

Foreword

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Much has been written about the UK devolutionary development involving Scotland, Wales and Northern Ireland, not least in terms of its central place in the remarkable story of British constitutional change since (New) Labour was returned to power at Westminster in 1997. This volume, however, breaks new ground in considering the classic governmental output function of law making as an essential part of the broader devolutionary milieu and in the light of a good few years of practical experience. As signalled in the title, the various constitutional dimensions to the activity constitute the book's golden thread.

In approaching the subject matter from a variety of angles, this book is innovative in another way. Whereas much of the literature adopts one or other of a central or local focus, so concentrating on matters either from a 'top-down' UK perspective or 'bottom-up' from inside one of the devolved territories, the essays on offer here exhibit both approaches; and, further, various blends of them. More particularly, the first half of the book focuses strongly on internal constitutional development in the three Celtic lands, as shown in the discussion by Alan Page in chapter 1 of the comparative novelty or otherwise of legislative practice in the Scottish Parliament using explanatory concepts of 'power-sharing' and 'power-hoarding'. By way of contrast, and further highlighting the long shadow of (populous) England across the constitutional development, a logical sequence of inter-linked essays towards the end of the book from members of the Constitution Unit in London is primarily concerned with the challenges of law making under devolution for UK institutions. That is to say: chapter 6 dealing with Whitehall by Alan Trench; chapter 7 on Westminster by Robert Hazell; and chapter 8 on the role of the courts, and especially the Judicial Committee of the Privy Council, by Graham Gee.

As sketched in the introductory note to this book, which is intended as an aide-memoire for those readers perhaps from overseas who are 'new' to the UK devolutionary development, the chief constitutional design feature of asymmetrical devolution is also fully reflected in the individual chapters. In the spirit of 'democratic devolution', the work was further conceived as a set of essays, one in which the contributors exercise broad discretion in concentrating on key features of interest for the different countries, while having regard to a basic template of legislative structures and processes for comparative purposes. In this regard, what could be more appropriate than say the study in chapter 2 by Barry Winetrobe of the Sewel Convention entailing the

re-direction of law making back to Westminster in the Scottish context of what used to be called 'Home Rule'? Or alternatively, the study in chapter 4 by Keith Patchett of attempts at joint working between two representative institutions, in the face that is of a restrictive Welsh model of devolution in which fragmentation of the law making function is carried to extremes?

Of course many of the basic issues raised in this volume are not unique to the United Kingdom. In ranging across such matters as transparency, participation and accountability in the law making processes under devolution, as also particular formulations of legislative power and judicial interpretation, parts of the book consciously echo major comparative themes in constitutional systems of divided competence, the EU as well as federal ones. A different but related point: some chapters more than others are concerned to make practical proposals, or at least suggest options or guiding principles for reform. So for example Robert Hazell in chapters 7 and 9 brings forward a series of recommendations concentrated at the London end, with the specific aim of improving the quality of law making under devolution.

Looking more closely, the various writings in *Devolution, Law Making and the Constitution* can be seen working through some closely related sets of ideas concerning constitutional development. That is to say, certain basic themes and organising concepts that typically inform the political science, public administration and legal literature on devolution, but which in this volume are given a firm practical edge in the context of (the day-to-day realities of) law making.

Take the close interplay under asymmetrical devolution of the twin elements in all basic constitutional development of continuity and change. The more or less creative re-working of prior understandings and practices in terms of legislation is a recurring theme in this volume, one that comprises a set of political, legal and administrative phenomena commonly associated with, but ranging well-beyond, the familiar (English) doctrine of parliamentary sovereignty. By way of example, chapter 6 by Alan Trench on law making under devolution seen from Whitehall, which brings to the fore deep-rooted and particularistic approaches by the individual line departments in central government, is a salutary warning against too much excitement of a devolutionist kind.

Turning the argument round, it is of course the various ways in which devolution plays on received wisdom, specifying different methods and opening up new possibilities, including in terms of bringing law making 'closer to the people', which provides much of the fascination. Take the sense in which the overarching constitutional development, by providing the countries of the UK with four representative assemblies rather than one, serves to frame current debate on parliamentary reform. In this regard, the discussion by Alan Page of the legislative structures and processes in the

Scottish Parliament strikes a particular chord, in view of a conscious effort made 'north of the border' to look 'different' from Westminster.

Chapter 5 on law making for Northern Ireland by John Morison and Gordon Anthony will be seen expanding on the general theme in various ways, for example in terms of the strong elements of administrative continuity flowing from a particular historical experience that includes devolution. Further, chapter 5 reflects upon the quest for 'a new kind of politics' of which much was heard at the advent of the broader devolutionary development in the late 1990s, and especially so in the case of Northern Ireland. At the same time, the authors are concerned to situate the law making structures for Northern Ireland in what obviously is a unique constitutional setting, one in which – to adapt a well-known saying – devolution is part of a process.

Also showing the character of this volume as an inter-linked set of essays, one which chapter by chapter builds up a more rounded picture of law making under devolution, all the contributors have been concerned to engage with the countervailing pressures for convergence and divergence inside the Union state. Such considerations will be seen featuring extra-large in chapter 3 of the book on devolved law making in Wales, by reason of a uniquely strong set of geographical and historical factors – not least in the law – pointing towards commonality of provision with England. Again, the evident potential for cross-fertilisation of relevant tools and techniques is underscored by Robert Hazell in chapter 9, especially as regards Westminster.

Factoring in contemporary ideas of multi-layered governance, it could hardly be expected that a volume entitled *Devolution, Law Making and the Constitution* would overlook the strong European dimension. By which is meant not only the general constraints on the various parliaments and assemblies of the UK, as for example the human rights considerations highlighted in chapter 8 on the courts, but also, as analysed in other chapters, the legislative obligations and opportunities entailed in implementation of EU law.

Another set of ideas informing the volume is the scope for, creative potential of, and limits to, the practice in law making of what, in a conscious borrowing from comparative studies of federal constitutional systems, can be called 'co-operative devolution'. Boldly envisioned, this is the realm of 'legislative partnership', a style and ethos of law making under devolution which naturally wears an extra shine in the early years of a new constitutional dispensation that are also characterised by the hegemony (other than in Northern Ireland) of one political party. Likewise, and not least because of the evident potential for sapping the devolutionary logic of diversity, how far this kind of approach should be taken is pre-eminently a matter for constitutional disputation.

Attention is drawn in various chapters to the differential development here: in terms, on the one hand, of the thick substance and process of inter-governmental relations; and, on the other hand, of the linkages between representative institutions – parliaments and assemblies – which typically are seen to lag behind. And once again particular contributions treat with the subject in a complementary way. For example, Keith Patchett in chapter 4 grounds discussion of the case for, and difficulties of, collaborative forms of democratic scrutiny in the Welsh context firmly in the necessary routines of legislative business. Meanwhile, in chapter 2, Barry Winetrobe sets out to unpack ideas of legislative ‘co-ordination’, ‘co-operation’, and ‘partnership’ in the context of the Sewel Convention, by means of two competing models of inter-parliamentary relations. In chapter 9, Robert Hazell pursues the theme, once again with a view to improving the effectiveness of different forms of ‘partnering’.

A strong sense of contingency and fluidity in the UK devolutionary development, as demonstrated in many diverse dynamics that bear on or involve the design and practice of law making, is also a recurring theme in this volume. For instance, the implosion of the internal architecture of the National Assembly for Wales outlined in chapter 3, which is seen having major implications as regards the ‘ownership’ of, and democratic scrutiny in, the local law making function, has been extraordinarily rapid. Similarly, as documented in chapter 2, the rise of the Sewel Convention as machinery for UK legislation was scarcely the message conveyed at the beginnings of the Scottish Parliament.

Looking forwards, there clearly is much of relevance which remains to be resolved in a set of devolutionary developments that characteristic of a constitution famed for flexibility is commonly ad hoc and piecemeal. Ranging, that is, from a conundrum of new legislative powers for Wales to reworked modalities of constitutional adjudication in a proposed Supreme Court, and further, one may dare to hope, to agreement for rejuvenation of a Northern Ireland Assembly suspended at the time of writing. Meanwhile, as particular chapters will testify, many sub-processes of law making under devolution are now whirring away to greater or lesser effect, and, in what are still foundational years of much learning by experience, by no means always with the intended consequences. It is in the face of these many complexities and uncertainties that a special premium has been placed on contributions to this volume helping to chart ways forward.