

BOOK REVIEW

DEVOLUTION, LAW MAKING AND THE CONSTITUTION.
Edited by Robert Hazell and Richard Rawlings (Imprint Academic,
2005. Hardback, 338 pages, £35.00)

The devolution project in the United Kingdom, which was introduced as part of a wider programme of constitutional change following the election of New Labour in 1997, was not an entirely novel idea as it was predated by periods of devolved government in Northern Ireland, and earlier attempts to devolve power to Scotland and Wales. Nonetheless, its present incarnation can be seen as a fundamental change in the way power is distributed within the United Kingdom. Although the traditional notion of parliamentary sovereignty has not been legally restricted by the establishment of devolved institutions, politically, the freedom of Westminster to legislate on matters which have been devolved, without the consent of the devolved region, is now more constrained. The devolution programme in the United Kingdom is asymmetrical, with each of the devolved regions being granted power to legislate in different areas and with legislation of differing status. Therefore, the impact of devolution on law making within the UK is not uniform across all the nation's constituent parts and cannot be subject to generalisation.

In "Devolution, Law Making and the Constitution", the authors attempt to tackle the question of how far devolution has altered the law making process within the United Kingdom to date by assessing the legislative powers of each of the institutions and the powers retained by central UK authorities. The book opens with an introductory note that provides a useful and clearly explained overview of the differing powers and structures of the parliaments and assemblies of the United Kingdom, and the mechanisms in which disputes between these bodies can be avoided or resolved. The subsequent chapters in the first half of the book focus on the constitutional development in the three devolved regions. In the latter half of the book the focus shifts to the experience within the central UK institutions, with chapters on Whitehall, Westminster and the courts, before the final chapter in which Hazell discusses the need for closer links between the executives and assemblies of the devolved regions and the United Kingdom in order to make devolution more effective. Throughout each of the chapters in this book, it is possible to identify some overarching themes that will be discussed below, and some general conclusions that have been made by the authors. These include a belief that devolution in its current form does not represent a radical shake up of how law is made in the United Kingdom as Westminster has retained supremacy and the ability to legislate on devolved issues; that English issues still dominate in UK-wide legislation; and that the methods of formulating and enacting legislation in the central UK institutions have yet to fully adapt to the changes brought by devolution. Nonetheless, the authors do highlight progress towards the development of distinctive legal cultures in the

devolved regions, and make valuable suggestions on how this process could be continued.

This book resulted from a four-year research project entitled “Law and Devolution Disputes” funded by the ESRC which aimed to assess the “role of the law in shaping the devolution settlement” during its first five years. The issue was analysed “in terms of adjustments to the division of powers between the UK and devolved governments, through legislation, legal interpretation by governments, intergovernmental negotiation and court decisions”. The project entailed a collaboration between the Constitution Unit of UCL and six constitutional and public law experts in Scotland, Wales and Northern Ireland. The empirical data for the project came from interviews with government lawyers in the devolved and the central UK institutions. The resulting text provides a thorough and insightful analysis of law making within the United Kingdom in the period 1999-2004.

Throughout this book, it is possible to identify key themes such as the extent to which devolution has resulted in change through the transfer of powers to each devolved region, and extent that continuity exists within the law-making processes in the central UK institutions. The authors also consider whether it is possible to identify the establishment or development of distinct legal cultures within each of the devolved regions. Furthermore, the authors consider whether the emphasis placed by the new institutions on concepts such as transparency and accountability can be seen as a form of “new politics” when contrasted with the Westminster style of government.

When considering whether devolution has resulted in continuity or change, the authors have considered *inter alia* the approaches to law making within the devolved regions and the central UK government. For example, in his analysis of the role of Whitehall in law making since devolution, Trench argues that the changes to the machinery of government and the law making process have been “limited, minimal, ad hoc and incremental”. He asserts that there has been no major rethink of the British constitutional arrangements to accommodate devolution, and that consequently, devolution has meant only “limited constitutional change”. He continues that the failure to assign an individual or team to provide Whitehall departments with authoritative guidance on how “legislation should treat a devolved territory” and “to monitor the working of devolution, and in particular the way government departments seek to legislate” contributes to inefficiency. In their analysis of devolution in Northern Ireland, Morison and Anthony have also highlighted instances of continuity, particularly regarding the role of the Northern Ireland Civil Service in policy formation both under direct rule and during devolution.

Despite this, the authors did find it possible to highlight some changes that have been introduced, such as the innovations in legislative structures and processes that were adopted by the Scottish Parliament. In his discussion of the Scottish institutional arrangements, Page argues that in contrast to Westminster, the Scottish Parliament is not simply a mechanism for enacting the executive’s wishes into law, despite the dominance of the executive. When considering the Welsh Assembly, Rawlings opined that although the institution’s powers are limited to secondary legislation, its establishment

nonetheless “represents a quantum leap” in comparison to pre-existing arrangements.

Perhaps the area where there is the greatest potential for change under devolution is in the development of distinct legal cultures within the devolved regions. This is a complicated issue as there are “countervailing pressures for convergence and divergence”, with the former pushing for minimum standards across the UK, and the latter advocating unique policy initiatives to address the concerns of the populations of the devolved regions. In his discussion of the work of the Scottish Parliament, Page explains that some measures are introduced to replicate laws in England, and Sewel motions, which permit legislation from Westminster on devolved issues to apply to the relevant regions with the consent of the devolved institutions, are frequently employed. Subsequently, Rawlings asserts that much devolved Welsh legislation mirrors English laws. Nonetheless, both commentators have found evidence that distinct legal cultures are developing, as Page highlights the increased volume of legislation relating uniquely to Scotland that has been introduced since devolution and Rawlings asserts that it is possible to identify the growth of “Welsh legislative difference”. Similarly, Patchett asserts that there have been instances where the Welsh Assembly has declined to bring into force legislative provisions that were assigned to it. In relation to Northern Ireland, Morison and Anthony assert that, whilst in operation, the Northern Irish Assembly was very active and had “the potential for effective and vibrant law making”. The impact of Britain’s different legal traditions and the development of different legislative cultures in the resolution of devolution disputes have not yet been fully considered by either the executive or the courts according to Gee. He argues that these issues need to be integrated into the proposals for the establishment of a British Supreme Court, by, for example, ensuring the judges from each of the different legal traditions are represented on the bench.

It is also possible that devolution will be a catalyst for change within the central British constitutional arrangements, due to the emphasis within the devolved institutions on values such as transparency, participation and accountability. The impetus for the devolution project came *inter alia* from a sense that English concerns dominated law making within the United Kingdom, resulting in perceived disadvantages particularly concerning economic problems. It has been hoped that devolution will address these concerns by allowing decisions to be made “closer to the people”. The authors in this book have considered this issue by analysing the law making mechanisms established by devolved institutions, and the scrutiny at Westminster over legislation which affects the devolved regions. In his chapter on the Scottish Parliament, Page asserts the institution was specifically designed to be different to Westminster with more consensus, not confrontation between the political parties. It was hoped this would reduce majority rule and produce legislation that reflected the views of a larger proportion of the population. Subsequently, Rawlings asserts that the working practices of the Welsh Assembly represent “new politics” with greater provision being made for scrutiny of legislation, in addition to arrangements for equality of opportunity and bilingualism in the law-making

process. Subsequently, in their discussion of the Northern Irish devolved institutions, Morison and Anthony highlight the importance of the concepts of “new politics” in context of the conflict in Northern Ireland and argue that although these issues have not taken hold sufficiently to contribute to “truly wide-ranging and sustained local legislative preferences”, they are nonetheless reflected in the constitutional architecture and the tendency to conduct widespread consultation on an array of issues.

The level of scrutiny at Westminster over legislation affecting the devolved regions was considered by Winetrobe in his chapter on Sewel motions and law making for Scotland that is conducted in Westminster. He asserts that the employment of the Sewel Convention is problematic as “the parliamentary processes by which it operates are unsatisfactory, inappropriate, and inefficient, and could eventually undermine the legitimacy of the Convention itself, and even of the legislation produced through it”. He highlights that the processes used to scrutinise Sewel motions at Westminster are the same processes that led to devolution being deemed necessary, and that the process by which Holyrood approves a Sewel motion is not as rigorous as its scrutiny of executive policy proposals. In addition, he shows that those Scottish civil servants or ministers who will be responsible for the legislation’s implementation do not appear before Westminster’s Committees, and are therefore not held strictly to account. Similarly, Patchett in his consideration of how Westminster and Whitehall legislate for Wales, asserts that formally the Welsh Assembly is excluded from the process of making primary legislation, and therefore, Wales has less influence over laws that affect it than it did before devolution, although there have been some limited moves to allow the Assembly a voice during the deliberative stages. In addition, Hazell asserts that Westminster is able to “provide specialist territorial scrutiny of bills which apply solely to Scotland and Wales; less so for bills applying solely to Northern Ireland”, but that in “multi-territory” bills, English concerns tend to dominate.

This book provides thorough and up-to-date assessments by respected academics of the key issues relating to law making under devolution. Its target audience includes academics and students in law and politics, and government practitioners and policy makers. The analyses are generally clearly written, although some sections may be too complex for non-specialists. The structure of the book was clearly organised and the key issues flowed consistently through each of the chapters facilitating comparisons between the devolved institutions and central government. The authors also raise many interesting ideas for future consideration as the practice and impact of devolution become more entrenched.

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