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**Rebalancing the central-local relationship: Achieving a bottom-up approach to localism in England**

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*Recent governments have introduced a plethora of reforms seeking to decentralise power to local government in England. Invariably, however, these have fallen short of stated objectives, leaving councils at the mercy of central supervision and with insufficient local autonomy. This article explores the reasons underpinning this concern. It identifies a top-down approach to localism and considers the culture of centralism that persists as a consequence. It then discusses how a bottom-up approach might be achieved, exploring how political and legal mechanisms can protect councils from centralised interference in the future.*

1. INTRODUCTION

The 2014 Scottish Independence Referendum, and the debates that encircled it, has been a catalyst for fresh discussions on the allocation of power within the UK Constitution. This has manifested itself not only in relation to devolution to the

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UK regions – particularly Scotland,<sup>1</sup> where a second referendum was considered (though later shelved) following the Brexit vote<sup>2</sup> – but also in respect of local government in England, where often-had discussions on decentralisation have resurfaced. Indeed, since 2014, a Select Committee report has explored ‘the case for local government’ in England,<sup>3</sup> the Northern Powerhouse has taken shape,<sup>4</sup> and Parliament has enacted the Cities and Local Government Devolution Act 2016. These reforms lay the foundations for greater local choice and freedom, departing from ‘the old model of trying to run everything ... from ... London’,<sup>5</sup> with the 2016 Act facilitating devolutionary deals between councils and Whitehall. Whilst fresh objectives for local invigoration are welcome, however, and the discussion of decentralising opportunities much needed, there can be understandable caution in respect of these new reforms.

In recent years, successive governments have promised decentralisation, usually as a reaction to concerns that predecessors fostered a culture of

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<sup>1</sup> See The Smith Commission *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (Edinburgh: The Smith Commission, 2014), and the Scotland Act 2016.

<sup>2</sup> See Scottish Government *Consultation on a Draft Referendum Bill* (Edinburgh: Scottish Government, 2016), and S Carrell, ‘Nicola Sturgeon shelves second Scottish independence referendum’ *The Guardian* 27 June 2017, available at: <https://www.theguardian.com/politics/2017/jun/27/nicola-sturgeon-shelves-second-independence-referendum> (accessed 7 September 2017).

<sup>3</sup> House of Commons Communities and Local Government Select Committee *Devolution in England: the case for local government* HC 503 (London: HMSO, 2014).

<sup>4</sup> HM Treasury and G Osborne ‘Chancellor on building a northern powerhouse’ *HM Government* 14 May 2015, available at <https://www.gov.uk/government/speeches/chancellor-on-building-a-northern-powerhouse> (accessed 21 March 2017).

<sup>5</sup> *Ibid.*

centralism.<sup>6</sup> Invariably, however, despite governments' apparent intentions and the introduction of legislative provisions, attempts to decentralise have generally fallen short of stated promises. In part, this has been due to the piecemeal nature of local governmental reform, with ever-changing policy giving rise to a diversity of powers and structures across the country, introduced at different times, on occasion changing reforms brought in relatively recently.<sup>7</sup> The result is a system that is inherently asymmetrical. With regards to councils' institutional arrangements, for example, unitary authorities in certain parts of the country co-exist with a two-tier structure in others; whilst the adoption of directly-elected mayors in certain cities operate alongside regional mayors in other parts of the country. More fundamentally, though, a failure to decentralise effectively means that councils lack power and autonomy, operating instead under close central supervision and tight financial restriction.<sup>8</sup> With the realities of Brexit continuing to emerge, especially with the European Union (Withdrawal) Bill's

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<sup>6</sup> See Department of the Environment, Transport and the Regions *Modern Local Government – In Touch with the People* Cm 4014 (London: HMSO 1998) para 3.52; Department for Communities and Local Government *Strong and Prosperous Communities: The Local Government White Paper* Cm 6939-I (London: HMSO, 2006) p 4; and Cabinet Office *et al.*, 'Big society speech' *HM Government* 19 July 2010, available at <https://www.gov.uk/government/speeches/big-society-speech> (accessed 21 March 2017).

<sup>7</sup> For example, the general power of competence was introduced by the Localism Act 2011 to replace the well-being power only 11 years after its introduction (See A Bowes and J Stanton 'The Localism Act and the general power of competence' (2014) Public Law 392).

<sup>8</sup> See J Stanton 'Decentralisation and Empowerment: An empirical study of local councils in London' (2015) 9 *Journal of Planning and Environment Law* 978.

passage through Parliament,<sup>9</sup> it has been argued that ‘the “take back control” chant of the “Leave” campaign ... [is] a plea for more devolution’.<sup>10</sup> This being the case, if councils are to play a part in post-Brexit Britain, facilitating devolution and providing local choice and freedom, then this lack of power and the persistence of centralised controls needs to be addressed.

The problem, however, lies not so much in the failure of incremental developments to the localism agenda and the piecemeal nature of reform, but in the Government’s top-down approach to localism, exacerbated by the constitutional reality that councils are fully dependent on the centre for their ability to act. So long as this approach endures and regardless of government’s efforts to decentralise, a culture of centralism prevails. On this premise, this article explores how a bottom-up approach might be achieved, within the context of the UK Constitution, enabling councils to enjoy greater power and autonomy. Its emphasis is on localism in England where the central-local relationship has long been the focus of discussion.<sup>11</sup> The article is structured in two sections – the first explains governments’ top-down approach, whilst the second discusses how a bottom-up approach might be achieved and protected.

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<sup>9</sup> At the time of writing, the European Union (Withdrawal) Bill has just passed its second reading in the House of Commons.

<sup>10</sup> D Peters ‘Devolution in the Brexit era’ (28 July 2016) *The MJ* 18.

<sup>11</sup> See J A G Griffith *Central Departments and Local Authorities* (London: George Allen & Unwin Ltd, 1966); M Loughlin *Legality and Locality: The Role of Law in Central-Local Government Relations* (Oxford: OUP, 1996); and J Stewart ‘Changing patterns of central-local relations’ (2000) 3(5) *Journal of Local Government Law* 88.

## 2. THE LOCALISM PARADOX: A CULTURE OF CENTRALISM AND A TOP-DOWN APPROACH

### **(a) Localism and the nature of local government**

Localism is a broadly used and somewhat ambiguous term. Though it often represents social and spatial depictions of community life, it is here taken from the legal and political perspective.<sup>12</sup> This ‘denotes the decentralised and grassroots forms of power ... [and is] used in the context of subsidiarity, devolution and decentralisation of the state’s powers, activities and responsibilities downwards to local governments’.<sup>13</sup> The value of localism, from a legal perspective, rests on the ability of local governmental institutions to make locally relevant decisions and policies, with the benefit of local knowledge and in preference to the imposition of a one-size-fits-all approach from the centre. As Mill comments:

‘The ... object of having a local representation is in order that those who have any interest in common which they do not share with the general body of their countrymen may manage that joint interest by themselves ... There are local interests peculiar to every town ... and common to all its inhabitants; every town, therefore ... ought to have its municipal council’.<sup>14</sup>

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<sup>12</sup> S Davoudi and A Madanipour ‘Introduction’ in S Davoudi and A Madanipour (eds) *Reconsidering Localism* (Abingdon: Routledge, 2015) p 1, pp 1 – 2.

<sup>13</sup> *Ibid*, p 1.

<sup>14</sup> J S Mill *Considerations on Representative Government* (New York: Harper & Brothers, 1862) p 292. For further and fuller discussion of Mill’s arguments in favour of local democracy, see I Leigh *Law, Politics, and Local Democracy* (Oxford: OUP, 2000) pp 7-12.

Localism is, in this sense, tied to the principle of subsidiarity. This demands that action should be taken at the lowest appropriate level of government,<sup>15</sup> thus justifying local government's place within the UK's constitutional arrangements, separate from a central government that acts for the country as a whole and focuses on national interests.

The significance of localism, though, is also linked to the notion of democratic legitimacy as it 'involves giving ... people ... the right to make decisions on local matters',<sup>16</sup> local institutions providing a medium through which citizens can contribute to local politics. This is echoed by the Widdicombe Committee, which notes the value of local government as being linked to its pluralist nature; the platform it provides for democratic participation; and its responsive 'provision of local ... services'.<sup>17</sup> This democratic value is highlighted by the reality that localism in England represents more than just devolution to local authorities. Policies and reforms have increasingly placed emphasis on communities, too. As Cameron noted in 2010, '[w]e must push power away from central government to local government – and we shouldn't stop there. We should drive it down even further ... to communities, to neighbourhoods and individuals'.<sup>18</sup> Provisions of the Localism Act 2011 attempt to demonstrate the fruits of this promise; these are explored below.

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<sup>15</sup> See Article 5(3) Treaty on European Union.

<sup>16</sup> V Bogdanor *The New British Constitution* (Oxford: OUP, 2009) p 235.

<sup>17</sup> D Widdicombe *The Conduct of Local Authority Business: Report of the Committee of Inquiry into the Conduct of Local Authority Business* Cmnd 9797 (London: HMSO, 1986) para 3.11 and ch 3, as cited in Leigh, above n 14, pp 5-6.

<sup>18</sup> Cabinet Office *et al*, above n 6.

The principle of localism, then, is a positive one. As ‘an alternative source of authority to the central state’,<sup>19</sup> it promotes local action and citizen engagement as tools of good governance and democracy, and involves the pursuit of efficient, effective and democratic leadership and decision-making, for the good of a local area.<sup>20</sup> With this in mind, the purpose of local government in England is, in one manner, extremely simple. It provides this governance, leadership and decision-making to local areas, carrying the mandate of local people and providing services to those areas. It is, in this sense, government on a local level.<sup>21</sup> Supporting this observation, King notes:

‘The word government in the phrase local government carries with it at least two connotations. One is autonomy. To say that an entity is a government is to imply that there is a sphere of activity within which it can expect its decisions to be carried out. The body in question is, within its own sphere, autonomous and the supreme authority’.<sup>22</sup>

The difficulty arises, however, when we consider the legal nature of local government. Loughlin explains:

‘In law, local authorities are statutory corporations which are dependent on powers given to them by statute for their ability to act; the doctrine of

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<sup>19</sup> Leigh, above n 14, p 7.

<sup>20</sup> See H Atkinson *Local democracy, civic engagement and community: From New Labour to the Big Society* (Manchester: Manchester University Press, 2012).

<sup>21</sup> See I Jennings *Principles of Local Government Law* (London: University of London Press Ltd, 4<sup>th</sup> edn, 1960) p 2.

<sup>22</sup> A King *The British Constitution* (Oxford: OUP, 2007) p 151. The other connotation, not relevant to this discussion, is the scope of governmental activity (pp 151-2).

*ultra vires* exists to ensure that they keep within their statutory powers and are accountable to the courts; and central departments of state possess a range of powers enabling them to influence the manner in which local authorities conduct their affairs'.<sup>23</sup>

Councils, therefore, are dependent upon parliamentary authority for everything that they do, they do not possess residual discretionary powers and cannot act beyond the limits of appropriate authority, incurring the jurisdiction of the Administrative Court if they seek to do so.<sup>24</sup> More than this, local government owes its very existence to statute – legislation, susceptible to ordinary repeal and amendment, provides the legal framework for local government and means, therefore, that councils enjoy no special constitutional status.<sup>25</sup>

Awareness of councils' legal nature and the limitation this imposes on their ability freely to act for local areas was at the heart of the Localism Act's general power of competence.<sup>26</sup> This empowers local authorities 'to do anything that individuals ... may do',<sup>27</sup> and is designed to reverse the 'assumption' that

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<sup>23</sup> M Loughlin *Local Government in the Modern State* (London: Sweet & Maxwell, 1986) pp 1-2.

<sup>24</sup> See S H Bailey *Cross on Principles of Local Government Law* (London: Sweet & Maxwell, 3<sup>rd</sup> edn, 2004) paras 1-20, cited in M Varney 'United Kingdom – Local government in England: Localism delivered?' in C Panara and M Varney (eds) *Local Government in Europe: The 'fourth level' in the EU multilayered system of governance* (Abingdon: Routledge, 2015) p 330, p 335.

<sup>25</sup> See S Bailey and M Elliott 'Taking local government seriously: democracy, autonomy and the constitution' (2009) 68(2) *Cambridge Law Journal* 436 at 441.

<sup>26</sup> See Department for Communities and Local Government *A plain English Guide to the Localism Act* (London: DCLG, 2011) p 4.

<sup>27</sup> Localism Act 2011, s 1(1).

councils are limited by the extent of their statutory powers.<sup>28</sup> The Government intended that '[i]nstead of being able to act only where the law says they can, local authorities will be freed to do anything - provided they do not break other laws'.<sup>29</sup> The discretion this provision affords, however, is not unfettered; it is set out by statute with express limits on its use, meaning it falls short of establishing any residual discretionary power for local government.<sup>30</sup>

The premise of local government's legal nature is not flawed so much as the consequences of it. Its existence as a statutory corporation means that, due to the constitutional framework within which it operates, it will forever be 'subordinate to some higher governmental authority',<sup>31</sup> often requiring the approval or encouragement of central departments before it can act.<sup>32</sup> This inferiority, though, also brings the potential for overly-prescriptive, centralised supervision, often at the whim of prevailing political themes in Whitehall. This concern is the inspiration for this article, with the government's centralist approach towards councils meaning that stated objectives and promises, aligned with the principle of localism, are often not realised to their full extent, as the next section discusses.

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<sup>28</sup> Department for Communities and Local Government, above n 26, p 4.

<sup>29</sup> Ibid, p 4.

<sup>30</sup> Localism Act 2011, s.2. See Bowes and Stanton, above n 7, at 397-401.

<sup>31</sup> Jennings, above n 21, p 2.

<sup>32</sup> Griffith, above n 11, p 18.

## **(b) A top-down approach to local government**

Localism manifests itself in two forms: substantive localism refers to the empowerment of local institutions through provisions setting out local power, whilst procedural localism denotes the broader process within which that power is facilitated and allowed to be exercised.<sup>33</sup> Both of these aspects must be satisfied if the objectives of localism are to be achieved; one cannot operate without the other insofar as the provision of local governmental power is meaningless if the lack of an appropriate procedural framework prevents councils freely exercising that power in their own specific ways. In England, procedural localism is lacking. This section shows that, whilst recent governments have provided substantive legislative provisions intended to empower local councils, the predominance of a top-down approach hinders the realisation of procedural localism and means, therefore, that the substantive element is undermined.

A fundamental criticism of the Governments' approach to localism is that the principle is taken as requiring fulfilment of objectives at the central level. In 2011, a government report identified localism as entailing six actions: to lift the burden of bureaucracy; to empower communities; to increase local control of public finance; to diversify the supply of public services; to open up government

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<sup>33</sup> Bailey and Elliott also identify two 'conditions' of localism: 'First, local authorities must possess sufficient *power, independence and financial resources* to govern in a way which is distinctive, meeting the ... needs of their areas and ... expectations of their citizenry ... Second, the *quality of local democracy* must ... enable the participation of individuals, vouchsafe the responsiveness of local institutions and remove the need ... for a high level of central interference in the business of local government" (above n 25, at 439). I am grateful to Professor Mark Elliott for his thoughts, which have helped develop this section.

to public scrutiny; and to strengthen local accountability.<sup>34</sup> Though good in principle, these are framed as actions for central government to facilitate and implement localism, rather than objectives led by councils, suggesting a unilateral exercise where everything comes from Whitehall. The Government's approach to localism, therefore, can be categorised as top-down. Such an observation is not novel;<sup>35</sup> nor is it a new problem but one long-embedded in the central-local relationship. Indeed, in recent years, '[o]ne of the major purposes of local government has been to deliver services that central government ... has not wished to manage directly'.<sup>36</sup> Rather than seeing councils as autonomous institutions, capable of exercising discretionary authority for their areas, they are instead seen as extensions of Whitehall's reach; puppets for the implementation of centralised policies and 'instrument[s] of the centre'.<sup>37</sup>

A consequence of this top-down approach is a centralist theme in legislation designed to implement ostensibly localist objectives. Legislation, sponsored by recent governments, though appearing to set out increased power for local authorities – and, in this sense, satisfying *substantive* localism – in reality ensures retention of authority at Whitehall to the extent that government

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<sup>34</sup> House of Commons Communities and Local Government Select Committee *Localism* HC 547 (London: HMSO, 2011) p 16.

<sup>35</sup> See R Hambleton 'The overseas experience with political management in local government' (1999) 2(6) *Journal of Local Government Law* 125 at 126; V Jenkins 'Local government reform and sustainable development in Wales and Ireland' (2009) 11(1) *Environmental Law Review* 21 at 23.

<sup>36</sup> Bailey and Elliott, above n 25, at 442.

<sup>37</sup> Loughlin, above n 11, p 50.

is able to supervise and prescribe the manner in which local power should be exercised; thus falling short of procedural localism.

The Localism Act 2011, for example, was introduced as effecting ‘a power shift away from central government’,<sup>38</sup> giving autonomy to the people and their communities. It formed part of the Big Society initiative, which included a focus on devolution amidst a planned reduction of the state to tackle economic austerity.<sup>39</sup> Reflecting this, early drafts of the bill proposed giving ‘power to residents to hold local referendums on any local issue’,<sup>40</sup> a move that was, at first glance, indicative of a bottom-up approach. (It is notable that this power was later removed from the bill). In reality, though, the 2011 Act created a number of new powers for the Secretary of State and made extensive provision for centralised supervision of a range of local matters.<sup>41</sup> It introduced, for instance, a requirement for referenda to be held whenever a local authority seeks to increase the council tax level above a limit approved by Parliament.<sup>42</sup> Though motivated

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<sup>38</sup> HM Government *Decentralisation and the Localism Bill: an essential guide* (London: HMSO, 2010) p 1.

<sup>39</sup> See M J Smith ‘From Big Government to Big Society: Changing the State – Society Balance’ (2010) 63 (4) *Parliamentary Affairs* 818. Also see Cabinet Office *et al*, above n 6.

<sup>40</sup> Conservative Party *Control shift: returning power to local communities* (2009) p 21, as cited in M Sandford *Local government: polls and referendums* Briefing Paper, Number 03409 (London: House of Commons Library, 2016) p 6. This provision required that 5 per cent of local citizens sign a petition in favour of a referendum within a 6-month period.

<sup>41</sup> See G Jones and J Stewart ‘Local government: the past, the present and the future’ (2012) 27(4) *Public Policy and Administration* 346 at 355-356.

<sup>42</sup> Localism Act 2011, s 72(1) and Sch 5.

by a desire to ensure local control of budgets, in reality it is ‘government that sets the parameters for the referendums by stipulating ... the amount of council tax increase deemed to be excessive’.<sup>43</sup> A top-down approach is also evident in the Act’s ‘community rights’ and neighbourhood planning reforms. These were introduced to enable communities to take the initiative in developing local areas, also affording them the opportunity ‘to take over the running of public services’.<sup>44</sup> The Act, however, gives the Secretary of State an overriding say in determining whether a council is permitted to take over a particular service,<sup>45</sup> whilst the changes to neighbourhood planning – accompanied as those were by the National Planning and Policy Framework – include requirements that community plans comply with centralised policy.<sup>46</sup> The Localism Act is thus littered with provisions that ensure governmental supervision of various local authority activities, exemplifying this top-down approach. Indeed:

‘The Act is so dominated by this centralist culture that it could well have been called the Centralism Act ... It is ironic that a Localism Act contains

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<sup>43</sup> I Leigh ‘The Changing Nature of the Local State’ in J Jowell, D Oliver and C O’Cinneide (eds) *The Changing Constitution* (Oxford: OUP, 8<sup>th</sup> edn, 2015) p 279, p 292.

<sup>44</sup> See J Stanton ‘The Big Society and Community Development: Neighbourhood planning under the Localism Act’ (2014) 16(4) *Environmental Law Review* 262 at 265 and 270.

<sup>45</sup> Localism Act 2011, Pt V, Ch 2, and Explanatory Notes to the Localism Act, paras 219 – 223.

<sup>46</sup> Department for Communities and Local Government *National Planning and Policy Framework* (London: DCLG, 2012) p 2, citing Planning and Compulsory Purchase Act 2004, ss 19(2)(a) and 38(6), and Town and Country Planning Act 1990, s 70(2), and cited in Stanton, above n 44 at 267 – 8. Also see Localism Act 2011, Pt VI, Ch 3, and Stanton, above n 44 at 269.

so many means by which central government can prescribe how local authorities' powers are to be used and the criteria to be applied to them'.<sup>47</sup>

Centralised prescription and supervision is also evident from other legislative examples. The Health and Social Care Act 2012, for instance, enacts a policy that sees '[u]pper tier and unitary local authorities ... taking on critical public health responsibilities'.<sup>48</sup> Whilst indicative of a willingness to trust councils with public service provision, the Act contains numerous sections ensuring the centre can supervise councils' work in this area. The Secretary of State, for instance, has the power to prescribe how councils carry out their functions, and he can issue guidance to which local authorities *must* have regard.<sup>49</sup> What is more, in view of announcements in 2015 that public health budgets were to be cut by £200 million, provisions of the 2012 Act could be seen as forcing councils to deal with the challenges of austerity, saving Whitehall the difficult decisions.<sup>50</sup>

This top-down approach is also evident in reforms dating back to Labour's time in government, suggesting it has long been embedded in the central-local relationship. The Local Democracy, Economic Development and Construction Act 2009, for instance, imposed a duty on councils to make provision for the holding

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<sup>47</sup> Jones and Stewart, above n 41, at 356 and 358.

<sup>48</sup> Department of Health *Public Health in Local Government: The new public health role of local authorities* (London: Department of Health, 2012) p 2.

<sup>49</sup> See *ibid*, p 2. Also see Health and Social Care Act 2012, ss 30 – 32.

<sup>50</sup> See N Merrifield 'Health visitor budget cuts 'open' to councils in public health savings drive' *Nursing Times* 31 July 2015, available at <http://www.nursingtimes.net/clinical-subjects/public-health/consultation-begins-on-200m-cuts-to-public-health-budget/5089335.fullarticle> (accessed 22 March 2017).

of and response to local petitions,<sup>51</sup> with the intention of encouraging greater local discretion and empowering communities to influence local politics.<sup>52</sup> The Act, though, also gave central government the power to prescribe ‘when local petitions could be held, the form they should take and the requirements necessary for them to be entertained by a local authority’,<sup>53</sup> enabling the centre to direct how powers designed for local innovation should be utilised. Going further back, the Local Government Act 2000 introduced a now largely abolished well-being power that enabled councils to do anything they considered likely to promote the economic, social and environmental well-being of their areas,<sup>54</sup> seemingly giving them broad scope to engage and work with communities.<sup>55</sup> Far from enabling local authorities to ‘develop ... meaningful ... community leadership role[s]’,<sup>56</sup> however, the power appeared simply to require councils to contribute to objectives pertaining to sustainable development to which

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<sup>51</sup> Local Democracy, Economic Development and Construction Act 2009, ss 10 – 22.

<sup>52</sup> See *Hansard* HL Deb, vol 706, col 850, 17 December 2008.

<sup>53</sup> J Stanton *Democratic Sustainability in a New Era of Localism* (Abingdon: Routledge-Earthscan, 2014) p 88, citing J Stanton ‘Localism in action?’ *UK Constitutional Law Association* 14 March 2013, available at <http://ukconstitutionallaw.org/2013/03/14/john-stanton-localism-in-action/> (accessed 22 March 2017).

<sup>54</sup> Local Government Act 2000, s 2(1). The power remains in force in Wales (Localism Act 2011, Sch 1).

<sup>55</sup> S Cirell ‘The modernisation of local government and its impact on planning’ (2003) *Journal of Planning and Environment Law* (Supplement: Occasional Papers No 31) 1 at 10 – 11.

<sup>56</sup> P Swann ‘Local government: the modernizing agenda’ (2000) *Journal of Planning and Environment Law* (Supplement) 9 at 13, cited in Bowes and Stanton, above n 7, at 394.

government was at that time particularly committed.<sup>57</sup> These various examples, therefore, demonstrate the extent of central government's top-down approach to localism. Though each Act sets out powers appearing to decentralise, their provisions contain localist objectives that are enforced at the centre, on centralised terms and with centrally imposed restrictions. In this way, whilst substantive localism appears satisfied, procedural localism is not.

This top-down approach, though, is also evident from recent government policy. In dealing with a lack of affordable housing in London, for instance, central government recently directed funds towards the subsidisation of private landlords, against the wishes of councillors, who would rather have used the money to build new homes.<sup>58</sup> Limited local control of finances and a heavily restricted budget is a factor underpinning this culture of centralism. Ryan observes that UK 'councils raise only 25 per cent of their own revenue, with the majority of it ... being supplied by the centre'.<sup>59</sup> This has recently been exacerbated by initiatives aimed at tackling austerity, which have imposed drastic cuts on the sector. Indeed, 'data shows that total government funding to local authorities fell by 27.9 per cent over the 2010 spending review period, 2010-

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<sup>57</sup> V Jenkins 'Learning from the past: achieving sustainable development in the reform of local government' (2002) Public Law 130 at 141. The economic, social and environmental objectives of the well-being power mirror the three-pillars of sustainable development. This is discussed further at: Stanton, above n 53, pp 19 – 20. For judicial limitation of the well-being power, see *R (Brent LBC) v Risk Management Partners* [2009] EWCA Civ 490.

<sup>58</sup> Stanton, above n 8, at 982.

<sup>59</sup> M Ryan 'Central-local government relations and the UK constitution' (2009) 14(1) *Coventry Law Journal* 20 at 21, citing House of Commons Communities and Local Government Select Committee *The Balance of Power: Central and Local Government* HC 33-I (London: HMSO, 2009) p 35.

11 to 2014-15', with '[p]rovisional figures suggest[ing] that by 2015-16 there ... [would] have been a total reduction of 37.3 per cent'.<sup>60</sup> It is pertinent to question how councils can make use of devolved powers if they are simultaneously having to manage reductions in budgets and operate with little money to go beyond their statutory duties. Whilst recent reforms aim to increase local financial autonomy, these bring their own problems, which the article now explores.

### **(c) The Northern Powerhouse and the 2016 Act: a change in approach?**

The reforms promoted by the current Government have, since 2015, been intended to reflect a changed approach to local government. The Northern Powerhouse has been hailed as 'a revolution in the way we govern England', appreciative 'that the old model of trying to run everything ... from ... London is broken'.<sup>61</sup> Alongside this, the Cities and Local Government Devolution Act 2016 has been lauded as promoting a bottom-up approach to localism, with councils being invited to agree devolutionary proposals with central government.<sup>62</sup> Also heralded as a means of rebalancing the economy, these deals are seen as bringing fiscal devolution to the English regions, intending to give councils greater financial autonomy. Indeed, even before the Act, it was announced that by 2020 councils will be allowed to keep all the proceeds from local business rates. Osborne explains: '[a]ttract a business, and you attract more money. Regenerate a high street, and you'll reap the benefits. Grow your area, and you'll grow your

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<sup>60</sup> National Audit Office *Local government report by the Comptroller and Auditor General: The impact of funding reductions on local authorities* (London: NAO, 2014) para 1.4.

<sup>61</sup> HM Treasury and G Osborne, above n 4.

<sup>62</sup> *Hansard* HC Deb, vol 603, col 822, 7 December 2015.

revenue'.<sup>63</sup> This is seen alongside aforementioned changes to council tax as a shift away from reliance on central money and an attempted increase in councils' ability to raise income for themselves, a move that is further emphasised by the announcement of cuts to various government grants.<sup>64</sup>

At this early stage, however, examination of the new reforms suggests that the underlying attitude towards localism remains unchanged, with considerable authority still retained at Whitehall. Government intervention in a decision to proceed with fracking near Blackpool, for instance, against the decision of the council and the wishes of local people, is indicative of this unchanged approach.<sup>65</sup> But there are concerns about the 2016 Act, too. Whilst promoted as an instrument through which councils can instigate change, there are fears that the Act still enables government to impose changes on local authorities. It is up to the Secretary of State, for instance, to bring about

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<sup>63</sup> G Osborne 'The Chancellor's speech to Conservative Party Conference 2015' *Conservative Party* 5 October 2015, available at <http://press.conservatives.com/post/130748611145/the-chancellors-speech-to-conservative-party> (accessed 27 September 2017). Also see BBC News 'George Osborne: Councils to keep £26bn in business rates' *BBC News* 5 October 2015, available at <http://www.bbc.co.uk/news/business-34445311> (accessed 22 March 2017).

<sup>64</sup> See Department for Communities and Local Government and G Clark 'Final local government finance settlement 2016 to 2017' *HM Government* 8 February 2016, available at <https://www.gov.uk/government/speeches/final-local-government-finance-settlement-2016-to-2017> (accessed 22 March 2017).

<sup>65</sup> A Vaughan 'Fracking given UK go-ahead as Lancashire council rejection overturned' *The Guardian* 6 October 2016, available at <https://www.theguardian.com/environment/2016/oct/06/uk-fracking-given-go-ahead-as-lancashire-council-rejection-is-overturned> (accessed 22 March 2017).

devolution and be responsible for agreeing deals with councils.<sup>66</sup> He also has the power to make regulations affecting the governance, membership and structural arrangements of local authorities, at times with minimal consent from those involved.<sup>67</sup> This concern carries weight when the realities of the Northern Powerhouse in Manchester are considered. Here, contrary to views expressed in a recent referendum,<sup>68</sup> the decision to establish a combined authority, overseen by a directly-elected mayor, was the result of a deal struck by George Osborne with local politicians, the first interim mayor appointed – not elected – in May 2015.<sup>69</sup> More widely, it is noteworthy that devolution under the 2016 Act will only be

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<sup>66</sup> See Local Government Association ‘Briefing: Cities and Local Government Devolution Bill, Second Reading, House of Lords’ *Local Government Association* 8 June 2015, available at <http://www.local.gov.uk/documents/10180/11607/2015+06+08+Cities+and+Local+Government+Devolution+Bill+-+HL+-+Second+Reading.pdf/fcfc0c8d-b108-4bde-9dbe-7debb1163513> (accessed 22 March 2017).

<sup>67</sup> See Cities and Local Government Devolution Act 2016, s 5(1). This concern was raised during the Bill’s Third Reading: *Hansard* HC Deb, vol 603, cols 822 – 823, 7 December 2015.

<sup>68</sup> See M Sandford *Directly-elected mayors* Briefing Paper, Number 05000 (London: House of Commons Library, 2016) p 13. The referendum, held in May 2012, saw the rejection of the proposed adoption of a directly-elected mayor for the existing Manchester City Council.

<sup>69</sup> Andy Burnham was elected as the new mayor for the Greater Manchester Combined Authority on 4 May 2017.

possible where combined authorities<sup>70</sup> either move to unitary status,<sup>71</sup> or adopt a directly-elected mayor; a model of governance that local people have consistently rejected.<sup>72</sup> Indeed, government further motivates adoption of this unpopular model by establishing the exclusive right of councils led by directly-elected mayors the power to increase business rates and thus council income.<sup>73</sup> This highlights another centralist concern insofar as greater autonomy is seemingly afforded to those councils willing to accept the centre's prescribed arrangements. The constitutional significance of the 2016 Act thus 'depends on how the raft of powers ... that accrue to the Secretary of State are deployed in practice'.<sup>74</sup> Going forward, it is important that the Government expatiate more clearly how far the

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<sup>70</sup> Combined authorities are created by joining two or more adjacent local government areas: Local Democracy, Economic Development and Construction Act 2009, s 103, though these no longer have to be adjacent to one another: Cities and Local Government Devolution Act 2016, s 12.

<sup>71</sup> See H Jameson and J Hailstone 'Unitary option mooted in push for devo deals' (18 February 2016) *The MJ* 3.

<sup>72</sup> Referenda under the Localism Act 2011, for instance, saw widespread rejection of the model in respect of existing councils (see: Sandford, above n 68, p 13). Even since the introduction of devolutionary deals, citizens have expressed a 'strong desire for devolution but no great love for a mayor' (D Peters and S Clayden 'DCLG leaves door open on delayed mayoral elections' (18 August 2016) *The MJ* 1), with turnout at the six combined authority mayoral elections held in May 2017 averaging just 27.45 per cent (BBC News, 'Elections 2017 results: Tories win four new mayors' *BBC News* 5 May 2017, available at <http://www.bbc.co.uk/news/election-2017-39817224> (accessed 6 September 2017)).

<sup>73</sup> See R Peston 'Partial reversal of Thatcher's local government castration' *BBC News* 5 October 2015, available at <http://www.bbc.co.uk/news/business-34449708> (accessed 22 March 2017).

<sup>74</sup> *Hansard* HL Deb, vol 762, col 654, 8 June 2015.

Secretary of State can go in deciding the powers to be devolved and the structures councils should adopt as part of that devolution.<sup>75</sup> Finally, local retention of business rates also presents cause for concern as it risks benefiting certain councils over others, meaning that authorities could suffer at the hands of a one-size-fits-all approach.<sup>76</sup> Indeed, the policy must be seen in the context of the March 2016 budget, which announced cuts to local business rates,<sup>77</sup> adding weight to the suggestion that Government at times devolves financial cuts to minimise the effect on the centre. Whilst underpinned by promises lauding the benefits of a bottom-up approach, therefore, the new policies and 2016 Act inspire familiar concern that it is yet more local reform on central terms and with centrally imposed restrictions.

The top-down approach to localism, therefore, has long been embedded in the way government engages with councils. Whilst substantive localism has been achieved, by the introduction of provisions seeking to empower councils with local autonomy, the persistence of centralised controls at the heart of those provisions and policies means that they fall short of procedural localism by failing to provide

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<sup>75</sup> See J Stanton '(D)evolution for local government' *UK Constitutional Law Association* 15 July 2015, available at <http://ukconstitutionallaw.org/2015/07/15/john-stanton-devolution-for-local-government/> (accessed 22 March 2017).

<sup>76</sup> J Stanton 'Decentralisation and council business rates: More of the same from Whitehall?' *City, University of London* 12 October 2015, available at <http://www.city.ac.uk/news/2015/october/decentralisation-and-council-business-rates-more-of-the-same-from-whitehall> (accessed 22 March 2017).

<sup>77</sup> HM Treasury and G Osborne 'Budget 2016: George Osborne's speech' *HM Government* 16 March 2016, available at <https://www.gov.uk/government/speeches/budget-2016-george-osbornes-speech> (accessed 22 March 2017).

the framework necessary to ensure that decentralised power can be exercised appropriately. The leader of Westminster City Council observes, ‘we have the powers to do really quite a lot if we want to. The issue is that we do not have the ... freedom to spend our money the way we might want’.<sup>78</sup>

That a top-down approach is contrary to the principle of localism goes without saying. The value of ‘decentralised and grassroots forms of power’<sup>79</sup> is lost if central government can exert excessive control over the way local powers are exercised. Whilst the realities of the unitary constitution must be kept in mind, if government is *too* prescriptive over what councils are able to do, a one-size-fits-all approach can result and mean that councils are not able to use local powers for the good of their areas. They become less ‘an alternative source of authority to the central state’,<sup>80</sup> and more an extension of Whitehall’s reach over policy areas that should be left to councils to manage: ‘a top-down, one-size-fits-all approach is contrary to the spirit of greater devolution’.<sup>81</sup> More than this, though, government’s overly prescriptive involvement in local affairs hinders the effective use of power, damages local democracy and means that local concerns often remain unresolved. In part, this is ‘because central government is remote from the actual issues being faced locally’;<sup>82</sup> but more fundamentally it is because

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<sup>78</sup> House of Commons Communities and Local Government Select Committee, above n 59, para 62.

<sup>79</sup> Davoudi and Madanipour, above n 12, p 1.

<sup>80</sup> Leigh, above n 14, p 7.

<sup>81</sup> A Bowes and M Purdue ‘Former DCLG permanent secretary criticises Government housing policies’ (2015) 9 *Journal of Planning and Environment Law* 1000 at 1000. Also contrast with Mill, above n 14, p 292.

<sup>82</sup> Jones and Stewart, above n 41 at 356.

prescriptive centralised supervision of local activity prevents councils from using powers intended to facilitate innovation in locally unique ways, affecting their ability to ‘manage ... local interests peculiar to every town’.<sup>83</sup> Demonstrating this, an empirical study in London found that government’s prescriptive supervision of councils ‘impacts heavily on attempts to decentralise as where government does push power down, “it comes with more bureaucracy, which just makes life harder”’.<sup>84</sup> Indeed, one councillor noted: ‘our Minister for Local Government ... [tells] us to do things on [a] micro level ... it should be local decisions, they shouldn’t be anything to do with him ... it just completely contradicts ... localism’.<sup>85</sup>

This section has explored the Government’s top-down approach to localism. Where attempts are made at decentralisation, a culture of centralism persists through provisions ensuring government retain an overriding say in how councils function and how far they can go in governing local areas. This is problematic, not only in terms of undermining localism, but also in terms of influencing the strength of local democracy, the appropriate allocation of power and the effectiveness with which local issues can be addressed by those elected for that purpose. The article goes on later to make the case for a bottom-up approach to localism. First, however, it considers the reasons underpinning this culture of centralism.

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<sup>83</sup> Mill, above n 14, p 292.

<sup>84</sup> Stanton, above note 8 at 983, citing interview 3.

<sup>85</sup> Interview 3, cited in *ibid* at 984.

**(d) The underlying reason: a question of trust or a democratic issue?**

There is an episode of the 1980s comedy show, *Yes, Prime Minister*, in which Cabinet Secretary, Sir Humphrey Appleby, explains to Principal Private Secretary, Bernard Woolley, the perils of local democracy. Discussing how best to develop a hypothetical plot of land in far-away Nottingham, Humphrey lauds the ‘fruitful’ work that can be achieved at the centre and warns of the dangers of taking power away from Whitehall and affording those proximate to Nottingham a role in the process; describing the latter as ‘amateurs’.<sup>86</sup> ‘If the right people don’t have power ... the wrong people get it ... Councillors, [and] ordinary voters’, he explains.<sup>87</sup> Whilst this article in no way suggests that such an extreme, comedic view of localism underpins the centre’s current attitude towards local democracy, and putting fictitious references aside, questions of government’s trust in local authorities does raise a pertinent issue. The persistently centralist tendencies of government have been attributed to a lack of trust in local government, evidenced by some of the examples explored above. Requiring neighbourhood plans to conform with centralised policy, for instance, or giving the Secretary of State for Health a directing say in the way councils fulfil their public health obligations – to name just two – are not indicative of a government that bestows a wealth of confidence in its councils always to take the most appropriate action.

Identification of a lack of trust giving rise to centralist tendencies is not a novel observation. Loughlin notes that ‘[i]n the ... system which ... emerged in

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<sup>86</sup> BBC television series, *Yes, Prime Minister: Power to the People* (7 January 1988), Series 2, Episode 5.

<sup>87</sup> *Ibid.*

the 1990s there is little room for any sense of trust ... the Government has forged a hierarchical central-local relationship based on precise powers and duties. Discretion has been replaced by rules and the primary form of law has shifted from a facilitative to directive style of law'.<sup>88</sup> This has paved the way for 'broad central powers of supervision'<sup>89</sup> and the culture of centralism described above. The practical effects of this are described by Jones and Stewart, who suggest that the 2011 Localism 'Act is based on the assumption that empowering communities and local government requires central-government prescription ... because it distrusts local government'.<sup>90</sup> Indeed, as the Leader of Camden Borough Council also notes, 'our frustration ... is not so much about the powers that we have ... we do not seem to be trusted to run our affairs'.<sup>91</sup>

Beyond these questions of trust, there is another factor underpinning this culture of centralism; one linked to democratic legitimacy. The aforementioned top-down approach to localism exists alongside a long-standing problem regarding democratic interest in local government. Turnout at local elections is historically very low: the 47.5 per cent turnout recorded in 1990 reflects a highpoint in recent decades; in other years fewer than 30 per cent cast their

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<sup>88</sup> Loughlin, above n 11, p 262, cited in V Lowndes 'Rebuilding Trust in Central/Local Relations: Policy or Passion?' in L Pratchett (ed) *Renewing Local Democracy?: The Modernisation Agenda in British Local Government* (London: Routledge, 2000) p 116.

<sup>89</sup> Loughlin, *ibid*, p 262.

<sup>90</sup> Jones and Stewart, above n 41, p 356.

<sup>91</sup> House of Commons Communities and Local Government Select Committee, above n 59, para 62.

vote.<sup>92</sup> With so few people apparently interested in local politics it is hardly surprising that government seems reluctant to decentralise power to councils established on rocky democratic foundations. The participative and responsive<sup>93</sup> potential of local government is undermined if its democratically representative nature is weak. Reasons underpinning low turnout have been explored elsewhere and are not replicated here.<sup>94</sup> It is argued, though, that there is a circuitous connection between the lack of popular engagement and this top-down approach. '[S]uccessive central government policies ... that have sought to restrict the role of local government and reduce its autonomy have weakened local democratic accountability ... in turn encourag[ing] the seepage of power to the centre, which further reduces electoral choice and local accountability'.<sup>95</sup> Though some have argued that increased opportunity for community participation could improve voter interest in local government,<sup>96</sup> realisation of a bottom-up approach might also contribute to the correction of this apathy, and restore voter confidence in councils.

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<sup>92</sup> The Guardian 'UK election historic turnouts since 1918' *The Guardian* 16 November 2012, available at <https://www.theguardian.com/news/datablog/2012/nov/16/uk-election-turnouts-historic> (accessed 22 March 2017). Turnout at the 1998 and 2000 local elections was 28.8 per cent and 29.6 per cent respectively.

<sup>93</sup> See Widdicombe, above n 17, para 3.11 and ch 3, as cited in Leigh, above n 14, pp 5-6.

<sup>94</sup> See C Rallings and M Thrasher *Local Elections in Britain* (London: Routledge, 1997) ch 4; and Atkinson, above n 20, pp 79-80.

<sup>95</sup> Atkinson, *ibid*, p 12, citing D Beetham 'Theorising Democracy and Local Government' in D King and G Stoker (eds) *Rethinking Local Democracy* (London: Palgrave, 1996) p 28, p 41.

<sup>96</sup> See Atkinson, *ibid*, pp 80-81.

Whether deriving from a lack of trust in councils, low turnouts or councils' constitutional position, this top-down approach is problematic, as the first section of this article has explored. It is important to consider, therefore, how a bottom-up approach might be implemented, free from prescriptive supervision at the centre, as the next section discusses.

### 3. A BOTTOM-UP APPROACH TO LOCALISM

In order that a bottom-up approach to localism might be realised, a fundamental shift in the central-local relationship needs to be effected. This section explores the basis for this shift, explaining what a bottom-up approach might look like, before discussing how it can be achieved within the existing constitutional framework.

#### **(a) What is a bottom-up approach and what should it look like?**

Bottom-up localism is associated with 'a bid for autonomy by ... lower [authorities]',<sup>97</sup> and means that the process of local government – decision-making, policy implementation and governance – is led by local institutions and local people, rather than supervised and prescribed from the centre. It is consistent with the principle of localism insofar as it is dependent upon autonomous councils,<sup>98</sup> acting separately and independently from the centre,<sup>99</sup> and exercising decentralised power,<sup>100</sup> freedom and autonomy for their local

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<sup>97</sup> A Madanipour and S Davoudi 'Localism: Institutions, Territories, Representations' in S Davoudi and A Madanipour (eds) *Reconsidering Localism* (Abingdon: Routledge, 2015) p 11, pp 15-16.

<sup>98</sup> King, above n 22, p 151.

<sup>99</sup> See Leigh, above n 14, p 6.

<sup>100</sup> Davoudi and Madanipour, above n 12, p 1.

areas. It is also justified by Mill, who states that ‘all business purely local – all which concerns only a single locality – should devolve upon the local authorities’.<sup>101</sup> In this sense, a bottom-up approach is linked to subsidiarity, on the basis of which ‘a larger and higher ranking body should not exercise functions which could be efficiently carried out by a smaller or lesser body’.<sup>102</sup> In the context of this discussion, this means that central government should not exercise powers or carry out functions that would be better exercised or fulfilled by local government. On this basis, and if successfully applied:

‘Subsidiarity [could] pave the way for a system of governance in which different levels of power can work together on a functional basis, each playing a role in a hierarchical organisation. A degree of autonomy is ... offered to the lower levels of authority while maintaining the control exerted by the higher levels’.<sup>103</sup>

The relevance of subsidiarity in these terms is especially pertinent since the notion of ‘different levels of power’ working together within a structural hierarchy indicates the institutional framework within which a bottom-up approach could operate in England. Though this article is rightly critical of the prescriptive supervision and interference that has come to typify Whitehall’s

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<sup>101</sup> Mill, above n 14, p 299.

<sup>102</sup> D Melé ‘Exploring the principle of subsidiarity in organisational forms’ (2005) 60(3) *Journal of Business Ethics* 293 at 293, cited in Madanipour and Davoudi, above n 97, p 17. (Also see Madanipour and Davoudi, pp 15-16).

<sup>103</sup> Madanipour and Davoudi, *ibid*, p 17, citing D Cass ‘The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community’ (1992) 29(6) *Common Market Law Review* 1107.

dealings with local authorities, it is equally mindful of the unitary nature of the Constitution and the fact that councils, as statutory corporations, cannot function without the appropriate allocation of powers from the centre. Indeed, and whilst pursuit of this bottom-up approach is a reaction against a one-size-fits-all approach to local government, uniformity of policy is, to a degree, a necessary part of our unitary system.

Bottom-up localism is also strengthened by the democratic legitimacy, which lies at the heart of the localism principle, and that derives from the platform councils provide for local engagement in the process of decision-making and service provision.<sup>104</sup> This value can be seen from Labour's New Deal for Communities programme, for example, which was established as a community-led neighbourhood renewal project in the late 1990s. Though it was affected by familiar concerns for centralisation and poor engagement, research showed that where the bottom-up nature was embraced it created opportunities for local democratic activity from which neighbourhoods could benefit.<sup>105</sup> More recently, the Big Society was underpinned by rhetoric supportive of a bottom-up approach, realised in part by initiatives concerned with the running of community services by local, non-state actors.<sup>106</sup> Though an extension of this sees local government

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<sup>104</sup> Bogdanor, above n 16, p 235, and Widdicombe, above n 17, para 3.11 and ch 3, as cited in Leigh, above n 14, pp 5-6.

<sup>105</sup> Stanton, above n 53, p 110 and ch 5 generally. For further examples of other community-led regeneration projects, see P Foley and S Martin 'A new deal for the community? Public participation in regeneration and local service delivery' (2000) 28(4) Policy & Politics 479.

<sup>106</sup> See Cabinet Office *et al*, above n 6, and Department for Communities and Local Government *Community Right to Challenge: Statutory Guidance* (London: DCLG, 2012).

being potentially relegated to having a residual function, something that is inconsistent with the democratic legitimacy it commands and the constitutional role it fulfils, bottom-up projects born out of the Big Society, such as neighbourhood planning and community rights, have been seen to inspire greater democratic interest in local affairs.<sup>107</sup> Recalling aforementioned concerns regarding low-turnouts in local elections and a broader disengagement with local politics, a bottom-up approach could therefore improve democratic interest, as citizens might feel more inclined to vote for and engage with councils that can exercise greater autonomy for their local areas.

A bottom-up approach, therefore, is consistent with the principle of localism. In terms of considering how it might work in practice, however, it could take effect by central government, with Parliament, legislating to provide the broad framework within which councils should exercise local discretion and autonomy, thereafter allowing councils independently and freely to act for the good of their areas and to exist as more than mere satellites of the centre. This would be consistent with their democratic ‘ability to make decisions based on their own judgement’,<sup>108</sup> correcting the top-down approach explained above and tilting ‘the balance of power between central and local government ... towards

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<sup>107</sup> Government reported in 2014 that ‘[a]ll 28 neighbourhood planning referendums held so far have been successful’, also noting turnouts as high as 59.5 per cent (Department for Communities and Local Government ‘Notes on #neighbourhoodplanning’ *DCLG* August 2014, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/342893/Notes\\_on\\_neighbourhood\\_planning\\_Edition\\_10.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/342893/Notes_on_neighbourhood_planning_Edition_10.pdf) (accessed on 22 March 2017)).

<sup>108</sup> Madanipour and Davoudi, above n 97, p 17.

localities'.<sup>109</sup> In terms of how this approach might be implemented in practice, however, it would not be enough merely to amend existing legislation to do away with centralising provisions and introduce new statutes correcting this approach; more fundamental change is needed, as the next section explores.

### **(b) Achieving a bottom-up approach to local government**

This article has already identified the incremental and piecemeal nature of recent local reform. New governments come in with fresh agendas, changing political policy and often giving rise to new reforms. The Localism Act, for instance, superseded and undid certain aspects of Labour's local governmental model, whilst the 2016 Act sees another change in direction. Governments, with their parliamentary majority, promote Acts that bring change to local government and impose new political visions on councils, leading to the top-down approach described above. As Butler *et al* note, the 'freedom of a government with a subservient Parliament ... [can redefine] the role of local government without any semblance of its consent'.<sup>110</sup>

The argument is made, on this basis, that ordinary legislation is too susceptible to repeal to provide the foundation for any long-term, bottom-up approach to local government. As this section explores, what is needed is a political agreement, underpinned and protected by legislative provision. Combining political and legal mechanisms as a basis for decentralisation is, of course, reminiscent of the devolution settlements set up with Scotland, Wales

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<sup>109</sup> House of Commons Communities and Local Government Select Committee, above n 59, para 146; cited in Ryan, above n 59 at 20.

<sup>110</sup> D Butler, A Adonis and T Travers *Failure in British Government: The Politics of the Poll Tax* (Oxford: OUP, 1994) p 303, cited in Bailey and Elliott, above n 25, at 457.

and Northern Ireland in 1998. Though this section draws parallels with these where appropriate, it is also mindful that we are dealing with very different constitutional institutions, those at Edinburgh, Cardiff and Belfast enjoying both greater democratic legitimacy and a clearer relationship with Whitehall.<sup>111</sup> With this in mind, this section now discusses the political and legal mechanisms necessary to ensure a bottom-up approach.

*(i) Political agreement and a central-local concordat*

The first step to achieving a bottom-up approach must come in the form of political agreement between central and local government. That is, agreement on the allocation of power and the expectations of both parties in how that power should be exercised. Political agreement is important as it means nothing is imposed by central government, but approved by both parties with a greater sense of equality. Drawing from previous examples in UK Constitutional Law, this political agreement could come in the form of a central-local concordat. Concordats are relatively recent developments, emerging, for instance, ‘as a device for co-ordinating UK governance in the wake of devolution to Scotland, Wales and Northern Ireland’.<sup>112</sup> In this use, they can be defined as

‘agreements between ... Government and the devolved administrations ... [that] stipulate the procedures and rules to be followed ... for effecting co-operation and co-ordination in policy processes characterised by shared competence ... or with respect to policies where the actions of one

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<sup>111</sup> See Bailey and Elliott, *ibid*, at 454-456.

<sup>112</sup> A Scott ‘The role of concordats in the new governance of Britain: taking subsidiarity seriously?’ (2001) 5(1) *Edinburgh Law Review* 21 at 21.

administration will impact on the policy environment of the other administration'.<sup>113</sup>

Concordats, therefore, facilitate agreement in the face of competing principles.<sup>114</sup> Though in the devolutionary settlements these were parliamentary sovereignty on the one hand, and the devolution of power on the other,<sup>115</sup> in the context of localism, a concordat could be used to find consensus in ensuring greater power and autonomy for local government, against the centralist tendencies of Whitehall.

The idea of concordats policing the central-local relationship is not new. In 2007, a concordat was agreed between central government and the Local Government Association (LGA), the latter acting on behalf of councils across Britain.<sup>116</sup> This reflected agreement on a number of issues, including a reduction in centralised interference; the need to give 'councils greater flexibility in their funding'; and a presumption in favour of subsidiarity.<sup>117</sup> Despite its good intentions, however, the 2007 Concordat 'quickly fell into disuse'.<sup>118</sup> Critics highlight the fact that it was agreed 'only by the DCLG and the LGA'; that 'it had

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<sup>113</sup> Ibid, at 21.

<sup>114</sup> Ibid, at 21, citing V Bogdanor 'Constitutional Reform in the UK' (paper presented at the Centre for Public Law, University of Cambridge, January 1998).

<sup>115</sup> Bogdanor, *ibid*, cited in Scott, *ibid*, p 21.

<sup>116</sup> See N Headlam *The Central-Local Concordat* SN/PC/04713 (London: House of Commons Library, 2008).

<sup>117</sup> Ibid, p 2.

<sup>118</sup> House of Commons Political and Constitutional Reform Select Committee *Prospects for codifying the relationship between central and local government* HC 656-I (London: HMSO, 2013) p 10.

no legal force<sup>119</sup> and that it lacked any meaningful substance.<sup>120</sup> As such, it failed to establish a constitutional foundation upon which local government could thrive and develop.<sup>121</sup>

Concordats, though, are not the only form of political agreement, with devolutionary deals, such as those central to the Northern Powerhouse policy and the 2016 Act, also facilitating consensus between localities and Whitehall. It has already been noted, though, that these are similarly reflective of centralist tendencies. The Secretary of State, for instance, carries great weight in determining the powers to be devolved, whilst the deal in Manchester was agreed privately by George Osborne and local politicians. These concerns are indicative of a potential problem in rooting a central-local relationship in political agreement, namely that consensus is, first and foremost, struck privately between elected politicians, with affected citizens disconnected from the process. This leads to the danger that any consequent agreement might exist merely as a point of reference for officials across different levels of government to facilitate local governance behind closed doors, potentially hindering, rather than helping, the realisation of any democratically supported activity. If future local governmental reform is to start with another concordat, therefore, there are a number of mistakes that cannot be repeated and issues to take into consideration. The need for more widespread representation of the agreement is obvious. Whilst the LGA is well placed to represent local authorities countrywide,

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<sup>119</sup> Ibid, p 10. Also see C Himsworth 'Prospects for codifying the relationship between central and local government' (2013) Public Law 702 at 705.

<sup>120</sup> See Bailey and Elliott, above n 25, at 470- 471.

<sup>121</sup> Ibid, at 470-471.

central government should be represented by more than merely the Department for Communities and Local Government, and should engage with the concordat such that it binds 'Whitehall as a whole'.<sup>122</sup> Policies across government impact on localism, so all departments should be united in the consensus. In addition, legal recognition would also be crucial to the success of any concordat. Though existing constitutional arrangements and parliamentary sovereignty present their own challenges, grounding an agreement in law could ensure clearer and stronger boundaries between central and local power. Finally, any agreement between central and local government on the way powers are allocated and exercised must have the support of those affected by such powers, that is, the public. Any concordat, therefore, should be democratically legitimised and endorsed by popular consent. The next section explores the issue of legal recognition; this one goes on to consider democratic legitimacy and the substance of a potential concordat.

This article has already identified a circuitous connection between the top-down approach to localism and low levels of local democratic engagement. If a bottom-up approach is to 'contribute to the correction of this apathy', as has been suggested above, then affording citizens a role in shaping that approach, by providing opportunities to endorse the proposed political agreement, could be a step towards invigorating greater popular interest in local politics. This might be presented by a referendum<sup>123</sup> or a consultation exercise where information about

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<sup>122</sup> Himsworth, above n 119, at 705.

<sup>123</sup> Use of referenda as a way of permitting the public a role in endorsing a strengthened central-local relationship is discussed here: C Copus 'Local Governance Research Unit: Codifying the Relationship between Central and Local Government' *Department of Public Policy, Business and Law, De Montfort University, Leicester* 2010, available at: <http://www.dmu.ac.uk/documents/business-and-law->

the concordat is made publicly available, along with opportunities for discussions. Whilst merely facilitating increased democratic participation is unlikely to rectify problems with apathy and engagement on its own, promoting the fundamental nature of the reforms to which the public are being invited to contribute (i.e. a new relationship between central and local government, defined by a bottom-up approach) could help turn the tide.<sup>124</sup>

Considering, now, the content of a potential concordat, the criticism, above, that the 2007 Concordat lacked meaningful substance refers to the fact that ‘it [did] not establish a realm of matters – analogous to the category of devolved matters for which devolved governments are ... responsible – which are the constitutional preserve of local authorities’.<sup>125</sup> Keeping in mind that a central-local concordat would seek to balance central power with the need for greater local autonomy, it would be important for a concordat to clarify those instances where councils can act freely and independently, making ‘decisions based on their own judgement’;<sup>126</sup> and when they should prioritise implementation of centralised policies, acting on instruction from Whitehall. To this end, a new concordat should set out a distinction between central and local matters, thereby clarifying the allocation of power between the two levels. This

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[documents/research/lgru/paper-2-codifying-the-relationship-between-central-and-local-government.pdf](#)

(accessed on 19 September 2017).

<sup>124</sup> Prominent referendums typically seem to inspire higher turnouts. At the 2014 referendum on Scottish independence, for instance, turnout was 84.6%, whilst in June 2016, the referendum on the UK’s continued membership of the European Union saw a turnout of 72.2%.

<sup>125</sup> Bailey and Elliott, above n 25, at 470-471.

<sup>126</sup> Madanipour and Davoudi, above n 97, p 17.

distinction would also give effect to subsidiarity, providing a foundation upon which the most effective level of authority could be specified in respect of certain areas of competence.

There is obvious similarity between this proposal and the devolution settlements established with Scotland, Wales and Northern Ireland. These are underpinned by the 1998 Acts, amended by more recent legislation, and a similar statutory framework giving legal effect to this division of central and local authority is explored below. Unlike the delineation between reserved / excepted and devolved matters in Scotland, Wales<sup>127</sup> and Northern Ireland, however, and in view of local government's constitutional position, there would be no devolution of legislative competence recognised in the concordat, only administrative. Whilst institutions in Edinburgh, Belfast and Cardiff were created, and have been subsequently amended, '[o]n both administrative and legislative levels',<sup>128</sup> councils, beyond their limited secondary legislative capabilities, only have administrative powers under the authority of Parliament. Any distinction between central and local matters, therefore, would merely clarify the administrative responsibilities to be exercised at the respective levels, with legislative power remaining the exclusive competence of Parliament.

In terms of identifying these central and local matters, powers remaining within the competence of central government would be those affecting the whole country, such as, for example, local governmental electoral boundaries, electoral processes, and councils' institutional organisation. Leaving these matters within

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<sup>127</sup> The reserved powers model in Wales was introduced by the Wales Act 2017, replacing the conferred powers model that previously existed.

<sup>128</sup> Bailey and Elliott, above n 25, at 471.

Whitehall's control would ensure uniformity across the country, consistency of democratic legitimacy and clarity of process (also potentially combating the aforementioned asymmetry of local government). In contrast, powers that might fall within the administrative competence of local authorities are potentially numerous. Council tax, housing, regeneration, and education are all matters that might be left for the sole attention of councils, thereby encouraging independent policy at the local level and making space for local decision-making and broad discretion, free from prescriptive, centralised supervision. It is unlikely, though, that all powers, relevant to local politics could be neatly divided into central and local matters. There are undoubtedly certain areas where both central and local government might need the authority to act, either jointly or concurrently, something that could be reflected by a third category, setting out shared matters.<sup>129</sup> These might cover, for example, transport, agriculture or employment; that is, areas where a degree of uniformity across the country is desirable, but where it is also important that locally specific issues be addressed by local bodies with local resources. Due to the UK's unitary constitution, however, and councils' position as statutory corporations, local matters *must* be framed in such a way that ensures the superior power of the centre is not eroded. This could be achieved by setting out a broad framework of laws and policies at the centre, there stating the objective to be achieved, then leaving it – and being required to leave it – with councils to exercise their local powers freely and broadly, in their own specific ways, and without central interference. Taking housing as an example, central government could publish a policy stipulating the

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<sup>129</sup> A category of shared matters also features within the devolution legislation. See, for example, Wales Act 2017, Sch 4, which identifies '[f]unctions of Ministers of Crown ... exercisable concurrently or jointly with Welsh Ministers'.

need to provide more housing across the country and Parliament could pass a law, requiring councils to increase the number of available homes in their areas. As a potentially local matter, it should then be up to councils to decide how they might wish to fulfil this objective, relevant to unique challenges facing their locality; deciding, perhaps, to build new homes, or support the subsidisation of landlords – to give just two possible options. As this example shows, greater autonomy and discretion brings the need for greater control over local money. An approach consistent with this central-local distinction, and with discussions above, might be either to provide councils with more general grants, not specified for a particular purpose, or greater opportunity to raise their own revenue.

A new central-local concordat, therefore, must be less about private agreement of the powers government is willing to relinquish, and more about wider consensus as to roles, responsibilities and powers, with a presumption in favour of subsidiarity. Real devolution rather than mere delegation. Though the 2007 Concordat attempted to afford '[c]ouncils ... the right to address the priorities of their communities ... and to lead the delivery of public services in their area and shape its future without unnecessary direction or control',<sup>130</sup> the lack of any broad central commitment to councils' need to fulfil this role freely and independently hindered its success, as did the lack of any specific acknowledgement of what substantive areas this might cover. A new concordat, therefore, must correct this. It should honour the roles that central and local government both play, recognising a distinction between central, local and shared matters, and demonstrating awareness of the importance of subsidiarity. In this

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<sup>130</sup> Department for Communities and Local Government and the Local Government Association

*Central-Local Concordat* (London: DCLG, 2007) p 10.

way, it can guarantee a bottom-up approach to localism, guarding councils from prescriptive centralised supervision. To correct one of the most prominent misgivings of the 2007 Concordat, however, a new agreement must be recognised and protected at law, as this next section discusses.

*(ii) Legislating for a bottom up approach*

Alongside a political agreement, legislation is needed both to give legal recognition to any consensus reached in a concordat and to spell out more clearly, within a legal framework, a bottom-up approach to localism. This section explains the form of such legislation before considering how legal mechanisms might protect this approach.

An Act giving recognition to an agreement, and setting out a legal framework for its bottom-up approach, could take a similar form to legislation underpinning the devolution settlements. On this basis, it could protect the division of authority between central, local and shared matters, set out in the concordat, clarify ‘difficulties that might arise in the outworking of the relationships’,<sup>131</sup> and ensure ‘that a rebalancing of the relationship [does] ... not result in a gradual creep of power back to the centre’.<sup>132</sup> Whilst, as has already been noted, there are important constitutional differences between the devolved institutions and local government, the combined effect of a political concordat, recognised and protected through a legislative framework,<sup>133</sup> could go some way to ensuring a workable, central-local relationship founded on subsidiarity and a

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<sup>131</sup> Bailey and Elliott, above n 25, at 471.

<sup>132</sup> House of Commons Political and Constitutional Reform Select Committee, above n 118, p 34.

<sup>133</sup> Bailey and Elliott note the benefits of combining political and legal measures in this context: above n 25, at 471.

bottom-up approach. Indeed, juxtaposition of a political agreement and legal framework also lies at the heart of the Northern Powerhouse agenda, devolutionary deals sitting within a framework established through the 2016 Act. Whilst concerns for that initiative have already been discussed, the basic premise, predicated on combining political agreement with a legal framework, is well established and could provide the foundation for broader devolution to local government.

One of the most fundamental aspects of legislation giving effect to a bottom-up approach would be legal protection of the concordat's distinction between central, local and shared matters. Continuing the parallel already drawn with the devolution settlements, to prevent central government from erring into local matters, legislation could include a provision mirroring Section 2 of the Scotland Act 2016. This states:

‘In section 28 of the Scotland Act 1998 (Acts of the Scottish Parliament) at the end add—

“But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament”<sup>134</sup>

This section is carefully drafted so as to acknowledge, rather than enforce, the Sewel Convention, mindful that making it a legal requirement to recognise Scotland's realm of devolved matters would limit the legislative competence of

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<sup>134</sup> Scotland Act 2016, s 2. Also see Wales Act 2017, s 2 for a similar provision with regards to Wales.

Parliament.<sup>135</sup> Nonetheless, a provision on similar lines could protect the distinction between central, local and shared matters, by providing that the Secretary of State will ‘not normally exercise functions with regard to local matters without the consent of concerned local authorities’.<sup>136</sup> Where government acts within or affects the realm of local matters, without this consent, it could then fall to the Administrative Court to determine instances of *ultra vires* in a similar fashion to that seen in cases concerning the devolution settlements.<sup>137</sup>

Ordinary legislation, however, susceptible to repeal or amendment through a simple majority process, would be insufficient to provide this legal framework and protect a bottom-up approach realised through any concordat. It has already been noted that one of the problems underpinning recent local government reform is the ease with which governments and Parliament are able to effect change on local government. The enactment and repeal of piecemeal reforms, often at the whim of prevailing political views, are frequently introduced with little input from councils, thus contributing to the aforementioned top-down approach. If legislation is to be introduced, therefore, recognising a concordat and providing a legal framework for a bottom-up approach, it needs to include measures that ensure governments cannot too easily enact politically motivated changes that unravel this new approach, re-establish a centralist culture and tilt ‘the balance of power between central and local government’ back towards

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<sup>135</sup> See further *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at 136 - 151.

<sup>136</sup> Where the consent of a large number of councils is required, the Local Government Association could act on behalf of councils, as happened in respect of the 2007 Concordat (see above, and n 116).

<sup>137</sup> See, for instance, *AXA Insurance v Lord Advocate* [2011] UKSC 46.

Whitehall.<sup>138</sup> To this end, legislation should do two things. First, it should set out the process through which a central-local concordat can be amended, and secondly, it must offer a degree of entrenchment to this legal framework to ensure it cannot be too easily altered or repealed. This section now goes on to consider how these objectives might be achieved.

The discussion above explores the way in which a provision, similar to that reflecting the Sewel Convention in the devolution legislation, could restrict government from encroaching on matters intended for local use. It is important, however, that procedural restrictions also be put in place to prevent government from unilaterally amending the concordat without the agreement of local government. It would be contrary to any political agreement if the centre could impose alterations to arrangements without the consensus of the other parties. Legislation, therefore, in providing the legal framework for this bottom-up approach, could clarify the procedure through which a concordat should be amended. This could potentially take a number of forms. It might, for example, be set out in a Sewel Convention-type provision, similar to that already discussed, by requiring any changes to the concordat to have the consent of local authorities. Other possible options, though, might include the requirement that government be required to consult councils before introducing any changes to the agreement, or the need for any changes to be supported by two-thirds of the House of Commons. Whatever form such procedural restrictions might take, they should serve to protect the political agreement and the bottom-up approach that that is designed to ensure.

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<sup>138</sup> House of Commons Communities and Local Government Select Committee, above n 59, para 146, cited in Ryan, above n 59, at 20.

With regards to entrenchment of the legal framework itself, the notion of legislation protecting a more empowered local government from centralist tendencies has been considered before. In 2013, the Political and Constitutional Reform Select Committee discussed proposals for a code to clarify the relationship between central and local government and, to this end, it set out various principles.<sup>139</sup> With particular relevance to this discussion, however, the report also proposed that the code be enforced by statute, with legislation enjoying a degree of entrenchment to protect local government from the ‘default position of [central] micromanagement’.<sup>140</sup> To this end, the report set out possible models for entrenchment, which are drawn from, where relevant, as this section progresses.

The question of entrenchment and the need to secure protection for valuable constitutional arrangements, in the face of parliamentary sovereignty, is a complex issue and its application in respect of bottom-up localism is just one strand. There are, in reality, other features of our constitution that might benefit from special protection, as discussions elsewhere reflect.<sup>141</sup> The issue arises due to the lack of a codified constitution and the consequential status of Acts of the sovereign Parliament providing the highest source of domestic law. It is a central

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<sup>139</sup> House of Commons Political and Constitutional Reform Select Committee, above n 118, p 3, these included: ‘local government should be independent of central government, have a secure financial base, and, with the consent of its electors, be able to exercise a range of revenue-raising powers suitable to the needs of the local community’.

<sup>140</sup> Ibid, p 33.

<sup>141</sup> See M Gordon *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Oxford: Hart Publishing, 2015) ch 3.

facet of orthodox sovereignty that no Act is immune from repeal and that Parliament can pass any law whatsoever (political constraints notwithstanding). Consequently, legislation setting out features of the Constitution – human rights, devolution, local government, for example – is blessed with no special status and is susceptible to ordinary repeal or amendment. Constitutional protection for such features is a challenge not conducive to existing arrangements.

Despite this, Smith observes that there are ‘certain Acts of Parliament whose repeal is virtually unthinkable. The Scotland Act is one ... example’.<sup>142</sup> The Scotland Act enjoys this special status on the foundation of democratic support in favour of devolution and the institutions in Edinburgh;<sup>143</sup> whether local government can be said to command the same degree of popular enthusiasm is an important question with a doubtful answer, as consideration of local turnouts, above, suggests. Of course, if a political agreement, set out in a concordat, were to be endorsed by popular consent, as discussed, then this might go some way to providing legislation recognising that concordat and setting out a framework for bottom-up localism the foundation necessary to achieve a ‘special status’ similar to the Scotland Act. More than democratic support, though, it is also a question of culture. In the aftermath of the 1998 devolution settlements, there was a culture shift in Westminster to ensure that respect for devolution, in

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<sup>142</sup> J Smith ‘The European Charter of Local Self-Government: does the UK Government comply?’ (2002) 5(5) *Journal of Local Government Law* 90 at 90.

<sup>143</sup> King echoes this: ‘Any attempt by the Westminster parliament radically to amend either the Scotland Act or the Government of Wales Act without the freely given consent of the Scottish parliament and Welsh assembly would cause uproar ... in the country affected’ (King, above n 22, p 207).

the ordinary law and policy-making processes, became conventional. Margaret Beckett, then Leader of the Commons, noted in 1998 that

‘the Government would expect that a convention would be adopted that Westminster would not normally legislate with regard to devolved matters without the consent of the devolved body. The Government is likely to oppose any private Member’s bill which seeks to alter the law on devolved subjects in Scotland or Northern Ireland’.<sup>144</sup>

This principle was endorsed by the Commons Procedure Committee and is reflected in the aforementioned Sewel Convention.<sup>145</sup> Whilst there are ongoing issues with regards to the relationship between central and devolved institutions,<sup>146</sup> if a bottom-up approach to localism is to be established, a similar culture needs to be observed in respect of the role that councils play in the Constitution, relative to central government. This has been recognised by the Communities and Local Government Committee, which notes that: ‘[w]e would like to see a culture of devolution embedded in all Government Departments’.<sup>147</sup>

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<sup>144</sup> House of Commons Procedure Committee *Procedural Consequences of Devolution: Interim Report* HC 148 (London: HMSO, 1999) p 15, cited in E Wood *The Procedural Consequences of Devolution* Research Paper 99/85 (London: House of Commons Library, 1999).

<sup>145</sup> Scotland Act 2016, s 2 and Wales Act 2017, s 2, and above n 134.

<sup>146</sup> The Public Administration and Constitutional Affairs Committee, for instance, noted in November 2016 ‘that occasions ... arise when the devolved administrations ... [are] treated as an afterthought’ (House of Commons Public Administration and Constitutional Affairs Select Committee *The Future of the Union, part two: Inter-institutional relations in the UK* HC 839 (London: HMSO, 2016) para. 106).

<sup>147</sup> House of Commons Communities and Local Government Select Committee *Devolution: the next five years and beyond* HC 369 (London: HMSO, 2016) p 45.

This article has already explained the difficulties arising from central government's top-down approach, and the extent to which any culture shift might be observed is dependent on the success of aforementioned political agreement and the legislation introduced to give it effect. Notwithstanding the democratic support and underlying culture shift that underpins the devolution settlements, however, there is clear scope for considering a form of legislation that would offer this bottom-up approach protection.

Legislation, recognising the concordat and providing the legal framework for a bottom-up approach, must contain measures that prevent it from being too easily repealed, making it harder for a majority government to interfere in local matters and upset the bottom-up approach realised through that concordat. Such legislation, specifically affecting councils in England, would be subject to the 'English votes for English laws' (EVEL) process, introduced in October 2015 as an amendment to House of Commons Standing Order 83.<sup>148</sup> This provides that, where the Speaker of the House identifies a Bill (or part of a Bill) that relates only to England<sup>149</sup> and concerns an area of policy equivalent to devolved matters in other parts of the UK, the MPs representing English constituencies discuss and vote on the Bill (or its relevant parts) in a Legislative Grand Committee. Their consent is required before the Bill, or English-specific provisions at least, can be enacted.<sup>150</sup> This extra level of legislative scrutiny is not an insignificant

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<sup>148</sup> See: House of Commons *Standing Orders: Public Business 2017* HC 4 (London: House of Commons, 2017), para. 83J.

<sup>149</sup> The procedure also applies in respect of Bills that apply only to England and Wales.

<sup>150</sup> Where consent is withheld, the Bill can return to the House for amendment. If it is still withheld, the Bill will go no further. See for further explanation: M Kenny and D Gover 'The triumph of EVEL:

constitutional hurdle and would provide a further measure of constitutional protection for local government reform.

The EVEL process notwithstanding, however, we now consider two possible ways in which an Act might be protected from easy repeal. The first involves measures offering, what Elliott terms, contingent entrenchment.<sup>151</sup> This might require, for instance, a two-thirds majority in both Houses of Parliament before that Act be altered or repealed. A measure along these lines was proposed by the Political and Constitutional Reform Select Committee in its consultation for a written UK Constitution. The Committee proposed that '[t]he freedoms and duties of local government in England ... be defined in an Independent Local Government Act. Such an Act may only be amended with the agreement of two-thirds of the members of each House of Parliament, and of the majority of people voting in a referendum'.<sup>152</sup> Requiring more than a simple majority in respect of such an Act would ensure the need for cross-party support to repeal or alter legislation providing a legal framework for a bottom-up approach, meaning a government would find it more difficult to impose centralist reforms on councils.

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What next for the English Question?' *The Constitution Unit*, UCL October 2015, available at:

<https://constitution-unit.com/2015/10/23/the-triumph-of-evel-what-next-for-the-english-question/>

(accessed on 19 September 2017).

<sup>151</sup> See House of Commons Political and Constitutional Reform Committee *Constitutional implications of the Government's draft Scotland clauses* HC 1022 (London: HMSO, 2015) para 36, citing DSB01 (written evidence submitted by Dr. Mark Elliott). Contingent entrenchment is here defined as provisions 'stipulating certain preconditions for their abolition, such as "a special majority in the UK Parliament"' (see para 36, citing DSB01).

<sup>152</sup> House of Commons Political and Constitutional Reform Select Committee *Consultation on A New Magna Carta?* HC 599 (London: HMSO, 2015) p 30.

An alternative form of contingent entrenchment was also proposed in the Political and Constitutional Reform Select Committee's 2013 report, which suggested amendment of 'section 2(1) of the Parliament Act 1911 to ensure that the consent of the Lords ... [be] required for any Bills that ... [alter] the "powers, functions or structure of local government"'.<sup>153</sup> The rationale here would be to set in place a 'lock', making it harder for the House of Commons – and thus the Government – to influence local matters, without wider parliamentary consent. Himsworth rightly questions, though, whether it is 'constitutionally intelligent ... to place the duty of securing local autonomy and local democracy on a legislative chamber which is itself unelected'.<sup>154</sup> Moreover, and in respect of both these proposed examples, neither requiring a two-third majority in both House or the express consent of the House of Lords takes the focus away from the centre, especially when we consider questions of a politicised House of Lords and the potential for future reform.

A second way in which an Act might protect this legal framework for a bottom-up approach could be through exclusion of implied repeal. Whilst this would not completely prevent revocation of such legislation, it would at least require explicit acknowledgement of the Act's repeal or alteration and, as a result, a degree of *political* entrenchment. The oft cited words of Laws LJ in *Thoburn v Sunderland City Council*<sup>155</sup> show that certain constitutional statutes

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<sup>153</sup> Political and Constitutional Reform Select Committee, above note 118, p 33.

<sup>154</sup> Himsworth, above n 119, at 706.

<sup>155</sup> [2003] QB 151. Laws LJ stated: 'We should recognise a hierarchy of Acts ... 'ordinary' statutes and 'constitutional' statutes. ...[A] constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope

are immune from implied repeal and to the European Communities Act 1972, Human Rights Act 1998 and Devolution Acts one could add any future legislation protecting a bottom-up approach to local government. Indeed, even outside Laws LJ's category, the Localism Act 2011 provides an example of a provision protected from implied repeal. As Varney explains, section 2 of the Act states that should Parliament 'choose to restrict the powers of local authorities after the coming into force of the [Localism] Act ... s. 2(4) requires that ... it do so expressly'.<sup>156</sup> This 'appears to ... exclude the operation of ... implied repeal from the realm of local authority powers ... [offering] a degree of what might be termed constitutional protection to the new power of general competence'.<sup>157</sup> Protection from implied repeal, therefore, whilst not necessarily placing legislation beyond the ordinary processes of Parliament, would at least ensure a need for express intention to change an Act setting out the legal framework for a bottom-up approach, thus offering a degree of protection to the central-local relationship. Though the UK's constitutional arrangements mean that opportunities for contingent entrenchment are limited, therefore, this section has explored how political and legal measures might combine to recognise and set out a bottom-up approach to localism, rebalancing the central-local relationship and offering councils greater protection from the centralist tendencies of Whitehall.

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of what we would now regard as fundamental constitutional rights ... Ordinary statutes may be impliedly repealed. Constitutional statutes may not' (at 186). Also see *Miller*, above n 135, paras 66-67.

<sup>156</sup> Varney, above n 24, p 337.

<sup>157</sup> *Ibid*, p 337.

#### 4. CONCLUDING REMARKS

Localism in England is in need of fundamental change. Whilst recent governments have made attempts to decentralise, numerous factors have conspired to prevent their full realisation. Chief amongst these is the persistence of a top-down approach, evidenced by provisions and policies that ensure Whitehall retains an overriding say in the way councils fulfil their functions and exercise local powers. Critical of this centralist culture, this article has explored the case for a bottom-up approach to localism. It has outlined the way in which political and legal mechanisms might combine to rebalance the central-local relationship, protecting potentially more empowered councils from Whitehall's centralist tendencies. Whilst this article has explained how existing constitutional arrangements might establish and accommodate a bottom-up approach to localism, however, it is equally mindful of factors beyond the readjustment of the political and constitutional landscape within which councils operate. It was noted, above, that the success of the 1998 devolution settlements has, in no small part, been due to a culture shift in Westminster. The extent to which any such shift might be observed with regards to local government is a matter for the politicians themselves. Only if those working within government respect the role that councils play in the constitutional framework can local government really begin to exercise the powers and responsibilities that have long been intended for local use and innovation.