

*The Practice of Multi-Level Government*  
*How Intergovernmental Relations Work in Federal Systems*

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INTRODUCTION: THE CHALLENGES OF WORKABLE SYSTEMS OF  
INTERGOVERNMENTAL RELATIONS

The 2007 elections brought home the reality of devolved politics to the United Kingdom. The SNP's narrow lead in the Scottish Parliament, and subsequent formation of a minority government, meant that Labour in London at last had to deal with a non-Labour government — and its worst fear, of a politically adroit nationalist government which was broadly left of centre but otherwise shared few of the presumptions about politics common to Labour or the Liberal Democrats. In Wales, Labour's 11-seat lead was not enough to create a stable government, and after protracted horse-trading led to coalition between Labour and Plaid Cymru. And with the restoration of devolution in Northern Ireland, and an executive dominated by the Democratic Unionists and Sinn Fein, Labour faces a coalition which may be curiously composed, but which is also quite willing to rock the boat. Ten years after its UK election victory, Labour has to deal with governments which do not share either the party label or its ideological approach, and whose electoral mandate it cannot belittle. To put it slightly differently, it has been apparent for several years that the real challenges of devolution would emerge in the UK when Labour sometime, somewhere lost an election. The time was 2007 and the place was Scotland and Wales.

The challenge this presents for all the various governments in the United Kingdom is to find ways of dealing with each other, despite their political and ideological differences, so that the business of government gets done. For some time the attitude of many elected politicians (and many officials) has been that there would be such an overwhelming interest in serving the electorate that nothing much would need to change, and that the UK's existing machinery and ways of managing intergovernmental relations would function perfectly well with some small tweaks and adjustments. This view has been widely resisted by many outside observers.<sup>1</sup> Even the immediate

<sup>1</sup> For example, C. Jeffery 'The Unfinished Business of Devolution: Seven open questions', *Public Policy and Administration*, 22(1) (2007): 92–108; House of Lords Select Committee on the

aftermath of the 2007 elections suggested the outsiders were right, as within a few weeks of taking office the SNP minority government in Scotland found itself publicly falling out with the UK Government over a range of matters. The excessive reliance of the existing system on 'goodwill', underpinned by shared Labour dominance of all the three governments in Great Britain (and lack of real opposition in Northern Ireland), was particularly culpable in this respect: such a quality can at best be a lubricant in the practice of such relations, but instead it was made to serve practically as the totality of them, substituting for institutional machinery of co-ordination.

The spats that emerged in the first few months of the SNP government are touched on in chapter 1. Almost without exception, the UK has handled these matters badly; even if it has been in the right on them on formal or constitutional grounds, it has failed to acknowledge that the Scottish Government is entitled to make itself heard about such matters, or that its arguments may have merit even, perhaps especially when, it rejects them. Instead, on one hand the UK Government has sought to treat the Scottish Government as a subordinate level of government of limited authority, refusing to accept its autonomy except within the limits defined by the 1998 settlement, while on the other trying to maintain the sort of informal, ad hoc approach to the process of intergovernmental relations that it has taken since 1999. Intergovernmental issues relating to Wales are entirely different, underpinned by complex party politics and a convoluted set of institutional relationships put in place by the Government of Wales Act 2006.<sup>2</sup> Thanks to the peace process, the interest of the Irish Government as well as the UK's, and the north-south dimension, so are those for Northern Ireland. The upshot is that there are three sets of bilateral relations with only limited overlap or common ground between them. The UK Government has sought to maintain this state of affairs, so it appears it prefers this situation to any alternative. The UK's response has instead been a combination of fragmentation of institutional relationships and constitutional debates, coupled with a largely rhetorical insistence on 'Britishness'. This reflects the piecemeal and incremental approach that has characterised devolution at UK level to date, but it has not involved any assessment of whether these approaches are in fact still appropriate or a different one might now be better.

The UK's pattern of intergovernmental relations is very different to how things work in other federal or decentralised systems, where intergovernmental relations are an everyday part of government. Various authors have pointed out the differences between the UK's approach, accurately characterised as still 'interdepartmental' in nature, from the 'quasi-diplomatic'

Constitution, *Devolution: Inter-Institutional Relations in the United Kingdom* Session 2002–3 2nd Report, HL 28 (London: The Stationery Office, 2003).

<sup>2</sup> See A. Trench, 'Old Wine In New Bottles? Relations between London and Cardiff after the Government of Wales Act 2006', *Contemporary Wales*, 20 (2007): 31–51.

approach common in federal systems.<sup>3</sup> Comparisons of such systems with the UK are hard to maintain, despite some institutional similarities — something which is revealing in itself. However, these may offer experiences on which elected politicians, civil servants, the public at large and the media in the UK can draw as they start to think about how these relations work.<sup>4</sup>

This chapter will discuss how such relations commonly work in a range of parliamentary federations, which display a striking degree of similarities in the ‘grammar’ of intergovernmental relations even if the issues and political contexts vary dramatically from system to system.<sup>5</sup> In particular, this chapter will look at practice in Australia, Canada, Spain and Germany, with occasional references to Belgium.<sup>6</sup> These systems all exhibit a form of ‘executive federalism’ in their intergovernmental relations that resembles each other, and makes their use as common reference points worthwhile. Indeed, perhaps the first research finding is that this group of systems exhibits a surprisingly extensive range of similarities to each in the way they approach and deal with intergovernmental relations.<sup>7</sup> The actors in such relations, the mechanisms and processes of them, the issues that arise in them (and very often the solutions adopted) are all very similar — intriguing in itself, given the many differences between them, for example, in political parties and party systems, or whether they are multi-national federations.<sup>8</sup> In this

<sup>3</sup> E.g. R. Parry, ‘The Civil Service and Intergovernmental Relations’, *Public Policy and Administration* 19 (2004): 50–63. The classic account of the ‘quasi-diplomatic’ approach is R. Simeon, *Federal-Provincial Diplomacy: The making of recent policy in Canada* (Toronto: University of Toronto Press, 1972), reprinted 2006 with a new introduction.

<sup>4</sup> See e.g. L. Hunter, *Managing Conflicts after Devolution: A Toolkit for Civil* (London: the Constitution Unit, 2000). Available at [www.ucl.ac.uk/constitution-unit/publications/unit-publications/65.html](http://www.ucl.ac.uk/constitution-unit/publications/unit-publications/65.html)

<sup>5</sup> ‘Parliamentary federations’ are federal systems based on principles of parliamentary democracy, rather than presidential systems with a separation of powers between the executive, legislative and judicial branches of government. Such systems — notably the United States — exhibit a very different form of intergovernmental relations. See R. Watts, *Executive Federalism: A comparative analysis* Research Paper 26 (Kingston, Ont: Institute of Intergovernmental Relations, Queen’s University, 1989).

<sup>6</sup> This chapter is based on research I undertook as part of a project on intergovernmental relation in the UK and comparatively as part of the programme on ‘Nations and Regions: the dynamics of devolution’ funded by the Leverhulme Trust and based at the Constitution Unit at University College London. It draws principally on interviews and field research carried out during three visits to Canada, two visits to Australia and shorter but more frequent visits to Spain and Germany between 2002 and 2005. My thanks to the Leverhulme Trust for their support.

<sup>7</sup> See A. Trench, ‘Intergovernmental Relations: In search of a theory’ in S. Greer (ed.), *Territory, Democracy and Justice: Regionalism and federalism in western democracies* (Basingstoke: Palgrave Macmillan, 2006).

<sup>8</sup> In this context, and much of the comparative literature, ‘multinational federation’ means a federal system founded upon more than one group claiming national identity within the boundaries of the federation, and which the federal system is intended to enable to live together within one state for the purposes of international law. See Burgess 2006, particularly chapter 4. Such states may also be multi-ethnic in the sense that there are people, usually recent immigrants or their descendants, of other nationalities within them – but they are not territorially concentrated and do not constitute a distinctive group with claims to constitutional recognition as a result. In this sense, Canada, Spain and Belgium are

respect, the general institutional characteristics of a federal system play a significant role in structuring the behaviour of actors within the system, while the specific constitutional and institutional arrangements of particular systems are much less important. Otherwise, it is impossible to explain why such otherwise-divergent systems continue to use the same repertory of techniques and methods. The practice of a broadly similar system of intergovernmental relations is not just common to most federal systems, but does not depend on the formal characteristics of the systems to which much attention has historically been given.<sup>9</sup> In order to do this, however, it is necessary to skim over many of the details of each specific system; this chapter focuses on the wood, not the trees.

One way of putting the UK into this broader context is to use a distinction between three models of intergovernmental relations: 'functional', 'financial', and 'summit-oriented'.<sup>10</sup> 'Functional' intergovernmental relations are dominated by specific policy matters and interactions, and are concerned with largely technical issues of how one government's policies affect another's. It therefore concerns ministers and officials for that policy area but seldom spills over to affect other ministers or departments. Consequently there is little or no interest in intergovernmental relations from the centre of government. Financial intergovernmental relations are concerned with financial matters (either the allocation of finance from the federal/central government to constituent units, or the management of fiscal relations between them), and means that the key actors become finance ministers and ministries, with other considerations (notably legal and constitutional ones) taking a back seat, and the finance minister making the running on intergovernmental matters more generally. Summit-oriented intergovernmental relations develop when high-stakes political issues come onto the agenda. It leads to the direct management of intergovernmental relations by heads of government, and their close and ongoing interest in it. This may well happen

multinational federations; Australia and Germany (and, for that matter, the United States) are not. For practical purposes such states are what Michael Keating and others call 'plurinational' states. Cf M. Keating, *Plurinational Democracy: Stateless nations in a post-sovereignty era* (Oxford: Oxford University Press, 2001). Constitutional asymmetry is commonly associated with such multinational systems, as a way of accommodating demands for recognition of the distinctive sub-state national minorities. There is obviously a parallel here with the UK's extreme asymmetry, the distinctive nationhood of Scotland and Wales, and the contested place of Northern Ireland within the United Kingdom.

<sup>9</sup> The classic example of this approach is K.C. Wheare, *Federal Government* 4th edition (Oxford: Oxford University Press, 1963). For a more up-to-date comparative discussion, taking into account issues of society and political theory as well as institutions, see M. Burgess, *Comparative Federalism: Theory and practice* (London: Routledge, 2006).

<sup>10</sup> This model is essentially that of Stefan Dupré: see J.S. Dupré, 'The Workability of Executive Federalism in Canada' in H. Bakvis and W. Chandler (eds.), *Federalism and the Role of the State* (Toronto: University of Toronto Press, 1987). Dupré distinguishes between financial, functional and constitutional intergovernmental relations: the modification to refer to summit-oriented intergovernmental relations is my own. See Trench 2006, pp. 236–8.

when constitutional issues — increases in constituent unit powers, or the possibility of secession/independence — come onto the agenda, but can arise in other circumstances such as a general desire by heads of government to remain engaged in such important matters, which may affect their own standing in their domestic arenas.<sup>11</sup> (Australia is a good example here, with the establishment of the Council of Australian Governments or COAG as a forum for the federal Prime Minister and state and territory Premiers to meet, at least annually, for discussions on important, usually policy matters — health, water resources, climate change, and so forth.) On this scale, until May 2007 the UK barely made it to having ‘functional’ intergovernmental relations, given the level of disengagement of even most departmental ministers and their senior officials from intergovernmental issues. The summit-oriented nature of intergovernmental relations in Canada, marked during the 1980s and early 1990s, has declined considerably since the late 1990s and Canada would probably now fall around the ‘financial’ stage of the continuum (though even that is debatable, as financial issues have receded in importance in the last year or so), as would Australia.

First of all, this chapter will discuss the role of some of the key actors in intergovernmental relations. Second, it will survey some of the key issues in such relations, and the ways these are dealt with. Then it will look at some of the common mechanisms and process of such relations. Finally, it will consider the application of these comparative experiences to the UK.

It is worth clarifying the terminology that will be used here. ‘Federal/central government’ should be self-explanatory, but ‘constituent unit’ may not be — this refers to states, provinces, Länder and similar governments. To try to avoid using ‘level’ or ‘tier’ to distinguish between these sets of governments (and so avoid the implication of a hierarchy in which one is higher than the other), I have used ‘sphere’ or ‘order’ (the former is often used in South Africa, the latter in Canada).

## ACTORS

### **First Ministers**

The political heads of governments usually take a close and keen interest in intergovernmental matters, indicating the political (as well as constitutional

<sup>11</sup> Dupré’s category of ‘constitutional’ intergovernmental relations conflates the importance of summitry (which can have other causes) with the emergence of legal and constitutional issues as the dominant ones. This conflation is understandable in a Canadian context, but is less valid for other systems. I have argued elsewhere that the role of law and legal issues in intergovernmental relations is related much more to societal characteristics, and (although the relationship is complex) where political systems are highly legalised that this will cause the emergence of constitutional issues as a major factor. See A. Trench ‘Legalisation and the Practice of Intergovernmental Relations in Federal Systems’. Paper presented at ECPR Joint Workshops, Helsinki, May 2007.

importance) of them. In many governments, especially smaller ones, first ministers will take on the role of acting as minister for intergovernmental affairs (for example, most Canadian Provinces or Australian States). Larger governments, with more complex relations, may have a special minister for the function, but that minister is usually directly answerable to the head of government and works closely with him or her (e.g. in Canada both the federal and Quebec governments). But in most federal systems, the head of government takes a close interest in intergovernmental matters and is engaged with them. This is obviously important when high-stakes matters are on the table — constitutional negotiations, for example, or discussions about changing systems of financial redistribution. On the day to day level, their role is understandably more marginal, but it is interesting that they remain engaged and give direction from the heart of government. It is also interesting that this is generally as true for federal/central governments as for state or provincial ones, with federal prime ministers needing to ensure that they are in control of the process and manage relations with states or provinces which are usually much weaker constitutionally and in other ways.

### **Ministers**

Ministers with specific portfolio responsibilities — for health, energy, or whatever — will similarly be closely engaged in intergovernmental matters. Many items in their portfolio will have intergovernmental aspects, and they will need to keep close contact with their counterparts in other governments as a result. For federal governments, this often provides a way to steer the overall direction of policy in a particular area, especially as they are likely to be able to support favoured initiatives with federal money. Such contact will take various forms, but commonly involves regular meetings of ministerial councils or conferences. Ministers commonly seek to manage the politics of their particular portfolios, both in relation to the other sphere of government and (for ministers from constituent units) their counterparts in other constituent-unit governments.

### **Officials and Issues of Internal Governmental Organisation**

Officials are the lynch-pins of intergovernmental relation in federal systems and have to do much of the work to enable those systems to function effectively. There is much liaison between governments to be done, and much co-ordination within a government as well. For that reason, internal organisation to deal with intergovernmental matters is an important aspect of understanding how intergovernmental relations are handled.

Part of this work is handled by central co-ordinating offices, located close to the head of government. Sometimes they are teams in the *Staatskanzlei*, the department of the prime minister or premier, or whatever the department

directly serving the head of government is called. In other cases, they constitute separate departments or ministries. They can vary hugely in size, but are commonly much larger in federal/central governments than constituent units (although Australia is an exception to this). In Canada, the most advanced case, the federal government's Intergovernmental Affairs Office in the Privy Council Office has around 130 officials at present. Its largest provincial counterpart, the Quebec government's *Secrétariat aux affaires intergouvernementales canadiennes*, has about 70; Ontario, the next largest, about 35, and some of the smaller provinces have a mere handful of officials at the centre. But the presence of a central coordination capacity to advise the head of government and other intergovernmental affairs ministers, develop and co-ordinate intergovernmental and often constitutional policy within government, liaise with other governments and gather intelligence is general.

As well as central agencies, there are also intergovernmental specialists, concerned with the broader constitutional implications of policy issues, in each functional or line ministry. Again, such teams are usually quite small (single figures of staff, often fewer than 5), but they act as both a source of internal advice to their colleagues concerned with finance or social welfare, and act as a broader network with their colleagues from other governments.

In addition to all this, intergovernmental relations commonly forms a major part of the work of many officials whose main concern is with a policy issue, down to quite low levels (the equivalent of HEO in the UK). Such officials are likely at least to keep an eye on what other governments are doing, partly as a source of ideas for making better policy, partly because their ministers and the mass media are likely to be interested, partly out of general awareness. The upshot is that a very large number of officials in all governments are concerned with managing relations with other governments, and that this takes up an appreciable amount of their time and work. It may only be a designated full-time specialisation for a few, but it is a concern for many.

There are two other salient points about the working of officials in federal systems. First, a consequence of the high level of interaction between officials and the extent to which they keep an eye on developments in other jurisdictions is that what one might call a 'concertation reflex' develops, particularly among constituent-unit officials. The result is that officials, presented with a policy challenge or some initiative of the federal/central government, will tend to ask each other what the other governments are doing and how they do it almost immediately. It is a straightforward response to operating in an environment where governments can be easily outmanoeuvred. The phenomenon is not unique to federal systems (it can also be observed in the European Union, for example), but it becomes an important feature of how federal systems work.

Second, officials from one level of government usually work in distinct civil services from one another — the Australian Commonwealth (federal) government and New South Wales each have their own civil services. (Germany is peculiar in this respect, as the regulation and grading of the civil service have been treated as federal matters until the recent Federalism-I reforms, although each government employs its own officials). They have no difficulty in understanding each other as professional colleagues and bound by similar codes of conduct and accountability.

Federal and central governments enjoy a considerable number of advantages when it comes to the bureaucratic aspects of managing intergovernmental relations. They often have more officials. They often (though by no means always) have fewer responsibilities for delivering public services, so can take a broader, more synoptic view of what policies 'the country' should have and how to deliver it, and also have the time to do so. They may be helped in this by having a better awareness of developments elsewhere, and perhaps a better network of international contacts than their constituent-unit counterparts. They may well enjoy the benefits of constitutional powers that enable them to play some role (even if it is a very minor one) in many areas of policy, so they can involve themselves in a wider range of issues than constituent-unit governments or departments. And, thanks to a combination of personnel, constitutional and financial resources (the last itself the consequence of a vertical fiscal imbalance), they can promote indirectly and by suasion initiatives favoured by the centre even when they have to act through or in conjunction with constituent unit governments. In other cases, they may simply be able to bypass constituent unit governments altogether. The result is that federal/central governments are in a powerful position, structurally if not constitutionally, and can often achieve what they wish even if they need to approach their goal tactfully and indirectly.<sup>12</sup>

### **Parliaments and Back-bench Politicians**

All federal systems worthy of the name are democracies, and many (including those discussed here) are parliamentary-type systems rather than presidential ones. But this does not mean that parliaments and legislatures play a major role in intergovernmental relations. Commonly, the executive takes control of this area (not surprising, as so many issues concern matters of policy and administration), and parliaments are at best a poor second.<sup>13</sup> Intergovernmental relations are largely a game the executive arms of

<sup>12</sup> Roland Sturm has pointed out the extent to which policies and institutional arrangements in federal systems come to resemble each other: see R. Sturm, 'The Adventure of Divergence: An inquiry into the preconditions for institutional diversity and political innovation after political decentralization' in S. Greer (ed.), *Territory, Democracy and Justice: Regionalism and federalism in western democracies* (Basingstoke: Palgrave Macmillan, 2006).

<sup>13</sup> See Watts 1989.

government, not territorial units as a whole, play. It is otherwise in presidential-type systems such as the United States, where each territorial unit has at least three actors for intergovernmental matters (the legislature, the governor or president, and the courts), and perhaps a fourth if state delegations to the US Congress are included.

Legislatures play a limited role for a number of reasons. One appears to be the lack of interest many elected members show in what are often complicated and arcane areas of policy. If the members are not full-time, or not of high calibre, this is exacerbated. A second factor is information, and accessibility of information; federal systems often give rise to complaints about how executive-dominated intergovernmental relations operate beyond the range of normal accountability to parliament.<sup>14</sup> The result is that legislatures seldom play a serious or active role in intergovernmental matters, whether by building direct links with other legislatures or by scrutinising their own government carefully and holding it to account for its actions in the intergovernmental arena.

### **Political Parties**

Political parties are important forces in intergovernmental relations, and many students of them following 'rational choice' approaches emphasise the importance of an integrated party system in maintaining unity across the country as a whole.<sup>15</sup> In many federal systems — particularly multinational ones (Spain, Canada, Belgium, for example) — there is no state-wide party system. While some political parties may operate across the whole of the state, the existence of parties for some particular parts of it (minority nationalist parties are the obvious example, but not the only one) mean that the conditions of party-political competition vary considerably depending on which jurisdiction (federal/central or constituent unit) is involved, and from constituent unit to constituent unit. Spanish elections are very different in Catalonia and Andalusia; Canadian federal elections are quite different from provincial ones.

There are two interesting points about how the practice of party politics in such complex environments affects the practice of intergovernmental relations. The first relates to party organisation. To operate effectively in such varying political environments, it is necessary for particular parts of state-wide political parties to have considerable financial, policy-making and campaigning autonomy to be able to adapt to the environment in which

<sup>14</sup> See R. Simeon and D. R. Cameron, 'Intergovernmental Relations: An oxymoron if ever there was one' in H. Bakvis and G. Skogstad (eds.), *Canadian Federalism: Performance, effectiveness, and legitimacy* (Toronto and Oxford: Oxford University Press, 2002).

<sup>15</sup> See for a recent example M. Filippov, P.C. Ordeshook and O. Shvetsova, *Designing Federalism: A theory of self-sustainable federal institutions* (New York and London: Cambridge University Press, 2004).

they function. What helps the CDU win votes in North Rhine-Westphalia is not the same as what wins them votes in Baden-Württemberg. In some cases (Canada is the most extreme) this results in a fragmentation of the party system, with different parties not only in federal and provincial elections but, at provincial level, varying widely from province to province (there is little similarity between the provincial Liberals in Quebec and British Columbia, for example). That sort of way of working is simply a fact of life in such systems. Parties concerned with a single constituent unit (particularly minority nationalist parties) have it much easier in this respect, as their focus is only on one specific part of the system — and they can often work better as an integrated party, using their strength in several spheres of government to advance the interests of their part of the country.

Second, even where there organisational or ideological links between the various parts of a state-wide party, it is hard for politicians to do favours to their party colleagues in another jurisdiction, whether that be from one constituent unit to another or from the federal/central level to a constituent unit (or vice versa). As one senior Australian Labor (state) politician put it privately, ‘I don’t win an election in [my state] by helping out the party nationally. I have to stand up for the interests of [my state].’ The focus on winning the elections that one contests takes precedence over the desire (which exists) to help out party colleagues operating in other domains. One will help them if one can, without it causing any harm in the domestic arena — but a politician’s concern is with that arena first and foremost. Standing up for the voters in one’s own jurisdiction is the best way that politicians can demonstrate that.

### **Courts and Judges**

Courts, particularly supreme and constitutional courts, play a surprisingly limited role in intergovernmental relations in parliamentary systems, especially common-law ones.<sup>16</sup> (They are much more important in presidential systems, where the separation of powers gives them both greater autonomy and greater scope to affect other actors.) The reason is that courts are not autonomous actors with control of a wide agenda in the way that governments are (and even parliaments, to some extent). While they have room for manoeuvre in deciding the issues that do come before them, they have very little control over what those issues are. Even courts which have jurisdiction to give advisory opinions on important but abstract issues (and which are not simply limited to resolving cases actually in dispute between the parties) can only consider a case if a) there is a point which is legally unclear and b) the

<sup>16</sup> For a comparative discussion of different approaches to federalism issues by the courts in three common-law federations, see G. Baier, *Courts and Federalism: Judicial doctrine in the United States, Australia and Canada* (Vancouver: UBC Press, 2006).

parties wish them to resolve it. Governments have the initiative when it comes to bringing such cases. They cannot wholly control the issues that a court might determine, as other public bodies, commercial interests and private individuals may all have concerns about the lawfulness or constitutionality of government actions or legislation, but they are the most active litigants when it comes to questions of how powers are divided between the different spheres of government in a federal system. If they can find other ways of resolving an issue in a way that is both legally secure and practicable, they may well do so. Litigation is a protracted and inherently unpredictable way of securing an outcome, so tends not to be preferred if there is a choice.

The result is that governments are unlikely to have recourse to the courts if they have a better alternative which they can control more effectively — if they can reach an agreement and ensure it will be legally binding, that is often preferable to going to court. The comparative unpredictability of the courts means that even litigants who generally do well before them are reluctant to undertake the risks of litigation.<sup>17</sup> Civil-law systems, like Germany or Belgium, work somewhat differently as the conception of what is ‘legal’ is broader, and the constitution is seen first and foremost as legal rather than political in nature. (A good example is the recurrent litigation before the Federal Constitutional Court in Germany about financial equalisation between the *Länder*.) There is therefore a greater need to ensure that any changes are lawful, and the courts (and lawyers) are more prone to assert their role in such systems.

This is not to say that courts cannot play a major role in intergovernmental relations. Many matters of legal but not political importance will be regularly before the courts, either because third parties bring them or because governments want an outcome that is legally certain even if they do not know what that outcome might be. More important is that courts define constitutional boundaries, and periodically those boundaries shift. As a result, court decisions play a significant role in reshaping the constitutional environment within which intergovernmental relations take place. (The opinion of the Supreme Court of Canada in the *Reference regarding Quebec Secession*, discussed below, is a good example.) This is, however, a role that is played on relatively rare occasions; having the power to reshape the boundaries of intergovernmental relations does not make the courts into actors in the more routine practice.

<sup>17</sup> The argument advanced here is developed at greater length in Trench 2006, pp. 244–6.

## ISSUES

**Finance: the Power of the Purse**

Finance is a key issue in every multi-level system. There are a number of problems. One is to find ways of dealing with different levels of prosperity and economic performance, and to reconcile that inequality with at least some commonality in the provision of public goods and services. The second is to deal with the different taxing powers of different levels or orders of government, as commonly the federal or central government has both wider taxing powers and greater fiscal capacity than state or regional governments. The first of these usually leads to some form of horizontal fiscal equalisation, which is usually undertaken by the central or federal government, and involves allocating funds to poorer regions at the expense of richer ones. The second results in some measure of vertical fiscal imbalance, which enables the federal or central government to engage in horizontal fiscal equalisation, and perhaps leads to a 'fiscal imbalance' between the two levels of government.<sup>18</sup>

Federal systems usually manage these conflicting objectives in a way that has similar elements in substance, if not in form. What usually emerges is a system in which:

- States or regions raise a substantial amount of their own *tax*, principally through personal income tax, but also other taxes and charges (for example, property taxes or stamp duties). In decentralised systems like Canada or Switzerland, this can account for as much of 70–80 per cent of overall constituent unit spending (which itself is typically 45–60 per cent of total public spending). In some cases, the taxing authority is the state or region under its own name; in others, a significant proportion of tax revenue (at least 30 per cent) is formerly allocated to the states or regions by the central or federal government, which on the formal level monopolises tax-raising powers.
- The federal or central government allocates *grants* to the states or regions for specific purposes. These grants are conditional, although how conditional they are varies a good deal; conditions are sometimes onerous and used to promote federal government policy, and on other occasions fairly limited and ensure country-wide application of a general sort of policy. They are usually related to welfare policies, notably health, perhaps also other social services or education. Such grants are usually calculated on a fairly crude basis — often simply on a per capita basis.

<sup>18</sup> For a recent comparative discussion of financial arrangements in federal systems see A. Shah (ed.), *The Practice of Fiscal Federalism: Comparative perspectives* (Montreal and Kingston: McGill-Queen's University Press, 2007).

- The federal or central government also allocates funding specifically to equalise the financial resources available to all governments. Such grants are unconditional, but the calculation of that is complex as it relates principally to need, and this manifests itself in various ways. Equalisation is of course a form of territorial redistribution: areas that are already prosperous can demonstrate little need, so receive relatively little from such funds, while poorer ones have both higher need and fewer resources of their own, so receive a larger amount.

How this broad framework is achieved varies a good deal from system to system. What is general is the use of a combination of instruments (by contrast, the UK's reliance on what is effectively a very large unconditional grant is highly unusual).<sup>19</sup> What is also general is that this then leads to complex and protracted debates about finance, which tend to be a running feature of financing federal systems. As any system means some constituent units are winners and others losers (and economic changes mean that the winner and losing constituent units change over time), there are recurrent attempts to re-open financial issues and revise the structure of finance (particularly the weight of the various instruments), and the formulae used. The questions this presents for a political system are significant: about money, and about the redistribution of money. One of the hazards they present is that what are essentially political questions become veiled in economic or financial terms, so the underlying issues become obscured — a hazard that is to some degree limited by the extent to which the questions are so clearly political that politicians become very closely interested in them.

### **Policy Making and Policy Overlaps**

Overlaps between the policy functions of each sphere of government is another inevitable feature of federal and similar systems. However perfect the constitutional design may be (or have been), in the modern world it is inevitable that there are overlaps between policy, which need to be handled in some way. Executive intergovernmental relations — the processes described above — are one way this often happens. Litigation is sometimes another, with the courts called on to determine which sphere of government has authority over a particular matter. But however such overlaps are resolved, they are a routine occurrence, needing to be managed at the level of day-to-day policy and to be understood as reflecting larger political struggles at a more profound level.

<sup>19</sup> For further discussion of the importance of finance and the instruments available, see A. Trench, 'Tying the UK Together? Intergovernmental relations and the financial constitution of the UK' in R. Hazell (ed.), *Constitutional Futures Revisited: Britain's Constitution to 2020* (Basingstoke: Palgrave Macmillan, 2008 forthcoming).

The question is how such overlaps are managed, in both substantive and process terms. Substantive outcomes depend on a range of factors, including the constitutional powers of each sphere of government, differences in the policies they wish to pursue and their ideological approaches generally, party-political linkages, and the general balance of power between the two spheres of government. Unsurprisingly, outcomes vary a good deal. But the processes are remarkably similar across systems: a process of negotiation and brokerage, along the lines sketched out in this chapter, organised around ministerial meetings and involving a wide range of actors within governments. (Recent academic writing, particularly in the US, has often focussed on such issues of 'intergovernmental management', as though this has not always formed a significant part of the work of officials concerned with the practice of intergovernmental relations.)

On the constitutional level, it is worth noting that the UK is distinctive in one important respect. Most federal systems have built their welfare states (in particular) around federal institutions: the constitutional framework of federalism preceded the welfare state, and the welfare state was therefore fitted into a pre-existing constitutional framework that would be tweaked if needed, but seldom fundamentally adjusted as a result. The UK's welfare state was built in the context of a much more centralised state, with common policies even if aspects of administration were handled by the Scottish (and later Welsh) Offices. Devolution has meant a spinning-out of centralised policies into the hands of the devolved institutions. Only one other system has done this: Belgium. Belgium's approach to intergovernmental relations is predicated on the exclusive grant of powers to each order of government, so in principle no government or legislature needs the consent of another in order to act, a marked contrast to the UK. However, the narrowness with which functions are defined for this purpose means that in reality extensive collaboration between governments is needed for the making of policy or the delivery of public services.<sup>20</sup> Thus, despite a completely different approach to the constitutional structure of federalism there, the overall outcome resembles the close entanglement of governments that one finds in the UK — and the mechanisms to manage these that are used in Belgium are generally similar to those used in other federal systems.

### **Constitutions and the Allocation of Competencies**

The issue of which government is responsible for which matters is a contentious one in pretty much every system. Debates about this are best regarded as part and parcel of operating in a multi-level system rather than as a regrettable intrusion. However, in most of federal systems, the issue of the

<sup>20</sup> See J. Poirier, 'Formal Mechanisms of Intergovernmental Relations in Belgium', *Regional and Federal Studies*, 12 (2002): 24–54.

'internal' constitution of a state or region is not part of this pattern. The constitutions of German *Länder*, Australian States, or Canadian Provinces (or for that matter US States) are internal matters; issues like the proper relationship between executive and legislature, the regulation of the legislature or the proper conduct of state or regional elections are internal matters, not federal ones, and change in these matters is similarly an internal matter. (Spain is an exception here, as the individual statutes of autonomy of the autonomous communities are matters of legislation by the central state, even if they are negotiated between individual autonomous communities and the central state.) The constitutional issues that are raised in intergovernmental relations mainly concern the division of powers between the two spheres of government, which requires a broader consensus. A secondary issue may be formal recognition of constitutional distinctiveness, and the granting of 'special treatment' or 'special regimes' for particular constituent units.

Constitutional politics are the most difficult area for the practice of intergovernmental relations. One issue is the difficulty of reaching agreement between parties with very different interests and views, when formal amending formulae often mean that unanimity or near-unanimity is needed to effect change. A second issue is that the relatively private and closed nature of intergovernmental processes makes it hard to build support for proposed changes among the general public. As the process tends to present a compromise outline agreement at a relatively advanced stage of intergovernmental negotiations, it is hard to re-open complex issues if that is needed to build public support, let alone have a process that involves the public and invites wider participation from the outset.<sup>21</sup>

### **National Minorities and Demands for Autonomy and Independence**

The place of minority nations in larger multinational or plurinational systems creates a perennial form of intractable constitutional politics in all such systems.<sup>22</sup> Such constitutional politics affect broader aspects of intergovernmental relations — quite apart from ongoing constitutional debates, they are an undercurrent in more routine intergovernmental relations too, and problems in making the system work as a whole can be used to support demands for further constitutional change, while demands for such change may be undermined if the present system can be shown to work effectively.

A major issue for central/federal states is the extent to which they accept, or encourage, asymmetry — differential treatment of some constituent units

<sup>21</sup> For a hugely valuable account of these processes in Canada, see P. Russell, *Constitutional Odyssey: Can Canadians become a sovereign people* 3rd edition (Toronto: University of Toronto Press, 2004). These problems particularly bedevilled the Meech Lake and Charlottetown accord processes there in the late 1980s and early 1990s; see chapters 9–11.

<sup>22</sup> For a comparative discussion of some of the issues see S. Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004).

compared with others, and the reaction of less favoured constituent units to this. Asymmetry causes (but may also be caused by) bilateral rather than multilateral relationships. Asymmetric constitutions add complexity, and may introduce a logic of ‘catch-up’ to the state as a whole — less-favoured units seek greater autonomy, prompting the previously-advantaged ones to seek yet further advantages (usually in the form of enhanced powers, either legal or financial) which have the effect of re-establishing a differential between that unit and other ones. Asymmetry runs the risk of opening up broader debates about territorial justice and injustice — whether one part of the state is doing ‘better’, and this is regarded as being at the expense of other parts. By and large, it would seem that central states seek to promote constitutional symmetry rather than asymmetry, though they may not be able to sustain that; apart from anything else, having all constituent units with similar powers makes life somewhat easier for them.

Debates about independence can similarly continue indefinitely. From the point of view of the central/federal state, the fact that the debate continues is an indication of success not failure — it means that constituent units in question have not, in fact, become ‘independent’ (whatever that may in fact mean). Yet the ground rules for such debates are often hard to identify — the yardsticks set by the Supreme Court of Canada in its landmark opinion on Quebec secession remain, however, of great importance.<sup>23</sup> These are, in essence, that there was no right to secede unilaterally in international or Canadian law, but that the demonstration of a clear desire to secede in response to a clear referendum question creates a duty on the federal government to negotiate in good faith the terms of independence. Such a ruling, while the subject of much contention, has led to greater clarity about the processes of secession than in any other part of the world.

## PROCESSES AND INSTRUMENTS

### **Intergovernmental Meetings**

It is probably evident from the discussion of actors above that meetings are a key part of the framework of managing intergovernmental relations. They occur regularly, routinely, at almost all levels of government from middle-ranking officials responsible for particular files or specialist areas of policy through more senior officials to ministers. The level at which meetings are rarest and least used is the summit level, of heads of government, discussed below.

<sup>23</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217. For a discussion, see D. Schneiderman (ed.), *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: Lorimer, 1999).

Ministerial meetings occur with varying frequencies, according to need; in some policy areas they may only be annual events, but in others might happen every two or three months. Ministerial meetings are, of course, the highest and most visible part of a network of broader collaboration between governments, involving preparation by senior and, below them, more junior officials. Meetings tend to be somewhat more frequent at working levels, especially when a policy issue becomes active (as with the pensions file in Canada in the late 1960s and early 1970s).<sup>24</sup> This can itself become an issue: the amount of time, energy and money that regular meetings take up is considerable, and may become a source of concern to governments that are keen to exercise autonomy (Quebec is a notable example here). Moreover, if such regular meetings lead to the development of system-wide 'policy communities' that embrace officials from federal/central and constituent-unit governments, developing a common idea of what would make 'good policy' that they then seek to effect in their respective spheres of government, they can act as a powerful force for convergence.

The heavy reliance on meetings is a useful tool for the central or federal government. It often convenes meetings, takes the chair at them (or co-chairs them with a representative of the constituent unit governments), and in practice can shape both agenda and outcome (for example, by offering financial support for some options but not others). Yet they do not get matters entirely their own way. Much depends on the extent to which constituent units are able to agree and stick to a common position. It is routine for constituent-unit governments to meet ahead of time to work out a common position. (Particularly at summit level, it is also common for the federal/central government to try to find ways to break up the unity of the constituent units.)

Intergovernmental meetings structure intergovernmental relations (junior officials develop detailed policy among themselves and may also meet to prepare for senior officials' meetings, which in turn prepare ministerial meetings), and become part of a web of government activity managing policy across the country. They are central to the practice of intergovernmental relations, not just because of their immediate role but because they structure much wider forms of interaction. Perhaps this explains why (other than in Germany) few constituent-unit governments have representative offices in the federal/central capital; they are not needed to represent views or act as a focus for co-ordination, as the relevant officials are in regular contact by phone, email as well as routine meetings in any event. (In Germany, the very intensity of official contact, particularly around the

<sup>24</sup> Discussed in Simeon 1972.

*Bundesrat*, appears to be the reason for the large offices that each *Land* maintains in Berlin.)<sup>25</sup>

Perhaps the most important aspect of intergovernmental meetings is their role in relation to disputes and disagreements between governments. Disagreements are a natural part of the practice of intergovernmental relations. The practice of working through a large number of meetings, at a variety of levels, provides a set of mechanisms for dealing with such disagreements. It enables issues to be clarified, and in many cases for them to be resolved by negotiation or compromise.

### **Summitteering**

Summit meetings of the first ministers or heads of government in federal/central and constituent unit levels are always significant events. In some systems, such meetings never happen at all (e.g. Spain — although there are bilateral meetings, there are no multilateral ones). In others (such as Canada), they happen sporadically; others, like Australia and Germany, hold them annually as a matter of routine.<sup>26</sup> All such meetings are inevitably politically charged — it is an opportunity for politicians from all governments to hold the public stage and seek to advantage the interests of their government, and the tensions are such that Canadian prime ministers have sought to hold such meetings as rarely as possible, knowing that they may well be embarrassed even if they secure the sorts of agreements or outcomes they sought, and will probably have to make significant concessions to get such outcomes. Summit meetings between federal/central and constituent unit governments are not just the rarest form of intergovernmental co-ordination but also the least useful aspect of it. Their value is partly symbolic (showing the efforts to which the federal/central government will go to seek endorsement of its proposals, the role all governments play in the overall governance of the country, and so its unity as well as diversity). It is also partly practical. Such meetings can be the only way to secure progress on important country-wide issues — whether it be major policy issues such reform of health care systems and financing arrangements or financial arrangements for equalisation systems, or constitutional change — as well as to secure agreement on particularly thorny disputes. But they are the tip of an iceberg of much wider co-ordination.

<sup>25</sup> See U. Leonardy, 'The Institutional Structures of German Federalism' in C. Jeffery (ed.), *Recasting German Federalism: The legacies of unification* (London: Pinter, 1999).

<sup>26</sup> The frequency of first ministers' meetings in Canada has declined since the end of the rounds of 'mega-constitutional' negotiations, and first ministers' conferences have ceased altogether since then. See Russell 2004.

**Horizontal and Vertical Relations**

Intergovernmental relations are not simply about vertical relations — between the federal/central government and those of constituent units. An important aspect are horizontal relationships, between the various constituent units among themselves. This can take a number of forms: meetings where the constituent units have (normally exclusive) formal competence, as with culture in Germany, meetings to develop and co-ordinate common positions ahead of meetings with the federal/central state as well, or meetings of constituent-unit heads of government covering a wide agenda and not simply oriented toward meetings of all first ministers in the country. This last approach has been adopted in Canada, with the Council of the Federation, and extended to Australia, with the Council for the Australian Federation.<sup>27</sup> In Germany, there are pre-meetings for the pre-meetings, with *Land* governments of different political complexions caucusing together before the *Länder* as a whole meet.

Although horizontal relations can be concerned with matters in which the federal/central government has no (formal) interest, they are generally principally focussed on relations with the federal/central government. Their intensity consequently depends chiefly on the extent to which constituent units collectively find that they are strongest when they act together, rather than manage their relations with the federal/central government bilaterally. The Council of the Federation in Canada arose from a determination of the incoming Quebec Liberal government to prove collective provincial strength, both in acting together where co-ordination of policy was desirable but the matters involved were exclusively provincial, and in developing common position of the provinces toward the federal government. Its impact has been limited not just by differences in interests and views among the provincial governments, but also by a changed approach to intergovernmental relations by the federal governments under Paul Martin and Stephen Harper.

**Intergovernmental Agreements**

Intergovernmental agreements are a routine instrument for handling intergovernmental relations. They have a number of common features in most systems: they tend to be numerous, used in a variety of contexts (making generalisations difficult to make), and described as not legally enforceable.<sup>28</sup> Legal enforceability would raise constitutional problems — it would entail one government purporting to bind its successor, and also binding its

<sup>27</sup> For details of the two Councils' activities, see their websites — at [www.councilofthefederation.ca](http://www.councilofthefederation.ca) and [www.caf.gov.au](http://www.caf.gov.au) respectively.

<sup>28</sup> The most comprehensive discussion is J. Poirier, 'The Functions of Intergovernmental Agreements: Post-devolution Concordats in a Comparative Perspective', [2001] *Public Law*, 134–57.

legislature. Although classifying such agreements is hard and generalising about them is difficult, there are clearly two distinct sorts of agreement. One sort are those that are general in content and political in intent, embodying a high-level agreement (usually at the level of heads of government) about a constitutional or policy matter. A good example might be the Canadian ‘Social Union Framework Agreement’. Such agreements are public, and meant to be — their purpose is at least as much to declare general political intentions as it is to shape the details of policy, and they may be enforceable before public opinion but not in the courts. What is often more important is what such agreements omit as what they say. Their level of ambiguity and generality is such that, even if they were regarded as legally enforceable, it would be very hard for a court to identify their legal meaning. The second sort are much technical and intended to make practical arrangements work. They tend to be professionally drafted, in legal form and with legal precision, so that they could be construed and enforced by a court if need arose (and if they were intended to be legally enforceable). These deal with areas where collaboration between governments needs to be clear and precise, for example when one government provides services to another (e.g. collecting taxes). These are a common tool of the practice of government, negotiated in detail if not in general outline by officials and drafted by government lawyers.

### **Legislation**

By definition, federal systems do not have the overlap and duplication of legislative competence that, legally speaking, underpins devolution in the UK. Even where legislative powers are expressed as concurrent rather than exclusive, legal doctrines arise to govern the exercise of legislative power — such as the precedence of federal/central legislation in areas where two pieces of legislation conflict, or that of ‘occupation of the field’, meaning that constituent units may not legislate in fields where the federal/central government has legislated (which itself raises the question of what exactly such a field is). Where legislation does need co-ordination (as arises in Australia, with the power of the state parliaments to refer matters to the federal parliament under section 51 (xxxvii) of the Australian constitution), the result is a highly formal process to control use of the power, involving legislation passed by state parliaments and legally-drafted, detailed inter-governmental agreements with the proposed legislation annexed between the federal and state governments.

It is common for federal/central governments to have powers relating to constituent-unit legislation, to ensure that such legislation only relates to functions constitutionally allocated to the constituent units. These powers usually include the ability to refer legislation that the federal/central

government considers exceeds those limits to the courts, for a decision about whether it is *intra vires* (within powers) or not. But the existence of such powers does not mean that one sphere of government will spend much time pre-emptively scrutinising legislation proposed in another sphere; they have too much 'real' work to do for that. While a government is likely to take considerable care over the constitutionality of legislation before its own legislature, checking other legislation is simply too much work. Such legal sanctions are therefore only likely to be invoked reactively, when there is reason to suspect that there is a problem.

#### CONCLUSION:

#### LESSONS FOR THE UNITED KINGDOM FROM FEDERAL SYSTEMS?

It will be clear from the discussion above that the way intergovernmental relations work in the UK does not resemble that of federal systems to any very great extent.<sup>29</sup> In the key areas — of the processes used, of the actors involved, or the main issues — the UK continues to manage its intergovernmental relations in a very different way to such systems, one which owes much to pre-devolution forms of interdepartmental relations and to forms of ad hoc management devised when Labour dominated all three British governments. Such an approach is no longer appropriate, as different political parties come to hold office in the various governments and to use power in increasingly different ways. The fact that such a wide range of federal systems have converged on similar ways of working is itself intriguing, and suggests that those systems may afford valuable lessons for the UK in the coming years. The UK has hitherto placed heavy reliance on trust and goodwill — important factors in the practice of intergovernmental relations, but not the sole factor by any means. These have been required to take the place of established institutional ways of working, rather than augment them.

Perhaps the most important issue is whether the system adopted in the UK is workable. 'Workability' is the concept used by Dupré to assess how effective intergovernmental relations were in Canada.<sup>30</sup> It asks, in essence, whether intergovernmental institutions and processes provide a forum conducive to negotiation, consultation or simply an exchange of information, or handicaps these aspects of intergovernmental relations. It may be enhanced by trust and regular contact between the various parties, but the key issue is whether overall the system in fact can operate given the demands placed on it. Whether the UK's system as it operated before May 2007 was workable was open to some debate, but by and large it met the demands

<sup>29</sup> For further discussions of the differences between the UK and federal systems, see chapters 11 and 12 (by Watts and Trench) in A. Trench (ed.), *Devolution and Power in the United Kingdom* (Manchester: Manchester University Press, 2007).

<sup>30</sup> See Dupré 1987.

placed on it — the problem was that those demands were likely to change, and indeed have. In some ways, the UK's systems met the standards Dupré sets for workability; the reliance on bilateral contacts, and the ability of specialists in particular areas to deal directly with their counterparts rather than have such people of differing professional backgrounds try to find common ground, are aspects of the UK's system that work well. But when it comes to more political matters, and especially ones where the complexities are technical as well as political, the UK's present arrangements fail to manage these complex relationships well, to recognise the nature of the devolved UK as a state, or to deal with the disputes and differences that naturally arise between governments.

Making the UK's arrangements more workable would not be easy but would be manageable. It would involve greater thought about constitutional powers, and what is a matter for each sphere of government. In this, it is particularly the UK Government and Parliament that need to change. They would also need to show greater acceptance of limits on what each can do as a result. That would imply administrative reorganisation in Whitehall, to differentiate more effectively and clearly between those functions of the UK institutions which related only to England (and were the counterpart of devolved function in Scotland, Wales or Northern Ireland), and those which were UK- or Britain-wide. It would also imply greater use of formal mechanisms, not because such mechanisms are inherently good but because they are an appropriate way to manage relations between governments with different functions and different approaches to policy whose interests and roles overlap or affect each other. That would enable common ground between administrations of different political hues to be identified, and differences managed. In that sense, the approach of the Scottish Government since May 2007 has been much in keeping with securing a workable form of intergovernmental relations than the UK Government's has been.

It is perfectly reasonable to ask what the interest of constituent unit governments might be in seeking to use techniques and processes that (from the account given above) often put them at a disadvantage compared with the federal/central government (although clearly that is not a view that the present Scottish Government shares). It will be apparent from this discussion that central or federal governments hold many of the cards in the practice of intergovernmental relations, and that it is not hard for them to secure favourable outcomes by a variety of means and by cumulating the effect of their various sources of influence. Part of the reason why this overall model is commonly followed is to do with habit and inertia, but that so many constitutionally-varied systems adopt similar approaches suggests that these are not the only factors. And while the question may be reasonable, it also misses the point, as it fails to ask what the alternative is. For most constituent units, the

alternative to this approach is one that places them at an even greater disadvantage, prone to being picked off by the central/federal government when it chooses. What this sort of approach to the processes of intergovernmental relations offers to constituent units is a degree of consistency and stability in how things work, and the opportunity to form alliances that offer at least a prospect of greater influence overall. Central states get influence rather power; constituent units get influence too, in a different sort of way. In an age in which sovereignty is becoming increasingly diffuse and hard to locate in a single place, it is an appropriate way of managing differences. That the UK has taken a different approach so far tells us that the early years of devolution have been a transitional period. What happens in the next decade will tell us whether the UK is indeed part of this broader family, or continues to be an exception.

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