] The number and purpose of central grants has varied over time, as has the basis for their calculation, but the proportion of local authority expenditure met from grants has steadily increased. A particular boost to reliance on grants was given by a substantial decrease in the community charge in 1991, paid for by an increase in VAT from 15% to 17.5%, prior to its replacement by the council tax from 1993–94.[49] By 2006–07, only 15% of local authority income was accounted for by council tax, compared to 62% from grants and redistributed business rates.[50] Thus, although local authorities have control over the levels of council tax (subject to capping by central government), the limits to the autonomy of local authorities in raising income are obvious.

C. Mechanisms of Central Control and Influence

When considering the relationship between central and local government, a further factor that should be noted is that there is a wide range

[45] Bellamy, above note 14, pp. 27–35.
[46] See section V below.
[47] *E.g.* the assignment of particular discrete income streams.
[48] Bellamy, above note 15, pp. 57–60; Sir Josiah Stamp in Laski, above note 23, pp. 382–6.
[49] Wilson and Game, above note 20, pp. 219–22.
[50] CLG, National Statistics, *Local Government Financial Statistics England No. 18*, 2008: www.local.communities.gov.uk/finance/stats/lgfs/2008/lgfs18/index.html, p. 31; CLG/National Statistics, *Local Government Finance Key Facts: England* (London 2008). Between 2005–06 and 2006–07, revenue support grant fell from £26.6bn to £3.3bn largely as the result of a significant switch of education funding to a new special grant.

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of mechanisms available to central government to control or influence local authorities. Many have been and continue to be enshrined in legislation; many others are not. Examples of the former include (or have included) controls over borrowing, capital expenditure and revenue expenditure;[51] the setting of conditions to the making of specific grants; the extent to which functions are conferred in the form of statutory duties rather than discretions; myriad powers for the Secretary of State or National Assembly for Wales to make regulations prescribing both substantive rules governing an area of activity and the procedures to be adopted in making specified kinds of decisions; inspection arrangements; power to act in default where performance is unsatisfactory; prescription as to what officers must be appointed and their qualifications; powers to confirm bye-laws; powers to issue directions[52] or guidance;[53] powers to entertain appeals or grant or refuse consent to individual acts; powers to require information to be provided; powers to require plans to be prepared and submitted (and sometime approved) and the arrangements for comprehensive performance (now area) assessment.[54] However, it must be recognised that wherever powers are conferred by legislation on a local authority, a minister will need express statutory authority to issue directions as to how they are to be exercised. This results from the application of the familiar general legal principle that the exercise of statutory powers cannot be fettered by the dictation of another person or body.[55]

The general trend over time as regards formal legal controls over local authorities has been away from detailed controls over individual operational actions. Over the years there have been a number of exercises to that end.[56] A recent variant has been for controls to be relaxed for higher performing authorities only.[57]

[51] The most visible mechanism here is the capping of council tax and precepts under the Local Government Finance Act 1992, Part 1, Ch. 4A, a power still exercised by the Labour government: see *e.g.* H.C. Deb. vol. 478 cols. 29–30WS (26 Jun 2008).

[52] Strictly within the statutory limits: *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] A.C. 1014.

[53] Which normally either must be followed or reasons given why it is not: *R. (Khatun)* v. *Newham L.B.C.* [2004] EWCA Civ 55, [2005] Q.B. 37, at [47].

[54] On comprehensive performance assessment, see further below at p. 467. See generally Bailey, above note 1, ch. 9. In some cases the requirement is cast as a duty imposed directly on the local authority by the legislation rather than as the result of a ministerial direction (*e.g.* duty to prepare plans for the purpose of town and county planning).

[55] See Lord Woolf *et al*, *De Smith's Judicial Review*, 6th ed. (London 2007), pp. 314–6. Accordingly, in the 1960s local education authorities could not, prior to the Education Act 1976, be forced to adopt the comprehensive principle in the organisation of secondary schools.

[56] See *e.g.* removal of detailed controls over the appointment of officers and committees by the Local Government Act 1972; Part 1 of the Local Government, Planning and Land Act 1980 (this removed a large number of controls); a number of projects to review and where appropriate remove consent regimes (see Office of the Deputy Prime Minister, *Consent Regimes: Reducing Unnecessary Bureaucracy* (London 2006)).

[57] *E.g.* requirements to produce plans: Local Authorities' Plans and Strategies (Disapplication) (England) Order 2005, S.I. 2005/157.

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Extra-legal mechanisms for control and influence by central government are also significant, and come in many forms. Examples include the issuing of non-statutory guidance,[58] and the plethora of specific projects whereby local authorities are encouraged to bid competitively for funding (normally time-limited) to support some innovative scheme or development. This is not all one way; the well established consultative processes have enabled the local authority associations (now the Local Government Association) and individual authorities to influence policy and the detailed content of legislation.[59]

IV. Democracy

So far, we have argued that substantial autonomy is a condition precedent to local government realising the potential ascribed to it by, *inter alia*, the Widdicombe[60] and Lyons[61] reports. However, it is also part of our argument that such autonomy is merely a necessary, not a sufficient, condition. If local government is to exhibit true *responsiveness* to local conditions and *mores*, thereby fulfilling its *place-shaping* role, it stands to reason that the quality of local democracy must be high: without significant engagement by individuals and communities in the local political process – including but not limited to participation by voting in local elections – how are local authorities to acquire sufficient appreciation of the concerns to which they ought to be responding as they determine local policy? Equally, it is difficult to see how local government can realise its *participative* potential without thriving local democracy. And if local authorities are to form a meaningfully *pluralist* part of the UK's governance arrangements, it is imperative that they enjoy a level of democratic legitimacy consonant with being a genuine counterweight to the power of the centre.

Only 36 per cent of those eligible to vote did so in the English local elections in 2008.[62] These figures compare unfavourably with the turnout in general elections – 62 per cent of those eligible to vote in the 2005 general election did so[63] – and with the turnout in local elections in many other European countries.[64] The impression given by these figures, that local democracy is not thriving, is consistent with other research findings. Qualitative data indicates confusion about the respective roles of central and local government and that people's views

[58] Which carries less weight than statutory guidance, although the difference is not necessarily great: *R.* v. *Islington L.B.C., ex p. Rixon* (1998) 1 C.C.L.R. 119.
[59] See Wilson and Game, above note 20, pp. 180–2; www.lga.gov.uk.
[60] Above note 9.
[61] Above note 12.
[62] Electoral Commission, *England and Wales Local Elections 2008 – Summary Report* (London 2008) at 6, http://tinyurl.com/dfmy25.
[63] Electoral Commission, *Election 2005: turnout* (London 2005), p. 16.
[64] Above note 6, para. 1.18.

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on the former therefore impact on how they vote in elections pertaining to the latter.[65] This is not consistent with well-functioning local democracy capable of delivering on key objectives such as participation and responsiveness. Indeed, the implication is that the (in any event low) turnout figures for local elections might *overstate* the level of engagement with local politics, given that a proportion of those who vote in local elections – and as many as 31 per cent of those who voted in south-east England in 2006 – are merely delivering a verdict on the performance of the UK government.[66]

It is not the purpose of this paper to determine why local democracy finds itself in this condition.[67] It is, however, part of our argument that there are certain basic conditions within which local democracy is more likely to flourish, and that it is by reference to such considerations that recent and future policy in relation to local democracy falls to be evaluated. Three points, in particular, should be emphasised.

First, it is necessary to consider the *organisation* of local government. Scotland, Wales and some parts of England feature single-tier local government, within which one council – a "unitary authority" – is responsible for all local authority functions.[68] However, large parts of England retain two-tier arrangements under which certain functions are performed by county councils and others by district councils. The position is further complicated by the fact that one local authority may delegate powers to another. For example, a county council may delegate certain of its highways powers as they relate to a particular geographical area to the relevant district council. While, in such circumstances, the county council would remain legally responsible, Leigh observes that "the public may be understandably confused about the lines of accountability when the visible delivery of the service is by a different local authority".[69] Given the complexity of this picture, it is not surprising that research conducted for the Electoral Commission in relation to the May 2003 local elections found that many people had "little understanding of which authority the elections were actually for", and that almost 20 per cent of respondents were uncertain whether the elections were for county or district councils.[70] These are hardly ideal conditions for the flourishing of local democracy, and they imply that local government is failing to realise its potential in

[65] Hayward *et al*, *The 2006 Local Elections and Electoral Pilot schemes: Report to the Electoral Commission*, p. 17.
[66] *Ibid.*, p. 23.
[67] Indeed, this is a matter which could be fully addressed only by detailed empirical research concerning the attitudes of the electorate.
[68] The position in London is different, where the Greater London Authority adds a further layer to local government.
[69] I. Leigh, *Law, Politics, and Local Democracy* (Oxford 2000), p. 210.
[70] Electoral Commission, *The Cycle of Local Government Elections in England* (London 2004), p. 13.

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terms of participation and responsiveness.[71] All other things being equal, it is clear that making arrangements as straightforward and transparent as possible is likely to increase the scope for public engagement with local government and participation in local democratic processes. We return to this issue below when we discuss unitary authorities.

Secondly, a similar argument can be applied to the *internal structure* of local authorities. Participation and responsiveness – and so the capacity of local government to realise its potential – are likely to be facilitated by arrangements which ensure the visibility of those with decision-making power, thus allowing them to be effectively held to account, and by transparent institutional and decision-making arrangements. These objectives have traditionally been thwarted not just by the complications inherent in two-tier governance but also by the *complexity* and *unfamiliarity* of the internal structure of local authorities. In particular, councils have traditionally seemed to be somewhat amorphous, in the absence of features – such as high-profile leadership and a clearly-defined executive body – which are familiar in relation to central government. These difficulties have tended to be exacerbated by the fact that the electoral system often delivers "hung" councils,[72] meaning that there has been neither an identifiable executive group nor a single party capable of being legitimately identified as responsible for the development and implementation of policy. It was against this background that major reforms were made through the Local Government Act 2000, which created formally distinct executive bodies – liberated from the usual requirement of political balance,[73] and thereby free to act in an explicitly partisan manner[74] – within local authorities. The intention behind these changes was to raise the profile, transparency and (thus) public understanding of local government, in order to move away from a situation in which people did "not know who to praise, who to blame, or who to contact with their problems".[75]

Thirdly, if, as we have argued, local government is only likely to realise its potential if local democracy flourishes, it is obviously important that the electoral process makes it as easy and straightforward as possible for individuals to engage with and influence local government. In 1998, central government judged that such objectives could best be realised by holding local elections frequently,[76] and, to that end, extended the practice of electing councils "by thirds" – a system in

[71] Participation being a condition precedent to true responsiveness.
[72] At any given time, typically around one-third of councils are "hung". See F. Gains, *The Implementation of New Council Constitutions in Hung Authorities* (London 2005), p. 6.
[73] Local Government and Housing Act 1989, s. 15.
[74] Local Government Act 2000, s. 24.
[75] Cm 4298, *Local Leadership, Local Choice* (London 1999), para 1.13.
[76] Cm 4014, *Modern Local Government: In Touch with the People* (London 1998), ch. 4.

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which one-third of council seats falls vacant in each of the first three years of the four-year election cycle. Elections are therefore held in three out of every four years, but no single occasion ever arises on which the entire council is subject to election. This model is highly problematic. Far from engaging voters, it causes confusion[77] and, no doubt, fatigue. Moreover, since the chances of overall control shifting are lower than they would be if all seats were up for election, the election by thirds system gives rise to a sense that "that the elector cannot affect the overall control of the council".[78] Unsurprisingly, turnout in "whole council" elections, in which all council seats are voted upon, is "systematically higher compared to other authorities".[79]

V. The Vicious Circle

A. The Relationship between Autonomy and Democratic Health

The picture which emerges from our analysis thus far may be characterised as a vicious circle. Central government – principally via primary legislation enacted by Parliament – has made some attempts to strengthen local government and local democracy. The introduction of council executives, the creation of unitary authorities and the facilitation of a shift to whole council elections are all liable, for the reasons discussed in the previous section, to enhance the potential of local government to fulfil the key roles ascribed to it by the Widdecombe Committee and the Lyons review.[80] However, these changes have not succeeded – either individually or collectively – in radically reinvigorating local government and local democracy. This is unsurprising for two reasons.

First, reform has been relatively modest. For example, notwithstanding the introduction of unitary authorities, two-tier arrangements persist in large tracts of England: 27 county and 201 district councils remain.[81] Meanwhile, councils were permitted (and most chose) to adopt a "cautious"[82] version of the executive model – the "leader plus cabinet" system; relatively few chose a directly elected mayor. And while it is now easier for local authorities to shift to whole council elections,[83] the adoption of this system is not required, and election by thirds remains the norm in many areas.[84]

[77] Above note 65, pp. 80–3.
[78] Above note 7, p. 60.
[79] *Ibid.*, *loc. cit*.
[80] See section VI.
[81] The position after the creation of nine further unitary authorities as from 1 April 2009: see http://tinyurl.com/prnw3a .
[82] Cm 6939, *Strong and Prosperous Communities* (London 2006), p. 55.
[83] Local Government and Public Involvement in Health Act 2007, Part 2.
[84] *E.g.* 44 per cent of the local elections held in England in 2007 took place under the election by thirds system. See Electoral Commission, *Local government elections in England 2007* (London 2007), p. 6.

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Secondly, attempts to reinvigorate local democracy have not been accompanied by any significant enhancement of the autonomy of local government: indeed, as we argued above, there have for decades been real limits to the independence of local government and its capacity to develop distinctive policies and approaches suitable to local conditions. The difficulty is that the position *vis-à-vis* the autonomy of local government cannot sensibly be divorced from that pertaining to the health of local democracy. As a Local Government Ombudsman has asked, "[W]hy should people vote for organisations that have so little power to change things on the ground?"[85] This sentiment finds expression in empirical data: for example, reporting the findings of their research into the 2006 local elections, Hayward *et al* observe that "a large minority of respondents were in no way persuaded of the value of voting …, making the ongoing low turnout figures no surprise".[86] As Rallings and Thrasher point out, "The real key to higher turnouts at elections is engaging a greater proportion of the electorate, not simply making it easier to cast a ballot."[87] Such engagement is likely only if, in the first place, local government has, and is perceived to have, sufficient power and autonomy to make a genuine difference – a view which is supported by research which found that if councils had "more scope to make decisions about what happens locally", two-thirds of people would be more likely to vote in local elections, and that greater "scope to set taxes and charges locally and decide how the money is spent" would induce 60 per cent to do likewise.[88]

Thus are the seeds sown for the vicious circle to which we referred at the beginning of this paper. As Leigh has observed, "governments have sought to correct local [democratic] failings by transferring functions to other (unelected) bodies, imposing national standards of service or periodic structural reviews of all or part of local government".[89] Central intervention is thus a response to the failure of local democracy, yet paradoxically it is, for the reasons set out in the previous paragraph, also liable to exacerbate such failings. So, as Jones and Stewart have argued, "At the heart of central-local relations lies a dilemma between a commitment to local government and decentralisation, and distrust [by the centre] of local government."[90]

These difficulties – and the vicious circle to which they give rise – are illustrated by the debacle concerning the reform of local government

[85] J. White, "From Herbert Morrison to Command and Control: the Decline of Local Democracy and its Effect on Public Services" (2005) 59 History Workshop Journal 73.
[86] Above note 65, p. 18.
[87] *2007 Post-Election Survey – Local Elections in England: Report to the Electoral Commission*, p. 18.
[88] Above note 13, text to note 117.
[89] Above note 69, p. 14.
[90] "Central-Local Relations since the Layfield Report" in P. Carmichael and A. Midwinter (eds.), *Regulation Local Authorities: Emerging Patterns of Central Control* (London 2003), p. 26.

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finance in the late 1980s and early 1990s.[91] The community charge, introduced in 1990,[92] was a flat-rate per capita system of local taxation which replaced one founded on the rental value of properties, and had the effect of widening the tax base. Margaret Thatcher, who was Prime Minister when the community charge was introduced, later wrote in her memoirs that the intention underlying the new tax was that "everyone should contribute something, and therefore have something to lose from electing a spendthrift council".[93] Thus the justification for the new system was said to lie in its capacity to strengthen the "link between paying for local government and voting in local elections".[94] Local accountability would be enhanced by (in the words of the Green Paper which prefigured the poll tax) ensuring "that the local electors know what the costs of their services are, so that armed with this knowledge they can influence the spending decisions of their councils through the ballot-box".[95] Yet when some local authorities set high levels of community charge, it was the Thatcher administration against which local taxpayers principally vented their spleen.[96] Although councils had on average adopted inflation-busting spending increases of over 13 per cent, an opinion poll in 1990 showed that 56 per cent of people blamed central government for the problems arising out of the poll tax; only 18 per cent blamed local government.[97] Meanwhile, other research found that for roughly half of voters the poll tax had exerted an "important" or "very important" impact on how they had cast their ballots in the 1992 *general* election, notwithstanding that 78 per cent of respondents to a 1990 survey agreed that, "Leaving aside the level of the Community Charge it is a good idea in principle that everyone should pay something towards the local government services they use."[98]

Of course, the ascription of a good portion of the blame to central government is entirely unsurprising, given that it was solely responsible both for the decision to introduce the community charge and its highly regressive nature. However, this is not the whole story. Broader

[91] See generally D. Butler *et al*, *Failure in British Government: The Politics of the Poll Tax* (Oxford 1994).
[92] Local Government Finance Act 1988.
[93] *The Downing Street Years* (London 1993), p. 648.
[94] T. Travers, "Finance" in J. Stewart and G. Stoker (eds.), *Local Government in the 1990s* (Basingstoke 1995), p. 13.
[95] Cmnd 9714, *Paying for Local Government* (London 1986), p. vii.
[96] In the 1990 English local government elections, the Conservative Party, outside London, did badly across the board, and made gains (and modest ones at that) only in areas with the very highest spending Labour councils, and lost votes even in areas with the lowest-spending Conservative councils. If, as Butler *et al*, above note 91, p. 162, put it, "the best the party could show outside London was a 2.2 per cent increase in its vote in 'loony' [Labour] authorities", this was hardly a ringing endorsement of the notion that the poll tax would cause people to cast their votes on the basis of the efficiency of local councils.
[97] Above note 91, p. 259.
[98] *Ibid.*, pp. 259–60.

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considerations meant that the situation was not ripe for the sort of renaissance in local accountability which, according to the community charge's supposed underlying philosophy, ought to have resulted in taxpayers' ire being directed to a greater extent at local authorities. Indeed, a deep intellectual ambivalence surrounded the introduction of the poll tax. Protestations that its aim was to enhance local accountability notwithstanding, Butler *et al* point out that it was introduced against a background of "remorseless attack on the autonomy of local authorities".[99] The Thatcher government had already intervened very substantially in local government finance, taking the unprecedented steps of securing (and exercising) statutory powers to control expenditure[100] and imposing a regime of compulsory competitive tendering.[101] Moreover, before eventually capitulating in relation to the community charge – one of the first acts of Thatcher's successor, John Major, was to replace it with another property-based tax – central government responded to concerns about poll tax levels by imposing caps and giving additional money to some councils from central funds, so reducing the need for the community charge to be levied at high levels but undermining the very culture of transparency and accountability which the new regime was intended to instil.

Thus the history of interference in local government finance helped to create, and the philosophically incoherent (but politically expedient) interventions in response to the new tax's unpopularity helped to perpetuate, precisely the sort of vicious circle referred to above. The success of the community charge was dependent on the *existence* of precisely the sort of relationship of accountability between local authorities and individuals – within which the democratic nexus is strong enough to render local elections an adequate control upon local taxation and spending – which it sought to *create*. For the reasons explored above, it is clear that no such relationship existed at the time of the poll tax's introduction, and it is unsurprising that it failed to establish one overnight.

B. The Constitutional Position of Local Government

The existence of the vicious circle is, of course, dependent on central government's willingness and ability to interfere in local affairs. It is therefore worth asking to what this propensity and capacity to intervene is attributable. Three factors are in play here.[102] First, and most obviously, politicians in control of central government may often have – or at least regard themselves as having – *positive reasons to*

[99] *Ibid.*, p. 284.
[100] See Local Government, Planning and Land Act 1980; Local Government Finance Act 1982.
[101] Local Government Act 1988.
[102] See further our discussion, above, of factors influencing central-local relations.

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intervene, in order to secure maximal implementation of their policy preferences and broader political philosophy.[103] Secondly, the United Kingdom's unusual *constitutional architecture* – in particular the close relationship which exists between the executive branch and Parliament – gives central government effective control of a sovereign legislature, thus providing a powerful vehicle for the outworking of any interventionist inclinations. Thirdly, it does not, of course, follow that politicians involved in central government are necessarily so inclined: some may, at least as a matter of abstract principle, ascribe preponderant value to local autonomy. Yet, even here, *considerations of self-preservation* are likely to incentivize intervention, since the risk arises that voters will punish central government for local government's failings precisely because of the weaknesses, already discussed, in the democratic accountability of the latter. All three of these factors are either animated by or themselves give succour to the vicious circle: acting upon interventionist inclinations undermines local government and the democratic nexus connecting it with its electorate; the weakness of local government, which is itself a function of the vicious circle, means that it is not an adequate counterweight to the central power of the executive and Parliament; and any perceived need for intervention on grounds of self-preservation only arises in the first place because voters' identification with local government is deemed insufficient to allow local democracy to function unhindered as the primary control upon local authorities.

Why does this account of central-local relations not apply with equal force to the relationship between central and *devolved* governments in the UK? Local government is, to a considerable extent, treated as an object of central government policy: intervention is frequent, substantial and regarded as acceptable. This is true in relation to (*inter alia*) the architecture of local government,[104] its finances[105] and its role.[106] In contrast, it is clear that devolved government is not regarded as an object of central government policy: its fundamental features and characteristics are not considered readily manipulable by the centre. This is apparent (for example) from the fact that recent changes to the

[103] See, *e.g.*, the Labour government's use of statutory powers, in the mid-1970s, to require local authorities, in certain circumstances, to shift from grammar to comprehensive schools, and the Conservative government's procurement and use of statutory powers, in the mid-1980s, to reign in what it considered to be profligate councils. See further section III.

[104] See, *e.g.*, the very substantial changes introduced this decade, via the Local Government Act 2000 and the Local Government and Public Involvement in Health Act 2007, and those which are proposed in the near future (above note 3).

[105] See, *e.g.*, the introduction of the community charge and its replacement with the council tax; and the establishment of the compulsory competitive tendering regime and its replacement with the Best Value system.

[106] *E.g.* the introduction of compulsory competitive tendering, as well as being a financially very significant development, implied a radical re-conceptualisation of the role of local councils, turning them, in important respects, from service providers into service commissioners.

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institutional arrangements for and extent of devolution in Wales, although necessarily enacted by the UK Parliament, were introduced to a large extent at the behest and with the assent of the National Assembly for Wales itself.[107] Similarly, the current debate about the Scottish devolution settlement is being driven by Scottish politicians. The Scottish Parliament has established a Constitutional Commission to "review the Scotland Act 1998 in the light of experience",[108] a development which has been "welcomed" by the UK government.[109] And, while the UK government and legislature will not necessarily implement every recommendation the Commission eventually makes, it is clear that the UK government regards itself as being much more constrained *vis-à-vis* intervention in the Scottish devolution settlement than in relation to local government matters.[110]

This reflects the different constitutional positions occupied by local and devolved government. (We use the term "constitutional" in a broad, extra-legal sense here.) While both forms of government legally exist due to an exercise – and therefore in the shadow – of parliamentary sovereignty, there are nevertheless important constitutional differences between them. Put bluntly, the devolved institutions are more obviously imbued with constitutional status than their local counterparts. There are several reasons for this. First, they enjoy a particular status in popular consciousness which derives from the fact that they are bound up with – and constitute a focal point for – senses of nationhood.[111] People are likely to identify less strongly with institutions of local government, not least due to the transient nature of the membership of many local communities[112] and the fact that such institutions may not in any event be aligned with notions of local identity.[113] As a result, it has been observed that the Conservative governments of the 1980s and 1990s "were able to remove functions and finance because local government was not greatly loved or respected by its electorates".[114] Secondly, the devolved institutions enjoy an obvious

[107] The Government of Wales Act 2006 reflected changes to the Welsh devolution settlement recommended by the Richard Commission (which had been established by the Welsh Assembly): see *Report of the Richard Commission* (Cardiff 2004).

[108] Scottish Parliament, 6 December 2007, cols. 4136–7.

[109] H.L. Deb. vol. 698 col. *WA*145 (31 January 2008).

[110] This point is developed below at pp. 470–2, where we discuss concordats and conventions pertaining to central-devolved relations.

[111] The position in Northern Ireland, of course, is more complex.

[112] According to K. Young *et al*, *In Search of Community Identity* (Joseph Rowntree Foundation, 1996), who surveyed community identity in the shire counties of England in the mid-1990s, "the largest group [of people] have no sense of attachment to any of their neighbourhood/village, their district or their county. Nearly one in three fall into this category."

[113] For example, in England in the 1970s some new county-level authorities (such as Avon and Humberside) were created with boundaries dictated by considerations of administrative convenience rather than respect for local *mores*. These authorities have since been abolished. See further *Communities in Control*, above note 3, para. 4.25.

[114] P. John, "Strengthening Political Leadership? More than Mayors" in G. Stoker and D. Wilson (eds.), *Local Government into the 21st Century* (Basingstoke 2004), p. 47.

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legitimacy which local government does not possess (at least not in equal abundance). For example, the devolved systems of government themselves enjoy legitimacy deriving from the fact that they were endorsed – albeit marginally in Wales – through referendums, while the democratic relationship – at least measured crudely by reference to election turnout – seems healthier in respect of devolved governments, with turnouts in the 2007 elections to the Scottish Parliament and Welsh Assembly of 52 and 44 per cent respectively.[115] It is worth noting in passing that the Welsh devolution settlement is less (and until recently[116] was markedly less) extensive than its Scottish counterpart, and that the Richard Commission, which carried out a review on behalf of the Welsh Assembly, found that "the most frequently cited cause for disappointment [with devolution in Wales] was the inability of the Assembly to fulfil its potential due to its limited powers".[117] Indeed, research by the Electoral Commission in relation to the 2003 elections to the Welsh Assembly – in which turnout was only 38 per cent – found that a majority of people said they would have been more likely to vote in Welsh Assembly elections "if the National Assembly was given much greater powers to change things that shape people's daily lives".[118] This suggests that there is a relationship between propensity to vote and the perceived powerfulness of the institution to which the election relates – a point which is of a piece with our argument about the relationship between autonomy and democracy in the local government context.

There is no shortage of evidence that central government perceives devolved institutions differently from – and, crucially, as imbued with greater constitutional status and permanence than – their local counterparts. There is an evident awareness in the relationship between central and devolved institutions of constitutional dividing lines which act as a brake on the capacity of the former to interfere. This is apparent both from the consultative approach (noted above) of the centre to the development of the devolution settlements themselves, and from the set of constitutional norms which regulate the relationship between central and devolved government *vis-à-vis* the implementation of the existing devolution settlements. Thus there is a very clear convention that the UK Parliament should not normally legislate on devolved matters unless the relevant devolved legislature consents.[119] Meanwhile, "concordats" set out the basis on which devolved governments – and

[115] While lower than for general elections, these figures are higher – substantially so in respect of the elections to the Scottish Parliament – than those for recent local elections.
[116] See now Government of Wales Act 2006.
[117] Above note 107, p. 25.
[118] Electoral Commission, *The National Assembly for Wales Elections 2003: The Official Report and Results* (London 2003), p. 37.
[119] Cm 5240, *Memorandum of Understanding* (London 2001), p. 8.

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departments within those governments – are expected to relate to one another.[120] Such arrangements imply a degree of respect by central and devolved administrations for one another – and recognition by central government that its devolved counterparts enjoy a measure of legitimacy which requires relations to be pursued on a negotiated basis. In contrast, it is clear that such dynamics do not shape the relationship between central and local government. For example, Butler *et al*, writing about the implementation of the poll tax, argue that the episode highlighted "the freedom of a government with a subservient Parliament to rewrite the Constitution at will" by "redefining the role of local government without any semblance of its consent".[121] This is not to suggest that local authorities are never consulted by central government about changes in policy and legislation; but there is unarguably a clear difference in the way that the constitutional status of devolved and local government is perceived by the centre.

This analysis shows that in respect of local as distinct from devolved government, a concatenation of factors *positively incentivises* and *fails to disincentivise* intervention by the centre. The weak state of local democracy acts as the incentive: so long as the democratic relationship between individuals and councils remains weak, it is in the political interests of central government to ensure that local authorities deliver key public services to a high standard. Meanwhile the absence of actual or perceived constitutional dividing lines means that there is no (effective) disincentive to intervention: such activism on the part of central government is the norm and is not, for the reasons considered above, regarded as constitutionally (or otherwise) improper. The resultant dynamic is self-perpetuating (as vicious circles tend to be): intervention weakens and prevents the flourishing of the democratic nexus between individuals and councils, thus incentivizing further intervention.

VI. Proposals for Reform

The Labour Government's recent White Papers on Local Government are replete with rhetoric about the returning of power to local communities.[122] The preface to the 2006 White Paper set the tone:

> The aim of this White Paper is to give local people and local communities more influence and power to improve their lives. It is about creating strong, prosperous communities and delivering better public services through a rebalancing of the relationship between central government, local government and local people.[123]

[120] See R. Rawlings, "Concordats of the Constitution" (2000) 116 L.Q.R. 257.
[121] Above note 91, p. 303.
[122] *Strong and Prosperous Communities*, above note 7; *Communities in Control*, above note 3.
[123] Above note 7, p. 4.

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While for the last ten years, central government had needed to drive improvements in public services, "for these improvements to continue, we must have the courage at the centre to let go".[124] It was recognised that the strong direction and framework needed to change. Accordingly, the White Paper set out proposals "which will provide freedom and space for councils to respond with flexibility to local needs and demands. It radically reduces national targets, tailors others to local circumstances and introduces a lighter touch inspection system".[125]

This suggests that the main vehicle for reducing central government control would be through changes to the performance assessment regime. At the same time, the White Paper proposed a new framework for the relationships between local government and its partners, and changes to the relationship between local government and local citizens and communities giving the latter a greater say over their lives.[126]

The White Paper proceeded to propose a wide range of measures under a series of headings or themes, comprising collectively "radical and devolutionary reform".[127] *Responsive services and empowered communities* would involve a greater focus on citizens and communities through such devices as neighbourhood charters; small budgets for councillors to tackle local issues; community management or ownership of community assets; greater citizen involvement in the best value framework; a new procedure, the "Community Call for Action"; an easier process for the creation of parish councils, including for the first time the possibility of establishing such councils in London; and the extension of the 2000 Act well-being powers to quality Parish Councils. *Effective, accountable and responsive local government* would involve strengthened executives, with new prescribed models and all executive powers vested in the leader of the council. There would be further moves to establish unitary councils in shire areas, and facilitation of whole council elections and single member wards. The making of bye-laws would be fully devolved to local authorities and most aspects of the conduct regime would also be devolved, leaving the Standards Board as a light local regulator. *Strong cities, strategic regions* would be encouraged with the development of strategies that cross local authority boundaries, supported by the proposals for stronger leadership models. There would be a report by the Department for Communities and Local Government, the Treasury and the Department of Trade and Industry[128] on how the government could best devolve powers and resources to regions and local authorities. *Local government as a*

[124] *Ibid.*, p. 4.
[125] *Ibid., loc. cit.*
[126] *Ibid.*, p. 5.
[127] *Ibid.*, para. 1.11.
[128] Now the Department for Business, Enterprise and Regulatory Reform.

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strategic leader and place-shaper would be reinforced by the further development of Local Strategic Partnerships and a delivery plan for the Sustainable Community Strategy each authority was already required to prepare, known as a Local Area Agreement. There would be *a new performance framework* ("Comprehensive Area Assessment") with a substantially reduced set of performance indicators set by central government, and including citizen satisfaction and perception measures. There would be a continuing requirement for efficiency-transforming local services, through the review of activity and working with other public bodies to share assets, systems, data, skills and knowledge more effectively. "Ambitious efficiency gains" would also be required. Many of the measures mentioned would also help in the promotion of community cohesion. These ideas were then taken forward into the Local Government and Public Involvement in Health Act 2007 with some detailed modifications. Meanwhile, the the Local Democracy, Economic Development and Construction Bill (before Parliament at the time of writing) will, if enacted, implement certain proposals in the 2008 White Paper. In particular, it will impose upon local authorities duties to promote understanding of local government[129] and to receive and act upon (*eg.* by considering or debating) petitions.[130]

It can be seen that a number of these measures and proposals involve a relaxation of central control. However, there is a tension at the heart of the package that potentially undermines it. It is unclear how far the new freedoms are designed (1) to enable authorities to provide or facilitate the provision of new services in accordance with the wishes of their local communities; or (2) to drive forward further innovations in how current services are delivered (or facilitated) so as to ensure that the efficiency gains required by the current state of the economy and pressures on public expenditure are delivered. The official answer is presumably both,[131] but the reality will largely turn on the financial context in which the package is to operate. The prospect of there being greater citizen and community involvement in deciding which schools or libraries to close or other services to cut is hardly likely to invigorate local democracy. A clear risk is that at the core there will be business as usual, with the major preoccupation of local authorities being the

[129] Cl. 1.

[130] Part 1, ch. 2. Further proposals are to be included in a draft Community Empowerment Bill (see http://www.commonsleader.gov.uk/output/page2669.asp). This is "planned to include measures to enhance local democracy and empower communities, amend politically restricted posts, enable remote voting for councillors, introduce voting incentives, modernise provisions around parish councils, remove the barriers to directly electing mayors and recognise the contributions of alderwomen and local people through reform of honorary and hereditary freedoms" (ibid).

[131] Note the comment at para. 1.7 of the 2006 White Paper, above note 7, that "the next stage of public service reform has to be driven from below if improvements are to continue and local needs and aspirations are to be met".

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unremitting struggle to deliver existing services with ever tightening budgets, within a performance assessment framework that has a lighter touch than before but is nevertheless significant. At the periphery, small amounts of money will be made available to help with (proportionately) small community projects with which local citizens will be involved, and indeed on whose voluntary services success in the project will probably depend. There is indeed both the appearance and actuality of greater public involvement in local government but not in the really big issues where the room for genuine local autonomy will remain heavily constrained. The claim that the package is "radical and devolutionary"[132] may be hard to sustain. The pressures on the public finances arising from the current recession will make the situation even more difficult.

Accordingly, much turns on the financial context. This was the subject of an extensive inquiry by Sir Michael Lyons, whose final report[133] was to feed into the 2007 Comprehensive Spending Review. In the meantime, he published two interim reports,[134] some of whose ideas influenced the 2006 White Paper. The Final Report is a detailed and complex document, with a range of recommendations, some for early implementation, some concerning ideas that required further consideration. As regards the strategic role of local government, it was important not to become fixated with the service delivery role; two other, albeit inter-related, roles were "as a vehicle for investment in public infrastructure; and as an institution of government – a place for debate, discussion and collective decision-making".[135]

The recommendations of the Lyons report were directed respectively to the contributions of central and of local government to reform; household taxation and local charges; business taxation; and grant and the use of national taxation to support local services.[136] Key points relevant to central-local relations included the following. There should be mechanisms to improve the transparency of the objectives of the local government funding system. As part of this, central and local government should agree in writing what the former requires of the latter and how it should be funded, and the ways in which the former should appropriately influence other aspects of local government activity. The government should consider ways to improve independent public information about the costs of new burdens and of controls on local government as compared with the funding available to pay for

[132] *Ibid.*, para. 1.11.
[133] Above note 12. Lyons Inquiry documents are archived at www.webarchive.org.uk/tep/15454.html.
[134] *Lyons Inquiry into Local Government: Interim Report and Consultation Paper* (London 2005); *National prosperity, local choice and civic engagement: a new partnership between central and local government for the 21st century* (London 2006).
[135] Above note 12, pp. 1–2.
[136] *Ibid.*, pp. 361–70.

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them, and whether the funding system is meeting the agreed objectives. The government should cease to use and then abolish capping powers as pressures on council tax reduce, forming part of a package of measures to re-establish local accountability for tax and spending decisions. Data burdens and reporting requirements and levels of guidance in areas of local concern and responsibility should be reduced. There should be a code of practice for departments and agencies defining the limited circumstances under which it is appropriate to place conditions on funding streams for local government. The government should commit to reducing the amount of conditional, ring fenced and specific grants. Central and local government should challenge the presumption that difference between areas, the "postcode lottery", is always a bad thing and recognise that for a range of local services the best way to improve well-being is to enable greater local choice.

Local authorities should engage in long-term planning even beyond the ten-year time frame of their community strategy. They should provide leadership for local partners and in so doing should facilitate, advocate, arbitrate and influence rather than dominate. They should identify where they can make space for neighbourhood or parish activity. There should be better training, support and freedom for individual councillors. There should be a step change in the quality of authorities' work in public engagement. Scrutiny work should be seen as a core strand of local government's place-shaping role, resourced appropriately and linked to local partnership work. Local government should think creatively about how to use its existing powers to the full and develop its capacity for innovation, while continuing to focus on performance.

As regards finance, council tax should be retained as a source of revenue for local government, while the option of shifting the balance towards other taxes in the longer term should remain open. The tax should be made fairer through changes to council tax benefit (to be retitled council tax rebate). While not the most urgent priority, the government should conduct a revaluation of all domestic properties for council tax and introduce new bands at the top and bottom of the current structure. The framework for charging should be reviewed and there should be new powers to allow for local authorities to charge for domestic waste collection. The existing national arrangements for business rates should be retained at present, with new local flexibility to set a supplement, after consultation with local businesses, to be spent on the purposes agreed through consultation. The government should develop proposals for the taxation of derelict property and brownfield land and consult on the introduction of powers for local authorities to levy taxes on tourism. In the longer term, government should consider wider reform to business rates, such as localisation. It should consider,

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in the medium term, assigning a fixed proportion of income tax to support local services in the context of a new constitutional settlement between central and local government providing for greater self–reliance on the part of local government. Overall, there should be a developmental approach to reform, based on this new constitutional settlement.

These recommendations would seem clearly directed to support a move to what we have termed the virtuous circle, providing additional local flexibility and enabling local authorities to pursue the place-shaping role.[137] They are cautious rather than radical. This is unsurprising, given the relatively intractable nature of the problems addressed. It is to be expected that any person conducting a review of this nature would tend to prefer to provide a package of recommendations with some chance of being implemented. In some respects they may be too cautious. Indeed there is something of an inconsistency in the recommendations concerning a new constitutional settlement. On the one hand, Lyons recommends a new contractual agreement between central and local government setting out "what central government requires of local government and how that should be funded, and a much clearer understanding of the appropriate extent of central government influence or control over other aspects of local government activity".[138] On the other hand, he did not seek "to enshrine the constitutional position of local government in law. Laws and agreements do not necessarily create relationships and the initial steps towards the developmental approach need to be given time to bed in".[139]

Nevertheless, he was attracted to a model which would in time provide greater Parliamentary oversight.[140] This is difficult to follow. It seems inconsistent to see law as having a role in the construction of a key part of the relationship between local and central government but having no role in a new constitutional settlement. On the one hand, if agreements do not necessarily create relationships, why should the law of contract be allowed to intrude at all?[141] To describe the introduction of Parliamentary oversight as (or as part of: which is not clear) a new "constitutional settlement" is to attach a grand label to a relatively modest change. We explain in the next section our view that a constitutional settlement worthy of the name is needed if the virtuous circle is to be achieved.

[137] *Ibid.*, p. 354.
[138] *Ibid.*, p. 358.
[139] *Ibid.*, p. 359.
[140] *Ibid*, *loc. cit*. Proposals had been made for a Parliamentary committee or for Parliamentary involvement through House of Lords reform.
[141] Or maybe "contractual" is used here in a rhetorical rather than strictly legal sense; such usage is misleading and should be avoided.

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VII. Assessment: A New, Virtuous Circle?

Our discussion so far suggests that if such a virtuous circle is to be established, there are three criteria which must be satisfied – and by which recent and proposed policy changes fall to be evaluated: the democratic nexus between individuals and councils must be strengthened; the powers and autonomy of local government must be enhanced; and the constitutional status of local government must be accorded greater respect. The analysis above demonstrates that these three issues are intimately connected with one another – failure in relation to one invites difficulty in relation to the others – and it is therefore crucial that policy-makers address these matters collectively. We now examine the extent to which the legislative changes made by the Local Government and Public Involvement in Health Act 2007 and envisaged in the Local Democracy, Economic Development and Construction Bill, and the government's response to the Lyons Inquiry, are likely to constitute a significant step towards the virtuous circle.

A. The Democratic Nexus

Recent constitutional history features several attempts to enhance the quality of local democracy which have ultimately failed or at least disappointed. However, in general, such attempts have been made in isolation from the other matters identified in the previous paragraph.

First, changes have been made to the voting system with the intention of stimulating voter turnout. As noted above, in the 1990s it was, somewhat bizarrely, thought that voters could best be engaged by giving them the opportunity to vote frequently – hence the extension of the system of election "by thirds". Empirical evidence suggests that this system has the opposite of the intended effect[142] and the Electoral Commission, in 2004, therefore recommended that all English local authorities should be elected via whole council elections.[143] That the government has accepted the case for such a change is to be welcomed,[144] as is the Local Government and Public Health Act 2007 to the extent that it makes it easier for local authorities to switch to whole council elections,[145] although it is regrettable that reform has not gone as far as to roll out whole council elections across the board. The government held back from doing this because it felt it would be "contrary to the devolutionary thrust" of the reforms introduced via the 2007 Act. Of course, leaving important decisions – in the spirit of subsidiarity, as European lawyers might put it – to the local level is all

[142] See above, text to notes 78 and 79.
[143] Electoral Commission, *The Cycle of Local Government Elections in England* (London 2004), p. 21.
[144] Above note 7, p. 60.
[145] Sections 32–34.

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very well if local democracy is in rude health. But if a given measure – as in this instance – has the potential (in concert with other measures) to reinvigorate a system of local democracy afflicted by malaise, it is somewhat paradoxical to devolve to the local level the decision whether to adopt the measure.

Secondly, policy-makers have sought to simplify the structure of local government in recent years by shifting from two-tier to single-tier arrangements. This has the potential to render the system more transparent and more comprehensible by making it clear that a single authority is responsible – and can therefore be held to account – for all local government matters. Such demystification should help to strengthen the democratic nexus between individuals and councils. Of course, the adoption of unitary arrangements is not in itself a panacea. For example, subsuming several district councils into one unitary authority covering a geographically large or socially diverse area may breed a sense of disenfranchisement incompatible with encouraging participation.[146] This implies that it is necessary to give careful thought to (*inter alia*) the size of new unitary authorities.

Thirdly, we saw above that there have been very significant recent changes to the internal structure of local government, through the introduction, via the Local Government Act 2000, of distinct executive bodies within councils, but that most councils adopted the most cautious mode of reform. It is therefore perhaps unsurprising that the 2000 Act was found not to have succeeded in enhancing the visibility of – and thus public awareness and engagement in – local government,[147] prompting the enactment of further reforms in 2007. Most significantly, given that it is the directly elected mayor model which is acknowledged to have the greatest potential to enhance the visibility of local government, the Local Government and Public Involvement in Health Act 2007 makes it easier for councils to switch to that system[148] and the 2008 White Paper proposes that it should be easier for the public to petition for a referendum on switching to a directly-elected mayor.[149] These reforms are welcome as far as they go – but they hardly constitute the sort of radical change which is likely to breathe new life into local government.[150] Nor do suggestions in the 2008 White Paper

[146] See, *e.g.*, letter dated 25 July 2007 from Department for Communities and Local Government to the Chief Executive of Cumbria County Council rejecting proposal for a single unitary authority in Cumbria, http://tinyurl.com/2vn2to.

[147] HC602-I, Transport, Local Government and the Regions Select Committee, *How the Local Government Act 2000 is working* (2001–2), vol. 1, p. 13.

[148] See section 64, which inserts sections 33A-I into the Local Government Act 2000.

[149] Above note 3, paras. 5.17. Provisions concerning this are to be included in a draft Community Empowerment Bill (see http://www.commonsleader.gov.uk/output/page2669.asp).

[150] *Cf.* Jenkins, above note 8, ch. 8, who advocates much wider use of elected mayors.

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that people might be incentivised to participate in local elections by entering voters into a prize draw.[151]

B. Autonomy

Those of the elements of the 2007 Act that are designed to promote local autonomy are in truth relatively modest. They include the following. Local authorities' powers under Part 1 of the Local Government Act 2000 to promote the economic, social and environmental well-being of their areas[152] will be extended to high performing parish councils;[153] a welcome development but one that will only affect relatively minor matters. The change to exempt the few, larger, parish and community councils currently subject to best value duties from those duties[154] will certainly give them more discretion, but is in substance a small change.

Of greater significance is the new legislative structure provided for partnership working.[155] This requires county, unitary district and London borough councils ("responsible local authorities") to submit to the Secretary of State a Local Area Agreement specifying local improvement targets. The agreement is prepared in consultation and cooperation with specified partner authorities (a wide range of local government bodies for the area, including district councils in two-tier areas, the police authority and the chief officer of police, the fire and rescue authority, NHS Trusts, the development agency, the local probation board and the youth offending team). Targets are to be for improvement in the economic, social or environmental well-being of the responsible local authority's area. They may apply to the responsible or partner authorities and, with their consent, other persons. Authorities must have regard to these targets in exercising their functions. The Secretary of State may designate targets. Targets other than designated targets can be changed by agreement among the parties. Designated targets can only be changed through a formal revision process involving submission to the Secretary of State. The process of local agreement to these targets and the fact that they are in terms "local" undoubtedly reinforces local autonomy. It remains to be seen how the powers of control retained by the Secretary of State will be exercised. It does not, however, seem that these developments will be

[151] Above note 3, paras. 4.23.
[152] We note in passing that the utility of these powers has been questioned because their conferral has not been accompanied by additional resources. See Department for Communities and Local Government, *Formative Evaluation of the Take-Up and Implementation of the Well Being Power Annual Report 2006* (London 2006), p. 31.
[153] Local Government and Public Involvement in Health Act 2007, s. 77, amending Local Government Act 2000, s. 1.
[154] 2007 Act, s. 176.
[155] 2007 Act, Part 5, Ch. 1.

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supported by new money. The "carrot" seems to be an increase in the flexibility over the use of mainstream resources, with some £5bn being moved from a large number of specific grants of various sizes into non-ringfenced general grants over the Comprehensive Spending Review period.[156]

There are new powers for the Secretary of State to make regulations providing for classes of byelaws that will not have to be confirmed by him or her and for byelaws to be enforceable through fixed penalty notices.[157] The former was seen by Unlock Democracy, a joint campaign by Charter 88 and the New Politics Network, as "arguably the most significant devolution of powers in the Bill".[158] If this is so, it does not say much for the rest of the Act. The White Paper stated that this change would enable communities to set standards of behaviour and rules affecting their localities, improving the quality of their environment and creating pleasant, safe local public spaces which can be enjoyed by all.[159] The Explanatory Note to the 2007 Act states that the government initially intends to apply the change to byelaws confirmed by the Secretary of State for Communities and Local Government: "These byelaws regulate matters such as low level nuisance in local spaces (for example parks and beaches, the use of market places and the cleanliness of barbers' and hairdressers' premises). The powers could be used in relation to byelaws in other areas in the future."[160] This is hardly the stuff of a new constitutional settlement. Furthermore, it will require considerable ingenuity on the part of local authorities if they are to use the new freedoms to add a new, distinctive dimension to the plethora of criminal offences and other processes already on the statute book, designed to control anti-social behaviour. Perhaps exceptionally clean barbers' shops will be of particular interest to some communities.

Important features of the Act are the opportunities that have been taken to reform the law governing the Local Government Ombudsmen[161] and ethical standards.[162] Most of the changes involve tidying up aspects of the respective legislative regimes in the light of experience, rather than fundamental changes. The major feature of the changes concerning ethical standards lies in transferring responsibility for dealing with complaints of breaches of the local authority codes of conduct in England from the Standards Board for England to local

[156] Over £4bn to the new Area Based Grant and £1bn to Revenue Support Grant: CLG, *Development of the new LAA framework Operational guidance 2007* (London 2007), pp. 31–37.
[157] 2007 Act, ss. 129–35, sch. 6.
[158] Cited by A. Arden and L. Johnson, Annotations in *Current Law Statutes Annotated 2007*, pp. 28–172.
[159] Above note 7, paras. 3.12–3.14.
[160] Para. 336.
[161] 2007 Act, Part 9.
[162] 2007 Act, Part 10.

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authorities. This can be presented as an increase in local autonomy. In one sense it is, but the policing of what is in effect a nationally prescribed code is incidental to the main business of local authorities.

The main changes affecting central-local relations arguably lie not so much in the Act, but in new arrangements for performance assessment. The essential elements are these.[163] Each major local authority must develop a Sustainable Community Strategy after wide consultation. National priorities were identified as part of the Comprehensive Spending Review 2007.[164] This "set out 30 national Public Service Agreement targets focused on delivering cost-cutting outcomes".[165] A single national set of 198 indicators was also published in October 2007 "that significantly reduces local reporting burdens".[166] By June 2008, 150 Local Area Agreements[167] between local authorities and a range of local partners, facilitated by the Government Offices for the Regions, had been entered and approved by ministers. Each Agreement includes up to 35 national priority targets (plus statutory education and childcare targets),[168] and may include others, not necessarily drawn from the National Indicator Set. Performance of each local authority will be measured against all 198 indicators through a new methodology for Comprehensive Area Assessments, which replaced the Comprehensive Performance Assessment regime[169] in April 2009. This is intended to support "a sharper focus on key priorities, a more collaborative approach to achieving outcomes, and a reduction in burdens on frontline services".[170] There should be fewer inspections of local services, mostly risk-based, after it is introduced.[171]

Finally, what of the government's response to the Lyons Inquiry? This was somewhat terse.[172] It was said that the core proposals supported and extended the government's commitments to strengthen local government. However, capping powers would remain; there were

[163] CLG, DWP, DIUS, BERR, *Delivering economic prosperity in partnership: The crucial role of the new local performance framework* (London 2008).
[164] Cm 7227, HM Treasury, *Meeting the aspirations of the British people 2007 Pre-Budget report and Comprehensive Spending Review*.
[165] CLG et al, *Delivering economic prosperity in partnership* (London 2008), p. 16.
[166] *Ibid.* There were formerly over 100 targets for local government.
[167] See DCLG, *Development of the new LAA framework: Operational guidance 2007* (London 2007); Earlier forms of Local Area Agreement had been in the course of development for a number of years; *LAA Annual Review 2008/09* (CLG, 2008). The 2007 Act provides a legislative structure: see above.
[168] Education Act 2005, s. 102; Childcare Act 2006, s. 1.
[169] This was developed out of the Best Value regime, and was "extremely crude" in that it accorded "a large, multi-service organisation a single adjectival or star rating" (excellent, good, weak, poor/one to four stars, in successive versions): Wilson and Game, above note 20, pp. 166–7. There was also evidence that it did lead to improved standards: see D. Turner and P. Whiteman, "Learning from the experience of recovery: the turnaround of poorly performing local authorities" (2005) 31 Local Government Studies 627.
[170] CSR 2007, above note 164, p. 5.
[171] Above note 164, p. 8. See further http://www.audit-commission.gov.uk/caa/index.asp.
[172] CLG Press Notice, 21 March 2007 (http://www.communities.gov.uk/news/corporate/government-welcomes-lyons).

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no plans for revaluation during the life of the present Parliament. The government would legislate as soon as possible to remove the current business rate relief for most empty properties and consider Sir Michael's proposals for a local supplementary business rate. It did not intend to introduce a tourism tax. There was no comment on central-local relations in general. The prospects for a significant increase in local financial autonomy seem bleak. Proposals concerning the rating of empty properties and the introduction of new powers for upper tier authorities to levy supplements to the business rate to support local economic development have been taken forward.[173]

C. The need for a New Constitutional Settlement

Our analysis so far leads us to the conclusion that there are essentially three possible models of local government. In the first, which we call the *agency model*, local authorities have no real autonomy at all; they are merely agents of the centre charged with implementing its policies and delivering services in particular geographical areas. This falls far short of the requirements in the European Charter of Local Self-Government[174] but is the logical end-result of the vicious circle we have sketched in this paper. Secondly, there is the *virtuous model* – the product of our virtuous circle – under which local authorities have a very high degree of autonomy to decide what policies to pursue, the powers to pursue them, less financial reliance on central government and a strong democratic relationship with their electorates. The third possibility is what we term the *disguised or hybrid model*, which has many of the trappings of the virtuous model – including superficial democratic credentials born of the (apparent but underdeveloped) commitment of (central government) policy-makers to local democracy as an ideal – but with genuine autonomy, save at the margins, stifled by the policy straightjacket, targets, statutory duties, controls and financial impotence which result from central government's inadequately curbed instinct to intervene in local affairs. Local government in England approximates most closely to the third model: and we have argued that realising the virtuous model would be possible only if the vicious circle were broken by addressing concerns relating to both the autonomy of local government and the democratic nexus between local authorities and their electorates.

We conclude, however, by arguing that none of this is likely to happen unless the constitutional position of local government is radically reconceptualised; and that (paradoxically) constitutional change in this sphere is itself unlikely without enhancements to the autonomy

[173] Rating (Empty Properties) Act 2007; Business Rates Supplements Bill 2008–09.
[174] See, in particular, Article 3(1) and 4(3).

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and democratic status of local government.[175] In this way, we contend, all three sets of concerns – autonomy, democracy and constitutional status – are inextricably bound up together, such that the creation of a virtuous circle in this sphere is possible only by tackling these matters in an integrated manner.

In articulating this argument, it is helpful to begin with White's contention that "[w]ithout some notion of what the EU calls subsidiarity *within* the nation, some ground-rules, local government will always be at the mercy of an aggrandizing and hubristic centre" – which, he contends, has resulted in "near-terminal damage" to local democracy as a result of "five and a half decades of parliamentary dictatorship".[176] It is, on this view, the lack of clear dividing lines between central and local government – and so the absence of any widely-recognised sphere which is the exclusive preserve of the latter and upon which trespass by the former would be perceived as unconstitutional – which undercuts attempts sustainably to establish the sort of virtuous circle which we advocate.

Of course it is, as we noted above, precisely such rigid dividing lines which the British constitution, at least *prima facie*, lacks. With no higher constitutional norms constraining the capacity of Parliament to legislate – including on the allocation of functions to different institutions of government – powers can be removed from local authorities as easily as they can be given. But, while correct in strictly legal terms, this analysis is incomplete. Notwithstanding its unwritten nature, the British constitution actually contains some rather rigid dividing lines. Most obvious is that which now traces the boundary between matters over which the UK is competent to legislate and those which must be left to the European Union. Even though, as a matter of constitutional theory, it may be possible for the UK Parliament to override EU law or for the government to negotiate withdrawal, it is perfectly clear that there is now a very clear and rigid distinction between what may be done at national level and what may be done at EU level. A similar point, as we noted earlier, applies to devolution: in spite of Westminster's theoretical sovereignty, it is now accepted – and enshrined in convention – that the UK Parliament should not normally legislate on devolved matters without the assent of the relevant devolved authority. Once again we see the emergence of clear dividing lines which, legal theory notwithstanding, are difficult if not impossible to breach.

Without equally clear – and fixed – dividing lines, attempts to reinvigorate local democracy are liable to fail over the long-term. Giving

[175] We note in passing that no attention is given to the constitutional position of local government in the Draft Constitutional Renewal Bill.
[176] Above note 85.

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local authorities greater autonomy and strengthening the democratic nexus between local government and the electorate are, as we have argued, essential; but there would remain a real risk of interference by the centre in local affairs. Part of the essence of democracy is that governing authorities must be given the scope (within appropriate legal and constitutional limits) freely to pursue their policies and to be judged on them by the electorate. The capacity of local democracy to flourish in this way is stunted by the instinctive desire of central government to intervene when it perceives that its local counterpart is failing. Such intervention distorts the democratic relationship between local authorities and their electorates, reducing the likelihood of local democracy functioning as an adequate mechanism of control, and thereby incentivising further intervention by the centre.

Of course, improving local democracy would reduce the perceived imperative on the part of central government to intervene in local affairs; but the constitutional position of local government must be reconceptualised such that central intervention is not merely disincentivised but also curbed. The creation of clear (small-c) constitutional dividing lines, so as to carve out a constitutional space within which local government may function, is necessary if White's "aggrandizing and hubristic centre" is to be prevented from acting out its interventionist instincts. The (short) history of devolution teaches important lessons in this regard. It suggests that there must be a positive commitment – on both sides – to the creation of constitutional space within which local institutions are largely protected from the reach of central government's legislative and executive tentacles. This was explicitly done in relation to devolution through the articulation, by means of concordats, of clear norms of behaviour – a step which, the authors of the Power Inquiry argued, should be applied to the relationship between central and local government, too.[177] In fact such a concordat was recently entered into between the UK government and the Local Government Association (on behalf of English local authorities);[178] but, by way of conclusion, we suggest that for three reasons it is unlikely to establish for local government anything resembling the sort of constitutional space which we have argued is necessary if it is to realise its potential.

First, the Central-Local Concordat is drafted in largely aspirational rather than prescriptive terms. For example, while it states (in line with the European Charter on Local Self-Government) that "there should be a presumption that powers are best exercised at the lowest effective and practical level", the concordat supplies no real basis for

[177] Above note 13, pp. 159–60.
[178] HM Government/Local Government Association, *Central-Local Concordat* (London 2007).

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determining what constitutes the province of local government: it does not establish a realm of matters – analogous to the category of devolved matters for which devolved governments are now responsible – which are the constitutional preserve of local authorities. As such, the concordat signally fails to create, or even lay the foundations for, the sort of dividing lines which are needed if a genuine constitutional space is to be carved out within which local government can thrive.

Secondly, it is noteworthy that the concordats pertaining to devolution are in effect a set of *political* agreements which bite upon a clear pre-existing *legal* framework within which the respective realms of central and devolved government are clearly demarcated.[179] On both administrative and legislative levels, the central/devolved dividing line is fixed by legislation, and the role of conventions and concordats is to finesse difficulties that might arise in the outworking of the relationships ordained by the devolution statutes. For example, in legislative terms, the Sewel Convention, by conditioning the exercise of the Westminster Parliament's theoretical sovereignty, ensures that the Scottish Parliament in effect enjoys exclusive competence within the realm of devolved matters. And, on the administrative level, a series of detailed concordats establishes a set of ground-rules for the interrelationship of particular central and devolved bodies when issues arise which cut across their statutorily-determined spheres of authority. The Central-Local Concordat, in contrast, does not exist against the background of a legal framework which clearly demarcates the central and local government realms; and nor does it make any serious attempt to constitute such realms. It follows that in the absence of legally or politically entrenched notions of where central government power stops and local autonomy begins, it is highly unlikely that the Central-Local Concordat will succeed in carving out a genuine constitutional space within which local government might flourish.

Thirdly and finally, changes to the constitutional status of local government can successfully be made only if tackled in conjunction with the other areas of difficulty considered in this paper – *viz* the democratic legitimacy and autonomy of local authorities. This follows – in two distinct but complementary senses – from the interconnectedness of the issues to which we have drawn attention in this paper.

On the one hand, strengthening the democratic quality of local government – which, we have suggested, is itself only possible if its autonomy is enhanced – ought to be regarded as a *condition precedent* to the creation of the kind of constitutional space which, we contend,

[179] See, *e.g.*, the concordats pertaining to the relationship between the Scottish Executive and central government: www.scotland.gov.uk/About/concordats.

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local authorities should inhabit. Endowing local government with constitutionally protected autonomy would be appropriate only if there were reason to be confident that a healthy, functioning system of local democracy would be an adequate mechanism of control.

On the other hand, conferring new constitutional status on local government would only be *possible* if its autonomy and democratic legitimacy were radically enhanced. This follows because of the nature of the British constitution itself. New constitutional space for local government cannot simply be legislated into existence, just as, for example, the inviolability of the Scottish Parliament and Executive's competence over devolved matters could not straightforwardly be constituted by statute. This much is elementary constitutional law: the Westminster Parliament's sovereignty and the absence of a written constitution conspire to preclude the creation of legally entrenched constitutional dividing lines in the UK. Instead, to the extent that such lines exist, they must develop organically. For instance, the constitutional status of the Scottish devolved institutions has grown out the high degree of perceived legitimacy – the reasons underlying which we explored above – that they enjoy. The reverse side of that coin is the perceived illegitimacy of uninvited intervention by London in devolved matters.

The upshot of this analysis is that a genuine constitutional space for local government can only emerge if circumstances develop such that the relevant actors come to regard interference in local affairs as improper. Then, and only then, may devices like a concordat between central and local government be useful, as a means of formalising understandings as to the location of the dividing line reflecting the spheres within which the two tiers of government may act with perceived legitimacy. And such circumstances are, as we have argued, liable only to emerge if, in the first place, local authorities come to occupy a much more significant role in the democratic life of the communities they serve – which, in turn, is likely only if the autonomy of local government is substantially augmented.

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