Principles

1. Are there common principles underlying the distribution and exercise of power in countries with multi-level governance systems?

The assumption of multi-level governance is that power is increasingly dispersed and polycentric. It follows that the principles that underpin multi-level governance are not always formally codified. When describing polycentric governance to students I like to use the metaphor of a ‘marble cake’ compared with a ‘layer cake’.

However, the EU Committee of the Regions has drafted a Charter for Multi-Level Governance\(^1\). All sub-national authorities are invited to sign up, as well as their associations, and individual politicians. Implicitly, the principles of multi-level governance are of the task-based dispersal of power based on the principle of subsidiarity, with the various levels or centres respecting each other’s competencies, though often with shared responsibilities, and with a premium placed on co-operation and co-ordination, along vertical and horizontal dimensions.

Multi-level governance is a technocratic and de-politicised model. In game theoretical terms, it is premised on the assumption that participants approach it as a positive sum game. In terms of practical politics, the problem with this model of governance is that it is (excessively) rules based, blurs accountability, and limits democratic input and control.

The template for this approach is the European Union (EU), especially after the Treaty of Lisbon (2007), with just under 100,000 sub-national tiers of government implementing over 2/3 of all EU legislation, with high levels of regional/trans-boundary co-operation, and with the presence of non-state players at all levels. Elsewhere we can find similar but less

\(^1\) [https://portal.cor.europa.eu/mlgcharter/Pages/default.aspx](https://portal.cor.europa.eu/mlgcharter/Pages/default.aspx)
developed processes in Latin America, Asia, and North America, but not on the same scale and not with the same penetration or displacement of what we traditionally assume to be nation state competences. So, for example, the growing formalisation of Trans-Tasman cooperation has been compared with the early years of the European integration process. But, where policy makers have created supra-national agencies (for example: Joint Accreditation System Australia—New Zealand (JASANZ), Food Safety Australia and New Zealand (FSANZ); Trans-Tasman Therapeutic Products Administration (TTTPA or, simply, TPA)) or pool sovereign decision-making in a COAG ministerial council, trans-Tasman institutions limit the competence of actors to specific issue areas. While the European Commission, Court and Parliament have broad powers over ‘single market’ issues, the planned TPA’s powers are limited to control of pharmaceuticals and medical devices. Elsewhere, the scope of the ASEAN-Australia-New Zealand FTA (AANZFTA) and planned Trans-Pacific Partnership (TPP) is very narrowly defined.

2. **Is the principle of ‘comity’ and mutual trust useful in federal or other multi-level constitutions? How is it enforced?**

- **Do you have any views how a principle of comity might be enforced in dealings between governments in the UK?**

The principle of comity is well recognised in theory but difficult to establish and maintain in practice. Comity is best applied in ‘low politics’ sectors such as the mutual recognition of professional qualifications. Around the world we can see the following.

The principle is formally codified in Article 4 of the US Constitution, otherwise known as the privileges and immunities clause (‘The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States’).

In Australia, the principle of comity was sharpened up by a number of High Court rulings on conflicting interpretations of what used to be British Commonwealth Common
Law (during the period when the Privy Council was the arbiter of last resort by right, which ended with the passing of the Australia Act in 1986) or Australian Commonwealth Law in intermediate appellate courts in individual states. Nevertheless tensions remain, especially between residual common law and newer statute law in the various states (on defamation, for instance).

In the European Union, comity is important to the functioning of the Single Market and EU Competition Law has a relatively elaborate enforcement structure, primarily through the Commission and buttressed by the ECJ. EC articles 81 and 82 (renumbered 101 and 102 in the Treaty of Lisbon) are key to this, with a number of ECJ rulings having established the ‘economic entity’ and ‘implementation’ doctrines. A third and more wide ranging principle, the so-called ‘effects doctrine’ remains to be sharpened up by ECJ rulings. Inside the EU, however, the Commission is influential through its links to National Competition Authorities and the network of authorities, the European Competition Network. The Commission has also agreed a number of anti-trust agreements with the US, Japan, and Canada but the practice of extraterritorial comity remains weak.

In Germany the idea of comity (‘Bundestreue’ or ‘bundesfreundliches Verhalten’ in German) is one of the founding principles of the Federal Republic. In a similar process to the one that took place in Australia, the operation of comity in Germany was sharpened up by Federal Constitutional Court Rulings in the late 1950s and early 1960s such as (1) the Concordat ruling on the state of Lower Saxony’s approach to faith schools; (2) rulings on individual states’ right to hold referendums on the possibility of the Bundeswehr possessing atomic weapons; and (3) the ruling on the so-called ‘Television case’, ostensibly about setting up of a second national TV channel but resulting in a comprehensive critique by the

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Court of the ad hoc and highly partisan manner in which the CDU/CSU government had
dealt with the individual German states since the foundation of the Republic in 1949.
Difficulties remain in areas of policy were states have sole competence, such as in the
recognition of educational qualifications across states for the purpose of entry into Higher
Education.

The politics of comity are fraught. What look like elegant working solutions to many
in the policy community can be interpreted by citizens as injustices imposed by technocrats
with a tin ear (or at least presented to them as such by politicians). In all of the countries I
have touched upon, Supreme Courts or Constitutional Courts have had to rule on
contentious issues to sharpen up the working of comity. By-and-large these rulings took
place in an environment where all of the major actors wanted the process of codification and
clarification to succeed.

Asymmetry and England

3. Do any other devolved/federal states have significant sub-state regions or nations
   without devolved powers? Are there any comparable examples to England?
   
   - Can administrative devolution to regions or nations substitute effectively for
     legislative devolution?

These questions reflect an empirical debate about the extent to which states can find the
right mix of ‘self rule’, ‘shared rule’, and ‘symbolic recognition’.

Federal states are often characterised by asymmetrical divisions of power to territories
with special circumstances. How that maps out depends on whether the organisation of state
powers is based on the so-called ‘residual model’ - in which states retain any powers not
formally ascribed to the federal level (the USA in theory) - or on a model in which the
Federal level enjoys all powers not explicitly reserved to the states (Canada, in theory). In
addition, there are exceptional circumstances that create anomalies in which (normally
relatively minor) sub-national units have limited powers, such as in (1) the District of Columbia in the USA; (2) the Australian ACT and Northern Territory; (3) West Berlin’s special status in the Federal Republic from 1949 to 1990. For various reasons, all of these arrangements worked or continue to work.

Devolved unitary states also distribute powers unevenly. Spain, for instance, gives considerable autonomy to Catalonia and Basque region. However I can’t recall an example of where the largest constituent nation in a devolved system enjoys no substantive devolution beyond the capital. The current arrangements for England fail to find an appropriate mix of ‘self rule’, ‘shared rule’, and ‘symbolic recognition’ and are in my opinion unsustainable.

4. Are there other countries that have a significant asymmetry of powers between regions? Does this cause problems in other countries?

There are many examples of asymmetrical Federalism. For instance, in Canada, Quebec enjoys a number of reserved powers and other privileges, including having three Supreme Court Justices reserved for the province, operating separate health and pension plans to the other nine provinces, and exercising some Federal competences over immigration and employment law within its territory.

Elsewhere, India is a patchwork of 29 States and seven Union Territories and there are special provisions for Jammu and Kashmir (Art. 370 of the Constitution), and also Andhra Pradesh, Arunachal Pradesh, Assam, Goa, Mizoram, Manipur, Nagaland, and Sikkim. Article 4 of the Iraqi Constitution makes special provisions for Iraqi Kurdistan. When Malaysia was founded in 1963 Singapore, Sabah and Sarawak were given autonomous powers (Sabah and Sarawak continue to enjoy more autonomy). In Russia there are 83 Federal subjects but with different specifications and powers from ‘republic’ through to Okrugs (with a significant ethnic minority) and Oblasts.
We also see Asymmetric devolved unitary states such as Spain (Basque Region, Catalonia) and China (Hong Kong SAR).

In terms of the whether these arrangements cause problems, it comes down to the question of whether the particular mix of ‘self rule’, ‘shared rule’, and ‘symbolic recognition’ is working? It appears to be working in Canada and Russia. It might be working in Spain, although the current confrontation with Catalonia is one to watch. But Singapore was expelled from Malaysia in 1965 and constitutional arrangements have clearly not worked in Iraq.

5. What do overseas examples tell us about how new sub-state regions for devolution or federalism are created? What lessons might the UK learn?

There are three points to make here. First, specific arrangements are often introduced as a solution to the dissatisfactions that arise when one or two constituent units feel significantly different needs from the others, as the result of an ethnic, linguistic or cultural difference (Malaysia, Canada, Spain). There is no hard and fast pattern to how successful these arrangements have been. What we can say is (1) too much ‘self rule’ and the ties that bind to the centre become irrelevant over time; (2) too much ‘shared rule’ and the conflicts between the sub-national units and the centre become institutionalised; (3) too much ‘symbolic recognition’ makes latent disputes become more salient not less so (contrary to George Robertson’s 1995 assertion that Scottish devolution would kill Scottish nationalism ‘stone dead’) BUT not enough recognition also stores up problems for the future (England after 1997). The problem for us as analysts is that the causal chain is complex and judgments about the effectiveness of any particular national settlement are often necessarily made with the benefit of hindsight.

Second, as already touched upon, the operating principles that underpin decentralized systems are often established in the abstract and then sharpened up through judicial activism.
This is (1) much easier to do when all involved have an interest in making this process work and also (2) works better in political cultures that already accept the idea of judicial activism. One could speculate that in the UK this process would be more difficult than it might be in polities where these two points apply.

Third, and again as already touched upon elsewhere, any solution has to be intuitively fair and not just functionally elegant or pragmatic.

Reservation and devolution of power

6. How is the idea of ‘social union’ reflected in the distribution of powers and resources in other countries?

- How far can welfare/social provision vary between sub-state regions and nations without undermining social solidarity or the overall integrity of a state?

There is a great deal of variance across the states used as examples in this document. In the USA there are a limited number of Federal programs, plus state, local, and private providers. It is a model of so-called competitive federalism, where individual states enjoy a great deal of autonomy in establishing their own models (see Scott Walker’s so-called Wisconsin model, for instance).

In Canada there is more of a European-style welfare state, with many programs run by the provinces. Quebec has particular autonomy on social policy but Federal government also runs targeted programs to promote cohesion – including for ‘Indian and Northern Affairs’, ‘Provincial Quebec’, and ‘Northern Ontario’. Thus, the notion of social union is stronger in Canada than it is in the USA.

Australia spends less on welfare as a percentage of GDP than most advanced democracies but paradoxically has also not experienced the cuts to existing programs seen elsewhere. This is partly due to Australia’s recent economic success but also because of the
‘ratchet effect’ that is imposed by its Federal structure. By-and-large, the Commonwealth takes the lead in social provision but the states have a role as well.

In the EU social provision is part of the ‘European Communities’ Pillar of the EU and therefore within the Social Chapter of the Treaty of Amsterdam. The EU enjoys ‘shared competence’ with a role to ‘support and complement the policies of the member states’. In practice this has meant introducing piecemeal legislation to put a floor under social conditions across the EU’s territory (e.g. the 1994 Works Council Directive; the 1996 Parental Leave Directive; the 2003 Working Time Directive).

In Germany the Basic Law empowers the Federal government to use shared competences to maintain a uniform standard of living (Article 72). This commitment is at the core of Germany’s ‘social market economy’ with a network of work-based social insurance schemes, that are cross-subsidised, informed by Catholic social theory, and corporatist in their operation. The Federal Republic’s role is based on a model of co-operative federalism, with horizontal transfers between states and vertical transfers between the individual states and the Federal level. Unemployment benefit (Arbeitslosengeld) is a Federal responsibility whereas Social Security payments (Sozialhilfe) are administered by the states. Direction comes from the Federal level but this includes input from the states through the Bundesrat.

In terms of the subsidiary question on how far a state can go in paring down its social commitments, a modern welfare state demands some uniformity of provision, an adequate resource base to meet its commitments, and a capacity for central direction. But the degree to which this can be paired back also depends on the political traditions of the State. Thus, liberal democracies such as the UK can probably trim further and faster than more corporatist or ‘etatist’ societies without threatening the integrity of the State, as it is understood by its citizens. Balancing this, however, one could also argue that the UK is
constrained in some aspects of reform in that public opinion in unitary states is more attuned to uniform standards of provision than in many Federal states.

7. Which powers need to be reserved to maintain an effective state/union?

- Do these go beyond defence, security and macro-economic policy, to include welfare or taxation?

Defence, security and macro-economic policy are essential reserved powers. Welfare and taxation are not essential but some degree of equalisation or steering capacity is desirable to maintain cohesion (see my previous observation that that public opinion in unitary states is more attuned to uniform standards of provision than in many Federal states).

8. Is there a successful precedent for setting out powers that may be devolved and allowing sub-state nations or regions to apply for those powers when they are wanted?

In preparing this document I could find no precise instance of this happening but - after consultation with colleagues - there are some (more or less) analogous examples that the Committee might want to consider.

The first two are very close to home. In England, it might be argued that the Cities and Devolution Bill offers this ‘opt-in’ for the major Northern cities (subject to certain conditions). In addition, the Government of Wales Act 2007 contained a set of powers within it that required 'unlocking' by a referendum - so the powers were on the book, but it was in 2011 that they chose to unlock them via referendum.

Further afield, France gives its five Overseas Departments (Martinique, Guadeloupe, Reunion, French Guiana, Mayotte) leeway to interpret laws and 'adapt' them to local conditions as they see fit. Recently the French Constitutional Court has gone further and developed options for autonomy (and even the development of a departmental-level 'foreign policy'), including the possibility of integrating the departmental and regional councils into
one. This is clearly a step away from the 'one and indivisible' Republic. In Canada, the so-called 'notwithstanding clause' allows Canadian provinces to 'opt out' of federal decisions (even involving the Charter of Rights and Freedoms), and Quebec makes regular use of this.

**Accommodating devolution at the centre**

**How do the institutions of the central state accommodate the sharing of powers between the state and sub-state nations or regions?**

- Do central governments have senior ministers responsible for the maintenance of the relations between sub-state governments, and the wider health of the union?

As already touched upon, states find their own mix of ‘self rule’, ‘shared rule’, and ‘symbolic recognition’. Some Federal states maintain a strong and active ‘field role’ that often over-rules the local tier (for example Federal Agencies in the United States) whilst other Federal states have very little field presence but rather operate through the individual states (as is the case with most functions in Germany). In addition, Supreme or Constitutional Courts are often the means by which disputes between tiers can be adjudicated. The degree to which this is practical in a given polity depends on the extent to which judicial activism is compatible with political traditions. Federal states are used to the Supreme/Constitutional Court ruling on disputes between the tiers of government. Can British political culture accommodate this to the same extent?

There are various means by which the territorial dimension can be accommodated at the centre. This could take the form of a:

- ‘Bundesrat’ model of second chamber or upper house, with members nominated from the sub-national tiers of government
US/Australian ‘Senate’ model of second chamber or upper house, with members elected from within sub-national demoi, often using an alternative electoral system to the one used for the lower house

Additional co-ordinating body, supplementing the second chamber or upper house, such as COAG in Australia (formalised meetings between the Prime Minister, the premiers of the States, the Chief Ministers of the two self-governing Territories and the president of the Australian Local Government Association) or the Council of the Federation in Canada.

In terms of the supplementary question on appointing a senior minister to oversee the territorial dimension, examples might be:

- A single dedicated minister (see the Canadian Minister of Inter-governmental Affairs)
- A set of sectoral ministerial responsibilities distributed across the Cabinet (in Sweden the relevant minister co-ordinates with the Swedish Association of Local Authorities and Regions),
- To bring the secretariat of the co-ordinating body into the Head of Government’s office (in Australia the COAG Secretariat is located within the PM’s office).

9. How important is it for states to foster a sense of national, rather than regional, identity? Which other countries offer successful and unsuccessful examples of this?

National identity remains intuitive with most citizens. English identity has quite a strong regional dimension to it as well but this cannot make up for the failure to symbolically recognise ‘Englishness’. Leaving EVEL to one side, devolution to the English regions would create a more even distribution of sub-national tiers but would not address the need to recognise Englishness. In addition, the decentralisation of England would be in obvious contrast to the process of centralisation that is taking place in Scotland (creating a unified
police force, for instance) and would undoubtedly shore up problems for the future as political styles – adapted to and conditioned by structures in which they are forged and deployed - diverge over time.

On the other hand, devolution to an English parliament would create a degree of asymmetry with the other nations of the Union that is also unsustainable. In my opinion the problem appears intractable.

10. **Do citizens of other states understand their constitutional structures and the sharing of powers among different state institutions?**

- To what extent do you believe it is useful for states to have a documents clearly setting out their constitutional structures?

The evidence from around the world is that citizens’ understanding is patchy at best.

In the USA a national survey of 1,230 adults in 2011 by the Annenberg Public Policy Center of the University of Pennsylvania found that only 38 per cent of those polled could name all three branches of the U.S. government and 33 per cent were unable to correctly name any of the branches\(^3\).

In Australia, surveys show a similar lack of knowledge about the constitution and the structure and functions of the Australian Commonwealth and its government. For example a 1987 survey for the Constitutional Commission found that almost half the population did not realise Australia had a written Constitution and nearly 70 per cent of Australians aged between 18 and 24 did not know this\(^4\).

In Germany, because of the very active state role in Civic Education, particularly in order to combat (Far Right and Islamic) radicalisation, citizens seem a little better informed.

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For comparative data on patterns of public attitudes and knowledge around the world, see the IEA Civic Education Study (CIVED)\(^5\). However the data are now at least 16 years old and need to be interpreted with this limitation in mind.

In answer to the subsidiary question, I believe it would be desirable to have a set of consolidated documents that set out the broad principles of the constitution and help citizens understand some of the arrangements that underpin it (for instance, the ‘Barnett Formula’ is particularly badly understood by citizens and misrepresented in political discourse).

Next steps

11. How did Canada get past the period of constitutional crisis and referendums on Quebec’s secession?

I am not a Canadian specialist but I understand that the 1999 Clarity Act was very important in that it allowed the Federal government to tighten up the conditions under which the Parti Québécois could hold another referendum. This Act was challenged by the Parti Québécois but upheld by the Supreme Court of Canada. I use a concept from political sociology, the Clarity Act reconfigured the ‘political opportunity structure’\(^6\) in Canada to produce a less benign environment for separatism.

Notes

\(^5\) [http://www.iea.nl/cived.htm](http://www.iea.nl/cived.htm)