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The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective

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¹ From the Quebec Bar. This article is part of a doctoral research project on the status of intergovernmental agreements, Faculty of Law and Clare Hall, University of Cambridge. An earlier version of this paper was first published in *Public Law*, Spring 2001. I wish to thank Professors James Crawford, Robert Hazell, Dawn Oliver and Pierre Klein for helpful comments and the Wiener-Anspach Foundation for financial support. The usual disclaimer applies.

Executive Summary

- Late in the process of conceiving the institutions of devolution, but early in the implementation stage, the UK government and the devolved administrations concluded a series of intergovernmental agreements, generally but not exclusively called 'concordats'.
- These agreements constitute one of the key elements of the system of devolution. While they have been described as mere 'road-maps for bureaucrats', they are designed to play a much more central role in the new UK constitutional order.
- This paper examines the functions played by concordats and other intergovernmental agreements, in light of the experience of some multi-layered democratic States, notably Canada, Belgium, Australia, Switzerland, Germany, the United States and Spain.
- Agreements between central authorities and constitutive units, or between constitutive units are very common (Spanish authorities conclude up to 500 of them each year!). Their legal status varies greatly: intercantonal conventions are legally binding in Switzerland, and can be enforced by the Federal Tribunal, while intergovernmental agreements in Canada are generally considered to be of a political nature, and therefore non-justiciable.
- Regardless of their status, however, agreements play at least five different functions:
 - a) Firstly, and predictably, they are used to co-ordinate or harmonise policies between orders of government (who does what? who pays for what?).
 - b) Secondly, agreements serve to manage process and procedure (how do they do it? how do they resolve disputes?).
 - c) Thirdly, intergovernmental agreements can play a 'para-constitutional' function when they are used to circumvent the formal distribution of powers, or to formalise a convention.
 - d) Fourthly, agreements can be instruments of 'regulation by contract', when they are used as tools of centralisation under the guise of compromise and consensus, or when, regardless of the formal distribution of powers, a party 'makes an offer' to another one which the latter 'cannot refuse...'
 - e) Finally, and in a related way, agreements are instruments of soft-law. Regardless of their legal standing, they tend to be negotiated, drafted and implemented by civil servants as if they were binding. This can be particularly problematic given the lack of parliamentary scrutiny which often surrounds their adoption.
- UK concordats are essentially designed to ensure efficient information-sharing, early-warning and rules of confidentiality between administrations. As such, their main

function is that of 'procedural cooperation'. However, a closer examination reveals that they also serve some policy-coordination functions.

- Furthermore, the 'no surprise' credo they embody is reminiscent of the principle of federal comity or federal loyalty. The Memorandum of Understanding of 1999 incorporates the Sewel convention. In so doing, it plays a para-constitutional function.
- There is no doubt that concordats play a soft-law function in the conduct of devolution politics.
- And finally, time will tell whether in the UK, as in other multi-layered States, concordats will play 'regulating by contract' functions, dressing up directions from the centre in consensual terms.

Introduction

With devolution to Scotland, Wales and Northern Ireland, the idiosyncratic constitutional set-up of the United Kingdom has become even more difficult to classify.² Devolution is charting new grounds in constitutional arrangements. To some extent, the process is reminiscent of the decentralisation movements that have taken place over the last few decades in Spain or Belgium. The problems encountered so far, and those likely to emerge in the future, are not unlike those that have occupied public lawyers in Canada or Australia since the creation of those federations. This includes the conception of an effective distribution of powers, fiscal autonomy, judicial review, issues of accountability, the tension between parliamentary sovereignty and devolved (or federated) state structures, the role of conventions and the need for co-ordination and co-operation between orders of government.

'Concordats' constitute one of the key elements of the system of devolution. The characterisation of these non-statutory agreements between executives varies. While some have tried to downplay their importance by assimilating them to internal bureaucratic directives, others perceive them as fundamental to the new constitutional arrangement, and deplore their lack of legal underpinnings.³ In fact, while one of their functions is indeed to provide guidance to the civil service, the new agreements are designed to play a much more central role in the new UK constitutional order. As a Welsh politician put it, they are 'the formal nuts and bolts to maintain the process of Devolution'.⁴ Or, to keep with a construction metaphor, 'concordatry [...] part of the 'glue' of a reinvented Union State'.⁵

The purpose of the present paper is to examine the functions played by concordats and other intergovernmental agreements, in light of the experience of some multi-layered democratic States, notably Canada, Belgium, Australia, Switzerland, Germany, the United States and Spain. This raises the immediate objection that devolution is not federalism, and that comparison with federal states is of limited use.⁶ I would give a threefold answer to this objection. First, comparisons with countries which have a similar constitutional framework to the UK are impossible given the uniqueness of the devolution settlements.

2 On the anomaly of an 'ostensibly unitary state' which functioned in a 'federal way' despite the absence of a constitutional form of federalism, see MacCormick, Neil, *Questioning Sovereignty: Law, State and Nation in the European Community*, Oxford U. Press, 1999, pp. 60 ff.

3 Rawlings, Richard, 'Concordats of the Constitution' (2000) 16 L.Q.R. 257-286.

4 OSSW Press notice, 1.10.1999, cited in Winetrobe, Barry K., *Concordats*, Research Paper 99/12, Information Centre, Scottish Parliament, Oct. 6, 1999, p. 23.

5 Rawlings (2000), p. 259.

6 All these countries, except for Spain are federations. The Spanish form of asymmetrical devolution is very close to federalism: see Agranoff, Robert, 'Inter-governmental Politics and Policy: Building Federal Arrangements' in, (1993) 3:2 *Regional Politics and Policies* 1-28; Hennessy, A., 'The Renaissance of Federal Ideas in Contemporary Spain' in Forsyth, M., ed., *Federalism and Nationalism*, Leicester U. Press, London, 1989; Keating, Michael, *Nations Against the State: the New Politics of Nationalism in Quebec, Catalonia and Scotland*, Macmillan, London, 1996.

Either one must take a purely self-centred approach, rejecting *a priori* the relevance of experience elsewhere, or one must approach that experience with an open mind as to the lessons that may be drawn, notwithstanding the difference between federalism and devolution. Secondly, federations differ immensely and the distinction between devolution and federalism may not be any more substantial or significant than the distinctions between some federal systems. This points both to the interest and the limits of comparing the institutions of various federal structures. Finally, UK constitutional history is being written piecemeal, and the federal solution may eventually be reconsidered.

A. The Functions of Intergovernmental Agreements in Multi-layered States⁷

All complex, multi-level constitutional systems have had to develop tools to co-ordinate the exercise of powers distributed amongst various decision-making entities.⁸ Effective policy-delivery often requires the co-ordination of the exercise of legislative powers. This is true in the cases of concurrent powers, and also of closely interrelated, although theoretically exclusive ones.⁹ Such co-ordination takes many forms: it can be vertical (between the central government and the constitutive entities) and horizontal (between those entities). It can be bilateral or multilateral.

Harmonisation, co-ordination and dispute resolution take different avenues. Co-operation (as the term is used in Belgium, Switzerland or Spain) and Intergovernmental Relations (as used in Canada and Australia) involve a wide range of institutional processes ranging from phone calls between civil servants to interministerial meetings, from the creation of joint bodies to interdelegation meant to circumvent the distribution of powers, from the negotiation within a unified political party apparatus active in different orders of government to a variety of consultation mechanisms.¹⁰

Intergovernmental agreements represent one of the most formal mechanisms of co-operation in the tool-box of intergovernmental relations. These agreements are 'ubiquitous'¹¹ instruments of policy-making in federations, whether these systems are described as cooperative, competitive, executive, or even 'confrontational'.¹² The trend is

⁷ While none of the following authors classify the functions of intergovernmental agreements as I have attempted to do in this article, my reflections are largely informed by their discussions: Lagasse, Charles-Etienne, *Les nouvelles institutions politiques de la Belgique et de l'Europe*, 2^e ed., Artel, Namur, 1999; Bankes, Nigel, "Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia", (1991) 29 *Alberta L.R.* 792 and 'Constitutionalized Intergovernmental Agreements and Third Parties: Canada and Australia', (1992) 30 *Alberta L.R.* 524-555; Painter, Martin, *Collaborative Federalism: Economic Reform in Australia in the 1990s*, Cambridge U. Press, Cambridge-NY-Melbourne, 1998; Saunders, Cheryl, 'Constitutional and Legal Aspects', in Galligan, Brian, et al., eds., *Intergovernmental Relations and Public Policy*, Allen & Unwin, Sydney, 1991; Zimmerman, Joseph F., *Contemporary American Federalism: the growth of national power*, Leicester U. Press, 1992, pp. 139-146 and *Interstate Relations: the neglected dimension of federalism*, Praeger, Westport, Conn., 1996, pp. 34-58.

⁸ This article does not address the role of local government, although some of the issues discussed would be relevant in that context.

⁹ Leclercq, Claude, *L'État fédéral*, Dalloz, Paris 1997, p. 62; Sharman, Campbell, 'Executive Federalism', in Galligan, pp. 23-38.

¹⁰ See, for instance: Painter; Cornes, Richard, 'Intergovernmental Relations in a Devolved United Kingdom: Making Devolution Work' in Hazell, Robert, ed., *Constitutional Futures: A History of the Next Ten Years*, Oxford U. Press, 1999, pp. 156-77.

¹¹ Swinton, Katherine, 'Law, Politics and the Enforcement of the Agreement on Internal Trade' in Trebilcock, Michael J., Schwanen, D., ed., *Getting There: The Agreement on Internal Trade*, C.D. Howe Institute, Toronto, 1995, pp. 196-210, p. 196.

¹² On this last description, which posits that federal structures can generate conflict, as much as resolving them, see Delpérée, Francis, 'Le fédéralisme de confrontation' in Delwit, Pascal, et al., eds.,

likely to be similar, or even strengthened, in a devolved State to which the 'watertight' approach to distribution of powers is even less applicable than in the case of classic federal systems.

The number of intergovernmental agreements is very large in long-standing federations, such as Canada and Switzerland. There are at least 1000 federal-provincial agreements currently in force in Canada, and the number of interprovincial agreements is also significant. This number is increasing rapidly in recently federalised Belgium: formal legally-binding agreements probably total over 100, to which non-binding protocols must be added.

Canadian intergovernmental agreements are negotiated, as their name suggests, by the Executives. They have traditionally given rise to very little public or parliamentary debate or scrutiny, although there is a certain degree of evolution in that respect.¹³ Agreements are generally not endorsed by legislative assemblies, and until recently they were not published.¹⁴ The same is essentially true of Australia.¹⁵ Because intercantonal Swiss concordats must - in theory - be communicated to the federal legislative Assembly, they are generally more accessible. Some agreements are also subject to referendums.¹⁶ In Belgium, some types of legally-binding agreement require legislative approval, while others do not. In the first case they are systematically published, while in the latter, publication is more haphazard.¹⁷

The role of legislatures is significant, especially in terms of democratic control and accountability, but it does not necessarily have an impact on the legal status of the agreements nor on the functions they play.¹⁸ In other words, an agreement can be authorised

Gouverner la Belgique: clivages et compromis dans une société complexe, Presses universitaires de France, Paris, 1999), pp. 53-69.

¹³ See, for instance, agreements on labour policy or environmental assessment: www.intergov.gc.ca.

¹⁴ This is one area which has been positively affected by the combined pressure from civil society for more transparency and the technological appeal of the internet as a tool of governmental communication. Documents which remained hidden in the filing cabinets of civil servants in the past, and were difficult to access even through Access to Information applications, are now found on websites. In that sense, the UK climbed on the intergovernmental train at the 'internet generation' station.

¹⁵ Saunders, pp. 39-56.

¹⁶ See, Article 48, Swiss Constitution of 1999. Auer, Andreas, Malinverni, Giorgio, Hottelier, Michel, *Droit constitutionnel suisse, vol. 1: L'État*, Staempli Editions, Berne, 2000, pp. 547-60. There are still important lacunae in publication of Swiss conventions: Boegli.

¹⁷ Coenraets, Philippe, 'Les accords de coopération dans la Belgique fédérale', (1992) 16, *Adm. Pub.* 158-200.

¹⁸ For a partial discussion of these issues in **Commonwealth federations**, see Nigel, 'Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia', (1991) 29 *Alberta L.R.* 792 and 'Constitutionalized Intergovernmental Agreements and Third Parties: Canada and Australia' (1992) 30 *Alberta L.R.* 524-555; Swinton, Katherine, 'The Enforcement of Intergovernmental Accords', in Institute of Intergovernmental Relations, *Assessing*

or endorsed by statute and not be legally-binding, or it may be concluded without any parliamentary involvement and yet be binding.¹⁹ It is the overall constitutional framework which will determine the legal status of an agreement, rather than the specific role of the legislature. The scope of this article does not permit an analysis of the legal status of intergovernmental agreements. It is interesting to note that whether agreements are binding (as many are in Spain, Belgium, Switzerland, the United States, and in a very limited fashion in Canada and Australia) or not (as is overwhelmingly the case in those last two countries and in Germany), they seem to play very similar functions. Indeed, regardless of their formal legal status, intergovernmental agreements play key roles in the functioning of those federations. They fulfil at least five major functions: substantive policy co-ordination, procedural co-operation, para-constitutional engineering, 'regulation by contract' and 'quasi-legislation' (or soft law). Many agreements will play several of these functions, and some would resist any classification.

a) Substantive policy coordination

Some intergovernmental agreements govern the articulation of powers between 'orders of government'²⁰ and provide redistributive financing schemes. Agreements are central to most fields of public activity, from the management of natural resources to education, from the protection of the environment to health care delivery, from agricultural policy to employment measures, from family policy to the promotion of internal trade and coordination of fiscal policy. They have been used to manage waterways and dams and even to settle border disputes between constituent units. Some framework agreements provide general operating principles, while others define responsibilities for very specific projects, such as road construction. Some agreements establish inter-jurisdictional agencies.

*Access: Towards a New Social Union, Proceedings of the Symposium on the Courchene Proposal, Kingston, Canada, 1997 and Saunders, supra. The central Canadian decision is Re Canada Assistance Plan, [1991] 2 R.C.S. 525. For Australia, see: South Australia v. Commonwealth (1962), 108 C.L.R. 130 (HC). For Spain: see art. 145 of the 1978 Constitution; Sentencia 44/1986, 17.4.1986, BOE, no. 102, 29.4.1986; Navarro, Angel J. Sanchez, 'Convenios entre comunidades autonomas' in Villamil, scar Alzaga, dir., *Comentarios a la Constitution espanola de 1978*, Tomo XI (1988), pp. 73-108. **Germany**: see art. 91 a and b of the Basic Law, Klatt, Hartmut, 'Centralizing Trends in West German Federalism, 1949-89', in Currie, David P., *The Constitution of the Federal Republic of Germany*, U. of Chicago Press, Chicago/London, 1994, 40-57, at pp. 44 ff.; Blair, Philip, Cullen, Peter, 'Federalism, Legalism and Political Reality: the Record of the Federal Constitutional Court', in Jeffery, Charlie, ed., *Recasting German Federalism: the Legacies of Unification*, Pinter, London/NY, 1999, pp. 1422 ff.; Heun, Werner, 'The Evolution of Federalism' in Starck, Christian, ed., *Studies in German Constitutionalism*, Nomos Verlagsgesellschaft, Baden-Baden, 1995, pp. 167-193, at p. 186. **Belgium**: Coenaets and Delpérée, Francis, Depré, Sébastien, *Le système constitutionnel de la Belgique*, Larcier, Brussels, 1998. **Suisse**: Auer.*

¹⁹ As is the case of Belgium 'cooperative agreements of an administrative nature', see Lagasse, p. 350.

²⁰ I prefer the expression 'order of government', to 'level of government' because it does not imply a hierarchy between constitutive units and the central/federal government. The absence of such a hierarchy corresponds to a classical conception of federalism, which obviously does not apply to all forms of multi-layered states, including, of course, the UK. The term 'order' precludes the need to make such distinctions in the general discussion.

The general purpose is to rationalise the exercise of distinct but related competences, avoid duplication and coordinate policy initiatives.

To give one example amongst thousands, a series of bilateral intergovernmental agreements have been concluded between the Canadian federal government and the provinces on labour training.²¹ These arrangements arose because the federal government has constitutional jurisdiction over unemployment insurance, whereas education and social assistance are provincial matters. In the post-war period, the federal government financed and managed training programs for the unemployed.²² The responsibility over this aspect of unemployment policy has now largely been 'administratively' transferred to the provinces. While the agreements vary from province to province, most contain detailed descriptions of federal and provincial responsibilities.²³

Similar examples can be found in a large array of policy areas. For instance, intergovernmental agreements designed to co-ordinate the exercise of concurrent and interrelated competences over the environment have been concluded in Canada and Australia.²⁴ Such agreements exemplify the pragmatic development of agreements to resolve problems as they arise. In general, there is no master plan and agreements are designed and negotiated by particular Departments as the need arise, and political possibilities allow.

In older federations, the development of social, environmental and even economic policy occurred within an already multi-layered structure. Depending on the particular distribution of legislative powers, policies could be allowed to develop in a relatively independent fashion in the different units, with or without much co-ordination or the development of 'country-wide' standards.²⁵ Intergovernmental relations in general, and intergovernmental agreements in particular, evolved alongside and often after policy development and implementation.

The need for coordination was felt more readily in Belgium, where the process of federalisation followed the development of a sophisticated welfare state. Previous unitary policy areas, from education to urban planning, from transportation to care for the elderly were constitutionally gradually decentralised. Continuity of service required a certain

²¹ www.hrdc-drhc.gc.ca

²² Often by 'purchasing' places for the unemployed in regular schooling and professional training programs, developed under the jurisdiction of the provinces.

²³ Poirier, Johanne 'The Canadian Social Union: Solution or Challenge for Canadian Federalism', in Vansteenkiste, Steven et al., eds., *Sociaal Beleid en Federalisme*, Vlaamse Juristenvereniging, Staatsrechtconferentie, Larcier, Brussels, 1999, pp. 25-84 at pp. 61-63.

²⁴ For Canada, see *Canadian Environmental Law Association v. Minister of the Environment*, 27 April 1999, T-337-98, F.C.T.D. (Reed J.); for Australia, see Painter, pp. 127-28.

²⁵ I prefer this term to 'national standards', because several multi-level States are multinational. Furthermore, the term 'national' can be both ambiguous and emotionally-charged.

degree of coordination between entities endowed with new legislative and administrative powers. In 1989, after nearly 30 years of incremental devolution of powers, the constitutive units and the pre-federal government were officially authorised to conclude binding agreements to co-ordinate their activities.²⁶ A large number of agreements have since been concluded. They range from road construction and coordination concerning European policy, to telecommunication or the provision of some services to residents of other constitutive units. Some of these agreements are 'compulsory', to the extent that the transfer of constitutional powers from the central order of government did not occur until the agreements had been concluded. Others are voluntary. It appears that voluntary co-operation occurs more readily between the French-speaking entities, than between the Flemish and French-speaking ones, a fact which reflects the degree of political conflict in the country, but which is also a consequence of the asymmetrical institutional design.²⁷

b) Procedural cooperation

While most intergovernmental agreements deal with substantive policy issues, others outline procedural mechanisms of cooperation. The former establish who does what, who pays for what. The latter provide for consultation or dispute resolution mechanisms, and can introduce multi-layered conferences or committees. Of course, many agreements will involve both substantive and procedural aspects. Hence, the Canadian Interprovincial Agreement on Internal Trade, concluded to minimize trade barriers within Canada, includes a section on dispute resolution.²⁸ Agreements in Germany and Belgium govern the consultation process which ensures the participation of their constitutive units in the elaboration of the country's platform on European Union policies.²⁹ A similar, though less formal, process was introduced in 1996 in Australia to ensure state participation in the negotiation of international treaties having an impact on state competences.³⁰ In Australia, rules on prior consultation, information-sharing, and agreement on the timing of public

²⁶ Belgium officially became a federation after the fourth stage of constitutional reform in 1993: see art. 1, *Belgian Constitution*. While the agreements are considered legally-binding, their exact place in the hierarchy of norms is unclear: Art. 92 *bis*, Double-majority Act 1980 as am. 1989, M.B. 15.8.1980. On both, see Craenen, G., ed., *The Institutions of Federal Belgium: an Introduction to Belgian Public Law* (1996) and Uyttendaele, Marc, *Regards sur un système institutionnel paradoxal: Précis de droit public*, Bruylant, Brussels, 1997.

²⁷ Indeed, to the extent that the institutions of the Flemish Community and Region have been merged, there is no need for formal co-operation between them. This institutional fusion has not occurred on the French-speaking side of the country, thus increasing the need for policy co-ordination of very dispersed legislative and executive powers: Lagasse, p. 354.

²⁸ See art. 1600 to 1723; Trebilcock (1995).

²⁹ For Belgium, see art. 92 *bis*, par. 4 *bis* of the 1980 Double Majority Act 1980 as am. 1989. The agreement is reproduced in (1994) *Rev. Belge de droit intern*. In Germany, a constitutional amendment has now reinforced the Länder's participation, in replacement of the so-called 'Lindau agreement', art. 23, Basic Law.

³⁰ Painter, p. 131. A more specific example relates to consultation in the field of environment: *ibid.*, pp. 127 ff.

announcements between the states and the Commonwealth have been provided for by non-binding intergovernmental protocols.³¹

c) Para-constitutional engineering

Intergovernmental agreements thus serve to harmonise or co-ordinate the exercise of concurrent or complementary powers, and to provide for certain forms of intra-State communication and dispute resolution. Agreements can also play what I call a 'para-constitutional' function. Hence, following the multiple failures to amend the Canadian Constitution over the last fifteen years, politicians have promoted the use of intergovernmental or 'administrative' agreements as an alternative to painful, and in the eyes of many, doomed, constitutional reform. One such attempt lies in the Social Union, an agreement concluded between the federal government and all the provinces except Québec.³² The Social Union was originally launched by provinces as a way of clarifying respective provincial and federal roles in social policy, including ways of harnessing the unilateral use of the federal spending power in areas of provincial jurisdiction.³³ Agreements such as the Social Union are hailed as non-constitutional solutions to constitutional problems. They are denounced by critics for exactly the same reason: they are seen as pale substitutes for fundamental constitutional resolution of long-standing disputes.

The Canadian agreements on labour training discussed above are also presented as concrete mechanisms enabling the provinces and the federal governments to work together, without having to clearly determine borders of constitutional responsibility.³⁴ The strategy is to seek to avoid direct and difficult constitutional questions and confrontation. The asymmetry which characterises the labour agreements, with provinces able to opt between different models involving different degrees of decentralisation, would be almost certainly be rejected if it were part of a conventional constitutional package. In other words, intergovernmental agreements enable governments to structure their relations so as to bypass hard

³¹ Department of Prime Minister and Cabinet (DPMC), *Commonwealth-State Ministerial Councils: A Compendium* (1994), discussed in Painter, pp. 69 ff.

³² While most aspects of social policy fall under provincial competence, other aspects are clearly federal in nature, while others are concurrent. More contentiously, over the years, the federal government has used its 'spending power' to influence aspects of social policy over which it does not have direct constitutional powers. The spending power has given rise to considerable academic commentary: Poirier (1999), pp. 33-36 ; Watts, Ronald L., *Étude comparative du pouvoir de dépenser dans d'autres régimes fédéraux* (1999) ; Petter, Andrew, 'Federalism and the myth of the federal spending power' (1989) *Can. Bar Rev.* 448-79.

³³ The Quebec government rejected the final agreement when the other provinces and the federal government agreed on a weakened version of the limits imposed on the use of the federal spending power.

³⁴ Canadian Policy Research Network, *Introduction to the Social Union Roundtables Project*, 1996-7, p.7. For a critique of this approach, see: Venne, Michel, 'Gains pour les chômeurs, demi-tutelle pour le Québec', *Le Devoir*, 23.4.1997, p. A-8 ; Dion, Jean, 'Formation de la main d'œuvre: désaccord sur l'accord', *Le Devoir*, 22.4.1997, pp. A-1 and A-8.

constitutional issues, or to find pragmatic solutions which would be unattainable in the more visible and politically charged constitutional negotiations.

An Australian multilateral agreement on fisheries concluded in the late 1970s also illustrates the importance of these instruments in circumventing more formal constitutional norms.³⁵ The Australian Constitution confers competence over offshore fisheries beyond territorial limits to the Commonwealth.³⁶ Until the 1940s, the states exercised actual responsibility over fisheries which were generally confined within these limits. The Commonwealth started exercising more powers from the mid-1940s. Given the uncertainty of jurisdiction, an intergovernmental agreement was reached in 1968, but it was called into question by federal legislation in 1973. Seized by the States, the High Court confirmed the primacy of the Commonwealth in relation to offshore resources.³⁷ The decision was rendered days after the election of the Fraser government, committed to a 'new federalism', including increased intergovernmental cooperation. An Offshore Constitutional Settlement was adopted in 1979 to reorder and readjust the respective powers and responsibilities of the States and the Commonwealth in this area. The agreement itself was not published. It was implemented by several federal Acts. The Hawke government, elected within weeks of the Settlement, opposed the deal but, given the legal uncertainty surrounding the possibility of unilateral repeal, chose to respect the agreement.³⁸ This case, amongst many involving natural resources in Australia, clearly illustrates that an intergovernmental agreement can be used to circumvent the formal distribution of legislative powers in a complex state, even, in this case, when it is the powers of the central authorities which were reinforced by a judicial decision.

In sum, intergovernmental agreements can shape the exercise of powers (although not the formal distribution of legislative powers itself) or can confirm a particular arrangement, whether or not it conforms to strict constitutional ordering. Agreements of this nature are not 'constitutionally neutral'. They alter the constitutional landscape while avoiding difficult - and often impossible - constitutional amendments.³⁹

An important caveat must be drawn with regards to this para-constitutional function. In some countries which recognise the legal status of certain forms of intergovernmental agreements, there is a prohibition on the conclusion of horizontal agreements (that is, between constitutive units) which amount to a 'political alliance' with the potential of

³⁵ Haward, Marcus, 'The offshore', in Galligan, pp. 109-128.

³⁶ Australian Constitution, s. 51(x).

³⁷ *New South Wales v. The Commonwealth* (1975) 135 C.L.R. 337 (HC).

³⁸ Mainly for purposes of economic reform, the Hawke government also endorsed a form of 'new federalism' which required commonwealth-state cooperation: see Painter, pp. 10 ff.

³⁹ The fact that amendments to the Australian constitution must be preceded by a popular referendum makes the process onerous and perilous. Intergovernmental agreements can offer an effective, if not equivalent, alternative.

threatening the federation. This is the case in Spain, for instance, and was formally the case in Switzerland until 1999.⁴⁰ This prohibition, judged necessary in the early days of vulnerable federal or quasi-federal unions, have been interpreted restrictively. Along the same vein, article I, sect 10 (3) of the American Constitution provides that interstate compacts may not be concluded without consent of the Congress. The U.S. Supreme Court has held that this requirement is restricted to agreements of a political nature likely to increase the 'political power or influence' of the contracting states in a way which may impair 'the full and free exercise of federal authority'.⁴¹

d) 'Regulating by contract'

Some commentators have given a more cynical interpretation of the function of intergovernmental agreements. Hence, Lajoie has adapted the 'regulating by contract' formula introduced by Daintith to denounce some intergovernmental agreements as tools of centralisation, under the guise of compromise and consensus.⁴²

The paradigm example provided by Daintith is of a public authority which has the power to legislate over a certain matter, but opts for a contractual solution instead.⁴³ The choice of contract in these situation is believed to favour compliance by the other party and to give an appearance of a more balanced power base between the public authority and the other party.⁴⁴ The ultimate threat of legislation or regulation is always implicit and this can significantly alter the content of the contract or agreement. Such contracts can thus be used as forms of indirect regulation, since one of the parties always has the option of replacing the consensual approach by a direct regulatory or legislative solution. Contract is thus used as a mode of social control,⁴⁵ as an alternative to the exercise of unilateral normative power, but with a similar objective, and, in many respects, effect.

Lajoie applies Daintith's analysis both to contracts between two public authorities and to intergovernmental agreements.⁴⁶ She argues that in both cases, the choice of a conventional solution is strategic. It is preferable to bring a partner - including a partner in a multi-

⁴⁰ Art. 145(1) of the Spanish Constitution. Compare art. 48 of the 1999 Swiss Constitution with former art. 7(1) of the Federal Constitution of 1874 ; Auer (2000), pp. 547 ff.

⁴¹ *Virginia v. Tennessee*, 148 U.S. 503 at 520 (1893). See also *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978) ; Zimmerman (1996), p. 37 ff.

⁴² Lajoie, Andrée, *Contrats administratifs: jalons pour une théorie*, Thémis, Montreal, 1984, pp. 144 ff. Daintith, 'Regulating by Contract: the New Prerogative' (1979) 32 *Current Leg. Prob.* 41.

⁴³ Daintith has used the *imperium/dominium* label to distinguish between the use of legal and non-legal techniques by government to further policy objectives: Daintith, Terence, 'The Techniques of Government' in Jowell, Jeffrey and Oliver, Dawn, *The Changing Constitution*, 3d ed., Clarendon Press, Oxford, 1994, pp.209-236, at pp. 213 ff.

⁴⁴ Lajoie (1984), p. 5.

⁴⁵ Harlow, Carol, Rawlings, Richard, *Law and Administration*, Butterworths, London/Edinburgh/Dublin, 1997, p. 211.

⁴⁶ Lajoie (1984), p. 144 ff.

layered State with whom one necessarily has long standing relations - to agree, rather than to impose its will through the unilateral legislative measures.

This use of intergovernmental agreements to further 'regulatory' purposes can arise in two distinct situations. It can indeed replace a possible unilateral legislative solution. When that is not a constitutional possibility, however, intergovernmental agreements can serve to influence the exercise of powers by other orders of government. The first case presents itself when the central government has the constitutional power to make legislation binding on federated entities, as is the case in Australia and the United States.⁴⁷ Even when the legislative route is available, it may be more expedient, or politically acceptable, for the central authority to negotiate an agreement, rather than to impose a unilateral solution. Compliance and cooperation are more likely to be forthcoming if the other party participates in the elaboration of the new norms. In the end, however, the threat of legislation is always there, possibly affecting the liberty of the federated entities. The conclusion of compacts in the United States has been described as an alternative to preemptive legislation by Congress.⁴⁸

Secondly, intergovernmental agreements can give rise to regulation by contract when the central authorities do not have the power to impose their will on the constitutive units by legislation, but 'make an offer one cannot refuse'.⁴⁹ For instance, accepting the terms of an agreement may be the only way for a constitutive unit to obtain financial contributions from (*ex hypothesi*) wealthier central authorities. Refusing to sign such agreements could result in depriving the population of services, which is neither good public administration, nor good electoral politics. These questions are of course banal to students of fiscal federalism. The point I wish to underline is that the inequality of the parties may be masked by the use of apparently consensual intergovernmental agreements.⁵⁰

⁴⁷ On federal pre-emption in the USA, see Gunther, Gerald, Sullivan, Kathleen, *Constitutional Law*, 13th ed. (1997), pp. 337-53 ; Zimmerman (1992).

⁴⁸ It would appear, however, that the use of pre-emptive legislation in lieu of agreements has increased over the last 30 years in the United States, by reason of the difficulties associated with the creation of formally binding compacts: see Zimmerman (1992), pp. 55-81, 146 and 194 ff.

⁴⁹ This has been the case of several conditional grants agreements made pursuant to s. 96 of the Australian Constitution, see Painter, pp. 98 ff.

⁵⁰ As can be the case with private contracts or government contracts, of course. Lajoie actually assimilates some intergovernmental agreements governing conditional grants to 'standard form contracts' (*contrats d'adhésion*) (1984), p. 155. In Canada, the use of the spending power plays a similar role to the threat of legislation. The federal government cannot use the spending power to directly regulate a matter falling within exclusive provincial competence (*YMCA v. Brown*, [1988] 1 S.C.R. 1532). That power can, however, be used to finance programs falling within provincial jurisdiction. In the absence of an agreement with a province concerning a program which the federal wants to institute, the later can simply set it up. The threat of the spending power, like the threat of regulation, acts as an incentive for provinces to reach agreements.

Whether - and how - intergovernmental agreements play this function of disguising a disequilibrium in the balance of power between actors in a particular constitutional set-up will of course depend on a variety of historical and political factors. They can lead to greater centralisation in countries such as Australia, where the financial dependence of States on federal grants is overwhelming.⁵¹ The conditional grants made by the Canadian federal authorities to provinces to offer social services from the 1960 to the 1990s were criticised as instruments which enabled the federal authorities to interfere with provincial priorities in the social sphere.⁵² In Belgium, at least one agreement between constitutive entities of unequal financial power has been criticised for similar reasons.⁵³

The 'para-constitutional' and the 'regulating by contract' functions can overlap. The correspondence is not unmitigated, however. Some agreements may be elaborated to solve constitutional problems without serving the interests of a more powerful actor. In other cases, it could be argued that the 'regulating by contract' route enables a dominant party to circumvent a constitutional obstacle (such as a lack of legislative power) to interfere in the sphere of jurisdiction of another party. Painter suggests that '[a] number of agreements are designed to provide a gloss of legitimacy to a Commonwealth scheme that intrudes on state jurisdiction'.⁵⁴ Similarly, some Québec critics of the Canadian Social Union deplore the fact that the multilateral agreement actually reinforces the position of the federal authorities by not substantially curbing the use of the spending power in areas of provincial jurisdiction.⁵⁵ From that perspective, intergovernmental agreements not only reflect actual imbalances in a federation, they can also exacerbate them.

There is a final way in which 'regulating by contract' may apply, in a more balanced way, in a federation. The Canadian and Australian parliamentary systems are modelled on the UK. They incorporate both a doctrine of parliamentary sovereignty and a practice whereby the Executive dominates the actual actions of the legislative branch of government. That is true at the state or provincial level, as well as the federal. Generally speaking, the parties always have the option of introducing legislation in their respective legislatures to override the agreement or legislate terms which are contrary to it.⁵⁶ This may violate the 'federal spirit', but withdrawal is legally effective. In that context, the conclusion of an agreement may reflect a measure of equality, since both parties have the weapon of parliamentary supremacy in reserve.

⁵¹ Painter, p. 96 ; Cornes, p. 160.

⁵² Poirier, 1999, pp. 51-52.

⁵³ This agreement was in fact, made redundant by a constitutional transfer of the exercise of powers from the 'weaker' entity to the stronger one: Coenraets.

⁵⁴ Painter, p. 101.

⁵⁵ See, for instance: Tremblay, André, 'Federal Spending Power', in Gagnon, Alain-G., Segal, Hugh, *The Canadian Social Union Without Quebec: 8 critical analyses*, Institute for Research on Public Policy, Montreal, 200, pp.155-185

⁵⁶ *Re Canada Assistance Plan*, *supra*.

e) Agreements as 'soft law'

From the perspective of legal pluralism, intergovernmental agreements can govern behaviour just as well as formal regulations.⁵⁷ In that respect, they parallel the use of soft law techniques in international relations. Soft-law rules are not formally binding, but they have an impact on international law.⁵⁸ More importantly, until a major dispute occurs and a party decides to exercise its sovereignty in contradiction of a non-binding agreement, the latter will play the same essential role as a treaty would do.⁵⁹ Ultimately, there is a 'way-out', since there is no legal constraint on withdrawal or denunciation. But under normal circumstances, such agreements will be respected and will govern the behaviour of officials. Even non legally-binding intergovernmental agreements are frequently negotiated with a high degree of formality, as if they were contracts. They are often drafted in contractual terms and for many civil servants who have to implement them, they are treated as binding. Interviews with Canadian civil servants revealed that until the crunch, when a significant change of policy leads to a unilateral modification of an agreement, and possibly legal action, officials feel as bound by these agreements as they do by legislation. The situation would presumably differ in countries where there exists, alongside non-binding intergovernmental protocols, a category of binding agreements. The latter would necessarily occupy a higher echelon in the hierarchy of norms. Even so, in the daily activities of civil servants who have to implement policies in co-operation with other components of the multi-layered states, the provisions of such agreements will be respected in practice. In that sense, non-binding agreements can be assimilated to soft-law instruments, with the advantages (less formality, more flexibility) and the disadvantages (less accountability) that those entail. Again, this function is not exclusive of the four previous ones. In fact, it is likely to be present in all cases, regardless of the other functions a particular agreement is meant to perform.

The description of intergovernmental agreements as instruments of 'soft-law' goes to their character and their location on the scale between legally-binding and non-binding agreements. Nevertheless, I think the soft-law analysis is also useful as a description of a 'para-legal' function. Until a major conflict arises, and legal rules are called upon to supersede or overturn non-binding agreements, they are negotiated, drafted, interpreted,

⁵⁷ On legal pluralism generally, see Lajoie, Andrée, dir., *Théories et émergence du droit: pluralisme, surdétermination et effectivité*, Thémis/Bruylant, Montreal/Brussels, 1998 ; MacDonald, Roderick, 'Pour la reconnaissance d'une normativité juridique implicite et inférentielle', (1986) 18:1 *Sociologie et Sociétés* 47.

⁵⁸ Eisenmann, P.M., 'Le gentlemen's agreement comme source du droit international', (1979) *Clunet* 32 ; Schachter, Oscar, 'The twilight existence of non-binding agreements' (1977) *A.J.I.L.* 296.

⁵⁹ See Kennet, Steven A., 'Hard Law, Soft Law and Diplomacy: the Emerging Paradigm for Intergovernmental Cooperation in Environmental Assessment' (1993) 31 *Alberta Law Review* 644.

executed, amended and terminated as are legally binding rules. They play a function which is very similar to that of formal legal norms, without having that formal character.⁶⁰

B. The Function of Concordats and of other forms of Intergovernmental Agreements in the United Kingdom⁶¹

Concordats were not part of the original devolution project. The idea of agreeing on general governing principles and concluding more specific pragmatic co-operation arrangements arose fairly late in the reform process, in order to palliate some difficulties which emerged as a consequence of the devolution legislation.⁶² In this section, I will discuss multilateral post-devolution agreements as well as those concluded between the Scottish Executive and the UK Government or Departments.⁶³

Concordats are meant to govern the administrative relations between the central and devolved administrations (and possibly between devolved administrations). Out of respect for the autonomy of the new devolved administrations, they logically could not be concluded until those were formally established. Yet, the purpose of these initial concordats was to ensure continuity and a smooth transition to the devolved system, in order to maintain effective public service delivery. The solution was for involved UK departments and members of the Scottish Office to prepare draft concordats, which were then finalised with the devolved administrations once devolution became effective.

⁶⁰ In a similar fashion, Brazier notes that constitutional actors (such as Ministers), do not care about the exact label given to non-legal constitutional rules. They will be guided by such rules, whether they are actually legally-binding or not: Brazier, Rodney, 'The Non-Legal Constitution: Thoughts on Convention, Practice and Principles', (1992) 43: 3 N.I.L.Q. 262 at 263 ; Brazier, *Constitutional Practice*, 3d ed., 1999 ; See also: Marshall, Geoffrey, *Constitutional Conventions: The Rules and Forms of Political Accountability*, Clarendon Press, Oxford, 1986.

⁶¹ A review process of various concordats is underway in the fall of 2000. The conclusions of this review are not available at the time of writing. No major modifications are expected, although difficulties concerning legislative coordination may lead to some fine-tuning of information sharing in this context: see Hazell, Robert, 'Intergovernmental Relations: Whitehall rules OK?', in *The State and the Nations: the First Year of Devolution in the UK*, Imprint Academic, 2000, p. 16.

⁶² Gay, Oonagh, *Scotland and Devolution*, House of Commons Library, Research Paper 97/92, July 1997, p. 23, citing the former Secretary of State for Wales.

⁶³ While much of the following analysis would likely apply to concordats to which the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee are party, the different nature of the devolution process in those three cases calls for caution. I focus on Scotland not because its experience can be directly transposed to the other two devolved administration, but to avoid drawing too many detailed distinctions.

A matrix for the concordats was issued in February 1998.⁶⁴ It provided a list of items which would likely have to be addressed in the different concordats. These included consultation arrangements, early notification of policy initiatives, the creation of joint working groups, rules of confidentiality, liaison and agency arrangements, access to research and technical advice, consultations about appointment, dispute resolution mechanisms, and provisions for review. This template has been followed in most cases, although the degree of detail differs depending on the UK Department and the particular subject matter involved.

In the first year following the inauguration of the devolution settlement, nearly ten multilateral intergovernmental were concluded in the UK,⁶⁵ and over twenty bilateral concordats were signed between Whitehall Departments and the Scottish Executive.⁶⁶ A general Memorandum of Understanding (MOU) and five supplementary multilateral agreements (often referred to as the 'overarching concordats') were concluded between the UK government, the Scottish Ministers and the Cabinet of the National Assembly for Wales in the early fall of 1999, a few months after devolution arrangements took effect. They were made public in Scotland, Wales and London on October 1, 1999 and presented to their respective legislative assemblies.⁶⁷ A new version of the Memorandum of Understanding was issued in the summer of 2000, to take account of the renewed devolution process in Northern Ireland.⁶⁸

The Memorandum of Understanding outlines general principles of information-sharing, early-warning and rules of confidentiality. It introduces a multilateral body to be chaired by the Prime Minister or his representative, the Joint Ministerial Committee, as well as 'functional' multilateral ministerial committees, charged with the conduct of some intergovernmental relations in particular policy areas.⁶⁹ The first of the five 'supplementary

⁶⁴ *Guidance on Concordats between the Scottish Executive and UK Government Departments*, Feb. 1998, reproduced as Appendix A, Winetrobe, pp. 19-20. See also, *Scottish Executive, Guidance Note on Common Working Arrangements*, SE website, 23 Jan. 2000, Annex A.

⁶⁵ It is difficult to ascertain the exact number because some agreements contain sub-agreements and annexes.

⁶⁶ Again, the exact number depends on the characterisation given to sub-agreements, annexes, supplementary working-level arrangements and so on. See www.scotland.gov.uk/concordats. For a discussion of the content of some of these agreements, see Rawlings (2000), pp. 266-78.

⁶⁷ Cm 4444 for the UK version ; SE/99/36 for the Scottish one. No precise date of signature is provided.

⁶⁸ Cm4.806 Devolution to Northern Ireland was suspended in Feb. 2000 (*Northern Ireland Act 2000*, ch.1) and reinstated at the end of May 2000: The new MOU was published as Cm 4806 (UK version). Since this MOU is also multilateral and should normally replace the original one, it would have been normal for them to be published on the other devolved assemblies' websites. So far this has not been done, and reference is always made to the original MOU (of Oct. 1999).

⁶⁹ Several meetings of the functional ministerial committees have taken place in the course of the first year, notably in the fields of Health, Knowledge Economy and Poverty. A plenary session was held on September 1, 2000 at the behest of the devolved administrations: see Declaration of the UK Prime Minister Blair, 01.09.2000. For a discussion of the activities of the JMC, see Hazell (2000), pp. 1-3.

agreements', published as Part II of the MOU, provides additional details about the mandate and terms of reference of the Joint Ministerial Committee and of the multilateral secretariat established to support it (Agreement A). The others, all named 'concordats', cover the Co-ordination of European Union Policy Issues (B), rules governing Financial Assistance to Industry (C), the participation and representation of devolved administration in International Relations over which the UK governmental still has exclusive competence (D), and finally rules governing the collection and transmission of statistics between different orders of government (E).

The MOU and the Agreement on the Joint Ministerial Committee are multilateral (UK, Scotland, Wales). Concordats C and E are also multilateral. Concordats B and D are composed of four sub-agreements: a common Annex which is multilateral, and three bilateral concordats (UK-Scotland, UK-Wales and UK-NI)⁷⁰. Those could have been conceived as concordats in themselves. Their introduction as parts of a larger concordat only seems to be a matter of presentation.⁷¹

In addition a series of policy-wide bilateral concordats has also been concluded between the Scottish Executive and particular Whitehall Departments.⁷² Some provide further details to the over-arching concordats.⁷³ Some of the bilateral agreements have detailed annexes which are more 'subject-specific'.⁷⁴ In other cases, instead of annexing a more detailed agreement, parties have concluded 'working level agreements'⁷⁵ or anticipate the adoption of 'working procedures, documents, desk notes and other working arrangements'.⁷⁶ The name given to an agreement does not appear to have any bearing on its formal status. None

⁷⁰ The original MOU of Oct. 1999 only had three annexes, since devolution to Northern Ireland was suspended at the time of conclusion of the first concordats.

⁷¹ A Guidance Note on 'Common Working Arrangements', adopted in January 2000 plays a similar role: it is apparently addressed by the UK to its administration and (at least) by the Scottish Executive to its administration. It was agreed to by the 'Official committee of the Joint Ministerial Committee'. It complements the MOU, and in fact, reproduces important sections of it. It is unclear why parallel, but identical, 'Guidance notes' were chosen as a mechanism, rather than an additional multilateral concordat. An Annex to this Guidance note (dated January 2000) deals with the drafting of concordats and is again almost identical to the Guidance note on the drafting of concordats which preceded the devolution process itself (issued in 1998). This illustrates one of the difficulties with the numerous types of documents related to the devolution process, including concordats: they are published on a variety of websites, at different dates, without reference to earlier versions etc.

⁷² Treasury; Home Office; Cabinet Office; Defence; Lord Chancellor; Environment, Transport and the Regions; Education and Employment; Social Security; Agriculture, Fisheries and Food; Culture, Media and Sport.

⁷³ *Concordat on Co-ordination of EU, International and Policy Issues on Public Procurement between the UK Government and the Scottish Executive*.

⁷⁴ *Concordat between the Department of Environment, Transport and the Regions and the Scottish Executive*, Annex 2, art. 2.1.3 and 2.7.1.

⁷⁵ *Working Level Agreement on Job Search and Support and Job-Related Training*.

⁷⁶ *Multilateral Concordat on Health and Social Care*, art. 2.

of the agreements adopted in the wake of the devolution process are conceived as legally binding.⁷⁷

The 1998 Guidance note on the drafting of concordats specified that they would normally be signed 'at senior official level', but that those dealing with particularly sensitive issues could be signed by Ministers.⁷⁸ A few of the agreements have been concluded by the UK Government,⁷⁹ some by UK Departments, and others by UK Ministers. In Scotland, the majority of the concordats and agreements have been concluded by the Scottish Executive, some by the Scottish Ministers, and in at least one case, clauses shift from one designation to another within the same concordat.⁸⁰ The published texts rarely indicate, however, who the exact signatories were,⁸¹ nor the date of conclusion of the agreement. In other words, the initial agreements envisaged as an integral part of the devolution settlements were clearly intended to be intergovernmental instruments. The actual parties, and the exact signatories, when they can be ascertained, are executive agents.

I will now examine the concordats and agreements that have been concluded so far through the prism of the five functions analysed in the first part of this article. Because of the particular nature of the current concordats, it is preferable to start with the procedural cooperation function.

a) Procedural cooperation

The maintenance of a unified civil service in the post-devolution raises concerns of conflicts of interests.⁸² The Civil Service Code, which applies to all civil servants in Great Britain underlines that while they are 'servants of the Crown', they 'owe their loyalty to the Administration in which they serve'.⁸³ Scottish Ministers appoint staff of the Scottish

⁷⁷ Although the status of future agreements may not be as crystal clear, especially if the constant disclaimer that concordats create legal obligations were to be omitted.

⁷⁸ *Guidance*, art. 7.

⁷⁹ The *MOU* and the *Supplementary agreements*. See also: *Concordat on Co-ordination of EU, International and Policy Issues on Public Procurement* or the *Concordat on European Structural Funds*.

⁸⁰ In Scotland, it is the 'Scottish Ministers', as members of the Executive are collectively referred to, who exercise executive power: s. 53 *Scotland Act*. The Executive is defined in s. 44 (1) of the SA. It includes the First Minister, Ministers he appoints pursuant to s. 47, the Lord Advocate and the Solicitor General for Scotland. In other words, junior ministers are excluded. For the confusion in designation, see art. 2 and 6 of the *Concordat on European Structural Funds*. The *Concordat between the Department of Social Security and the SE* specifically defines -for its own purposes- the SE as the Scottish Ministers and their officials (fn 2).

⁸¹ A rare exception is the *Concordat between the Department of Culture, Media and Sport and the Scottish Executive*.

⁸² *Scotland Act*, s. 51 ; art. 10, *Concordat between the Cabinet Office and the Scottish Administration*.

⁸³ Cabinet Office, *Civil Service Code*, 01.01.1996, as amended on 13.05.1999, see in particular art. 1, 2, 5, 9, 10 and 12 ; see also Gay, p. 20. For a critique of the decision to maintain a unified civil service, see Hazell, Robert, and Morris, Bob, 'Machinery of Government: Whitehall' in Hazell (1999), pp. 136-55, at p. 138.

Administration, but organisationally they are integrated and governed by rules of the Home Civil Service. This presents advantages in terms of mobility and potential dissemination of ideas and good practice. The risk of contradictory instructions or, more likely implicit expectations, is obvious however, especially in the foreseeable situation of distinct political parties governing in London and Edinburgh or Cardiff. To give just one example, what if a civil servant's superior is reluctant to send a policy document South, while the civil servant's counter-part in London requests a copy of the policy statement? This is the kind of situation which many of the concordats concluded so far seek to avoid.

Upon their publication, these initial agreements were described as 'a robust framework for co-operation and communication', and as 'a solid foundation for good working relations'.⁸⁴ Principally concerned with consultation processes, these initial agreements and concordats thus have a 'procedural' function. The primary aim of the Memorandum of Understanding 'is not to constrain the discretion of any administration but to allow administrations to make representations to each other in sufficient time for those representations to be fully considered'.⁸⁵ All multilateral and bilateral agreements comprise undertakings to share information in a timely fashion.⁸⁶ Processes for consultation on draft legislation, policy papers, even for an early notification of press releases are outlined. Different concordats set up joint working groups or monthly meetings. They explain how correspondence wrongly addressed to an administration is to be handled. They emphasise the need to respect rules of confidentiality as well as applicable norms of access to information.

A second and related theme which runs through the initial concordats is continuity with previous arrangements between various Whitehall Departments and the Offices of the Secretaries of State so that policy-delivery will not be disrupted, even after the seat of political accountability has changed. Pursuant to the 1998 Guidance note on the drafting of concordats the general purpose of the agreements was 'to preserve the good working relationships which currently exist and ensure that the business of Government in Scotland and Wales and at the UK level is conducted smoothly and efficiently after devolution takes effect'.⁸⁷ Several of the concordats assert continuity. Relations between Whitehall Departments and the Scottish Office are to be transposed, without much alteration, into the post-devolution relations between those same Departments and the Scottish Executive. For instance, the Concordat on Financial Assistance to Industry was designed to replace existing coordination measures between the Department of Trade and Industry and the Scottish

⁸⁴ See SE press release, SE 775/99, 1.10.1999 and OSSW Press notice, 11/99, 1.10.1999, both reproduced in Winetrobe, pp. 22-23.

⁸⁵ *MOU*, par. 4.

⁸⁶ Even if this is sometimes qualified with terms such as 'when appropriate', 'reasonable' and so on.

⁸⁷ *Guidance note on common working arrangements*, Annex A, art. 1.

Office. It recognises that the parties 'have inherited common guidelines on financial assistance' which are not to be modified without adequate consultation.⁸⁸

b) Policy co-ordination

The distribution of powers between the UK government and its departments on the one hand and the Scottish administration effected by the Scotland Act and its Schedules follows several models. Some powers are exclusive (although this term must be used with a great deal of caution),⁸⁹ others concurrent. In addition to 'legislative' devolution, accompanied by the transfer of executive powers, the Scottish Executive may exercise administrative powers in policy areas which have remained under the legislative competence of Westminster. Regardless of the particular technique used in a specific policy area, the degree of overlap between devolved and non-devolved matters is likely to be significant.⁹⁰ Whether the purpose is to prevent disruption in public service in the transition period, or harmonisation of policies in the long run, there is also a need for agreements on more substantive matters. Thus, the need for co-ordination over interlocking competences, which has led to the conclusion of intergovernmental agreements in other systems, is likely to be felt in much of these arrangements.

While the current concordats are essentially described as procedural, many contain rules of continuity in substantive terms. They indicate not only how things are to be done, but who must do them. Sometimes this is expressed in terms of continuity with previous practice. Hence, the Concordat on European Structural Funds provides that the Scottish Executive will take over the responsibilities of implementing all programmes in Scotland from the Scottish Office.⁹¹ A Concordat on culture specifies that pre-devolution arrangements on the export of works of art or acceptance of works in lieu of taxes 'will be maintained'. Similarly, a multilateral Concordat on Health and Social Care provides that arrangements previously in place with the UK Department of Health to provide services to Scotland, Wales and Northern Ireland 'will continue for the time being on the basis of existing custom and practice until more detailed arrangements are agreed'.⁹² If the maintenance of particular arrangements is provided by concordat, one can surmise that modification of these arrangements would follow the same route. In other words, concordats will be used to coordinate policy development and implementation.

In fact, several of the concordats already contain clear aspects of policy coordination. A concordat on fisheries divides the monitoring of distinct fishing fleets between the UK

⁸⁸ *Concordat on Financial Assistance to Industry*, art. C.13.

⁸⁹ The term 'exclusive' must be used with care in this context, since Westminster has the constitutional power to legislate on any devolved matter: *Scotland Act*, s. 28(7).

⁹⁰ Cornes, pp. 167-8.

⁹¹ *Concordat on European Structural Funds*, art. 12.

⁹² *Concordat on Health and Social Care*, art. 14.

Department and the Scottish Executive.⁹³ In another one, the Cabinet Office undertakes not merely to consult and inform the Scottish Executive, but to provide support and services to the Scottish Administration, including procurement, cars and drivers, and secure mail services.⁹⁴ The Concordat on Statistics provides that technical services offered by the Office of National Statistics to the devolved administrations will be subject to cost-sharing agreements.⁹⁵ Apportionment of costs is also provided in the case of cross-border authorities.⁹⁶

Hence, while the MOU, the 'overarching agreements' and the bilateral concordats concluded so far mostly deal with process and procedure, some do contain substantive clauses. Moreover, some undertakings are clearly difficult to classify and have both procedural and substantive undertones. In the end, it is not particularly important to define the prime function of a particular agreement. My point is simply the following: describing them as simple guidance on consultation procedures only paints part of the picture drawn so far. Furthermore, it is likely that more substantive agreements will develop with time, pursuant to policy imperatives. Such a development would be consistent with the experience of federal and pre-federal systems where agreements deal mostly with policy, rather than with process.⁹⁷

c) **Para-constitutional engineering**

The MOU calls upon the parties to communicate 'especially where one administration's work may have some bearing upon the responsibilities of another administration'. Each government undertakes to 'encourage' its respective legislatures 'to bear in mind' the responsibilities of the other.⁹⁸ All parties are to be guided by the underlying principles of the devolution settlement. Communication and respect for each other's responsibilities is to be accomplished through an early warning system on policy development, if possible prior to publication of policy documents, through 'appropriate consideration to the views of the other administration', and through a variety of joint policy-making in areas of shared

⁹³ *Subject Specific Concordat between MAFF and the SE on Fisheries*, art. 10.

⁹⁴ *Concordat between the Cabinet Office and the Scottish Administration*, art. 21, 28 and Annex D.

⁹⁵ *Concordat on Statistics*, art. E10.2 and E10.7.

⁹⁶ E.g., 'British Waterways': *Concordat between the Department of the Environment, Transport and the Regions and the Scottish Executive*, Annex 1, art. 1.9.2. On cross-border authorities, see *Scotland Act*, ss. 88-90

⁹⁷ *Art. 2 of the Guidance on drafting concordats* of Feb. 1998, (republished as Annex A to Guidance Note 1, in Jan. 2000), suggests that in addition to concordats, other 'less formal' arrangements could sometimes be sufficient. The possibility that *more* formal arrangements may eventually be necessary was not even contemplated. Note that pursuant to s. 93 of the *Scotland Act*, UK Ministers may transfer the exercise of their non-legislative functions to Scottish Ministers, and vice-versa, through 'agency agreements'. The functions so transferred are identified by (UK) orders-in-council. This would appear to grant a greater legal status to 'agency agreements' than to concordats. The 'policy-coordination' concordats I have in mind are not as formal as those 'agency agreements', although they could, in some instances, have similar objectives.

⁹⁸ *MOU*, art. 4, 14, 15.

responsibilities. The different concordats create working groups, and a variety of information-sharing processes, including early notification of policies, proposed legislation and even press releases. The code-word is 'no surprise'. Concordats also underline the importance of treating transferred information with discretion and respect rules of confidentiality. These concerns are covered by the procedural cooperation function, but they also seem to play a fundamental role from a constitutional perspective.

The repeated concern for the interest of the other orders of government has echoes of the principle of 'federal comity' elaborated by German courts,⁹⁹ or of 'federal loyalty' enshrined in the Belgian Constitution.¹⁰⁰ In Germany, the Constitutional Court held this principle of good faith to be inherent in the notion of federalism. It is said to create a duty to 'cooperate sincerely to reach a common understanding'¹⁰¹ to show 'mutual support and consideration [...and] to work together in accordance with the aims of the union and to contribute to its strengthening and to meeting the concerns of its constituent units'.¹⁰² In Belgium, the notion of federal loyalty was entrenched in the Constitution in 1993.¹⁰³ Minimally, it is described as an 'obligation of mutual non-aggression'¹⁰⁴. More generally, it implies that in exercising their constitutional powers, the different orders of governments 'should not disturb the equilibrium of the whole construction'.¹⁰⁵ The notion of federal loyalty or comity is particularly important in the context of the interface between the construction of the European Union and the federal structure of some of the members states. For instance, in 1995 the German Constitutional Court found that when it approves European community regulations in matters falling within the competence of the Länder, the German federal government had a duty to consult with the Länder. The principle of comity dictates that the federal authorities consider the position of the Länder, although the latter's final consent was not required.¹⁰⁶

While neither the *Scotland Act* nor the various concordats concluded so far contain a catchphrase such as 'devolution loyalty' or 'comity', exhortation to take the interests of the other parties into consideration point to a similar purpose. With their detailed account of how consultation is to be carried out, the Memorandum of Understanding and the other

⁹⁹ Blair and Cullen, pp. 132-141 ; Kommers, Donald P., *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed., Duke U. Press, Durham/London, 1997, pp. 69-75.

¹⁰⁰ Art. 143, *Constitution of Belgium*. On the notion of federal loyalty, see: Verhoven, Joe, *La loyauté*, Larcier, Bruxelles, 1997. See also Ch. 3 of the *Constitution of South Africa* (1996).

¹⁰¹ Blair and Cullen trace the ups and downs of the doctrine over the last 45 years, pp. 133 ff. See also Currie, p. 77.

¹⁰² Schneider, Hans-Peter, 'German Unification and the Federal System: The Challenge of Reform' in Jeffery, pp. 58-84 at p. 64.

¹⁰³ Art. 143, *Belgian Constitution*. Note that the notion is not directly justiciable.

¹⁰⁴ Lagasse, p. 341.

¹⁰⁵ See Belgian Parl. Doc., Senate, 100-27/8 (ES 91-92), p. 20.

¹⁰⁶ *Television case*, discussed in Kommers, p. 75. Such a conclusion could potentially be reached through the application of the doctrine of procedural legitimate expectations.

concordats provide a concrete illustration of how institutional respect for the settlement agreement is to operate.

The Memorandum of Understanding seems to play another fundamental constitutional role in the devolution process. Devolution does not squarely modify the doctrine of parliamentary sovereignty as it has traditionally been understood, at least in England. Hence, the White Paper on *Scotland's Parliament* clearly states that '[t]he UK Parliament is and will remain sovereign in all matters [...] The Government recognise that no UK Parliament can bind its successors'.¹⁰⁷ The most explicit confirmation of the supremacy of the UK Parliament lies in section 28(7) of the *Scotland Act* pursuant to which Westminster can legislate on any matter, including those devolved to the Scottish Parliament.

Nevertheless, in the Memorandum of Understanding the UK Government agrees to 'proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature'.¹⁰⁸ In attempting to curb the *exercise* of Westminster's sovereignty over devolved matter, the Memorandum of Understanding stipulates that:

'[t]he UK Government will encourage the UK Parliament to bear in mind the primary responsibility of devolved legislatures and administrations in these fields and to recognise that it is a consequence of Parliament's decision to devolve certain matters that Parliament itself will in future be more restricted in its field of operation'.¹⁰⁹

Concretely, this suggests that the UK Government should not introduce legislation into Parliament, or that it should oppose any private Member's bill concerned with devolved matters, if this approval has not been obtained.¹¹⁰ For obvious reasons, the statement is not descriptive of an existing practice or custom which may or may not be considered binding by the relevant actors. It is clearly prescriptive of future conduct.¹¹¹ In other words, the Memorandum of Understanding sets explicit foundations for the 'evolving' convention on

¹⁰⁷ White Paper, *Scotland's Parliament*, art. 4.2

¹⁰⁸ MOU, art. 13. See also statement by First Minister Dewar to Scottish Parliament, O.R., 9.6.99, col. 358.

¹⁰⁹ MOU, art. 14. Note that the Scottish Executive makes the corresponding undertaking, that is to remind the Scottish Parliament of the devolution settlements. But to the extent that the Scottish Parliament is not sovereign and cannot trump the powers of Westminster, the parallel is more cosmetic than substantive.

¹¹⁰ On this, see also art. 15, *Guidance note 10*, Cabinet Office (www.cabinet-office.gov.uk/constitution).

¹¹¹ A criterion which distinguishes constitutional practice and convention: Brazier (1992), p. 266. It is interesting to note, however, that the *Concordat on International Relations*, presented together with the MOU, specifies that despite this undertaking 'instances may arise, for reasons such as urgency, where full consultation and agreement is impractical'. Common Annex, D3.12. The example given is of the implementation of UN Security Council Resolutions by order in council, a not altogether good example of legislation by the Westminster Parliament in contradiction to the evolving convention.

which the devolution settlement is built. This is consistent with Marshall's contention that the content of conventions is 'determined partly by special agreement'.¹¹²

In the event that the Westminster Parliament intends to legislate regarding a devolved matter (presumably pursuant to the wish of the UK Government), the Memorandum of Understanding further specifies that '[t]he devolved administrations will be responsible for seeking such agreements as may be required for this purpose on an approach from the UK Government'.¹¹³ This commitment by the Scottish Executive that it will seek to ensure the consent of the Scottish Parliament, when the Parliament of Westminster is set upon legislating on devolved matters ironically makes them participants in the post-devolution exercise of the sovereignty of the Westminster Parliament. Again, the importance of this undertaking by the UK Government and the Scottish Executive belies the conception of concordats as mere 'road maps for bureaucrats' and points to their para-constitutional function.

d) 'Regulating by contract'

A reference was made above to the criticisms which have been formulated concerning the use of intergovernmental agreements as tools of indirect regulation under the guise of covenant. In the UK devolution context, it is arguable that the ultimate power to legislate even on devolved matters which the Westminster Parliament has retained could also be used as a veiled threat to encourage the conclusion of certain intergovernmental agreements. Certainly, some politicians have complained that the concordats concluded so far weigh heavily in favour of UK Departments.¹¹⁴ They point to the fact that the Joint Ministerial Committee both in its plenary and functional incarnations is always to be chaired by UK Ministers. While some of these criticisms emphasise certain arrangements and

¹¹² Marshall, p. 217.

¹¹³ *MOU*, art. 13. In fact, the Westminster Parliament has already legislated on devolved matters, following what is described as the 'Sewel convention': see, for example, the *Criminal Justice and Court Services Act 2000*, and the *Food Standards Act 1999*, ch. 28 (UK Parliament). The Scottish Parliament's consent is provided through a motion. For instance, in the case of the *Justice and Court Services Act*, which deals with sexual offenders, a motion of consent was adopted unanimously (but still gave rise to some debate, especially on the part of the SNP, on the legitimacy of letting the UK Parliament legislate on devolved matters): see O.R., Scot. Parl., 5.10.2000, c. 1030-1057.

¹¹⁴ E.g. Alex Neil MSP, talks of 'Westminster-imposed diktats' (SNP press release 1.10.1999, cited in Winetrobe, p. 9). See also his statements, O.R., Scot. Parl., 7.10.1999, c. 1115. For Rawlings, concordats are as lop-sided as the whole devolution design: (2000), p. 266 ff. Others have criticised the fact that the Scottish Executive undertakes to support a single UK negotiating line at the EU level: see Ron Davies, MP, former Secretary of State for Wales, Records of Proceedings, Welsh Assembly, 7.10.1999, quoted in Gay, p. 35. There is ample provision for consultation of the Scottish Ministers in elaborating that position, but their consent is not required. So they could have to support a position with which they disagree, in an interesting reconstruction of pre-devolution Cabinet solidarity.

overlook others,¹¹⁵ they do underline the particular nature of devolution, and the dominant position which the UK institutions ultimately occupy.

Of course, concordats and other agreements are not binding in law, and are therefore not contracts *per se*. Nevertheless, Lajoie's analysis of non-binding agreements as indirect regulation by consensual quasi-contractual means may be apposite in this context.¹¹⁶ This is not to suggest that the agreements concluded so far are instruments of regulation by the centre. My point is simply that there is a possibility that the balance of power could eventually be reflected in post-devolution intergovernmental agreements.

e) **Agreements as 'soft law'**

In his critical analysis of the opaque nature of concordats, and of the lack of accountability which 'bureaucratic law' implies, Rawlings writes:

Whereas to the lawyer concordats appear low in the hierarchy of rules governing administration, the civil servant naturally sees things differently [...] the fact of writing things down is significant. Concordats are seen performing functions inside the civil service familiarly associated with a process of formal legal codification.¹¹⁷

Indeed, these non-binding agreements, concluded by executives and without parliamentary scrutiny, are likely to be important guides to public officials who have to make devolution work. In a sense, this is not very different from internal directives which can have a major influence on the priorities and culture of a civil service, despite their lack of legal underpinnings. In that context, a non-binding rule can be treated as mandatory. The formality involved in the presentation of the MOU and other concordats, and the fact that they have systematically been published, is a major improvement over the way agreements used to be concluded in countries such as Canada. The importance which has been attached to the agreements as ground-rules for cooperation is likely to increase the weight afforded to them by civil servants. They are soft-law instruments, with a slightly harder edge.

Again, to give an example amongst many, the concordat on defence expands on Schedule 5 of the *Scotland Act* and provides an illustrative and detailed list of 28 types of activities

¹¹⁵ Admittedly, less significant, at least in symbolic terms. For instance, the Welfare to Work Planning Group created under the *Working Level Agreement: Job-Search and Support and Job-Related Training* is chaired by a representative of the Scottish Executive: art. 5 ; while the Fisheries Science Customer Group introduced by the *Subject Specific Concordat between the MAFF and the SE on Fisheries*, will be chaired alternatively by both parties (art. 24).

¹¹⁶ Rawlings describes concordats as 'pseudo-contracts' by which he means 'the use in public administration of contract-type arrangements which are not true contracts in the legal sense of an agreement enforceable in the courts': 'The New Model Wales', (1998) 25: 4 *J. of Law and Soc.* 461 at p. 502 ; see also Rawlings (2000).

¹¹⁷ Rawlings (2000), p. 280.

'likely to be included' in the matters reserved to the UK Government. Under normal circumstances, civil servants will likely be strongly influenced by this agreed description of reserved tasks, in spite of the fact that the concordat specifies that the list is not meant to preclude precise determination by courts.¹¹⁸

As was mentioned in the first part of this article, this fifth function is very closely related to the fourth one. Indeed, pseudo-contracts or quasi-contracts constitute a soft-law technique. In the first case, however, the decision to regulate by contract (or 'pseudo-contract') reflects a political choice: that of negotiating with a partner, rather than imposing one's will through legislation. In the case of the UK Government, armed with its effective domination of the sovereign Westminster Parliament, the decision to conclude intergovernmental agreements partakes of this political calculus. The 'soft-law' function I underline here is slightly different. It is not a question of the choice of arms, but of the actual impact of the arm chosen. The 'regulating by (pseudo-contract)' function underlines the aim of using non-legal or non-legislative means in order to improve intergovernmental relations, respect the devolution settlement and ensure smooth political relations. The 'soft-law' function, in the sense I use it here, simply illustrates that non-legal tools can be interpreted and applied by significant actors, such as civil servants, just as if they were legal instruments.¹¹⁹

CONCLUSIONS

To paraphrase Zimmerman, governance in a multi-layered democratic state is 'inherently complex compared to governance in a unitary system'.¹²⁰ Different administrations will face different political imperatives, even when responding to the needs and preferences of the same population. Conflicts are inherent in democratic structures, as they are inherent in complex states, be they federal, quasi-federal, or pre-federal. The challenge is not to eliminate conflict, but to minimise and manage it. The devolution settlement has, at least with regard to Scotland, been introduced with relative smoothness and effectiveness. Concordats are, in my view, effective tools to ensure continuity and future collaborative process. They also flesh out the will to collaborate (so far). Once the initial wave of devolution has passed, however, disagreements will almost inevitably arise. The likelihood of discord will of course be exacerbated when different administrations are governed by different political parties or coalitions. The risk of discord may also increase once the

¹¹⁸ This example could also support the argument that concordats play policy-coordination and para-constitutional and functions, in the first case because it outlines 'who does what', in the second because it can be seen to supplement the description of reserved matters found in Schedule 5 of the *Scotland Act*.

¹¹⁹ Harlow and Rawlings (1997), pp. 177-78.

¹²⁰ Zimmerman (1992), p. xi.

decision-makers in place are no longer those who formed part of the initial team which charted the devolutionary process, people who actually know one another and are used to working together. It is then that the effectiveness - or vulnerability - of concordats will be tested.

From a comparative point of view, the architects of devolution in the UK have shown a great deal of foresight in requesting their civil service to anticipate collaborative processes as well as dispute resolution mechanisms. It took Belgium nearly twenty years to introduce co-operative agreements, while Canadian intergovernmental agreements are, at best, an haphazard if ubiquitous institution. Moreover, those agreements are more substantial than process-oriented. This does not diminish their importance of course. But it underlines that while Belgium was in the process of fundamental constitutional decentralisation, and while Canada has been pulled towards both increased centralisation and decentralisation, 'a road-map for civil servants' to guide them in their dealings with their counter-parts in other orders of government has not been provided. While those road maps will only be as good as the political will of the leadership, their very existence, from the early days of devolution, may provide the initial impulsion for co-operation which can be counter-intuitive in a centrifugal constitutional process.

Regardless of their legal status, concordats and other intergovernmental agreements in post-devolution UK play similar functions to intergovernmental agreements in federal systems. They are also original in their programmatic (promotion of good relations) as well as pragmatic (solving practical problems as they arise) missions. In light of the experience of other countries, it is likely that the conclusion of further agreements dealing with policy-coordination will be necessary. In governing the behaviour of the civil servants entrusted with the challenge of 'making devolution work', they fulfil a soft-law role. Finally, time will tell whether the MOU will be effective in harnessing the exercise of the sovereignty of the Westminster Parliament (a para-constitutional function) and whether agreements will serve as indirect tools of 'regulation by contract'.