

# Local government in England: do we comply with the European Charter of Local Self-Government?

*Analysis and report by Jeremy Smith, May 2013*

## PART 1 - Introduction

*“There are plenty of causes for pessimism in the world; but the outlook in English local government is not amongst them. An unlimited vista of future usefulness and expansion stretches before us. We can look forward to the coming century in the most cheerful sense of the term.*

*Whatever the future may hold for our economic system, local government is likely to remain firmly established as the most effective instrument of social welfare in our national life. Adherents of all the major parties are agreed in recognizing the fundamental value of our municipal institutions, and this unity of opinion is of far greater moment than the temporary party conflicts about particular questions...”* Professor W.A. Robson, “A Century of Municipal Progress, 1835 to 1935”.

*“The Government believes that it is time for a fundamental shift of power from Westminster to people. We will promote decentralisation and democratic engagement, and we will end the era of top-down government by giving new powers to local councils, communities, neighbourhoods and individuals.”* The Prime Minister and Deputy Prime Minister, “The Coalition: Our Programme for Government Agreement”, 2010

English local government is experiencing great change and tough challenges. On the one hand, the concept of Localism has gained ground, and in important respects local governments have more legal scope for action than for many years. Yet on the other hand, the financing of local government has been reduced since 2010 by a highly significant margin, and further reductions are to be anticipated. Overall, detailed regulation of local government remains high, even if the most intrusive forms of top-down inspection and “assessment” have been removed. It is not surprising therefore that public debate is beginning to develop into the future capacity and roles of individual local governments<sup>1</sup>, and from this to the position and status of democratic local government as a systemic whole.

I am asked by the Local Government Association to carry out an independent analysis of English local government’s compliance with the European Charter of Local Self-Government, a formal convention of the Council of Europe (CoE). Within its mandate, the CoE’s Congress of Local and Regional

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<sup>1</sup> I frequently use the term ‘local governments’ rather than ‘local authorities’ precisely to underline the governmental role they should play in a constitutional system based significantly on the principles of subsidiarity and local self-government, rather than being simply local administrators of the decisions of central government.

Authorities undertakes as part of its formal terms of reference a programme of visits and reports whose principal purpose is to monitor the commitments undertaken by Member States of the Council of Europe (CoE) who have signed and ratified the Charter. The first such visit since 1998 is due at the end of May 2013, and it is intended that my analysis should assist the both the LGA and the visiting delegation in relation to their work. I hope it may also be of relevance and interest to central government - who will undoubtedly be invited to meet the Congress and delegation and give their perspective - and perhaps to a wider interested audience.

## **Background to the Charter**

The UK government signed the Council of Europe's Charter of Local Self-Government in June 1997, and the Charter was ratified by the UK (with commendable speed) in 1998. Therefore successive UK governments have for the last 15 years been formally "bound" (the word used in Article 1) to respect its terms and implement its requirements.

The Charter was itself the culmination of a long process – since the end of World War 2 - of refining and lobbying for a clear, broad, official framework setting out the principles of local self-government which all modern democratic European states should be committed to and apply. Far from being a "top-down" imposition from distant European authorities, its principles really do come from "the base" of Europe's localities.

In 1953, the Council of European Municipalities had adopted the first Charter of Municipal Liberties, which contained the seeds of many of the provisions of the future European Charter. In 1968, the Standing Conference of Local and Regional Authorities (now the Congress) of the CoE adopted a "Declaration of Principles on Local Autonomy"<sup>2</sup>, and later drew up a more formal text for adoption by governments. The Conference's draft – which had the strong input of UK elected members – was developed (and to some extent qualified) further by a group of ministerial experts. Their draft was approved by the Conference of European Local Government Ministers in 1984, and formally adopted as a Convention by the CoE's Committee of Ministers in June 1985. It was opened for signature by the Member States of the Council of Europe on 15 October 1985, and came into force in September 1988, once a 4<sup>th</sup> Member State had signed and ratified. By the time the UK signed, it had already been signed and ratified by around 30 countries.

## **The broader impact of the Charter**

Today, the Council of Europe – which the UK played a vital role in establishing after World War 2 - has broadened far beyond its original geographical scope (mainly western Europe) and now has 47 countries in membership – including all EU countries, but also Russia, Ukraine, and the countries of former Yugoslavia and the Caucasus. Only Belarus is still 'absent'.

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<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=329068&SecMode=1&DocId=634004&Usage=2>

From 1989 onwards, the political division of Europe which had endured throughout the Cold War came to a rapid end; most states from central, eastern and later south-eastern Europe began a process of democratic and structural reforms – in which the Council of Europe played a crucial role. Attaining membership of the Council of Europe was seen by them as an important international recognition of progress in building a functioning modern democracy.

As a condition of joining the CoE, the new member states were required to sign just two formal conventions – the Convention on Human Rights, and the Charter of Local Self-Government. The Charter in fact played a far more important developmental role than many in British political circles realise. It has also influenced the political environment in favour of legal and constitutional change in ‘older’ member states in favour of subsidiarity and stronger local self-government.

We may also note that since 2009 the EU Treaties - for the first time - include direct reference to local self-government. Article 4.2 of the Treaty on European Union provides:

“The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”.

Today, the European Charter of Local Self-Government has been signed and ratified by 46 out of 47 Member States of the CoE – the only one not to do so yet is the tiny statelet of San Marino, which is understandable!<sup>3</sup>

This means that the principles laid down in the Charter have become accepted universally across virtually the whole European continent. Moreover, the principle of local self-government is written into a majority of national Constitutions, often at some length.

All of the larger-population (over 30 million) Member States of the EU recognize local self-government in their Constitutions – except of course the UK which has no single written Constitution. Annex 1 to this report sets out relevant extracts from the Constitutions of Germany, France, Italy, Spain and Poland. The Constitution of Poland indeed covers almost all the Charter’s provisions in a very positive way, and merits wider international attention than it has received.

### **The Charter and the UK**

The UK was rather slow to sign up to the Charter, largely on the ground that local government was not seen by the then government as an issue for international standard-setting. (A House of Lords Select Committee on central-local relations had however in 1996 recommended signing the Charter). This non-participation was however widely seen by other CoE members as a symbol of UK isolationism; certainly the final decision to sign and ratify was well-received within the CoE, and also helped domestically to some extent in the relations between central government and the newly-formed LGA.

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<sup>3</sup> But since writing this I hear that even San Marino may sign.

Moreover, while the Charter allows States to sign up to only a certain proportion of its provisions, the UK government in signing accepted to apply all of the Charter's provisions for England, Wales and Scotland, which was also seen as positive. Its application to Northern Ireland was however excluded, as its local authorities at that time had only modest competences; and all parish and town councils are still excluded.

The Congress of Local and Regional Authorities in 1998 undertook a Charter-monitoring visit to the UK which was timed to coincide with the Charter coming into effect. The rapporteurs found that on most points, the UK appeared to comply with the Charter – but there were some important exceptions. The formal Recommendations from the Congress in May 1998, in the light of the visit, included:

- To establish a legal framework giving local government a clear basis and general competence for the benefit of its citizens and other inhabitants, including the issue of community leadership;
- To increase seriously local government's financial capacities by developing a much higher share of 'own income' as compared to State grants, and by abolishing practices such as rate-capping, as well as by localising the business rate;
- To give local authorities greater accountability towards citizens;
- To reduce the power of outside bodies on local government management in fields such as 'value for money' or 'best value';
- To ensure that elected mayors/councillors etc. who have to work full-time should be able to receive a decent income from their activity;
- To establish that the principles accepted by the UK within the European Charter should be incorporated in domestic law and considered as binding by the courts.

Back in 2002, I undertook a brief review of the extent of the UK's compliance with the Charter<sup>4</sup> and likewise concluded that in many respects, we were fully in line with its provisions – but in some important areas, we either were not in compliance, or there was a risk of being in breach of its terms.

For a range of reasons, the Charter was for several years not much used or referred to as a point of reference or focus for public political debate on central-local relations, or for testing the state and degree of local self-government. However, that has changed in more recent years, in particular as regards debate over whether to recognize the "constitutional" status of local government. This has at least partly resulted from the consequences of devolution (or decentralisation) to the nations of the UK other than England.

### **Select Committees, the European Charter and local self-government**

In May 2009, the House of Commons Communities and Local Government Committee published its "Report on the Balance of Power: Central and Local Government"<sup>5</sup>. The Committee advocated, inter

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<sup>4</sup> Published in Journal of Local Government Law, Vol.5 Issue 5 p.90

<sup>5</sup> <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcomloc/33/33i.pdf>

alia, “further cultural change within central government... towards a more decentralised balance of power structure”. For present purposes, the most important recommendation was this:

“That the Government introduces ‘constitutional’ legislation that places the European Charter of Local Self-Government on a statutory basis”.

In addition, there should be a Joint Committee of both Houses of Parliament to oversee compliance with this “constitutional settlement”.

For the record, I gave evidence to this Committee which mainly concerned compliance with the Charter, including this point (which I felt was more practicable than incorporating the Charter as such):

“Although we have no easy means in UK constitutional practice of entrenching rights etc., we have a long history of adopting legislation which everyone knows is “for the long run” and has a certain constitutional value – and not to be part of the ordinary cut and thrust of day to day party politics. It cannot be a difficult task, in principle, to reach agreement between all of the major political parties, with the LGA..., on a set of principles that define modern local self-government. And if all agree, it provides a reasonably strong guarantee that, for years to come, the rules and spirit will be protected. This would need, moreover, to be accompanied by a special oversight body – perhaps made up of members of both Houses of Parliament and senior local government representatives...”<sup>6</sup>

In January 2013, the House of Commons Political and Constitutional Reform Committee published its report on a similar theme, “Prospects for codifying the relationship between central and local government.”<sup>7</sup> The Committee wants to encourage central government to

“examine the possibilities of a stronger constitutional status for local government, through an entrenched statutory code, or similar proposal”.

To this end, it has – with the assistance of an academic expert – drawn up a Code (comprising 10 articles) for central and local government aiming to

“prompt Government to start a serious national dialogue, with a timetable, with the intention of discussing and agreeing its own entrenched statutory code. This will continue the direction of recent reforms and give clear and irrevocable power to local government in England”.

The same Committee has even more recently (March 2013) published a further report, “Do we need a constitutional convention for the UK?”<sup>8</sup> in which it examines the series of constitutional or quasi-constitutional changes in the UK, including devolution, and again raises the issue of further

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<sup>6</sup> Available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcomloc/33/33we01.htm>

<sup>7</sup> <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpolcon/656/656.pdf>

<sup>8</sup> <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpolcon/371/37102.htm>

devolution of powers to local government as a potential means of solving the ‘English question’. The report quotes the LGA Chairman, Sir Merrick Cockell<sup>9</sup>:

“It is time, not to break up the system or head in the direction of an English Parliament or something like that, but to re-craft a grown-up relationship with local government.”

The Local Government Association, for its part, has engaged in a consultation process with its membership, on an all-party basis, on the Select Committee’s draft Code, looking to promote a more “independent local government”. In its “next steps” document<sup>10</sup>, the LGA argued in favour of an enforceable legal document via an Act of Parliament.

The particular elements highlighted by the LGA for such a law are:

- Full retention by local government of uncapped, locally-decided council tax and business rates
- Entrenching local accountability by removing many of central government’s supervisory powers
- Removing central government’s and Parliament’s power to decide councils’ boundaries, structures and governance models
- Restating the general power of competence and extending its principles, by making it a default position that local government should have the power to provide any local public service not explicitly reserved to another body
- Entrenching local government’s legal position (as referred to above)

The LGA has drawn up a draft Local Autonomy Bill which seeks to put these points into more ‘legislative’ language.

The Government has just published its response to the Political and Constitutional Reform Select Committee’s January Report, in which it states<sup>11</sup>:

“The Government’s approach is necessarily incremental. But we believe this provides a more effective means to deliver reforms rather than seeking to establish a more rigid, constitutional blueprint through a statutory code.... Regardless of the merits of a statutory code, the Government does not believe that the case has been made for any amendment to the Parliament Act or for treating legislation affecting local government differently from other statute.”

I return to this issue in the discussion on Article 2 of the Charter.

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<sup>9</sup> See paragraph 65 of the Report

<sup>10</sup> [http://www.local.gov.uk/c/document\\_library/get\\_file?uuid=362c4097-661d-4ce3-8b2e-6ebc2572e951&groupId=10171](http://www.local.gov.uk/c/document_library/get_file?uuid=362c4097-661d-4ce3-8b2e-6ebc2572e951&groupId=10171)

<sup>11</sup> <https://www.gov.uk/government/publications/government-response-the-prospects-for-codifying-the-relationship-between-central-and-local-government> at Paragraph 17

## **The Heseltine Report**

Historically, local governments have not only been service providers or commissioners, or regulators, but have played powerful roles in the UK's economic development. In his report "No stone unturned"<sup>12</sup>, Lord Heseltine added his voice to the calls for a major rebalancing of the power and competences relationship between central and local government to enable this economic role to be performed more fully in today's circumstances. In his words:

"2.4 With central government reserving for itself the power to make the vast majority of economic decisions – creating itself as a functional monopoly – local authorities have been relegated to service providers. To make matters worse, as Whitehall has taken more powers so its distrust of local decision makers has increased. At the first sign of trouble, further powers are wrested back to the centre. At the same time – and I would say as a result – the involvement of local business people in the governance of their communities has dwindled, and their energy and innovation has been lost. The local economic leadership that drove the UK to the forefront of the world economy has disappeared.

2.5 Besides neutering local leadership, the monopoly of Whitehall is dysfunctional on two counts. First, too many decisions are taken in London without a real understanding of the particular, and differing, circumstances of the communities affected. And second, with responsibilities divided up between policy departments, no one in government is tasked to look holistically at the full range of issues facing a particular area."

The government has responded positively in some important respects to Lord Heseltine's report, as it relates to the local government role in promoting economic development. Its response to the Political and Constitutional Reform Committee Report (see above) usefully summarises some of its initiatives in relation to localism and economic development, including progress on City Deals. This refers to "powers and levers negotiated as part of City Deals for core cities" and gives several examples.

The word "negotiated" is, however, important to note, and indicative of the overall philosophy in relation to major local economic development. It means that under English decentralisation to date, essential powers and resources are still granted to local governments, or "earned" by them, on a case by case basis by central government through negotiation etc., rather than being automatically located as the responsibility of the local governments and their local business and civil society partners.

### **English local government and the Charter - some observations**

In assessing the degree of UK (and specifically English) compliance with the Charter, we should bear in mind that our local governments differ from all others in Europe (and indeed North America) in one important respect – size. Their average population – and in many cases their geographical scope

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<sup>12</sup> <http://www.bis.gov.uk/assets/biscore/corporate/docs/n/12-1213-no-stone-unturned-in-pursuit-of-growth>

– is far larger than elsewhere. The average UK local authority has over 150,000 inhabitants, compared to an average of less than 20,000 in most countries. France, which has a population almost the same as the UK, still has 100,000 communes, though for most service delivery, they combine into groupings. And when Denmark a few years ago radically reformed its system of local government, reducing the number of local governments by two-thirds, it ended up with over 90 for a population of 5 million – the same as Scotland which has just 33 local authorities. (Of course, if one were to take parish and town councils into account, the UK would look far more similar to continental systems).

This means, amongst other things, that the scale of local authorities being on average much greater, and their number fewer, central government has had an increased focus on performance and outcomes in specific authorities, not just in aggregate terms, and a greater propensity to see it as its task to intervene. This also reflects one side of our (contradictory) historical tradition of local government, which combines a strong sense of municipal self-government, enterprise and sense of local identity, with a more ‘instrumentalist’ perspective of local authorities as, in effect, akin to administrators of central government policies, or at least as bodies that must be controlled and hedged in by detailed prescriptive rules.

The second important point to note is that the Charter focuses on the relatively autonomous role of the local government – as democratic representative of local citizens - separately from other public authorities operating on the ground in the localities. The more recent approach in England and the UK has been on the issue of coordination and even sharing tasks and budgets between all the local “players” including the local authority. This makes it more complex to analyse compliance with some parts of the Charter when it comes to issues like Community Budgets and Total Place strategies, for example, where local governments are combining with other organisations to achieve results together. We may surmise, however, that faced also with increasing financial and service pressures, this English experience will become of growing interest and relevance to local governments elsewhere. The Charter needs to be interpreted in line with such developments in the way local government works with and in the interests of local people.

## Looking ahead

The Government’s response to the Political and Constitutional Reform Committee Report argues that “the Government’s approach [to local government] is necessarily incremental.” And it concludes:

“Reforming one of the most centralised countries in the western world requires an ongoing commitment of political will and attention.”<sup>13</sup>

I hope this review of how, and how far, the system of English local government complies with the European Charter of Local Self-Government may be a useful contribution in this unfolding process.

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<sup>13</sup> <https://www.gov.uk/government/publications/government-response-the-prospects-for-codifying-the-relationship-between-central-and-local-government> at paragraph 32

## PART 2 - ANALYSING COMPLIANCE WITH THE CHARTER

The Charter comprises the following:

- Preamble,
- Article 1, which states that the signatory states “undertake to consider themselves bound by the following articles in the manner and to the extent prescribed in Article 12”,
- Part I, which in ten Articles (Articles 2 – 11) sets out the principles of local self-government which the signatory states commit to uphold,
- Part II, which (Articles 12 – 14) permits signatory states to decide not to be bound by every Article or Paragraph, and
- Part III, which (Articles 15 – 18) deals with formal issues of signing, ratification, denunciation, entry into force etc.

There is no specific provision within the Charter for reporting or monitoring by signatory states, but as stated in the Introduction, the Congress of Local and Regional Authorities has been given the function within the CoE of conducting monitoring missions followed by reports.

This Part of my report refers briefly to the Preamble, and looks in particular and in some detail at Part I of the Charter, taking each Article and Sub-Article point by point. Since the UK signed up to all ten Articles in Part I, there is no need to look further at Parts II or III in this context.

### The Preamble

The European Charter of Local Self-Government begins, as is traditional for international conventions, with a short Preamble. This does not have legal effect, but expresses the shared intentions of the initiators and signatories. The full text of the Charter is at **Annex 1** to this report, including the Preamble, whose main points may be summarised as follows:

- the aim of the Council of Europe is to achieve a greater unity between its members to safeguard and realise the ideals and principles which are their common heritage;
- Local authorities are one of the main foundations of any democratic regime;
- the right of citizens to participate in public affairs is one of the democratic principles shared by all Member States, and this right can be most directly exercised at local level;
- the existence of local authorities with real responsibilities can provide an administration which is both effective and close to the citizen;
- safeguarding and reinforcing local self-government is an important contribution to the construction of a Europe based on principles of democracy and decentralisation of power;
- this entails the existence of local authorities with democratic decision-making bodies and possessing a wide degree of autonomy with regard to their responsibilities, the means by which those responsibilities are exercised, and the resources required for their fulfilment.

## Article 2 – Constitutional and legal foundation for local self-government

**“The principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution.”**

This Article is of major importance in any analysis or assessment of UK compliance with the Charter. It has often been pointed out that many European states – and certainly all the larger ones – have local self-government written into their Constitutions. Extracts from the Constitutions of larger EU states are set out in **Annex 2**. As another example, the Swedish Instrument of Government begins as follows in a simple and explicit way:

### Article 1

(1) All public power in Sweden proceeds from the people.

(2) Swedish democracy is founded on freedom of opinion and on universal and equal suffrage. It shall be realized through a representative and parliamentary polity and through local self-government.

Since the UK has no single written Constitution, the issue is whether the *principle* of local self-government is recognized in *legislation*. In my 2002 review on compliance with the Charter, I stated that as there is no clear recognition of the principle of local self-government in our legislation, “the UK is currently in breach of this Article”. The 1998 Congress visiting team in their report hoped (para. 30) that “steps could be taken in order to comply with the spirit of Article 2... by granting this principle a formal legal and quasi-constitutional recognition, perhaps in the future Local Government Bill.”

The UK government has always argued that if one looks at the totality of local government legislation, as well as our long history of elected local government, in reality the UK complies with the Charter, including this Article. In the Explanatory Memorandum on the Charter in 1997/8<sup>14</sup>, the then Minister for Local Government (Ms Armstrong) stated that the standards prescribed in the Charter “are compatible with the existing and developing system of local government in the United Kingdom”, and that “no amendments to United Kingdom law are necessary to ensure compliance with the Charter”. The Memorandum then added this important point concerning what it termed *the degree of compliance*:

“It is the government’s intention that any future legislation affecting local government should further strengthen the degree of compliance with aspects of the Charter and ensure continued compliance with its provisions.”

On 2<sup>nd</sup> March 2009, the then Secretary of State (Ms Blears) wrote to the Chair of the CLG Select Committee stating, in respect of Article 2,

“In the UK the principle of local self-government is recognised in the whole corpus of domestic legislation including, particularly, the Local Government Acts, that make provision

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<sup>14</sup> Available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcomloc/33/33we45.htm>

for the powers and procedures of local government which are entirely compatible with the Charter. There is no need for taking the exceptional step – as suggested by some – of giving this principle specific constitutional recognition or providing a comprehensive statement of the Charter’s principles in an Act of Parliament”.<sup>15</sup>

This is clear, but with respect does not address the actual wording of the Charter, which is not simply about having a statutory system of elected local authorities, but about recognising the principle of local self-government in a clear way. To be referred to the whole “corpus” of local government legislation – which is almost universally seen as dense, detailed and quite prescriptive – is not a satisfactory response to the question – where and how is the principle explicitly recognised in our legislation?

The ordinary definition of “principle” is this:

“A fundamental truth or proposition that serves as the foundation for a system of belief or behaviour or for a chain of reasoning”

For example, the principles of criminal justice include that the accused is presumed innocent until proven guilty, and that the judge should be independent.

Even in statute, government knows how to express simple principles simply. In the Localism Act, local governments must include a set of “principles” in their Codes of Conduct. These include integrity, objectivity, accountability, openness, and leadership. While the principles of local self-government may each require more than a single word to encapsulate them, we can safely conclude that setting them out in explicit terms is not in its nature complex.

I have re-looked at each of the main Acts of Parliament related to local government since the Local Government Act 1972 and – not surprisingly given our tradition of Parliamentary drafting – can find nothing in the nature of an explicit recognition of a “principle” of local self-government. To the question I posed above – where and how is the principle explicitly recognised in our legislation - the only answer I can find is: nowhere.

From a simple interpretation of the wording used in the Charter, I therefore conclude that the UK is not in compliance with Article 2.

But if nonetheless one takes the line of the previous government, that the UK is in some way implicitly in compliance with Article 2 as set out in the passages cited above, it remains evident that more could be done to “further strengthen the degree of compliance” with this aspect of the Charter by making recognition of local self-government explicit.

The question follows, what should be done to remedy the position and ensure that the UK complies, or more fully complies, with Article 2? It is not the task of this report to answer this with precision,

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<sup>15</sup> Also available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcomloc/33/33we45.htm>

but it may be helpful to set out some possibilities. Some recent well-publicized proposals have been referred to in the Introduction, and they include:

- Legislation to incorporate the European Charter into English domestic law, as recommended by the CLG Select Committee in its report on “The Balance of Power” (2009)
- Legislation to provide a Code of Guidance for the central-local relations, along the lines proposed by the Political and Constitutional Reform Select Committee in its report “Prospects for codifying the Relationship between Central and Local Government), published in January 2013”
- Enactment of specific legislation along the lines of the LGA’s draft Local Autonomy Bill

Each of these would ensure effective and explicit compliance with Article 2, and give a much stronger “quasi-constitutional” role to local government. I do not seek to discuss here the issues and difficulties (or pros and cons) of constitutional legislative entrenchment; the Government (in its response to the Political and Constitutional Reform Committee Report on the prospects for codifying the relationship between central and local government) has very recently expressed its opposition to such constitutional “entrenchment”:

“Regardless of the merits of a statutory code, the Government does not believe that the case has been made for any amendment to the Parliament Act or for treating legislation affecting local government differently from other statute.” (Paragraph 29).

The key issue at this point, in relation to Article 2, is to ensure that the adopted solution involves agreement on the specific key principles of local self-government which are clearly set out, in relatively simple terms, and have the broad political support of all the main political parties - and which are thus seen as being outside the day-to-day party political debates and differences.

We know that some legislation is effectively seen as either permanent, or at least as “there for the long run”, and as having constitutional significance or effect. The Parliament Acts, the Acts providing for decolonisation, even the more recent devolution Acts for Scotland, Wales and Northern Ireland, are examples of how this (quasi-)constitutional recognition occurs in a variety of domains.

Therefore, if government is presently not minded to accept any of the more detailed legislative code solutions set out above, for reasons it has recently expressed - the main principles of or taken from the Charter could be set out in more general terms and included either directly in legislation, or in a Statement of Principles which has statutory backing.

Thus, and simply by way of example, primary legislation could affirm (without aiming at formal entrenchment):

“(1) The principle of local self-government is recognized [as a matter of constitutional significance] in England, and shall be respected in relation to future legislation in relation to local authorities.

(2) The Statement of Principles of Local Self-Government attached to this Act sets out the more specific principles which, taken together, comprise the overall principle of local self-government under (1) above.

(3) The Secretary of State shall, in consultation and coordination with associations representative of local government, review existing legislation, with a view to repealing or amending such provisions as are not in accordance with the specific principles set out in the Code.”

I have used the term “constitutional significance” in (1) above (but in square brackets as the phrase could be left out) since it has been used in very recent local government legislation, namely Section 6(2) of the Localism Act 2011, which deals with the powers of the Secretary of State in relation to the general power of competence. There may be other ways of referring to constitutional importance or effect, but this phrase has the merit of recent precedent in local government law without necessarily meaning entrenchment.

Some (including the Select Committees cited earlier) have argued in addition for new forms of Parliamentary oversight of the way that current or proposed legislation impacts on the principles of local self-government as recognized in or under legislation. This is an important but separate matter to consider, and falls outside the remit of this report.

## Article 3 – Concept of local self-government

***1. Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.***

By comparison with previous eras, in some respects local government in England has fewer powers and responsibilities than it once had. Its role in education, for example, though still residually existing, is far less than it once was. Going further back, the 1945 government nationalised some functions (e.g. municipal energy utilities), and water was later privatised. More recently, there was major public debate over whether the use of quangos to provide locally-based services was excessive and in effect by-passed or removed functions from elected local governments.

Notwithstanding this, in my assessment, local governments in England continue to regulate and manage a substantial share of public affairs in the interests of their local population. I reach this conclusion whether one looks at England on a stand-alone basis, or by comparison with other European countries. Of course there are European states where local governments have a greater range of functions – such as health in Scandinavian countries – but there are numerous countries with no more or fewer than in England. Given the responsibilities for adult and child care, environmental services, housing, planning, libraries, and so on, it is fair to conclude that English local government currently meets the test of “substantiality”.

It is worth however noting the use of the term “under their own responsibility”. While English local government has undoubtedly a wide degree of discretion in many or most services, it remains the case that it is weighed down with many limitations, conditions, and caveats. These are expressed in terms of statutory duties which often prescribe in great detail how tasks are to be performed or not, what is permitted or not etc. The Secretary of State has often detailed legal powers of intervention.

This is still reflected in a political culture in which - notwithstanding the official philosophy of localism - central government (whether at political or civil servant level) see it as their role to influence or enforce the way local governments carry out their responsibilities. The issue of “waste collection – once or twice a week?” is a classic example. What and how local governments may or may not communicate in their news publications to citizens is another issue that has re-emerged.

Whilst this Article says “within the limits of the law”, it is evident that the limitations imposed by the law should not be so great or deep as to in effect negate the realisation of the principle set out in the Article.

Accordingly, and in line with the political philosophy of Localism, and with the last government’s commitment to “strengthen the degree of compliance with aspects of the Charter” (which I am confident will be shared by the current government) I would recommend that there be a review of existing statutory limitations and conditions imposed on local authorities, and the repeal of as many as cannot be proved to be of overriding necessity or value.

The final issue to raise here is that of Community Budgets and generally, the issue of integration of local place-based budgets and services with other local providers. The Charter does not deal with this in a direct sense, but the philosophy in this and other Articles is to ensure that wherever possible and effective, it is the democratic local authority that should have the primary role and broad discretion in undertaking responsibilities and managing services (see further under Article 4 below).

In sum, I conclude that English local government is currently in compliance with Article 3.1, but recommend – in the spirit of strengthening compliance on this point - that the extent and degree of statutory limitations on the discretion of local governments in carrying out their responsibilities be progressively reviewed and any that cannot be clearly justified be removed.

***2. This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute.***

Across Europe, there are many different forms of local democracy and electoral systems; moreover some countries have directly elected mayors or equivalent, with stronger or weaker powers, while others have a system based on committees of elected members, and so on. It would therefore not have been right or possible for the Charter to seek to prescribe any particular form.

Moreover, the Charter does not address the issue of whether choice of the form of local government (e.g. directly elected mayor, or indirectly elected Leader and Cabinet) should lie with national government and Parliaments through legislation, or be left (in whole or in part) to the choice of the local government or local communities, e.g. through local referenda.

English local government is made up of councils composed of members freely elected by secret ballot and with executive organs which are ultimately responsible to them. The Charter does not address the issue of the balance of responsibilities between the full council and the executive, and it could be argued that, in England today, the full council has insufficient control over the executive, i.e. it does not have an “executive organ” which is sufficiently responsible to it. However, the full council is still responsible in law for setting the budget; for agreeing the main policy direction; for deciding the constitutional framework of the council; and for scrutinising the executive in depth.

The law now provides for local referenda and for forms of direct citizen participation, so the last part of this Paragraph appears to be satisfactorily met.

I therefore conclude that English local government is in compliance with Article 3.2, but recommend (to ensure ongoing compliance with the spirit and letter of the Charter) that the degree and forms of responsibility of the executive, in its different formations, to the full council be subject to periodic review. The aim of this is to ensure that a positive balance is struck and maintained between effectiveness in decision-making and implementation, and genuine accountability of the executive to the full body of elected councillors.

## Article 4 – Scope of local self-government

***1. The basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute. However, this provision shall not prevent the attribution to local authorities of powers and responsibilities for specific purposes in accordance with the law.***

The general basic powers and responsibilities of English local authorities are provided for by or under statute. The second sentence of this Paragraph permits the attribution of specific powers to individual or groups of authorities, and this in my view means that bestowing ‘freedoms’ on some but not all authorities, for example on the grounds that they have demonstrated a track record of high performance in a field of activity, is in general permissible in terms of the Charter, provided that this is dealt with by statute and all councils in the group are dealt with equitably.

I conclude that English local government meets the requirements of Article 4.1

***2. Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority.***

When the UK signed and ratified the Charter in 1997/98, this provision was one which many observers (myself included) felt the UK did not comply with, notwithstanding the government’s view to the contrary. At the time, the only power to act for purposes beyond the defined statutory functions of local governments was under Section 137 of the Local Government Act, which provided a very small ‘capped’ additional spending power. The whole history of English local government, which was from the outset subject to the ultra vires doctrine, was contrary to the Charter’s philosophy that councils should be able to act on their own initiative in the interests of their community unless the law provides a specific prohibition or limitation.

In Section 2 of the Local Government Act 2000, the new power to promote the economic, social and environmental well-being of the community was introduced, and this undoubtedly went some significant way to meeting the point. However, few councils actually relied on this new power to act, and the courts disappointingly (but in line with their long tradition) took a narrow interpretation of the new power when deciding on the lawfulness of London councils setting up a mutual insurance scheme.

The position has been further improved, in a historically bold legal step which is to the credit of the present government, by Part 1 of the Localism Act 2011, which provides what is known as “the general power of competence”. This is defined as a power of local authorities “to do anything that individuals generally may do”, and the aim is clearly to give a very broad range of discretion to local authorities to act. The 2011 repeals (as to English local government) the “well-being” powers of the 2000 Act.

However, the clarity and simplicity of Section 1 of the 2011 Act, which provides the new “general power”, is somewhat diminished by a set of limitations and ‘glosses’ in Sections 2 to 6. Given the

novelty of the approach, this is perhaps to a degree understandable, but the detail risks importing the legal uncertainties that the main provision in Section 1 sets out to remove.

Moreover, notwithstanding the power in Section 5 for the Secretary of State “by order [to] make provision preventing local authorities from doing, in exercise of the general power, anything which is specified, or is of a description specified” is certainly very sweeping, as is the power in S.5(4) to make the exercise of the general power subject to conditions. These powers moreover can be targeted at individual authorities, as well as classes of authorities. Furthermore, the powers of the Secretary of State to remove barriers to the exercise of the general power by local authorities are themselves to some extent limited by the (curiously drafted) Section 6; yet his powers to make provision preventing local authorities from exercising the GPC are not so constrained.

My conclusion, on balance, is that the general power of competence, as provided in Part 1 of the Localism Act, and despite its restrictions imposed “within the limits of the law”, means that Article 4.2 is probably complied with in relation to England (but with some concern over the extent of ministerial reserve powers, below).

However, the general power of competence is still considerably burdened and circumscribed by the weight of historic conditions and regulation, which are continued into the new framework by Section 2(1) and (2). Moreover, the rather sweeping powers of the Secretary of State to make provision to remove or restrict the power from all, or a class of authorities, or even from a single authority, potentially could (if used in the wrong or disproportionate way) reduce the overall scope of the general power to a significant degree, and thus bring back into question the government’s compliance with Article 4.2.

It is greatly to be hoped, therefore, that the limitations in Part 1 of the Localism Act to the general power of competence (in particular the far-reaching reserve powers of the Secretary of State) will be seen as interim cautionary provisions, while the new framework settles down. It is quite clear that the degree of compliance with Article 4.2 could, in future, be enhanced, so that its spirit is more fully reflected, and doubts concerning full compliance resolved.

***3. Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.***

This provision is, in effect, an expression of the application of the principle of subsidiarity to local government. It can be compared with the EU’s later definition of subsidiarity in Article 5.3 of the Treaty on European Union, which now expressly covers local government:

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

In my view there are two aspects to this Paragraph – what one might call “vertical subsidiarity”, and what one might call “democratic subsidiarity”. By “vertical subsidiarity” one means the allocation of powers to the “lowest” governmental level, where “lowest” means closest to the citizen, i.e. in general local government. (I use the metaphor of “high/low” in this context not because I think it best reflects appropriate relationships, but because it is in most common use). This Paragraph therefore means that responsibilities should be allocated to the local level unless there are good reasons in terms of the type or scale of task or overall cost-effectiveness to retain it at central government level.

The issue of “democratic subsidiarity” relates to the specific role of local democracy as the basis of local government and governance. Even if there are other public or quasi-public local providers of services (the Quango issue, for example) the requirements of subsidiarity and of the Charter mean, in my view, that decentralisation of responsibilities must be to local governments unless there are overriding reasons to decentralise to another non-elected local-level body. The term “closest to the citizen” does not simply mean “working at local level” – there must be a real connection of *accountability* to citizens.

In reality, and this is not only in the UK, there are often relevant reasons why another public or publicly-funded local body (e.g. in the health or education service) is given functional responsibility rather than the local authority. But increasingly, the concept and reality of “whole place” Community Budgets<sup>16</sup>, and integration of services between providers more generally, means that the local government and other bodies are coming together, to ensure that resources are used to best effect in difficult economic times. The area of social care, for example, is of particular importance, where responsibilities have been shared between the NHS and local government, and where the service, demographic and financial pressures will grow for the foreseeable future.

In such cases, it is important to underline that – in preference and by virtue of the democratic mandate – it is the local government that should either have the lead responsibility, or have a wide degree of responsibility for and discretion in the policy- and decision-making, including in relation to the allocation, distribution and spending of the relevant resources.

In conclusion, I am certain that much more could be done to implement the principle of subsidiarity in a fuller way (both “vertical” and “democratic” subsidiarity, as I have called them). However I do not think one can decisively establish or conclude that the government is in breach of Article 4.3 in relation to England, given its rather general terminology, and noting the Article’s use of the term “in preference”.

Nonetheless, I recommend that the spirit of Article 4.3 could and should be kept much more in the forefront of public discussion and governmental thinking, when it comes to future decisions on who should be responsible for what in relation to public services.

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<sup>16</sup> Community Budgets are described by the Department for Communities and Local Government as “a new way for local public service providers to work together to meet local needs. Community Budgets allow providers of public services to share budgets, improving outcomes for local people and reducing duplication and waste”.

**4. Powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by another, central or regional, authority except as provided for by the law.**

In the broadest sense, “powers” are often shared between different types of governmental or public bodies. Thus, competences in relation to the environment, or public health, or economic development are all the responsibility of central and local government, as well as of other key public bodies (Environment Agency, NHS etc.). All of this is in the very nature of modern governance, where different levels of government and different agencies work together to solve problems in a given field. But I do not consider that this type of “shared competence” is what Article 4.4 is about.

The key issue here is that when legal powers or duties are given to local governments, they should not be limited or subject to detailed conditions. That is the natural meaning of “full and exclusive”. The Paragraph uses the word “normally”, which means that there may in a relatively small proportion of issues be a need to qualify the “fullness” of the powers so granted, in the public interest. So what is the position of English local government, in terms of the powers given to it?

We have already noted, in relation to the general power of competence, that it is limited by qualifications and residual powers of the Secretary of State to change the rules. Given the newness of the general power and its genuine in-principle breadth, one may consider this to be a temporary exception to what should be a general rule.

However, when one looks at the whole array of local government legislation, one cannot but be struck by the degree of regulation to which so many (one might say almost all) of its competences are subject. The LGA has estimated that the number of “duties” imposed on local government is far in excess of 1,000 (the Ministry, DCLG, estimated 1294 in 2011), and has called for many duties to be repealed. In fact, duties come in different forms, ranging from a broad statutory duty (e.g. to provide a comprehensive and efficient library service) – which in itself is not objectionable – to myriad detailed reporting requirements. But in addition to *duties*, there are even more *conditions* attached in many statutes. Even the Localism Act includes a significant number of both new duties on the “how” services are to be carried out, and conditions to which powers are made subject.

We may note too that local authorities have by law some important general responsibilities, whilst the actual “powers” to perform them have been substantially removed – for example in relation to schools where the large number of academies are now highly independent from their local authority. Yet the official educational inspectorate, OFSTED, intends to “inspect” how local authorities are performing their general duty in relation to improvement of education, notwithstanding the paucity of levers available by law to them. The LGA and SOLACE (professional organisation for local authority senior officers) have robustly opposed such a move.

There appears indeed to be a growing mismatch between the actual powers of local governments and the extent of accountability that OFSTED seeks to place upon them. See for another example OFSTED 2011/12 Annual Report page 16, headed “Is the leadership of local authorities good

enough?”<sup>17</sup>. Of course leadership should be exercised by local authorities in relation to all of their responsibilities, but this has to be placed within their true legal and financial context and capacity.

So looking at the first sentence of Article 4.4, the traditional way that statute so often provides for local authorities to be regulated in vast micro-detail means, in my view, that the test of “full and exclusive” is frequently not met, in the sense intended by the Charter’s plain wording. However, the second sentence says that powers given to local government “may not be undermined or limited by another, central or regional, authority except as provided for by the law.”

The whole basis of English local government is that it is regulated by law – more accurately, micro-regulated by law. “Undermined”<sup>18</sup> is an odd word to use here, but the text as a whole appears to allow for powers to be significantly restricted, provided this is duly done by law. The second sentence indeed is hard to reconcile with the first. The only regional government in England is the Greater London Authority, which does have powers of direction over the London boroughs in certain respects, but all provided by law.

To conclude: under the Charter powers should “normally” be full and exclusive; the degree of detailed prescription in legislation concerning local government, and especially the detailed duties and conditions laid down, are in my view out of line with the spirit of the general power of competence, and with the general ordinary meaning of local self-government.

However, due to the language of the second sentence, I do not feel able to conclude that the government is definitely in breach of Article 4.4 in respect of English local government, as the huge volume of restrictions on the powers given to local governments – and therefore to their fullness - is provided by the law.

I recommend that to reach a fuller and satisfactory degree of compliance with the Charter, a more fundamental re-appraisal of the degree of prescription in local government legislation be undertaken, with the aim of enhancing local government’s own responsibility and removing unnecessary burdens.

***5. Where powers are delegated to them by a central or regional authority, local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions.***

In general terms, there is not in the English local government constitutional or legal tradition a clear distinction made between local authorities’ “own powers”, which should normally be full and exclusive, and powers delegated to them by another level of government, as with the German Länder or Federal government. (There are some possible exceptions, e.g. when local authorities carry out highway works on behalf of government). Thus in my view the circumstances referred to in Article do not generally apply in a literal sense to English local government. Nonetheless, this Paragraph does underline the points made in my comments on Article 4.4 above. In general, the

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<sup>17</sup> <http://www.ofsted.gov.uk/resources/annualreport1112>

<sup>18</sup> The French text uses the term “mises en cause” which means “called into question” .

detailed legal regulation of English local government is excessive and counter to the overall spirit of the Charter which – after all – is a Charter of Local Self-Government.

I conclude that there is no breach of Article 4.5, as its provisions do not generally apply to our system of local government.

***6. Local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly.***

In general terms, the corpus of local government legislation applicable to England for the most part does provide for local authorities and their representative associations to be consulted on matters which concern them directly. This also includes consultation on key issues of local government finance (see below).

From my inquiry on this point, the issues that concern the Local Government Association in relation to consultation are not so much the existence of legal duties on central government to consult, but on the time allowed, i.e. the issue is around the words “in due time and in an appropriate way.”

The Cabinet Office in 2010 published its Guidance on Consultation Principles, which apply to all consultees, not just local government. These include, correctly and positively, that

“Engagement should begin early in policy development when the policy is still under consideration and views can genuinely be taken into account.”

It also states that:

“Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response. The amount of time required will depend on the nature and impact of the proposal (for example, the diversity of interested parties or the complexity of the issue, or even external events), and might typically vary between two and 12 weeks.... For a new and contentious policy, such as a new policy on nuclear energy, the full 12 weeks may still be appropriate. The capacity of the groups being consulted to respond should be taken into consideration.”

This means that on average the time for responding will be significantly shorter than under the Code issued by the last government in 2008, which on this point said:

“Under normal circumstances, consultations should last for a minimum of 12 weeks. This should be factored into project plans for policy development work. Allowing at least 12 weeks will help enhance the quality of the responses. This is because many organisations will want to consult the people they represent or work with before drafting a response to Government and to do so takes time.”

This last point is of importance to local governments and their representative associations, since it is usually essential that, as an essential part of a participative democracy - they consult the people they work with or represent. This is not an issue of “capacity”, but of democratic representativity.

One recent example of apparent non-compliance by government with its own 2010 Guidance timeframe relates to the recent consultation on “Protecting the independent press from unfair competition”. The time given for responses was 4 weeks, and took place during the local election period. Page 3 of the Guidance states:

“Consultation exercises should not generally be launched during local or national election periods. If there are exceptional circumstances where launching a consultation is considered absolutely essential (for example, for safeguarding public health) departments should seek advice from the Propriety and Ethics team in the Cabinet Office.”

I am not aware of any such exceptional circumstances, nor do I know whether the Propriety and Ethics team was contacted for advice. That said, it is hard to see why the Guidance was not followed in this case.

From the limited evidence available to me on this issue of “due time” to enable consultation to work fairly and effectively, I could not conclude that the government has to date acted in a systemic way in breach of Article 4.5.

However, the concerns expressed by the LGA and others about the risk of insufficient timeframes (i.e. for consultation with stakeholders/members) on some important issues, and the particular example cited above of apparent breach of Guidelines, merit consideration by government in order to ensure that (among other factors) consultation really does give due time for response, taking into account the time needed to obtain well-informed responses on the issue in question.

In conclusion, I recommend that the LGA monitor the time limits actually being given to local government, record any difficulties, and that government and LGA review the working of consultation on, say, an annual basis.

## Article 5 – Protection of local authority boundaries

*Changes in local authority boundaries shall not be made without prior consultation of the local communities concerned, possibly by means of a referendum where this is permitted by statute.*

In England, local governments and local communities are always, by law, consulted in relation to boundary changes. The Local Government Boundary Commission for England has responsibility for conducting reviews, and carries out public consultation at different stages of its work. Its functions, including that of consultation, are set out in the Local Government and Public Involvement in Health Act 2007.

The history of changes in the structure and boundaries of English local authorities has once again traditionally been centrally-driven and the 2007 Act maintains this tradition strongly. English local authorities, through the LGA, have more recently urged that decisions on boundary changes should be a matter for local councils to decide, based on recommendations of the Boundary Commission. This point is seen as an important one in terms of developing a more independent local government in England, and is strongly reflected in the LGA's draft Local Autonomy Bill, Clause 2.

Whether the initiator is central government or local government, or some combination, is very much a matter of political and democratic philosophy. Different European countries have adopted different practices in achieving boundary changes or mergers of municipalities.

However for my present purposes, Article 5 requires simply that local communities be consulted, and is silent on whether the process should emanate from central government (which in my view is the general implicit assumption of the article) or from one or more local councils.

I therefore conclude that the system of English local government in this regard is in compliance with the wording of Article 5.

## **Article 6 – Appropriate administrative structures and resources for the tasks of local authorities**

***1. Without prejudice to more general statutory provisions, local authorities shall be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management.***

Traditionally, English local government was able to decide on its own internal administrative structure – meaning its officer staffing structure - to a large extent without central government or other intervention, though there were statutory requirements in relation to certain post-holders.

In more recent times, with the advent of executive mayors, executive cabinets etc. the border-line between the executive roles of members and officers has become more permeable. There is no pure definition of “internal administrative structure” under this Article, so it is a matter of interpretation how far the term extends into the political executive domain. My view is that it is probably best seen as referring to the ability of the elected members of the council to determine the officer structure, including departmental or equivalent structures.

The acute and chronic financial pressures on English local government have been accompanied by both central government and peer pressure to organise shared services. Some government pressure has indeed been vigorously expressed. At present, that has not led to actual legal requirements, so the legal freedom to decide on officer structures has not been restricted. Moreover, Schedule 2 of the Localism Act provides a broader degree of choice to local governments to decide on their type of governance arrangements within which its executive and administrative arrangements are established.

I therefore conclude that the system of local government in England complies with Article 6.1

For the future, it is important that this basic element of local self-government continue to be respected.

***2. The conditions of service of local government employees shall be such as to permit the recruitment of high-quality staff on the basis of merit and competence; to this end adequate training opportunities, remuneration and career prospects shall be provided.***

Whilst issues of “adequacy” of training opportunities, remuneration (notably in the context of multi-year pay freezes) and career prospects are somewhat subjective, in my judgment English local government still meets these requirements at the basic level envisaged in Article 6.2. The issue of appointment on the basis of merit and competence has indeed for many years been written into law and is an obligation on local authorities.

I therefore conclude that the system of local government in England complies with Article 6.2.

## Article 7 – Conditions under which responsibilities at local level are exercised

### ***1. The conditions of office of local elected representatives shall provide for free exercise of their functions.***

The functions of local elected members in English local government have changed in recent years, with the diverse forms of governance and executive, and with the majority of members playing largely a scrutiny role (in addition to their role as ward representative etc.). But whilst the functions may have changed, there is in my view no serious legal or practical impediment, in the conditions of office, to the free exercise of their functions.

I therefore conclude that the system of local government in England complies with Article 7.1

### ***2. They shall allow for appropriate financial compensation for expenses incurred in the exercise of the office in question as well as, where appropriate, compensation for loss of earnings or remuneration for work done and corresponding social welfare protection.***

The law provides for councillors to receive an allowance for their role in their local authority (on average around £7000 per year) which broadly covers compensation for loss of earnings etc. so in general terms, the system of English local government meets the requirements set out. The reference to “corresponding social welfare provision” is not further defined. In recent years, elected councillors have had the right to join the local government pension scheme, but the present government has decided to put an end to this (without affecting accrued benefits). The argument put by the Minister (Mr Grant Shapps) in December 2012 was this:

“Ministers in this government take a fundamentally different view to the last administration. We do not believe that taxpayer-funded pensions are justified. Councillors are volunteers undertaking public service; they are not and should not be employees of the council dependent on the municipal payroll. They are not professional, full-time politicians, nor should they be encouraged to become so.”<sup>19</sup>

A different perspective was recently put by the Communities and Local Government Select Committee in its report “Councillors on the frontline” (January 2013)<sup>20</sup>, which argues that the present volunteer system means that councillors are to an excessive degree persons in retirement, which leads to an imbalance.

Councils in England are in effect – and perhaps increasingly – not only democratic bodies for their area, but equivalent in scale and turnover to quite large businesses. For many years, a small proportion of councillors in many authorities have committed themselves to full-time or substantial part-time work as office-holders; those holding executive positions in larger and more complex authorities are most likely to do so.

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<sup>19</sup> <https://www.gov.uk/government/speeches/local-government-pension-scheme>

<sup>20</sup> <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmcomloc/432/432.pdf>

I do not conclude that the withdrawal of the councillor pension scheme (save for a small number of elected mayors) itself constitutes a breach of Article 7.2. I would however recommend that the government reconsider its decision, at least for some classes of elected councillors holding office, where the expectation and reality involves a major continuing contribution in time and work (including governance), of an extent and responsibility comparable to employment or directorship.

***3. Any functions and activities which are deemed incompatible with the holding of local elective office shall be determined by statute or fundamental legal principles.***

The terms of this Paragraph are fully met under UK law as it applies to English local government, which is therefore in compliance with Article 7.3.

## Article 8 – Administrative supervision of local authorities' activities

***1. Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute.***

The issue of the extent and degree of administrative supervision of English local authorities has indeed been a key issue for many years. It is however the case that the powers to carry out such supervision have been laid down by or under statute, and this remains the case.

I therefore conclude that the terms of Article 8.1, taken alone, are complied with.

***2. Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.***

This Paragraph is based on the philosophy that central government sets the legal framework within which local governments work, but that the way services are delivered and responsibilities carried out is largely a local issue, with the accountability being between local electors and the local authority. The second sentence (referring to supervision relating to “expediency” which I interpret as meaning effectiveness) does not apply much in England as our system does not generally have a distinction between local governments’ own tasks and additional tasks delegated by central government for execution.

The extent and purpose of top-down “administrative supervision” of English local authorities has however been an issue for many years, and has been an area of contention as to whether it is in compliance with the Charter. For decades, the District Auditor had played a role that many claimed went beyond simply checking on legality and correctness of accounting. The Audit Commission’s role in relation to “value for money” is probably to be seen as a form of supervision, even though normally this leads to public reporting, rather than any legal action against the supervised authority.

The last government’s Comprehensive Performance Assessment (CPA) clearly amounted to systemic and deep administrative supervision which went far beyond the ordinary meaning of the words “aim[ed] only at ensuring compliance with the law” and thus in my view represented a clear breach of the Charter. From 2009, the system was changed with the introduction of the Comprehensive Area Assessment which reduced the number of national indicators to around 200. In the words of the government White Paper of 2006, “Strong and Prosperous Communities”<sup>21</sup>,

“We will put in place a new regime for dealing with monitoring, support, assessment and intervention, building on the success of Comprehensive Performance Assessment...”

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<sup>21</sup> <http://www.official-documents.gov.uk/document/cm69/6939/6939.pdf>

Though more limited than the CPA, in my view the CAA still involved a total system of administrative supervision which “normally” aimed at far more than simply ensuring compliance with the law. It involved six separate inspectorates, and comprised two aspects:

- (a) An area assessment, which looked at “how well local public services were working together to make things better for local people across the whole area, focusing on local priorities and prospects for improvement”, and
- (b) An organisational assessment for councils, combining the external auditor’s assessment of value for money in the use of resources with a joint inspectorate assessment of council service performance.<sup>22</sup>

Since coming into office in 2010, the present government has dismantled this overarching CAA framework. In the words of the Secretary of State (October 2010)<sup>23</sup>:

“In future, the emphasis needs to be on local authorities being democratically accountable to local people rather than to central bureaucratic systems. That is why I am encouraging local authorities wherever possible to make their performance data accessible to their citizens.”

The government also intends to abolish the Audit Commission, and the Bill to do so has just been included in the Queen’s Speech for the coming year’s legislative programme. The previous VFM work will be much diminished, with some residual VFM functions passing to the Comptroller and Auditor General who may (the Bill says)

“carry out examinations into the economy, efficiency and effectiveness with which English local authorities have used their resources in discharging their functions...identifying improvements that may be made by all English local authorities, or all English local authorities of a particular description.”

In my view, this general role – taken alone – is acceptable in terms of the Charter. Moreover, the dismantling of the CAA framework is also considerably more in line with the Charter’s philosophy of self-government, and thus moves towards a better degree of compliance than before.

However, local government in England continues to be subject to a considerable scale of inspection which in effect amounts to administrative supervision. I have elsewhere referred to OFSTED in this regard; they have the task to inspect and regulate services which care for children and young people, and those providing education and skills for learners of all ages.

Councils are also required, on a substantial scale, to submit data returns to central government in line with the Single Data List<sup>24</sup> which sets out the datasets local government can be required to provide, and any data request must meet one or more of these principles<sup>25</sup>:

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<sup>22</sup> This summary of CAA is from the Audit Commission’s website <http://archive.audit-commission.gov.uk/auditcommission/inspection-assessment/caa/pages/default.aspx.html>

<sup>23</sup> <https://www.gov.uk/government/speeches/local-government-accountability--2>

- to fulfil international obligations, for example under EU directives
- to support the effective administration of funding, highlighting where data are being used as proxies (for example, data on free school meals being used as a proxy for need)
- to support accountability to Parliament for national public funds and policy decisions
- to hold public services to account, for example holding government to account for national delivery
- to support the evaluation of economic, social and environmental trends
- to provide comparable local performance data, by exception, where it doesn't already exist, to enable local people to hold local services to account

In general terms, these requirements seem to me in principle reasonable for central government to require, and (see Article 8.3 below) also proportionate if correctly implemented. But according to the LGA, there remain on average 40,000 data items per council per year to be provided, so there remains much room for discussion and decisions on reducing this weight of requirement.

There do remain concerns, however, as to whether today all inspections and forms of “supervision” currently proposed or carried out are appropriate and proportionate. I return to the example given above under Article 4.4., namely the proposal of OFSTED to create a new “framework for inspection” of local governments in relation to their general duty to promote high standards and the fulfilment of educational potential.

Under Section 136 of the Education and Inspections Act 2006, OFSTED may inspect either the overall performance by any local authority of its educational functions, or of any particular function; the Secretary of State may also require an inspection to be conducted. In this case, OFSTED proposes that it “will evaluate the effectiveness and impact of education and training functions provided by the local authority where schools and other providers are not yet good or where they are not improving quickly enough”.

The actual powers of local government to carry out this general educational duty have been minimised by law, and it appears (from this framing of the issue by OFSTED) that it intends to do more – in relation to the local authorities – than to ensure compliance with the law.

I have gone into this example at some length because it appears to me to exemplify a wider issue. Central government has a legitimate interest in ensuring that vital local services are provided to the requisite legal standards, and in particular when those standards are essential for the well-being, present or future, of citizens. But this is different from “inspecting” individual local governments not to ascertain whether they are fulfilling their legal duty (which in a case like this will depend significantly on what powers and resources the local governments really have) but on their policies and effectiveness. The latter, in general, is not permitted by the Charter.

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<sup>24</sup> Data List available from <https://www.gov.uk/government/policies/making-local-councils-more-transparent-and-accountable-to-local-people/supporting-pages/single-data-list>

<sup>25</sup> It is interesting to note here another example of how “principles” can be simply expressed when the will exists – see discussion on Article 2 above!

A continuing drive for improvement, development and quality is essential, that is not in doubt. But the point of a true local government system is that the accountability is to local electors and citizens... not upwards to central government save as regards compliance with the law. Laws may set legal standards that are reasonable and proportionate – and even stringent where the interests require this - which local governments must meet. Some reasonable degree of monitoring or supervision is acceptable to ensure that this is the case. It is also not excluded by the terms of the Charter, in my view, for central government to intervene – in extremis - in a particular local authority if it fails consistently to comply with such basic legal duties in services of great importance to citizens, and where it has not improved even with support.

But it is the local government sector itself which has the primary responsibility for taking the lead. This can and should often be done by local government in partnership with national government and other bodies, including inspectorates. But beyond compliance with legal standards, local government has the responsibility for ensuring continuous overall improvement, and is politically and ethically accountable for doing so. The LGA and SOLACE have underlined their commitment to this approach in their response to OFSTED<sup>26</sup>:

“The Department for Education invested £9 million in 2012-13 (and is to invest £8.5m in 2013-14) in enabling the sector to develop its own approach to children’s services improvement. This is being delivered through the Children’s Improvement Board, which is a partnership between LGA, SOLACE and the Association of Directors of Children’s Services...

As well as building on the sector-led approach, improvement could also be delivered by sharing best practice through a joint inspectorate-sector programme of thematic reviews and sector-led work to support the councils that most need it. We do not believe that a return to top-down inspection is the best or most cost-effective way, to improve council performance in this area.”

In sum, the removal of the CAA framework, and the reduction in the value for money remit of auditors etc., means that the system of supervision of English local government is now generally more compatible with the Charter and its guiding philosophy. There remain some important caveats in relation to the powers of some inspectorates, as noted above, where there remains a risk that supervision (including inspection) of local governments as such will regularly go well beyond ensuring compliance with the law.

I conclude that, on balance, the overall system of supervision of English local government complies with the wording of Article 8.2 since most supervision is now “normally” aimed at ensuring compliance with the law. However, there remains a significant risk of non-compliance in certain cases where inspection or supervision may go beyond the Charter’s remit.

I therefore recommend that the LGA keep track of and draw attention to any forms of supervision of local governments that regularly go beyond ensuring compliance with the law and legal standards,

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<sup>26</sup> [http://www.local.gov.uk/c/document\\_library/get\\_file?uuid=7f64dc5f-2557-4403-b0d6-643bff7dad0c&groupId=10171](http://www.local.gov.uk/c/document_library/get_file?uuid=7f64dc5f-2557-4403-b0d6-643bff7dad0c&groupId=10171)

and that government and LGA review (perhaps every 2 years) how overall supervision is taking place, across sectors, in the light of Article 8, and including the issue of proportionality under Paragraph 3 below.

***3. Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect.***

I would make very similar points here as in relation to the previous Paragraph. The previous government's system of Comprehensive Performance Assessment, and Comprehensive Area Assessments, went considerably beyond simply ensuring compliance with the law (including legally laid down standards) and in my view – as a result of its scale and scope – was also overall to a significant extent disproportionate to the importance of the interests it was intended to protect.

Again, this is not to question the importance of the interests – in essence, the quality of service to citizens. Government has a right to introduce legislation for basic standards in areas like the care of vulnerable people, and to check whether these are being achieved. But a system of *local self-government* simply cannot be based, with any logic, on such an intrusive top-down approach as the CPA, or even the CAA. The local government sector itself has and had a major role and duty to ensure that standards are improved and maintained, and ultimately, the primary accountability in a system of local democracy must be that of the local government to the electors.

In the light of the present government's changes, and from the material available to me, I do not consider that the system of supervision and intervention from "above" in local government in England is overall disproportionate to the interests it aims to protect, and thus conclude that it complies with Article 8.3.

Having said this, there are still numerous ways in which central government or specialised inspectorates de facto monitor and sometimes seeks to micro-manage how local government performs, in ways that are inappropriate to a mature shared philosophy of local self-government (and outside the terms of the Charter). The OFSTED case above appears to be one such; the government's attempts to influence local policies on the regularity of the household waste collection-cycle may be seen as a particular symbol of this tendency.

Therefore, as with Article 8.2, there remain some elements of risk of non-compliance in certain cases where inspection or supervision goes beyond the Charter's remit and is disproportionate to the interests involved. I again recommend that central and local government review together, perhaps every 2 years, whether Paragraphs 8.2 and 8.3 are being applied in practice, including the issue of proportionality.

## Article 9 – Financial resources of local authorities

*1. Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers.*

*2. Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law.*

I have taken these two Paragraphs together as they are so inextricably linked. The issue of whether local authorities have “adequate” resources can only be seen and judged in the context of the extent of their legal responsibilities.

As we have noted, English local authorities do still have responsibility for a substantial share of public affairs, and in 2010/11, local government income was £147 billion. Of this, £103 billion was central government grants, and council tax £22 billion. These are no small sums, and the total represents around one quarter of total public spending (figures from National Audit Office (NAO) report, “Financial Sustainability of Local Authorities”). However, a large part of the annual grant to local government is dedicated to schools, and the local authority simply passes this on to the schools which today have a very broad autonomy.

We may next note that in difficult economic times, the current national economic policy is to constrain public spending. From the NAO report<sup>27</sup>:

“As part of its fiscal deficit reduction plan, central government planned at the 2010 spending review to reduce funding of local authorities by 26% (£7.6 billion) in real terms, between April 2011 and March 2015... Including council tax, the overall reduction of local authority income was forecast to be 14% in real terms.”

In his statement on the Autumn Statement 2012, the Chancellor said<sup>28</sup>:

“Local government budgets are already being held down next year to deliver the freeze in council tax, so we will not seek the additional 1% savings next year – but we will look for the 2% saving the year after”, i.e. 2014/15.

The Local Government Association estimate from all this that the real terms decrease in government funding to local government will amount to 33% in real terms by 2014/15. Moreover, the government published in the 2013 Budget its forecast government spending amounts for the period up to 2018/19. This does not detail the amount by department, or mention local government specifically, but on the basis of existing policies appears likely to have a further major impact on funding for local government.

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<sup>27</sup> Downloadable at <http://www.nao.org.uk/report/local-services-financial-sustainability-of-local-authorities/>

<sup>28</sup> <https://www.gov.uk/government/speeches/autumn-statement-2012-chancellors-statement>

Professor Tony Travers of the LSE commented on 21<sup>st</sup> March 2013, just after the Budget, that local government “looks likely to face at least 50% spending cuts between 2011/12 and 2017/18.” He points out:

“ ‘Resource DEL [Departmental Expenditure Limits] including depreciation’ (broadly current expenditure) will be reduced by £3.8 billion in 2014-15 and £3.1 billion in 2015-16. However, the fall in 2016-17 is shown as £6.8 billion and in 2017-18 a further £8.2 billion.”<sup>29</sup>

If current policy remains, which protects health and schools funding, for example, the effect on the remaining services – including local government - is likely to be very great, hence the estimate of an overall 50% reduction from 2011 to March 2018.

A cut in central government grant funding would not of itself matter quite so much if local authorities were free to raise all or a large part of the shortfall from other sources. That however is not the case. The Council Tax today raises a higher proportion of overall income, but central government has controlled its level of increase by (a) providing some interim financial “protection” for authorities who keep the tax increase at a very low level, and (b) by the provision in the Localism Act which requires any increase above the Secretary of State’s limit (currently 2%) to be approved in a local referendum – which in difficult economic times for citizens, is also unlikely to be the case.

From April 2013, local government are able to retain a proportion of the local business rate (before, it was all passed on to central government to be redistributed as part of the equalisation mechanism). This is a positive step in terms of giving an incentive to “grow” the local business tax base, but unlikely by itself to make major differences in the overall resource base of local authorities.

The LGA has done its own ‘modelling’ of income and expenditure, the results of which are summarised in its submission to HM Treasury of March 2013. Making reasonable assumptions about likely increases in business rates and council tax, and after allowing for ongoing efficiency savings, as well as cuts in government grant, the model indicates that

- (a) total income falls by £9.5 billion in cash terms between 2010/11 and 2019/20, or 33% in real terms, from around £51 billion to £41.5 billion, and
- (b) expenditure rises in cash terms by only £7 billion (14%) over the period – a real terms reduction of 6%, from around £51 billion to £58 billion.

This still leaves a projected funding “gap” of £16.5 billion. The LGA model then projects forward the real terms growth in expenditure on social care and waste management/disposal, and LGA concluded that:

“funding for other council spending drops by 66% in cash by the end of the decade, from £24.5 billion in 2010/11 to £8.4 billion in 2019/20. This is the equivalent of an 80% real terms cut.”

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<sup>29</sup> <http://opinion.publicfinance.co.uk/2013/03/the-budgets-great-unloved/#more-10741>

The LGA have proposed a series of what they call “local government’s proposals on growth and public service reform” which aim to resolve, at least to some extent, this problem of future financing of local government. The key proposals include (a) a local growth deal, with “single pot” local funding for economic development purposes, (b) new ways of budgeting for public services across a place, i.e. taking forward “whole place community budgets”, and (c) relaxing controls and limits on local income raising, including council tax.

The NAO, for its part has also recognized the scale of the future problem. Their report states:

“Local authorities may find it harder over the rest of the spending review period to absorb funding reductions and maintain services.

So far, local authorities have generally been able to absorb central government funding reductions. However, there is emerging evidence that some service levels are reducing. ..These changes [to the resourcing mechanism] increase financial uncertainty and more local authorities are facing the challenge to avoid financial difficulties while meeting their statutory responsibilities. This risk will not manifest itself evenly across the sector, with some local authorities being more affected than others.

This risk must be identified early so that it can be managed effectively... Central government must also satisfy itself that it understands the cumulative impact of funding changes and can make informed decisions about the funding required for local authority services.”

Coming from this source, and before the later Departmental Expenditure Limits up to 2017/18 (see above) were announced which imply major further reductions, the warning is both serious and important. In 5-6 years’ time or even earlier, the financial position of many local authorities could be significantly at risk unless there are changes in approach.

The Audit Commission’s report “Tough Times 2012”<sup>30</sup> did not look ahead as far as 2017/18, but already concluded that a significant number of authorities were likely to be experiencing financial stress in the next two years. The impact of much deeper reductions over 5 or 6 years is therefore likely to be very significant.

Returning to Articles 9.1 and 9.2 in the light of the current and projected position up to 2018, I conclude from the above that at present, despite the estimated 33% reduction in central government grant, and the overall 14% reduction in overall income from all sources up to 2014/15, but taking account of national economic policy, and the NAO’s observations, English local authorities overall probably do still receive “adequate” financial resources of their own, of which they may dispose relatively freely within the framework of their powers. The fact that service levels have to be reduced does not of itself mean that resources are inadequate, and so far councils appear to be responding positively to the challenges, including by sharing services.

I therefore conclude that, at present, the government remains in compliance with Article 9.1.

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<sup>30</sup> <http://www.audit-commission.gov.uk/wp-content/uploads/2012/11/20121121toughtimes2012.pdf>

However, looking ahead to 2017/18 and 2018/19, there appears to me from the above to be a very substantial risk – unless things change materially – that the resources available to English local authorities will not be sufficient, or “adequate”, to enable them to carry out the full range of their legal responsibilities to a minimum reasonable level, even taking into account further efficiency savings.

That is, there is a substantial risk of non-compliance with Article 9.1 in the period 2017 to 2019.

This risk can be reduced by providing local authorities with greater income-raising powers or capacity, or by a lower reduction (or indeed increase) in central government funding from that envisaged. It can also be mitigated in part by new forms of “whole place” local budgets in which the local authority plays a leading role (including financial role), and changes in current ring-fencing of public sector budgets. I should also add that my conclusions are based on the resources available to local authorities in aggregate – there is a real concern, I am aware, that a significant number of authorities may be in real difficulties sooner, as the NAO has warned.

Turning to Article 9.2, it also follows from this analysis that, to date, English local authorities' financial resources still remain overall “commensurate with the responsibilities provided for by the constitution and the law”, however difficult the situation for many.

I therefore conclude that to date the government also currently complies, on the same basis, with Article 9.2.

However, it also follows that the same substantial risk exists of future non-compliance with Article 9.2 having regard to the likely negative evolution of local government resources to 2019.

This risk can be mitigated in the ways set out above, but could of course also be mitigated by a reduction in the range of responsibilities provided for by the law, where such reduction had a significant financial effect. In most respects, I doubt whether this solution is likely to be the best one, since the services provided by English local government appear to me to be necessary or desirable – but at a certain point, hard decisions have to be taken, and the Charter does not rule out a reduction in some responsibilities, provided that Article 3.1 is still complied with.

***3. Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate.***

This Paragraph deals with an issue which has long been a source of contention between central and local government, namely the use of statutory powers by central government to “cap” local authorities' local revenue-raising capacity (whether by rate-capping, budget-capping or council tax-capping). The system is unquestionably dominated by central government; in the words of the Department for Communities and Local Governments,

“the local government finance system is one of the most centralised in the world”<sup>31</sup>

The present government has, to its credit, removed via the Localism Act the power it inherited to cap council tax increases; but it also retains the power to recommend maximum limits (currently 2%) which cannot be exceeded unless a local referendum is held on the issue and a positive vote in favour is received. This power is now to be extended in the Local Audit and Accountability Bill to cover other public bodies (e.g. waste disposal authorities) whose budget is added to the local authority’s in calculating the council tax level.

In terms of Article 9.3, where does this leave us? English local governments do receive part of their financial resources (even if not yet a big enough part in the eyes of many) from local taxes over which they have, to some extent, the power to determine the rate. The limitation on this power (the local referendum) is provided for by statute. And the Charter itself clearly allows for the use of local referenda.

Yet I remain doubtful whether this particular requirement to hold a referendum is fully consistent with Article 9.3. Local governments have the heavy responsibility of balancing the financial and service issues they face; it is a central part of their role to reach decisions on the right balance. But getting across the complexities of the management and policy choices and balances in a straight Yes or No referendum situation is extremely difficult. California has given evidence of the potential negative impact on sub-national government finances when the use of referenda goes too far, and the fiscal policy discretion of the elected sub-national government is severely curtailed or removed. I can see the case for requiring a referendum where a large percentage increase is proposed, but under the present case, the increase sought might be quite modest, and below the CPI inflation rate.

I conclude that the first part of Article 9.3 is fully complied with, but compliance on the second part is questionable, since the power to set the rate is excessively conditioned by the requirement to hold a referendum for any increase above the Secretary of State’s recommended maximum.

That is to say, the legal requirement to hold a referendum for what may be a very small increase, in effect largely removes (rather than “limits”) the power of the local authority to determine the rate within the limits of statute, and shifts it mainly on to the Secretary of State. In terms of the Charter, statute should not in my view go so far as in effect to negate rather than reasonably limit the local government’s discretion, and thus the income-raising potential and discretion of the local authority which has the duty to fairly balance all of its responsibilities.

This risks leaving local authorities in reality with very little power in reality to raise the rate, even if this is the most prudent option. If even small increases in the rate require affirmative vote in referendum to go above the Secretary of State’s figure, the “limits of statute” mean that a cap is to a large extent, and in most cases, being imposed in all but name by the Secretary of State. It also has a “feedback” impact on the buoyancy of the local government financial systems under Article 9.4 below.

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<sup>31</sup> from the “Plain English guide to business rates retention”

***4. The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks.***

Until recently, the system of financing local government in England was heavily weighted towards central government funding. This took the form of grants, and also the redistribution of the business rates, whose level is fixed by central government. The only significant local tax has been the council tax, which until recently raised around 20 to 25% of funds. Thus the system lacked diversification, and while central government grant has for most of the last 20 years kept more or less up with inflation, local authorities have had very little flexibility due in part to the system of council tax-capping.

The reductions in government grant mean that local taxation now plays, and in future will continue to play, a much larger part in the overall system of financing local government in England. The power to retain a proportion of the business rate may over time also give a fairly significant boost, and add a welcome degree of diversification. However, by comparison with many other countries, the degree of diversity within the whole *system* of local taxes or other revenues is limited. In many countries, for example, local taxes on hotel occupancy exist, but not in England. In short, the financial system on which local government's financial resources are based consists essentially of a reducing grant from government, business rates whose level is set by central government (a modest proportion of which may now be retained by local authorities), and a council tax based on property values that are never re-assessed, and whose rate is effectively set for most authorities by a "recommendation" of the Secretary of State (to exceed which a referendum must be held). This is not diversified and is of limited buoyancy.<sup>32</sup>

The last point under Article 9.4 is that the financial systems in place should enable local authorities "as far as practically possible" to keep up with the "real evolution" of the cost of carrying out their tasks. This seems to me to include not just inflation in general, but the impact of demographics. Thus the cost of providing social care increases beyond the simple rate of inflation if the cohort of vulnerable elderly people increases in a major way. This Paragraph does not of course mean that central government must through grant cover all inflation and demographically-related increases; but it does require that the overall system takes these fully into account, and through its diversity enables local authorities to fulfil their tasks and responsibilities as these develop.

I conclude that the system on which the resources of local government in England are based are not yet of a sufficiently diversified or buoyant nature as to meet the criteria in Article 9.4 I therefore conclude that for this reason, the UK does not comply with Article 9.4 as regards English local government.

Even assuming there is compliance with this provision, I recommend that to strengthen the degree of compliance, and to increase diversity and buoyancy (i.e. ability to evolve) of the resource base, further potential sources of local tax income for local authorities be provided.

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<sup>32</sup> The French version of this Paragraph is clearer: « ... nature suffisamment diversifiée et évolutive pour leur permettre de suivre, autant que possible dans la pratique, l'évolution réelle des coûts de l'exercice de leurs compétences. »

***5. The protection of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility.***

The system of local government in England has for many decades included a relatively sophisticated equalisation procedure for the purposes set out in this Paragraph, in part because of the degree of reliance on central government funding, and I do not consider that the equalisation system has (in the terms of this Paragraph) adversely affected the discretion of local authorities. The government is also committed to continue an equalisation scheme in relation to the proportions of increased and retained business rate income. I am not in a position to judge how successfully the present equalisation scheme (based on a much reduced quantum) meets in practice the aim of “correct[ing] the effects of unequal distribution” of finances and of the financial burden they support; these are always the subject of legitimate and necessary debate and contention between (and within) central and local government.

I therefore conclude that the system of local government in England complies with Article 9.5.

The issue of how far Article 9.5’s objectives are met, and the impact of the equalisation scheme, should be kept under regular review between central and local government (as I am sure it will be) so that changes can be made if the evidence requires it.

***6. Local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them.***

I do not have detailed information or knowledge of the precise system and practice of consultation of English local authorities and their associations on the way redistributed resources (i.e. business rates) are allocated at present, but there are certainly – and have for many decades been - clear legal requirements on central government to consult. I have discussed the need for adequate timescales for consultation under Article 4.6 above and do not repeat them here.

Subject to earlier points on the timing of consultation (see Article 4.6 above), I conclude that the government in principle complies with Article 9.6.

***7. As far as possible, grants to local authorities shall not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction.***

The second sentence stands of Article 9.7 stands independently of the first, and in the English local government context, is probably the more important one for present purposes. In sum, the provision of grants to local governments in general (ring-fenced for projects or not) should not remove their basic freedom to exercise policy discretion.

In relation to the first sentence, the limiting term “as far as possible” I interpret as meaning something like “as far as reasonably practicable, in the light of the importance and scope of the policy objective”, rather than “possible” in an absolute sense, since it is always absolutely possible not to earmark. The term “specific projects” is also to be noted – this can be given a broad or narrow definition. In the UK, the great weight of ring-fencing is not related to individual named “projects” but rather to programmes – e.g. the Dedicated Schools Grant and grant funding for maintained schools, and funding for public health purposes.

Within this approach, the present government affirms that it has indeed reduced ring-fencing. In the Mid-Term Review of the government’s Programme for Action, the Department for Communities and Local Government states:

“In the 2010 Spending Review, the Government ended ring-fencing of all main revenue grants from 2011/12. The removal of ring-fencing from local-government grants has given councils freedom over the money they receive and has allowed them to work with their residents to decide how best to make their spending decisions address priority needs.”<sup>33</sup>

The Local Government Association however has recently stated:

“We are concerned about the cuts in general funding at the same time as an increase in ring-fencing. In particular, we are concerned at the cuts to early intervention funding which seem bound to affect local authority provision.

The LGA welcomed the reduction in ring-fencing in 2011-12. However in this settlement there seems to be a movement back to ring-fenced grants. This goes against local choice on expenditure decisions.”<sup>34</sup>

At a time of increasing financial constraints and stress, it is essential that local governments have the maximum discretion reasonably possible in relation to the allocation and spending on matters that are within their legal responsibilities, as Article 9.7 clearly affirms. Where certain forms of ring-fencing are nonetheless retained on public policy grounds, their operation should still ensure that local governments have as much policy flexibility, and as few conditions and constraints, as possible within the ring-fence.

Returning to the issue of earmarking for “specific projects”, I should mention – as an example - the “Single Pot” concept for bringing together at local level finances which come from several sources for local economic development purposes, broadly in line with Lord Heseltine’s recommendations. This may also be linked to the issue of allocation of ESF and other EU funding. Provided that there is

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<sup>33</sup> <http://midtermreview.cabinetoffice.gov.uk/programme-for-government-update/chapter-4-communities-and-local-government/index.html>

<sup>34</sup> Local Government Finance Settlement 2013-14 and 2014-15 Local Government Association Response [http://www.local.gov.uk/c/document\\_library/get\\_file?uuid=f62d9366-81dc-49fa-a73e-76f9cb1e01ae&groupId=10171](http://www.local.gov.uk/c/document_library/get_file?uuid=f62d9366-81dc-49fa-a73e-76f9cb1e01ae&groupId=10171)

true local discretion in relation to the strategy for and spending from the “pot”, I do not see this as running counter to this Paragraph of the Charter, especially because the aim is for local governments and their business and civil society partners to work together in defining and implementing the strategy.

Having mentioned that there are real concerns around the extent and especially the perceived over-regulation in relation to ring-fenced grants, on the material available to me, I do not consider that the system as a whole puts at major risk the basic freedom of local authorities to exercise policy discretion. In new fields like public health, there may be good public policy reasons for ring-fencing in the start-up period, given its importance. However, this should be kept under review with the aim of removing or relaxing the ring-fencing in future.

One area of concern in relation to compliance with the Charter relates to the Dedicated Schools Grant, in which it appears that the ability of local governments to exercise sensible choices within their overall (declining) real resources is possibly over-restricted, e.g. in relation to early intervention.

I conclude that, on balance, the present overall system of grant-making to English local government is in compliance with Article 9.7. However, the issue is of high importance and will be even more so as budgets continue to be tightened in coming years. I therefore recommend that central and local government review together the issue of ring-fencing on an annual basis, taking the Charter’s wording fully into account.

In the first instance, having regard to Article 9.7, I would suggest that a review of the limitations of discretion in relation to the Dedicated Schools Grant be undertaken.

***8. For the purpose of borrowing for capital investment, local authorities shall have access to the national capital market within the limits of the law.***

The 2003 Local Government Act gave broader discretion than before to local authorities to borrow for capital purposes, provided the borrowing is in sterling. While they have access to capital markets, in general, local authorities have access to the Public Works Loan Board (PWLB) for borrowing for capital investment purposes, which provides better terms on average than the national capital market.

I conclude that the system of borrowing for capital investment by English local governments is in compliance with Article 9.8.

## **Article 10 – Local authorities' right to associate**

***1. Local authorities shall be entitled, in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest.***

English local authorities are in general terms entitled to cooperate with other local authorities, and to act through joint arrangements. There may be a need for clearer legal powers on cooperation between one or a group of local authorities with other public bodies, especially to deal with the further development of “whole place community budgets.”

I conclude that the system of English local government is in compliance with Article 10.1

***2. The entitlement of local authorities to belong to an association for the protection and promotion of their common interests and to belong to an international association of local authorities shall be recognised in each State.***

Section 143 of the Local Government Act 1972 empowers local authorities to subscribe to any association of local authorities formed (whether inside or outside the United Kingdom) for the purpose of consultation as to the common interests of those authorities and the discussion of matters relating to local government, and also to any association of officers or members of local authorities which was so formed. Therefore, the basic right to belong to local government associations in the UK or beyond is quite explicit. It might be desirable to update this power to include the words of the Charter, “protection and promotion of their common interests” which is the reality of what local government associations do.

I conclude that the terms of Article 10.2 are complied with in relation to English local government.

***3. Local authorities shall be entitled, under such conditions as may be provided for by the law, to co-operate with their counterparts in other States.***

In practice, English local authorities frequently co-operate with counterparts in other states in Europe and beyond. This is not clearly stated in any statute, as far as I am aware, but is implicit *inter alia* in the way that twinnings and EU Structural Funds have operated for many years, and its legality is not in doubt, at least assuming the purposes of the cooperation are relevant to local government affairs. The Local Government (Overseas Assistance) Act 1993 also provides for local authorities “to provide advice and assistance... to a body engaged outside the United Kingdom in the carrying on of any of the activities of local government”, which legitimizes international development activities, within a general consent granted by the Secretary of State.

I conclude that the terms of Article 10.3 are complied with in relation to English local government.

## Article 11 – Legal protection of local self-government

*Local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation.*

Local governments in England do have the right to seek a judicial remedy via judicial review or otherwise, when they consider that the government or another public body has acted in breach of its rights or powers. However, as we have noted in the discussion under Article 2, there is no explicit recognition in the law of the overall principle of local self-government, and no set of principles (plural) of local self-government such as are here referred to, that are enshrined in domestic legislation.

I therefore conclude in a minimalist way that at present the UK government is not in breach of Article 11, since no principles of local self-government are enshrined in our legislation. Rather than being a matter of satisfaction, however, this is actually a matter of disappointment since the basic principles of local self-government ought to be set down and “enshrined” in law.

## The Additional Protocol on the right to participate in the affairs of a local authority

The UK government has signed but not ratified this first Additional Protocol to the European Charter. I have not therefore assessed for this report whether the UK complies with its terms, though I am confident that it does so. I have some criticisms of the Protocol in terms of its drafting and philosophy (which differs from that of the rest of the Charter) which I can explain if ratification is to proceed.

## PART 3 - Conclusions

The United Kingdom is a mature democracy, with a long tradition of elected local government. It is therefore no surprise to find that – as regards most Articles of the European Charter of Local Self-Government – the UK is in general compliance with its provisions.

However, in difficult economic times, and with the prospect of sharp further reductions on top of already very large real terms reductions, our local government system faces stresses and risks which we have not experienced for generations. The relationship between central and local government is extremely important, whichever party or parties are in power for the time being. And making sure that in the course of tackling financial challenges, we do not diminish – but rather strengthen – our system of democratic local *government* (I again stress the word) should be a high priority for the sake of our whole constitutional system.

Moreover, the UK has played an important role down the years – through the Council of Europe and in other bodies - in helping newer democracies to develop their systems. It is also important, if we are to play a continuing European and international role in strengthening democracy (as I strongly hope) that we should lead by example.

From the Article-by-Article analysis in this report, it will be seen that the UK is, in my judgment, in compliance (as regards local government in England) with the large majority of Articles and their Paragraphs which comprise the substantive part of the European Charter of Local Self-Government.

Successive governments have taken some important steps to improve the degree of compliance of UK – and specifically English – local government with the Charter. The development of the “well-being” power first, and more recently the general power of competence, are positive examples of progress. But as I have underlined, there are several important areas where we need to act in order to come into compliance, and several border-line areas where we should act, to enhance the degree of compliance.

Three key issues in particular stand out.

- (1) First, ***legal recognition of the principle of local self-government***. At the heart of the matter is the nature of the relationship between central and local government, including but not limited to that with the Department of Communities and Local Government. It can be described as being a longer-term matter of “constitutional significance”, to use the words of Section 6 of the Localism Act 2011, transcending the particular time-bound relationships between individual ministers and local government politicians, or the specific central and local government terms of office.

As stated earlier, under Article 2, “the principle of local self-government should be laid down in the constitution or in legislation”. This could be done in simplest form, as I have suggested, via a short statute-created Statement of Principles to be followed for future legislation, and used in reviewing existing laws. But in whatever form, thus far Article 2 has not been explicitly “laid down in legislation”.

- (2) Second, the issue of how far local governments should be *regulated in detail* in relation to the conduct of their responsibilities, and how far “*administrative supervision*” of local authorities should go. The Charter is clear in principle on both aspects. Local authorities’ powers should normally be “full and exclusive”, and not limited by another authority. Yet the whole history of English local government tends in the direction of micro-management and detailed condition-setting. It is surely time to change this approach.

In relation to “administrative supervision”, the Charter is plainly worded – such supervision should normally only be to ensure compliance with the law. The present government has diminished the degree of top-down supervision and inspection, but there are still issues and risks of inappropriate “supervision” which need to be watched closely. To be clear, national government has legitimate public policy interests in ensuring that basic legal service standards are maintained in areas that have a major impact on citizens’ well-being; but the overall issue of improvement and development should be a high responsibility for local government itself, and for partnership between central and local government (and relevant inspectors etc.), not a one-way top-down relationship.

- (3) And third, the issue of *finance* – which is undoubtedly top of every local government’s agenda for obvious reasons. I have not concluded that, to date, there is a breach of the requirement under Article 9 to ensure that local governments have “adequate resources” commensurate with their responsibilities – but I have indicated that there is a significant risk of systemic breach of this crucial requirement in around 5-6 years’ time, if present policies are pursued under which very significant further reductions are imposed on local governments grant financing, without the ability in reality to augment them from other sources. This brings in the related issues of the lack of diversification and buoyancy of the overall system of resources and taxation, the issue of ring-fencing, and also the issue of effective capping of council tax increases, all of which involve, or risk, non-compliance with Article 9.

I referred in the introduction to the government’s point (in its recent response to the Political and Constitutional Select Committee) that:

“Reforming one of the most centralised countries in the western world requires an ongoing commitment of political will and attention.”

I hope that the points made in this review of English local government against the principles of the European Charter can be of some help in furthering this ambitious commitment – as well as in assisting the Council of Europe visiting team in relation to their task. And in Professor Robson’s words cited at the outset of this report, perhaps we can help to fulfil his positive prediction that

“Local government is likely to remain firmly established as the most effective instrument of social welfare in our national life. Adherents of all the major parties are agreed in recognizing the fundamental value of our municipal institutions, and this unity of opinion is of far greater moment than the temporary party conflicts about particular questions.”