

EDITORIAL

The articles contained in this issue are revised versions of papers presented at a workshop that was co-hosted in Belfast, on 27th – 28th September 2002, by Queen's University's Institute of Governance, Public Policy and Social Research and the *Northern Ireland Legal Quarterly*. The idea for the workshop followed the same sort of impetus as that which led to the very decision to establish an Institute of Governance, Public Policy and Social Research at Queen's. The Institute of Governance was established in 2001 with an award in excess of £5 million from the Government's Support Programme for University Research (SPUR).¹ Its creation reflects the recognition that the ways in which public policy is conceived and delivered are changing rapidly in the face of social, economic and political developments, such as globalisation, devolution, privatisation and Europeanisation. All societies must, in short, face the challenge of adapting to these changing patterns of governance in order to guarantee the making of effective public policy, and it was for this reason that the Institute was established with a view both to furthering interdisciplinary debates on the challenge, and also to creating new networks and research forums within which to conduct the debates.

While the research agenda of the Institute is wide-ranging, the particular focus of the Institute's work, and its whole means of operation, is cross-disciplinary and interdisciplinary. Indeed, this workshop was, as such, one of a number of early Institute initiatives that brought together academics and practitioners from the fields of the legal, social, and political sciences. It is perhaps particularly appropriate that the results of this collaboration should be published in a legal journal. While legal scholars in general, and public lawyers in particular, are increasingly coming to terms with ideas that the whole project of *government* is being reduced through a loss of decision-making power and accountability to bodies beyond the traditional state, ideas of *governance* are already well-developed in the literature of politics and the social sciences. Of course there are, inevitably, disputes about what the term governance means. Rhodes, for example, talks of it having at least six distinct meanings clustered around the idea of "governing without government".² Kooiman, on the other hand, emphasises that modern governance is defined by being less about the direct intervention of government and more about the ways in which the environment of action for private actors can be shaped by the state.³ Others such as Skelcher, put the emphasis on notions of the "congested state" where there is a complex of networked relationships between public, private, voluntary and community actors which has produced a dense, multi-layered and largely impenetrable structure of public action.⁴

¹ Further details about the Institute's activities can be found at www.qub.ac.uk/gov.

² See further R Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (1997), especially Chap 1.

³ J Kooiman, *Modern Governance: New Government Society Interactions* (1993).

⁴ 'Changing Images of the State: Overloaded, Hollowed out, Congested' *Public Policy and Administration* Volume 15, (2000) pp 3-19.

However, within all these formulations of governance the notion of hollowing out of the state is characteristic. There is a loss of functions upwards to the European Union and through wider globalisation, and downwards towards agencies and the private sector. Government does not now take place only within a single, unified national territory or by means of a unified, single system. The effects of globalisation mean that territory, like economy and culture, are increasingly multiple and plural rather than unified and national. Within the politics literature ideas of multi-level government have evolved from a simple recognition that there are layers beyond the national state to more sophisticated ideas of how power is dispersed into a multiplicity of sites, constituting nodes in a heterarchical network rather than layers in a hierarchical pyramid, which operate in a relationship of mutual influence rather than control. There are also ideas emerging that the activity of government is complex and multi-format too. There are now many more agencies and bodies from civil society and the private sector as well as from government and quasi-government and these operate at every level from the local, regional, national to the European to deliver both the policy and services of government. As one of the contributors to this volume writing elsewhere expresses it, there has been a “reterritorialisation of politics” which has involved “a dual process of sub-state mobilisation and supra-state integration” and a “search for new levels of political action”.⁵

The influence of these ideas has now largely translated from political science to law. Most constitutional theorists accept in general terms that there has been a movement from government to governance, and that the role of the state has changed from being a guarantor and provider of security, wealth and law towards being more of a partner or facilitator for a variety of other bodies and agencies at various levels as they concern themselves with such issues. The additional value that lawyers may add to this debate is in developing and articulating further notions of “good governance” as promoting values of transparency, democracy and human rights, and in providing something of a normative framework to begin to evaluate new forms of governance.

It was in this spirit, therefore, that this group of scholars and practitioners came together to explore ideas about how government and governance might be re-configured. The papers presented ranged across, among others, issues of the relationship between pluralist democracy and changing understandings of sovereignty; what “good governance” should mean at a time of global terrorism and crises in international relations; whether we can ‘join-up’ the different sites of government and, more importantly, ensure that such joined-up government is accountable; and what role courts should play in ensuring accountability, whether in relation to joined-up government or, more controversially, State responses to international terrorism. In addressing one or more of these themes, each contributor has, in effect, shown how there remain many positive and negative aspects to current patterns in governance, as well as a number of unresolved and perennial dilemmas. The first article,

⁵ M Keating, ‘Europe’s Changing Political Landscape’ in P Beaumont, C Lyons and N Walker (eds), *Convergence and Divergence in European Public Law* (2002) at p 7.

for example, by Prof Michael Keating of the European University Institute in Florence, examines in a positive light the overlapping challenges that are presented by sovereignty, nationalism, and pluralism. His contribution, as its title suggests ('Plurinational Democracy in a Post-Sovereign Order'), argues that nationalism, so often regarded as antithetical to "universal values, to liberal democracy and the very project of modernity itself", can – and should – be seen in terms that embrace pluralism and the accommodation of others. Highlighting how different nationalist identities have historically been more or less responsive to notions of inclusivity and pluralist democracy, he contends that, as nation state units no longer enjoy the sovereign powers that previously defined them (this a consequence of globalisation, European integration, and the rise of regional pressures), now is the opportune time to develop the logic of post-sovereign thinking in which national identities depend more upon territorial affiliation, rather than those that are ethnic, religious, or cultural. Arguments of this kind, while cast in slightly different terms, have also been made in some recent legal writings (the point is noted by Keating), and the cross-over between the disciplines marks out a clear understanding that it is feasible to retain traditional values and associations, without thereby allowing them to define the future only in accordance with the past. Point one in the collection, therefore, might be taken to argue that governance, as a process that embraces the full range of institutional, cultural, and political relations, can best be structured around key values of flexibility, respect, and tolerance.

The second article in the collection then shows how, in a very real sense, the process of governance can go awry when minimum values are not prioritised by government. The attacks of September 11th 2001 – while in themselves indicative of an absence of tolerance and related values – have since given rise to a "war on terror" which has, among other things, seen Western governments adopt draconian laws to counter the perceived emerging threat. In criticising in particular the response of the US and UK governments, Professor Phil Thomas of Cardiff University uses his article "September 11th and Good Governance" to demonstrate how legislative and executive actions have failed to correspond to the core legal value of the Rule of Law (which value may, in turn, be said to run prior to any legal system's capacity to engender equal respect for "others"). The problem, as identified by Thomas, is really one of how political expediency at a time of perceived and real crisis can lead to decisions being taken in the absence of effective control mechanisms, whether political or legal in form. Lamenting the brevity of the legislative processes whereby the USA Patriot Act and the UK's Anti-terrorism, Crime and Security Act were introduced, he notes how the political process has seemingly placed core principles in abeyance, with the motivation being found either in a concern for public safety and/or a concern among politicians to be seen to be doing something. All of which would, of course, then appear to leave it to the courts to ensure accountability and control but, here too, Thomas notes how concerns about the balance of judicial-executive relations has led UK courts to adopt an approach that is, at best, inconsistent in respect of balancing public safety concerns with those of the individuals who are most readily affected by new and sweeping State powers.

The judicial-executive problematic also provides the context for Dr Tom Zwart's article, "Comparing Standing Regimes From a Separation of Powers

Perspective". Here, the central question examined is how far courts can encourage open access to public law remedies, in itself a potentially important democratic safety valve, without crossing the line that separates the judicial and executive, and indeed legislative, functions. In considering the dilemma from a number of perspectives, Zwart, a comparative public law lawyer from the University of Utrecht, draws upon case law and commentary from Ireland, the US, the UK, Australia and India (among others) to show how there is a sliding scale upon which some national systems prefer a public interest approach to standing, while others tend more towards a narrow private interest model. Neither approach is, in the end, recommended as inherently superior to the other, as Zwart regards the application of standing rules as dependent upon different national contexts and understandings of what the separation of powers doctrine should entail. But within this conclusion, one point that stands out clearly relates to his comments about standing in UK law since the coming into force of the Human Rights Act. Although the section 7 "victim" requirement in the Human Rights Act is generally taken to herald a narrowing of the standing rules in UK law, Zwart points to existing case law of the European Court of Human Rights by way of arguing that the Strasbourg court itself has not always interpreted the "victim" requirement, on which section 7 is based, narrowly. Given this, and given Professor Thomas' concerns about the manner in which various aspects of the war on terror are being monitored, would public interest litigation on Human Rights Act points go someway towards fostering increased accountability and protection of rights?

The following three articles in the collection then relate, to a greater or lesser extent, each of the themes of accountability, transparency, institutional balance, and identities to the more specific context of devolution in the UK. The arguments here are about both the strengths and weaknesses in the current design. Peter Leyland of the London Metropolitan University, for example, uses his article "Devolution, the British Constitution and the Distribution of Powers" to provide a wide-ranging and critical analysis of the manner in which the devolution settlement does, or does not, work. For Leyland, the way in which the devolution reforms have been brought into being is rich with an apparent inconsistency as, to the extent that much of the programme fits with the language of UK constitutional law orthodoxy, the reality is that the reforms can equally be said to be "shaking the foundations of the informal constitutional arrangements that have been relied upon for many generations". This is then not only seen to raise concerns about how to resolve in the longer term the West Lothian question, the problematic balance within the Concordats, and the funding of the new government structures; it is also taken to raise concerns about how well-placed the UK's new governmental structures are in terms of ensuring effective representation and decision-making in the European Union (and, by analogy, the globalising economy and polity). Although the European Union has, in recent years, increasingly emphasised the importance of regions and the related principle of subsidiarity, the corresponding fact that European Union law is formally neutral as to the internal constitutional arrangements of its Member States leaves open the question of how far differing Northern Irish, Scottish, and Welsh interests will be represented at the supranational level. Does the reality of modern day governance, set beside the centralising tendency of the UK constitutional tradition (*viz* the fact that Westminster

remains finally responsible for European Union matters), not render as illusory the idea of representative government at the devolved level?

The beginnings of an answer to this question are provided by Dr Amanda Sloat's article, "Reconfiguring Scottish Politics: Domestic Governance v European Influence". Here, Sloat, of the Institute of Governance at Queen's, draws upon empirical research to consider both what was expected in advance of the Scottish Parliament *vis-à-vis* the formulation of European Union policies, and also what the Scottish Parliament has achieved since it came into being in 1998/1999. The pre-1998/1999 expectations are, as such, identified as including increased transparency and accountability at the local level through the existence of the Parliament, coupled with more "democratically legitimate and discernible participation" in policy formation at the European Union level (to be achieved through, among other things, the Scottish executive lobbying Westminster and Brussels in respect of 'home' interests). Although Sloat indicates that understandings of how far these expectations have been fulfilled depend very much on a particular political actor's perspective and experience, she does point to some statements to the effect that the "autonomous" representation of Scottish interests in Europe can, and does, occur. While these statements are not then taken to mean that Scottish interests are routinely pursued outside the framework of a unified UK policy line (attention is also drawn to the counter belief of other actors that it is, in general, better for Scotland to co-operate with, rather than oppose, central government), they are said to be consonant with the understanding that the bypass of Westminster does, at least to some extent, already happen. In other words, the statements might, at least in part, reasonably be taken to imply that the political reality of policy formation is that it sometimes takes place at one remove from that which is 'mandated' by constitutional orthodoxy and corresponding legislative frameworks.

The sixth article, by Robin Wilson of Democratic Dialogue, a Belfast think-tank and partner institution of the Institute of Governance, also complements Leyland's paper, and in particular Leyland's comments about the financial arrangements and implications of devolution. The article, "Private Partnerships and the Public Good", focuses on the problems that Northern Ireland now faces in terms of financing the provision of high level public services (the article was written prior to the suspension of the Northern Ireland institutions in October 2002, although the arguments clearly remain relevant, on the assumption that institutions will be restored in the future). Principal among Wilson's concerns is the manner in which public-private partnerships have been used in Northern Ireland. At a general level, he notes that, while the merits of using private enterprises to provide public services is at the heart of left-right debates in other parts of the UK, the nature of the Northern Ireland institutions (power-sharing that emphasises national affiliations rather than socio-economic policy preferences and ideologies) has rendered parallel debates largely absent. And beyond that, he then also points to the politically unpalatable choices that may now have to be made if Northern Ireland is to enjoy strong public services. Thus, although Northern Ireland can already enter into borrowing arrangements with central government, the problem of financing "European-level public services" is taken to demand that local politicians "grasp the nettle" of requesting, among others, powers to vary regional income tax levels. Wilson's caution,

therefore, is not just that models for public service provision need to be fully debated; it is that they also need to be fully and properly financed.

The final contribution in the collection is Dr Cathal McCall's "From Barrier to Bridge: Reconfiguring the Irish Border After the Belfast Good Friday Agreement". McCall's contribution provides a particularly appropriate concluding piece as his article considers the significance of constitutional change in the Republic of Ireland and Northern Ireland (of which devolution is a key component) from a perspective which reflects much of the intellectual content of Professor Keating's opening article on nationalism and post-sovereign orders. Focusing on how the Good Friday Agreement has given rise to unprecedented cross-border institutional co-operation on the island of Ireland (which co-operation must, of course, now also be seen in the light of the suspension of the Northern Ireland institutions), McCall, of the Institute of Governance, identifies the factors that have brought about changed political attitudes, particularly among Northern Ireland's unionist community. These factors, which are said to include European influences, cultural changes in the Republic of Ireland, changed British-Irish inter-governmental relations, and changed party political power relations in Northern Ireland, each relate to the post-sovereign qualities considered by Keating, and while McCall notes that any ideological shift in Northern Ireland remains in a "transitional phase", it is difficult to deny that there is here at least some kind of a practical manifestation of post-sovereign politics. It is also difficult to deny that such post-sovereign politics continue to provide the most appropriate template for fostering political progress in Northern Ireland and, indeed, much further a-field.

Beyond these points and conclusions, there are of course, and as indicated above, many other aspects to the debates about governance, and readers of this number will doubtless disagree with some of the points made by the contributors, as well as with some of the underlying assumptions. That said, however, it is to be hoped that readers will equally agree that this is a very strong and challenging collection of articles. The points raised are not only insightful, but sometimes provocative, and we, the editors, would like to thank each contributor for their time, thought, and enthusiasm for this project. We would also like to thank the various chairpersons at the workshop – Mr David Capper, Professor Rick Wilford, and Ms Susan Breau – together with a number of other participants, notably Dr Claire Kilpatrick, Professor Istemi Demirag, and Dr Rory O'Connell. Finally, our thanks are due to SLS Legal Publications, publishers of the *Northern Ireland Legal Quarterly*, for so generously funding aspects of the workshop.

Gordon Anthony, Elizabeth Meehan, and John Morison.