

Intergovernmental Relations In Federal Systems: Ubiquitous, Idiosyncratic, Opaque And Essential

Abstract

Regardless of institutional design, all federal systems imply substantial degrees of interaction between federal partners. "Intergovernmental relations" (IGR) refer to the many modalities through which this interaction takes place. IGR take many shapes and forms. They fluctuate with time and according to policy areas. In this sense, they are idiosyncratic. They are, however, the essential "oil in the machinery" of every federal system, and as such may be rather ubiquitous. Following a short incursion in the terminological challenges relating to intergovernmental relations (and its companion: "comparative federalism"), this article explores the actors in the IGR game as well as the rich catalogue of legislative – and mostly executive-techniques on which these actors rely to structure their relations. IGR waltz between institutionalization and informality, often in an opaque fashion which tends to reinforce the executive branch of each federal partner.

This brief overview of IGR from a comparative perspective suggests that federations grounded in the "continental civil law tradition" are more likely to structure IGR through legal mechanisms and norms than their more pragmatic "common law" counterparts. Though this is a significant simplification, the latter tend to consider IGR primarily (if not exclusively) through a political lens. Yet – somewhat paradoxically – regardless of informality and legal status, IGR play similar functions in various federal systems. Coordination functions, of course. But also para-constitutional engineering ones, through which federal actors (generally the various executives) implicitly alter the official federal architecture.

Introduction

Politics based on federal principles are complex systems, each with their own internal logic and means of translating into concrete forms the combination of self-rule and joint rule. Regardless of how competences are actually divided in diverse federal arrangements, substantial interaction between federal partners is always – and probably increasingly – inescapable. In many federations, any significant policy development often requires some form of collaboration – or generates some friction – between orders of government. “Intergovernmental relations” (IGR) are the various means and processes through which this interaction takes place. More prosaically, IGR are the “oil in the machinery” of federal systems. They are an inevitable component of every federal institutional architecture.

IGR are affected by a wide range of factors, including geography, history as well as political and legal culture. Hence, while they are found everywhere, they take a specific colour (or shade of grey!) in specific federal environments. Dominant federal design (such as the number of constitutive units, the distribution of legislative and administrative competences, redistributive mechanisms and so on) will influence how IGR are conceived and unfold. The form of government (presidential, parliamentary, council-type) also has an impact, as do party politics and electoral systems. Diversity (ethnic, religious, linguistic) impacts on relevant IGR actors and dynamics. As a result, the study of IGR must be highly contextualised. The generalisations offered in this contribution are thus rather perilous.^[1]

The Challenge of Terminology

The very expression “intergovernmental relations” is, from a comparative perspective, problematic. In English-speaking political science literature, IGR traditionally refer to the wide variety of ways in which orders of government enter into relations with each other. By contrast, in European-type federations, the expression “cooperative federalism” has tended to dominate, notably among jurists. Unfortunately, neither expression is fully adequate. “Inter-*governmental* relations” suggests that relevant interaction is the purview of the executive branch of each order, thus marginalizing other institutional arrangements. As for “cooperative federalism”, it is clearly under-inclusive, since interaction between federal partners does not only include cooperative institutions and practices, it also involves conflict, competition and coercion.^[2] “Cooperative federalism” thus paints a picture that is far more harmonious than is often the case in the daily life of federal systems.

To complicate things further, the term “intergovernmental” is even more problematic in the context of the EU (examined through a “federalist” lens). In EU jargon, “intergovernmental” essentially refers to the “*international* relations” the member states maintain between themselves as sovereign states rather than as members of a (quasi)federal polity. In other words, the expression “intergovernmental relations” could be interpreted as antithetical to the federal dimension of the EU.^[3] Clearly, this may generate a certain degree of confusion. This said, in what follows, I will use the generic “IGR” to refer to modalities, institutions and processes that structure relations between orders of government (and some third parties) in a federal-type arrangement.

Who’s who in IGR?

As the term suggests, *intergovernmental* relations take place between formal state actors: the official components of a federal regime. IGR can be vertical (between “central authorities” and constitutive units), horizontal^[4] (between the latter), bilateral or multilateral.

Increasingly, however, IGR involve third parties which are not “official” actors in a federation: municipalities (when these are not formally incorporated as a third order of government), indigenous peoples, private interests, minority groups and civil society. The emergence of new players adds further layers of complexities to IGR. Yet, taking third parties into account offers a more complete portrait of how power is actually exercised, negotiated and shared in federal systems. When central authorities deal more “directly” with these new actors, the impact may be of marginalising the “official” components of a

federation, thus creating what has been termed “hour-glass federalism” in which the state/province level is largely being bypassed.^[5] But this is not always the case, as constituent units may also have closer links with some local “non-governmental” actors, which are included in the IGR game. For our purposes, what matters is that IGR are not (or no longer) conducted solely with constitutionally recognised holders of state power. This creates more complex decision-making and implementation networks, and also challenges the very conception that state authorities have a monopoly on the exercise of power.

A Rich Catalogue of IGR Institutions and Mechanisms

Intergovernmental interaction takes place through a wide range of institutional arrangements. Some involve legislative institutions and techniques. These include, of course, bicameralism, in which (federal) chambers are meant to give a voice in federal law-making to constituent units. But IGR may also take the route of parliamentary committees, and in some cases of direct cooperation between parliaments and elected officials of various orders of government. Legislative harmonisation, coordination and delegation are also used to limit dissonance between orders of government without resorting to the centralisation or uniformity that would often contradict the very purpose of the federal regime.

However, by far the most frequent modalities of IGR involve the executive branch. Executive-type IGR include the integration of members of constituent units in the composition of the federal cabinet, high profile fora or meetings of the top executives of various orders of government (Presidents and governors, Prime ministers and premiers, for instance) and innumerable meetings between policy specialists from all (or a number of orders) of government. They may also involve specialised agencies to which administrative functions are delegated by orders of government.^[6]

Another method for promoting coordination is through a partially integrated civil service, or at least one that values and enjoys mobility and interaction and/or common training. A “professional” civil service (one that is immune from partisan influence) is more likely to facilitate effective IGR in the context where there is no party congruence between various orders of government, or in cases of changes in dominant parties with differing political agendas. In other words, a professional public service can offer stability in the face of political change.

By far one of the most common instruments of structuring IGR is through intergovernmental agreements, which go under a variety of names, including “concordats”, “compacts”, “cooperation agreements”, “administrative agreements”, “accords”, “memorandums of understanding”, etc. Governments literally conclude dozens (and in some cases hundreds or even thousands) such agreements any given year. As will be noted below, some federations consider such agreements to be formal legal sources (generally with supra-legislative normative force), while others consider them to be political “until proven otherwise”.^[7]

Managing the plethora of collaborative institutions, techniques, and processes requires a complex logistic. In many cases, a specialised body or secretariat is mandated with tracking down and facilitating interaction, somewhat alike to a Department of Foreign Affairs. It can plan and oversee “high level” meetings, promote the conclusion of agreements, in some cases serve as a repository of those “inter-federal treaties”. In some instances, a specialised Department within orders of government centralises all actions to “inter-federal” relations, with a Minister specifically dedicated to maintaining those relations, again, in parallel with Ministers of foreign affairs. In other cases, this “umbrella management” lies with the office of the Head of government (federal prime minister or heads of the executive branch of the various constitutive units). Some inter-ministerial bodies have complex voting formula to adopt binding decisions. In other cases, such high level meetings function by consensus, which may lead to “lowest common denominator” agreements. Given an increasing trend in “horizontal” cooperation, secretariats that bring together all (or some) constituent units are also emerging.

When IGR are dominated by central authorities (when a federal minister always presides over inter-ministerial meetings for instance), the impact may, of course, be strongly centralising. This said, some federations do entirely without such bodies. The coordination work takes other routes, often using political party’ channels. This, of course, renders cooperation between federal partners led by different political parties more challenging, and often more difficult to track.

From Constitutionalised to Informal IGR...and Back.

Assessing the “formality” and “informality” of IGR partly depends on disciplinary and cultural lenses. Hence, it appears that jurists – particularly those trained in legal regimes that have been influenced by the romano-germanic tradition – tend to conceive as “informal” any mechanism that is not grounded in written and preferably legally-binding texts. By contrast, political scientists – and other analysts trained in a more pragmatic common law context – are more likely to focus on the predictability of the process, on its decorum, on the fact that relevant actors generally respect commitments regardless of legal status. In short, the boundary between “formal” and “informal” can differ depending on context, discipline and political/legal culture. The terms must thus be used with caution.

In some federations, IGR are officially grounded in legal (or even constitutionalised) rules and procedures. This is, of course, always the case of second chambers. But laws and regulations may also structure meetings at the highest levels, outline voting procedures, set-out the binding legal status of agreements concluded between federal partners. A recent Spanish law even sets out which intergovernmental documents and information must be made public and how.[8]

A comparative analysis of IGR in a variety of federations partly confirms a loose dichotomy between federations in which IGR are largely understood as political in nature, and those where interaction is more formally structured by law and controlled by courts. With the USA as a partial exception,[9] the first group is largely composed of federations that are grounded in the “common law” tradition, while the second is comprised of those which arose in the context of the more “legicentrist” romano-germanic (civilist) legal tradition.[10]

While broad generalisations ought to be used with caution, it would seem that the common law tradition allows for more fluid norms, and the idea that courts may *not* have the power to control (un)cooperative behaviour by federal partners seems justified from a separation of powers perspective. By contrast (and again, with caution), the civil law tradition is more “legicentrist” and actors trained in this tradition tend to like “things written down”. [11] They appear more wary of non-legally binding norms and tend to consider normal that judges – the formal arbitrators of the federal compact – may, to a certain extent, oversee how partners behave and relate to each other. Notably, in those regimes, the idea that a principle of “federal loyalty” – a form of constitutionalised good faith – may bind federal partners, and be subject to some form of judicial review, is more readily accepted.[12]

Similarly, students of federalism trained in the “civil law tradition” are more likely to consider “intergovernmental agreements” as formal legal sources, often with a supra-legislative status that precludes them being unilaterally repudiated by one of the parties. In common law federations which have inherited the British constitutional tradition, the principle of parliamentary sovereignty protects this autonomous and democratic capacity of legislatures to “change their mind”, over and above their commitment to keep to their word. This being said, this distinction should not be overstated either, since, in most cases, agreements enjoy a very high degree of effectivity, regardless of their formal status.

In short, the dominant common law or civil law legal culture seems to exert some influence on the design and workings of federal systems, and notably on cooperative mechanisms. This dichotomy must be nuanced however. A number of factors will also influence the degree to which formal law permeates IGR. Hence, federations established more recently are more likely to explicitly outline the “federal rules of engagement” in their constitutional text or other organic laws. They benefit from a number of examples of more explicit IGR mechanisms developed over time by older federal polities. Similarly, federations which emerged through a process of dissociation/disaggregation of a previous unitary state (by contrast to one of unification of pre-existing entities) are also more likely to adopt a legal framework to structure modes of interaction, given that it is often the lack of trust, or an experience of marginalisation by certain groups that led to the dissociative federal process in the first place. In that context, it might be feared that “spontaneous” cooperative relations are less likely to emerge.

In other words, empirical comparative analysis suggests that “law” – both in terms of norms and of judicial review – plays a greater role regarding IGR than is often thought to be the case even in the more “pragmatic” common law federations. Conversely, even in federations in which IGR largely ground in a legal framework, informal IGR (fora organised in parallel to

the formal ones, phone calls, emails, etc.) play an undeniably important function in the daily life of federations. Put another way, the impact of legal cultures may not be ignored, and the role of legal framework and rules should be acknowledged and more systematically studied. But the distinction between federations that consider IGR as part of public law, and those which relegate it to the world of politics ought not to be reified. In both cases, law and politics inter-mingle.

The ‘Para-constitutional’ Functions played by IGR

The obvious purpose of IGR institutions and processes is to help components of a federal state share information, articulate their respective actions in areas of exclusive competences, and structure their respective actions in areas of concurrent or shared competences. Through IGR they (should) develop more harmonious policies, set-up processes and bodies for sharing information, consultation, joint-decision making etc. IGR are used to negotiate or impose financial redistribution and to manage natural resources and inter-regional bodies of water, bridges, or student mobility. Again, the objectives and the panoply of means for realizing them are endless, with some parallels between federations, as well as rather unique arrangements.

This said, IGR also play less visible, less explicit functions. IGR may be very effective (and sometimes rather opaque) tools of constitutional (re)engineering. For instance, through delegations or agreements, federal partners may circumvent the formal distribution of competences. Formal and informal IGR mechanisms may, depending on context or periods, reinforce officially hierarchical or centralising arrangements or serve to counter those tendencies on the margins of the official institutional design of a specific federal regime. IGR may be used to create – or recreate – regional groupings, in a way that may officiously circumvent the formal territorial divisions (as is the case in Nigeria, for example).

IGR may, as we saw, incorporate non-governmental actors in public management and decision-making. They can serve to give a voice or provide services to minorities who do not enjoy the official “tools of state” that a territorial unit offers.^[13] IGR can also reinforce the multinational character of a federation, notably through the incorporation of asymmetrical arrangements that reflect power relations and/or concerns for the specific situation of minority groups or nations within the federation, for instance. In other words, beyond their “institutional planning function”, IGR can consolidate the multinational character of a federation.

In addition, IGR have been rather effective in officiously – implicitly – transforming officially dualist federations into partially “integrated ones”. This is done, for instance, when, through inter-delegation and/or agreements, one order of government which officially should be implementing its own laws and programmes (in the “dualist” mode), transfers this administrative function to another, in the name of rationalising policy-delivering. This may indeed lessen duplication and lead to more effective and streamlined services. However, over time, the trend can surreptitiously transform the “dualist” paradigm (Canada, Australia) into more “integrated ones” (Swiss, German), but without the internal safeguards that integrated federal systems have to ensure a strong voice in federal law-making. Both archetypes have their own internal and institutional logic. Shifts from one dominant conception to another may thus have an impact on the overall coherence and balance of the system, and may – gradually and implicitly – transform a federation’s official architecture.^[14]

Finally, IGR may serve to complement formal constitutional reforms (federal partners will sort out “details” once major principles have been enshrined). In other cases, IGR will be used as “alternatives” to constitutional reforms, particularly when constitutions are rigid and formal amendments seem impossible to attain. Of course, this may create a vicious/virtuous circle – having “non-constitutional” means of modifying the way a federal system actually functions may obviate the need to officially restructure it.

Conclusion

Regardless of the initial and official structure of a federal system, interdependence and interaction between orders of government is inevitable. Through intergovernmental relations, federal actors share information, pool and redistribute

resources, negotiate and implement cooperative arrangements that determine who does – or should – do what. This interaction takes place through a wide range of institutions and processes. Oddly, when contrasted with *international* relations, IGR are largely under-studied. This is particularly true of the most informal dimensions of collaboration, communication and negotiations between federal partners, with or without third parties. The results are essential networks which are often remarkably opaque. Deciphering IGR in any particular federal system thus amounts to lifting a veil on federalism “as it is lived”, concretely.

In short:

IGR are *ubiquitous*: except in the most centralised federations, hardly any policy area is immune from intervention by multiple orders of government. They are, in a sense, part of “federal destiny”;

IGR are *idiosyncratic*: despite commonalities, cooperative mechanisms and processes adapt to the particularities of every federal system, depending on history, timing, socio-demographic reality, form of government, federal design and legal culture;

IGR tend to be *opaque*: while some institutions are highly visible, a notable portion of relations between orders of government (and of those that increasingly include third parties) develop informally behind closed doors (or private electronic conversations);

IGR *reinforce the executive branch(es)*, sometimes allowing executives to do together, with little parliamentary scrutiny, effective judicial review or media analysis, what they might not get away with, when acting in their respective legal orders;

In conclusion, IGR are *essential*: the unavoidable “oil” in any federal machinery, but one that can generate serious challenges to transparency, accountability, the rule of law and democracy.^[15]

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[1] For more detail and references, see the General Introduction and the concluding chapter by Johanne Poirier and Cheryl Saunders in Poirier, Johanne, Cheryl Saunders and John Kincaid (eds), *Intergovernmental Relations in Federal Systems*:

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[3] Levrat, Nicolas, "The European Union: From International Relations to Intergovernmental Relations" in Poirier, Johanne, Cheryl Saunders and John Kincaid (eds), *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Oxford University Press 2015), pp. 174-205

[4] The terminology of "horizontal" and "vertical" interaction is commonly used in many federal systems to describe relations between constituent units and between units and the centre respectively. However, the adjectives may also be given other meanings. For instance, Stephens and Wikstrom use "horizontal" to refer to the separation of powers between legislative, executive and judicial branches (p.4), but also to refer to inter-state relations in the United States (p.30): G. Ross Stephens and Nelson Wikstrom, *American Intergovernmental Relations: A Fragmented Polity* (New York/Oxford: Oxford University Press, 2007).

[5] Thomas Courchene, "Hourglass Federalism" (2004) Policy Options (Canada) 12; Palermo, Francesco and Kössler, Karl, *Comparative Federalism: Constitutional Arrangements and Case Law* (Oxford and Portland, Hart), 2017, p. 315.

[6] Some agencies are created by one order of government but also exercise administrative functions delegated by other orders of government. Others act more at "arm's length" from executive branches and are more likely to be accountable a legislative assembly.

[7] On intergovernmental agreements: see, notably, Johanne Poirier, *Keeping Promises in Federal Systems: the Legal Status of Intergovernmental Agreements with special reference to Belgium and Canada*, PhD thesis, University of Cambridge, 2004: <https://www.repository.cam.ac.uk/handle/1810/276241> and other references in the bibliography.

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[9] Where Art. 1, section 10 of the Constitution provides for « interstate compacts » that can be interpreted and enforced by courts.

[10] Fleiner, Thomas and Saunders, Cheryl, "Constitutions embedded in different legal systems" in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *The Routledge Handbook of Constitutional Law* (Routledge, Oxford, 2013), 21-32.

[11] In fact, even bodies which develop alongside formal ones are likely to adopt «internal rules of procedures» (in Germany, for instance). This type of "formalisation" is highly unusual in other federations (such as Canada). On Germany, see: Roland Lhotta and Julia von Blumenthal, "Intergovernmental Relations in the Federal Republic of Germany: Complex Co-operation and Party Politics" in Poirier, Johanne, Cheryl Saunders and John Kincaid (eds), *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Oxford University Press 2015), pp. 206-238

[12] See, for instance: Gamper, Ana, "On Loyalty and the (Federal) Constitution" (2010) 4 Vienna Online J. on Int'l Const. L. 157.

[13] Johanne Poirier, « Fédéralisme coopératif et droits linguistiques au Canada : peut-on 'contractualiser' le droit des minorités ? », in Alain-G. Gagnon & Pierre Noreau, dir, *Constitutionnalisme, droits et diversité : Mélanges en l'honneur de José Woehrling*, Montréal, Thémis, 2017, pp. 317-347.

[14] See Gaudreault-DesBiens, Jean-François & Johanne Poirier, "From Dualism to Cooperative Federalism and Back?: Evolving and Competing Conceptions of Canadian Federalism", in Oliver, Peter, Macklem, Patrick & Desrosiers (eds), *The Oxford Handbook of the Canadian Constitution*, Oxford, OUP, 2017, pp. 391-413.

[15] Eva Maria Belser, "Heading Together – Intergovernmental Relations and Horizontal Law-making by Swiss Cantons" forthcoming in Johanne Poirier & Alain G. Gagnon (eds), *Canadian Federalism and its Future: Actors and Institutions* (Montreal/Kingston: McGill-Queen's University Press, 2019).