

Devolution: Coordination between UK and Devolved Governments

The Absence of Disputes – So Far

Relations between the UK Government and the devolved administrations have been remarkably harmonious since 1999. There has been no intergovernmental litigation before the Judicial Committee of the Privy Council (and few cases initiated by third parties involving devolution issues); no disputes have been referred to the Joint Ministerial Committee; and even behind the scenes there have been relatively few spats. Only one Act of the Scottish Parliament has ever been considered by the Judicial Committee, and after three meetings between 1999 and 2002 the JMC has not met in its plenary form since October 2002 (despite a formal requirement to meet every year).

These are, of course, still early days, but comparative experience suggests that we can expect many more disputes between the UK's various governments to arise in due course. The practice of multi-level government in countries such as Spain or Canada typically involves regular and routine differences between governments, which manifest themselves in political disputes and arguments, large intergovernmental conferences, protracted constitutional debates, and litigation before the highest courts. The complete absence of any of these features is highly unusual, and the reasons why they have not materialised yet are unlikely to persist for long.

The Framework of Intergovernmental Relations

The structure of the UK's system of intergovernmental relations is one reason why there have been so few disputes. The key features of this system are:

- *Asymmetry* – not only do Scotland and Wales have different forms of devolution and different functions to exercise on a devolved level, but England remains wholly out of the picture. Even when Northern Ireland has had devolved government, only 15 per cent of the UK's population has been affected. The concerns involved are largely peripheral for the UK state as a whole.
- This in turn creates a *dual role* for the UK Government – as the only government for non-devolved or reserved functions, but also as the government for England in matters elsewhere devolved. As by far the largest territory, English concerns dominate the approach of the UK Government and its policy concerns, and the focus of the UK media remains overwhelmingly on Whitehall and Westminster.
- Moreover, there are *very few devolved units* of government – unlike Spain (with 17 autonomous communities plus the central government) or Australia (with 6 States and 2 Territories, as well as the federal government), the UK still only has 4 governments at most.
- The upshot is that there are *bilateral relations* between the UK Government and each devolved administration, rather than multilateral relations managed across the UK as a whole (an approach that is mirrored in the UK's internal organisation for managing devolution disputes).

Why are there So Few Disputes?

The UK's system means that major differences have not reached the public domain. The key reasons for this are:

- Labour dominance of all three governments in Britain (and despite the existence of a coalition in Scotland) means that there is *relatively little ideological difference* between the various parts of the UK. The general political climate is not one likely to create major differences between governments. One notable outcome has been the involvement of the devolved administrations in the UK government's practices for preparing and asserting UK priorities in EU decision-making. In this involvement the devolved administrations, especially Scotland, have come further and faster since 1999 than other sub-state administrations in the EU that have been campaigning for better access to member state priority-setting for two decades or more.
- Labour dominance also means that there is a *common electoral interest* in presenting a united front and avoiding open disputes between different governments of the same party. The absence of disputes has itself become a measure of the success of devolution, creating a powerful pressure on governments generally to minimise the differences between them.
- *Generous increases in public spending* have meant that financial issues have not been a source of difficulty despite the many problems presented by the Barnett formula. These have been further eased by formula by-passes, notably regarding extra Objective 1 funding for Wales.
- *Flexibility* built into the devolution arrangements means that, if governments can agree, there is little need for legal disputes; matters can be dealt with by legislation (by orders in council to amend divisions of powers, or by Acts of Parliament, sometimes using the 'Sewel convention' if they relate to devolved matters in Scotland).
- Extensive work has been done *behind the scenes by officials and ministers* to minimise and defuse disagreements. Much of this involves the Scotland and Wales Offices acting as an honest broker to explain key points of devolution to Whitehall, and the needs of the UK Government to the devolved administrations. And difficult legal issues have been dealt with by opinions of the Scottish and UK law officers, followed within government if unknown outside it.
- These have been reinforced by *ingrained habits of co-operation* between officials and departments, deriving from the time before devolution when they were all part of one government bound together by Cabinet collective responsibility. Key to this has been the principle that there should be '*no surprises*' – though in practice the devolved administrations have been quite often surprised by actions of the UK Government.

These factors are each likely to be short-lived. Elections may well throw up party-political differences between the UK and the devolved administrations within a few years. The period of generous public spending increases is coming to an end. Even if Labour remains in office, Labour governments will have to adapt to different political environments in Scotland or Wales compared with England, which will mean different positions in the devolved territories and at UK level. Labour, and indeed the

other main Britain-wide parties, the Conservatives and the Liberal Democrats – have begun to adapt their internal party organisations to allow greater flex between their UK and devolved components.

And as devolved governments become more established and more and more of their staff are newly recruited, relying on practices and habits of government that date back to the time before devolution will become harder and harder. Agreements between governments will have to be based on explicit recognition of differences rather than assumptions of shared goodwill.

Getting ready for the inevitable

Recognising that intergovernmental disputes will come, sooner or later, is not the same as wishing that they will arise. Rather, it is the opposite; it means trying to ensure that mechanisms are in place for problems that will have to be dealt with sooner or later. This was the opening recommendation of a House of Lords Constitution Committee Report on devolution in 2002 which drew strongly on evidence from ESRC research (Box 1).

Box 1: The House of Lords on intergovernmental relations

“We recommend that further use should be made of the formal mechanism for intergovernmental relations, even if they seem to many of those presently involved as excessive. Formal mechanisms, such as the Joint Ministerial Committee are not intended to serve as a substitute for good relations in other respects, or for good and frequent informal contacts, but rather to serve as a framework for such relations and to act as a fall-back in case informal personal relations cease to be sufficient. Such mechanisms are likely to become increasingly important when governments of different political persuasions have to deal with each other.”

The following are suggestions on the mechanisms that might be needed ‘when governments of different political persuasions have to deal with each other’:

1. *Accept that disputes between governments are a necessary and proper part of the working of a devolved system of government.* Treat them as a means of showing that the system works – that differences arise, but can be resolved to the satisfaction of each party. They are not a crisis.
2. *Accept transparency as a key element of the working of government.* At present intergovernmental relations takes place in the shadows; it is something consenting governments do in private. There is nothing obscene about this process, but much that affects the public interest. As much as possibly should be done in public and disclosed to the public, rather than as little.
3. *Ensure that the general machinery of intergovernmental relations works,* and is regarded as a normal part of government. There is much symbolic value in regular, publicised meetings of the JMC for the public at large. It will also help politicians and officials to accept such meetings as part of the way business is done – as part of the grammar of government. This will reduce the sense of crisis when a meeting is needed to resolve a real difference between governments, let alone a dispute.

4. *Review what that machinery consists of, and how it works.* Different sorts of procedures may be appropriate for different sorts of issues. As most devolution questions are fundamentally political in nature, the machinery needs to reflect that, and enable intergovernmental disputes to be handled in political ways by elected politicians. When political choices need to be made, that is entirely right.
5. But the background to many likely disputes will be highly technical, and politicians will need to have authoritative expert advice in making their decisions. Governments' own bureaucracies may not be well-placed to do this as they may lack impartiality. Having *standing committees of technical experts* to give well-informed independent advice, to clarify the nature of the choices to be made and inform politicians about them, may be very helpful.
6. That will be particularly the case with *financial issues*. This is a common source of tension in other systems, and the problems inherent in the use of the Barnett formula are widely discussed. But these issues are fiendishly complicated, and a workable solution will involve both technical and political considerations, the latter no doubt expressed in the terminology of differential 'needs' in different parts of the UK. The machinery used for dealing with these issues will need to give adequate weight to both sets of considerations.
7. *Legal issues are similarly matters that need to be aired publicly.* Lawyers know well that the fact that parties engage in litigation does not necessarily mean they are hostile toward each other, but that there is a legal issue that needs authoritative resolution after an airing of all its aspects and a testing of all the arguments. Bringing such issues to the Judicial Committee (or the new UK Supreme Court) will do that, and give the public confidence in the outcome, better than resolving such issues in private – and does not mean either turning the devolution settlement into the plaything of lawyers or that governments are at daggers drawn when they have recourse to the courts.

[IN SMALL PRINT AT THE FOOT OF THE PAGE] This insert was written with the help of Alan Trench