



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# DEVOLUTION (FURTHER POWERS) COMMITTEE

Thursday 17 September 2015



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**DEVOLUTION (FURTHER POWERS) COMMITTEE**

**22<sup>nd</sup> Meeting 2015, Session 4**

**CONVENER**

Bruce Crawford (Stirling) (SNP)

**DEPUTY CONVENER**

\*Duncan McNeil (Greenock and Inverclyde) (Lab)

**COMMITTEE MEMBERS**

\*Malcolm Chisholm (Edinburgh Northern and Leith) (Lab)

\*Linda Fabiani (East Kilbride) (SNP)

\*Rob Gibson (Caithness, Sutherland and Ross) (SNP)

\*Alex Johnstone (North East Scotland) (Con)

\*Alison Johnstone (Lothian) (Green)

\*Stewart Maxwell (West Scotland) (SNP)

\*Mark McDonald (Aberdeen Donside) (SNP)

\*Stuart McMillan (West Scotland) (SNP)

\*Tavish Scott (Shetland Islands) (LD)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Professor Nathalie Behnke (University of Konstanz)

Bill Kidd (Glasgow Anniesland) (SNP) (Committee Substitute)

Professor Bart Maddens (University of Leuven)

Dr Sean Mueller (University of Berne)

Philip Rycroft (United Kingdom Government)

Professor Julie Simmons (University of Guelph)

Ken Thomson (Scottish Government)

**CLERK TO THE COMMITTEE**

Stephen Imrie

**LOCATION**

The Mary Fairfax Somerville Room (CR2)



# Scottish Parliament

## Devolution (Further Powers) Committee

Thursday 17 September 2015

*[The Convener opened the meeting at 09:03]*

### Intergovernmental Relations (Parliamentary Oversight)

**The Deputy Convener (Duncan McNeil):** Good morning. I welcome members and the public to the 22nd meeting in 2015 of the Devolution (Further Powers) Committee. It is normal at this point to remind members to switch off their phones and electronic equipment, as they can interfere with the broadcasting system.

Agenda item 1 is parliamentary oversight of intergovernmental relations. I am delighted that we have a panel of academic witnesses with us: Professor Nathalie Behnke, University of Konstanz, Germany; Professor Bart Maddens, University of Leuven, Belgium; Dr Sean Mueller, University of Berne, Switzerland; and Professor Julie Simmons, University of Guelph, Canada. Welcome to you all. We have not asked for any opening statements and, as we have a precious hour with you, we will go directly to questions.

You are all here because you are experts in intergovernmental relations in different jurisdictions. To what extent in the countries that you come from are the legislators effective in scrutinising intergovernmental relations? That is my starter for one. Who would like to take that on?

**Professor Julie Simmons (University of Guelph):** In Canada, we have Westminster-style parliamentary decision-making at the central level, which we call the federal level, and at the provincial level, which is the level of the subunits in the federation. The discussions between the central Government and the provincial Governments, to the extent to which they take place, are in extra-parliamentary forums, outside the legislatures at the central and the provincial levels, and they exclusively involve the executive branch of government. For example, the Premiers of provinces would get together to have a meetings if they were invited by the Prime Minister to do so. However, they have not had such a meeting since 2008. The decision making that takes place is usually at the sectoral level. For example, all ministers of social services from the provinces would get together with their federal counterpart. They are present at the meeting by virtue of the fact that they are the minister for that

policy area and are a member of the executive in their respective legislatures.

**Professor Nathalie Behnke (University of Konstanz):** I will continue by giving evidence on Germany. The Länder traditionally have a very strong influence in federal decision making, and we have a fully fledged Parliament in all 16 Länder. However, I am not aware of any formal mechanism of parliamentary scrutiny on intergovernmental relations. Intergovernmental meetings are generally regarded as exclusively a matter for the executives. We have 18 ministerial councils in more or less every policy field, in which the Länder ministers meet regularly—between two and four times a year. The federal ministers are involved in most of those conferences.

However, let me say two things. First, I think that our Länder Parliaments in a way misperceive their own role, because they try to do the same politics that the federal Parliament is doing but, because of the typical distribution of functions between the federal and the Länder level, the Länder need to care more about implementing laws. Parliamentarians tend to neglect the administrative aspect of implementing laws, so they do not take enough interest in those intergovernmental agreements.

The second point is that in the parliamentary system, a lot of information goes through the party committees. Of course, those parties in the Government would inform their party members in the Parliament, but that is insufficient. It is necessary to have in place a rule so that the results of intergovernmental meetings and ministerial conferences are at least made public regularly. Parliament could profit if there were a regulation to say that they directly receive the results. That could be in the form of a protocol, for example, which enabled them to be informed about what was decided on. It would be even better if there were a regulation to say that the results of ministerial conferences were made public, for example on the conference websites, so that the wider public and the media could access them. Consequently, there would be public debate, as well as better transparency and accountability of executive decision making.

However, a great advantage of the interministerial councils is that they are highly informal and are not open to the public. It is a necessary precondition for Länder Governments that they can informally, for example, change their position in negotiations without being held accountable to their Parliaments. I would not touch the vital advantage that the informal networks and negotiations have by requiring the meetings to be made public, for example. They are always closed to the public, and I think that that is very important for making them work.

**Dr Sean Mueller (University of Berne):** First of all, it is a pleasure to be here—thank you for the opportunity. The Swiss cantonal, or regional, Parliaments are not at all effective in overseeing intergovernmental relations, because that is considered to be the Government's prerogative. It is considered that such relations fall under foreign affairs, even if they are with other cantons within Switzerland—another canton is like a different country in that sense.

The lack of efficiency is because Swiss parliamentarians are not full-time but part-time politicians. They lack resources and the time even to deal fully with their own home rule legislation, let alone to deal with complex matters of intergovernmental relations. Therefore, they are quite happy that the Government does the job.

Secondly, the Parliaments are not really important. Every important decision and act of Parliament or Government is subject to challenge through direct democracy. Anything contentious will be voted on and the people will decide, so the Parliaments do not matter.

There is one exception to that. The six French-speaking cantons have signed a special interparliamentary convention that institutes a permanent interparliamentary body with six delegates from each of the six Parliaments. They meet three times a year to discuss issues. The body monitors all the intergovernmental treaties and agreements that are being concluded by any of the six cantons.

**Professor Bart Maddens (University of Leuven):** First of all, I would like to emphasise that I am honoured to be invited by this prestigious Parliament to give evidence. In Belgium, intergovernmental relations are largely based on co-operation agreements between the various authorities. Some of the agreements are executive; others are legislative and have to be agreed by Parliament. About half of the co-operation agreements, because they have implications that are legislative or budgetary or they generate rights or obligations for the citizens, have to be put before Parliament.

In Parliament, the co-operation agreements are dealt with at the federal and the member states level in the same way as international treaties, which implies that they cannot be amended by Parliament. Parliament either agrees or disagrees. I do not know of any instances where Parliament has ever disagreed, yet the co-operation agreements are very important, because they limit the scope of legislative work afterwards, so the legislation has to be in conformity with the agreements. In Belgium, Parliament's involvement in bringing about and agreeing the co-operation agreements is very limited, which is generally considered to be a democratic deficit. Even if they

have to be agreed by Parliament, there is very little discussion there, not least because the co-operation agreements deal with very technical matters.

In the last reform of the state, which was agreed on in 2011 and implemented in 2012-13, a new device that was introduced to solve this kind of democratic deficit was the possibility of voting on common laws in the various Parliaments. For example, the Parliament of Flanders and the Parliament of Wallonia will be able to vote on common law, which implies that the same text will be voted on in the Flemish Parliament and the Walloon Parliament and will be prepared by an interparliamentary commission. As this is a new device, we do not yet know the extent to which it will be used and whether it will help to solve this democratic deficit, but most institutionalists or constitutionalists fear that the procedure will be much too cumbersome and will come to nothing. It will be very exceptional.

09:15

**The Deputy Convener:** We have a limited amount of time, so I am now going to open it up to questions from committee members. If we get concise questions and answers, we will make some progress.

**Malcolm Chisholm (Edinburgh Northern and Leith) (Lab):** I had two questions, but I think that the first one has been covered to some extent. By the way, I should thank you for your very interesting and informative submissions.

From your first responses, it appears that Parliaments are not coming out of this too well. I did not know this until I read the submissions, but I was struck by the fact that the Bundesrat is made up of Länder Governments, not Parliaments, and Professor Simmons has highlighted the fact that bilateral meetings between executive branches are almost the foundation of intergovernmental relations. In a way, then, that issue has already been covered, but perhaps I can roll it up into my second question and you can comment on both matters.

Lots of areas interest me, but I was struck by a reference in Professor Maddens's submission to some research that said:

"In a normal federal system, state-wide or federal parties constitute by far the most important element of linkage between the state-wide and regional party systems".

I think that you have said that that does not happen in Belgium; it certainly does not happen in the UK, because the Scottish National Party is just a Scottish party. However, with those two big ideas in mind, can you tell us the extent to which those party relations between different layers of government are important in your country?

Moreover, do you want to say any more about the involvement of the executive? Those are, crudely speaking, the two ideas that I have in mind. In certain countries, executives come together, while in others parties facilitate those intergovernmental relations. I would be interested to hear your comments on either or both of those areas.

**Professor Maddens:** With regard to Belgium, it is important to make a distinction between the various levels. I have already referred to the co-operation agreements, which are like the oil that makes the mechanism function. That is the level at which very technical conflicts or disputes are settled.

Then there is the political level, where we also have various co-operation devices. The most important is the federal Consultation Committee, where the Prime Ministers of the federation and the various member states meet. Although it appears that at the administrative level—in other words, the level of the co-operation agreements—things are largely functioning, when an issue gets politicised, it gets raised to the level of political decision making. That means that it comes to the Consultation Committee, and it is then very difficult to reach a solution.

This comes back to the problem of the split political parties in Belgium and the asymmetry between the various coalitions. Right now, we have a centre-right coalition at the federal level and at the Flemish level, but we have a centre-left coalition in the Walloon region and the Francophone community. No party on the Francophone side is part of both the federal and regional coalitions. In fact, this is the first time that that has happened in the history of Belgium federalism, and it makes it very difficult to reach a solution in the Consultation Committee. If there is a politicised conflict, the Consultation Committee notices that that conflict exists and that the different member states or the different levels have different points of view.

**The Deputy Convener:** We will come to the issue of conflict resolution later, but does anyone else wish to respond to Malcolm Chisholm's question?

**Professor Simmons:** In Canada, the party system is not a federated system. For example, although there is a Conservative Party at the national level, it has no formal ties with any of the right-wing parties in any of the provinces. In fact, to make things confusing, the provinces sometimes have different names for their Conservative Party. For example, British Columbia's Conservative Party is called the Liberal Party, which is the name for the central party at the national level; in Saskatchewan, the Conservative Party is called the Saskatchewan

Party; and in Alberta, it is called the Wildrose Party.

Parties do not have those kinds of formal ties, except for the New Democratic Party, which is the most left-wing party active in the Parliaments at both the federal and provincial levels. That party does have a federated system, but because it has not yet formed a Government at national level—

**Tavish Scott (Shetland Islands) (LD):** Not yet.

**Professor Simmons:** We will see in a couple of weeks.

However, because it has not yet formed a national Government, we have not been able to see a lot of cross-pollination as a result of, say, ministers who have held portfolios at a provincial level and who have been involved in those legislatures moving into the national forum. I think that that would be a very healthy thing, as it might encourage politicians at either level to think about the other order of government. Sometimes it is good for provincial politicians to think about things not necessarily in terms of protecting the turf of the province, but in national terms; likewise, it might be good for federal politicians to think about things from the perspective of individual provinces, nations or what have you within the broader state.

**Professor Behnke:** I totally agree with Mr Chisholm's diagnosis and want to emphasise the importance of networks in German intergovernmental relations. Those networks are a mix of party-political and bureaucratic actors, and a very important informal institution in Germany is the weekly telephone conferences involving ministerial bureaucrats from the Länder ministries and state chancelleries. They are like two overlapping networks; there is the A round, which involves Länder governed mainly by the Social Democrats, and the B round, which involves Länder governed mainly by the Christian Democrats.

That very strong and powerful informal network operates not only through telephone conferences but through informal meetings in Berlin, where ministerial bureaucrats are sent from the Länder to the Länder representations. They work in Berlin and attend, for example, factional committees in the federal Parliament. With, say, a Land governed by the Christian Democrats, a ministerial bureaucrat will be sent to Berlin and will go to a meeting of a party committee dealing with his policy field in the federal Parliament. There is therefore a very close interconnection, and that is where information flows move.

You might consider it unpleasant, but Länder Parliaments play an unimportant role in those networks. Information normally goes between ministerial bureaucrats and the parties' policy experts, and that is facilitated by our strong

vertically integrated party system. In other words, we have the same parties at the Länder level and at the federal level.

**Dr Mueller:** In this regard, Switzerland is the exact opposite of Belgium. The five major parties in power at federal level at the moment are also in power, more or less, in each of the 26 cantons. Because there are so many parties, we have a multiparty system. Also, because there are so many channels for vetoing things, it is impossible to have a Westminster-type Government Opposition. The Opposition has so much power that it is better to include it in the Government to ensure that it does not veto anything through direct democratic challenge.

Of course, there is always an exception. The canton of Ticino, which is Switzerland's only Italian-speaking canton, has its own regionalist party called the Lega dei Ticinesi, which in the past 20 years has taken off on an agenda of being different, although not wanting secession or independence. That is because it is very small and it could go only to Italy—and nobody wants to go to Italy. *[Laughter.]* In fact, it would like more federal involvement in regional affairs, which means more subsidies, more protection and being out of the European Union. However, that is the only case where there is not integration in the party system. As in Germany, party channels are very important for transmitting information in both directions.

**The Deputy Convener:** We will need to move at a canter now.

**Alex Johnstone (North East Scotland) (Con):** It seems that parliamentary scrutiny of intergovernmental relations is a rare beast, but where it has been achieved, has that been made easier because of a formal institutionalised structure? I see all of you nodding.

In that case, I have a simple question for you. Having observed what has happened in other countries, I think that this sort of thing has evolved over time and has reacted to different demands at different times and the structures are very much specialised for their particular areas. We have a chance to look at the matter from an evolutionary perspective and to try to put parliamentary scrutiny into the structure at any early stage. If you had a blank slate in your various countries, what would you do differently? What should we be doing to institutionalise parliamentary scrutiny of intergovernmental relations?

**Professor Behnke:** I want to make two points. First, I would give a legal foundation to interministerial councils. That would oblige them to meet regularly and would not make meetings dependent on, for example, the will of the Prime Minister. In Germany, that is not necessary

because we are in the habit of doing this sort of thing, but if you want to establish the habit, it would certainly be helpful to have a legal foundation.

Secondly, I would include in such a legal foundation an obligation to make the results of negotiations public. That is very important; indeed, it is something about the German system that I am really unhappy about. It is so informal that you just do not get the results. We researchers do not get them, and Parliaments do not get them either. There should at least be some provision to ensure that a protocol setting out the results of each meeting is given as information to the Parliament.

**The Deputy Convener:** Do the other witnesses agree that such principles are important?

**Professor Maddens:** On the basis of the Belgian case, my impression is that, at a technical level, institutionalisation is not so important. The technicians, by whom I mean the civil servants and members of the ministerial cabinets, will find a way of solving technical matters. We have a huge number of institutional devices in Belgium for facilitating co-operation, but my impression is that they are not so important and, even if they did not exist, people would find a way of solving matters via ad hoc regulations. On the other hand, when an issue becomes politicised, it is already too late. When that happens, the institutions do not help either, and it does not make a big difference whether you have those devices or not.

09:30

I should add one thing. I have talked about the various layers—the more executive administrative layer of co-operative agreements, and the political layer, which is able to solve political issues in exceptional cases—but another layer in Belgium that is becoming increasingly important is the Constitutional Court. The Constitutional Court is becoming an important player in solving political disputes, if there is a dispute over who is competent for a certain matter. For instance, we had a dispute in Belgium about foreign trade, which is a matter within the competence of the regions, but there was interference from the Federal Ministry of Foreign Affairs in foreign trade policy. That political dispute was a big issue in Belgium, and it was finally settled by the Constitutional Court a couple of months ago.

The Constitutional Court's powers have also been increased through the latest reform of the state and the Constitutional Court will now also be able to check whether the legislation conforms with the constitutional principle of federal loyalty.

The Constitutional Court has the power to abrogate laws. I raised that issue in a recent column; I said that the Constitutional Court is the



most powerful Parliament in Belgium. It is not directly elected; in a way, it is indirectly elected, because the members are appointed by the Federal Parliament, but it is the final stage of the legislative process. A law is voted on in Parliament and everybody waits to see what the Constitutional Court will say in the end. Obviously before the Constitutional Court can scrutinise a law, somebody has to put it before the Constitutional Court, but that is increasingly happening, because if a law is a little bit controversial, somebody will put it before the Constitutional Court.

**Alex Johnstone:** All of us around the table might see routine recourse to the courts in some form as a horrifying prospect. Are you recommending it?

**Professor Maddens:** No. The Spanish case is very interesting in that respect. The Tribunal Constitucional in Spain plays the same role as the Constitutional Court in Belgium. It also consists of politically appointed judges, but its role has become increasingly controversial. One of the reasons why the independentists in Catalonia have so much support and might even win the quasi-referendum on 27 September is that they argue that the Constitutional Court is a politicised organ composed of Spanish-minded judges who abrogate most of the laws on which the Catalanian Parliament votes. If it is obliged to become a political player, there is a risk that the Constitutional Court will become politicised. The major issue is who appoints the judges to the Constitutional Court and to what extent those appointments are transparent. The process is transparent in the United States, where there are hearings.

**The Deputy Convener:** Professor, we take the point that if we do not co-operate and set up some trustful relationships, that is where we might end up.

**Tavish Scott:** I like your constitutional principle of federal loyalty; that sounds like something that we should come back to in this country.

I want to ask about the German experience of a practical issue. Obviously, your country is dealing with the refugee crisis in a very public way and you are to be applauded for that. Was the federal Government's decision to encourage so many people from Syria to come to Germany discussed with the Länder through the mechanisms you described?

**Professor Behnke:** No, there was simply no time. We have had a public discussion, trying to figure out why and how Angela Merkel came to her decision. It was a typical instance of the prerogative of the Chancellor and she decided autonomously. The discussion happened

afterwards, because the Länder said, "Okay, this is your decision, but we have to handle it, so we need the money and we need the facilities". After the decision, the typical intergovernmental mechanisms started working.

**Tavish Scott:** That is very helpful; I understand that. I also want to ask about the Canadian experience, because, as Professor Simmons rightly said, it is much more akin to—or it is—a Westminster system. Do you have a perspective on Alex Johnstone's question about whether intergovernmental relations should be backed by some kind of statute or by law? Would that make any difference? You described how your Prime Ministers have not met the provincial leaders, the Premiers, for—I cannot remember—12 years or so?

**Professor Simmons:** Yes. In Canada, since about the 1960s, the leaders of each of the provinces, the Premiers, meet annually and, from time to time during that period, they have called for regularised meetings with the Prime Minister. The latest iteration of that was in discussions in about 2003, when the Premiers were trying to create a new institution that might involve the Prime Minister. In fact, the initiative was spearheaded by Quebec, which wanted to have a regular institutionalised intergovernmental forum for leaders to meet, but ultimately the other Premiers did not want to extend the invitation to the federal Government.

**Tavish Scott:** Was there any parliamentary scrutiny or was there any discussion about parliamentary scrutiny of the process when those discussions took place?

**Professor Simmons:** There was not, although the discussions were at the executive level, so I was not privy to them.

**Tavish Scott:** Yes, exactly. Did the Parliaments, whether in Quebec or in British Columbia, not kick up and say, "Wait a minute. We have to have a role in that"?

**Professor Simmons:** No. Had it come about, that would have been a monumental change, so the prospect of bringing Parliaments into the discussion would probably have been a second monumental change.

**Tavish Scott:** In fairness, I was not arguing that they should be in the discussion. I was asking more about whether there was any parliamentary monitoring of what was happening, akin to the comments that you have been making.

**Professor Simmons:** No, there was not.

**Tavish Scott:** Not noticeably?

**Professor Simmons:** Not to my knowledge, no.

**Linda Fabiani (East Kilbride) (SNP):** That was all interesting, and it leads on to what I wanted to bring up, which relates to last night's round-table discussion. Professor Guy Laforest said that to make intergovernmental and parliamentary relations and inclusion in that work, you had to challenge the historic hierarchies. That was an interesting comment. We could well be in the privileged position of starting this off, rather than being where your respective legislatures are, but the British system also has historic hierarchies of all sorts.

Another participant talked about strengthening relationships among the devolved institutions. Professor Mueller, you have raised that today. What are the witnesses' opinions on how to challenge the historic hierarchies? What will strengthen the relationships among the devolved institutions and how can that be used to challenge those hierarchies? Within the current UK settlement, there is a British-Irish Council but, beyond that, there is nothing except the informal meetings that are similar to those that Professor Behnke mentioned, around the joint ministerial committees that sometimes meet.

**Dr Mueller:** I will just pick up on that first, if I may. You are right—that is a feature of Swiss federalism. To begin with, the hierarchy in Switzerland is the other way around: the cantons call the shots and the national Government is weaker and has less money and less power than the bottom level.

Maybe most interesting in your case would be the insight that coalitions can be issue specific and of variable geometry. I will give you an example. In fiscal equalisation, the rich regions pay the poor regions. In Switzerland currently, there are nine rich regions and 17 poor regions. That came about because the poorer regions got together beforehand and came to an agreement about the way in which the system should work. They use a formula that means there are more winners than losers, with the result that the majority would win in a popular vote. It is interesting that the rich regions are not only the German or French-speaking regions, or the mountain or the rural areas; they are all over the place. Therefore, on the issue of fiscal equalisation, the alliance between the winners is different from the alliance on education policy or on rural or urban planning, where there are other interests.

If I can be frank, my advice would be to seek issue-specific coalitions with other players that are involved in the British system. As mentioned yesterday, why not team up with the City of London on economic development? Why not team up with local governments in other areas? You do not always have to be in bed with Wales or Northern Ireland, so to speak.

**Linda Fabiani:** That is interesting.

**Professor Maddens:** A crucial characteristic of Belgian federalism is that, in principle, there is no hierarchy between the various levels. The allocation of competences is based on the principle of exclusivity. Either one level is competent or the other is, and if one level is competent, it has full legislative powers, so the federal level cannot substitute what is done at the sub-state levels.

There is one important caveat to raise here: the impact of the European Union. In Belgium, we see that in completely devolved areas, such as agriculture, the federal Government has almost no competence, but the European Union has an important competence on agriculture. Because of that, even though the federal level is formally not competent and is not hierarchically higher than the regions, it remains a crucial player because it acts as a link to the European Union level, it co-ordinates the points of view of the various regions, and it facilitates the expression of the Belgian point of view at the European Council of Ministers.

In the European Council of Ministers, Belgium has only a single unitary vote. It cannot split up its vote, so the regions have to reach an agreement about that vote. If they do not reach agreement, they have to abstain and they lose their impact on the decision making of the Council of Ministers. They always reach agreement. There is only one example of a case in which there was no agreement among the regions. As I said, this is co-ordinated by the Federal Ministry of Foreign Affairs. Something that you have to keep in mind is that, even for fully devolved matters, the federal level remains a crucial player because of Europeanisation.

09:45

**Professor Behnke:** Linda Fabiani has asked a tough question. In terms of hierarchy, three issues come to mind. The first is money. In Germany, the Länder are historically older than the federal level and they exist independently. However, the federal level gets the lion's share of joint taxes, so it is always in a stronger position to influence policies.

To crack the hierarchy issue, Scotland must get an independent funding base; I was talking about that yesterday. I do not know whether it would be best to do so through tax autonomy or through a fixed share of shared taxes, but the first step must be to get some leeway in taking independent action.

The second point concerns federal architecture. As far as I can see, most negotiations take place bilaterally between Scotland and the UK level. As Sean Mueller said, one step in empowering the regional level might be to strengthen horizontal

linkages, either on specific issues or at a general level, so that there would be a multilateral negotiation arena of all regionalised territories negotiating with the UK level. Of course, that would be very complicated because of the England issue and the lopsided architecture, so it is not a problem that you can solve today, but you must keep it in mind.

Thirdly, autonomy is helpful, but co-decision making is valuable too. You must be careful in deciding in which areas you claim more autonomy on decision making, and in which areas you might try to claim co-decision rights in whichever way you do. We are privileged to have the Bundesrat as a very strong institution for securing co-decision rights. You might think about establishing veto rights or committees so that, in those matters that are important to Scotland, you try to get more co-decision making.

Those are three aspects. They are all very hard to address, but they might be helpful in thinking about cracking the hierarchy.

**Professor Simmons:** My list is similar, so I will not go over the same issues.

In Canada, the key terrain for hierarchy is finances. My advice would be that, in the particular areas of jurisdiction for which you are responsible, you need to ensure that you have either full control of the money to fund things or shared control over the formula by which that money is shared.

You also need to ensure that the money that comes in is unconditional and there are no strings attached. In Canada's history, the federal Government has played a very big role in areas of provincial jurisdiction by placing conditions on the grants that it gives to the provinces. Over time, those grants have become more and more unconditional. Only a very small percentage—I said in my submission that it was around 25 per cent—of the funding that provinces get from the federal Government is conditional; the rest of it is unconditional. Only about 15 per cent of the provinces' money comes from the federal Government, as they have their own tax-raising powers. Nonetheless, even in the midst of all that, there is still a hierarchy.

We need more horizontal decision making—to which Professor Behnke referred—so that the provinces come together. The strategy has been for the provinces to emphasise their counter-legitimacy in claiming to speak on behalf of the country as a whole. The federal Government cannot claim to know exclusively what is best for the interests of Canadians, as the Premiers of the provinces can come together and say, "We have come together and reached these agreements, and we represent Canadians too."

**Mark McDonald (Aberdeen Donside) (SNP):**

In the responses to Alex Johnstone and Tavish Scott, there was some discussion about the legal basis for intergovernmental relations. It struck me that we have a different situation in the UK because of the absence of a written constitution.

The supremacy of Westminster means that Westminster legislation is not able to be challenged in the way that it would be in a constitutional court scenario, for example. Does that present a difficulty for embedding intergovernmental relations in statute in the UK? How effective has the system proven to be—in terms of processes and outcomes—in those places where that element is embedded in statute?

**Professor Simmons:** In Canada it is not embedded in statute. Intergovernmental forums are not recognised constitutionally, and parliamentary sovereignty can always trump any intergovernmental decision, even if Premiers and the Prime Minister—or ministers for social services, in the example that I am about to give—were to get together and agree on something. In 2005, the ministers for social services agreed on childcare funding, but when Stephen Harper was voted in as the next Prime Minister, he chose unilaterally to cancel every childcare agreement with every province. I would not suggest that you emulate that route.

**Mark McDonald:** Similarly, as we have a system here in which no Parliament can legally bind its successor, there would be nothing to stop a similar scenario from arising with a future Westminster Government even if that aspect was placed in statute.

**Professor Behnke:** I do not see a real problem with not having a written constitution. In Germany, most of these aspects are not written into the constitution—they exist on a regular statutory basis, if they are statutory at all. You are right that statutes can be changed, but they also develop a certain continuity and power if they work. I would recommend putting that aspect on a statutory footing, simply because, if you want to establish new routines and empower groups that have been weak in the past, a statutory footing would help.

One analogy—although it may be misplaced—would be the gender quota in Germany. One may be against it and say, "This is against democratic principles," but it helps in establishing certain routines. After a while, when things are working, one can move back from the statutory footing and the system still works. I would definitely recommend a statutory footing as a starting point.

**Professor Maddens:** In Belgium, we have a constitution, but the details of the institutional structure are written down in special laws, which

form a kind of quasi-constitution. All the arrangements for co-operation are written down in those laws.

In my view, the most important implication of Belgium having a constitution and those special laws that are based on constitutional principles is, as Mark McDonald mentioned, the Constitutional Court, which checks whether the laws conform to the constitution. If you do not have a constitution, it is difficult—obviously—to see how you would have a constitutional court.

**Rob Gibson (Caithness, Sutherland and Ross) (SNP):** Good morning. We are thinking about financial equalisation between sub-states and the state. The new UK devolution proposals in the Scotland Bill are expected to be accompanied by a no-detriment principle. That means two things. First, neither the UK nor the Scottish Government should face a detrimental revenue or spending impact as a result of the decision to transfer new powers at the point of devolution. I think that we understand what that is about. Secondly, neither the UK nor the Scottish Government should face a detrimental revenue or spending impact as a direct result of the policy decisions of the other Government. If one Government is adversely affected financially by the policy decisions of the other, the no-detriment principle suggests that the offending Government should compensate the other financially. No one seems to understand that. In the countries that you study or are familiar with, can you point to any similar compensatory mechanism that resembles that no-detriment principle?

**Dr Mueller:** The most recent major reform of Swiss federalism was built on that principle. It took 25 years to implement the reform, but when it finally came into force in 2008, the principle was as follows. Divisions were reallocated between the national and regional levels, and some competences became national and some regional. There is therefore a kind of devolution, but it goes both ways. Every competence was monetarised exactly, with the cost of every policy shift indexed and the tax sharing adjusted accordingly. In the balance, the regional levels got more power and also more money to pay for those competences. I am not aware of any on-going embedding of that principle; that was just a one-off change as part of a wider reform.

**Professor Maddens:** In Belgium, the situation is similar. Whenever a competence is devolved, the budget is also devolved and the regions or communities obtain the means to execute that competence. However, in the latest—the sixth—reform of the state, the Government decided, as a way to economise at the federal level, to devolve only 90 per cent of the means to execute the competence. That was done as a way to force the

member states themselves to economise. One of the main political issues in Belgium at present is that the federal Government, which is not hierarchically superior, cannot oblige the member states to economise. Using that trick—transferring only 90 per cent of the means—was a way to oblige the regions and communities to economise.

**Professor Behnke:** One founding principle of the German fiscal constitution is the principle of connectivity, which means that the level that is responsible for a task is also responsible for financing that task. Any time that a new task is decided on or switches levels of government, there is a negotiation on how to finance it.

We do not usually set those in statute or devolve tax autonomies—we mostly renegotiate the VAT shares. VAT revenue represents a large sum of money. The Länder come to the Bundesrat and say, “Okay—if we have to pay for whole-day childcare and it is in our competence, the connectivity principle requires that we pay for it. We do not have the power to levy new taxes, but if you give us 1 per cent more of the VAT share, we can take this money and finance whole-day childcare.” The VAT share between the federal and the Länder level represents the major negotiation pool for adjusting the finances and the tasks.

**Rob Gibson:** So the spillover mechanisms are worked out on the basis of agreement.

**Professor Behnke:** Yes, that is always negotiated.

**Rob Gibson:** In addition, it seems that, in the first instance, there is an agreement that the devolved subjects have particular powers.

**Professor Behnke:** Yes.

**Professor Simmons:** In Canada, we do not have anything like the principle that Rob Gibson initially described, but there are tax harmonisation agreements between the provinces and the federal Government with regard to the percentages of corporate tax and personal income tax revenue that will automatically be given to the provinces. Tax is collected by the federal Government, but those harmonisation agreements govern the percentage of the revenue that goes to the provinces.

Over time, provinces have introduced their own sales taxes—the equivalent of the value added tax in the UK—as a way of creating revenue; the federal Government also has a value added tax. By and large, over time, a greater percentage of personal income tax and corporate tax revenue has moved from the federal Government to the provinces. There is not a lot of transparency around that, although there are specific agreements in place. You would want to speak to

an economist about the ins and outs of those agreements.

10:00

**Stuart McMillan (West Scotland) (SNP):** My first question is for Professor Behnke and goes back to her comments on the connectivity principle. If a Land has the powers and the finance to take a particular policy direction, does it have to communicate to the Bundesrat and the other Länder what it is doing and why it wants to do it?

**Professor Behnke:** Do you mean a situation in which a Land autonomously decides to introduce and spend money on a new policy?

**Stuart McMillan:** Yes.

**Professor Behnke:** Basically, that is its right. The distribution of money between levels and among Länder is based on a logic of equalising fiscal capacity, not on specific policies. In Rheinland-Pfalz, for example, childcare places do not cost anything—in other words, parents do not have to pay to put their kids in childcare—whereas in all the other Länder parents have to pay for them. A Land can decide to do something like that completely autonomously; it has its own income and revenues and the right to fiscal equalisation based on fiscal capacity, and it has the right to decide how to spend its money. Such things are communicated in the informal circles that I have referred to; Länder simply inform each other on the basis of generating best practice, but there is no formal necessity for them to do that.

If a decision is taken at federal level to introduce a policy that affects the Länder in terms of personnel or which gives them new tasks or finances, it must be approved in the second chamber—the Bundesrat. That puts the Länder in a strong position, because once the process moves to approving these new tasks, they can negotiate on financing.

**Stuart McMillan:** You mention in your submission the situation regarding the Bundesrat and the trading of self-rule or self-government for shared rule. Is such a trade-off necessary or can you have both shared rule and self-rule at the same time?

**Professor Behnke:** We have both. The tendency to trade rights of self-rule for rights of shared rule is all about achieving the greatest parity of fiscal capacity among the Länder. Personally, I do not approve of that, but I can understand why Länder that do not have a lot of their own resources, perhaps because they have a weak economy and get only a small share of income tax and corporate tax, prefer to get finance from a federal level or get co-financing for a lot of tasks. They just cannot afford to do that sort of

thing on their own. Rich Länder have more fiscal resources and can afford it, so there is a conflict of interest among the Länder in that respect. One will observe a tendency over the years for the majority of Länder to prefer giving tasks back to the federal level and getting rights of co-decision making and co-financing from the federal level.

**The Deputy Convener:** If no other member wishes to ask a question—

**Stewart Maxwell (West Scotland) (SNP):** Can I just come in with a small supplementary, convener?

**The Deputy Convener:** Of course you can.

**Stewart Maxwell:** I am not sure that I am clear about the no-detriment principle that is supposed to be getting introduced here and, indeed, your answers on that issue. My understanding at the moment of what is supposed to be happening here is that if one part of the UK—Scotland, for example—were to implement a policy that negatively impacted on another part, we would in effect have to compensate that part of the UK and vice versa. Does that happen anywhere else? You seem to be saying that if a Land or state had the right and the money, it could introduce a particular policy irrespective of its impact on the surrounding states, cantons or Länder. Is that correct?

**Dr Mueller:** I think that it would depend on the area. In general, you are right. The regions in Switzerland are completely autonomous and actually the very idea of federalism is to have competition. For example, you want regions to lower their levels of education so that they can attract those people who do not need public education but can afford private education. That, by definition, has a detrimental impact on other regions. Because you want that competition, you should not provide any compensation. On the other hand, there is the idea that cantons should get together and compensate each other for any major spillover effects, but it is up to them to decide to do it.

**Professor Maddens:** In Belgium, we have a special mechanism called conflicts of interest. If one region's policy has a detrimental impact at federal level or on another region, the other region can invoke a conflict of interest, and that is decided in the Consultation Committee that I referred to earlier. That is very closely related to the notion of federal loyalty, which is written down in the constitution.

We make an important distinction between conflicts of competence and conflicts of interest; after all, a region might remain formally within its competence but still harm the interests of another region. However, the tendency in Belgium is for the distinction between conflicts of interest, which are essentially political issues, and conflicts of

competence, which are formal legal issues, to become blurred, and there is also a tendency for the Constitutional Court to check conflicts of interest. That relates to the extended competences of the Constitutional Court, which is applying the principle of proportionality more and more. In other words, a level should execute its own competence in such a way that it does not disproportionately limit the possibilities of the other levels to execute their own competences. That is how the distinction between conflicts of interest and conflicts of competence has become more or less blurred.

I do not know whether that is clear. It is a difficult issue in Belgian constitutional law.

**Stewart Maxwell:** It sounds it.

**Professor Behnke:** It might be helpful to distinguish between the logic of curing negative consequences and the logic of preventing them. As I understand it, the no-detriment clause is an ex post facto clause, which means that once an action has taken place, something must happen to compensate for it. In Germany, the logic behind co-operative federalism is to try to avoid actions that are to the detriment of others, so things are negotiated in advance and there is no formula for making compensation afterwards.

**Professor Maddens:** That is the case in Belgium, too. We have all kinds of preventive institutional measures to prevent conflicts of interest, and the various levels have to inform one another and have to collect advice from the other levels. However, that is largely a formality in Belgium, and it does not really play an important role. The Government makes sure that it abides by the formal requirement to inform other levels, but it really has no impact. The curative devices are much more important in Belgium than the preventive ones.

**The Deputy Convener:** I know that I am pushing things, because we have reached the end of our time, but I want to ask one final question. Right at the beginning, you said that Parliaments around the world were generally very weak and were not involved in the scrutiny of intergovernmental relations. The members of our next panel, who are sitting behind you in the public gallery, are the two most senior civil servants responsible for intergovernmental reform. Should their review change the situation with regard to the parliamentary scrutiny of intergovernmental relations and ensure that we do not make the mistakes that others have made by having an absence of such scrutiny?

**Professor Simmons:** I am sorry, but what review are you talking about?

**The Deputy Convener:** The review of the memorandum of understanding. The civil servants

whom I have just mentioned are reviewing the whole process of intergovernmental relations. In the next evidence session, we will probably be asking them—and I am looking at them as I say this—about the role of Parliament and its committees in the scrutiny of intergovernmental relations. What role would Parliament play in that? You have all suggested that Parliaments, their committees and all their structures either are weak or play no role in that at all. Should the review that I have mentioned seek to make things different here with regard to our intergovernmental relations?

**Dr Mueller:** That is for you to decide. It is not for us to say what you should do or what kind of structures you should implement. It is an academic debate whether it is good to have parliamentary involvement in intergovernmental relations. I am not sure that having meetings in public would help in finding agreement. There is a whole literature that says that it is helpful to have meetings in secret, because people can be more open and can seek compromise. Given that this is a political question, I think that you as the politicians should answer it.

**The Deputy Convener:** That was not as helpful as I had hoped it would be.

**Professor Maddens:** As a political scientist, I am quite pessimistic about this. Because of all kinds of factors, the impact of Parliament is decreasing, and it is now largely a theatre. I know that Jeremy Corbyn said yesterday that he wants to make it less so, but it is really a theatre. In Belgium, at least, Parliaments have a minimal impact on policy making.

Another aspect is Europeanisation. There was an attempt to cope with the problem at a European level through the early warning procedure in the Treaty of Lisbon, but that has had very little impact in Belgium. Parliaments try to grasp what is going on at a European level, but they just do not have the expertise or the personnel. The issue is so complex and technical that the involvement of politicians in Parliament is doomed to be marginal.

**The Deputy Convener:** Please stop. [Laughter.]

Professor Behnke, can I tempt you into a response? I suppose that you have already commented on the matter.

**Professor Behnke:** Indeed. I think that I have said everything that I want to say about that.

**The Deputy Convener:** On that pessimistic note from Professor Maddens, I thank our witnesses very much for their attendance this morning and, indeed, for their engagement at last night's event, which those of us who were able to attend enjoyed. Many of our panellists' colleagues

joined us here in the Parliament, and that informal engagement and all the time our four witnesses have given this morning are very much appreciated.

At this point, I suspend the meeting to clear this panel of witnesses and set up our next.

10:13

*Meeting suspended.*

10:18

*On resuming—*

## **Intergovernmental Relations in the United Kingdom**

**The Deputy Convener:** Item 2 is to take further evidence on wider reform of intergovernmental relations from UK and Scottish Government officials. We have with us Philip Rycroft, head of the UK governance group, Cabinet Office, UK Government; and Ken Thomson, director general, strategy and external affairs, Scottish Government. I welcome you both, gentlemen. There are no opening statements so, in the interests of time, we will press on.

I will open with the first question for Mr Rycroft. You are the UK Government's lead official with responsibility for the review of the memorandum of understanding and the apparatus of joint ministerial committees. It might be helpful if you could outline why the review was set up and the background to it, what its terms of reference are and how it is progressing.

**Philip Rycroft (United Kingdom Government):** Thank you, convener—those are all good questions. We have had a system of intergovernmental relations in place since devolution in 1999, with JMC machinery supported by the MOU. In fact, there is a complex set of concordats and MOUs that cover a number of different parts of business.

That system has served its purpose—very well, in the view of some—over the years, but we are coming to a major juncture in the devolution settlements. There are proposals currently before the Westminster Parliament for further devolution for Scotland, and a commitment from the UK Government for further devolution to Wales and a significant change in the Welsh settlement, and—following the Stormont House agreement—changes in the Northern Ireland settlement. The devolution settlements are changing. The JMC plenary that met last year, chaired by the Prime Minister, with the Welsh and Scottish First Ministers and the Northern Irish Deputy First Minister in attendance, agreed—by consensus, as always—that it was an appropriate moment to review the machinery of the JMC and the associated MOU.

That was the remit that we were given: it was passed to me and Ken Thomson, and to our colleagues from the Welsh Government and the Northern Ireland Executive, and we are taking it forward. The terms of reference are broad, so we are not confined by what we consider in that space. We have hitherto taken the process forward through a series of meetings at official level. As it happens, the latest meeting, at which

we covered the territory again, took place just yesterday. At some point in the next few weeks, we will have to consult our own ministers on the way forward. We are ultimately looking for ministerial agreement before the end of the year—it is hoped—at the JMC plenary.

I hope that that gives you a brief overview of where we are at. The process is interesting, but it marks—as is recognised by all the Administrations—a moment of change in the devolution settlements. It is an appropriate moment, therefore, to review the way in which the intergovernmental machinery works.

**The Deputy Convener:** Within that broad remit, have you given any consideration to how you would inform Parliaments or their committees about the depth and volume of the work in which you are engaged and about those with whom—aside from ministerial officials and experts—you are engaging?

**Philip Rycroft:** I will answer that question in general terms with regard to what people see and understand about what is going on in the intergovernmental relations space.

It is probably true to say that parliamentary scrutiny across the piece has been relatively light over the past few years. I suspect—certainly from my perspective, working in the Whitehall context—that that will change. There is a lot of interest in this work from the House of Lords Constitution Committee and the Political and Constitutional Reform Committee in the House of Commons, so I anticipate that we will face increased scrutiny on intergovernmental relations in the months and years ahead.

As was said in this morning's previous session, it is for the Parliaments themselves to decide how they hold their executives to account in this space. However, we need to think about the fact that, in order for effective scrutiny to take place, Parliaments and the wider public need to understand what is happening in the intergovernmental space.

It is worth making the point that the JMC sits at the apex of a whole complex of intergovernmental working. That intergovernmental working is—in 101 different aspects and dimensions—critical to the good governance of the UK as a whole. Day-to-day contact between the devolved Administrations and the UK Government, and among the Administrations, is important to ensure that business policies can be taken forward effectively.

There is clearly an advantage in people understanding the depth and the range of the interaction between the Governments and how it supports the good governance of the United Kingdom. One aspect that we will have to look at

is how we make that real. We will consider what constitutes an appropriate level of information and transparency around dealings in the intergovernmental relations space. Ultimately, however, it will be for the ministers of all four Administrations to decide how they express that and what kind of agreement they reach when they look at the situation in the round.

**The Deputy Convener:** You say that both Governments need to work together to create a more respectful team and a productive, robust, visible and transparent relationship. Do you believe that, through your process, you have achieved that objective yet?

**Philip Rycroft:** I will make a couple of quick points. We are thinking about not just two Governments but four Governments, as the Welsh Government and the Northern Ireland Executive are also involved in this space.

Past practice is probably not the best guide to future practice in this space, and that applies to the changes in the devolution settlement. I will take the two most salient examples. If and when further powers over tax and welfare are devolved to the Scottish Parliament and the Scottish Government, that will intensify the requirement for close working between the UK Government and the Scottish Government. Past practice in this context is not a good guide as to what practice should look like in the future in terms of the visibility and understanding of how those relationships operate, how they deliver value and how the operators in this space are held to account by their respective Parliaments.

**The Deputy Convener:** As you may have seen, the committee's report expressed a concern that we are at this stage, in starting these engagements, establishing practice and precedent if it is not already established. Based on what you have said today, the process has not involved any real consideration of how it will involve the other Parliaments and their parliamentarians and committee structures. They are not involved in the talks, and there are not even any public hearings. They do not know that the talks are taking place, nor are they aware of the broad agendas and issues, the people who have given evidence or those with whom you are engaging. None of that is happening at all right now.

As parliamentarians, that causes us concern. I will not take the pessimistic route and say that we will make ourselves redundant—I do not think that is going to happen. However, you have not yet indicated in any of your answers that you have given any consideration to how you will bring those Parliaments and parliamentarians into play. You might do something in the future, but nothing has so far been done.



**Philip Rycroft:** To be clear, are you talking about input into the process of consideration?

**The Deputy Convener:** I am talking about having any awareness of the number of meetings that you and your officials attend; the number of calls that they make; the issues that they are dealing with; and the agendas and issues that are being discussed. We are talking about basic information.

**Philip Rycroft:** There has been and will continue to be a good deal of input from parliamentary committees. Indeed, the fact that we are here today shows that we are very much alive to getting input in a parliamentary context, and that has been picked up by many other commentators in this domain.

How do we make sure, over time, that intergovernmental relations and the interface with parliamentary scrutiny are appropriate? We are currently engaged in discussions at official level, as we have been asked to do by our politicians through the JMC, and that process has to take its course. I do not think that it would be appropriate to have that negotiation in the public space. We need the space to have that discussion. Ultimately, our job is not to make the decisions about what happens here but to advise our politicians on how they may take matters forward. Ultimately, the decisions on JMC structures and the review of the MOU, and on intergovernmental relations more generally, will be for the JMC itself, and we are preparing the way for that. We are not delivering the outcomes at official level.

**The Deputy Convener:** Parliamentarians may be given some consideration with regard to how the process should go forward, but until now we have not been asked to be involved in the process at all. Does Ken Thomson want to add anything on that before I open up the session to questions?

**Ken Thomson (Scottish Government):** I will not repeat what Philip Rycroft has said but, on your last point, convener, I will just distinguish between the work that Philip has described to put the JMC in a position to take decisions on this issue, which is one strand, and the other strand, which is the day-to-day work of intergovernmental relations. As he said, a lot of that happens fairly informally in day-to-day contacts between officials. That is part of the work of government and therefore it is open to scrutiny by our respective Parliaments. We are accountable to our ministers and they to their Parliaments, and the Scottish ministers are accountable to you. There is the opportunity for parliamentary committees to scrutinise the work that is done between as well as within Governments through all the many ways in which that can be done, including hearings such as this one. Just as the work of Governments evolves as the devolution settlement evolves so,

too, does the nature of parliamentary scrutiny or the content of that scrutiny. However, my point is that the opportunities for that are there—the structures are there through the accountability of ministers to Parliament.

**Stewart Maxwell:** I want to pursue a little more some questions around the memorandum of understanding. What stage in the process are you at with the work that you are doing now? Are the discussions and your work likely to revisit the principles of IGR? Could we also perhaps see changes in, for example, the intergovernmental relations processes that are undertaken? Will you give us some detail about where we are at the moment and what exactly you are looking at?

**Ken Thomson:** The MOU in its current form largely reflects the document that was drawn up before devolution happened. To that extent, in doing this review, we have the advantage of all those years and experience of working between Governments. It remains a live document and set of processes, so we are not writing something in the abstract from either past experience or current issues. I think that we have a pretty good idea of how the principles that are in the MOU operate in practice and how they need to operate. That includes mutual respect between Governments, good communications and how we resolve disputes and so on.

Like Philip Rycroft, I do not want to give a running commentary on a discussion that ministers have not yet engaged in, given that the JMC plenary has not happened. However, broadly speaking, given that ministers in both—or all—Governments have continued to evolve and adapt the MOU, you could take it that they agree with the principles that are in it. What we are largely doing is seeing how those principles can be reinforced for the changing nature of the devolution settlement. Some of that will be quadrilateral in nature for the four Governments but, increasingly, a lot of it will be bilateral because of the particular nature of the changes that are coming on tax and may well come on welfare. I do not think there is a lot of disagreement; in fact, there is a lot of consensus about the principles set out in the MOU. We have the opportunity to look at the detail of how that works in the light of experience and to look ahead to the changes that are going to come on tax and welfare in particular.

**Stewart Maxwell:** Are you saying in effect that you are not re-examining the principles of IGR in the MOU that is currently in operation but that you are looking more at the processes?

**Ken Thomson:** We are looking at both. You would expect us, as part of a review, to look at how it works as a whole. Maybe I can make the same point in a slightly different way. There is the culture of intergovernmental working and there are

the processes and rules. Both matter. The significance of the rules and the principles in the MOU is not just that they govern the work of the JMC committees but that they set the framework and the tone for how the Governments interact day to day on a whole range of issues. Broadly speaking, when I am describing to my colleagues how I think that should work, I say that it is important for Governments to understand each other's positions, even when they do not agree on them. That underpins the nature of intergovernmental working.

**Philip Rycroft:** Obviously, a starting point is thinking about the principles that underpin intergovernmental relations. It is a credit to the framers of those principles that they have stood the test of time, as Ken Thomson said. Those principles have worked well. We will be putting in advice to our ministers what we think about them. However, the focus has to move on from the principles to how we make sure that intergovernmental relations work effectively. In that context, it is worth being aware that the JMC is a political forum for discussion between Governments that will not always agree on a way forward. Our job is to give advice to ministers individually and, ultimately, collectively on how we think we can adjust those processes to ensure that intergovernmental relations remain effective in the light of the changing devolution settlement. That encompasses principles, but it clearly also encompasses process and practice.

**Stewart Maxwell:** I will wrap up my two questions in one to try to speed things along.

**The Deputy Convener:** That would be helpful.

**Stewart Maxwell:** First, there has been discussion about whether the MOU, which is legally non-binding, should go on a statutory footing. Is there any discussion going on about that, not on the basis that it would create inflexibility in the system but in order—you have probably heard some of the discussions on this—to help create transparency and legitimacy in the process? Are there any barriers to putting the MOU and its procedures on a statutory footing? Secondly, will you explain to us how it operates? Does it operate on the basis that the Governments and all those involved in the process are on an equal footing of mutual respect and trust, or is it on a hierarchical basis?

**Ken Thomson:** I will try and give you a brief combined answer. The JMC operates by consensus—there is no casting vote, if you like. On embedding it into statute, the current MOU is not a piece of legislation. You have heard us both say that, broadly speaking, we think that it has served the four Governments reasonably well over the period of devolution. Some statutory aspects to how the Scottish and UK Governments relate

are set out in the Scotland Act 1998. I do not want to speak for my ministers but, so far, experience shows that it has been possible to promote good intergovernmental working, resolve disputes where they arise, and make clear what is happening without having to put the whole process on to a statutory footing, which I think would probably change the character of it and make it a bit less flexible. As Philip Rycroft said, it is a political forum, and political issues tend to get resolved by politicians rather than by judges. That would be my reflection on that.

**Philip Rycroft:** You have the slight advantage on us because you have had quite a long debate on other jurisdictions where intergovernmental relations are on different footings. Indeed, it was clear from the earlier panel that they are not on a like-for-like basis and that they all vary in their ways. We have had a look at practice around the world. I do not think that we have spotted a very strong correlation between the extent to which intergovernmental relations are tied down in statute and their effectiveness. Ultimately, it comes down to, if you like, the political will that imbues the way in which intergovernmental relations operate. We are aware that the opinion has been expressed by those who have been looking at intergovernmental relations that they should be put on a statutory footing. That is something that we will have to advise our ministers on, and that is what we will do. As I said, we are not seeing the evidence very strongly that, in the UK context in particular, that would necessarily add to the effectiveness of the processes that we have.

I will also pick up your point about mutual respect. The Prime Minister has been very clear on his respect agenda, and that is something that informs our approach to intergovernmental relations. The process that we are running together reflects that. By “together”, I mean together with our colleagues from the Welsh Government and the Northern Ireland Executive. This is a process that we will move forward by consensus, recognising that respect between the Administrations.

**Tavish Scott:** I totally accept your point, gentlemen, that, in order for intergovernmental relations to evolve, they must be in a space that allows that to happen. However, as the convener said, this is as much about parliamentary scrutiny of the process. It is not about what is happening in the nuts and bolts of a negotiation but about how Parliaments in Cardiff, Edinburgh and, for that matter, London keep an eye on that. I put two examples to you. There is a lot of Government activity in Edinburgh and London around the refugee crisis in Europe. Was that subject to a JMC process or has that all happened so quickly that, as in the case of Germany, which we heard

about, it was just done by ministerial phone calls and so on?

The second example is more akin to the discussions that Linda Fabiani and I had in the Smith commission when we discussed the monthly agriculture and fisheries council. There has recently been a European agreement for €500 million, which is described as the Hogan package. That would have been subject to a discussion between agriculture ministers across the UK, but what about parliamentary scrutiny of that? You may well say, Mr Thomson—and you would be right to say this—that I can lodge parliamentary questions and I can ask Richard Lochhead at question time, but no committee, including Rob Gibson's Rural Affairs, Climate Change and Environment Committee, has yet had a chance to have a precise look at that. That is a long way of saying that I do not think that we are there yet in terms of parliamentary scrutiny of what exists, never mind what happens after the Scotland Bill becomes law.

**Ken Thomson:** I will respond briefly, and then Philip Rycroft may want to come in. There are two issues there. The first is when events move fast; the other is how Parliaments scrutinise the outcome of an intergovernmental discussion.

By way of preface, I should say that I cannot speak to the detail of either of your specific examples, so I will give you a general answer of how such things work, which is informed by my knowledge of those two issues. When something blows up fast, the nature of the relationship between the two Governments is that officials and ministers know one another, so they can lift up the phone, and it is possible to have those conversations. I am sure that people on both sides would think that such conversations are sometimes more effective and sometimes less effective. In cases that I was more directly involved in, such as the outbreaks of swine flu and—this is a very good example—the Glasgow airport bombing, there was very good intergovernmental contact, communication and co-operation on a fast-moving issue. That is by way of illustration to show that dealing with such issues does not all go through the formal process of a JMC plenary that meets once a year.

On your example from a European negotiation—again, I was not directly involved in the lead-up to the particular negotiation that you described—in general, the JMC on Europe is the place in which ministers from the four Administrations come together to discuss and agree the UK line, which is then developed and delivered in negotiations in Brussels. That is the process and the structure that allows the Governments to work together on an issue of that kind. Again, I am sure that there will be occasions

when the four Governments find that process more or less successful or helpful, but it exists. It is worth noting that, even when the JMC plenary went into abeyance for a time, the JMC on Europe remained functioning. When things get used, that shows that there is a use for them.

Finally, on your point about parliamentary scrutiny, I would repeat what I have said: if you regard this issue as not different but simply part of the work of Governments, it is possible for Parliaments to scrutinise it in the way that Parliaments scrutinise the work of Governments generally. One reflection is that perhaps it is not so clear to parliamentary committees, which tend to have a portfolio focus, where intergovernmental relations would sit. It is interesting that you are having this discussion and inviting us to give evidence because, by its nature, this committee has that focus. I am just speculating, but that might also be something that the Conveners Group would ask the First Minister about, given that an important part of her work is to relate to the other Governments within the UK. The mechanisms are there, but there is scope for their use to evolve as the bandwidth in this relationship gets bigger with the changes to the devolution settlement.

**Philip Rycroft:** I do not have a huge amount to add to that. Like Ken Thomson, I see two distinct issues. The effective working of intergovernmental relations day to day, particularly when under pressure of time, as with the refugee crisis, and an agriculture and fisheries council that was dealing with what was deemed to be a bit of a crisis. The JMC tends to meet before the big meetings of the Council of Ministers, but there is always a procedure of consultation between the four Administrations in advance of meetings of the agriculture and fisheries council in which they discuss and put that together the UK line. It is quite an elaborate procedure that has been honed over time and now works pretty effectively. Obviously, as Ken Thomson has indicated, there is not always 100 per cent agreement, but there is a process for seeking to reach agreement. I assume that that would have operated in this case.

10:45

Some things move fast and sometimes there is a bit of a disjuncture in the system, particularly if an issue is blowing up in a part of the system that does not have the habit of interaction. My colleagues in agriculture and fisheries are used to dealing with such issues because of the close intersection of the devolved and reserved settlements in the agriculture and fisheries space. However, in other parts of the system, here and in

the south, people will not have that habit of working so closely together.

Ken Thomson and I and other colleagues are having to think about whether we could do more through our auspices for those who are charged with the responsibility for thinking about intergovernmental relations generally. Can we do more at an official level to step in and support the respective Governments to get through difficult moments if that is required? That is one of the things that we need to think about.

On parliamentary accountability, I would draw a distinction between accountability for intergovernmental relations in the round and accountability for day-to-day business, under which it is legitimate to ask, "Was that piece of business transacted in a way that demonstrated effective working between the Governments?" If that is not demonstrated, it is drawn out. That is normal business and it uses all the mechanisms that you and the Westminster Parliament have at your disposal to hold the Governments to account.

There is a separate issue with the accountability for intergovernmental relations in the round. In a sense, that brings intergovernmental relations more into our domain and is about how we make sure that, in essence, intergovernmental relations are visible to departments and to the broader public so that people can hold us to account effectively. That is one of the things that we need to think through and advise our respective ministers on.

**Linda Fabiani:** Everyone on the committee recognises that intergovernmental relations go on every day and deal with things as they come up. However, the memorandum of understanding is being reviewed at the moment, and within that we have the joint ministerial committees, which are set structures of intergovernmental relations. That is where people can see their respective ministers coming together to discuss and promote joint working.

I feel strongly that if we are to do a meaningful review, we have to be honest about what has gone before. I have to say to Mr Rycroft that I find his comment that the joint ministerial committees have served us well over the years astounding. I suppose that it depends on your perspective, who you think has been served and whose interest should be served. For the first eight years of this Parliament, the joint ministerial committees hardly met at all, apart from the European one. From my experience, when I went as a minister to a joint ministerial committee on Europe, Scotland came under the heading of "Any other competent business" on the agenda. That was not serving Scotland well in any way at all.

I do not particularly want to go over that old ground. All I am saying is that fine words are being spoken about mutual respect and parity of esteem, but if this is the right time to be looking at these things over again, let us be honest about where we have come from and how it has evolved over the years. The Scottish Parliament used to have to ask parliamentary questions to find out when joint ministerial committees were being held. Why should our Parliament and a particular committee not know when issues are on the agenda for discussion and at least get some kind of report back from it?

As I say, I do not want to beat anybody up; I am just talking about the facts. Let us be clear about where we start from, how we have evolved and what we are trying to achieve from now. I hope that we can do that.

**Philip Rycroft:** I am not sure that there was a precise question in there, although there was your comment directed at me about the way that things have worked in the past.

Clearly, if you look at the way in which the MOU and the JMC have supported intergovernmental relations, one can always find examples of where things have gone wrong and you can take an unfavourable view of the overall prospectus. However, in the main, intergovernmental relations have functioned. For example, the number of formal disputes that have come through the system has been relatively small. To my knowledge, there have been four during the past few years and those have been resolved. One took a little bit of time, but the others were resolved relatively rapidly.

The point that you are making is that, whatever the past, we are at a juncture where we have to look forward. If people have been concerned about parliamentary scrutiny or transparency, we can learn from that. We need that input to inform our work, and indeed we have had a lot of that input. It will ultimately be for ministers to decide how they reflect that in the structures and new ways of working that they agree, if they do so. That is part of our job that is informed by the deliberations of this committee and others.

**Linda Fabiani:** Thank you. Can I ask another question, please?

**The Deputy Convener:** We will hear from Mr Thomson first.

**Linda Fabiani:** I forgot about Mr Thomson. How could I?

**Ken Thomson:** I should have kept quiet. I just wanted to reflect on what Linda Fabiani said and the experience of being at some of those committees myself. I would not want to give you the impression that they are never frustrating

occasions. At the meetings, politicians who sometimes have very strong differences of view come together. You know from your own experience that that can be frustrating and I am sure that others have felt the same. What we are saying is that when there are disagreements, the JMC process, broadly speaking, has recently provided a forum for airing the issues.

I want to go back to the point about the JMC. For some years, the JMC plenary fell into abeyance. I think that I recall discussing that with you at an earlier evidence session and making the point that, in the period from 1999 to 2007, there was one political party—the Labour Party—in power in Westminster and in coalition at Holyrood. Some of the discussions that we are talking about went through party-political channels. There was a significant moment of evolution in the practice of intergovernmental relations in 2007, when the same colour was no longer in power in both places. That caused the operation of formal intergovernmental machinery to have to strengthen because the other channels were not there. Broadly speaking, that has been a good development because, whatever other channels exist, it is important to have channels in which the two Governments can engage directly as Governments. The experience of the JMC during that period was not uniform and it always has its frustrations but, broadly speaking, it provides a forum in which politicians can get together to try to work out answers to their differences or at least to understand each other.

**Linda Fabiani:** That brings me back to the point that it is the structure that is there, and that Parliaments and people should know that the meetings are taking place. It is very important that there is an allowable degree of transparency around them.

Moving on from that, at an event last night, some members of the previous panel and other academics raised the importance of discussion among the devolved legislatures. I am not sure that anything formal has been set up to deal with it recently; I know that it was not there before. There were obviously informal discussions around JMCs and the British-Irish Council and so on, but is that something that you are looking at under the MOU?

**Ken Thomson:** We caught Dr Mueller's answer to you that that is a political question and you are the politicians. We quite liked that answer.

To give you a serious answer, the focus of our work is on supporting our ministers and how they decide how Governments should relate. There is clearly a set of issues around how Parliaments relate but we would be exceeding our brief if we advised Parliaments on that. You have your own sources of advice.

**The Deputy Convener:** I think that you already have. Earlier you suggested that parliamentarians need to look seriously at how to fulfil that responsibility and to ensure that we are using all the mechanisms that are available to us in a new situation. You referred to that earlier.

**Philip Rycroft:** Of course, the bilateral—or trilateral or quadrilateral—relations between Parliaments are one of the things that came out of the Smith commission proposals. That is clearly a debate space for all the Parliaments to take forward and we are happy to do anything that we can to facilitate that, but it is not our place to lead on that work.

**The Deputy Convener:** Yes, it is something that we can reflect on.

**Malcolm Chisholm:** I am interested in dispute resolution. Philip Rycroft referred to four instances in which, presumably, the protocol had been invoked, but we do not know how that works. Could you say something about what happens when there is a dispute?

**Philip Rycroft:** A process is set out in the MOU. It is part of the consensual workings of the JMC that, if one of the Administrations feels aggrieved about a particular issue, it can invoke the dispute avoidance and resolution procedures. There is then a whole set of procedures to go through to escalate that as necessary.

I have two points to make about that. One is that the clue is in the title to the relevant section of the MOU, which is "Dispute avoidance and resolution". A lot of the work that we are doing is informed by the collective wish of Governments to avoid disputes where possible. How do we avoid disputes? We avoid disputes by having good and respectful working relationships, and by having early discussions about issues that might come up, so there is the time and the space to resolve issues before they get to the point of formal disagreement or dispute.

Secondly, a lot of people are looking at dispute resolution—it is clearly on our agenda—and asking whether dispute resolution should be made more formal, or whether the whole process should be made statutory. We are going to have to look at that quite hard. The point that I would make at this stage is that, as with the wider machinery, the process is intrinsically political. The more formal you make dispute resolution, the more you risk beginning to constrain the scope for political intervention to resolve something.

The Deputy First Minister discussed those issues when he was at the committee early in June, talking about the dispute about the Olympic Barnett consequential. He said that it took an awfully long time for that to be resolved, which is true, but he also said that there was a resolution

when there was the political will to make that resolution. The important point is that, in looking at dispute resolution, we should not overly constrain politicians' capacity to find a resolution to the issues that arise.

**Malcolm Chisholm:** The issue that we are all thinking about at the moment is the fiscal framework; would that just go through the joint ministerial committee? It has been suggested that, if there is no agreement, there should be some independent arbitration on that. I presume that that would be resisted by the UK Government, but maybe not by the Scottish Government. What do you think about that?

**Philip Rycroft:** The fiscal framework falls squarely into the bilateral space and it will be a bilateral relationship between the UK Government and the Scottish Government. As you are well aware, the negotiation on that is in process at the moment and you had the opportunity to speak to the Deputy First Minister about it some weeks ago now. That process continues. As with fiscal relationships hitherto, there needs to be an on-going relationship between the Treasury and the Scottish Government to manage those issues on an annual as well as a multiannual basis. All that will become more complex if we get to the stage of further devolution, particularly of tax and welfare powers. How that is managed once we get to that point will have to be looked at in the context of the fiscal framework negotiations. I am not at liberty to lift a veil on that, but how those processes are to be managed effectively on a year-to-year basis, including dealing with any issues that may come up between the two Administrations, will absolutely have to be dealt with in that context.

11:00

**Malcolm Chisholm:** That is the process of agreeing the fiscal framework. If there is not agreement between the Governments, will the process that you describe be invoked and the issue resolved through the joint ministerial committee, or will it be resolved any other way?

**Philip Rycroft:** I cannot give you an answer to that question, because clearly the two Governments are discussing that in a separate forum. They will have to work out in that context how to manage issues around the fiscal framework effectively. The only point that I would make is that these are political processes. The Prime Minister runs the UK Government and the First Minister runs the Scottish Government and, ultimately, they are responsible for the smooth working of relations overall. How that is expressed formally in structures will have to be worked through in the course of the discussions on the fiscal framework and intergovernmental relations more generally.

**Malcolm Chisholm:** Does Ken Thomson want to comment on arbitration?

**Ken Thomson:** I will respond to your earlier question and then I will comment on arbitration.

Philip Rycroft made the point that the relevant section in the MOU is headed "Dispute avoidance and resolution". Typically, disputes arise because the right people are not looking at the issues, which are problems of attention. Quite often such problems are resolved through a less formal process, which can include Philip ringing me up or me ringing him up and saying, "We need to make sure that people are looking at this issue because it is heading towards a dispute." The dispute protocol operates in such a way so that people achieve an understanding of each other's positions and where there are shared interests. The protocol is written in a way that gets good work done on that.

The protocol tries to put a timetable on things so that they do not drift. However, the timescales that are set out are not binding. The Olympics issue took longer than the timescale that was set out, but a solution was eventually found. All that is by way of saying that nobody is in doubt that the fiscal framework is receiving attention and that good work is being done on it. A clear timetable has been set out in the way that the Deputy First Minister has commented on the importance of the fiscal framework outcome for his advice to the Parliament on the Scotland Bill legislative consent motion. I will not comment on the substance of that negotiation, but it is certainly getting a lot of attention and hard work. As yet, nobody has thought it necessary to invoke the protocol that is in this document.

Malcolm Chisholm mentioned arbitration. The protocol was recently amended to include the possibility of independent input. I may be wrong but, to the best of my recollection, that has not happened in a dispute so far. It is therefore an open question whether that independent input could include arbitration. I am speculating slightly, but if the ministers involved wanted it to, it could. That decision would have to be made by consensus.

My experience—I am echoing points that Philip Rycroft made—is that these are essentially matters of politics. Politicians are good at working out an agreement if there is an agreement to be found, or not doing that if there is not one to be found. Would arbitration help? There is a range of views on that. I think that I commented on that the last time I was in front of you to give evidence, and I would say the same thing this time.

**Malcolm Chisholm:** That is an interesting point about the external input—I think that that was the phrase that you used. I do not know whether I

should know this, but is that written in the memorandum?

**Ken Thomson:** It is in the memorandum.

**Malcolm Chisholm:** I had not seen that. That is interesting.

My final observation would be that all the issues that you have described are very micro by comparison with the fiscal framework, so some external input may well be useful if there are problems with them.

**Ken Thomson:** I will give you one further example. The Edinburgh agreement, which nobody would describe as a micro agreement, was reached by negotiation between the two Governments. The process was essentially similar to the one that is happening on the fiscal framework, and neither Government found it necessary to invoke the dispute resolution procedure, because they reached an agreement through the ordinary course of intergovernmental working. We are not at the point of having a formal dispute on the fiscal framework; we are in a negotiation, and that is pretty normal.

**The Deputy Convener:** Mr Rycroft, you said that you did some comparative work on intergovernmental agreements across other jurisdictions. You will have found that in some countries intergovernmental agreements are subject to the consent of Parliament and that sometimes Parliament has an opportunity to suggest amendments to those agreements. The legislative consent motions that we deal with here are linked to that—that is the broad mechanism that we use. Given that we will be dealing with more and more shared powers of welfare and taxation, have you considered in your discussions that there may be a case for extending the role of Parliament in giving consent to intergovernmental agreements?

**Philip Rycroft:** The whole parliamentary nexus is something that we have to consider. Points on that have been raised by this committee, Smith and numerous others. How we manage the relationship between the processes of intergovernmental relations and parliamentary procedures is very much within our purview. On the question of formal involvement, my guess is that Parliaments are able to propose formal amendments to procedures where those procedures are bound into statute. Those two things would be hooked together. If we do not end up in a statutory space, a rather different relationship regarding input from the Parliaments would be required.

I make the point that we are working through the issue in real time. The legislation that is changing the settlements is still going through Parliament and in some cases is still to be introduced to

Parliament. Experience of the new settlements will develop once they are implemented—if they are implemented—and as they move forward. That takes us into, if you like, the dynamic relationship between parliamentary accountability, the opinions of Parliaments individually and collectively about how the process is working, the input of that into Governments and how Governments are held to account, and how intergovernmental relations evolve and develop over time.

You will have noticed that the MOU that we have at the moment has been amended and revised several times over the past few years, which reflects the dynamic of intergovernmental relations under the current settlements. I make the point that one should not restrict oneself to looking at a fixed point for parliamentary input but should see parliamentary input as part of the process of scrutiny and accountability. The Parliaments' proposals and suggestions for improving intergovernmental relations should be put to Governments as matters develop and as we get more experience of intergovernmental relations in the context of the new devolution settlements.

**Ken Thomson:** I agree broadly with what Philip Rycroft said, which echoes my earlier point that this is part of the work of Governments and therefore is open to the Parliaments to scrutinise. For example, when committees scrutinise how ministers and civil servants handle the refugee crisis, they could ask how good the intergovernmental working between the two Governments was. The mechanisms for scrutiny are there and their use will evolve as the settlement evolves.

**The Deputy Convener:** Will there be an opportunity for this Parliament and other Parliaments to see a draft of the revised memorandum of understanding before it is signed off?

**Ken Thomson:** That would be a question for our ministers, but we will have the opportunity to take that point back to them.

**The Deputy Convener:** Finally, would you welcome proposals from this committee and Parliament to your review process on a formal evidence basis?

**Philip Rycroft:** Over the past few months, we have been very conscious of the input from a number of sources, including parliamentary sources; this committee's consideration; the Smith commission; the Silk commission, which had words on this; and, as I mentioned, the House of Lords Constitution Committee and the House of Commons Political and Constitutional Reform Committee. Quite a lot of the academic community that interests itself in this area has offered its wisdom, as well. There is a rich evidence base,

but you have an advantage of coming to this issue with your current inquiry when the broad structure of the evolving devolution settlements is becoming clearer. Speaking personally, I say that the fruits of your discussions would be enormously helpful to inform our work as we move it forward. We have not reached any conclusions yet, so our door is open and I hope that our minds are open to any input that you would wish to make.

**The Deputy Convener:** We will take that as a yes.

**Philip Rycroft:** Good.

**The Deputy Convener:** Thank you very much for your attendance at this session.

As previously agreed, we now go into private session. I give our witnesses a few moments to leave before we make progress.

11:11

*Meeting continued in private until 11:28.*



This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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