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Summary

A. The Cities and Local Government Devolution Bill (hereafter: the Bill) while proving a framework for the devolution of functions, tasks and responsibilities does not fundamentally alter the relationship between central and local government.

B. The Bill maintains a centralist perspective in that ‘deals’ and ‘agreements’ must be negotiated with and agreed by the centre, rather than providing a framework within which local government can construct, with minimal interference, its own preferred ways of co-operating across local government and more broadly across the public sector.

C. The Manchester Agreement while highly appropriate and successful in the Manchester context cannot be seen as a ‘model’ for further agreements as each agreement must allow for a process which suits the needs of the areas concerned and the parts of the public sector involved and reflect these in each negotiation.

D. The Bill is right to focus on governance arrangements and each new Combined Authority, or devolved agreement, should include a directly elected mayor to provide for a clear line of accountability to the electorate and for direct democratic legitimacy.

E. Different constitutional settlements exist overseas that provide a model for creating a more flexible framework within which local government can decide, among itself, how best to configure new working and structural relationships that take in a number of councils and parts of the wider public sector. The committee could explore in detail a range of those settlements as evidence to improve the framework for devolution contained within the Bill.

F. Devolution to English local government is no substitute for the absence of an English Parliament, Government and First Minister.

G. In the absence of an English Parliament devolution to local government should include primary legislative powers along the lines of those existing for the devolved assemblies in Scotland, Wales and Northern Ireland and a debate is required about the nature and extent of primary powers that could and should be devolved to local government.

1. Introduction

The Cities and Local Government Devolution Bill provides a framework within which a major devolution from the centre to local government can take place. But there are weaknesses in the framework and the submission focuses on those weaknesses to suggest how they might be strengthened. In undertaking that analysis the submission addresses the following questions from those set by the committee in the order posed by the committee:

- Is the Manchester devolution deal a model for other areas;
- How the Bill will build on existing local accountability structures and ensure appropriate governance mechanisms are put in place for devolved functions;
• How the range of models available in the UK and abroad may suit the needs of different authorities, including all areas which have or intend to have a combined authority;

The next section explores the overall weaknesses of the Cities and Local Government Devolution Bill and the devolution process for which it provides the framework.

2. Cities and Local Government Devolution Bill: Overview

As a Bill that enables the Secretary of State to, by order, put in place devolution deals with Combined Authorities and to confirm the Manchester arrangement, it does provide the flexibility to allow for the delivery of specific devolution deals across the country. Yet, that framework, which flows from the 2009 Local Democracy, Economic Development and Construction Act, rests on the principle that devolution is a process designed and controlled by the centre which also regulates and agrees how that process will operate and the outcomes of that process in terms of the powers and responsibilities of Combined Authorities. The complexity of the Bill and the arrangements for negotiating and agreeing devolution packages means that power and sanction over local government remains at the centre. That is demonstrated but the setting of an artificial deadline date in September 2015 for devolution submissions – a date which reflects purely a central government requirement and one which has produced, for local government, an unnecessary hurdle to overcome.

The Bill, while promoting devolution does so within the existing constitutional relationships between central and local government. It does not therefore, provide for an entirely new approach to devolution and the wider relationship between the centre and local government that the Bill maintains also needs to be questioned. Devolution remains a gift of the centre, which can be taken away, or denied to others. In the last Parliament the Political and Constitutional Reform Committee, in an inquiry into the ‘prospects for codifying the relationships between central and local government’ produced a draft code which set out a new way of working between central and local government. That code provided the basis of a genuine re-structuring of the relationships between central and local government, in a way that the Cities and Local Government Devolution Bill does not (TSO, 2013).

Rather than being prescriptive the Bill should provide a simple and broad framework within which councils can design their own methods and arrangements for co-operation, between and within councils and leave councils to work out the exact details between themselves. Indeed, the creation of a Combined Authority should not require final government approval (see section 5 below for overseas examples)

Where the Bill is correct however, is in the focus on governance arrangements and while directly elected mayors are not popular with councillors, without an elected mayor Combined Authorities, with considerably enhanced powers and responsibilities, will have no direct mandate from the public, nor any direct lines of accountability (see section 4). Indeed, the interim mayor of Manchester Combined Authority was selected at a private meeting from an electorate of 10 council leaders – vastly smaller than the overall electorate for the constituent authorities of the Combined Authority. Councils and councillors must overcome their reluctance to allow the voters to choose who will head the Combined Authority in return for greater powers and resources. It is a disingenuous distraction to say governance does not matter and that devolution is about public
services only – devolution is as much about enhancing local democracy and ensuring the right governance arrangements are in place, for without that services will become ever more detached from the public and so too will democracy and politics, generally.

3. Manchester: A Model?

It is tempting to see the Manchester Combined Authority agreement as providing a template for future devolution and particularly as a way of avoiding the ‘re-invention of the wheel’ and the need to work through each devolution deal as though it were a new process. But, the Manchester agreement is just that: an agreement specific to the Manchester Combined Authority. That agreement reflects the needs of the Combined Authority (10 separate local authorities) and its specific health and social care feature (including £6 billion of health funding) also reflects the needs of NHS England, 15 NHS providers, and 12 Clinical Commissioning Groups and it involves a package for joint decision-making for integrated care. Other Combined Authorities – or combinations of authorities that are not part of a formal Combined Authority – may seek powers over health spending or to integrate with the various health organisations within their areas, but their own specific needs will be very different from the Manchester area and therefore must be able to shape any final agreement and the process of developing that agreement.

The West Midlands agreement being negotiated at the time of writing this submission displays a different dynamic and focus and although health and social care plays a part it is not currently such a dominant feature as in the Manchester model. Thus, the search for a ‘model’ could become a constraint and influence the shape of future devolution agreements. A broad framework is needed to provide a focus for negotiations but those negotiations and the outcome of them must be able to reflect the specific priorities and needs for the local authority areas concerned and the personalities, interests, priorities and required outcomes of any area. That is not to criticise the particular Manchester route or approach to devolution, which was indeed remarkably successful, it is simply to argue that a light-touch framework which can be adjusted to suit the varying needs of different configurations of authorities across the country, is preferable to the search for a one-size-fits-all model, which itself is against the spirit of devolution.

The Manchester agreement is one which reflects an urban policy agenda but devolution can and must reflect the needs of two-tier county areas and semi-urban, semi-rural and rural councils. Manchester does not provide a model by which non-urban councils can develop specific devolved settlements that address their differing needs. Indeed, the particular requirements of two-tier areas not only involve very different policy, financial and growth agenda but also require very particular and sophisticated negotiation between the county and district councils and between different county councils and districts located in different county areas. The Bill, as is currently formatted, does not easily support that type of negotiation and nor does the Manchester model.

4. Governance Mechanisms

Few debates about local government create as much opposition among councillors than the about elected mayors, but that does not mean the idea is a bad one. It is surprising so many complain of ‘too much power’ in one person’s hands when that person is elected by the whole of the voting population of an area, but do not raise similar complaints when that person is chosen by a small
group of councillors (Copus and Dadd, 2014, Kukovic et al, 2015). It is inconceivable that indirect democracy can be the basis of large scale Combined Authorities and of significant devolution of powers, finance and responsibility to local government.

It would be inappropriate to devolve significant powers to newly created bodies (Combined Authorities) without some direct link of accountability to the voter – that is without a directly elected mayor. As Combined Authorities could have powers over health, transport, skills and other areas of public policy currently resting with other bodies, it would assist the new authorities in establishing their right to govern if there was a directly elected mayor in each case – without such democratic office it could appear to those in non-local government areas, that councils were involved in a land grab; with an elected mayor there is no argument about democratic legitimacy.

It would appear in some areas councillors and senior councillors are so concerned as to avoid an elected mayor that they would forgo the benefits of devolution or would attempt to negotiate an elected mayor out of any devolution settlement.

That some council areas that could be part of a Combined Authority may have rejected an elected mayor for the council in a referendum (some have also adopted one) the point is irrelevant as the Combined Authority is an entirely new creation, with no direct democratic mandate to act. It is perverse that the political leader of such a new entity could be chosen by a few council leaders only, meeting in secret, rather than all the voters of the area. A Directly elected mayor should be the governance model for all devolution settlements.

Directly elected mayors require additional scrutiny than direct election alone and at very least combined scrutiny arrangements developed between the constituent councils of any Combined Authority, must be formed with sufficiently robust powers to be able to effectively hold an elected mayor to account. The same issue is encountered here as with the legitimacy for political leadership: should councillors elected to constituent authorities in a Combined Authority have the powers to hold to account someone elected by the voters of the whole Combined Authority area? There is a case to examine whether large urban based Combined Authorities require a separately elected scrutiny body – along the lines of the London Assembly.

The important questions in any governance model are:

- Where is the source of legitimacy to act politically and to govern an area?
- What mechanisms exist to secure the giving and holding to account of any political leader – however he or she may secure their office?
- Who is being represented and governed by whom?
- What is the size of the area governed and does that indicate particular approaches to governance?
- How can any political leader operate effectively within networks of agencies, organisations and bodies over which he or she has no direct power but can only wield influence?

The Bill must provide the framework within which each of these questions can be addressed and its focus on elected mayors goes some way to providing appropriate answers.

5. Models overseas and across the UK
Across much of Europe the relationship between central and local government is codified in some way – either through a written constitution, or through what might be seen as constitutional legislation. Such settlements provide lessons for the committee’s current investigation. What is required in the devolution debate is a framework which provides the greatest freedom and flexibility for councils to negotiate – among themselves – the nature of the devolution they require, the area they wish to cover and how they wish to co-operate and with whom. In countries such as France, Portugal and Poland councils are far freer than in England to work together within a broad framework set by the centre. In Poland, for example, the centre through legislation has set out a broad framework for how councils can form ‘communal joint authorities’ for specified services. Councils then form such bodies and simply inform the centre of their existence. No centre-local in-depth negotiations are involved and certainly no final permission granted by the centre to the existence of these new bodies.

Below are examples of the constitutional settlements that exist in a number of European countries and there are many other such examples from Europe and beyond that the committee could consider. The point about these settlements is that they provide a broad framework – often supplemented by other legislation – within which local government can operate and that includes the freedom to co-operate with other councils or to form co-operative arrangements. It is an indication of the difficulties of overcoming centralisation that central government is currently controlling the process by which councils can co-operate (Combined Authorities) and the nature of the process by which that occurs.

The few examples below demonstrate a range of approaches towards the constitutional position of local government, which can be used as a model for developing the devolution agenda as it is set out in the Bill. At the heart of many approaches to central-local government relationships is a presumption in favour of localism where governments accept limitations (to varying degrees) on their powers over, or in regard to, local government. If devolution is to mean anything it must mean the acceptance by the centre of limitations on its power over localities – devolution muscle is not displayed by the functions, resources and responsibilities passed to local government by the centre, rather by the willingness to structure an entirely new and permanent relationships where local government has powers beyond the reach of the centre. The following examples of how such a relationship could develop are presented, here:

- **France’s** written constitution, states: ‘Territorial communities may take decisions in all matters arising under powers that can best be exercised at their level.’ (Article 72 du Titre XII). The principle of free administration and general competence has been reinforced under the 2003 constitutional reform.
  
  - The general competence described in France is one of the criteria for defining 'collectivités territoriales', along with elected councils, as opposed to all types of joint bodies (intercommunal bodies) that only have delegated competences from their member-communes.
  
  - A current reform being considered in France however, is for departments and regions to lose their general competence and only have dedicated responsibilities so as to avoid joint (or mixed) financing. Only communes (the smallest level of sub-national government) will keep their general competence - they have since the 1884 Municipal Act.
Article 28 of the **German** constitution stipulates that local authorities regulate community affairs on their own authority and requires that local government is provided with an independent revenue stream for doing this. The details are regulated by the Länder and all 16 Länder constitutions set out their own frameworks that guide local authorities. There are three basic principles underpinning the system:

1. Local authorities are expected to fulfil a national-constitutional obligation to ‘regulate’; they must act, and they must preserve their capacity for action.
2. There is a clear obligation to enable democratic participation in local politics.
3. Authorities are expected to do their jobs efficiently and economically.

- The autonomy of German local authorities in conducting their tasks is legally guaranteed but so is the strict oversight of their operations.

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

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

- The 1985 Local Government Law (LBRL) specifies general principles regarding the territory, internal organisation and functions of local government; details are left to regional legislation. Each Autonomous Community can determine its own local government arrangements, but respecting the existence of municipalities and provinces, which have constitutional recognition.

- Article 25.1 of the 1985 law includes a general competence clause which states ‘municipalities can promote any activity or deliver any services that contribute to satisfy the needs and expectations of the citizens’.

- **Portugal**: Article 238 of the constitution: Categories of Local Authorities and Administrative Division
  (1) The local authorities on the mainland are the parishes, municipal authorities, and administrative regions.
  (2) The autonomous regions of the Azores and Madeira comprise parishes and municipal authorities.
  (3) In large metropolitan areas, other organizational forms of territory self-government may be established by law in accordance with special local conditions.
  (4) The administrative divisions of the national territory are established by law.
Within the UK the devolved bodies in Scotland, Wales and Northern Ireland, also display a model within which devolution can be secured within England. There is currently however, an unbalanced constitutional and devolution model existing in Britain, where one nation (England) has been denied or excluded from a devolution settlement, so readily granted to rest of the UK. That situation would not be rectified by Combined Authorities as these do nothing to provide national recognition for England or provide an all-England governing voice and elected body. Only the creation of an English Parliament can re-balance the constitution and grant to England that which has been granted to Scotland, Wales and Northern Ireland: a parliament, government and first minister of its own.

Yet, the existing devolved bodies do provide a model for the kind of powers that could be granted to combinations of authorities as part of a wider more fundamental package of devolution – even in the absence of an English Parliament. That is, that the primary legislative functions that rest with those existing devolved bodies could also form the powers resting with new Combined Authorities to give them the hard governing powers required to address their own specific economic, fiscal, political, social, and environmental policy problems and to do so through creating a specific legal framework for the area that would differ from other legal frameworks within other Combined Authority areas. That the centre tolerates such legislative and policy difference across the constituent nations of the UK (and always has done to some extent in relation to Scotland) indicates that such real, hard governing power can be handed down from the centre. An interesting line of further inquiry for the committee would be exactly what primary powers should be devolved from the centre with the aim of allowing different legislative frameworks to exist within different parts of England, represented by newly formed combinations of councils covering sufficient territory to make such primary devolution of power worthwhile.

What might primary local legislation include? Well here are a few provocative examples: if for example, a council wished to ban smoking in public, but to permit fox-hunting and another council wished to do the reverse, and at the same time, increase the age at which it was possible to drink alcohol to 25, then those decisions would suit specific local needs. There is of course, the question of policy spill-over. So, if Council A decided to set the age at which alcohol could be consumed at 25 years old – would not drinkers be inclined to travel to other areas where the age was lower? Many might, but surrounding councils would have similar legislative powers and indeed may decide to tackle the issue of alcohol consumption in entirely different ways, preferring to focus on sale, cost and the licensing of premises instead, dependent local issues and priorities.

Councils would have the power to construct a local legislative, political, moral and economic policy framework within which responses to all issues of concern would be located. Indeed, it is not a test for devolution that is required rather a test to see if central government should legislate for the whole of the country or leave certain aspects to local government. It is in that spirit and using the existing devolved assemblies in the UK as a model that a more fundamental devolution from the centre to English local government can be envisioned than that contained in the current Bill.

6. Conclusion

The Bill provides a framework within which negotiations can take place between the centre and the localities for new governing arrangements to be forged and for new responsibilities to be devolved to new formations of local government. As such the Bill is a bold step in the long-term journey to de-centralise one of the most centralised states in Europe, but the processes is being conducted
within a similar pattern of central control, with objectives and priorities set by the centre and with final approval to devolution deals resting with the centre. While significant responsibilities may be handed to, or return to, local government in various parts of the country, the process does not represent, and the Bill does not facilitate, a fundamental shift of power from the centre, nor something which is on a permanent footing. The positive aspect of the Bill is that it does see a shift away from a centralising assumption to a more localist perspective on governing the country and a desire to provide more powers, functions and responsibilities to new configurations of local government. There is however, much further to go in devolving power permanently from the centre and in fundamentally rebalancing the relationship between the centre and local government and some of the examples in this paper provide an alternative devolution journey.

References


August 2015