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Devoluzione e governo locale

Charter incorporation in Scotland to the rescue of central-local relations?

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Charter incorporation in Scotland to the rescue of central-local relations?**

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Abstract (Ita): In un secolo di scritti sul governo locale nel Regno Unito, un tema inevitabilmente dominante è stata l'analisi delle relazioni centro-territorio – nel tentativo la misura del controllo da parte dei ministri e dei dipartimenti centrali sugli enti locali e il grado il grado di autonomia comunque mantenuto dagli enti locali. Nel complesso la storia (compresa quella che copre gli anni della devolution) è stata caratterizzata da un crescente controllo centrale e da un declino dell'autonomia. In tempi più recenti, il Regno Unito ha firmato e ratificato la Carta Europea dell'Autonomia locale del 1985. Ancora più recentemente, nel Parlamento scozzese sono stati avviati passi per «incorporare» la Carta nel diritto scozzese interno. Questo articolo esamina quali effetti potrebbe avere sui rapporti centro-territorio l'incorporazione della Carta.

Abstract (Eng): In a century of writing about local government in the United Kingdom, an inevitably dominant theme has been the analysis of central-local relations - defining the measure of control by central ministers and departments over local authorities and the degree of autonomy nevertheless retained by the local authorities. On the whole the story (including that covering the years of devolution) has been one of increasing central control and declining autonomy. In more recent times, the United Kingdom has signed and ratified the European Charter of Local Self-Government of 1985. Even more recently, steps have been commenced in the Scottish Parliament to «incorporate» the Charter into the domestic law of Scotland. This article considers what effect on central-local relations the incorporation of the Charter might have.

Parole chiave: Scozia; devolution; governo locale

Keywords: Scotland; devolution; local government

1. INTRODUCTION

One of the most significant constitutional initiatives of the current sixth session of the Scottish Parliament has been the European Charter of Local Self-Government (Incorporation)(Scotland) Bill (the «Charter Incorporation Bill»). It is a Member's (non-governmental) Bill promoted initially by Andy Wightman MSP and is designed primarily to require the Scottish Ministers (the Scottish Government) «to act compatibly» with the «Charter Articles» (as appended to the Bill in a schedule). Other draft sections include the imposition of a further duty on the Scottish Ministers to «promote local self-government»[1].

In the language of the European Charter of Local Self-Government 1985 (the «Charter») itself, its focus is evidently on «local self-government»[2] or «local autonomy»[3] and their protection. The more familiar language has, in the United Kingdom, been that of «central-

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[1] [1] For further provisions of the Bill, see text at n 47 below.

[2] Which is terminology unfamiliar to UK statutory practice which has almost always preferred simply «local government» which, in turn, signifies government by elected local authorities as opposed to merely «local administration» by other bodies.

[3] The language of the French version of the Charter: Charte Européenne de l'Autonomie Locale.

local relations» but the same constitutional concern is common to both – that of the risk of an overly dominant role for central government in relation to elected local authorities. This article briefly considers the history of central-local relations in UK practice and then assesses the contribution, and more importantly, the potential future contribution, of the Charter and the Charter Incorporation Bill and other possible similar legislative projects.

2. CENTRAL-LOCAL RELATIONS IN THE UNITED KINGDOM IN THE TWENTIETH AND TWENTY FIRST CENTURIES

Nearly one hundred years ago, in the 1920s, the youthful and, as yet, unknighted William Ivor Jennings delivered a course of lectures on constitutional law, first in the University of Leeds and then, from 1929, in the University of London. One element of those lectures became the foundation of what he described as his «little book», *Principles of Local Government Law* (*«Principles»*)[4], published in 1931. In the Preface to that book Sir Ivor[5] explained that he had «concentrated upon the juristic and constitutional principles which seemed to [him] to underly our system of local government»[6]. Chapter V is headed «Central Control» and Sir Ivor recalled «that the Benthamite[7] principle of local government involved close control by the Central government. The local authorities were to be agents of the Central Government to carry out locally the national policy»[8]. That principle had been adopted (from 1834) in «Poor Law» (welfare) legislation which, by the time of the Poor Law Act 1930, provided that the Minister of Health was «charged with the direction and control of all matters relating to the administration of relief to the poor throughout England and Wales…»[9]. Sir Ivor notes that such a power of direction and control was larger than the Minister possessed in any other sphere of local government[10] *but* it illustrated, Sir Ivor commented, «the relation which is gradually being established between local government and central government. In all the branches of local administration in which national interests are said to be involved – and it should be stated that some students of government consider that it applies to many other branches as well – the Central Government is gradually obtaining the sort of general control which is referred to in the section quoted. The actual administration and the exercise of discretion within narrow limits are left to the local authority. The general lines of the administration and the method of exercising discretion are determined by a department of the Central Government. The department may give general orders; it may advise what should be done in individual cases; it may admonish for what has already been done in individual

[4] I. Jennings, *Principles of Local Government Law*, London, U of London Press, 1931. And subsequent editions to the 4th of 1960.
[5] Jennings was not actually knighted until 1948.
[6] I. Jennings, *Principles*, cit., p. 7.
[7] Jeremy Bentham who developed a *Constitutional Code* including the «division of the country into uniform districts, a popularly elected council for each of them, and control of the council by the central legislature in the interests of the rest of the country» cfr. *Principles,* cit., p 62).
[8] I. Jennings, *Principles*, cit., p. 157.
[9] I. Jennings, *Principles*, cit., p. 158.
[10] I. Jennings, *Principles*, cit., p. 159.

cases. The administration, in short, is in the hands of local authorities; the general control is left with the Central Government»[11].

Most of the rest of Chapter V was devoted to a summary listing of the ten varieties of controlling powers available to ministers:

1. The issuing of general orders and regulations.
2. Control over officers.
3. Inspection by central officials.
4. Confirmation of bye-laws.
5. The audit.
6. Control over grants.
7. Control over loans.
8. Appellate functions.
9. Powers of acting in default.
10. Powers in respect of local legislation. (p160)

A not dissimilar listing of such powers might have been offered by any analyst over the succeeding century. Sir Ivor concluded the chapter with a note on the «Cumulative Effect» of the central controls which brought local government under the direct control of Central Government[12]. Beyond the terms of statutes providing the ministers' powers, the close control had a «psychological effect»[13]. A relationship of local authority subordination had been established and, for constitutional lawyers at least, the subsequent discussion of central control and the central-local relationships has taken place within the tradition of Jennings. Later in the twentieth century, Professor John Griffith (like Jennings (until his move to Cambridge), from the London School of Economics) produced his magisterial study, *Central Departments and Local Authorities*[14] and the Redcliffe-Maude Royal Commission Report[15] which formed the basis of local government reorganisation in England and Wales from 1974. The language of the Report was that of a future relationship of «partnership» between local authorities and central government, avoiding thereby the previously dominant role of ministers and their departments. Nor was this idealised concept of partnership a new arrival on the scene. By the time of the first edition of his own general constitutional law text, *The Law and the Constitution*[16], Sir Ivor had adopted it. In his treatment of local authorities as a section[17] within his Chapter V on «The Administration» he retained a focus on central control but he conceded, as he had done earlier in *Principles*, that this resulted in a sharing of responsibilities; «Consequently, local administration is in many respects a partnership between the Central Government and the local authorities,

[11] I. Jennings, *Principles*, cit., p. 159.
[12] I. Jennings, *Principles*, cit., p. 196.
[13] I. Jennings, *Principles*, cit., p. 196.
[14] J.A.G Griffith, *Central Departments and Local Authorities*, London, George Allen & Unwin, 1966. See also M. Loughlin, *Local Government and the Modern State*, Mytholmroyd, Sweet & Maxwell,1986.
[15] *Report of the Royal Commission on Local Government in England*, Cmnd 4040 (1969).
[16] I. Jennings, *The Law and the Constitution,* U of London Press, 1933.
[17] I. Jennings, *The Law and the Constitution,* cit., pp. 176-182.

the general policy being determined for the most part by the appropriate Government Department and its application to the individual case being left to the local authority»[18].

3. DEVOLUTION AND OTHER INSTITUTIONAL CHANGE

Despite the recognizable continuity of the Jennings model of analysis, if it is to be taken as the background to what has to be addressed, in the years since 1985 or 1997, by the Charter, a number of important modifications, especially those affecting institutional structures, have to be noted. Above all, it has to be observed that the era since 1997 has been that of the rolling out across the United Kingdom of substantial waves of devolved government. As a preface to that, however, there should be a return to Jennings himself for a reminder that his own subject of study was England, although, because of their combination within the same «legal system» or «jurisdiction» (in an international private law sense) and because the Westminster Parliament habitually legislated for both together, virtually all that could be said of England could also be said of Wales. On the other hand, in many, many important respects, Scotland was different. Under the arrangements secured by the Treaty of Union 1706, the separate legal system of Scotland had been maintained and, with it, the distinct institutions of local government for which, in the main, separate legislation was enacted by the UK Parliament. The pattern, for instance, of county councils established for England and Wales[19] was, at the end of the nineteenth century, substantially replicated for Scotland but under separate legislation[20] and with large and small burghs instead of districts at the sub-county level. In addition, arrangements at the level of central government had diverged from those in England, with the establishment, from 1885, of the Scottish Office, with, from 1925, the Secretary of State for Scotland. Thus, by the time of Scotland's separate Royal Commission on Local Government in Scotland[21], the central local relationship was, almost entirely, one between the Scottish Office and the, separately established, county councils and large and small burghs. What equally has to be noted is that the Wheatley analysis of that relationship matched very closely that of Redcliffe-Maude and the reorganisational reform proposals (though cast in terms of Scotland's new regional, district and islands councils) including the notion of «partnership» were very similar.

Things were different in Northern Ireland. By the time of Jennings's lectures and book, the Province had entered its first instantiation of «Stormont» devolution. The Government of Ireland Act 1920 had originally made provision for Parliaments to be established in both Belfast and Dublin but, following the establishment of the Irish Free State (subsequently the Republic of Ireland) from 1922, only Northern Ireland benefited from its terms. This meant that, during the period 1922-72, the Parliament of Northern Ireland had legislative responsibility and central-local relations were conducted between

[18] I. Jennings, *The Law and the Constitution*, cit., p. 181.
[19] In the Local Government Acts of 1888 and 1894.
[20] Cfr. Local Government (Scotland) Act 1889 and Burgh Police (Scotland) Act 1892.
[21] Also known as The Wheatley Report, Cmnd 4150, 1969.

the Northern Ireland Government and the Province's county councils[22]. In essence this was a position similar to the other parts of the United Kingdom, although sharply affected by the politics of Unionist Party domination at both levels throughout. Between 1972 and 1999 the governance of Northern Ireland was in disarray, and with many traditionally local authority functions assigned to unelected «boards».

Returning to the post-1997 devolution initiative to record institutional change, varying, it is true, from country to country within the United Kingdom, the UK Parliament passed the «Devolution Acts»[23] which created new legislatures (the Scottish Parliament, the Northern Ireland Assembly and the National Assembly of Wales – subsequently the Senedd) and Executives/Governments responsible to each. The following quarter century has, for each country, been different; in Wales, a period of substantial strengthening of the powers of both institutions; in Scotland, a similar strengthening but from a much higher base and very much related to growing nationalism in the country, and with the independence referendum of 2014 a key political event; and, in Northern Ireland, a period of political precarity despite the Good Friday Agreement of 1998 and the ending of the earlier violent «Troubles», and the intermittent functioning and non-functioning of the institutions. Subject to those varieties in the experience of devolution, what all the models have produced for our own subject of study has been an institutional redefinition of the central-local relationship in Scotland, Wales and Northern Ireland. In all cases, the Parliament/Assembly/Senedd has legislative competence for local government and the governmental relationship has been transferred to one which no longer engages the UK/Whitehall Government but instead the devolved governments in Edinburgh, Cardiff and Belfast.

The actual new relationships are still being worked out. And against the background of two competing assumptions. On the one hand, it may be argued that the structural reforms of devolution dictate no particular outcome in terms of the exercise of legislative or administrative power in relation to local government. Devolution redefines the structures but does not determine developments thereafter. On the *other* hand, there is room for apprehensions that devolution necessarily involves the insertion into the institutional space of the former central-local relationship of the newly devolved legislature and government, with each seeking, in circumstances of an assumed zero-sum struggle, to expand the reach of its own competences and, in relation to those beneath, the potential for controls those competences bring[24]. These were indeed apprehensions expressed, most poignantly and ironically perhaps, by the UK Government at the time of the passing of the Scotland Act 1998 when it sought, whilst conferring broad powers on the Scottish Parliament and

[22] See eg. A.S. Quekett, *The Constitution of Northern Ireland*, HMSO, 1933.
[23] Scotland Act 1998 («SA 1998»), Government of Wales Act 1998 and Northern Ireland Act 1998, all as subsequently amended/replaced.
[24] See eg. CMG Himsworth, *«New Devolution: New Dangers for Local Government?»* 24 *Scottish Affairs* 74, Edinburgh University Press,1998.

Executive/Government, to urge their deployment with restraint[25]. The UK Government established a Commission of Local Government and the Scottish Parliament which produced (in 1999) recommendations on future relationships[26].

Whilst the arrival of devolution might have brought the need for the biggest revision of Sir Ivor Jennings's analysis of the early twentieth century position (although only, in devolution's «full» version, in relation to those parts of the United Kingdom not directly treated by Jennings himself[27]) there are, of course, other changes in the general condition of public administration which have to be accommodated. The period between the 1920s and the 2020s has, in the first place, been one of a large expansion in the delivery of public services – most notably after the Second World War, of the hospital and primary health services and the expansion of «welfare» and other social services. And this has, of course, been accompanied by an expansion of that provision by public authorities – in some cases, local authorities, as reorganised over the century; in others by central department (whether devolved or not), and, most importantly, by the addition of many, many public bodies in the domain of «intermediate government». A glimpsed overview of the field reveals the creation of the National Health Service, with a substantial, and varying, array of public bodies for local delivery separate from local authorities subject to ministerial supervision; the removal of local «Poor Law» functions in the direction of (mainly at a UK level) central provision of social security; the post-War expansion of «town and country planning» largely at the local government level but subject to central supervision; the expansion of school education, again largely by local authorities but, in England, with much delegation to schools or groups of schools through «academicization».

One reaction to this much-revised picture of the constitutional and administrative environment since the early twentieth century might be to suggest that a much more sophisticated analysis is required to replace the simpler binary portrait of the central and the local. And, of course, that would be necessary if such a comprehensive analysis were required. But, as long as democratic local self-government (or indeed local autonomy) is retained as one significant actor and as long as its retention is conditional upon the sustaining of conditions under which central control does not dominate, then the specific state of central-local relations (and indeed the differing states of central-local relations across the United Kingdom and the conditions, within that, of «local autonomy») remain an important focus of study.

By reference to a selected cluster of sources it is not difficult to demonstrate the continuing high profile, in Scotland but also across the United Kingdom, of the reform of central-local relations as a part of initiatives in the direction of decentralisation and of gove-

[25] See the White Paper *Scotland's Parliament* (Cm 3658(1997) Ch 6).
[26] For more detail, see CMG Himsworth and CM O'Neill, *Scotland's Constitution: Law and Practice* (4th Ed, 2021) para 8.7 on Local Government and Devolution.
[27] The Cities and Local Government Devolution Act 2016 conferred wider powers on directly elected mayors and «combined authorities» in England but, although the word «devolution» is in its title, it does not involve devolution in the sense in which the term is applied in the other parts of the United Kingdom.

rnmental reform in general – see, for instance, (Gordon Brown and Labour), *A New Britain: Renewing our Democracy and Rebuilding our Economy*[28] recommending, for Scotland, «Enhanced local control: there is a strong case for pushing power as close as possible in Scotland, and consideration should be given to establishing new forms of local and regional leadership, such as directly elected mayors»[29]; and, on the other hand, (Iain Stewart MP from a Conservative perspective) *Beyond Holyrood: Unlocking Local Growth in Scotland*[30], including «Holyrood has a tendency to be a centralising force in Scotland, especially under the current SNP administration…proposals such as the establishment of a national care service cannot be seen as anything but a transfer of powers and responsibilities from Scotland's local authorities to the central government. This follows the SNP's controversial centralisation of police and fire services». From a non-political standpoint, John Stanton has recently, in his *Law, Localism, and the Constitution: A Comparative Perspective*[31] contributed a broad-ranging description and analysis on «Central-local relations and constitutional reform»[32]. In April 2023, Matthew Engel, writing in the political journal, *The New Statesman*[33] chose the banner of «The Death of Local Government» under which to lament the current condition of local democracy.

Continuing consideration of the cluster of sources with a more direct focus on Scotland, the concerns expressed about the risks for local government at the launch of devolution have already been mentioned[34]. More recently Lord Smith, Chair of the Smith Commission which followed the Scottish Independence Referendum of 2014, expressed a personal plea for further devolution *from* the Scottish Parliament to local authorities and civic Scotland[35] and the Report of the Reconvened Consultative Steering Group contained a similar warning[36]. During the period 2017-22 there were the early stages of a Local Governance Review conducted jointly between the Convention of Scottish Local Authorities («COSLA») and the Scottish government (although interrupted by COVID-19) but this was replaced by a commitment on the Government's part to reach a «New Deal» for local government, including a new «Partnership Agreement» and «Fiscal Framework». Although there was an ambition to have the New Deal in place for the

[28] *Report of the Commission on the UK's Future*, (Labour Party, 2022), p. 15.
[29] Perhaps strange terminology in a Scottish context where corresponding terminology has been that of «provosts»? See below. See also, in the Report, Rec 3: There should be a constitutional requirement that the political, administrative and financial autonomy of local government should be respected by central government (p 70); Rec 12: Local government should be given long term financial certainty (p 93); and Rec 13: Local government should be given more capacity to generate its own revenue with fiscal powers (p 94).
[30] *Onward*, 4 June 2023.
[31] J. Stanton, *Law, Localism, and the Constitution: A Comparative Perspective*, London, Routledge, 2023.
[32] Ibid, Ch 7 «Relations between central, devolved and local government and Ch 8. A new constitutional settlement for local government».
[33] Issue 24 April-4 May 2023, pp 34-36.
[34] See text at n 16.
[35] See *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2004).
[36] *Reflections on 20 Years of the Scottish Parliament* (Oct 2019) paras 13-14.

2022-23 financial year and that target was missed, there has been renewed commitment to its implementation[37].

In May 2023 a conference was held on «Central and Local Government: Building for the Future», bringing together a wide range of participants from central and local government, other stakeholders and academia. I suspect that nothing said would have surprised Sir Ivor Jennings, save only perhaps that he might have been relieved to hear that elected local authorities had survived for a hundred years since his day.

4. THE EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT

During the same conference, Councillor Steven Heddle, speaking on behalf of COSLA, twice invoked the need to continue the process in the Scottish Parliament towards enactment of the Charter Incorporation Bill. He looked forward to the creation of a «resilient partnership between local and central government» and spoke of the need, in particular, for progress on «fiscal empowerment», aligned with the principles of the Charter and to ensure that the Charter was «enshrined in Scots law as soon as possible». And it is to the Charter as an anticipated solution to the problem, both long-standing and of our own day, of central-local relations to which we should now turn – starting with the question, both whimsical and serious: What would Sir Ivor have thought? We have seen that, already by the time he was lecturing and writing in the 1920s and 1930s, Jennings had reached his own conclusions about the direction of travel of the central government control of local government in England. Democratically elected[38] local authorities were, at that time, really quite new – only about thirty years old. But he feared for their freedom from ministerial interventions and domination. How might he have responded to a suggested solution in the form of a European Charter of Local Self-Government? It is, of course, an impossible question. His generation (he was himself born in 1903) had known the horrors of the First World War and the formation, from 1920, of the League of Nations, by the time of *Principles of Local Government Law* in 1931, but had yet to confront the political, military and genocidal disasters of the 1930s and 1940s which produced the circumstances in which the Council of Europe, the European Convention on Human Rights («ECHR») and, in due course, the Charter were born. On the other hand, by 1940, Sir Ivor had produced his *A Federation for Western Europe*[39] in which he developed his ideas (and, in its Appendix, a «Rough Draft of a Proposed Constitution for a Federation of Western Europe») for the conversion of the utopianism of a global federal dream[40] into a practical European post-War framework. From the point of view of this article, however, it is no more than a mere disappointment that, given Sir Ivor's own attachment to local government as an aspect of democratic governance overall, there is no reference to the role of local government in *A Federation*. Even in a chapter section on «The Maintenance

[37] See https://www.gov.scot/news/a-new-deal-for-local-government/.
[38] But still lacking participation by 50% of the population.
[39] I. Jennings, *A Federation for Western Europe*, Cambridge, Cambridge UP, 1940.
[40] Sir Ivor himself, at p 2, referenced C. Streit, *Union Now*, New York, Harper, 1939 and W.B. Curry, *The Case for Federal Union*, New York, Penguin,1939.

of Democracy»[41] local government goes unmentioned[42]. This is to be contrasted, it may be observed, with the case made for the Charter after the Second World War which was, in part, based on the potential for local democracy to survive where national democracy is under threat.

Far more important for present purposes than speculation about the imagined thoughts of Sir Ivor, however, is the much more directly relevant analysis of our own time. Two principal questions may be selected: How far may the United Kingdom's signature and ratification of the Charter be expected to have a positive effect on the unhappy state of central-local relations by challenging central control? And, secondly, how far might the formal «incorporation» of the terms of the Charter make an additional contribution? For a full account of the emergence of the post-War case for the adoption, across Western Europe, of shared standards of local self-government (undoubtedly, in part as a reaction to the much larger abandonment of democracy during the 1930s and the War period) and their eventual articulation in an enforceable international treaty by the Council of Europe, reference should be made to other sources[43]. That process had begun as early as 1950 with the «Seelisberg Declaration» and culminated in 1985 in the opening of the Charter for signature by the then 21 members of the Council of Europe. It is clear from the formal records that UK representatives played an active part in the process, even if it reflected their caution at many points, leading to the dilution of the strength of initial draft Articles[44]. Such caution was perhaps inevitable, given the state, for instance, of financial controls on UK local authorities (though these were and are widely shared across Europe and have been ever since). The subjection of local planning authority planning control decisions to appeals to ministers was another clear example of potential Charter conflict[45]. Following the adoption of the Charter's text in Rome in November 1984, the United Kingdom joined all the other Council of Europe members in signing the Treaty[46].

Following an important Preamble in which it is declared, inter alia, that «local authorities are one of the main foundations of any democratic regime» and that «this entails the existence of local authorities endowed with democratically constituted decision-making bodies and possessing a wide degree of autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised and the resources required for their fulfilment», Part 1 of the Charter contains its substantive provisions. And these, in turn, include a commitment to the recognition of the principle of local self-government

[41] A part of Chapter VI on «The Federation and the States».
[42] The only point in the book at which there is any reference to local authorities is within Ch V, on «The People's House», where there is brief discussion of the identification of House constituencies in England (pp 74-76).
[43] One such would be C. Himsworth, *The European Charter of Local Self-Government: A treaty for local democracy*, Edinburgh, Edinburgh UP, 2015. Ch 2.
[44] C. Himsworth, *The European Charter of Local Self-Government: A treaty for local democracy*, cit., Ch 3.
[45] C. Himsworth, *The European Charter of Local Self-Government: A treaty for local democracy*, cit., pp 57-58.
[46] Although some, the United Kingdom included, took much longer to *ratify* the Treaty. Belgium, for instance, did not ratify until 2004.

ng «the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs» (Art 3(1)) as exercised by «councils or assemblies composed of members freely elected by secret ballot» (Art 3(2)) and of the scope of local self-government (Art 4), including the requirement that «public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen» (Art 4(3)). Further Articles serve to provide for and protect local authority boundaries (Art 5); appropriate structures and resources (Art 6); conditions of office of locally elected representatives (Art 7); restrictions on administrative supervision (perhaps the essence of central control) (Art 8); «adequate financial resources» (Art 9); local authorities' rights to associate (Art 10) and the legal protection of local self-government (Art 11). Later Charter provisions include Article 12 which requires each state party to specify which of the substantive Articles it considers itself bound by – with the United Kingdom specifying (along with many, but not all, Council of Europe members) all the substantive Articles; and Art 13 which enables state parties to specify (and therefore to restrict) the categories of local authority to which the Charter will apply. The United Kingdom used that provision wholly to exclude the application of the Charter in Northern Ireland, by confining local authorities subject to the Charter, as those in *other* parts of the United Kingdom.

5. CHARTER ENFORCEMENT AND «INCORPORATION».

Comparisons are readily drawn between the Charter and its longer-standing cousin, the ECHR. The Charter creates «autonomy rights» for local authorities whereas the ECHR had created «human rights» for individuals. When it comes to the enforceability[47] of the guaranteed rights, it is appropriate, in both cases, to look to both Europe-level and domestic mechanisms and, in the case of the ECHR, the European Court of Human Rights in Strasbourg (with political back-up from the Committee of Ministers) has rightly acquired a very high prominence. No such equivalent court is established under the Charter[48], even though its terms are regarded as binding and enforceable under international law. Instead, early in the Charter's existence, a form of «political» supervision of the implementation of the Charter was established under the auspices of the Congress of Local and Regional Authorities of Europe («the Congress»). The Congress created a system for the frequent monitoring of Charter implementation and the production (following documentary study and country visits and interviews) of reports and recommendations[49]. Since 1997, the United Kingdom itself has been scrutinised and reported on in this way on three occas-

[47] Whilst «enforceability» may be a principal criterion of Charter impact, it may be observed that, without doubt, the Charter has seen its greatest overall impact in Central and Eastern Europe in the 1990s when the Charter was universally invoked as the basis for establishing democratic local self-government in the post-Soviet era. See C. Himsworth, *The European Charter of Local Self-Government: A treaty for local democracy,* cit., pp 148-151.

[48] Nor indeed, under the European Social Charter.

[49] One member of all monitoring teams is appointed from the Congress's Group of Independent Experts and I should declare my own membership of that Group between 1997 and 2023.

ions[50]. The most recent Recommendation of 2022[51] expressed some general satisfaction with aspects of the United Kingdom's progress towards implementation of Charter requirements, but also requested, inter alia, that the Committee of Ministers should invite the UK authorities to «explore all possible legal venues [sic, but query better «avenues»?] in order to recognise the principle of local self-government in domestic law» (see below); to initiate a reform of the system of local government funding; to ensure that the administrative supervision over local authorities is limited to the control of legality; and to extend Charter coverage to the Greater London Authority and local authorities in Northern Ireland.

Turning to domestic enforcement, the Charter itself contains two relevant provisions. On the one hand, Art 2 provides that the principle of local self-government shall be «recognised» in domestic legislation and, where practicable, in the constitution. Plainly, for the United Kingdom, recognition in «the constitution» holds difficulties, in the absence of a written constitution. Recognition in domestic legislation may arguably be implied, in the United Kingdom or elsewhere, wherever relevant statutory provision is made, for example, to establish, empower and finance local authorities[52]. On the other hand, Art 11 provides for local authorities to have a right of recourse to a judicial remedy «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». The restriction of this provision to principles «enshrined in the constitution or domestic legislation» (ie. as confined to the existing state of that legislation without specific reference to the Charter) is important. At all events, neither Art 2 nor Art 11 expressly requires express «incorporation» of the Charter by state parties.

It should be observed that, at this point, a necessary distinction has to be recognised between those («monist») states which confer domestic legal recognition on international treaties to which a state has acceded and, on the other hand, the («dualist») states where that process does not automatically occur and some form of express adoption into the legal system (or systems) has to be enacted. The United Kingdom is in the latter category and domestic implementation of the ECHR by means of the Human Rights Act 1998 (HRA 1998) was necessary to provide the UK courts with their powers of enforcement[53] and very often HRA 1998 has been thought of as an «incorporation» of the ECHR. In

[50] In 1998, 2014 and 2022. For fuller discussion, see C. Himsworth, *The European Charter of Local Self-Government: A treaty for local democracy,* cit., Ch 4. And for an informal critique of Scottish local government against Charter standards, see C. Himsworth, «*Local Government in Scotland*» in A. McHarg and T. Mullen (eds), *Public Law in Scotland*, Avizandum, 2006.

[51] Rec 474 (2022).

[52] But note Rec 474 (above) which invites further steps to be taken.

[53] It should be acknowledged that, even before incorporation, English (but not Scottish) courts were able to take limited account of the ECHR to assist interpretation of the law in circumstances of uncertainty. In *R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] 3 All ER 548, the English Court of Appeal (and, before them, the High Court), whilst conceding that the Charter might, in an appropriate case, be available as an interpretative aid, evinced a distinct lack of enthusiasm for the justiciability of the Charter.

the sense, however, of actually enacting the treaty into UK law, with the consequence, for instance, of impliedly but automatically displacing any previous statutes incompatible with it, it was not an incorporation of the Convention[54]. The same is true of the Charter Incorporation Bill, even though it does adopt the language of «Incorporation» into its name. In both cases, what they do is to identify the substantive provisions of the relevant treaty (in a schedule) and then to specify the terms on which they may be invoked within the legal system – in the case of HRA 1998, providing that public authorities must act compatibly with the ECHR. In the case of the Charter Incorporation Bill, the scope to invoke the Charter is similar, but narrower (s 2)[55]. Only the Scottish Ministers are required to ensure that their behaviour is compatible – unsurprisingly (though not inevitably[56]) as the principal threat to local autonomy will always be the relevant «central government», in this case, the devolved Scottish Government. In addition, the Scottish Ministers have an obligation to «promote local self-government» by considering steps to safeguard and reinforce local self-government (s 3). There is further provision for the interpretation of legislation (including, importantly (see below) UK Acts of Parliament), so far as possible, compatibly with the Charter Articles; for «declarations of incompatibility»; and for parliamentary statements on the Charter-compatibility of Bills[57].

The Charter Incorporation Bill is, of course, an exclusively Scottish initiative, a demonstration of the capacity of devolution to enable sub-national divergence of practice, even if against the background of a longer tradition of differing statutory provision from the single Westminster source. It would be open to the devolved legislatures of Wales and Northern Ireland to adopt similar initiatives there – with the Westminster Parliament retaining sole legislative competence for England. There have been no such parallel proposals for Charter incorporation, although some years ago (and especially during 2007-13), House of Commons committees did devote some energy to the pursuit of other (and perhaps misguided) efforts in the direction of securing greater local government autonomy[58].

Whilst devolution has provided the range of institutions (legislative and executive) to provide, in turn, a range of different policy responses (and, in this case, to the incorporation or not of the Charter), devolution has also, of course, provided new judicial institutions and procedures which can be invoked to impact the law-making of the devolved legislatures. Specifically, the UK Government (through its Law Officers) is empowered to intervene[59], within four weeks of the passing of a Bill to refer it to the UK Supreme Court

[54] As confirmed by the Lord Chancellor of the time, Lord Irvine, who, at Committee Stage on the Bill, said: «The Convention rights will not, however, in themselves become part of our substantive law». HL Debs 18 Nov 1997 cols 508-509.
[55] References to the Bill are to the version «As Passed» by the Scottish Parliament.
[56] Other public bodies (eg. in the NHS) could have been added.
[57] Details remain subject to further revision. See below.
[58] See C. Himsworth, pp 152-167; J. Stanton, *Law, Localism, and the Constitution: A Comparative Perspective*, cit., pp 276-281.
[59] SA 1998, s 33.

etence. Along with the United Nations Convention on the Rights of the Child (Incorporation)(Scotland) Bill which had been passed by the Parliament on 16 March 2021, the Charter Incorporation Bill was referred to the Supreme Court and the results of the UKSC proceedings are to be found in the Court's judgment of 6 October 2021[60]. The UKSC held that the provision made by two sections of the Charter Incorporation Bill was beyond the powers of the Scottish Parliament. In both cases, it was the potential impact of the Bill on the interpretation and application of UK Acts of Parliament that was held to be unlawful. Section 4(1A), in relation to a general duty to interpret legislation in a manner compatible with the Charter Articles, and s 5(1), in relation to declarations of incompatibility, were both held (para 90 (v) and (vi)) to be outside the legislative competence of the Scottish Parliament. The reasoning which led the Supreme Court to these conclusions is not wholly easy to follow. For one thing, because the judgment dealt with two Incorporation Bills, the conclusions on the Charter Incorporation Bill are heavily derivative upon those on the other Bill and are not set out separately in full. More significantly, the basis of the argument in both cases was not on the relatively familiar grounds that the Bills «related to a reserved matter». The Court had readily acknowledged that the incorporation of the treaties was «a matter for the Scottish Parliament» (para 4). Instead, relying on a line of reasoning first adopted by the Court in an earlier case in 2018[61], it held the provisions incompetent because they «would modify section 28(7) of the Scotland Act», contrary to s 29(2)(c) and Sched 4 of the Act.

Much of the Scotland Act itself, unsurprisingly, cannot be modified by the Scottish Parliament. The Act serves as a, largely unamendable, «constitution»[62]. But the purported modification of s 28(7) is a very strange basis for an argument that the Scottish Parliament has exceeded its powers. The subsection provides that: «This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland». The subsection had long been viewed[63] as having been inserted *ex abundanti cautela* to reconfirm the understanding, fundamental to the concept of devolution, of the retention, despite the powers devolved by SA 1998, that the principle of the sovereignty of the UK Parliament was being preserved. The notion that that principle might be «modified» by the Scottish Parliament (or even by the UK Parliament) would be unthinkable. But, instead, the UK Supreme Court has gone down the novel road of the creation by the subsection of a new principle that the powers of the UK Parliament are indeed adversely affected (and the

[60] *References by the Attorney General and the Advocate General for Scotland on the United Nations Convention on the Rights of the Child and on the European Charter of Local Self-Government* [2021] UKSC 42; 2022 SC(UKSC) 1; 2021 SLT 1285 («*Incorporation Bills*»). See C. Himsworth, «*Incorporation Bills in the Scottish Parliament: The Theoretical and Practical Consequences of Uncertainty*», *Public Law,* (forthcoming).

[61] *UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill – A reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64; 2019 SC (UKSC) 13; 2019 SLT 41.

[62] See especially M Elliott and N Kilford, *Devolution in the Supreme Court: Legislative Supremacy, Parliament's 'Unqualified' Power, and 'Modifying' the Scotland Act*, UK Const L Blog, 15 Oct 2021 (and [2022] CLJ 4). See too G Cowie, *The Power to Make Laws for Scotland: The Treaty Incorporation Bills Reference*, PL, 2022, p. 189.

[63] See eg C.M.G. Himsworth and C.R. Munro, *The Scotland Act 1998*, Edinburgh, W. Green/Sweet and Maxwell, (2nd edn), 2000, pp 36-37.

subsection thereby modified) by provisions in an Act of the Scottish Parliament which, inter alia, subject UK Acts to judicial interpretation in accordance with those provisions. It is not yet known, of course, where the interpretation of s 28(7) may lead. Much uncertainty surrounds future developments. But, for the purposes of the Charter Incorporation Bill, the decision of the UK Supreme Court has conclusively returned the Bill for amendment prior to a «reconsideration stage» in the Scottish Parliament. And that is where the Bill currently rests, with the Scottish and UK Governments in a process of negotiation of a new text which might successfully avoid a further reference to the Supreme Court under SA 1998 s 33.

6. **CONCLUDING ASSESSMENT**

It is a matter of very great regret that this article has to be signed off before the Charter Incorporation Bill reaches the statute book[64]. As explained, its Royal Assent has been delayed for reasons not directly associated with the case for or against incorporation. Without a final text, any concluding assessment has to be, to an extent, provisional. But, even if that final text were already available, any conclusions would include a cautionary «Wait and See». There has to be much uncertainty about the likely impact of an Incorporation Act and that uncertainty has been increased by the current doubts as to the terms of its final text – assuming that stage is reached.

The principal question bears repetition. After at least a century of recognition, at both the UK level and, more recently, the specifically Scottish level, that central controls have denied local authorities the freedom and autonomy their constitutional status deserves, how far might incorporation of the Charter make a significant difference? The case publicly articulated for incorporation has included, unsurprisingly, the need for such an impact. But, at the same time, there will always be a case for some scepticism, as with any other reforming legislative initiative launched against the tide of political forces it has to confront. But, despite that pessimism of the intellect, there is scope for, at least an experimental optimism of the spirit. There has to be the *possibility* that the Charter's enhanced status may encourage its adoption into political debate to a higher degree than hitherto and even its being directly called in aid in the forms of litigation anticipated by the Incorporation Bill to be available. The Charter's terms may have a general character rendering its application by Scottish courts problematic for judges familiar with more specifically drafted statutes but this was true too of the application of the ECHR and there is no doubt at all that, especially in the context of proceedings for judicial review, the resort to and impact of the ECHR has been huge.

On the other hand, and to end with a cautionary word, the take-up of Charter incorporation, whenever that might happen, may be much less than that of the ECHR, whether by courts or in the political process. Furthermore, what may yet be revealed is that UK local authorities, operating in the «Northern European» tradition of relatively large and relat-

[64] Perhaps there may be an opportunity for the publication of a post scriptum in which later developments may be reported?

ively well-empowered and well-funded bodies acting «in partnership» with central government, struggle to establish their Charter-ordained autonomy.