



# **INTERGOVERNMENTAL RELATIONS AND BETTER DEVOLUTION**

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## **About the author**

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## **About the UK's Changing Union project**

The UK's Changing Union project is a joint initiative between Wales Governance Centre at Cardiff University, the Institute for Welsh Affairs, and Tomorrow's Wales/Cymru Yfory on the future of the Union and the Welsh devolution settlement. The project is kindly funded by the Joseph Rowntree Charitable Trust and the Nuffield Foundation for a period of three years between January 2012 and January 2015. The project itself has two inter-related aims.

First it seeks to overcome the disconnected nature of the contemporary debates on territorial-constitutional matters in the four countries of the UK – debates which are currently conducted largely independently of each other and in which the implications of change in one place upon the other countries or upon the whole of the union are only rarely considered.

Against this background of a wider engagement with the future of the UK's territorial constitution, the project has been established to make a seminal contribution to the deliberations of the Commission on Devolution in Wales (or the Silk Commission) that was established in 2011 by the UK government.

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## Summary of key points and recommendations

- The key issues between the UK and Welsh Governments are all bilateral, and need to be managed bilaterally rather than through multilateral forums.
- The failure of such bilateral machinery affects Wales more than Scotland or Northern Ireland, as Wales is both entangled with government and administration in England, and less able to secure advantageous arrangements when it needs to.
- Statutory regulation or a code of conduct is unlikely to improve the working of intergovernmental relations. What is needed is a way of ensuring both governments have a similar political interest in managing their relations.
- The idea of a ‘Welsh Intergovernmental Committee’, proposed by the Silk Commission and endorsed by the Welsh Government, is likely to prove unwieldy in practice.
- A more effective way of improving co-ordination would be through regular liaison through the Wales Office and Secretary of State. That would imply a very different way of working for the Wales Office, and a less high-profile campaigning role for the Secretary of State.
- The plenary Joint Ministerial Committee (JMC) is too prone to grandstanding at present. A greater focus on substantive matters would reduce this.
- Devolved governments should have the formal right to include at least one item on the plenary JMC agenda, so it cannot be monopolised by UK Government concerns.
- The JMC should also have a dedicated secretariat, independent of any government.
- The JMC (Domestic) has ceased to play a significant role. Its role should be redefined more narrowly, and the committee made to work better when it does meet, or it should be wound up. If it does continue, timeslots should be longer – half a day rather than a mere hour; meetings should be held in a variety of centres, not just London; and attendance should normally be below the level of first ministers.

- The JMC disputes machinery is heavily weighted toward UK Government interests. This threatens the working of devolution more generally. However, an arbitration mechanism is unlikely to be appropriate for what will in essence be political disputes.
- The disputes panel needs to be clearly independent of both governments. It should have an independent chair, or a panel of members nominated by both UK and devolved governments.
- To ensure a measure of equality before the disputes panel, it should be able to make statements of its view about a matter referred to it, even if the governments involved cannot reach an accommodation. A silent acceptance of the status quo should not be the worst outcome the UK Government can face.
- A multilateral forum for legislators from all four UK legislatures – along the lines of the British Irish Interparliamentary Body – would help improve knowledge on the part of MPs, AMs, MSPs and MLAs of what each does and how their legislatures function.
- Legislatures should take on a greater role in managing the working of the Sewel convention, communicating with each other over bills subject to the convention rather than leaving this to be handled by governments. Again, a statutory basis is likely to prove cumbersome and unwieldy.
- A ‘devolution committee’ at Westminster, as recommended by the McKay Commission, would also play a valuable role in ensuring greater coherence regarding devolution matters at Westminster, with knock-on effects in ensuring greater attention within Whitehall.

## 1. Introduction: the problem, and some comparative background

It is widely acknowledged that the UK's arrangements for managing co-ordination between governments are flawed. What is currently in place is disjointed and often ad hoc. On the whole, it is Wales that suffers the worst effects of this, having neither the political clout that Scotland can wield or (at least until recently) the special treatment that Northern Ireland has been able to claim, and having a set of devolved functions that have an entangled relationship with similar functions for England. The Silk Commission devoted a good deal of attention to the issue in Part 2 of its inquiry, and had further submissions from both the Welsh and UK Governments.<sup>1</sup> The Smith Commission, formulating plans for further devolution for Scotland, has also addressed the issue.<sup>2</sup> The purpose of this paper is to sketch some ideas for remedying these dysfunctions and to suggest ways of making the system of intergovernmental relations more effective and workable, regardless of how or when implementation of the Silk Part 2 and Smith Commission reports takes place.

The management of intergovernmental co-ordination is key to making federal and decentralised systems work. It involves the interplay of high politics – which is particularly charged if the governments involved are of different and competing parties – and more routine bureaucratic processes. Inevitably, the high politics plays a major role, but underlying interests of particular regions or units of government often mean that their approach to intergovernmental processes remain similar over time, even as governments change. The tendency – which has become quite common in the UK – to see all aspects of IGR as reflections of party politics is certainly incorrect in comparative terms, and arguably overstates the importance of party politics in the UK as well.

The practical mechanisms and techniques for managing IGR are remarkably similar around the world. The common pattern includes extensive, more or less routinised co-ordination involving not just regular ministerial meetings, but extensive liaison by officials, through meetings, individual telephone calls and group conference calls, and email. There are questions about just how intensive such networks are and how frequent interaction is; whether it has an institutional focus (as it does in Germany, with the business of the *Bundesrat*, the upper house of the German legislature, playing a major role); how much it depends on bilateral or multilateral co-ordination, which in turn relates to how asymmetric the country's system as a whole is, and how much it involves the prime minister of the federal or central-state government. But in all systems such co-ordination is both a fact of life, while lacking in any formal constitutional requirement to take place (with some limited exceptions relating to EU business). It happens because it is necessary, in political or practical terms or both, to

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<sup>1</sup> Commission on Devolution in Wales *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (Cardiff, 2014).

<sup>2</sup> The Smith Commission *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (Edinburgh, 2014), particularly paragraphs 28-31.

make the country work.<sup>3</sup> It is therefore accepted as central to the practical conduct of government business by all involved, even when it can be irksome or inconvenient – and in some cases is used by federal/central governments as an effective lever of influence to achieve their goals, when they have no powers or unilateral action might come at an excessive political price.

## 2. The UK system at present

The territorial politics of the UK have changed dramatically since devolution. In 1999, Labour had a large majority in Westminster, and was in government in both Scotland (in coalition with the Liberal Democrats) and Wales (as a minority). By 2010, the situation was quite different; Labour's only remaining toe-hold in government was in Wales, where it was in coalition with Plaid Cymru. The Conservative-Liberal Democrat Coalition held office at UK level, while Scotland had a minority SNP government. Elections a year later saw Labour resume government alone in Wales and the SNP win a majority in Scotland. In just over a decade, the UK moved from the maximum level of political congruence (the same party in government everywhere) to the maximum level of incongruence possible. At the same time, the responsibilities of all devolved governments have increased, most strikingly in Wales but in Scotland and Northern Ireland too, and their self-confidence and determination to make their own policies have increased. Despite that, the UK's arrangements for IGR remain very largely those designed at the introduction of devolution, in 1999.<sup>4</sup> It is a system that is lightly institutionalised and largely informal which relies on a sizable dollop of goodwill and an ill-defined role for the territorial Secretaries of State to augment the limited use of multilateral committees.<sup>5</sup>

The principal committees are six in number. Four of them are 'formats' of the Joint Ministerial Committee (JMC), originally established in 1999 and which have met with varying degrees of regularity.

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<sup>3</sup> For further discussion see A. Trench 'The Practice of Multi-Level Government: How intergovernmental relations work in federal systems' in A. Trench (ed.) *The State of the Nations 2008* (Exeter: Imprint Academic), and also A. Trench 'Intergovernmental Relations: In Search of A Theory' in S. Greer (ed) *Territory, Democracy and Justice: Regionalism and federalism in western democracies* (Houndmills: Palgrave Macmillan, 2006).

<sup>4</sup> The key document, setting out these arrangements, is the *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee*. The latest version was agreed in October 2013 and is available at <http://www.scotland.gov.uk/About/Government/Inter-Governmental/Memo-of-Understanding>. Details of how often each format of the JMC has met, and some information about what meetings considered, is given in the Annual Reports of the JMC, agreed at each year's plenary JMC. The most recent one available is for 2012-13, and can be found at <https://www.gov.uk/government/publications/joint-ministerial-committee-annual-report-2012-to-2013>

<sup>5</sup> These are described in House of Lords Select Committee on the Constitution *Devolution: Inter-institutional Relations in the United Kingdom*, Session 2002–03 2nd Report, HL 28 (London: The Stationery Office, 2003).

- The plenary JMC is chaired by the UK Prime Minister and includes the three devolved First Ministers, as well as their deputies, the territorial Secretaries of State and a number of other UK ministers. It is required to meet at least annually, though it did not do so between 2002 and 2008. It deals with high-level political matters, including keeping the arrangements for intergovernmental relations under review. As a result, its meetings often agree revisions to the overarching *Memorandum of Understanding*.
- The JMC (Domestic) deals with practical policy matters, where non-devolved policies have an effect on devolved ones or vice versa. It was established in 2008, is chaired by the Deputy Prime Minister and meets about twice a year, though only once in 2013.
- The JMC (European Union) meets around four or five times a year, and is concerned with EU business – particularly matters being considered at European Council meetings. Its meetings were suspended for around 18 months after 2007.
- A further co-ordinating format of the JMC for senior officials also exists.
- The JMC also has a disputes resolution panel, which meets as and when needed under the ‘disputes avoidance and resolution protocol’ added to the *Memorandum of Understanding* in 2010. It was first convened in 2011 to consider the row about consequentialism under the Barnett formula for the 2012 Olympics. It is chaired by a UK minister without direct involvement in the matter in dispute – Francis Maude, Minister for the Cabinet Office, on the one occasion it has met so far.
- Finance ministers also have a quadrilateral meeting, which is formally outside the JMC framework. This is chaired by the Chief Secretary to the Treasury and meets about twice a year. There is a separate ‘Joint Exchequer Committee’ for its implementation of the Scotland Act 2012, and a similar bilateral committee is proposed to deal with tax devolution to Wales under the 2014 Wales bill.

Beyond this, there is the role of the Secretary of State for Wales, who is supposed both to manage bilateral co-ordination between UK and Welsh Governments and ensure due consideration of matters relating to Wales within the UK Government, whether those matters are devolved or not.<sup>6</sup>

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<sup>6</sup> To the extent there is a formal definition, it is in the Cabinet Office’s Devolution Guidance Note 4, *Role of the Secretary of State for Wales*, which identifies the Secretary of State’s functions as to act as guardian of the devolution settlement in Wales; to ensure that the interests of Wales are fully taken into account by the UK Government in making decisions which will have effect in Wales; to represent the UK Government in Wales; and to oversee the progress through Parliament of primary legislation making separate provision for Wales.



There have been three notable changes to these arrangements since 1999. First, the role of the Secretary of State has evolved. This is not so much to do with the formal functions of the office (which were always limited in scope as well as vaguely defined), as with the changing political role of the Secretary of State. Following the Assembly's acquisition of the 'Part 4' legislative powers, the Secretary of State simply has much less to do particularly when it comes to the impact of the Westminster legislative programme on Wales. The role has become a more political – and adversarial – one.

Second, the JMC (Domestic) was established in 2008 to deal with 'ordinary' policy issues, replacing a patchwork of earlier 'functional' formats of the JMC which had ceased to meet some years earlier. While it is clear that the JMC (Domestic) has done some valuable work, it is also clear that much policy co-ordination work falls outside its purview.

Third, constitutional issues have come increasingly to the fore. There have been decisions about holding the Scottish independence referendum, leading to the 2012 'Edinburgh Agreement'; about further devolution for Scotland, leading to the Scotland Act 2012 and more recently the Smith Commission, as well various processes in Northern Ireland to address issues such as flags and recognition of the past, including the process chaired by Richard Haass. In Wales, there was the debate about following the Richard Commission report that led to the Government of Wales Act 2006; the holding of a referendum on primary law-making powers for the Assembly; and the Silk Commission and its two reports leading to the 2014 Wales bill and more recently the 'St David's Day process'. What all these processes have in common is that they have bypassed the usual intergovernmental framework. They have been dealt with country by country, usually under the aegis of the Secretary of State for Scotland, Wales or Northern Ireland (though 10 Downing Street has taken an interest, particularly in Scottish and Northern Ireland matters). The arrangements for intergovernmental relations simply do not engage with constitutional matters at present, and constitutional debates are unstructured as a result.

This formal framework was arguably already too loose and informal for the calls placed on it in the early years of devolution.<sup>7</sup> It is now badly out of date. It has often been side-stepped, particularly for major issues that involve problems in the framework of devolution, whether constitutional or financial, which have been addressed ad hoc, and often in a very unstructured way. Even when it comes to routine matters, however, there are evidently problems. The Welsh Government's further evidence to Silk regarding intergovernmental co-ordination reveals a litany of areas where the process,

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<sup>7</sup> For an early but still apposite critique, see the 2002 House of Lords Constitution Committee report *Devolution: Inter-institutional Relations in the United Kingdom*, op cit.

the outcome or both have led to dissatisfaction at the Cardiff end.<sup>8</sup> It would be unrealistic to expect the Welsh Government always to be content, but such a long and detailed set of recent case-studies shows the nature and extent of problems.

### 3. Making things work better

Finding ways of making the system work better is not straightforward. It is easy enough to come up with recommendations, but some are wholly impractical and others have been tried but failed to work. One fundamental problem is asymmetry; the fact that Welsh interests are different in many ways to those of the devolved governments in Scotland or Northern Ireland, as well as the institutional arrangements. A second fundamental problem is the UK Government's overall limited interest in devolution issues, particularly if those relate to anywhere other than Scotland. Finding ways of improving relations between the Welsh and UK Governments means looking at more than simply when and where ministers meet, but at the wider context of how governments interact with each other. That is as much about internal matters within UK Government as with what happens between governments. A third problem is constitutional; the Welsh devolution arrangements, more than those for Scotland or Northern Ireland, is based on a division of powers that leaves many overlaps between devolved and non-devolved matters in place, even after the move to primary legislative powers for the National Assembly. This reflects administrative history rather than constitutionalism, and often leads to disagreements which serve little practical purpose. Effective co-ordination is needed to redress this, without weakening the ability of the National Assembly and Welsh Government to handle devolved matters.

One idea that is sometimes mooted is the idea of statutory regulation: a requirement for the UK Government to consult with devolved governments about certain matters and in certain ways, enshrined in primary legislation. This was proposed by the Conservatives in 1998, has remained a popular idea with the Scottish Liberal Democrats (it was recommended by both the Steel Commission and the more recent Home Rule and Community Rule Commission) and more recently was tabled by the Scottish Government in relation to EU business during debates about the Scotland Act 2012. The Silk Commission did not go this far, but it did recommend a code of conduct underpinned by statute – a recommendation not endorsed by the Welsh Government in its response.<sup>9</sup> While clarity about what should happen and when is desirable, it is hard to see how putting this into statute would materially or improve matters. No federal or decentralised country has any sort of formal obligation for consultation for purely

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<sup>8</sup> Letter of 6 June 2013 from Rt Hon Carwyn Jones AM to Paul Silk and annexes, available at <http://commissionondevolutioninwales.independent.gov.uk/files/2013/07/Welsh-Government-additional.pdf>

<sup>9</sup> Commission on Devolution in Wales *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (Cardiff, 2014), chapter 5; Welsh Government *Devolution, Democracy and Delivery: Powers to achieve our aspirations for Wales* (Welsh Government, July 2014), para. 20.

domestic matters.<sup>10</sup> Governments will interact with each other when there is reason for them to do so, and a vague statutory obligation is less compelling than it being in governments' mutual interests to do so. Failures to comply with the rather generalised terms of the *Memorandum of Understanding* do not suggest a strong desire on the part of governments for greater prescription. If there were a statutory provision, who would enforce it? Could the courts really be expected to declare that there was a breach of the requirement for consultation in any but the most exceptional of cases? What sort of remedy could they order if there were a breach? Unless there were both a meaningful prospect of such outside intervention and a worthwhile legal remedy, statutory provisions are likely to be of little or no practical value. Equally, ensuring a mutuality of interest in managing relations effectively is a surer safeguard than an unenforceable statutory rule.

### ***The machinery of intergovernmental co-ordination***

The machinery for conducting intergovernmental relations is flawed, more by what it does not do or try to do than what it does. The plenary JMC acts as symbolic forum for meeting at the highest level, but is more often used for political grandstanding than anything more constructive. This is to a large degree inevitable, but it can be reduced if meetings have substantive business to transact as well as being a rare opportunity for devolved first ministers to meet the UK Prime Minister publicly (which they necessarily need to use to challenge him or her). Making the meetings more focussed on matters of substance may involve a degree of political discomfort for the UK Government in the short term, but will pay dividends in the longer term.<sup>11</sup> One practical step forward would be an express right for devolved governments to place items on the agenda of their (collective) choosing – this may not be a problem in practice, but the right should still be recognised. Another would be for the UK Government to ensure that the plenary JMC is able to discuss a range of issues about its plans for government, whether legislative or otherwise, while those plans are still being framed. Presenting devolved governments with a sequence of *faits accomplis* will not improve relationships, but being able to identify likely areas of overlap and potential problems will.

A different set of problems afflict the JMC (Domestic). This format of the JMC was intended to be a more practical and less politicised forum than the plenary JMC. It has not quite worked in that way. Again, it is prone to grandstanding. Part of the reason for that is the breadth of its agenda, which means that devolved first ministers usually attend accompanied by one other minister – but first ministers need to claim a political dividend, not least because of the amount of their time it requires. Then, there are the

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<sup>10</sup> Belgium and Germany have constitutional or statutory requirements for consultation in relation to EU matters. These have proved of limited value to sub-national governments in practice – the timescales relating to EU business require far quicker action than the prescribed timescales allow.

<sup>11</sup> Focussing the work of the Council of Australian Governments, the Australian top-level intergovernmental summit, on practical issues served to reduce the extent of grandstanding.

practicalities of JMC Domestic meetings, which place a much greater burden on devolved governments than the UK. To attend such a meeting in Whitehall (entailing about an hour of UK Ministerial time, plus preparatory work) will involve several hours' travelling by the devolved governments' delegations – meaning at least half a working day, if not a full one, will be wiped out – for a one-hour meeting. Sometimes, such arrangements descend to almost-farcical levels: meetings are given simply an hour-long slot, and have to be curtailed because of other bookings for the room being used, or other UK ministerial commitments. This may not be intended to appear dismissive of devolved governments, but that is the effect of forcing devolved ministers to travel to London to dance attendance on UK ministers for something that is supposed to be of mutual benefit.

The JMC Domestic has clearly served a useful role in the past. This is largely because it triggered a wider process of policy review within the UK Government which in turn enabled useful practical discussion to happen between officials in preparation for the inter-ministerial meeting. It was not so much the summit that was useful practically as the preparatory work – the sherpa-ing. Even this, however, has dramatically declined in value, as there are so few areas where even two devolved governments have an interest in the same issue. Welfare reform has been one of the few, but even that is limited. It is getting harder and harder to find meaningful business for the JMC Domestic to do – something evidenced by the declining number of its meetings (only one in 2013 and 2014), and a struggle to find business to discuss when it does meet. It may well be that the time for looking to the JMC Domestic as a way of resolving problems is past. One option would simply be to terminate it.

If the JMC Domestic is to continue, it needs to play a useful role. Three changes would be needed to make the JMC Domestic work better.

- First, there should be a different approach to attendance, so that devolved first ministers no longer usually attend. In the same way that the JMC Domestic is chaired by the Deputy Prime Minister (not the Prime Minister), why should devolved deputy first ministers or other ministers not take the lead? This will reduce the political stakes, and so grandstanding.
- Second, the 'balance of inconvenience' relating to meetings must change. Devolved governments should not incur disproportionate inconvenience in attending, while the UK Government experiences little or none. Meetings could simply rotate between all four capital cities. But why not also hold them in other major cities – such as Glasgow, Swansea or English cities like Manchester or Birmingham?
- Third, meetings need to have longer timeslots to deal with substantive issues. If a meeting is justified, it also needs adequate time, not simply an hour that can be perfunctorily fitted into UK ministerial diaries around other commitments.

The Smith Commission has taken a different approach, identifying the need for a 'scaled up' approach to intergovernmental co-ordination generally and suggesting new 'sub-committees' for such policy areas as home affairs, rural policy including agriculture and fisheries, and social security and welfare in particular. The absence of a 'home affairs' format is striking, particularly in a Scottish context (it would have much more limited functions for Wales), but it is hard to see why the need for one will be greater after the Smith recommendations are implemented than it is at present, or why a social security format might be needed beyond managing what - at least for the time being - is likely to be a purely bilateral matter for Scotland. It is hard to see how the answer to a lack of multilateral business for the JMC Domestic is to have more committees instead.

### ***Resolving disagreements and disputes***

Until 2010, there was no express mechanism for resolving disagreements between governments. There was a hope that compliance with the '4 Cs' (communication, consultation, cooperation and confidentiality) would largely avoid problems, and those that did arise could be resolved through the 'good offices' of the Secretary of State, or if need be referred to the plenary JMC. The 'protocol on dispute avoidance and resolution', agreed in March 2010, reiterated and elaborated on these principles, but also established a framework for resolving disputes through a 'disputes resolution mechanism, which entails formal notification of the 'disagreement' to the JMC Secretariat and referral to disputes resolution meeting chaired by a UK Government minister.

The Smith Commission has called for 'more effective and workable mechanisms to resolve inter-administration dispute in a timely and constructive fashion with a provision for well-functioning arbitration processes as a last resort'.<sup>12</sup>

So far, there have been four notified 'disagreements', only one of which has been referred to a disputes resolution meeting - that regarding the allocation of Barnett consequential for spending on the 2012 London Olympics.<sup>13</sup> Tellingly, no new 'disagreement' has been notified since 2011.

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<sup>12</sup> *Report of the Smith Commission* op cit, paragraph 30(3).

<sup>13</sup> These disputes are detailed in the *JMC Annual Report 2011-2012*, with subsequent updates about their progress. They relate to the 2012 Olympics, the Common Fisheries Policy whiting quota in the North Sea (UK/Scotland), capital funding under *Building Britain's Future* (UK/Wales) and capital funding for Northern Ireland. For more detail on the Olympics issue, see posts on the 'Devolution Matters' blog, particularly 'The Barnett formula and the Olympics' 3 June 2010, <http://devolutionmatters.wordpress.com/2010/06/03/the-barnett-formula-and-the-olympics/>; 'Joint Ministerial Committee meets in dispute-resolution mode', 14 October 2010, <http://devolutionmatters.wordpress.com/2010/10/14/joint-ministerial-committee-meets-in-dispute-resolution-mode/>; and 'The 2012 Olympics and the Barnett formula: an end to the row', 23 December 2011, <http://devolutionmatters.wordpress.com/2011/12/23/the-2012-olympics-and-the-barnett-formula-an-end-to-the-row/>.

Some of the problems regarding the JMC's disputes resolution panel are similar to those affecting the JMC (Domestic). It similarly has been crammed into UK ministerial diaries, requiring much greater commitments of time and effort by devolved ministers to participate than from UK ones. But the problems the disputes process face are much deeper. The panel is constituted by a UK minister who functions more as mediator than arbitrator or adjudicator. If the UK Government department chooses not to concede to the applicant devolved administration, it cannot be compelled to. The result will be a decision that reaffirms the status quo, which will have been set by the UK Government department in the first place. The result is that devolved governments will settle a disagreement, even when they think they have a strong case, for whatever they can get – not what might be 'fair', because there is no independent figure who can say what 'fairness' might mean, but because something is better than the nothing they will otherwise receive.

Because the whole structure of the disputes avoidance and resolution procedure is fundamentally skewed in the interests of the UK Government, this mechanism is unlikely to be able to command much credibility from devolved governments. Over the longer term, there is a real risk that this could undermine the legitimacy of the whole system of devolution. Arbitration is unlikely to be the answer, however. It would constitute a revolutionary change, to which the UK Government is unlikely to agree. The choice of arbitrator would be contentious under any conditions, but more so as the issues that fall to be considered by this mechanism will be principally political in character. (Legal issues would be resolved by the UK Supreme Court.) It is hard to see how arbitration will in fact effectively resolve such disagreements, if they are political in nature. Moreover, if we were to go down the arbitration route, that implies also having not merely a mechanism to adjudicate the disagreement but also to give effect to the adjudication – an enforcement mechanism as well.

All this suggests that effective mediation would achieve many of the desired goals, including pre-empting disputes. To make mediation effective would imply some significant changes, however. First, it means that the mediator needs to be able to work with genuine independence. This means an independent chair, or even a panel of members rather than a single person – perhaps, one nominated by the UK Government, one by the devolved government or governments concerned, and one agreed neutral figure. Second, it needs the ability to make the UK Government pay some sort of price, if only politically, if it cannot reach agreement between the parties. Even a pronouncement that the UK Government declines to compromise on terms acceptable to a devolved government, made clearly and publicly, would be a meaningful sanction to penalise intransigence; it will be impossible simply to sweep the disagreement under the carpet.



## ***Bilateral co-ordination: a 'Welsh Intergovernmental Committee' and the role of the Secretary of State***

It is increasingly clear that the key deficiency in the intergovernmental machinery relates to bilateral issues rather than multilateral co-ordination. There is no dearth of issues that governments need to resolve. The problem is that issues of concern to Wales are not those of concern to Northern Ireland or Scotland. The existing machinery was built on an assumption that these would just be resolved by ad hoc bilateral mechanisms – officials ringing their counterparts, bilateral meetings between devolved and UK ministers when needed, perhaps with help from the Wales Office or Secretary of State. In practice this area of liaison has weakened, partly because the party linkages that helped make it work in the late 1990s and 2000s have now gone. Moreover, Wales gets the worst of this, as it has less political leverage to exercise than either Scotland or Northern Ireland, but also – thanks to a long history of administrative entanglement with England, rather than the more distinct arrangements that both Scotland and Northern Ireland enjoy – feels greater impact from English decisions.

The creation of a Welsh Joint Exchequer Committee for tax devolution, paralleling the one already in place for Scotland, marks a small step away from that informality on the bilateral level, but only a small one. Constitutional matters still fall to be dealt with in an ad hoc way, depending on the interest, wishes and energy of the Secretary of State.

The solution proposed by the Silk Commission, and endorsed now by the Welsh Government, is a bilateral 'Welsh Intergovernmental Committee'. This would have a role in 'seeking to simplify the existing devolution model' and 'considering detailed proposals for changes to devolved responsibilities' as well as resolving disagreements, monitoring EU developments and resolving cross-border issues. It would be jointly chaired by the Prime Minister and First Minister, with two other ministers from each government (and perhaps others depending on what was under discussion), a joint secretariat, regular meetings throughout the year, and perhaps sub-committees depending on issues that needed to be resolved.

One attraction for the Welsh Government is that such a committee would greatly reduce, or perhaps eliminate, the role of the Welsh Secretary and Wales Office in Whitehall. This is understandable, not just because of political differences between recent First Ministers and Secretaries of State, but also because the Wales Office has come to be seen as at best ineffective and at worst positively unhelpful in managing the Welsh Government's relations with Whitehall. The Welsh Government has reasons to wish to see an end to the Wales Office and the Welsh Secretary, and such a committee would help make up for its absence.

To an observer from outside Wales, the Welsh Intergovernmental Committee nonetheless looks overambitious. In essence it is an elaborated but bilateral version of

the JMC Domestic, which in some ways also encroaches onto functions of the plenary JMC. Its role is as much concerned with far-reaching issues that probably need wider consideration as they may affect the UK as a whole as with the many 'snagging points' in the present arrangements. It is hard to see what attractions this approach would offer the UK Government; it would be time consuming, offer a good deal of scope for embarrassing publicity, and overlap uncomfortably with other JMC functions, quite apart from the way it would marginalise or eliminate the Wales Office and Welsh Secretary. It is particularly hard to see how, or why, the Prime Minister would devote the time and attention that such a system would need – and if not the Prime Minister, who would represent the UK Government in it? However, the political support this proposal has attracted not only highlights the problems of present ways of handling bilateral relations, but also the need for action to redress the problem. If not a Welsh Intergovernmental Committee, what?

This may be a role that a revamped approach to the role of the Secretary of State for Wales and Wales Office. These have survived despite their shrinking relevance and role, particularly since the 2011 referendum. Calls for replacement of the territorial Secretaries of State (for Wales and Scotland, and maybe Northern Ireland) by a single 'secretary of state for the nations and regions' have been made on many occasions, but always fallen on deaf prime ministerial ears.<sup>14</sup> Whatever merits such an approach might offer, the best time to implement it was during the period of relatively easy relations in the early 2000s. The Scottish independence referendum and its likely after-effects mean it will be hard to implement it in the foreseeable future even if there were the political will to do so. The Secretary of State for Wales is likely to be a fixture for quite some time to come, even if the role has become superfluous in a number of ways.

The Secretary of State's current functions are limited to a variety of ad hoc discussions with the Welsh First Minister, decision-making about constitutional matters – notably, at present, framing the UK Government's response to the Silk Commission's recommendations including the 'St David's Day' process and the Wales bill – and 'flying the flag' for the UK Government in Wales. The last seems to have taken up the bulk of David Jones's time to judge from Wales Office press releases, despite the political tensions it engendered. Both Jones and his predecessor, Cheryl Gillan, were more Whitehall's man or woman in Wales than Wales's representative in Whitehall. This has come at the expense of taking on an active role within UK Government in response to managing bilateral, policy-oriented matters – a role that would have given tangible expression to the previous Secretary of State's commitment to asymmetric devolution.<sup>15</sup>

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<sup>14</sup> For example, R. Hazell *Three into One Won't Go: The Future of the Territorial Secretaries of State* Briefing No. 69 (London: The Constitution Unit, 2001); House of Lords Constitution Committee *Devolution: Inter-institutional Relations in the United Kingdom*, op cit.

<sup>15</sup> See D. Jones, 'Wales in the Continuing Union', Speech by the Secretary of State for Wales to the Wales Governance Centre, Cardiff University, 24 June 2013, available at <https://www.gov.uk/government/speeches/welsh-secretary-delivers-wales-in-the-continuing-union-speech--2>



Many of the intergovernmental problems identified by the Welsh Government arise from a lack of regard for devolved Welsh concerns and responsibilities on this level.

One way forward would be for the Secretary of State to take on an active role in managing bilateral relations. This would entail regular (monthly or fortnightly) bilateral meetings of the Secretary of State and First Minister or perhaps the Minister for Government Business, to identify areas where each government's emerging policy agenda involves some form of overlap or interaction. The agenda for that meeting would be substantive issues under consideration by both governments. These would include the progress of Sewel motions in the Assembly, of UK Government consents or orders being sought by the Welsh Government, and forthcoming policy proposals in each government that would affect the other (all areas of difficulty highlighted in the Welsh Government's evidence to Silk). This would make it easier to monitor and chase progress, and would supplement and give a structure to the current ad hoc interactions between the Welsh Government and UK Departments, of which the Wales Office may be unaware, as well as constitutional ones which it leads. It would also help ensure that the Wales Office was aware of what was going on across Government that affected Wales – so reducing the likelihood of the sequence of problems that affected the marking and replacement/revision of GCSEs in England since the summer of 2012.

This would call for a very different approach by the Secretary of State. It would not be a job calling for a figure keen to campaign actively or make political noise, but rather someone willing to work more quietly to accomplish effective outcomes – a job more like Leader of the House or some of the Cabinet Office ministers. Stephen Crabb's recent speech suggests a different approach, but one focussed more on constitutional issues and method rather than managing relations between governments.<sup>16</sup> Such a role could also be filled if there were a 'Secretary of State for the Nations and Regions', either by the Secretary of State or a Minister of State for Wales. Whoever takes on the job, that is the role that appears to be needed, which is clearly not being played at the moment.

### ***Whitehall's organisation for devolution***

The Coalition's first Welsh Secretary was well aware of the problems of co-ordination of policy matters affecting Wales (and other devolved governments) within the UK Government. Cheryl Gillan established – and was keen to promote – a network of 'devolution ministers' (at Minister of State/Parliamentary Under Secretary) level across UK Government, to address exactly this problem. This idea was well-intentioned but drew little enthusiasm outside Gwydyr House, never meeting more than twice a year. It has clearly under-delivered and since Gillan's departure from office, the network has withered on the vine.

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<sup>16</sup> See 'Secretary of State for Wales sets out long-term vision on devolution', 17 November 2014, available at <https://www.gov.uk/government/speeches/secretary-of-state-stephen-crabb-sets-out-long-term-vision-on-devolution>

There were always questions about whether a ministerial-level network was the most appropriate way of dealing with this job. The ministerial network supplemented an existing official-level one of designated 'devolution contacts' in each Whitehall department which remains both active and useful. Liaison for such matters at the level of senior officials might be more appropriate. A refurbished approach within Whitehall at official level – to enable ministers to answer the questions that will be put to them, whether by their colleagues in UK Government or counterparts in devolved governments – is part of ensuring an effective approach to policy co-ordination.

### ***The role of legislatures***

This discussion has focussed on the executive branch of government, but there is more to intergovernmental relations than purely what happens between executives. Particularly important is what happens between, or involving, legislatures. Members of all four legislatures have relatively few opportunities to come into contact with members of other ones (one exception is the British-Irish Interparliamentary Body), but when they do they often comment on how valuable the experience has been. Some sort of multilateral forum for contact between parliamentarians, bring together members of the UK and Scottish Parliaments, National Assembly for Wales and Northern Ireland on an annual or biennial basis, might well help improve mutual understanding and contacts across the UK as a whole.<sup>17</sup>

Accountability when it comes to intergovernmental relations remains problematic. Legislators know little about what goes on between governments, and their limited knowledge means it is hard if not impossible for them to scrutinise their government effectively or hold it to account. At the extreme, this can amount to a fundamental undermining of representative government by creating a 'third tier' or order of government, accountable to no-one.<sup>18</sup> The Smith Commission's recommendations for the laying of reports before parliaments and 'pro-active reporting to respective Parliaments of ... the conclusions of Joint Ministerial Committee ... and other inter-administration bilateral meetings' do offer a sensible way forward.<sup>19</sup> For Wales, they will need to include a Welsh Intergovernmental Committee or any Wales Office/Welsh Government ministerial mechanism, as it will not work effectively unless one or other of those is in place.

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<sup>17</sup> The Scottish Conservatives' recommendation for a 'Standing committee of the parliaments and assemblies' would be one way of addressing this: see Scottish Conservatives *Commission on the Future Governance of Scotland: Report* (Scottish Conservatives, May 2014), p. 18.

<sup>18</sup> This argument has been most clearly made for Canada; see for example R. Simeon and D.A. Cameron 'Intergovernmental Relations and Democracy: An oxymoron if ever there was one?' in H. Bakvis and G. Skogstad (eds) *Canadian Federalism: Performance, effectiveness and legitimacy* (Toronto: Oxford University Press, 2002).

<sup>19</sup> *Report of the Smith Commission* op cit, paragraph 30(2).

Better knowledge might pay particular dividends when it comes to the working of the Sewel convention. Better communication about what legislative programmes are expected to contain, and changes in bills, would enable greater timeliness about that consultation – and so make it easier to ensure that the majority of bills receive devolved consent (or not) by the stipulated time of Commons second reading.

A further issue regarding the Sewel convention remains its status. This depends on its incorporation in the *Memorandum of Understanding*, an agreement between the executives, and it refers to ‘the UK Government proceeding on the basis’ of normally obtaining the devolved legislature’s consent. Again, it seems inappropriate for a convention that governs the conduct of legislatures in relation to each other to depend on a statement of intent by a government. The Smith Commission recommends both that the Scottish Parliament be made ‘permanent’ and that the Sewel Convention be given statutory form, both promises that may well prove cumbersome in practice and which may also have significant unintended consequences. It might be better for Parliament itself to adopt the convention, by a Commons motion or resolution setting out the basis of the convention if not by statute, and for it then to be incorporated into Commons standing orders, to give it both formal recognition as a principle and ensure an appropriate degree of flexibility in operation.

More broadly, part of the recommendations of the McKay Commission (which was principally concerned with legislative procedures in the Commons following devolution –starting with the West Lothian question) was for the establishment of a Commons devolution committee.<sup>20</sup> This committee would undertake a general overview of devolution issues in legislation, and indeed the settlements as a whole. Such an authoritative committee could play a useful role in two particular ways. It would improve parliamentary scrutiny of, and engagement with, devolution issues. Given Parliament’s relative dis-engagement from territorial matters, this would be no bad thing. It would also act as a powerful incentive for UK ministers to take devolution and its implications seriously. They would be open to scrutiny by it, and would not be able to count on inertia and obscurity serving to keep devolution matters from wider attention.

#### **4. Conclusion**

The UK Government has enjoyed a low-maintenance approach to managing its relations with devolved governments in the near decade and a half since political devolution became a reality. That situation has caused many problems, even in benign conditions, and become increasingly problematic now that there are real political differences

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<sup>20</sup> The McKay Commission *Report of the Commission on the Consequences of Devolution for the House of Commons* (London: The McKay Commission, 2013).

between governments and the UK faces profound questions about what it is for and what should be done by the respective tiers of government. The framework of intergovernmental co-ordination – and the ways UK Government departments engage with devolution questions – are badly in need of refurbishment, to ensure better policy making by all the governments involved and improve relations between them, but also to make the Union as a whole function better. Key to this, of course, is governments respecting the functions and prerogatives of each other, and there is a long-standing concern that greater engagement between governments might undermine that. Done properly, however, it in fact safeguards each government's position; and it is notable that it is the Welsh Government that has sought a more active engagement with this area, not the UK one.

The central underlying question, however, is that of will. Is the UK Government willing to make a series of changes, some minor but some major, and some which will involve a measure of political difficulty or even embarrassment, in order to achieve those outcomes? Is the UK Government sufficiently committed to the Union, not just in a rhetorical way but in substance, to do what is necessary to make that Union function better and to help its citizens understand why they have the structure of government that they do, with some things being done differently across the UK and some things being similar or the same? An enhanced approach to intergovernmental relations, which improves the substance of governance but also enables the UK Government to provide symbolic answers to those questions, is a keystone of enabling devolution to work as a sustainable, durable and effective form of democratic government.