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Top down or bottom up? How subsidiarity is helping local authorities change the Government's supply side housing policies

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Abstract

The application of the EU principle of subsidiarity, that has grown in its strength since 1992, has largely been regarded a major shaping and legal underpinning force for devolution in the UK. However, the application of this principle has been considered to have been largely absent in England until the introduction of the executive mayoral government arrangements in London in 2000 and directly elected mayors for 6 combined authorities in 2017. In this, the application of subsidiarity has been partial and, although suggested as a bespoke approach, has a largely offered a menu driven approach. While local authorities were given a general power of competence in England through the 2011 Localism Act there was initially little confidence in its use. Yet it can be argued that the austerity and financial reform programmes implemented by the then Secretary of State for DC LG, Eric Pickles and the Chancellor of the Exchequer, George Osborne has nudged if not driven local authorities into using these subsidiarity powers in ways that may not have been anticipated.

This paper will consider how the general power of competence given in the 2011 Localism Act has been used by local authorities to establish housing and energy companies that are shaped to meet local needs and priorities, have different forms and create the opportunity to return to foundational principles of municipalism that rely on the independence created by subsidiarity. While the general powers of competence do not offer the scale of fiscal federalism

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envisaged by the OECD, leaving the UK as a primarily centralised state, these local government innovations may support more local financial independence than has been the case in the post-war period. This paper will consider these changes, what is encouraging them and conclude with some discussion about their potential future direction.

Key words

Subsidiarity; local government; housing; fiscal federalism; localism.

Introduction

Local government within the UK and particularly England is set within the most centralised system of government in the OECD. The ability of UK local authorities to make decisions about their funding, to raise income through specifically locally taxation and to use their assets to raise investment for their services is severely hampered by the central state. This is manifest in a variety of ways that comprise the use of centralized agencies to provide funding based on competitive nudging to meet central rather than local government objectives, such as through the £44bn provided for Homes England for housing. There are other forms of centralisation including the use of quasi-independent state bodies such as Local Enterprise Partnerships (Pike et al 2015) as a means and mechanism for channelling central government decisions for state approved expenditure that should be delivered though the EU Cohesion regulation (Morphet 2017). A further example is the determination of housing targets through local planning systems that are now promoting a common mechanism for assessing housing need at the local level (MHCLG 2018).

This centralisation is located in the absence local government as a tier of the state in the British unwritten constitution and it has been a creature of statute since its current form was constructed in the late 1880s. While there have been a series of attempts to gain more independence for decision making at the local level including the eventual signing of the European charter of self-government (Keating 2004), the Local Government Act 2000 which included Henry Vlll powers to promote well-being (Morphet 2008) and the Localism Act 2011 which provides local authorities with a bounded general power of competence, local authorities have worked within these central government boundaries, learning to manage them to meet their own needs as far as possible. This approach has come under severe strain since the austerity agenda was introduced by the Coalition Government in 2010 (Lowndes and Pratchett 2012; Grimshaw and Rubery 2012), since which local authorities have been the most significantly squeezed part of government, with their budgets reduced to a greater degree than other parts of the public sector (NAO 2018). This continuing austerity has been compounded by a removal of the Government's Revenue Support Grant made to local authorities on an annual basis (Lowndes and Gardiner 2016) and the increased reliance on New Homes Bonus which was introduced in 2012 to encourage local authorities to permit more housing to be built in their areas against NIMBY opposition (Dunning et al 2014; Matthews et al 2015; Wilson et al 2107) .

This paper reviews the position of local authorities in relation to the self determination of their decision making within the context of the EU's subsidiarity principles and then considers the UK government's attempts to comply with these specifically in England. The paper will then continue with a case study on the way in which local authorities are providing housing to overcome austerity using their assumed new subsidiarity powers to create a more independent financial basis for their operations and increased financial independence from central government. The paper will conclude with some observations on the likely future directions of these trends and the prospects for local authorities and subsidiarity post-Brexit.

Subsidiarity and its application in the UK

The role of locally determined decisions for sub-state government within the context of subsidiarity is rarely discussed in this form within the UK and more specifically in England. In the preparation for introduction of devolution in Scotland, the role of subsidiarity, particularly as it was enhanced in the Treaty for the EU in 1992 (Toth 1992; Cass 1992) has been considered regarded as an anchoring principle, for subsequent devolution legislation. However, in England subsidiarity has primarily been discussed in the context of the relationship between the EU and the UK state and Parliaments (Kiiver 2007) rather than within tiers of the state within the UK including England. While this has not been regarded as an issue, there have been pressures on the UK government to reduce its centralisation from the EU specially through the applications its programmes such as that for Cohesion and local transport. The pressures to introduce more subsidiarity specially in relation to cohesion programmes was set out in the Lisbon Treaty 2007 (Mayoral 2009; Piris 2010; Craig 2010) and this has created more pressure on the UK to reform the distribution of decisions and where available funding to deliver these programmes whether from the EU or the UK.

In preparation for the introduction of more subsidiarity in sub-state institutions in England, the UK government undertook several steps. These include the initial approaches to create s a sub state tier of government through Government Offices supported by Regional Assemblies in 2004 (Rhodes 1997; Jones and Macleod 2004; Allen and Cochrane 2007). These were accompanied by a round of ad hoc local government reorganization which was designed to demonstrate that local authorities were not capable of managing their own agenda san making decisions (Clarke and Stewart 1994; Wollman 2004). These new institutions were accompanied by mechanisms for strategic plans at regional level for land use, the economy the environmental, transport and culture (Roberts and Lloyd 2000; Marshall 2009). However, these were all top down. A second wave of devolution initiatives was set in motion after 1998, with the publications of a White Paper on local government, legislation allowing some general competences in the 2000 Local Government Act (which were subsequently undone in the courts). These were accompanied by centralised policies for ‘freedoms and flexibilities’ (Lowndes 2002) and ‘earned autonomy’ (Downe and Martin 2006), which appeared to offer local authorities more freedom in decision making but, in their forms, underlined the extent to which central government controlled the decision-making system and decided which local authorities would be able to benefit (Wilson 2003).

The third wave of subsidiarity initiatives quickly followed this general approach when, in 2002 there was a White Paper on the creation of directly elected Regional Assemblies in England with control over funds and decision making but while these discussions were on -going, also in 2002, the Treasury announced its proposals for new localism (Balls 2002; Corry and Stoker

2002) which undermined the regional proposals (Hazell 2006; Baker and Wong 2013). New localism promised that local authorities would be 'set free' within ten tears and during this period the mechanisms for control, over performance and financial priorities were loosened though the abolition of the Audit Commission and pooled rather than ear marked funding streams (Pratchett 2004). The third spatial scale to be considered for change within this group of initiatives was sub regions though the Sub National review (HMT 2007) that proposed the creation of larger local authority groupings as combined authorities within Functional Economic Areas (FEAs). These Combined Authorities might have some freedoms for investment than strategic decision making. Therefore, the formal planning structures established in the 1990s and continued into the 2000s were abolished (Pike et al 2018) and the Regional Assembles were expected to be translated into boards of local authority leaders.

In 2010, immediately following the abolition of these regional plans and strategies, the general election led to the creation of the Coalition government. Rather than continuing the obvious paths of localism that had been set, the Coalition established non-statutory Local Enterprise Partnerships that appeared to remove any powers and funding from local authorities. Instead, these local powers for investment and strategic decision making to unelected bodies led by businesses on which the local authorities had a seat but no control (Bentley et al 2010). At the same time other organizations such as the Homes and Communities Agency were created to provide a greater state role and presence in local programmes through mechanisms using of competitive bidding for funding.

Austerity initiatives for local authorities were also introduced by reducing their budgets and through encouragement to achieve efficiency through the creation of larger local authority groupings (Lowndes and Gardiner 2016). There was also a review of local authority funding which was expected to provide more freedom at the local level through the removal of the revenue support grant and its replacement with a greater retention of council tax and business rates. Also, in 2013, a new method so accounting for local authorities was introduced, the International Financial Reporting Standard (IFRS), as agreed across the whole of the OECD (Nobes 2014). However, where this standard was expected to provide local authorities with the ability to use their assets in the same way as the private sector to secure further investment in infrastructure and housing projects for their area, HMT decided to implement it while maintaining its approach to classifying local authority capital loans as debt rather than investment and maintained a cap on the Housing Revenue Grant as a means of restricting local authority house building (Lund 2017).

Despite this degree of continued centralisation and control, the government also introduced the Localism Act 2011 which contained numerous provisions for local authorities. While most Parliamentary time in consideration of this Act was taken up with neighbourhood planning and housing, the Act also contained provisions for a general power of competence for local authorities (s1-7). This enabled local authorities to operate in the same way as the private sector – despite not being able to use the accounting provisions in IFRS to accompany this. During the passage of the Localism Act before it was enacted, the provisions in s1-7 were not debated at all and passed though the legislative process unscathed. When the Localism Bill was first introduced in 2010, the then Secretary of State for Communities and Local Government argued that these provisions would allow local authorities to set up banks and companies to act in the same way as the private sector (Hope 2010) but at the time this seemed unlikely in practice.

The effects of austerity on local government in England

The pressure on local authority budgets as the austerity period wore on have been considerable. Local authorities have undertaken a range of efficiency measures including joint staff between authorities (e.g. Wandsworth and Richmond; Adur and Worthing), combining into new larger authorities (Suffolk), closing services or transferring them to voluntary providers e.g. libraries and increasing fees and charges for parking. Two local authorities have come close to bankruptcy (West Somerset DC and Northamptonshire CC) and the National Audit Office (2018) has demonstrated that more local authorities are in danger of financial crises.

At the same time, during this period of austerity, the situation of families that have been made homeless has continued to create pressure on local authorities (Loopstra et al 2016). While homelessness was formerly related to family break up or unemployment, there has been an increased rate of 'no fault' terminations for tenancy agreements but landlords seeking to achieve higher rental income from new tenants (Moore 2017). The provision of local authority housing has been further reduced though a reintroduction of the right to buy policy in 2012 and the rules allowing local authorities to rebuild at the same rate have severely curtailed their ability to meet these replacements (Disney and Luo 2017). Families who are homeless must be found accommodation within legal requirements placed on local authorities and much of the cost is in rents to private landlords frequently in homes that were formerly owned by the local authorities but have been sold through right to buy. Homeless families also need more support and there are long terms costs to education of children will have difficulty with places to undertake their homework and mental health needs (Karim et al 2008).

The combination of the budget restrictions and pressures on services that are legally required particularly homeless needs have been accompanied by other local concerns. Housing supply, which has been a major concern of central government policy, has not been growing at a rate that can hep to meet these needs as well as from changes in household formation. More young people are living with their parents for longer period as they cannot afford to rent or buy a home and this is placing considerable pressure on local politicians. However, when councils are permitting more housing in their areas, these are not being built out with many permitted sites lying empty or build out rates being very low (Adams and Leishman 2008; LGA 2016). Further the additional affordable homes that have been promised though planning agreements are being subsequently challenged by developers on viability grounds (Grayston 2017). Thus local politicians have promoted the increase in planning consents for housing, frequently against the wishes of local communities (Matthews et al 2015) to meet local housing need only to find that these houses, although having planning consent, are not being built or planning contributions are being reduced in comparison with the original planning agreements.

Using subsidiarity to overcome austerity: the case of housing

The perfect storm of austerity and severe housing need appears to have has a significant effect on the local political initiatives to provide housing. In the research undertaken on local authority direct housing provision (Morphet and Clifford 2017), local authorities are engaging in directly delivery of housing in new ways that enable them to generate income to make up the shortfall from government and to meet housing need. Many local authorities are now recasting their role as patient investors by establishing a long-term income through investment funds that could eventually make them free of all central government dependency. Thurrock is the first local authority that has declared itself to be independent in this way and, if this becomes a trend, then there could be a new relationship between local and central government. How is this occurring?

Faced with the rising social and financial costs of homelessness, many local authorities have started to purchase housing on the open market using their general fund to achieve this. The houses become part of the council's portfolio of assets, they generate rent and alleviate the costs of social support for families that would otherwise be in temporary accommodation. While that has not added to the nation's overall housing stock it has made local authorities consider direct investment most closely. Some local authorities have gone beyond this and invested in the purchase of bed and breakfast hotels for their own direct management or building hostels for homeless people, again using their own funds.

Other local authorities have been motivated to provide housing as a means of meeting general need and, in the survey that was part of this research, we found that this was most frequently mentioned by local authorities. During the research, we were advised by several local authorities that housing associations were not building social and affordable homes in their areas or there was no interest on the part of developers to build any types of housing. This is despite consistent complaints by housebuilders that it is not possible to obtain planning consents (HBF 2016, 2018). Where housing is being built, it is frequently of the type that only partially meets the needs of those seeking housing or is not affordable. Where local authorities are providing housing, their primary method is through the long-standing Housing Revenue Account using their available borrowing and right to buy receipts where this is possible. However, many councils are restricted y the debt cap and 70% of councils of councils reporting that they had housing company were also delivering housing through the HRA. Further some local authorities sold their housing as part of large scale voluntary transfer schemes and do not have available HRA skills or funding to provide housing (although they are not prohibited from doing so again if they wish).

After the need to provide housing and meeting the needs of homelessness, the next major motivation cited for local authority housing provision in our research was the need to generate income to replace the revenue support grant. In these cases, the local authorities were proposing to build housing for affordable, social and market rent and retain this stock within the local authority. Most of local authorities taking this approach were using a wholly owned company to provide this housing, but this was not the case in all councils with some major local authorities building housing for rent using capital in its general fund without a company structure. There were many reasons why local authorities were using companies. Some are of the view that a company approach is more tax efficient and allows it to make more income to return to the local authority. Other local authorities have used a company structure to overcome the need to use public procurement processes claiming that this provides a speedier means of providing housing.

Where local authorities are using companies to generate revenue, they are doing this in a variety of ways. Primarily, any funding provided to the Council’s wholly owned housing company must be loaned at a margin to meet EU state aid rules. The local authority also needs to generate interest payments on the loans. This is the case where the local authority makes an initial loan from the Public Works Loans Board and then lends it on to its wholly owned housing company. A second means of generating income for the local authority is using service level agreements for staff who may undertake work for the company. In Birmingham, the company employs three planners full time and in other local authorities, the company is supporting apprenticeship and members of staff. A third means of generating income is through rents for the properties. This may be used by the local authority to pay down the debt taken to support the housing development but where the local authority has loaned its own funds, this resource can then be used to generate further investment. Another means of generating income is through service charges from residents in affordable and market rent housing. In these cases, some local authorities have established their own property management and maintenance companies that not only undertake the service requirements on their own properties but also through selling services to other property managers. Some councils are generating income from consultancy to other councils to assist them in setting up their own companies or providing specialist development support to prepare and fund specific projects. Finally, where locally authorities have developed housing they have a long-term asset which may be sold or used to support more investment in the future. It should also be noted that housing provided though Council wholly owned companies is not subject to right to buy and can remain on the Council's asset portfolio.

In addition to wholly owned companies, many local authorities are also working in Joint Ventures (JVs) with other housing providers from all sectors. These may be the private sector, with housing associations or other local authorities. In these cases, each JV will be different with the contributions of each partner varying on a site by site basis. In some cases, the local authority will contribute land and the JV partner will provide some funding and development expertise. In some cases, JVs have been established to meet other regeneration needs such as town centre renewal and the proportion of housing provided within these developments is increasing. In some town centres, local authorities are providing market housing to retain their graduates after they have attended the local university. Students are more familiar with higher quality student accommodation as undergraduates and may leave when they find no similar accommodation in the private rented market. Having a supply of new market rent accommodation is considered to be major factor in graduate retention.

Many councils are developing tenure blind housing which includes elements of cross-subsidy within each development. Some councils are providing social rent with assured shorthold tenancies for five tears that can be rolled forward. Some councils have schemes where they are setting rent levels as a proportion of income which is particularly important in higher proceed areas.

While local authorities are motivated by the need to generate income to be self-sufficient or meet housing need many other are providing housing directly as a means of encouraging private sector developers to build existing planning consents. In the Housing White Paper (DCLG 2017) there is a proposal that local authorities should be able to take some action where developers have unimplemented planning consents. This issue is being further examined in a review conducted by Oliver Letwin (2018). Here the frustration of local authorities is leading to a variety of initiatives. In some cases, local authorities are pursuing land acquisition through Compulsory Purchase Orders (CPOs) and on occasion these sites will then be sold on to developers to form part of a JV. In some cases, the start of CPO proceedings has identified other interests in the land such as banks or HMRC and where this is the case, it may be possible to progress development of these stalled sites. Elsewhere in our research, we found that local authorities are buying land, sites with unimplemented consents and off-plan housing units to meet local needs particularly in rural areas.

Where local authorities have been successful in negotiating social and affordable housing as part of the planning agreements, these have traditionally been passed on to housing associations for management and maintenance. However, in our research, we found several locations where housing associations do not want to take on these dwellings and, indeed, are selling their own social and affordable stock. In these cases, local authorities are taking on responsibility for managing this housing provided through planning agreements and where the authority may no longer have any stock of its own, it is creating a company to manage it. This has given rise to further consideration of retaining all such stock rather than passing it to housing associations.

Local authorities are funding these developments through a variety of means including their own financial and property resources, loans from the Public Works Loans Board, raising bonds or commercial loans, using a specially created hedge fund or borrowing from other councils. One local authority has established a bank and others have development companies to provide funding for their own and other councils' development. Where local authorities are committed to providing housing through a wholly owned company, this may take up to two years to get going but once committed, local authorities are building out whole sites to generate rental income rather than completing a few homes per year to manage the sale price as Letwin has found in his preliminary research on the private sector (HMG 2018).

In the research we examined whether there were any political or geographical differences in the types of local authorities providing housing. Overall, we found that all regions in England were active except for the north west where there are antagonistic attitudes towards returning to direct housing provision in local authorities. There was slightly more likelihood of councils with more housing need providing housing and those with a Labour majority, but this was not an overwhelming difference. At the same time, local authority provision of housing was not a function of local authority size with large Labour authorities relying on their HRA alone while smaller Conservative councils had a high completion rate using all methods of provision. While local authorities have entered housing provision activity for several reasons, what was clear from the research is that a diversity of methods has been adopted over time so that those authorities that have been engaged in this activity the longest are likely to have the largest repertoire of funding and delivery models.

Discussion

Why have local authorities undertaken these innovative approaches to providing housing? The Localism Act 2011 has communicated the sense that local authorities can undertake a wider range of direct delivery of housing than was considered possible before, although this is not the case in practice. Local authorities have always had the powers to build housing, but it is austerity, homelessness and frustration at the low buildouts rates of developers that is pushing them forward now. Some local authorities are providing housing because they consider that is what local authorities should be doing, regardless of their political majority, size or location. While austerity has been a driver in the direct provision of housing both because of the need for local authority income, increases in homelessness or hidden households, the role of the Localism Act 2011 through its communication of local freedoms for local authorities to be able to act like companies has been a major factor in convincing local authorities that this is an activity that should be pursued. Up to 2011, local authorities had assumed that their powers to build housing had been restricted where it is more likely that their use of capital funding had been more fettered in practice.

Conclusions

This drive by local authorities to deliver housing using companies and other means is now becoming the norm. while numbers of homes provided is yet small, in our research 65% of councils stated that they were active in the direct provision of housing with another 22% councils actively considering direct engagement. While many local authorities have been conducting their housing provision under the radar with a wish ton to attract central government attention, there is an understanding that the Localism Act 2011 has given a green light to diverse ways of generating income.

Looking back over the period of new localism, it could be argued that the pressure on local authority funding through the period of austerity has given a jolt to local authorities to generate their own income and become more independent of central government. This approach has been brutal in its approach but may now result in many local authorities having greater financial freedoms and autotomy in ways that did not seem possible when new localism was introduced in 2002. Whether this approach will be possible for all local authorities – where markets are less buoyant and resources are not available remains to be seen. A further push to fiscal independence could come through the full application of the IFRS and localisation of business rates that has long been promised. However, having started their push for income generation and financial freedoms, local authorities returning to their core function of building homes may have found the means of achieving their independence and the appropriation of subsidiarity.

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