Subnational Constitutional Governance

16–18 March 1999
St George's Hotel, Rietvlei Dam
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Introduction

The international conference on *Subnational Constitutional Governance* – held from 16 to 18 March 1999 at St George's Hotel, Rietvlei Dam, Pretoria – was organised and sponsored by Rutgers University, the Konrad Adenauer Foundation – Johannesburg office and the University of South Africa's (Unisa's) VerLoren van Themaat Centre for Public Law Studies. The conference was originally the brainchild of Professors Robert Williams and Alan Tarr of Rutgers University, New Jersey, United States and Dr Bertus de Villiers of the Human Sciences Research Council (HSRC), South Africa. After Dr De Villiers left the HSRC for the National Parks Board, the South African share in the venture was "inherited" by Unisa's Department of Constitutional and Public International Law.

Some may ask why a conference on "subnational constitutional governance", particularly in this country since the South African Constitution, 1996, makes it clear that there are three spheres of government (national, provincial and local) and not tiers or levels. In the South African context, therefore, "subnational" may well be seen as a misnomer if it signifies subordination of regional authorities to the central authority. If we interpret subnational governance in South Africa as a reference to authorities that are elements of a greater whole, rather than as less important or subordinate, the relevance of the experience of the wide range of different systems represented at the conference becomes more apparent.

It was decided not to overload the programme with formal presentations, leaving instead more room for informal discussion. This proved to be a sound choice; one that was vindicated by the high level of participation by the 60 delegates. South African participants were drawn largely from government and related areas, with a fair sprinkling of academics. The conference revealed that issues of "pure" or technical constitutional law remain significant despite popular preoccupation with fundamental rights issues. It was believed that much still needs to be explored, especially in the field of local government.

Rutgers University must be thanked for its participation as organisers, sponsors and participants; in particular, the enthusiasm of Professor Robert Williams, who was the driving force behind the conference and who was largely responsible for procuring the services of the foreign speakers, should be mentioned with appreciation, as must the contribution of Professor Alan Tarr. Valued assistance was rendered by Thea van Doorne of the VerLoren van Themaat Centre, Moses Mdumbe of Unisa's Department of Constitutional Law and the staff at the Konrad Adenauer Foundation office, especially Dr Michael Lange and Marlize van den Berg.

Gretchen Carpenter
Professor of Constitutional Law
University of South Africa

Welcoming Remarks

Michael Lange

INTRODUCTION

This is the first time that the Konrad Adenauer Foundation (KAF) has organised a conference with the VerLoren van Themaat Centre for Public Law Studies at the University of South Africa (Unisa) and we are delighted to have the opportunity to cooperate with this institute in introducing current constitutional issues to a wider audience of academics in general, and lawyers, advocates and law students in particular.

1. BACKGROUND TO KAF

For those wondering what type of institution KAF is and why it has sponsored this conference, allow me to sketch a brief background to the German political foundations and to outline some of the reasoning behind KAF's involvement in South Africa.

The five political foundations are a unique feature of today's democratic culture in Germany. The move behind their creation, which dates back to the 1960s, was the expectation that political or civic education would help develop and consolidate democracy in post-war Germany.

Both in Germany and abroad, the foundations seek to develop and encourage people to play an active part in the political and social lives of their communities. They cooperate with local organisations and societal groups which, while drawing on different value systems and political concepts, are committed to promoting the development of democracy and pluralism in their respective societies.

By engaging in a variety of activities, the foundations assist in constructing a legal order which supports human rights, an independent judiciary and the rights of minorities. They also assist economic development and help to implement social justice and the rule of law.

KAF is closely affiliated to former German Chancellor Helmut Kohl's Christian Democratic Union Party. It proudly bears the name of the first chancellor of post-war Germany and acts in the spirit of this remarkable German statesman.

KAF is represented in many countries throughout the world and in this way actively assumes a share of responsibility for shaping international relations, while conveying modern German political culture to the rest of the world. International cooperation is an important part of KAF's work and accounts for no less than half of the general budget of some DM220 million.

2. KAF IN SOUTH AFRICA

KAF runs a number of wide-ranging programmes in South Africa. It cooperates not only with political parties and their respective think-tanks but with reputable education and research institutions, as you will note from today's event.

Since the beginning of its involvement in South Africa, KAF has been actively involved in projects dealing with constitutional development at federal and provincial levels, policy aspects of local government, and the training of local government officials and councillors.

3. SUPPORTING FEDERALISM

Germany is a federal state and KAF believes that the new South Africa could gain much

from Germany's experience with this particular concept of governance. An important task of the Foundation is therefore to enhance cooperation between the constitutional courts of these two countries.

As far back as 1995, KAF hosted a conference in Bonn where the issue of constitution-making principles was tackled by various constitutional experts from both Germany and South Africa.

South Africa – as a result of well-intentioned advice – has developed a rather unique kind of federal system that has far fewer provincial powers than exist in Germany. In the run-up to South Africa's national elections, we see certain political parties (such as the Inkatha Freedom Party) asking for a more federal state and other parties (such as the Pan African Congress and Azapo) asking for a more centralised system of government. Since the South African Constitution seems to be not yet cast in stone, there is room for more advice and debate on these contentious issues.

Finding the required number of qualified people needed to run a federal system of governance – with its various tiers of government – is no easy task, especially considering the prevailing circumstances in South Africa. Nevertheless, KAF believes that only a federal system allows different communities to develop and contribute in a meaningful way to the good of the nation. KAF has therefore been providing expertise from Germany in all matters concerning cooperative governance and has facilitated training for a number of different groups of government officials.

All this, I believe, clearly shows the importance KAF gives to constitutional development in South Africa.

4. OTHER KAF ACTIVITIES IN SOUTH AFRICA

Apart from these important programmes, KAF assists provincial governments in their attempts to integrate their different local administrations and provides support for small- and medium-sized enterprises and self-help groups with special emphasis in rural areas.

In each case, the Foundation utilises the tools available to it to further its objectives. This includes international and national seminars such as this one; short-term expertise; study tours to Germany; research programmes; and where appropriate, publications through KAF's series of seminar reports and occasional papers. Many of the Johannesburg office's publications have tackled constitutional issues, as can be noted by the titles of some of these publications:

- *Implementing Federalism in the Final Constitution of South Africa*
- *The Final Constitution of South Africa: Local Government Provisions and their Implications*
- *A Lay Person's Guide to the 1996 South African Constitution*
- *Future Challenges for Local Government in the 21st Century*
- *Local–Provincial Government Relations*
- *The Constitutional Basis of Local Government*
- *Constitution and Law*

5. TRANSFORMATION AND ITS CHALLENGES

Some people argue that apartheid was South Africa's Berlin Wall. It was the great divider, artificially separating people who, in the final analysis, were bound to share the same destiny.

When apartheid fell – as part of a chain reaction set off not least by events in Germany, culminating in the fall of the Berlin Wall – South Africa turned away from segregation and conflict and turned towards democratic togetherness and cooperation.

South Africa has only recently set out on a most difficult path towards democracy and prosperity for all its people. The transformation of our two countries has led – and will for some time to come lead – all of us through difficult territory. People from all sectors of society find it difficult to adapt to new conditions. Previously entrenched and accepted rules have changed dramatically and many have completely disappeared.

South Africa is considered to be a legally consolidated democracy in which the development of a constitutional, pluralistic state ruled by the new law of the land appears to be irreversible. But there are still challenges to be faced.

6. BUILDING AND MAINTAINING DEMOCRACY

Many say that the rule of law has all but disappeared. Some professional observers have warned that the crime situation is moving the country dangerously close to anarchy: if we define tyranny as the "public order without

freedom" and anarchy as "freedom without public order", we are witnessing in South Africa today the former being replaced by the latter. I cannot believe that South Africans have struggled against the tyranny of apartheid only to have to live with the anarchy of crime.

I believe that by transforming white minority rule to black majority government, only the foundations of a peaceful democratic society have been laid. Making the new South Africa a winning nation will depend:

- on the willingness of those who were wronged under the old regime to put the good of the so-called Rainbow Nation above their desire for retribution (reconciliation)
- on the acceptance that the tyranny of apartheid should not be replaced by the anarchy of crime.

Building and maintaining a strong and enduring democracy on these foundations will furthermore depend on a continuing commitment by all segments of South Africa's diverse population to reconciliation and far-reaching economic and social transformation. KAF is willing to contribute to this process.

CONCLUSION

This conference is designed to stimulate debate on the role of concurrent legislation and on the difficult question of how far a provincial constitution might deviate from the framework set by the national constitution. It is also meant to examine the extent to which a provincial constitution may or may not give expression to a particular view regarding the rights and responsibilities of the citizens in question.

Germany's federal approach to governance sets a good example in favour of provincial autonomy, especially regarding the definition of rights and responsibilities in areas of particular provincial concern, such as cultural affairs, education and taxation.

I am grateful to Professor Ipsen of Osnabrück University for accepting our invitation to present a paper. His paper deals with the important relations between subnational and local governments in Germany. I am sure that the extent of provincial autonomy which exists in Germany will surprise some of our South African guests.

I hope you find this conference enjoyable and worthwhile.

Provinces, States, *Länder* and Cantons: Content and Variations Among Subnational Constitutions of the World

Ronald Watts

INTRODUCTION

I wish to make it clear right from the outset that I am approaching this topic as a political scientist rather than as a constitutional lawyer, and therefore my focus will be not on the legal characteristics of subnational constitutions or the classification of them as legal documents, but rather on the conditions giving rise to different forms of subnational governments and the consequent relevance of the form and content of their constitutions. As the first paper of the conference, it is perhaps not inappropriate to set the broader scene and to raise issues which will in subsequent papers and sessions be pursued in more depth.

A feature of the contemporary world is the conditions that have given rise to the proliferation of a variety of systems of multilevel governance. Throughout the world contemporary developments in transport, social communications, technology and industrial organisation have produced pressures not only for larger states but also for smaller ones. Thus, there have developed two powerful, thoroughly interdependent, yet distinct and often actually opposed political motives: the desire to build effective and dynamic forms of integrated national and supranational organisations, and the search for distinctive regional and local identity. The former is generated by the goals and values shared by most Western and non-Western societies today: a desire for progress, a rising standard of living, social justice and influence in the world arena. It is further fuelled by a growing awareness of worldwide interdependence in an era whose advanced technology has made both mass destruction and mass construction possible. The latter – the desire for distinctive identity – arises from the desire for smaller self-governing political units, more responsive and accountable to the individual citizen, and from the desire to give expression to the primary group attachments which provide the basis for a community's sense of identity and yearning for self-determination. These include linguistic and cultural ties, religious connections, historical traditions and social practices. Thus, the second half of the 20th century has seen a tension between these two parallel forces producing contradictory trends in the direction of both integration and disintegration.[1]

Given these simultaneous pressures for larger political units capable of fostering economic development and improved security, and for smaller political units more sensitive and accountable to their electorates and capable of expressing local distinctiveness, it is not surprising that multilevel political regimes such as federations and constitutionally decentralised unitary systems should have had such widespread appeal in the contemporary world. Such multilevel regimes provide a technique of political organisation that permits action by a shared government for certain common purposes, while allowing autonomous action by smaller regional or local units of government for purposes that relate to particular regional interests and concerns. Consequently, nearly two billion people in the world currently live in some 24 countries that claim or can be considered to be federal.[2] A similar number live in 15 other countries with some form of multilevel regime involving constitutional decentralisation.[3] In

addition, some 20 relatively small political entities are linked to substantially larger political units in a federacy or associated state relationship.[4] At the same time, there have grown a variety of supranational political organisations such as the European Union (essentially a confederation incorporating some elements more typical of a federation), and other looser supranational entities such as the North American Free Trade Agreement (Nafta), the Association of South East Asian Nations (ASEAN), the South Asian Association for Regional Cooperation (SAARC), the Caribbean Community (Caricom), the Nordic Council, the North Atlantic Treaty Organisation (Nato), and the Commonwealth of Independent States (CIS). This suggests that multilevel governmental regimes – by reconciling the need for large scale organisation with the recognition and protection of ethnic, linguistic or historically derived diversity through self-governing constituent units – have had the advantage of allowing a closer institutional approximation to the multinational and diverse reality of the contemporary world.

In the past decade a major factor in the pressure for multilevel regimes of governance has been the recognition that an increasingly global economy has unleashed powerful economic and political forces further strengthening both international and local pressures at the expense of the traditional nation-state. My colleague at Queen's University, Tom Courchene, has labelled this trend "glocalisation".[5] Global communications and consumership have been awakening desires in the smallest and most remote villages around the world for access to the global marketplace of goods and services. As a result, national governments are faced increasingly with the desires of their citizens to be both global consumers and local citizens. Thus, the nation-state is proving both too small and too large to serve by itself the full desires of its citizens. Furthermore, changes in technology are generating new models of industrial organisation with decentralised and flattened hierarchies and involving noncentralised interactive networks, thereby influencing the attitudes of people in favour of more noncentralised forms of political organisation. Another recent factor has been the collapse of the totalitarian regimes in Eastern Europe and the former Soviet Union: these developments have undermined the appeal of transformative ideologies and have exposed the corruption, poverty and inefficiency characteristic of massive authoritarian centralisation.

All these factors have contributed to the heightened interest in forms of multitiered and multisphered political regimes as a method of organising and distributing political powers in a way that will enable the common needs of people to be achieved while accommodating the diversity of their circumstances and preferences. Some 40 years ago Pennock suggested that citizen preferences might be maximised (or citizen frustrations reduced) by multiple levels of political organisation, each operating at a scale for performing most effectively its particular functions as long as these benefits were not offset by the costs of increased complexity.[6] Twenty-six years ago Martin Landau argued that despite the inherent complexities in multilevel regimes of government, the redundancies within federal systems provide fail-safe mechanisms and multiple safety valves enabling individual subsystems within the multilevel regime to respond to needs when others fail to, thus contributing to a longer-run basic effectiveness and survival of the polity.[7] The continued proliferation of multilevel political regimes in the past half century suggests that they were both right in pointing to the valuable role of genuinely autonomous subnational governments within larger polities. This international trend to multisphered governance – to use the South African terminology – is reflected in the emphasis placed in the current South African Constitution upon a system of "cooperative government".[8] Indeed, except for a large number of relatively small or island states, centralised unitary government has increasingly ceased to be the norm as nation-builders have come to recognise that overcentralisation can lead to anaemia at the extremities and apoplexy at the centre.

1. THE VARIETY OF CONTEXTS FOR SUBNATIONAL GOVERNMENTS

The form and character of subnational governments, and hence of their constitutions, varies throughout the world because of the variety of the contexts within which they have been established and operate.

An important factor is the historical pattern of their establishment. Many subnational gov-

ernments have been created as a result of devolution within a pre-existing larger political union. In such circumstances, the constitutions of the subnational governments – most usually labelled provinces rather than states – and their jurisdiction and the major features of their constitutions have usually been embodied within the constitution of the overarching union or federation. In the case of decentralised unitary systems, subnational constitutions have sometimes simply been set out in statutes of the national government. Within such broadly devolutionary frameworks, the provinces/states have, nevertheless, usually been empowered to determine more detailed arrangements relating to their own constitutions. Examples of this pattern found in federations and quasi-federations include Belgium, Germany, India, Pakistan, Nigeria and Spain. In the case of the South African Constitution, 1996, the broad framework for provincial governments is set out in Chapter 7, but provinces are permitted to establish their own constitutions (section 142). These must, however, comply with certain stipulations in the national constitution and be so certified by the Constitutional Court.

Where the overarching union, federation or confederation has been created instead by the aggregation of previously separate political entities, the scope of jurisdiction of the constituent units has usually been set out in the uniting constitution and it may even include a few minimum requirements for member state constitutions in the interests of compatibility, but the member states have normally been left to articulate their own constitutions. Such cases are relatively rare among decentralised unitary systems, but examples among aggregative federal and confederal systems are the United States (US), Switzerland, Australia, Malaysia, most of the Latin American federations (Argentina, Brazil, Mexico and Venezuela patterned their federal constitutions closely on the American model) and the confederal European Union. It should be noted that the establishment of some unions and federations has involved both processes in a combination of both devolution and aggregation, but in such cases the basic constitutions of the subnational governments have usually been contained within the federal constitutions. Significant examples are Canada and India.

Another important factor has been the relative intensity of the pressures for the autonomy of the subnational governments. The significance of historical, geographic, economic, linguistic, religious, cultural or social factors, and the extent to which these may be cumulatively reinforcing or cross-cutting has affected the strength of the desires to ensure the security of their distinct identities and interests by establishing autonomous subnational governments with their own constitutions.[9] Such pressures have been most intent in cases where constituent governments within a union or federation have come to represent diversities with the force of national communities, as for example in the cases of Quebec in Canada and of the Basques and Catalonians in Spain.

An important factor affecting the character of subnational governments, and with important implications for their constitutions, is the degree to which the territory of the subnational government coincides with the territorial concentration of historical, economic, linguistic, religious, cultural or social interests. Where the boundaries of subnational governments coincide only imperfectly with the territorial concentration of interests, the usual result has been the creation of a situation of "minorities within minorities", leading to the need to incorporate within the constitution of the subnational governments safeguards for intra-provincial minorities (discussed further in section 4). Of course, it is virtually impossible to draw the territorial boundaries for subnational governments so that there are no intra-provincial minorities, but in some unions and federations the problem has been much more serious than in others. In some it has even led to the redrawing of the boundaries for some subnational units in order to make them coincide more fully with social and political realities. Significant examples have been the reorganisation of Indian states along linguistic lines in 1956 with further adjustments in the following years and the progressive division of the constituent units of Nigeria from the original three regions in 1960 to four in 1963, then 12, then 19, then 21, then 30 and now 36.

Another factor sometimes contributing to the redrawing of provincial boundaries has been the desire to avoid excessive disparities in the relative sizes (area and population) and wealth of subnational governments. Such disparities can be a source of inter-regional resentment

both in terms of relative influence in national politics and in terms of relative administrative capacity. These were factors which led to the redrawing of the boundaries of the *Länder* within Germany in the early years of the West German Federation. The reunification of Germany raised the same issues which continue to be the focus of much discussion. The issue of relative balance among subnational units was also an important factor in the progressive multiplication of states in Nigeria, referred to above.

The factors referred to so far all presume that the subnational governments represent territorial groups. That is, of course, the normal pattern. But is it necessarily the only one? Could non-territorial subnational governments be possible. Elkins has explored this possibility, focusing on a range of non-territorial organisations to unblock thinking tied to a territorial conception of the state.[10] The Belgian example in which three of the six subnational units of government are non-territorial Communities appears to be an interesting innovation in this respect, although it is still too early to judge its long-run efficacy. Within Canada too, there have been pressures for non-territorial units of government to provide those aboriginal peoples not concentrated on reserves with some form of self-government. The full possibilities and limits of non-territorial subnational governments, however, remain to be developed.

In the introduction, attention was drawn to the trend towards multitiered forms of governance in the contemporary world. Traditionally the analysis of federations has centred on relations between federal and provincial/state governments. But increasingly attention has been drawn to the constitutional status of another form of subnational government, local governments, as well as to supranational forms of government. Until recently, although local governments have in fact played a significant role in the political dynamics of many unions and federations, particularly in the US and Switzerland, the determination of the scope, powers and autonomy of local governments has usually been left to the intermediate level of subnational governments, i.e., the provinces or states. In recent years, however, there have been efforts in some unions and federations – notably Germany, India and South Africa – to recognise formally in the constitution of the union or federation the position, powers, and in some instances the basic structure of local governments as autonomous political entities. Supranational political organisations have also become more significant. The multilevel situation created by the membership of at least four federations within the European Union – Austria, Belgian, Germany and Spain – has had a major impact upon the internal relationships between national and subnational governments within each of these federations. This has occasioned considerable literature, for instance, in Germany.[11] It has also led to the establishment within the European Union of a forum for subnational governments – both state and local – in the Committee of Regions.[12] Even the much looser arrangement of Nafta linking the three federations of the US, Canada and Mexico has had implications for the roles and jurisdictions of their states and provinces.

2. THE VARIETY OF SUBNATIONAL GOVERNMENT AUTONOMY REGIMES

As a result of the conditions affecting subnational governments in different countries, there is in fact in the world today a great variety of autonomy arrangements for subnational governments. I use the term “autonomy arrangement” advisedly. The notion of “autonomy” relates to more than simply decentralisation, as Elazar and Osaghae have noted.[13] There are forms of decentralisation where hierarchical controls or direction may still leave the autonomy of subnational governments relatively restricted. What distinguishes autonomy from decentralisation is the exercise of final responsibility on a range of matters by the subnational governments. An important context for the role of subnational governments then is not just the scope of jurisdiction that is decentralised to them, but the degree of autonomy they have in exercising that jurisdiction.

One category of political regime in which the autonomy of the constituent subnational governments is a distinguishing feature is federations. What distinguishes federations from decentralised unitary systems is that in the combination of shared rule through common institutions for certain specified matters and self-rule through subnational governments for other matters, the relationship in a federation always involves a degree of constitutionally guaranteed autonomy, or final responsibility, over some

specified matters for each order of government. In a federation, each order of government derives its authority from the constitution rather than another order of government. A corollary is that each order of government acts directly upon its citizens rather than indirectly. Federations have varied enormously in the range of powers assigned to each order of government, but common to them all is the constitutional guarantee to the subnational governments of noncentralisation, i.e., autonomy, in at least some fields of jurisdiction.[14] It is noteworthy that some 24 countries in the world meet the basic criteria for classification as federations.[15]

Unitary systems, especially those embracing subnational populations and territories, often involve substantial elements of administrative and even legislative decentralisation to subnational governments. Significant examples include China and Indonesia. What distinguishes them from federations, however, is a different kind of autonomy regime, whereby the responsibility for all matters including the scope of jurisdiction assigned to subnational governments and indeed their constitutions, rests with the central or national government. Thus, in a unitary system the authority of the subnational governments is derived not from the constitution of the union but from its central government.

Yet another form of autonomy regime is represented by confederations where common institutions composed of delegates of the constituent governments are established to deal with shared interests, but such bodies derive their powers from the constituent units. Ultimate responsibility in confederations is retained by the governments of the constituent units through the requirement of unanimous agreement.

Still another form of autonomy is that of federacies and associated states, of which there are currently some 20 examples. In these a smaller political entity is linked to a larger one, often a previous colonial power, but the smaller unit retains considerable autonomy in return for a minimal role in the government of the larger one.[16]

But the variety of autonomy arrangements for subnational governments does not end there. Since statesmen and nation-builders are often more interested in pragmatic political solutions than in theoretical purity, they have on occasion created hybrids combining different kinds of autonomy regimes. One such type is that of "quasi-federations" where the overall structure is predominantly that of a federation but the federal or central government is constitutionally allocated some overriding unilateral powers akin to those in unitary systems that may be exercised in certain specified circumstances. Significant examples are Canada (although there unilateral central powers have fallen into disuse for more than half a century now), India, Pakistan and Malaysia. A different hybrid autonomy regime is that of constitutionally decentralised unions. In these the system is predominantly unitary, but the national constitution contains some constitutional safeguards for the jurisdiction and role of the subnational governments. Major examples of this type of autonomy regime for subnational governments are the United Kingdom, Italy, Japan and Papua New Guinea. The unique South African hybrid comes somewhere between these two types of hybrids. In my view, debates about whether South Africa is "federal" or not are fruitless. More important is whether this particular form of hybrid makes possible effective governance and policy-making to meet the needs of the South African people and whether modifications would help to meet these objectives.

Yet another form of hybrid is that of confederations involving some elements more typical of federations. The European Union is the prime example of this type of hybrid as it has progressively incorporated such features as weighted majority voting and decisions binding member states.

In addition to this variety, note must also be taken of some new and innovative autonomy regimes. There is, for instance, that relating to Hong Kong within China involving the co-existence of a free market with a socialist economy within one sovereignty.[17]

A further point to be made is that within each of these categories of autonomy regimes, the scope of jurisdiction and of autonomy may be applied uniformly – i.e., symmetrically – to all subnational governments, or asymmetrically as for instance is the case in a number of federations including Canada, India, Malaysia, Belgium, Spain and Russia. Such asymmetry among constituent unit governments, also occurs within the confederal European Union

(for example in relation to Denmark and the United Kingdom and in relation to the monetary union) and within constitutionally decentralised unions as illustrated by the different relationships applying to Scotland, Wales and Northern Ireland within the United Kingdom and of Hong Kong, the autonomous regions, and the other regions within China. Depending on the circumstances, such asymmetry may be permanent to deal with fundamental variations as in Canada, Belgium or Malaysia, or transitional in order to provide a period when variations in development or capacity may be reduced, as in Spain or the European Union.

Clearly, then, there is a great variety both in the impact of historical, geographic, economic, cultural and social factors upon the political significance and character of subnational governments, and in the range of autonomy regimes governing the role and autonomy of subnational governments within multitiered systems of government.

3. THE SOURCE OF AUTHORITY FOR SUBNATIONAL CONSTITUTIONS AND THEIR AMENDMENT

From the preceding survey outlining the variety of conditions and of autonomy regimes, it will not be surprising that the source of authority for the constitutions of subnational governments has also varied where subnational governments have been created by devolution within a unitary system. In these cases the subnational constitutions have generally either been embodied in the national constitution or have derived their authority from national legislation. In the case of federations or quasi-federations created by devolution from formerly unitary systems, all or most of the main features of the subnational constitutions have usually been embodied in the federal constitution or at least have derived their authority from it, a pattern with which South Africa is consistent. On the other hand, in confederations or federations created by aggregation of previously existing separate polities, the federal constitutions have delineated the distribution of jurisdiction between the federal and subnational governments, but otherwise the constitutions of the subnational polities have usually derived their authority independently from the pre-existing regimes. Nevertheless, some such federal constitutions, for example the US, have specified certain basic requirements for the constitutions of the member states becoming members of the federation.

This raises the question of the amendment procedures for subnational constitutions. For subnational constitutions within decentralised unitary systems, amendments of any major features almost invariably require the concurrence of the national government or sometimes even simply ordinary national government legislation. In federations or quasi-federations where the subnational constitutions are embodied in the federal constitution, there has often been a specific procedure for all amendments of subnational constitutions requiring the concurrence of the federal legislature to amendments proposed by a subnational legislature. For instance this has been the case in India, Pakistan and Malaysia.[18] The rationale offered for such an approach has often been that since the units of a federal structure are interdependent, the general structures of subnational constitutions are of legitimate concern to the federation as a whole. In some other federations or unions with a devolutionary origin, however, a special procedure has been set down in the federal constitution for amendment of subnational constitutions which has left each province or state considerable latitude to amend its own constitution without requiring the endorsement of the national government except for certain basic requirements. Canada and South Africa both fall into this category.[19] In those federations created by the aggregation, where normally the constitutions of the member states have not been incorporated into the federal constitution, amendment of the subnational constitutions has been generally left to each subnational legislature subject in some cases to the requirement that they be consistent with a few basic principles set forth in the federal constitution.

4. THE CONTENT OF SUBNATIONAL CONSTITUTIONS

Whether embodied in the overall constitution of the federation or union or in a separate distinct document, the content of subnational constitutions and particularly the degree of detail has varied also. Most specify in outline or in detail the structures and procedures for the provincial or state legislative, executive, administrative and judicial bodies. Legislative and budgetary procedures have usually also been set out,

although here too the degree of detail has varied.

A major difference exists between those subnational governments that have fixed-term executives with a separation of powers between legislature, executive and judiciary within the subnational government and those that have adopted parliamentary executives with the fusion of legislature and executive through the operation of a cabinet chosen from and responsible to the legislature. In the US and Switzerland where the principle of the separation of powers has prevailed at the federal level, whether in the American presidential-congressional form or the Swiss fixed-term collegial executive, the form of government prevailing at the subnational level has in practice been in parallel. The Latin American federations (except in periods of military rule when governors have been appointed by presidents) have broadly followed the American model of separately elected governors and state legislatures. In those federations or quasi-federations with parliamentary regimes at the federal level – such as Canada, Australia, Germany, India, Malaysia, Austria, Belgium and Spain – the subnational regimes have also been parliamentary in form. Where there has been a mixed form involving a combination of presidential and parliamentary institutions at the federal level, as in Russia and Pakistan, this has also been reflected in the prevailing form of subnational governments. The South African Constitution, 1996, establishes a mixed presidential-parliamentary regime at the national level, but sections 104 to 141 lay out in considerable detail provisions for parliamentary provincial governments. Nevertheless, section 143(1)(a) empowers a provincial legislature to enact a provincial constitution providing for provincial legislative or executive structures and procedures that differ from these as long as they are not inconsistent with the national constitution and, as required by section 144, are so certified by the Constitutional Court.

An interesting sidelight to this issue is whether a republican form of federal government might be compatible with a monarchical form in a subnational government. The South African Constitution, 1996, s. 143(1)(b) expressly empowers a provincial constitution to provide for "the institution, role, authority and status of a traditional monarch, where applicable". This would not be unique, for under the Malaysian Constitution nine of the 11 Malayan states retained "constitutional rulers".[20] The republican movement in Australia may raise interesting questions should the monarchy be abolished for the federal government since the governor of a state at present is appointed by the Queen on the direct recommendation of the state premier (not the federal government as in Canada). Were some states to choose to retain that arrangement, Australia would become a republic containing some monarchies. In confederations it has not been unusual to find a mixture of forms of government among the member states. The European Union – which includes both monarchies and republics – is an illustration of this.

Four further points are worth noting about the content of subnational constitutions. First, issues of the scope of jurisdiction of subnational governments and of their interrelationship with the national or federal government have always been defined in the national or federal constitution rather than in the subnational constitutions. The scope of legislative competence, executive jurisdiction, and of taxing and borrowing powers, as well as constitutional provisions governing intergovernmental relations, collaboration, and financial transfers have in most cases been set out totally in the federal or national constitution (or its schedules). In those cases where they have been alluded to in the subnational constitution of a pre-existing polity, these have been totally overridden by the federal or national document. One unusual variant, however, is the case of Russia. There the current federal constitution sets out a distribution of powers between the federal government and the governments of the subjects of the federation (as the constituent units are known), but the federal constitution also includes a section permitting a constituent unit to negotiate a treaty modifying its specific jurisdiction. By the end of 1997, 45 of the 89 subjects of the federation had already negotiated such treaties creating a highly complex asymmetry in the jurisdiction of these units and their relation to the federal government.

Second, there are variations among decentralised unitary systems, quasi-federations and federations in the degree to which a full duality of civil services and judiciaries has been established. The US as the first modern federation

applied the notion of duality not only to legislatures and executives but also to public services and judiciaries, each level having its own. But this principle has been moderated in some other federal countries. In the case of public services, it has been normal in federations and quasi-federations, for each government to have its own public service. India, Pakistan and Malaysia, however, did make specific provision for joint higher public services and for commissions shared by federal and provincial governments.[21] The South African Constitution, 1966, has provided for the establishment of a single Public Service Commission for the Republic to advise national and provincial government (s.196).[22] Section 197 of the constitution emphasises the integrated character of the South African public service but section 197(4) declares that "provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform public service".

While a dual judiciary would seem to be the logical corollary of the dual polity inherent in the federal principle as traditionally formulated, a number of federal systems have concluded that a fully dual system of courts is not necessary as long as the independence of the judiciary from the executives and legislatures of both levels of government can be assured. Indeed, of the older federations only the US has come close to establishing a fully parallel system of courts. The central governments of Australia, Canada and Switzerland have had authority to set up their own courts but generally they have depended upon subnational courts to administer central law relying on the appellate jurisdiction of their supreme courts to impose some uniformity of the interpretation of federal laws. Most of the newer federations, especially in Asia and Africa, short of experienced judges and influenced by their predecessors, have also avoided the duplication of courts. Malaysia for instance has had an almost unitary system of courts, a pattern followed also under the South African Constitution, 1996, Chapter 8. The courts in India and Pakistan form a single integrated system with the same courts adjudicating both the federal and state/provincial laws, but unlike Malaysia and South Africa authority over their organisation has been divided between the central and state/provincial governments.[23]

Third, there is the issue of the constitutions of the other level of subnational governments, local governments, both municipal and rural. As noted in the introduction, increasing attention has been given throughout the world in recent years to the importance of local governments in meeting the needs of citizens. In most decentralised unitary systems the scope and structure of local governments have been defined simply by national legislation.

Traditionally in most federations, including quasi-federations, the constitutional distribution of powers between the federal and provincial/state governments has left the responsibility for the establishment and operation of local governments with the provinces or states. In recent years, however, in some federations – notably Germany and India – efforts have been made to recognise the importance of local government as a full-fledged third order in the federal system by formally recognising in the federal constitution the position and powers of local governments.

The South African Constitution, 1996, has followed this path by devoting a whole chapter (Chapter 7, ss. 151-164) to the structure, powers and functions of local governments and by emphasising in Chapter 3 the integral role of local governments as a sphere of cooperative government (sections 40 and 41).

In practice the importance of local governments as a third sphere of government has varied enormously from federation to federation, being perhaps most prominent in Switzerland and the US and least in Australia. It is also worth noting that in some federations intergovernmental relations directly between federal and local governments have been considerable, whereas in others, such as Canada, nearly all such relations have been funnelled through the provinces as intermediaries.

One of the problems affecting the relations of local governments with other spheres of government is simply the sheer number of local governments which raises issues of how they should be represented in intergovernmental councils. Nevertheless, in Australia when the new Council of Australian Governments was established in 1992 to improve intergovernmental collaboration on economic development policies some representation for local governments was formally included, and the European Union has established a Committee of Regions

which includes representatives of both subnational state governments and local governments.

Fourth, there is the issue of safeguarding those citizens who find themselves in a minority within a subnational territorial unit. Federations best protect distinct groups and minorities when those communities are regionally concentrated in such a way that they may achieve self-government as a majority within a subnational government. Examples are the largely unilingual and uniconfessional cantons of Switzerland, the predominantly French-speaking majority in Quebec within Canada, and the predominantly Flemish and French-speaking regions and communities within Belgium. But rarely in practice are populations distributed into neat watertight territorial subnational units. In virtually all federations the existence of some intra-unit minorities within the subnational units of government has been unavoidable. Where significant intra-provincial minorities have existed, three types of solutions have been attempted.

The first has been to redraw the boundaries of the subnational units to coincide with the location of the linguistic and ethnic groups. The creation of the Jura as a separate canton in Switzerland and the reorganisation of state boundaries in India and in Nigeria referred to earlier provide examples. But even when boundaries have been redrawn it has been extremely difficult to avoid leaving some intra-state minorities within the new units.

A second approach has been to assign to the federal government a special role as guardian of intra-provincial minorities against possible oppression by a provincial majority. Examples of such quasi-federal provisions can be found in the federal constitutions of Canada, India and Malaysia.[24]

The third, and most widely used approach has been to attempt to protect intra-provincial minorities through a set of fundamental rights embodied in the federal constitution.[25] Although it was not the original intent of the Bill of Rights added to the US Constitution by the first ten amendments in 1791 to apply the bill to state governments, the effect of the Fourteenth Amendment in 1868 and subsequent judicial interpretation has been to extend the protection of individual rights not just from federal action but also from state action. A number of subsequent federations have set out in their constitutions more extensive lists of fundamental rights, including in some cases collective group rights, protected from both federal and subnational government action. Examples have been Germany (1949), India (1950), Malaysia (1963), Spain (1978), Canada (added in 1982), and Belgium (1993). The South African Constitution, 1996 (Chapter 2, sections 2-39) clearly follows in this tradition. On the other hand, Switzerland, Australia and Austria have not elaborated sets of fundamental rights in their federal constitutions.

In some instances subnational constitutions have also included their own set of fundamental rights to protect their own citizens and minorities. This has been the case, for instance, in some Canadian provinces, most notably Quebec which has its own Charter. Indeed, when the Supreme Court of Canada in its December 1988 decision struck down a section of Quebec's controversial language law, it did so on the grounds that these sections conflicted with the Quebec Charter of Rights rather than with the Charter in the federal constitution. Where there are both federal and subnational charters of rights, there is always the possibility of a charter duel, but in such cases courts have normally judged that the federal charter of rights, insofar as there is conflict, must prevail. What provincial charters of rights can do, however, is to supplement or extend the rights available to their own citizens and minorities beyond those set out in the federal constitution.

CONCLUSION

As this survey has indicated, there is a broad and extensive variety in the contextual factors, the nature of the autonomy regimes, the source of authority and character of their constitutions, and the content of the constitutions of subnational governments in multitiered or multisphered polities in the contemporary world. Clearly there is no single ideal model – whether federal, unitary or hybrid – applicable to all circumstances. Those designing subnational governments can learn a great deal from this rich diversity of experience, but ultimately each system of subnational governments must be shaped and adapted to fit the particular conditions and circumstances in which it is established.

There is one further point which has not been emphasised in the body of this paper but which

is crucial to effective subnational government within a multi-sphered polity. That is the public acceptance of the respect for constitutionalism and the rule of law. If subnational constitutions, whether embodied in the federal constitution or in separate distinct documents, are to be more than mere words on paper, the public and politicians in their practice must recognise and observe them as a fundamental prescription of the structures and procedures required for multitiered or multisphered democratic government.

ENDNOTES

1) R. L. Watts, "Federalism, regionalism and political integration", in David Cameron, ed., *Regionalism and Supranationalism* (Montreal: Institute for Research on Public Policy, 1981) pp. 3-5.
2) R.L. Watts, *Comparing Federal Systems in the 1990s* (Kingston: Institute of Intergovernmental Relations in association with McGill-Queen's University Press, 1996) pp. 6-14.
3) D.J. Elazar, ed., *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements* 2nd ed. (Harlow, Essex: Longman Group Limited, 1994), pp. 357-9, and Watts, op. cit., p. 12.
4) Elazar, op.cit., pp.357-9, and Watts, op. cit., p. 11, 13.
5) T. Courchene, "Glocalisation, institutional evolution and the Australian federation", in B. Galligan, ed. *Federalism and the Economy: International, National and State Issues* (Canberra: Federalism Research Centre, The Australian National University, 1993), pp. 64-123.
6) J.R. Pennock, "Federal and unitary government – disharmony and reliability", *Behavioural Science*, vol. 4(2), 1959, pp. 147-57.
7) M. Landau, "Federalism, redundancy and system reliability", *Publius*, vol. 3(2), pp. 173-95.
8) Constitution of the Republic of South Africa, 1996, Chapter 3.
9) For a fuller discussion see R. L. Watts, "Federalism, regionalism and political integration", pp. 6-9.
10) D. Elkins, *Beyond Territory: Territory and Political Economy in the Twenty-First Century* (Toronto: University of Toronto Press, 1995).
11) R. Hrbek, "German federalism and the challenge of European integration", in C.

Jeffrey and P. Savigear, eds. *German Federalism Today* (Leicester: Leicester University Press, 1991); U. Leonardy, "Regionalism with federalism: the German Constitution prepared for European Union", in B. de. Villiers, ed., *Evaluating Federal Systems* (Cape Town: Juta & Co, 1993).

12) See, for instance the special issue of *Regional and Federal Studies: an International Journal*, vol. 6(2), 1996.
13) Elazar, *Exploring Federalism*, pp. 34-38; E.E. Osaghae, "A reassessment of federalism as a degree of decentralisation", *Publius*, vol. 20(1), 1990, pp. 83-98.
14) Watts, *Comparing Federal Systems in the 1990s*, pp. 6-14, 65-74.
15) Ibid., pp 7-8, 10. Significant examples among the 24 federations are the United States, Switzerland, Canada, Australia and Germany.
16) Ibid., pp. 8, 11, 13; Elazar, *Federal Systems of the World*, pp. xvi-xvii, 357-9.
17) Y. Ghai, "Autonomy with Chinese characteristics: the case of Hong Kong", unpublished paper delivered at conference on "Federalism and diversity", 23-24 January 1998, The Hague, The Netherlands, sponsored by the International Centre for Ethnic Studies, Colombo and the Institute of Social Studies, The Hague (due for publication in 1999).
18) R.L. Watts, *New Federations: Experiments in the Commonwealth* (Oxford: Clarendon Press, 1966), pp. 304-5.
19) The Constitution Act, 1982, s. 45 leaves provinces free to amend their own constitutions, subject to a few basic requirements set down in s. 41 which require the assent of the federal parliament and all the provincial legislatures. On South Africa see The Constitution of the Republic of South Africa, ss. 142, 143 which permits provinces to establish or amend a provincial constitution if its legislature does so with a two-thirds majority and as long as its provisions are compatible with certain requirements of the national constitution.
20) Watts, *New Federations*, pp. 240, 265.
21) Watts, *New Federations*, pp. 230-1. Examples are the "All-India" Indian Administrative Service (IAS) and Indian Police Service (IPS), the "All-Pakistan" Civil Service of Pakistan (CSP), and Police Service of Pakistan (PSP) and the provisions in Malaysia for secondment of administrative officers between central and state governments.
22) The previously existing national and provincial public services were continued for a transitional period, however. (Schedule 6 item 24(2)).
23) Watts, *New Federations*, pp. 226-228.
24) Watts, *Comparing Federal Systems*, pp. 96-7.
25) Ibid., pp. 97-9.

The Relationship Between National and Subnational Constitutions

Cheryl Saunders

INTRODUCTION

Federalism is a form of government in which citizens are members of two political communities, each of which has a degree of final autonomy. While some polities are organised as federations for historical reasons, most federal systems serve significant contemporary purposes as well, actually or potentially. The unifying characteristics of federalism enable joint action, common standards and other benefits of a larger community in areas where these are considered important. The devolutionary character of a federal system can facilitate the governance of ethnically diverse peoples, extend democratic participation, adapt policy to regional needs and encourage innovation, experimentation and competition.[1]

By definition, the autonomy of subnational units in a federation is not absolute and its extent will depend, properly, on the needs of the polity concerned. By definition also, however, the autonomy of the units will be greater than that of local governments in a unitary system, to which central authority has been devolved.

Every federal system is structured by a central constitution which divides power, establishes central institutions, prescribes the rules for resolving disputes and provides a procedure for its own alteration. The characterisation of subnational units as political communities, however, suggests that they must have constitutions of some kind as well, although it does not necessarily prescribe the form they should take. The first theme of this paper is the relationship between these two groups of constitutions within a federation. While it may readily be accepted that a subnational constitution should comply with the national constitution, there are more difficult questions about the extent and manner of national control, given the nature and purpose of federalism.[2] And from the perspective of subnational communities, there are even more difficult questions about the status of these constitutions, the source of authority for them and the manner in which they can and should be changed.

Federal-type systems take many forms, but all anticipate the possibility of conflict. The usual, although not invariable rule is that central action, taken within the limits of the central constitution, is entitled to prevail. Associated with it, typically, is an assumption that disputes over the boundaries of power will be resolved through courts. This was, indeed, the most compelling original rationale for judicial review of the constitutionality of legislation.

Judicial review is a remedy of last resort, however. It is costly and can be disruptive. It is a blunt instrument, in the sense that it cannot moderate but can only identify winners and losers. Arguments persist about its relationship with majoritarian democracy. Its effect generally has been to expand central power at the expense of subnational competence. The pressures of internationalisation and globalisation exacerbate this tendency. At the end of the 20th century, there is some interest in mechanisms that might avoid competency disputes in federal-type systems or at least avoid their resolution in this way. The results should be monitored closely. In some jurisdictions, dispute-avoidance techniques may strike a more appropriate balance between unity and diversity than could

have been achieved through the courts. In others, abandoning the neutral adjudication that courts, at their best, provide ultimately, may undermine the constraints on power on which a federal-type system depends.

This paper deals with two distinct, but related questions: national control over subnational constitutions and processes for resolving competency disputes. Its purpose is to identify issues and options as a basis for comparative study. Some examples in the paper are taken from a variety of declared federations. Some are taken from systems that are not formal federations but which have some federal characteristics: South Africa is one of these.

Most of the examples are taken from Australia; this is partly because Australia is the federation most familiar to me. But it is also because Australia presently offers an appropriate case study for the purpose. The current constitutional debate in Australia raises many issues for the division of power between national and subnational constitutions and institutions, which have potential relevance for other federal-type systems, and for which a comparative approach may be useful.

1. THE AUSTRALIAN FEDERATION

This section provides a brief introduction to subnational constitutions in the Australian federation, as background for the analysis that follows.

Australia consists of six states, two self-governing mainland territories and a number of external territories. All six states were original constituent units of the federation. Before federation, they were self-governing British colonies, each with its own constitution, institutions of government and laws. In that sense, the Australian states predate the federation itself. Section 106 of the national constitution refers to state constitutions, as follows:

> "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

The purpose of the first part of the section was a practical one: to ensure that the constitutions of the former colonies survived the transition to federation, as the fundamental constitutional instruments of each of the states.[3] The presence of such a provision in the national constitution, however, has prompted the High Court of Australia to conclude that state constitutions now derive from the national constitution.[4]

One practical effect of this development is that state constitutional issues become matters arising under the national constitution. They thus fall within federal jurisdiction[5] and are subject to the power of the federal Parliament to legislate for the manner of the exercise of that jurisdiction, within the limits prescribed by the Constitution. The doctrine has theoretical consequences as well, which are taken up below.

The second part of the section was designed to preserve the existing "manner and form" requirements for the alteration of state constitutions. At the time of federation, the inclusion in colonial constitutions of a special amendment procedure needed authorisation by Imperial law.[6] Section 106 served to rebut any presumption that the authority to entrench state constitutions had been overridden and parliamentary sovereignty restored. When the final, formal links were broken between the United Kingdom and Australian parliaments, the authority to entrench was reiterated in the Australia Acts 1986.[7]

These pre-existing principles, antiquated although they undoubtedly are, have prevented the interpretation of section 106 as itself providing authority for the entrenchment of state constitutions. Nor, despite some encouragement from its wording, has the section been interpreted to prevent alteration of state constitutions by the national constitution alteration procedure.[8]

As original states,[9] the existing states enjoy certain constitutional guarantees that would not necessarily be available to new states. These include entitlement to an equal number of senators and a guarantee of minimum representation in the House of Representatives.[10] The established character of the original states helps to explain one other distinguishing feature of the Australian Constitution: the relatively few direct controls that it imposes on state constitutions. In recent years, however, new controls have emerged through judicial decisions as a consequence of the interrelationship between national and subnational institutions. These have the potential to alter significantly the autonomy of states in relation to their own con-

stitutions and the way in which state constitutions operate in practice.

The position of the territories in the constitution provides an opportunity for reflection on the nature and significance of statehood. The two self-governing territories are particularly significant in this regard, because they are similar to the states in all but name. One of these, the Northern Territory, presently is seeking admission to the federation as a new state. The other, the Australian Capital Territory, is the seat of the federal government and probably is unable, constitutionally, to become a state.[11]

There are relatively few non-federal limits on the power of governments and parliaments in the Australian Constitution. Such as they are, however, they generally apply only in the states and for the benefit of the people of the states. Examples include the separation of federal judicial power,[12] the right to trial by jury,[13] the protection against discrimination on the grounds of residence[14] and the guarantee of freedom of interstate trade.[15] This feature can be justified either as an accident of history or as a reflection of the dominant federal purpose of the constitution. On either basis, it is inconsistent with current community attitudes.[16] A slow process of change has been under way for some time through legislation,[17] judicial interpretation,[18] and constitutional alteration.[19] Its exclusion from the constitutional mainstream has, however, been one of the arguments advanced by the Northern Territory in favour of its admission as a state.

The experience of the Northern Territory in seeking statehood is relevant more generally to this paper as well. The beginning of the modern movement to statehood for the Northern Territory in the late 1980s, was almost a textbook example of how to draft and secure acceptance for a constitution as an essential prerequisite for a new state. A bipartisan Parliamentary Committee was established to consult widely with the entire community of the Territory, which includes the largest proportion of indigenous Australians of any state or territory. On the basis of these consultations, the committee prepared a draft constitution.[20] It dealt with issues that would be likely to prove most controversial, by developing several options for consideration by a Northern Territory Constitutional Convention, before the final constitution was put to a territory-wide referendum. Issues handled by the committee in this way included guarantees of rights and recognition of Aboriginal customary law.

The textbook case became a negative example, however, in the final stages. The basis on which the convention was constituted was widely criticised as manipulative on the part of the government.[21] The draft approved by the convention "followed more closely a second document, put forward by . . . a senior Minister"[22] than it did the final draft constitution of the Sessional Committee. The Northern Territory Legislative Assembly adopted the constitution approved by the convention, with minor modifications.[23] At referendum, the electorate was asked only whether it approved statehood "now that the Legislative Assembly has adopted the Constitution". Largely in reaction against what was perceived as a flawed process, the electorate voted "no". It is not clear at this stage whether it will be possible to revive the movement towards statehood in time for the constitutional centenary in 2001, which was the original goal.

One final, recent development – with potential relevance for state constitutions – requires mention. Australia presently is a constitutional monarchy. There are direct links between the Monarch and her representatives nationally and in each of the states. For most practical purposes, a governor-general and six state governors carry out the functions of the Monarch in Australia. A proposal to break the links with the Crown and, in this sense, to establish a republic is presently under active consideration and will be put to referendum in November 1999.[24] It raises a number of issues that are relevant for present purposes.

The central question is whether an alteration to the national constitution should establish "republicanism", in the limited sense in which the term is used in Australia, as a national norm. In effect, this would impose a republican system on each of the states, even where a state majority had opposed and voted against the change in a national referendum. A further complication is that, even if republicanism were established in this way, consequential changes to state constitutions would still be necessary to alter monarchical forms and to create republican institutions. In some states, the relevant parts of the state constitution can be changed only by referendum.[25] It is easy to foresee cir-

cumstances in which a state community might be unwilling to make such changes. In that case, the only solution would be to prescribe interim state constitutional structures in the national constitution. This would be a major new departure in Australia and, potentially, extremely divisive. These considerations have influenced the decision to draft the republican model in a way that leaves the decision about the links with the Crown at state level to the state concerned, and does not interfere directly with state constitutions at all.[26]

2. NATIONAL AND SUBNATIONAL CONSTITUTIONS

2.1 The form of subnational constitutions

All subnational units must have a constitution of some kind, formal or informal. Not all are separate from the national constitution, as the examples of Canada and India show. Subnational units are more likely to have separate constitutions where they existed as units with their own constitutions before federation, as in the United States (US) and Australia. Even in these cases, however, the national constitution may refer to subnational constitutions and may be interpreted as authorising them, as in Australia.

Authorisation of subnational constitutions by the national constitution raises an important question of principle about the link between a subnational constitution and the community it serves. It may readily be accepted that national constitutions are based on popular sovereignty. The corresponding assumption about subnational constitutions is complicated by their relationship with the national constitution. No subnational constitution is completely uncontrolled. To a degree that depends on the extent of control, subnational constitutions therefore draw on the authority of the people organised nationally, as well as the authority of the people of the subnational community. On one view, this is merely another manifestation of the compromise inherent in any federal-type system. Nevertheless, the resulting ambiguity undermines the significance of state constitutions and makes it less likely that they will develop as a focal point of local democracy.

This largely theoretical question has important practical ramifications for the question foreshadowed earlier: whether and in what circumstances subnational constitutions can be altered through the national constitution by a national majority. To the extent that subnational constitutions are controlled by the national constitution, change is likely to be effected by the national constitution alteration procedure.

Consideration of the relevance of these constitutions to subnational communities, however, suggests that it may be appropriate to accommodate their views in some way, as well. One option would be to require subnational consent, appropriately conveyed, to changes that affect subnational constitutions, generally or in significant ways.

Little attention has been given to this consideration in connection with the Australian Constitution. The constitution alteration formula under section 128 of the Australian Constitution requires the consent of particular subnational units for certain alterations. Those specified are changes to the proportional representation of the original states in the Australian Parliament or changes to state geographical boundaries. There is no express requirement of state consent to changes that would affect the constitutions of the states themselves. The preservation of state constitutions "until altered in accordance with the Constitution of the State" by section 106, might have provided encouragement to the development of a judicial doctrine which protected state constitutions from alteration by national majorities. So far, however, this has not occurred.

The issue is a live one in Australia, in connection with the move to a republic. The constitution alteration procedure prescribed in section 128 of the Australian Constitution requires proposals for change to be passed by the Commonwealth Parliament and approved by referendum with national majorities and majorities in at least four states. Construed literally, it would allow a republican referendum to be carried by majorities in four states overriding the views of state majorities in the other two.[27] This would be so, even if the proposed alteration were to require the states as well as the Commonwealth, to sever links with the Crown. Whatever the legal position, there are political problems with such a course of action. These are avoided in the present proposal, now released in the form of a draft bill to amend the national constitution,[28] which would not affect state constitutions. Rather, the proposal assumes that a republic will be achieved at both Common-

wealth and state levels by cooperative and coordinated action between the various governments.

The decision to confine the referendum on the republic to the national sphere of government raises the possibility that some states may retain their links with the Crown after Australia becomes a republic, at least in the short term. The Constitution Alteration Bill would facilitate this, by expressly authorising states to retain their links with the Crown and providing that, in such a case, the monarch of the state would be the person who would have been the monarch of Australia had the republican referendum not been passed.[29] Such an outcome would be widely deplored. Nevertheless, staggered change of this kind has some historical precedent in Australia, where the sovereignty of the British Parliament *vis-à-vis* the Commonwealth Parliament formally was repudiated[30] fifty years before the same step was taken in relation to the parliaments of the states.[31] The possibility of a partial republic illustrates the extent to which Australian constitutions are free of national constitutional control. More significantly, for present purposes it is evidence of the existence of a culture that resists such control, even on a point of major principle.

2.2 Procedures for control

The usual rule is that a national constitution is paramount and that a subnational constitution must be consistent with it. The significance of such a rule depends on what the national constitution says about subnational constitutions.

In a hierarchy of norms, a valid national law usually is paramount over subnational constitutions as well. The federal division of powers, however, may mean that the capacity of the centre to makes laws affecting a subnational constitution is limited. Nevertheless, the possibility that an ordinary national law may override a subnational constitution raises even more starkly the question about how subnational constitutions can or should be changed. In Australia, the question is complicated by the fact that both the list of federal concurrent powers in section 51 and section 106 – to which reference already has been made – are expressed to be "subject to this Constitution". In the case of a conflict between an exercise of power under section 51 and section 106, one or other of these sections must have priority.

The issue was raised before the High Court in 1989 in the context of the effectiveness of a Commonwealth law passed under section 51(38) of the Constitution, with the concurrence of all state parliaments, to expand the state competence to make laws for areas below the low water mark. In effect, the law altered the constitutions of the states, by extending their jurisdiction off-shore. The High Court held that in these circumstances, the exercise of Commonwealth power under section 51 prevailed.[32] In part, at least, the decision was justified by the cooperative nature of the exercise. Whether the same logic would apply in less cooperative circumstances, if a state constitution were overridden by a different power, remains unclear. The principle of the priority of Commonwealth law having been established in relation to one power, however, it is unlikely to be altered for others, cooperation notwithstanding.

Whatever the autonomy or dependence of existing subnational units, national control is likely to be exercised at the point where a new unit is admitted to the federation. National power to admit a new unit usually implies a power of decision in relation to its constitution. Thus, for example, section 121 of the Australian Constitution authorises the Commonwealth Parliament to admit or establish new states and "upon such admission or establishment, make or impose such terms and conditions . . . as it thinks fit". To similar effect, Article IV section 3 of the US Constitution provides that: "New States may be admitted by the Congress into this Union . . ."

The meaning and effect of the Australian provision may become an issue in relation to statehood for the Northern Territory. The effective rejection of the previous draft constitution by the people of the territory themselves has already been noted. One of the major issues in any attempt to revive the statehood movement will be the adequacy of the protection which the new state constitution offers to the indigenous people of the Northern Territory, whose vote was instrumental in the rejection of the earlier draft. Even if a new draft is accepted in the Territory, it is likely to come under close scrutiny in the Commonwealth Parliament, directly or indirectly, as the Parliament considers legislation for the admission of the Territory to statehood. The stance of the Australian

Senate, typically constituted by a minority of government members, is likely to be particularly important.

These points concern the opportunity for national control of subnational constitutions. There is a further question, however, about the mechanisms through which a national constitution actually controls subnational constitutions. A range of models is suggested by existing federal-type systems.

Most obviously, a national constitution may expressly control subnational constitutions. Prescribing all or part of the subnational constitutions may do this. In theory at least, a national constitution may make full and final provision for subnational constitutions. Alternatively, a national constitution may provide the framework for subnational constitutions until individual subnational units provide otherwise, as in South Africa.[33] In this case, the national constitution is likely to provide some mechanism for controlling the content of new subnational constitutions. In South Africa, this is achieved through the certification procedure of the Constitutional Court.[34]

Even in a system that assumes the separate existence of subnational constitutions, the national constitution may prescribe particular principles with which subnational constitutions must comply. Thus, for example, the US Constitution requires the US to "guarantee to each State . . . a Republican Form of Government".[35]

The South African Constitution requires subnational constitutions to comply with basic constitutional values and the principles of cooperative government.[36] The German Constitution requires the constitutions of the *Länder* to "conform to the principles of republican, democratic, and social government based on the rule of law".[37]

There are no such positive specifications for subnational constitutions in the Australian Constitution. Like many federal-type constitutions, however, the Australian Constitution prescribes some rules which subnational constitutions may not transgress. In Australia, these relate to the nature of the union that the constitution was designed to create and are largely economic in character. Thus, for example, it would not be possible for an Australian state constitution to significantly favour residents of that state over other Australian nationals.[38] Similarly, state constitutions may not protect local industries by discriminating against trade with other states, directly or in substance.[39]

In addition to express restraints of this kind, a national constitution may inadvertently affect subnational constitutions through the interrelationship of central and subnational institutions. Some different examples are suggested by Australian experience.

The first concerns the position of state governors. A governor represents the Queen in each state and, in effect, fills the position of non-executive Head of State typically found in parliamentary systems derived from the Westminster model. State governors are, however, also given functions under the Australian Constitution. Most of these concern the Australian Senate, originally conceived as a States' House. Thus, for example, state governors issue writs for Senate elections[40] and play a part in filling casual vacancies in the Senate representation of their state.[41] In practice, also, state governors have acted as deputies to the governor-general, thus acting, in effect, as national Head of State. Under the proposed model for a republic, the constitution would be altered to formally enshrine this practice in the text of the constitution.[42] The acting President of Australia would be drawn from the ranks of state governors from time to time.

In fact, the constitution interprets the term "Governor" broadly, to include any "Chief Executive Officer or Administrator of the Government of the State".[43] The breadth of the definition lessens the implications of these national constitutional references to state governors. These same sections, however, refer to other state institutions as well. State parliaments also play a role in filling casual Senate vacancies.[44] And in exercising some powers, governors specifically are required to act on the advice of the "Executive Council" of the state.[45] The Executive Council is a formal advisory body, the continuing usefulness of which is open to question. No state is likely to be tempted to abolish its parliament. If these sections were interpreted to entrench state executive councils, however, they might seriously constrain future state attempts at institutional reform.

A similar example concerns state courts. The Australian Constitution enables the Australian Parliament to confer federal jurisdiction on

state courts.[46] It also provides for an appeal to the High Court, at the apex of the Australian judicature, from State Supreme Courts.[47] At the very least, these sections require the states to retain their Supreme Courts. More importantly, the High Court recently has held that these sections also require states to maintain the integrity of their court systems, to the point where there is no "incompatibility" between a state court and the exercise of federal jurisdiction.[48]

Applying this principle, a state law that conferred jurisdiction on the Supreme Court to make an order detaining a person in preventative custody was held invalid. The power of detention was incompatible with the exercise of federal judicial power, where the detainee was not adjudged to have broken any law. The notion that references to state courts have qualitative implications of this kind could be even more significant if extended, by analogy, to the references to state parliaments.

The final example is of a different kind. In a series of cases in the early 1990s, the High Court found an implied protection for freedom of political speech in those parts of the Australian Constitution which provide for the establishment of the national Parliament.[49] The logic of this conclusion was that a system of representative democracy, evidenced by constitutional requirements for an elected Parliament, depends on a degree of freedom of communication between voters and their representatives and among voters themselves. Understood in this way, the doctrine does not automatically provide protection for freedom of speech from inroads by state parliaments. In practice, however, the political systems of the Commonwealth and the states are so closely interwoven that it is impossible to quarantine free speech in the Commonwealth sphere in that way. The Court has therefore accepted that the Constitution places limits on the powers of state parliaments as well, although the extent of these limits remains unclear.

There are other ways in which national constitutions and actions taken pursuant to them may affect the operation of state constitutions. Examples in Australia include the procedures for making grants to the states on condition[50] and for coordinating government borrowing.[51] Both offer procedures by which state governments may obtain access to funds that have not been raised with the authority of the parliaments of the states.[52] They have weakened both the reality and the perception of state executive responsibility to state parliaments and thus the institution of state parliaments themselves.

2.3 The substance of control

One final issue concerns the matters in relation to which national constitutions typically control subnational constitutions. Inevitably, the answer depends in part on whether subnational constitutions exist as separate instruments designed and implemented by subnational polities themselves. Inevitably also, the subject matter of national constitutional control varies between federations, depending on different views of the areas in which national norms are important.

Nevertheless, at least two common themes can be identified across most federal systems. First, it is usual for national constitutions to prescribe the essential characteristics of subnational governments, including the basic civil and political rights which all citizens, considered nationally, are entitled to enjoy. Australia is an exception in this regard, largely because its constitutional culture so far has been resistant to the protection of particular rights. The most important principles of economic union also are likely to apply nationally. Typically, these include freedom of movement of people, goods, services and capital and to that extent limit subnational freedom of action. In direct contrast to the position in relation to rights, economic union is a central feature of the Australian Constitution, reflecting the preoccupations of the colonies at the time the constitution was framed.[53]

As a generalisation, the broader the substance of national control the greater the homogenising effect on the federation as a whole. This effect might be lessened if national constitutions were construed merely so as to establish a basic rule or "floor" allowing subnational units to prescribe more rigorous standards, as is the case with the protection of individual rights in the US. The significance of this approach has been demonstrated by the recent history of the interpretation of human rights standards in the US.[54] The approach is open for adoption in any federal system unless the standards laid down in the national constitution are expressed as absolutes. Interpretation of subnational constitutions to prescribe standards higher than the

national norm is likely to be facilitated by a separation of national and subnational court systems, as in the US.

National control will be more difficult to effect if subnational units pre-dated federation. The virtual absence of national constitutional control of state constitutions has made Australia a classic and extreme example. In consequence, Australia offers a useful case study of a federation in which subnational units have been left free to experiment with different constitutional forms.

The potential of this freedom has not been realised. The explanation lies in part in their origins, as colonial constitutions, authorised by the Imperial Parliament and cast from the same mould. From the beginning, therefore, the Australian state constitutions were very similar to each other. Some examples of experimentation may be given, however, drawn from more recent times.

Importantly, in the Australian context, state constitutions have pioneered the use of fixed-term[55] and partly fixed-term[56] parliaments. The development of the compromise of a partly fixed-term – leaving governments with one year within which an election may be fixed to suit their convenience – has the potential to influence debate on the term of the national Parliament as well.[57] An example of a different kind is provided by recent amendments to the constitutions of Victoria and New South Wales to protect aspects of judicial independence. In neither case is the provision as sweeping as the separation of judicial power in the national constitution. Both sets of state provisions can nevertheless be understood as an appropriate response to local issues and pressures. Thirdly, a variety of constitutional alteration procedures has been developed for state constitutions, ranging from approval of major constitutional changes by referendum to alteration by simple or special parliamentary majorities. Cross fertilisation of these mechanisms between states is leading to a spread in the use of the referendum. As this occurs, the extreme flexibility that originally characterised Australian state constitutions will give way to greater rigidity. The relative success of state constitutional referendums suggests that, even in this case, they are likely to remain easier to alter than the national constitution.

One area of pending experimentation is constitutional recognition of indigenous customary law. If and when a new state for the Northern Territory finally is established, its constitution is likely to accord some status to indigenous customary law. The argument for such measures is strong in the Territory, because of the relative size of its indigenous population. Other states, however, also have indigenous communities. A successful resolution of this issue in the Northern Territory undoubtedly would have an influence on state constitutions elsewhere.

The generally positive effects of experimentation in these different areas may inadvertently have been precluded by inconsistent national standards under a more controlling national constitutional regime. This advantage of the Australian approach must be weighed against the occasions where state constitutional autonomy has enabled experimentation of a less admirable kind in relation, for example, to state electoral boundaries and civil rights standards. The trade-off is a familiar one. Each federation is likely to make different choices about standards that should apply nationally and those that may be set at a subnational level.

3. PROCEDURES FOR RESOLVING COMPETENCY

3.1 Dispute avoidance

There are some obvious mechanisms for dispute avoidance that should be considered in drafting any federal-type constitution. One includes the prescription of clear competency boundaries between the two spheres of government. Words cannot be so clear as to preclude all disputes but obvious ambiguities can be avoided, with an eye to the experience of other federations. One particular problem is the effect of changing circumstances on allocations of constitutional competency. A possible solution, which will not always be appropriate, is to draft limits on power in a way that allows future flexibility. Thus in 1901, the Australian Constitution conferred power on the Commonwealth Parliament to make laws for postal, telegraphic, telephonic and "other like services", on which national legislation for the electronic media now is based.[58]

A second technique, even more difficult to perfect, is the development of a culture in which governments and parliaments take responsibility for compliance with competency limits, instead of continually pushing the boundaries of their competency through the

courts. The South African Constitution provides a possible model, with its requirement for all spheres of government to "not assume any power or function except those conferred on them in terms of the Constitution".[59] By contrast, the institutions of Australian government, both Commonwealth and state, accept disputes over power as a normal aspect of governance, which can be used to attain a more favourable outcome if established boundaries appear vulnerable, for whatever reason.

An alternative to competition over power, waged through the courts, is agreement between governments to take joint action in areas of shared interest or potential conflict. Depending on the institutional structure of the federation, agreements may be made through intragovernmental means. The German *Bundesrat* is an example. The South African National Council of Provinces has some potential to become another. In most common law federations, however, agreements are intergovernmental in nature. A wide range of mechanisms is available for use, depending upon the outcome sought. Ministerial meetings involving all participating jurisdictions are a common forum for negotiating arrangements of these kinds. The experience of both Australia and Canada suggests that, if this medium is used, some attention should be paid to ensuring adequate accountability for the decisions that are taken.[60]

One catalyst for disputes over power in recent years has been the impact of treaties on the established modes of operation of federal-type systems. The power to enter into treaties typically is a federal competence. Implementation usually lies with the federal sphere as well. As treaties have increased in number and range, federal power has expanded correspondingly, at the expense of subnational competence. Most significantly, by this means, federal power can extend to areas previously considered largely the responsibility of subnational units. Heritage protection and the rights of children are examples of areas now covered by treaties, which would not necessarily have attracted national power in the past. Some federations have sought to circumvent the legal and political disputes to which this development inexorably leads through cooperation. To be effective, the cooperation should begin at the point at which the decision to enter into the treaty is made, if not before, during the negotiation phase.

Again, the Australian experience is illustrative. The reach of the federal "external affairs" power was a major area of dispute between governments in the 1970s and 1980s.[61] The legal issues ultimately were resolved in favour of the centre. The potential for further disputation on political grounds was stemmed by cooperative arrangements, developed in several phases, with increasing levels of sophistication. The most recent of these involve a "Treaties Council" constituted by Heads of Government, as a forum for consultation about treaties with implications for state power.[62]

A mechanism of a different kind for discouraging disputes that can be resolved only through courts is the development of a culture of cooperation. The most familiar example is the principle of *Bundestreue*, associated with the jurisprudence of federations in the German tradition. Drawing some inspiration from the German experience, the South African Constitution has specifically prescribed principles of cooperation, in Chapter 3.[63] The principal value of such a mechanism is likely to be political in character. It encourages cooperation and legitimises collective action. In extreme cases, such principles also may be employed by courts to refuse to deal with cases that come before them prematurely or to penalise parties acting in a manner that is inconsistent with cooperative standards.

3.2 Dispute resolution procedures

Disputes cannot always been avoided. A degree of friction and competition between governments is natural and to be expected. In any event, private parties often will challenge the competency of a national or subnational law on constitutional grounds, if they have standing to do so. Courts usually settle such disputes. The Swiss initiative and referendum procedure offers an alternative that is, however, specific to Swiss experience and culture and would be difficult to transplant successfully elsewhere.

There is a range of variations in the procedure for judicial review, which may affect its operation in practice.

Some of the most obvious concern the structure of the courts themselves. Jurisdiction to deal with disputes over the federal division of power are likely to be vested in the general

courts in common law federations and in specialist constitutional courts in civil law federations. The systemic distinction is not necessarily determinative. South Africa, for example, has a specialist constitutional court with jurisdiction over competency disputes.[64] Different rules about the qualifications and tenure of judges are likely to apply in specialist and general courts. Whether and to what extent these affect the principles developed by those courts is a question that may merit further consideration.

A structural issue of a different kind concerns the relationship of the courts to the spheres of government themselves. Some federal-type systems, of which the US is a prominent example, have a dual court system. In others, of which Canada and South Africa are examples, there is a single system of independent courts, possibly with varying degrees of reliance on the spheres of government, at different levels in the court hierarchy. Australia is a hybrid: Chapter III of the Constitution confers sufficient flexibility in the vesting of federal jurisdiction to accommodate either a single or a dual court system culminating, in either case, in the High Court at the apex of the judicature. Among the many implications of these structural differences is the likelihood that a single court system will encourage homogeneity of legal principles developed through the courts. In contrast, the existence of separate courts systems in the subnational sphere provides a setting for greater jurisprudential diversity.

The decision-making techniques used by courts may affect the course of judicial review as well. Three examples may be given. First, unlike their counterparts in the US and Australia, the Canadian courts have an advisory jurisdiction, which can be used to resolve disputes at an earlier stage and which has played a significant role in key federal issues in Canada.[65] Secondly, some federations have experimented with the technique of prospective overruling, giving governments the opportunity to correct constitutional problems and avoiding the disruption of judicial invalidation with immediate effect.[66] Whatever its merits in terms of convenience, common law courts are wary of this technique because of the focus it casts on the law-making role of the judge. Thirdly, a distinction may be drawn between a judicial order that invalidates legislation and one that declares it inoperative.[67] In the latter case, the challenged legislation may revive, if and when the constitutional impediment is removed.

Finally, different judicial systems employ a variety of ways of limiting access to the courts or limiting the impact of judicial decisions. One of the most familiar in common law systems is the concept of non-justiciability. A court may decline to intervene if, for example, a dispute lies solely within the political arena. In Australia the doctrine has been applied in various contexts. Relevant for present purposes, courts have used the doctrine to avoid involvement in disputes over intergovernmental agreements that they decide are largely political in character.[68] Even where an issue is justiciable, courts may employ a variety of presumptions in favour of validity. Using Australia as an example again, the cooperative character of a challenged measure has been identified as a factor that favours validity, in marginal cases.[69] More directly still, the South African Constitution authorises courts to refer disputes back to the parties where they have not taken adequate steps to resolve the matter in another way.[70]

3.3 Principles

The principles to be applied by a court in settling a competency dispute will depend in part on the constitution. The normal rule is that national constitutions and national laws will prevail if they otherwise are valid. In practice, however, the principles adopted by courts are likely to depend on the federal model. Relevant variables include the use of a vertical or horizontal division of power; the exclusive or concurrent allocation of power; and the assignment of residual power.

The strength of the federal culture may be relevant also. Ideally, federation requires acceptance of the values of decentralisation and diversity, mutual respect between the different spheres of government and acquiescence by governments in the limitation of their own powers. The existence of such a culture within the polity as a whole is likely to affect the tenor of judicial decisions as well.

Australia is an example of a country in which the federal character of the constitutional system is in some conflict with the traditions of centralisation and parliamentary sovereignty that tend to be associated with parliamentary

government, Westminster-style. Arguably, this has affected its constitutional jurisprudence. The High Court has rejected any notion of "balance" between the national and subnational spheres in favour of a "literal" interpretation of federal power, which has proved centralising in practice.[71] Even so, some limits on power have been implied from the federal structure of the Constitution, to deal with the special case where one level of government impinges on the actions of another. The federal immunity principles presently prevent discrimination by the Commonwealth against or between states and any action on the part of the Commonwealth which threatens the existence of state government institutions or their capacity to function.[72] Conceivably, these principles may in time provide some limit on the extent to which national laws can interfere with key institutions of state government, established by state constitutions.

CONCLUSION

The comparative study of relations between national and subnational constitutions is still in its early stages.

This paper has identified at least three issues of important principle on which greater comparative understanding would be useful in Australia and, possibly, in other federal-type systems. The first, in terms of logic, is the areas in which national constitutions control subnational constitutions. In practice, the areas of control will depend largely on the differing needs of different jurisdictions. The Australian experience suggests, however, that there may be some value in formally considering the principles to be applied, rather than leaving the outcome purely to historical chance. A comparison with other federations, moreover, may help to suggest what such principles might be.

An associated issue concerns the manner of alteration of those parts of national constitutions that control or significantly affect subnational constitutions. The difficult question here is whether there should be a requirement for agreement on the part of subnational institutions to changes of a certain kind. If the answer is yes, other questions follow about the types of changes that should attract special procedures and the form that such procedures might take.

One final issue – fascinating in the relatively adversarial culture of most common law federations – is the practical effect of principles of cooperation, however derived, on courts and on organs of government. Whether such principles make a difference and whether cooperation can be mandated, if not already present in the federal culture, are points of particular interest. For these reasons, among many others, the evolution of the South African Constitution is likely to attract much attention from federalists throughout the world, over the coming years.

ENDNOTES

1) Cheryl Saunders, "Constitutional arrangements of federal systems" (1995) 25 *Publius*, 1-19.
2) For present purposes, the concept of control is construed broadly to include any manner in which a national constitution governs the content of subnational constitutions or the way in which subnational governments conduct their affairs.
3) Similarly, section 107 saved the power of

state parliaments and section 108 saved existing state laws.

4) *New South Wales v Commonwealth* (1975) 135 CLR 337, 372; *Victoria v Commonwealth* (1971) 122 CLR 353, 371-2; *China Ocean Shipping v South Australia* (1979) 145 CLR 172, 182; *Commonwealth v Queensland* (1975) 134 CLR 298, 336-337; *Western Australia v Wilsmore* (1982) 149 CLR 79, 86; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 106; *Muldowney v South Australia* (1996) 186 CLR 277; *McGinty v Western Australia* (1996) 186 CLR 140, 170-173, 207-210.
5) Constitution, section 76(1).
6) Provided in the Colonial Laws Validity Act 1865.
7) Section 6.
8) Section 128.
9) Commonwealth of Australia Constitution Act 1900 (Imp) section 6.
10) Sections 7 and 24 respectively.
11) Section 125 of the Constitution requires the "seat of Government" to be "within territory which shall have been granted to or acquired by the Commonwealth" within the state of New South Wales.
12) *Attorney-General (Commonwealth) v The Queen* (1957) 95 CLR 529, 545.
13) Section 80.
14) Section 117.
15) Section 92.
16) Local Constitutional Conventions Program, Summary of Conclusions, Constitutional Centenary Foundation, 1999.
17) Northern Territory (Self-Government) Act 1978 (Cth), section 49; Australian Capital Territory (Self-Government) Act 1988 (Cth), section 69, both extending the effect of the free trade provision to the territories.
18) *Capital Duplicators Pty Ltd v Australian Capital Territory* (No.1) (1992) 177 CLR 248 (section 90); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 (section 51 (xxxi)).
19) Constitution Alteration (Territories) 1977, conferring the right to vote in referendums on voters in certain territories.
20) Northern Territory Session Committee *Foundations for a Common Future* (1996).
21) Alistair Heatley and Peter McNab "The Northern Territory Statehood Convention 1998" (1998) 9 *Public Law Review* 155.
22) Op.cit., 157.
23) Alistair Heatley and Peter McNab "The Northern Territory Statehood Referendum 1998" (1999) 10 *Public Law Review* 3.
24) Constitution Alteration (Establishment of Republic) 1999.
25) Queensland and Western Australia; probably also New South Wales and South Australia.
26) Constitution Alteration (Establishment of Republic) 1999, Schedule 3, section 5.
27) Some commentators have suggested that majorities in six states nevertheless are necessary because the original federation was established "under the Crown". In effect, their argument is that removal of the Crown would require renewal of the federal bargain.
28) Constitution Alteration (Establishment of Republic) 1999.
29) Constitution Alteration (Establishment of Republic) 1999, Schedule 3, section 5.
30) Statute of Westminster 1931 (Imp); adopted for Australia by the Statute of Westminster Adoption Act 1942, backdated to 1939.
31) Australia Act 1986 (Aust) sections 1,3.
32) *Port Macdonnell Fishermen's Association v South Australia* (1989) 168 CLR 340.
33) Constitution of the Republic of South Africa, Chapter 6.
34) Section 144.
35) The Constitution of the United States, Article IV, section 4.
36) Section 143.
37) Article 28.
38) Australian Constitution, section 117.
39) Section 92.
40) Section 12.
41) Section 15.
42) Constitution Alteration (Establishment of Republic) 1999, proposed new section 63.
43) Section 110.
44) Section 15.
45) Sections 15, 84.
46) Section 77(iii).
47) Section 73.
48) *Kable v Director of Public Prosecutions* (1996) 189 CLR 51
49) *Australian Capital Television v Common-*

wealth (1992) 177 LR 106; *Nationwide News v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 ; *Stephens v West Australian Newspapers* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 71 ALJR 818.

50) Australian Constitution, section 96.
51) Australian Constitution, section 105A; Financial Agreement between the Commonwealth and the States, 1927.
52) Cheryl Saunders, "Impact of intergovernmental arrangements on Parliament", (1984) 9 *Legislative Studies Newsletter*, 29. Cheryl Saunders, "Government borrowing in Australia", (1989) 17 *Melbourne University Law Review*, 187.
53) Sections 90, 92, 117 in particular.
54) G. Alan Tarr "The new judicial federalism in perspective" (1997) 72 *Notre Dame Law Review* 1097.
55) Constitution of New South Wales.
56) Constitutions of Victoria, South Australia.
57) Local Constitutional Convention Programme, Summary of Conclusions, 1999.
58) Section 51(v).
59) Article 41(1)(f). The article is reinforced by other provisions: for example, sections 41(3) and (4); 150.
60) Cheryl Saunders, "Accountability and access in intergovernment affairs: a legal perspective", Wood, Williams and Sharman (eds), *Governing Federations*, Hale and Iremonger, Sydney: 123 (1989).
61) *New South Wales v Commonwealth* (1975) 135 CLR 337; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1.
62) Cheryl Saunders, "Articles of faith or lucky breaks?" (1995) *Sydney Law Review,* 148.
63) Bertus de Villiers "*Bundestreue*: the soul of an intergovernmental partnership" Konrad-Adenauer-Stiftung, *Occasional Papers*, 1995.
64) Section 167(4).
65) Most recently, in *Reference re Secession of Quebec* (1998) 161 DLR (4th) 385.
66) *Ha & Lim v New South Wales*, High Court of Australia, 1996.
67) *Butler v Attorney-General of Victoria* (1961) 106 CLR 268.
68) *South Australia v Commonwealth* (1962) 108 CLR 130.
69) *R v Duncan; ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.
70) Article 41(4).
71) *Amalgamated Society of Engineers v Adelaide Steamship Company* (1920) 28 CLR 129.
72) *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192.

Development of Concurrent Legislation – a New South African Perspective

Dirk Brand

INTRODUCTION

The new constitutional system designed at Kempton Park and further refined in the Constitutional Assembly at Cape Town is a decentralised system of government, or, put differently, a system with certain federal characteristics. The introduction of this new constitutional order in 1994 included, among other things, a new concept in South African constitutional law, namely concurrency. At the Kempton Park constitutional negotiations it was clear that the new provinces had to have some measure of legislative authority. Some parties argued for more powers for the provinces, while others were more centralistically inclined. The result of this debate was an agreement that provinces should have a list of legislative powers concurrent with the national government. Concurrency is therefore an essential element of our new constitutional system and appears to be a concept that is accepted in some other decentralised or federal systems such as Germany and Canada.

In the German constitutional system there is provision for concurrent legislative jurisdiction of the Federation and the *Länder*.[1] The German Basic Law also uses another concept which relates to the issue of concurrency, namely that of framework legislation.[2] In Canada, concurrency is the exception rather than the rule if one merely looks at the constitutional provisions. The Constitution Act of 1867 contains comprehensive lists of exclusive powers of the Parliament and the provincial legislatures respectively.[3] There are only three provisions in the Constitution Act which specifically confer concurrent powers.[4] There is, however, in practice a more substantial development of concurrent legislation.[5]

In this paper some reflections will be given on the concept of concurrency as it has developed over the past five years in South Africa. This will include some practical examples of legislation in the concurrent field, problems experienced with the concept in practice (in particular from the side of provinces) and some suggestions for reform or improved practical application of concurrency.

1. CONSTITUTIONAL PROVISIONS

1.1 Interim Constitution[6]

The constitutional system designed under the Interim Constitution is one of decentralisation of government whereby government consists of three levels – national, provincial and local government. Functions were allocated to the national and provincial levels of government by way of listing the areas of concurrent legislative jurisdiction. Residual legislative powers vested in the national government, although it was not expressly stated as such in the Interim Constitution. Whereas the bulk of provinces' legislative powers was concurrent, provinces had limited exclusive legislative authority, such as the power to adopt a provincial constitution[7] and certain exclusive tax raising powers.[8] Concurrency was originally defined in a manner which seemed to indicate that provinces had the competence to legislate on any of the matters listed in Schedule 6, but in so doing had to anticipate if and to what extent Parliament could make use of one of the "overrides" in section 126 (3) in passing a law on the same subject matter.[9] Although the

wording of section 126 was changed,[10] the result of the construction of concurrency was still the same. The inference could still be made that a province, in exercising its concurrent legislative competence, had to predict the legislative activity of Parliament in order to determine the scope of the provincial law on the same subject matter. This was clearly an inhibiting factor on provinces' actual exercise of their concurrent legislative authority.

A certain amount of "natural" conflict is contained in any constitutional system where there is an allocation of concurrent powers to different levels of government. Conflict regulation thus becomes an important element of such a constitutional system. Extensive provision was therefore made in the Interim Constitution for regulation of conflict between the provisions of national and provincial legislation in concurrent functional areas.[11] If the conflict regulatory rules are applied and the conflict is resolved, none of the two conflicting laws will be invalidated. The one is merely subordinated to the other law to the extent of the conflict.[12] The paramount provisions of the other law will then prevail.

1.2 New Constitution[13]

The basic constitutional scheme designed under the Interim Constitution was carried through to the new Constitution, but significant changes were made to the content of the scheme, in particular the allocation of powers among the various spheres of government, as they are now referred to. The 34 Constitutional Principles against which the new text was tested by the Constitutional Court contained a number of principles relating to the system of government, the allocation of powers and the relationship between and among the various governments in South Africa.[14] Constitutional Principle XIX *inter alia* provided that:

> "The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers."

Constitutional Principle XXI dealt in more detail with the allocation of powers and also laid the basis for the conflict regulatory provisions in the new Constitution.

When assessing the new text, the Constitutional Court in *The First Certification Judgement*[15] was satisfied that the allocation of powers to national and provincial governments as listed in Schedules 4 (Functional areas of concurrent national and provincial legislative competence) and 5 (Functional areas of exclusive provincial legislative competence) of the new text complied with Constitutional Principles XIX and XXI.

Although both Schedules 4 and 5 are divided into a Part A and a Part B, which relate to local government matters, the discussion below will focus on the primary areas of concurrency between the national and provincial governments, which appears in Part A of Schedule 4.

In contrast to the structure of the provinces' concurrent legislative authority in the Interim Constitution where the list of national "overrides" was included in the enabling provision,[16] a somewhat clearer construction of the legislative authority of provinces and of the national government is used in the new Constitution. The legislative authority of Parliament and that of the provincial legislatures are separately listed in section 44 and section 104 of the Constitution respectively. In each case one of the enumerated legislative functions is to pass legislation with regard to any matter within a functional area listed in Schedule 4. Provincial legislatures thus have original legislative authority over Schedule 4 matters, which they share with the national Parliament. No mention is made of the list of "overrides" in this part of the construction of concurrency. This only becomes relevant, according to the Constitution, when there is a conflict between national and provincial legislation falling within a functional area listed in Schedule 4. This signifies a significant shift in the constitutional construction of concurrency.

It is no longer envisaged that provinces when drafting laws in the concurrent field should be prophetic concerning if and to what extent the national government will make use of the "overrides" or national criteria to design a national law on the same subject matter.

In addition to the specific authority to legislate on matters falling within Schedule 4, provinces' concurrent legislative authority is expanded by the inclusion of section 104 (4), the incidental legislative power. Legislation "that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4" is also regarded as Schedule 4 legislation. A similar provision was included in the Interim Constitution.[17]

Provinces can use this power creatively to expand their scope of legislative activity. An example of such legislation is the Western Cape Land Administration Act, 6 of 1998, which deals with the administration of all provincial land matters, whereas "land matters" is not a functional area listed in Schedule 4.

1.3 Assignment of legislation

A significant feature of the legislative framework within which the newly created provinces have had to function since May 1994 is the possibility of assignment of national legislation to provinces. It was expected that it would take some time before the new provincial legislatures had exercised their legislative authority to create a new body of provincial legislation. The provincial executives, however, had to govern their respective provinces in accordance with the Interim Constitution and could not wait for the legislatures to pass all the provincial laws required to do so. The drafters of the Interim Constitution thus made use of the concept of assignment of legislation to fill this vacuum. The President had the authority to assign the administration of legislation "to a competent authority within the jurisdiction of the government of a province".[18] Provinces thus became the executing authorities of such assigned laws. The assignment of executive authority to a provincial government is clearly an irrevocable action by the President.[19] There is no constitutional provision for a reversal of such procedure.

In terms of a transitional provision in the new Constitution, assignment of legislation to provinces is still possible.[20] Here also no suggestion is made that there is authority to reverse the procedure. A consequence of assigned legislation is that it becomes provincial legislation in terms of section 239 of the new Constitution.[21] Provinces have legislative authority to pass legislation with regard to any matter listed in Schedule 4 and 5,[22] which thus includes the competence to amend or repeal any existing provincial legislation, including legislation assigned to the province.

The scope of legislation to be assigned in terms of Item 14 of Schedule 6 of the new Constitution includes matters in the concurrent as well as the exclusive provincial area. The question of assignment of legislation therefore has a major impact on the way in which concurrency is developing in South Africa. When a province is considering new legislation with regard to a matter in a concurrent functional area, it has to determine whether there is national legislation that might be assigned, or that has already been assigned, to provinces. If there has been an assignment, the assigned legislation may form the basis for discussion on the new provincial legislation. A complicating factor in the development of legislation on concurrent matters is the fact that a national law might be only partially assigned to provinces. This means that the provinces have an assigned law, for example on cultural matters, but certain provisions that were not assigned stay with the national government and thereby form a skeleton national law on cultural matters. This causes a somewhat odd situation that could lead to much legal uncertainty.

2. RESOLUTION OF CONFLICT

Conflict regulation is dealt with in the new Constitution in a different manner than before. Whereas the Interim Constitution contained the conflict regulatory measures in the provision that stipulated the concurrent legislative authority of provincial legislatures and Parliament, conflict regulation is dealt with as a separate issue in the new Constitution. A set of conflict regulatory rules similar to that contained in section 126 (3) of the Interim Constitution is again included, but the wording differs substantially from the text of the Interim Constitution and tips the scales in favour of the national government.

In addition to these rules, a new chapter on cooperative government,[23] which includes a list of principles of cooperative government and intergovernmental relations, is included in the new Constitution.[24] The constitutional negotiators chose a system of cooperative federalism comparable to the German system, in contrast to the competitive federalism of the United States (US). The fact that the new Constitution clearly stipulates that we now have a system of cooperative government is of particular importance to the processes of resolving conflict between different governments.

The Constitutional Court said in this respect in *The First Certification Judgement* at par [290]:

> "Intergovernmental cooperation is implicit in any system where powers have been allo-

cated concurrently to different levels of government."

It is apparent from the further reasoning of the Court that the aim of Chapter 3 is to keep intergovernmental disputes out of the courts as far as possible. In the *Education Policy Bill-case*[25] Chaskalson P said at par [34] with respect to concurrency and cooperation:

> "Where two legislatures have concurrent powers to make laws in respect of the same functional areas, the only reasonable way in which these powers can be implemented is through cooperation."

Intergovernmental disputes should only be before a court as a last resort when all other remedies are exhausted. These provisions apply to all situations of intergovernmental disputes, including situations where there is conflict between provisions of an Act of Parliament and a provincial Act. It is clear that it is also applicable in the process of development of legislation in the concurrent field, as will be illustrated later in the discussion on practical examples. The governments concerned are required in terms of section 41 (3) to "make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose". Parliament has not yet passed legislation required in terms of section 41 (2) that must provide for intergovernmental mechanisms and procedures. Nevertheless, the different spheres of government are still obliged to act in accordance with the principles of cooperative government and to try and resolve any intergovernmental conflict so as to avoid resort to litigation. This could in practice include negotiations between the relevant national and provincial ministers to resolve the conflict. If agreement is reached by way of consultation and negotiation, it may cause one or both of the two conflicting laws to be amended. However, if no solution is found on a political level, the matter will have to be resolved by an appropriate court.

At this point the conflict regulatory provisions contained in sections 146 to 150 are particularly relevant, and act as a yardstick against which a competent court will decide the question of the alleged conflict of laws falling within a functional area listed in Schedule 4 – in other words, concurrent legislation.[26] When a court considers the question of conflict between two laws, it has to determine:

(i) if both laws were validly enacted;
(ii) if the national law is uniformly applicable in the country and meets any of the overriding provisions listed in section 146 (2);
(iii) if the national law meets any of the overriding provisions in section 146 (3).

The conflicting provisions of the national law will prevail if the court is satisfied that it meets the requirement in either (ii) or (iii). If not, the conflicting provisions of the provincial law will prevail. The conflicting provisions in the other law will not be invalidated, but merely become inoperative for the duration of the existence of the conflict.[27] The provisions that are not in conflict will still be operative.

3. CONCURRENCY IN PRACTICE

The following two examples of how legislation on concurrent matters has developed will provide some insight into the mechanics of intergovernmental interaction as well as the pitfalls relating to the amendment of legislation on concurrent matters.

3.1 Welfare Laws Amendment Bill, 1997

"Welfare services" is a functional area listed in Schedule 4 of the new Constitution and is therefore an area of concurrent legislative authority. The Social Assistance Act, 1992, was assigned to a competent authority within the jurisdiction of the government of each of the provinces.[28] The result of this was that on 1 March 1996 (the effective date of the assignment) the rendering of social assistance in terms of this law became a provincial function. The law itself has since that date been administered by the provinces. By virtue of the definition of "provincial legislation" in the new Constitution, this Act became provincial legislation insofar as it has been assigned to the provinces.

The Welfare Laws Amendment Bill, 1997, introduced in Parliament during the second half of 1997, purported to reverse the arrangement as set out above by amending the entire Social Assistance Act, 1992 – that is, both the national skeleton Act as well as the assigned provincial laws. The long title of the Bill *inter alia* included the following statement:

> "to restore the administration of the Act [the Social Assistance Act, 1992] to the national government after such administration was assigned by proclamation under the Interim

Constitution to the provincial governments."

The Bill was thus expressly aimed at reversing the assignment and explicitly transferring the administration of the social assistance function from provinces to the national government.

It is obvious that an incorrect constitutional approach to the amendment of the legal framework governing social assistance has been followed. The Western Cape Provincial Government objected to this unconstitutional way of amending assigned legislation falling within the concurrent field. This led to various consultation and negotiation sessions between the provincial and national governments. The result was the new Welfare Laws Amendment Bill, 1997, which validly amended only the skeleton national law on social assistance. The nine assigned provincial laws on social assistance are still in place and may validly be amended by the various provincial legislatures. However, the amendment to the Social Assistance Act, 1992, was quite an extensive amendment that overrides some of the provisions of the assigned legislation and thus prevails over such legislation to the extent of the conflict.

The conflict in this case fell on two levels, namely:

- a conflict between a national bill, the Welfare Laws Amendment Bill, 1997, and the assigned portions of the Social Assistance Act, 1992, which became provincial legislation; and
- a conflict between the national bill and the Constitution, because of the purported amendment of the provincial laws.

In resolving the conflict, the national government, the Western Cape provincial government as well as Parliament attempted to settle the dispute by means of intergovernmental negotiation and cooperation, which process eventually resulted in constitutionally sound legislation and correct legislative procedures. Recourse to the courts was thus avoided, as is envisaged in section 41 of the Constitution.

3.2 Education laws

One of the listed functional areas of concurrent legislative authority in Schedule 4 of the new Constitution is "education at all levels, except tertiary education". Both Parliament and the nine provincial legislatures may thus pass legislation on this matter. There are indeed a number of laws that cover education below tertiary level. Before May 1994, school education was governed by different laws and administered in a very fragmented manner. A process of rationalisation of school education was started after the commencement of the Interim Constitution in order to create a uniform approach to the provision of school education. Old order legislation had to be amended or repealed and new national and provincial legislation had to be developed. As the new system slowly unfolded, it became clear that provincial governments would be the main administrators of school education, while the national government will focus on policy matters and matters that require uniform, nationwide norms and standards to be set.

As a first step in the process of rationalisation and transformation from a fragmented to a more unified system of school education, some of the old national acts were assigned to the provinces in October 1994,[29] for example the Act on Education Matters (House of Assembly), 70 of 1988, and the Coloured Persons Education Act, 47 of 1963. Some of the provisions of these acts were not assigned and therefore remained national legislation. Provinces also developed their own legislation on school education, such as the Western Cape School Education Act, 4 of 1994. In 1996, Parliament adopted two new laws on school education, namely the National Education Policy Act, 83 of 1996 and the South African Schools Act, 84 of 1996. The South African Schools Act, 1996, which was adopted in order to provide a uniform system for the organisation, management and financing of schools throughout South Africa, only came into operation on 1 January 1997. Existing provincial laws had to be amended to fit the new scheme as stipulated in this act.

When the new Constitution came into operation on 4 February 1997, we therefore had a situation whereby school education in South Africa was governed by new national legislation, assigned legislation and existing original provincial legislation; clearly an example of concurrency in action. In order to create harmonised legislative governance of school education, it thus became necessary to review all existing legislation.

The technically correct approach was followed by Parliament when it adopted the South

African Schools Act, 1996. This act repealed the national provisions of the various assigned acts, namely:

- Coloured Persons Education Act, 47 of 1963
- Indians Education Act, 61 of 1965
- Education and Training Act, 90 of 1979
- Private Schools Act (House of Assembly), 104 of 1986
- Education Affairs Act (House of Assembly), 70 of 1988.

As far as the provinces are concerned, the Western Cape is again used as example. The Western Cape Provincial Legislature amended its School Education Law, 1994, in 1997 to be in line with the new national legislation.[30] This amendment law has also repealed all the sections of the laws assigned to the province. Throughout this process of reshaping the school education environment, there have been various intergovernmental meetings and discussions. The principles of cooperative government had to be observed by all roleplayers in this process. In respect of the various legislative processes, in particular the amendment of assigned legislation, this is a case where Parliament as well as the provincial legislatures acted correctly and in accordance with the new Constitution.

4. PRACTICAL PROBLEMS

When evaluating the development of concurrency in practice over the almost four years since the introduction of the new constitutional order in South Africa, it soon becomes clear that the application of this notion is fraught with problems. The new Constitution envisages the development of legislation in the concurrent field in a manner based on a shared responsibility between the national and provincial governments. The practice, however, often creates a different impression: namely, that Parliament is very active in the concurrent field while the various provincial legislatures have passed a limited number of laws on concurrent matters. It can be argued that provinces have up to now not fully utilised their constitutionally allocated legislative authority.

An initial problem that supports the fact that provincial legislatures are not as active as Parliament, is the limited legislative drafting capacity of provinces compared to that of the national sphere of government. The newly created provinces had to build their legal divisions over a period of time to support the various administrations. They started in May 1994 not only with a shortage of experienced lawyers, but also with a serious deficit in their legislative drafting capacity. This had a significant effect on the number and quality of laws that were passed by provinces. In contrast thereto, the national government had a pool of experienced legal advisors who could take care of the legislative drafting needs of the national government.

The notion of concurrency is still relatively new to politicians, administrators and lawyers alike, and this leads to a lack of understanding of the notion. One often finds that some of the roleplayers concerned with the development of legislation in the concurrent field do not understand the concept. Administrators and politicians at provincial level sometimes think that they are not allowed to take the initiative in developing concurrent legislation, but that they must wait for their national counterparts to first initiate a national law on the subject – for example on the development of agriculture – before they can consider a provincial law on the same subject. In contrast thereto, some national administrators and politicians sometimes create the impression that a national act on a concurrent matter, such as agriculture, should be first, owing to the belief that the national government holds the initiative to concurrent legislation. In both cases these arguments signify erroneous thinking. This is a mindset problem based on a lack of knowledge and understanding of the notion of concurrency. If consideration is given to the way that concurrency has developed in other federal systems, as well as the particular construction of concurrency in the new Constitution, it is clear that provincial governments as well as the national government have an equal right to take the initiative in developing concurrent legislation.

The notion of assignment – and in particular the fact that in a number of cases the President assigned only part of an act to provinces – complicates the application of concurrency. The result of such a partial assignment – namely, part of an act on the national statute book and part of the same original act on the provincial statute books – leads to uncertainty with respect to the application of the different provisions of such law. The situation is aggravated if a provincial legislature or Parliament decides to pass an amendment to the assigned act.

CONCLUSION

Although concurrency is a feature of various federal or decentralised systems, different systems provide different variations of concurrency. The essence of the concept is, however, the same – i.e., that more than one level or sphere of government has constitutionally allocated jurisdiction over the same functional areas. The South African constitutional system provides its own version of concurrency, which is still in its infancy.

The problems that were experienced up to now with the development of concurrent legislation in South Africa are not insurmountable. A growing constitutional awareness and commitment to the constitutional state by politicians, administrators and legal practitioners will contribute much to the improved development of concurrent legislation. From the perspective of provinces, more training in drafting of legislation should complement such constitutional awareness.

The one technical hurdle in the implementation of concurrency appears to be the way in which the notion of assignment of legislation has been structured and applied. Assignment of legislation is a specific instrument in the hands of the President that is used in a process of decentralisation of authority. For legal certainty it is necessary that the effect of an assignment of legislation should be a clear and distinct division of authority between the national and provincial governments concerned. The particular law that is assigned may be amended or even re-enacted by the President in order to regulate its interpretation.[31] These powers should be used creatively in aid of a clearer development of legislation. Although provinces could benefit from more meaningful assignments, it is also in the interests of the national government that the assignment action be done in such a way that contributes to the development of concurrency; in other words, the sharing of authority.

ENDNOTES

1) Art. 72, 74 and 74A of the Basic Law for the Federal Republic of Germany, 1949.
2) Art. 75 provides for the enactment of federal framework legislation in a number of areas in which the *Länder* have the right to legislate, which means that the *Länder* will fill in the detail of a subject on which a framework law is passed by the Federation.
3) Sec. 91 and 92 of the Constitution Act, 1867.
4) Sec. 92A (2) – export of natural resources; sec. 94A – old age pensions; sec. 95 – agriculture and immigration.
5) P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Carswell, 1992) at 410.
6) Constitution of the Republic of South Africa, 200 of 1993.
7) Sec. 160.
8) Sec. 156.
9) This way of defining concurrency was criticised by U. Leonardy "Constitutional provisions on devolution and federalism" 144 at 157 in B. de Villiers *Birth of a Constitution* (Juta, 1994).
10) Sec. 2 of the Constitution of the Republic of South Africa Amendment Act, 2 of 1994.
11) See sec. 126 of the Interim Constitution;

D. Basson, *South Africa's Interim Constitution – Text and Notes* revised edition (Juta, 1995) at 199.

12) *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 CC at par. [16] and [17].
13) Constitution of the Republic of South Africa, 108 of 1996.
14) See in particular CPs XVI to XXVI.
15) *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 BCLR 1253 CC; 1996 (4) SA 744 CC.
16) Sec. 126 (3).
17) Sec. 126 (2).
18) Sec. 235 (8) of the Interim Constitution. See also Chaskalson and Klaaren "Provincial government" at 4-4 in M. Chaskalson et al *Constitutional Law of South Africa*, 1996.
19) *Executive Council, Western Cape Legislature v President of the Republic of South Africa and Others* 1995 (4) SA 877 CC at par. [173].
20) Schedule 6, Item 14 (1): "Legislation with regard to a matter within a functional area listed in Schedule 4 or 5 to the new Constitution and which, when the new Constitution took effect, was administered by an authority within the national executive, may be assigned by the President, by proclamation, to an authority within a provincial executive designated by the Executive Council of a province."
21) "'Provincial legislation' includes (a) subordinate legislation made in terms of a provincial Act; and (b) legislation that was in force when the Constitution took effect and that is administered by a provincial government."
22) Sec. 104 (1) (b)(i) and (ii) of the new Constitution.
23) Chapter 3.
24) For a discussion on the history of the principles of cooperative government and *Bundestreue* see B. de Villiers "*Bundestreue*: the soul of an intergovernmental partnership" in Konrad-Adenauer-Stiftung *Occasional Papers* (March 1995). See also D. van Wyk "'n Paar opmerkings en vrae oor die nuwe Grondwet" 1997 (60) *THRHR* 377 at 389, and D. J. Brand "The South African Constitution – three crucial issues for future development" in *Stell. LR* 1998 (2) 182 at 184 for some comments on the development of intergovernmental relations in South Africa.
25) See note 12.
26) Klaaren "Federalism" at 5-12 in Chaskalson et al *Constitutional Law of South Africa*, 1996.
27) Sec. 149.
28) On 23/02/1996 the President, by Proclamation R7 of 1996, assigned in terms of sec. 235 (8) of the Interim Constitution the administration of the whole of the Social Assistance Act 59 of 1992, except sec. 13, to the provinces.
29) The President had assigned by way of Proclamation R 151 of 31 October 1994 the following laws partially to the provinces to administer, viz. Coloured Persons Education Act, 47 of 1963; Indians Education Act, 61 of 1965; Education and Training Act, 90 of 1979; Technical Colleges Act, 104 of 1981; Private Schools Act (House of Assembly), 104 of 1986; and Education Affairs Act, (House of Assembly) 70 of 1988.
30) It was amended by the Western Cape School Education Act, 12 of 1997.
31) Item 14 (2) of Schedule 6 of the new Constitution.

Cooperative Government, Devolution of Powers and Subsidiarity: the South African Perspective

Gretchen Carpenter

INTRODUCTION

Subsidiarity is not among the many buzz-words that have hit South Africa in the past few years. In fact, most people – even those who work with concepts such as devolution, federalism, cooperative government, subnational autonomy and the like – have probably not encountered it much, if at all. (Maybe because it is such an awkward word to get one's tongue around.) Although it is by no means a recently coined word, one will scan older dictionaries in vain for a definition. A more recent edition of the *Collins Concise Dictionary* defines subsidiarity briefly as "the principle of devolving political decisions to the lowest practical level". As I hope to point out, even this is not a good definition, as it misses the whole point of subsidiarity.

The concept of subsidiarity is thought to have been borrowed from classical political theory by the Roman Catholic Church, which turned it into a moral principle. It was restated in a papal encyclical, *Quadragesimo Anno*, in 1941, as follows:

> "It is an injustice, a grave evil and a disturbance of right order for a large and higher organisation to arrogate to itself functions which can be performed more efficiently by smaller and lower bodies."

This is a somewhat high-flown and polysyllabic way of saying, quite simply and in the words of popular writer and business columnist Charles Handy, that stealing people's responsibilities is wrong. He continues to say that subsidiarity implies a kind of reverse delegation, namely a delegation of power from the outside to the centre.

It is for this reason that I said earlier that subsidiarity is not the same as devolution: devolution, like delegation, means that the original repository of the power is in the centre, which hands out some of this power to be exercised by the constituent parts. It is up to the central authority to decide which powers are to be delegated or devolved, and to which controls the delegation will be subject. Subsidiarity, by contrast, means that the power originally rests with the smaller, lower, more regional entities, and is delegated "upwards" at the discretion of the latter, and not at the discretion of the central authority.

The essence of subsidiarity is the recognition that certain responsibilities and powers belong not at the centre but at the edges – or lower down or further away, depending on how one likes to phrase it.

Handy also contrasts subsidiarity with empowerment – a word South Africans are very familiar with today. He says empowerment implies that someone in a superior position is giving away power to someone in an inferior position, while subsidiarity means that power does not have to be given away – it properly belongs where it is. By the same token, of course, the responsibility belongs there too.

It is therefore clear that subsidiarity lies at the heart of the call for "power to the people" and "decisions at grassroots level", which have become so much part of the new South Africa. It is very closely related to the concept of federalism, when the latter is properly understood. "Federalism" is a much wider idea than "federation": a federation is a formal political struc-

ture or system of government; federalism is a principle which recognises that the parts of a whole are as important as its centre. It can be usefully applied to any kind of organisation, not only to government structures.

Subsidiarity – like democracy, constitutionalism and many of the other notions that occupy centre stage in the political and constitutional debate – is not a legal concept in the first place. As mentioned earlier, the Roman Catholic Church turned it into a moral social principle. In its most elementary sense, subsidiarity gives implicit recognition to the idea that communities are ordered hierarchically, and that the individuals or "lower" echelons in the hierarchy must be enabled to do everything they have the capacity to do. The groups and "higher" echelons play a "subsidiary" role insofar as they provide support and, possibly, take over the functions of the lower functionary if the latter is unable to perform them adequately and comfortably.

In essence, this is a "bottom up" approach to hierarchic relationships rather than the "top down" approach which is characteristic of devolution and delegation in general. Decisions are therefore taken by those with the most intimate knowledge of local circumstances and the greatest interest in making things happen. Because this is done as of right, the credit for success cannot be claimed by the central authority, nor the responsibility for failure laid at its door. This is where the moral aspect of the concept of subsidiarity comes in.

The central authority – in most cases this will be the state, via its central or national organs of government – nevertheless does have a role to play in this process. It has a positive obligation in the sense that it must create the climate or provide the means that are necessary for the other to operate. Its obligation also has a "negative" aspect in that its role is predominantly supportive or complementary.

History has shown, however, that the application of the basic principles of subsidiarity varies greatly in practice. Even in those times and spheres where subsidiarity was accepted as a guiding principle, the relationship between ruler and subjects, between central and local authorities and between the church and its members bore little resemblance to the ideal described above. Ironically, the present-day emphasis placed on the individual and on individual rights (such as the right to human dignity) bears a greater resemblance to the ideals of subsidiarity. At the same time it is not difficult to see the connection between subsidiarity and the notion of the social contract; there is more than an element of original authority in the idea that a community actually contracts with the superior authority, sovereign or ruler. Why would a contract be necessary if the latter had all the authority it required?

The principle of subsidiarity can find application in the relationship between a church and its members, a community and the individuals that constitute it, between family members and, of course, between the state and its members and between political structures themselves. In modern South African idiom, it can apply not only between the various spheres of government, but between structures of the state and those of civil society. Seen in this light, subsidiarity has a decided significance in the relationship between state organs and non-governmental organisations (NGOs).

There are various ways in which subsidiarity can be explained in terms of constitutional law. It may be seen as part of unwritten constitutional law, and in a general sense it could apply to any relationship that has hierarchic elements. In the German literature, for example, it is sometimes said that the relationship between the Constitutional Court (*Bundesverfassungsgericht*) and the other courts is based on subsidiarity. This means, in practice, that the so-called "lower" courts are both entitled and obliged to exercise their jurisdiction before a matter is referred to the "superior" Constitutional Court. This principle is also applied in the South African context, as is evident from the number of Constitutional Court cases that have dealt with proper referral. In fact, during the first two years of its existence, the South African Constitutional Court was engaged in one of the most graphic applications of the principle of subsidiarity in its endeavours to put in place a system of referral of cases to it in terms of the 1993 Constitution.

In the constitutional sphere, subsidiarity is primarily concerned with the relationship between the different spheres of government, although it also features in the relationship between the state and the individual or groups of individuals. Like federalism, it is not a notion which is peculiar to federations, but it is

regarded as one of the typical features of a federation. Federal systems manifest a clear demarcation of authority between the federal, provincial and local levels or spheres of government.

Subsidiarity can have an impact on structure, on the allocation of powers and on the exercise of authority. In the typical federation, a formal constitutional allocation of powers is made between the central or federal authority and the provinces or states. Each level bears responsibility for the way in which the earmarked powers are exercised. Here, the principle of subsidiarity plays a largely structural role insofar as it is applied during the initial formulation of the Constitution, at the time when it must be decided which powers are to be allocated to which level of government.

Where a constitution provides for concurrent powers – that is, where both the federal and the provincial authority can exercise powers in regard to the same matters – subsidiarity can have a significant effect. This is the case in Germany, for example.

1. SUBSIDIARITY AND THE SOUTH AFRICAN CONSTITUTION

Before the new constitutional dispensation came into operation in 1994, one would have had difficulty in arguing persuasively that there was any room for the notion of subsidiarity in South African constitutional law. Parliament was sovereign and the political dispensation became increasingly centralised from the 1980s onward – both in law and in practice. It was therefore quintessentially contra-subsidiarity. The same applied to the relationship between the state and the individual and between the state and society: ours was an excessively paternalistic society in which government – and more particularly central government – arrogated to itself to decide for everyone, both white and black, what was best for them.

Despite some attempts at nominal and structural devolution (in the so-called independent homelands, for example), one cannot help but conclude that the entire apartheid system was a denial of the principle of subsidiarity in the body politic.

The possibility of change was, however, created with the introduction of the new democratic order. At the time when the Interim Constitution of 1993 was being written, voices could be heard calling for the relationship between the national and provincial levels of government to be based on the principle of subsidiarity. It seems that what was meant was more or less the notion of subsidiarity as defined in the *Collins Concise Dictionary* referred to earlier, namely a devolution of political decisions to the lowest practical level. The trouble with this definition is that it is based on a conceptual paradigm from the monarchic and absolutist era, firmly anchored in the Westminster tradition in which the sovereignty of parliament or legislative supremacy is the dominant norm.

It implies, simply, that all power inherently rests with the central authority, which may devolve some of this power to other levels of government. The latter have no original or inherent powers of their own.

Subsidiarity was not taken seriously as a principle in this process. There are a number of possible reasons for this: possibly the notion of subsidiarity was propagated by parties that were overtly in favour of a federation, something that was anathema to the African National Congress. Anything that smacked of federation was therefore doomed from the outset. Secondly, there may have been a natural suspicion of unknown, new concepts which could further complicate an already complex negotiation process. Finally, the idea may have been raised too early in the negotiation process.

The question, however, is whether subsidiarity did find its way into the South African Constitution in some shape or form. The answer depends on a number of factors: first, the interpretation to be given to certain provisions of the 1993 and 1996 Constitutions; the second is political and government practice; finally, the judgements of the Constitutional Court must be examined to determine whether the 1996 Constitution is understood as subsidiarity-friendly, whether this is explicitly stated or not.

1.1 The Interim (1993) Constitution

There were some distinct pro-subsidiarity indicators in this Constitution. While it would serve no purpose to discuss these in detail, I mention them as part of the process that eventually led to the creation of the present (1996) Constitution.

The Interim Constitution featured the Bill of Rights which emphasised fundamental rights

for the first time in any South African Constitution. The repeated references to equality and freedom pointed to a relationship of subsidiarity between state and individual.

What is of greater importance in the present context, however, are the provisions that governed the relations between the various levels of government, as well as some of the constitutional principles included in Schedule 4 to the Constitution. Four points are highlighted here:

- It can be inferred from the wording that the 1993 Constitution signified a conscious rejection of the centrally managed Westminster model of former times. What was previously known as the "central" level of government was now the "national" level. The change of wording from "central" to "national" is hardly conclusive proof of a switch to a subsidiarity approach; however, it is too conscious and calculated a change to be meaningless. Unfortunately, even under the 1996 Constitution, this shift appears to have passed almost unnoticed in many respects. Not only do the less informed still refer to "central" government, but many of those who should know better are also guilty. Even the Constitutional Court referred to "central government issues" in a heading in *The First Certification-case*.
- Section 126 of the 1993 Constitution contained provisions which were consonant with the notion of subsidiarity. To a large extent the entire debate, once so heated, about whether South Africa is (or should become) a federation like Germany or the United States, is therefore now *passé*. The crucial issue is the extent to which the provisions of section 126 dealing with concurrent powers, permitted a subsidiarity-oriented approach.
- Provincial government and local government were given new status under the Constitution. Section 174 contained a number of expressions and prescripts which left the door open for an interpretation that is reconcilable with the subsidiarity principle. Local authorities were referred to as autonomous, and it was said that they had the right to govern themselves. It was further said that Parliament and the provincial governments were not permitted to interfere with the powers, functions and structures of a local authority in such a way that the fundamental/underlying status, purpose and character of local government would be impaired; and proposed legislation which affected the status, functions and powers of a local government had first to be published for comment.
- Constitutional Principles (CPs) XIX to XXVI in Schedule 4 of the Constitution contained the framework in accordance with which the final Constitution had to provide for national, provincial and local government structures. The phrases having a bearing on the principle of subsidiarity stand out: "Concurrent and exclusive powers" featured in CPs XIX, XX, XXI XXIII; "appropriate and sufficient legislative and executive powers" in CP XX; "legitimate provincial autonomy" in CP XX; "the level at which decisions can most effectively be taken" in CP XXI; and "where mutual cooperation is necessary or desirable" in CP XXII.

It may be argued that the constitutional principles merely governed the division of powers among the various levels of government and that they should be interpreted as value-free wherever possible; in other words, that they fall into the category of "everyday, mundane provisions" referred to by Van Dijkhorst J in *Kalla v The Master*.

However, one must look at the way in which they were dealt with by the Constitutional Court during the certification of the final Constitution: first of all, the main reason why the Court declined to certify that the final Constitution was in accordance with the CPs was that provincial powers had been attenuated; secondly, it is clear that just like the rest of the 1993 Constitution, the CPs had to be coloured by the values of the new legal order based on constitutionalism. The Constitution did not create a closed value system: it is therefore suggested that a subsidiarity-oriented approach may be seen as one of its values.

1.2 The 1996 Constitution

The so-called "final" Constitution of 1996 leaves even more room for a subsidiarity-driven interpretation and application than did the 1993 Constitution. This becomes evident if we take the first three points discussed above for purposes of comparison.

1.2.i "National" government and "spheres" of government

The 1996 Constitution confirms the usage of the 1993 Constitution in referring to "national"

rather than "central" government. In fact, the use of "national" is extended even further. Not only is the reference to "national" government throughout, but the term "national" legislation is also used instead of "parliamentary legislation" or "Act of Parliament", and the "national legislature" and the "national legislative process" is used rather than "Parliament". Provision is made for the resolution of conflicts between "national" and provincial legislation.

But the 1996 Constitution goes even further. Whereas the 1993 Constitution still referred to "levels of government", these levels have now become "spheres" – a clear attempt to move away from the traditional view that the different tiers of government are hierarchically ordered, with a "centre" that is more powerful than the second or intermediate tier, which in turn has more power than the third tier. The use of the word "spheres" is manifestly aimed at entrenching the constitutional status of provincial and, in particular, local government. If this principle is taken to its logical conclusion and is fully realised in practice, the 1996 Constitution will, in principle, be one of the most subsidiarity-friendly constitutions in the world.

1.2.ii The relationship between the national and provincial spheres

Because the final Constitution had to comply with the constitutional principles contained in the 1993 Constitution, the provisions of the 1996 Constitution relating to the position of the provinces are, if anything, even more faithful to the principle of subsidiarity than was section 126 of the 1993 Constitution. The provinces now have exclusive powers, which they did not have before, as well as concurrent powers which must be exercised together with the national sphere of government. Sections 146-150 in Chapter 6 of the Constitution make even more detailed provision for the resolution of conflicts between national and provincial legislation in concurrent matters than does the German Constitution. Unfortunately the provisions in question are not always models of clarity. This is partly due to the way in which the constitutional principles were formulated. Furthermore, it was perhaps to be expected, given the fact that the CPs required a greater degree of deconcentration than that with which most of the drafters of the Constitution were familiar.

In broad terms, provincial legislation enjoys primacy in terms of section 146(5) unless any of the five factors (plus a number of subfactors) listed in section 146(2) and (3) is present. These provisions read as follows:

> "(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:
>
> (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
>
> (b) The national legislation deals with a matter that, to be dealt with effectively requires uniformity across the nation, and the national legislation provides that uniformity by establishing –
>
> (i) norms and standards;
>
> (ii) frameworks; or
>
> (iii) national policies.
>
> (c) The national legislation is necessary for –
>
> (i) the maintenance of national security;
>
> (ii) the maintenance of economic unity;
>
> (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
>
> (iv) the promotion of economic activities across provincial boundaries;
>
> (v) the promotion of equal opportunity or equal access to government services; or
>
> (vi) the protection of the environment.
>
> (3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that –
>
> (a) is prejudicial to the economic, health or security interests of the country as a whole; or
>
> (b) impedes the implementation of national economic policy."

When interpreting any conflicting legislation, the court must give preference to any reasonable interpretation which eliminates the conflict.

There are other important provisions as well: Section 147(1) provides for the case where national legislation and provincial constitutions conflict. It is clear that such a constitution does not enjoy much greater status than ordinary provincial legislation if it conflicts with national legislation. This provision reads as follows:

> "If there is a conflict between national legislation and a provision of a provincial constitution with regard to –
>
> (a) a matter concerning which this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution;
>
> (b) national legislative intervention in terms of section 44(2), the national legislation prevails over the provision of the provincial constitution; or
>
> (c) a matter within a functional area listed in Schedule 4, section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section."

National legislation may also enjoy preference to exclusive provincial legislation, provided the national legislation is necessary for the purposes of section 44(2), which reads thus:

> "Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary –
>
> (a) to maintain national security;
>
> (b) to maintain economic unity;
>
> (c) to maintain essential national standards;
>
> (d) to establish minimum standards required for the rendering of services; or
>
> (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole."

In this case it is important that the national legislation is adopted in accordance with the procedure prescribed by section 76(1). The National Council of Provinces (NCOP), which is expressly enjoined by the Constitution to represent provincial interests in the national sphere, plays an important role in this process.

Cognisance should also be taken of section 100, which deals with national supervision over provincial administration: when a province fails to or is unable to fulfil an executive obligation in terms of legislation or the Constitution, the national executive may intervene. Again the NCOP plays a prominent role.

1.2.iii Local government

The provisions of the 1996 Constitution, like those of the Interim Constitution, are capable of a pro-subsidiarity interpretation here as well. The first point to be made is that the status of local government in South Africa is constitutionally entrenched as one of the three spheres of government. Section 151 confirms the constitutional importance of local government. Subsection (1) stipulates that municipalities must be instituted for the entire Republic; subsection (2) states that municipalities have legislative and executive powers which vest in the municipal councils; subsection (3) provides that municipalities may take the initiative in the management of local affairs in a particular community; but subsection (4) is the most important for present purposes: it prohibits the national government and provincial governments from restricting the ability or right of municipalities to exercise their powers. This is in sharp contrast to the position in the past, when local government was hierarchically distinctly inferior to provincial authorities.

Section 151 is reinforced by several other provisions. For example, section 154(1) requires that municipalities must be supported by legislative and other measures by national and provincial governments in their capacity to manage their own affairs; section 154(2) stipulates that all national and provincial draft legislation which affects the status, institutions, powers and functions of local authorities must be published for comment to enable interested parties to make representations; section 155(7) gives the national government and provincial governments legislative and executive powers to ensure that municipalities perform their functions effectively; and section 156(4) obliges the national government and provincial governments to assign powers to municipalities if these powers can be most effectively exercised at local level and if the municipalities in question have the administrative capacity.

1.3 Cooperative government

Chapter 3 of the 1996 Constitution provides the cornerstones for cooperation between the different spheres of government and organs of state in South Africa. The chapter has only two sections (40 and 41), but they are so value-laden that they justify continuous analysis and suggestions for practical application. The reason why they are of such importance for subsidiarity is that they completely undermine the

historical centre-driven or centrifugal approach. The value-laden character of this chapter of the Constitution is best illustrated with reference to the actual wording of section 41:

> "41(1) All spheres of government and all organs of state within each sphere must –
> . . .
> (e) respect the constitutional status, institutions, powers and functions of government in other spheres;
> (f) not assume any power or function except those conferred on them in terms of the Constitution;
> (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere;
> (h) cooperate with one another in mutual trust and good faith by –
> (i) fostering friendly relations;
> (ii) assisting and supporting one another;
> (iii) informing one another of, and consulting one another on matters of common interest;
> (iv) coordinating their actions and legislation with one another;
> (v) adhering to agreed procedures; and
> (vi) avoiding legal proceedings against one another.

This provision contains both "hard" and "soft" phrases: among the "soft" phrases are the ones referring to friendly relations, assistance and support, consultation and information, and avoiding legal proceedings. Among the "hard" phrases are those enjoining spheres of government not to arrogate the powers of other spheres to themselves, not to impinge on the geographical, functional and institutional integrity of other spheres, and so on. Of course, the word "integrity" is used here in its original sense of "wholeness" and not in the modern acquired sense of "honesty" or "probity".

Subsection 1(h)(vi) is further shored up by subsection (3), which provides that an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all of the remedies before it approaches a court to resolve that dispute.

All of these provisions are part of the objective of ensuring effective, transparent, accountable and coherent government of the Republic as a whole. These objectives may seem to be value-free at first glance; in truth they represent the profoundest values of the democratic state.

2. EVALUATION OF THE 1996 CONSTITUTION IN TERMS OF THE PRINCIPLE OF SUBSIDIARITY

As mentioned, the Constitution seems to have been drafted with efficiency rather than subsidiarity in mind. If we look at CP XX(1), effective decision making appears to be the first factor used to determine which power should be exercised by which sphere of government. This has raised the fear that the weight to be accorded to efficacy may have pushed the "competing" principle of subsidiarity into the background. Whether the two are mutually exclusive is, of course, debatable. Efficacy and subsidiarity may exclude one another, but need not do so. In a country such as South Africa, for example, efficiency and efficacy will depend on the extent to which provincial and local spheres of government are enabled to meet their constitutional obligations.

It has already been emphasised that the Constitution abounds with indications that the old traditional stratified three-tier system of a central government at the top (and therefore the strongest), a second provincial tier in the middle and a local tier (the weakest) at the bottom, has been jettisoned for a model in which there are three spheres of government, no one of which is inherently stronger than the others. The concept of "national" government does not connote the scope of the authority in the first place, but the geographical area in which the power is exercised. The same holds good for provincial and local government. Seen in this light, it is obvious that the national government must have different kinds of powers to those of the other spheres. Although this was not stated in so many words, the Constitutional Court appears to have acknowledged (in *The First Certification-case*) that the national government's right to interfere in the provincial sphere is limited:

> "Any attempt by the national government to intervene at an executive level for other purposes [than effective government] would be inconsistent with [the 1996 Constitution] and justiciable."

The elements of subsidiarity are already evident

here. The national government is not, as it was under a system of parliamentary sovereignty, a primordial source and determinant of all power. Nowhere does the Constitution contain a presumption of efficacy which operates in favour of the national government. It is true that Parliament has a residual power to make laws about matters not covered by Schedules 4 and 5.

This does not mean, however, that only Parliament can exercise such powers. Nothing precludes Parliament from assigning some of those powers to a legislative authority in one of the other spheres of government. Neither is there anything that prohibits Parliament from adopting the legislation itself, and then leaving its implementation to the executives of the other spheres of government.

The closely intertwined provisions of the Constitution dealing with the relationship between the three spheres of government leave room for a presumptive power favouring the so-called "minor" spheres, particularly where there may be uncertainty about the interpretation of the scope of the powers. In most cases the answer to the question of which sphere of government is clothed with authority will be found in the words of the Constitution itself. However, it may sometimes be necessary to determine who is the bearer of authority in a particular case. This is a political exercise in the first instance; only if the problem cannot be solved by recourse to Chapter 3 procedures will the courts be called upon to decide. It is suggested that both the politicians and the courts should, when dealing with such an issue, make use of the leeway which the Constitution allows and go for the subsidiarity option. In other words, the "smaller" sphere exercises the power unless it cannot or will not do so. But the "smaller" sphere must participate fully in the decision about the "cannot" or the "will not" as well.

In South Africa there is a danger that, owing to the shortage of skills and infrastructure, there will be constant competition between the spheres of government. As a result of a number of factors, not least of which is prestige, the national sphere is likely to come off best in such a contest. This is precisely why the notion of subsidiarity is propagated so emphatically here.

The forces operating within the modern state cannot be described or regulated by means of one-dimensional formulas: it is too complex for that. This is equally applicable to the principle of subsidiarity in its most elementary sense. South Africa is no longer a classic example of a unitary state; neither is it formally and structurally a federation. The democratic order has nevertheless acquired a fair sprinkling of federal characteristics. As Dan Elazar said about the 1993 Constitution:

> "[I]t is explicitly not a federation and clear national supremacy is specified. Yet at the same time it is almost as clearly a federal arrangement in that the provinces are anchored and constitutionally protected in the document, as are their powers . . ."

This is even more true of the present Constitution.

As my colleague Dawid van Wyk puts it, an appreciation of subsidiarity is something that is not inborn, but has to be acquired, like good manners. It requires a conscious choice in favour of the "smaller sphere". It need not be called subsidiarity; the name is really neither here nor there. What it does mean is that the more powerful spheres of government will have to make a point of empowering the smaller and weaker spheres – especially that of local government – so that the power can truly be placed in the hands of the people.

There are already a number of encouraging signs. One of the earlier ones was the Green Paper on Local Government and the proposals contained in it. A more recent example is the Intergovernmental Fiscal Relations Act 97 of 1997. The stated aim of this law is to promote cooperation between the national, provincial and local spheres of government in fiscal, budgetary and financial matters and to prescribe a process for determining the equitable sharing and allocation of revenue raised nationally. The Act provides for the establishment of a Budget Council, composed of the Minister of Finance as Chair and the members of the Executive Council (MECs) for finance of each province. The purpose of the Council is to ensure consultation between the national and provincial governments regarding any fiscal, budgetary or financial matter affecting the provincial sphere; any proposed legislation or policy which has financial implications for any of the provinces; and anything relating to the financial management of the provinces or the monitoring of the above. A Local Government Budget Forum is

also provided for. It consists of the Minister as Chair, the provincial MECs for finance, five representatives of the national organisation recognised in terms of the Organised Local Government Act of 1997, and one representative of each provincial organisation recognised in terms of the above Act. This body's mandate is to consult about revenue sharing, the role of the Financial and Fiscal Commission and a Division of Revenue Bill (in terms of s 214(1) of the Constitution).

It is clear both from the attitude of the Constitutional Court to provincial and local powers in *The First Certification-case*, and from the legislation which has emanated from the national legislature, that subsidiarity – or whatever one chooses to call it – has a good chance of taking root in South Africa. It must not be forgotten, however, that subsidiarity means much more than power; it also entails responsibility.

It is therefore vitally important that the "smaller" spheres of government should not see the national government and the national fiscus, in particular, as a milch cow, or perhaps more accurately, as the modern equivalent of the widow's cruse, with an inexhaustible supply of funds and resources. Conversely, of course, nor should the national government use the purse-strings to exercise control over the other spheres of government in a manner which undermines the values of subsidiarity.

The Other Sphere of Government: South African Provincial and Local Structures in Practice

Mathews Phosa

INTRODUCTION

Before South Africa's first democratic elections in 1994, the country was made up of a complex combination of four provinces, four "independent states" and six "self-governing states".

It is important to realise that prior to 1994, South Africa had a very centralised government arrangement that was in line with the philosophy of the apartheid government, whose overriding policy was ultimate control. In contrast, the philosophy of the African National Congress (ANC) government is to put the people at the centre of government and governance. The ANC believes that if this new democracy is to succeed, the people themselves must work for it; the creation of provincial and local governments is informed by that understanding.

1. RESHAPING AND STREAMLINING

It is essential that this inherited complex and chaotic situation is reshaped into a streamlined democratically based government. South Africa is now divided into nine provincial structures, each given a degree of political authority. Legislatures and executive councils have been established and premiers appointed.

Chapter 3 of the South African Constitution, 1996, demands that the three spheres for government (national, provincial and local) cooperate and coordinate their activities to ensure the creation of a truly non-racial, non-sexist, democratic and just society. All actions by these spheres of government should therefore aim to work towards the attainment of these noble ideals.

The principles of cooperative government and governance put the national interest first, and require a fundamental commitment from each sphere of government to play an establishment role in the creation of a culture of cooperation, national unity and mutual trust.

2. FORUMS

To effect this arrangement, a number of institutions have been created to give both politicians and administrators the necessary forums to discuss relevant issues.

- The National Council of Provinces (NCOP) has replaced the Senate. The NCOP brings together representatives from all nine provinces to ensure that provinces are involved in the legislative process.
- The Intergovernmental Forum (IGF) is one of the biggest forums and is chaired by the Deputy President. Ministers, premiers and their directors-general meet here to discuss all issues involving government at all levels. Local government is represented here by Logam.
- Minmecs are where national ministers and the relevant provincial MECs (members of the executive council) meet to formulate policy and discuss any other related issues.
- The Premiers' Forum is where the premiers of the nine provinces meet to discuss common issues, some of which are taken up to national government level. Cooperation between and among the provinces is discussed here, as well as issues affecting premiers themselves.
- The Forum of South African Directors-General (Fosad) provides directors-general

from national and provincial governments with a forum to discuss issues that are relevant to and cut across the departments and provinces.

These are some of the institutions created to ensure coordination in policy formulation and implementation. The intention is to make sure that policies emanating from different levels and spheres of government reinforce, rather than negate, each other.

Government is pleased with the progress that has been made in this regard over a period of less than five years, believing strongly that a unique and firm foundation for participatory democracy has been laid. But much still needs to be done before one can call the system perfect. Government agrees that it is still too early to legislate for cooperative governance; for now, it is comfortable with an evolutionary-type process.

3. CHALLENGES STILL FACED

Many challenges still exist for government at all levels. The following still needs attention and fine-tuning:

- Although competencies are divided among national, provincial and local governments, it is important for all three spheres to realise that they serve the same customer, the South African citizen. Situations still exist whereby national government will, for example, implement a project without understanding the plans of provincial and local governments. This creates confusion and sometimes even duplication and wastage. Provinces are also guilty of this. We need to realise that all development is, in the end, local.
- Although each sphere of government wants its own key performance indicators, there is a need for a set of indicators that tell whether government at all three spheres is on track as far as policy and Gear (Growth, Employment and Redistribution) targets are concerned and according to the requirement of global competition. This will help us to detect difficulties before they become problems.
- There are still too many government versus government court cases: this runs against the letter and spirit of cooperative governance. A big challenge, therefore, is for the various governments to learn to deal with problems without resorting to the courts.
- Cooperative governance should be effective both vertically and horizontally. At present, focus has been mainly between national and provincial governments, and to a lesser extent with local government. Horizontal cooperation has been minimal. It is important to strengthen these relationships since much experience can be shared. A simple example of the lack of horizontal cooperation is that each province sends its own missions overseas, with each learning similar things: the experience and knowledge gained is not shared among the provinces and local governments. The provinces also need to know about each other's developmental plans. For example, it makes no sense to have two big hospitals on either side of a provincial border, while millions of people elsewhere have no hospitals at all. Gauteng and the Northern Province have begun offering services to each other on an agency basis: we are, after all, all South Africans.
- In government and progressive circles, local government is called the hands and feet of the Reconstruction and Development Programme (RDP). This shows the importance attached to this sphere of government. In reality, however, local government remains marginalised, separated from mainstream cooperative governance and under-resourced. Except for Logam – which is the structure representing local government at the IGF – there is no other local government representation at national or provincial level. At a recent councillors' forum, it was suggested that an intergovernmental forum be created between provincial and local governments as a means of strengthening cooperative governance.
- In provinces such as Mpumalanga, KwaZulu-Natal, the Northern Province and Eastern Cape, more than one centre of power exists at local level – namely, democratic local government and traditional leadership structures. It is vital that coordination and cooperation be established between these structures if transformation and delivery is to succeed at this level.
- Structures that deal with intergovernmental relations – such as the IGF and the Premiers' Forum – should be restructured and refined at horizontal as well as vertical levels of government, as relates to policy making and implementation.

- Provincial governments should act according to those policies agreed upon by intergovernmental institutions and structures so that there is unity of purpose and rapid progress.
- Local government structures should be streamlined to ensure that this grassroots level of government is emersed in the agenda of cooperation and cooperative governance.
- Cooperation is needed at all levels of government, i.e. among all three spheres as well as their different departments and structures.
- Further restructuring of intergovernmental relations as well as capacity development and creation is needed at all levels of government.
- Streamlining and synergy of structures, plans and budgets is required.
- Creative ways of financing infrastructure projects is needed. Since 1994, there has been much success with public-private partnerships. An example is the Maputo Development Corridor project which has brought much growth and development to that region.

CONCLUSION

Local government is the structure that serves the people most directly. It is therefore vital that this sphere of government applies the principles of cooperative governance.

Local government is the vehicle for development; it is through local government structures that democracy is brought into the homes of each and every South African. We therefore need to strengthen this sector and to equip it with the necessary skills and knowledge to serve the people. We need to ensure there are dedicated and devoted people to lead communities towards prosperity.

Local government structures provide democratic and accountable government to local communities and should ensure the delivery of services in a sustainable manner, promoting social and economic development in these communities.

Local government structures should also encourage community involvement in the building of a better future for all.

I believe that government will succeed in bringing water, housing and employment to all South Africans. If we can master the process and art of cooperative governance, we shall surely emerge victorious.

Relations Between Subnational and Local Governments, Structured by Subnational Constitutions*

Jörn Ipsen

INTRODUCTION

The point of departure for any discussion on local government law in Germany is the Basic Law. Art. 28(2) *Grundgesetz* (abbr. GG) stipulates that:[1]

> "The municipalities [i.e. local governments] shall be guaranteed the right to manage all the affairs of the local community on their own responsibility within the limits set by law. Within the framework of their statutory functions the associations of municipalities likewise have the right of self-government in accordance with the law. The right of self-government shall include responsibility for financial matters. The local governments have the power to levy trade taxes according to the rates for assessment determined by them."

All the issues I wish to address are covered in the answers to the following questions:

- What constitutes local government?
- What are the duties of local government?
- From which sources are local governments financed?
- Which control mechanisms exist with regard to local government activities?
- Which legal remedies are available to local governments, should their right of self-government be violated?

1. LOCAL SELF-GOVERNMENT AND DUTIES ASSOCIATED WITH IT

The first two issues we are going to address are based on a thesis implicit to the wording of the constitutional guarantee. With regard to local self-government, we should distinguish between the administrative **mode** of self-government (*Selbstverwaltung als Verwaltungsmodus*) and the **duties or functions** of self-government (*Selbstverwaltungsaufgaben*). This distinction is based on the interpretation of the Basic Law and not on a legal theoretic position. The guarantee expressed by the first sentence of art. 28(2) GG stipulates that "all the affairs of the local community" – thereby referring to their duties or functions – have to be regulated as "their own responsibility" – thus determining the administrative mode.[2]

I suggest that we first have a closer look at local self-government as an administrative mode. In older literature[3] on the subject, local self-government is usually divided into five powers (i.e. the so-called "*fünf Hoheiten*"), namely:

- management powers (*Organisationshoheit*)
- the power to appoint staff (*Personalhoheit*)
- the power to make by-laws (*Satzungshoheit*)
- the power to administer their own finances (*Finanzhoheit*) and
- zoning and planning powers (*Planungshoheit*).

These five powers are interrelated and form segments of local self-government as an administrative mode. In other words, they cannot be separated from each other.

The **management powers**[4] refer to the competency of local authorities to conduct their local affairs freely within the boundaries of what is statutorily permitted. They may, for example, decide to create or close down certain sections, departments (*Dezernate*) or offices (*Ämter*) of the local authority. The scope of their competencies in this regard is narrowed down insofar as subnational statutes (*Länder-*

gesetze) determine the organs through which the local authorities should act. However, within this statutory framework the local authorities are free to manage their local affairs.

The **power to appoint their own staff**[5] encompasses the responsibility to fill positions independently and to decide who they want to appoint to specific positions. The local and district authorities therefore act in their capacity as public-law employers (*Anstellungskörperschaften*) when they appoint civil servants and other employees (*Dienstherrnfähigkeit*).

The **power to promulgate by-laws** is the typical instrument for local authorities to regulate matters falling exclusively within their sphere of competency. The autonomy of local governments to make by-laws is based directly on the constitutional guarantee regarding local self-government. Unlike other administrative bodies, they are not dependent on an enabling statute to confer such powers upon them. In other words, this is an original power and not a delegated one. However, the procedure relating to the promulgation of by-laws has been regulated in terms of subnational legislation.

The **power to administer their own finances** includes the responsibility of local authorities to realise their own income and to spend it in accordance with their budget. Art. 28(2) GG has recently been amended[6] to the effect that local authorities are autonomous with regard to their finances, in order to clarify this point explicitly.

The powers (*Hoheiten*) which have been discussed thus far are just segments of local self-government in the sense of an administrative mode. The planning and zoning powers of local governments distinguish themselves from these powers in that they are not concerned with the mode of administration but can be characterised as duties of the local governments. These duties relate to "all the affairs of the local community". Of special interest in this regard is development planning (*Bauleitplanung*) in terms of which the utilisation of building projects within the area of the local government is decided on. Development planning is an obvious example of such administrative duties of local self-government.

With regard to other affairs it is not always that easy to distinguish between those with a local (i.e. *örtliche Angelegenheiten*) or broader (i.e. *überörtliche Angelegenheiten*) dimension. The Federal Constitutional Court (*Bundesverfassungsgericht*, abbr. BVerfG) defined affairs of the local community as:[7]

> "those needs and interests which are rooted in the local community or have a specific relation to them and which are shared by the people living in that (political) community in that it directly concerns the common basis of their living conditions."

As can be expected there are often legal disputes on the issue whether a specific matter should be regarded as a "local affair" or not. Adjudication on garbage removal and waste recycling as well as the provision of energy (electricity) played a significant role in developing criteria for classifying matters as belonging to the ambit of "local affairs". In order to illustrate how wide the scope of local affairs is, I would like to cite art. 83(1) of the Bavarian Constitution:[8]

> "The following duties fall within the scope of responsibility of the local governments (art.11(2)): the administration of property and assets of the local authority as well as the administration of public enterprises; furthermore, the municipal transport system, roads and road construction; the provision of services such as water, electricity and gas; institutions to secure an adequate supply of food; local planning, housing and housing supervision; local police services, fire protection and local cultural life; primary schools, vocational education and adult education; guardianship and social security; local health services; marriage and maternal guidance as well as nurseries; school hygiene and the physical development of juveniles; public baths; cemeteries; upkeeping of public buildings and memorials of historic value."

This provision of the Bavarian Constitution offers me the opportunity to explain the relationship between art. 28(2) of the Basic Law and the provisions guaranteeing self-government in the various constitutions of the *Länder*, since they are the focal point of this conference. To start, the mode of self-government as well as the autonomous duties associated with it are constitutionally guaranteed. Moreover, in the case of transgression of this guarantee a constitutional lawsuit may be filed at the Federal Constitutional Court. This constitutional guarantee also sets a minimum standard with regard

to the local self-government guarantees contained in the various constitutions of the *Länder*. Put differently, the self-government guarantees in the *Länder* constitutions may go further than the guarantee embodied in the federal constitution but may not drop below its standard.[9]

This relation between the Basic Law and the subnational constitutions gained in importance lately. Under the influence of Justice Böckenförde, the Federal Constitutional Court interpreted art. 28(2) GG in a manner which emphasised the function of this provision as an institutional guarantee.[10] The court placed less emphasis at its function of securing public-law rights (*subjektive Rechte*) of local authorities *vis-à-vis* the powers that be. In a more recent decision, however, the Constitutional Court (*Staatsgerichtshof*) of Lower Saxony held that the rule aimed at curbing the excesses of state authority – the so-called *Übermaßverbot* – also applies to local authorities in order to secure their constitutional rights.

The distinction between self-government as an administrative mode, on the one hand, and the functions exercised in the course of local self-government, on the other, offers a key to the understanding of the constitutions of the *Länder* which likewise distinguish between these two forms.

To recapitulate, the Basic Law as well as the subnational (*Länder*) constitutions not only guarantee local self-government as an administrative mode but also as a set of functions which they may exercise autonomously. Furthermore, the constitutional guarantee of art. 28(2) GG has the effect that similar guarantees in the *Länder* constitutions are bound to guarantee at least the same degree of self-government; obviously they may go beyond that level of protection and guarantee an even greater degree of local self-government.

Strange as it may sound, the constitutional guarantees with regard to these local self-government functions became less significant during the past couple of years, which have been marked by a serious financial crisis. The local authorities no longer try to secure functions falling within their competency; instead they are eager to get rid of them! In this body of local affairs, the so-called compulsory duties (*Pflichtaufgaben*) are of particular importance. This category of functions refers to the duties which the local authorities are under a statutory obligation to fulfil. Whereas local authorities have the competency to relieve themselves of some of their voluntary functions (*freiwillige Selbstverwal-tungsaufgaben*) – for instance public facilities such as public baths, concert halls or adult education – they may not do so with regard with the compulsory duties – e.g. public schools and social welfare on a local level. The dilemma facing local authorities is that these compulsory duties which they have to execute absorb the lion's share of their budgetary means. Consequently, hardly any money remains to finance local affairs which they provide on a voluntary basis.[11]

The compulsory duties which form part of the local self-government duties must be distinguished from those duties which have been additionally transferred to the local authorities (*übertragene Aufgaben*). Some subnational constitutions refer to the latter as directives (*Pflichtaufgaben nach Weisung*).[12]

A bone of contention is whether the functions of the local authorities should be regarded in a monistic way, thereby regarding both the traditional local affairs and the transferred duties in an undifferentiated manner as "local affairs", or whether they should be approached in a dualistic manner which clearly distinguishes between these two categories of functions. This issue has not yet been resolved. For practical reasons I shall proceed from the perspective which has been endorsed by most of the *Länder* constitutions, namely that the duties which have been additionally transferred to the local authorities should be distinguished from the traditional local affairs, thereby regarding the system to be of a dualistic nature.[13]

The matters which are transferred (*Auftragsangelegenheiten*) to the local authorities are state duties and are therefore in principle also executed by state authorities. However, this would lead to a duplication of administrative activities: state administrative bodies would then exist parallel to those of the local authorities should the latter indeed execute only the functions connected with their local affairs. Such a duplication of administrative bodies would obviously be uneconomical. The transfer of state duties to local authorities has a long tradition in Germany.[14] Insofar as it does not – by way of exception – concern the so-called "borrowing of an organ" (*Organleihe*), the local authority does not become a state authority due

to the fact that it exercises duties on behalf of a state authority.[15]

The identity of the local authority is not affected in the process and the difference in the nature of these functions which are executed does not come to the fore in practice.

Such functions which are usually transferred in most of the *Länder* include that of danger (or hazard) prevention, building inspection, trade supervision, traffic regulation, health and veterinarian matters, nature conservation and environmental protection.[16] Since these functions have over many years always been executed by the local authorities along with the administration of their local affairs, the administration is often not even aware that these are delegated functions. In 1997 the government of Lower Saxony – the federal state in which the University of Osnabrück is situated – for the first time published a list with all the functions that have been transferred to local governments. Previously, nobody knew exactly which duties had actually been transferred to the local governments.

The process of transferring functions from the subnational administrations to the local governments has not been concluded yet and the current administrative reforms seem to be providing new impulses to the process. I would even stick out my neck to predict that in due course the only remaining state administrative bodies will be the financial authorities and the police force. This underscores the increasing importance of the local authorities, particularly with regard to their function of executing delegated state powers (*originär staatlichen Aufgaben*).

2. FINANCIAL INDEPENDENCE

The question relating to the financing of local self-government certainly addresses the single most important aspect of local government. At the outset I briefly indicated that the Basic Law has been amended to the effect that the local authorities' "responsibility for financial matters" has been guaranteed at a constitutional level. The power to levy trade taxes (i.e. a *wirtschaftskraftbezogene Steuerquelle*) forms part of the basis of their financial independence. Apart from that, local authorities have been allotted a specific share of the revenue from income tax and general sales tax (art. 106(5) and (5a) GG). Furthermore, local authorities are entitled to an overall percentage of the total revenue from joint taxes which accrue to the *Länder* (art. 106(7) GG).

The income from the latter source together with revenue generated from subnational taxes forms the basis of a financial compensation (i.e. the so-called *Ausgleichsmasse für den kommunalen Finanzausgleich*).[17] The individual *Länder* are obliged to compensate the local communities (i.e. district councils and local authorities) due to differences in their financial strength. This is stipulated by the Basic Law as well as the various *Länder* constitutions. In other words, they have the obligation to put the local authorities in a financial position to execute their duties. It would hardly come as a surprise to you that the compensation which has to be paid to local authorities has been the most dominant theme of the past few years. It is no exaggeration to say that the local authorities suffer from a financial crisis. This can be subscribed to the following mechanism:

The county districts (*Landkreise*) and the cities which have the same legal status as districts (*kreisfreie Städte*) are responsible for social welfare aid at a local level. Such social welfare aid falls within the ambit of self-government duties even though the amount of aid to be paid is determined by a federal statute. This is a good example of an instance where the federal legislature statutorily specifies a duty to be executed by the local authorities, but leaves the financing of it to the *Länder*. The dilemma of the district authorities is that in contrast with the duties which the *Länder* execute on behalf of the federal government, there is no constitutional link in this case between the duty and its financing from a federal perspective.[18] Consequently, the connecting principle (*Konnexitätsprinzip*) which has been formulated in art. 104a(2) GG[19] does not apply. Due to the limited resources which could generate revenue from taxes levied by the local authorities themselves, they are in a dilemma. As a result of difficult financial times and increasing unemployment, the expenditures for social welfare aid escalate whereas the available revenue to buffer the costs simultaneously sinks. Consequently, they really do depend on financial compensation (*Finanzausgleich*) to survive.

This brief excursus shows that even the financing of traditional self-government duties is a highly complex matter. The financing of

the delegated duties is a matter on another plane with its own difficulties and should be clearly distinguished from the expenditures for these self-government duties.

From the preceding discussion it became clear that the financing of delegated duties is usually also regulated in terms of other provisions than those dealing with ordinary self-government duties. The *Länder* constitutions usually provide that when duties are delegated to local authorities this has to be linked to with adequate financial means to cover the expenses (referred to as a "connecting principle"). Art. 57(4) of the Constitution of Lower Saxony illustrates the point well. A free translation of the provision is as follows:[20]

> "State duties may statutorily be delegated to the local authorities and districts by way of a directive provided that proper arrangements are made to cover the expenses for executing such delegated duties."

The interesting question from a constitutional perspective is whether this provision foresees a special form of compensation over and above the tax-sharing provision which is dependent upon the amount of revenue generated for purposes of financing local authority functions (i.e. the *kommunalen Finanzausgleich*). The Constitutional Court of Lower Saxony affirmed this point of view.[21] The landmark decision is of importance insofar as it will certainly play a role with regard to the interpretation of other *Länder* constitutions as well. The dualistic nature of duties correlates with a duality of financing the respective duties. A distinction is drawn between compensation with regard to ordinary self-government duties which should be financed from the revenue of taxes levied by the local authorities (*finanzkraftabhängige Zahlungen*) and compensation with regard to delegated duties which do not depend on their financial strength (*finanzkraftunabhängige Zahlungen*).

3. CONTROL MECHANISMS

The dualistic nature of local government duties also correlates with a dualistic supervisory system, which brings us to the next point. Which control mechanisms exist with regard to local government duties?

In terms of art. 28(2) 1st sentence GG, the management of their affairs by the local authorities takes place "on their own responsibility within the limits set by law". In other words, the Basic Law is explicit about the fact that the local authorities are autonomous in managing their affairs. The *Länder* constitutions contain similar provision to this effect. The only kind of control which could be exercised by the *Länder* over the local authorities under these circumstances is so-called "legal supervision".

In principle, state supervision over local authority matters takes on the form of legal supervision (*Rechtsaufsicht*).[22] This means that the local authorities should be administered in conformity with the statutes which apply to them. As a general rule, control may be exercised with regard to the legality of administrative measures, not with regard to the suitability thereof. However, in practical terms it is often very difficult to clearly distinguish between the legality and suitability of administrative measures. Particularly in the field of budgetary law, the legality of measures could hardly be separated from the suitability of such measures.

In practice these control mechanisms are therefore usually invoked in a very generous way not to obstruct the decision-making process of local authorities or to impede their willingness to assume responsibility for local affairs. Control mechanisms which could be invoked *vis-à-vis* local authorities include objections (*Beanstandungen*), the substitution of measures taken by the local authorities (*Ersatzvornahmen*) and the appointment of a representative (*Bestellung eines Beauftragten*). All these control mechanisms are administrative acts and the local authorities may take legal steps against such measures.

In contrast to the ordinary local self-government which is only subject to legal supervision, the delegated duties are subject to administrative supervision (*Fachaufsicht*)[23] which includes control over both the legality and suitability of measures. In this regard a relationship of subordination and control exists between the state authorities and the local government authorities; the latter are bound to instructions given by the state authorities. Since the delegated duties are duties which are originally attributed to the state, the responsibility to execute the duties (*Wahrnehmungskompetenz*) and the competency to exercise control over the measures (*Sachkompetenz*) are split. The right of self-government by the local authorities is also not affected by such directives. However, should the delegated

duties not be financed sufficiently, the self-government duties are obviously directly affected due to the fact that there is only a single budget at the disposal of the districts and the local authorities for these purposes. Against this background the constitutional courts of the *Länder* held that an under-financing of delegated duties is unconstitutional.

4. LEGAL REMEDIES

The final issue which needs attention is the possibility of submitting a constitutional complaint to the Constitutional Court should the local authorities' right of self-government be violated. This is regulated in terms of art. 93(1) no. 4b GG which stipulates that:[24]

> "The Federal Constitutional Court shall rule . . .
>
> 4(b) on constitutional complaints by municipalities or associations of municipalities alleging violation of their self-government under Article 28 by a (federal) law; in case of violation by a *Land* law [i.e. a statute of one of the *Länder*], however, only where a complaint cannot be lodged with the *Land* constitutional court."

Such a complaint about the unconstitutionality of subnational legislation (*Landesgesetze*) may only be submitted to the Federal Constitutional Court if there is no constitutional court in that specific *Land* or when the subnational legislation does not make provision for a constitutional complaint regarding local self-government matters. The only federal state where this is still the case is Schleswig-Holstein which does not have an own constitutional court.

Against the background of the parallel existence of constitutional complaints to either the Federal Constitutional Court or the constitutional courts of the *Länder*, I would like to sketch an extraordinary legal constellation. In both Schleswig-Holstein and Lower Saxony, similar statutes have been adopted which direct local authorities to appoint representatives on a full-time basis to promote equal treatment of females (*hauptamtliche Frauenbeauftragte*). Many local authorities immediately submitted a constitutional complaint against this statutory provision because they regarded it as a violation of their right of self-government.

The only option open to the local government authorities in Schleswig-Holstein was to submit a constitutional complaint before the Federal Constitutional Court on the basis that their constitutionally guaranteed right of self-government has been infringed. The Constitutional Court rejected the complaint with the argument that the institutional guarantee of self-government in terms of art. 28(2) GG has not been affected.

The local government authorities in Lower Saxony submitted *their* complaint based on the constitutional guarantee of local self-government in the Constitution of Lower Saxony to *their* Constitutional Court. In this case the decision was totally different. The Constitutional Court of Lower Saxony held that this subnational statute was unconstitutional insofar as one could not reasonably expect local authorities with less than 20 000 inhabitants to appoint a full-time representative to promote equal treatment of females. The Court concluded that the local authorities may rightly complain about the excesses of state authority in this instance.[25]

This judgement in Lower Saxony is significant insofar as it heralds a new age in which the self-government guarantee in the *Länder* constitutions and constitutional complaints based upon the violation of local self-government clauses on a subnational level have developed an own profile and became independent of federal constitutional law in this regard.

From a German perspective, the research done by the Centre for State Constitutional Studies at Rutgers University and the VerLoren van Themaat Centre for Public Law Studies at the University of South Africa is of great importance. In Germany, a renaissance of subnational law can also be observed.

ENDNOTES

* The author wishes to express his thanks to Dr Loammi Wolf who translated this article into English.

1) Official Translation (revised and updated edition of November 1994) of the Press and Information Office of the Federal Government of Germany. The original German text is as follows:
   "Den Gemeinden muß das Recht gewährleistet sein, alle Angelegenheiten der örtlichen Gemeinschaft im Rahmen der Gesetze in eigener Verantwortung zu regeln. Auch die Gemeindeverbände haben im Rahmen ihres gesetzlichen Aufgabenbereiches nach Maßgabe der Gesetze das Recht der Selbstverwaltung. Die Gewährleistung der Selbstverwaltung umfaßt auch die Grundlagen der finanziellen Eigenverantwortung; zu diesen Grundlagen gehört eine den Gemeinden mit Hebesatzrecht zustehende wirtschaftskraftbezogene Steuerquelle."
   The last sentence was inserted at a later stage and has not yet been taken up in the official translation; it has therefore been translated freely.
2) Cf. J. Ipsen, "Schutzbereich der Selbstverwaltungsgarantie und Einwirkungsmöglichkeiten des Gesetzgebers", *ZG* 1994, p. 201 seqq.
3) Cf. K. Stern, *Staatsrecht* vol. 1., 1st ed. 1977, p. 310 seq.; E. Schmidt-Aßmann, "Kommunalrecht", in: E. Schmidt-Aßmann (ed.), *Besonderes Verwaltungsrecht*, 10th ed. 1995, p. 21 seqq.; M. Nierhaus, in: Sachs (ed.), *Grundgesetz-Kommentar*, 2nd ed. 1999, Art. 28, note 44; J. Ipsen, *Niedersächsisches Kommunalrecht*, 2nd ed. 1999, note 95.
4) For fundamental information see: E. Schmidt-Jortzig, *Kommunale Organisationshoheit*, 1979, p. 33 seqq.
5) For definition see: BverfGE 17, 172 (p.182).
6) BGBl. I, 1994, p. 3146.
7) BVerfGE 79, 127 (151 seq.), (decision of the Federal Constitutional Court of 23.11.1988) The original German citation is as follows:
   ". . . diejenigen Bedürfnisse und Interessen, die in der örtlichen Gemeinschaft wurzeln oder auf sie einen spezifischen Bezug haben, die also den Gemeindeeinwohnern gerade als solchen gemeinsam sind, indem sie das Zusammenleben und -wohnen der Menschen in der (politischen) Gemeinde betreffen."
8) The German Text of art. 83(1) of the Bavarian Constitution is as follows:
   "In den eigenen Wirkungskreis der Gemeinden (Art. 11 Abs. 2) fallen insbesonders die Verwaltung des Gemeindevermögens und der Gemeindebetriebe; der örtliche Verkehr nebst Straßen- und Wegebau; die Versorgung der Bevölkerung mit Wasser, Licht, Gas und elektrischer Kraft; Einrichtungen zur Sicherung der Ernährung; Ortsplanung, Wohnungsbau und Wohnungsaufsicht; örtliche Polizei, Feuerschutz; örtliche Kulturpflege; Volks- und Berufsschulwesen und Erwachsenenbildung; Vormundschaftswesen und Wohlfahrtspflege; örtliches Gesundheitswesen; Ehe- und Mütterberatung sowie Säuglingspflege; Schulhygiene und körperliche Ertüchtigung der Jugend; öffentliche Bäder; Totenbestattung; Erhaltung ortsgeschichtlicher Denkmäler und Bauten."
9) Cf. E. Schmidt-Aßmann, "Kommunalrecht", in: E. Schmidt-Aßmann (ed.), *Besonderes Verwaltungsrecht*, 10th edition, 1995, p. 14; J. Ipsen, *Niedersächsisches Kommunalrecht*, 2nd edition, 1999, note 3.
10) Cf. BverfGE 79, 127 (143 seqq.).
11) See F. Schoch, "Finanzverantwortung beim kommunalen Verwaltungsvollzug bundes- und landesrechtlich veranlaßter Ausgaben", *ZG* 1994, p. 246 seqq.
12) For Lower Saxony see: Art. 57 sec. 4 of the *Niersächsische Verfassung* (NV), § 5 sec. 1 of the *Niersächsische Gemeindeordnung* (NGO) and § 4 sec. 1, sent. 1 of the *Niersächsische Landkreisordnung* (NLO).
13) Cf. T. Elstner, in: Korte/Rebe, *Verfassung und Verwaltung des Landes Niedersachsen*, p. 372 seqq., E. Schmidt-Jortzig. *Kommunalrecht*, note 332; E. Schmidt-

Aßmann, in (ib. ed.), *Besonderes Verwaltungsrecht*, p. 95.

14) See E. R. Huber, *Die Deutsche Verfassungsgeschichte seit 1789*, vol. 1, 2nd ed. 1967, p. 175 seq; O. Gönnewein, *Gemeinderecht*, p. 86.
15) Cf. J. Ipsen, *Kommunalrecht*, 2nd ed. 1999, note 164.
16) For further details see J. Ipsen, *Kommunalrecht*, 2nd ed. 1999, note 170 seqq.
17) For further details on the *Finanzausgleich* see: F. Schoch, *Verfassungsrechtlicher Schutz der kommunalen Finanzautonomie*, 1997; H.-G. Henneke, *Die Kommunen in der Finanzverfassung des Bundes und der Länder*, 2nd ed., 1998; M. Inhester, *Kommunaler Finanzausgleich im Rahmen der Staatsverfassung*, 1998; J. Ipsen (ed.), *Kommunale Aufgabenerfüllung im Zeichen der Finanzkrise*, 1995.
18) For further details on this subject see: F. Schoch, *ZG* 1994, p. 246 seqq.
19) The official English translation of art. 104a(2) GG is as follows:
"Where the *Länder* act for the Federation the latter shall finance the resulting expenditure."
20) The original German text of the provision is as follows:
"Den Gemeinden und Landkreisen . . . können durch Gesetz staatliche Aufgaben zur Erfüllung nach Weisung übertragen werden, wenn Bestimmungen über die Deckung der Kosten getroffen werden."
21) Nds. StGH, Nds.VBl. 1995, 225 seqq.; Nds. VBl. 1998, 43 seqq.
22) Cf. J. Ipsen, *Kommunalrecht*, note 821 seqq. with further references.
23) Cf. J. Ipsen, *Kommunalrecht*, note 842 seqq.; E. Schmidt-Jortzig, *Kommunalrecht*, 1987, note 555 seqq.
24) The original German text of the provision is as follows:
Das Bundesverfassungsgericht entscheidet: "über Verfassungsbeschwerden von Gemeinden und Gemeindeverbänden wegen Verletzung des Rechts auf Selbstverwaltung nach Artikel 28 durch ein Gesetz, bei Landesgesetzen jedoch nur, soweit nicht Beschwerde beim Landesverfassungsgericht erhoben werden kann."
25) Nds. StGH, Nds. VBl. 1996, 87 seqq.

The New Judicial Federalism in the United States: Expansive State Constitutional Rights Decisions

Robert Williams

INTRODUCTION

Although universal rights seem to be the natural order, independent state constitutions offer opportunities to entrench certain rights – at least in some places – when the nation or its highest court cannot agree on applying these rights. We have already seen signs of this with regard to privacy, victims' rights, women's rights and environmental rights provisions in some state constitutions. In this way, states can also serve as laboratories for rights experimentation.

The new judicial federalism may also have implications for emerging democracies worldwide. Often, ethnic, religious and linguistic hostilities preclude consensus on common rights. However, entrenching even a few common rights in the national constitution is a step in the right direction that can foster the trust needed to break down barriers to the recognition of more universal rights.[1]

1. INDEPENDENT STATE CONSTITUTIONAL RIGHTS

During the past 25 years there has been a renewed interest in American state constitutional rights protections; the "new judicial federalism". States and state courts may not recognise less in the way of rights for their residents than is required by federal law. Federal law creates a national minimum of rights or – in the words of one state court – "the least common denominator" of rights protections.[2] But in the United States (US) federal system, states and state courts (and courts in American territories and possessions)[3] are permitted to recognise more rights protections for their residents than they are required to enforce as a matter of federal law. This makes for a fairly complex legal system, but it is one which provides a double source of protection for the individual rights of US citizens. The American system of dual federal and state courts may seem to be a necessary ingredient for such an expansive state constitutionalism, but the American lessons are relevant even in federal systems which do not have separate state courts.

Interestingly, it was the late William J. Brennan, Jr. who, as a Justice on the US Supreme Court, emphasised this double source of protection in his famous 1977 *Harvard Law Review* article.[4] Brennan, a former New Jersey State Supreme Court Justice in the 1950s, called on state courts to be more aware of rights under their state constitutions because his own US Supreme Court was becoming more conservative and less protective of individual rights. Not only has the US Supreme Court's conservatism continued, but state courts have accepted Justice Brennan's invitation to "fill the vacuum" being left at the federal level. To date there are literally hundreds of cases where state supreme courts have interpreted state constitutions to provide more rights than recognised under the federal constitution. Often these state cases explicitly reject the prior conclusions of the US Supreme Court on the matter when it was presented as federal constitutional question! This is an extremely important, but still generally unrecognised, aspect of US constitutional federalism.

A federal constitutional arrangement such as America's which permits state constitutional rights beyond the national minimum standard

results in a "rights landscape" that may be characterised by "peaks and valleys of rights protection" among the different component units.[5] Such an approach, however, is a central feature of a federal system, with a variety of different legal rules in the component units.

Observations such as the following by the Alaska Supreme Court still may startle some American lawyers and judges, as well as observers from other countries, especially those who are accustomed to considering the US Supreme Court to be the exclusive American judicial body enforcing individual rights:

> "While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution . . . We need not stand by idly and passively, waiting for our constitutional direction from the highest court of the land."[6]

The power of state supreme courts to "go beyond" decisions of the US Supreme Court seems to contradict the fundamental understanding of the supremacy of the federal constitution. Unraveling this apparent paradox provides a number of lessons about US constitutional law:

- Identical state and federal constitutional language can have different interpretations, with state courts interpreting their state constitutional provisions to recognise more, but not less, constitutional protection than is provided by the US Supreme Court interpreting the federal constitution.
- Most of the protections of the federal Bill of Rights were modelled on state concepts of constitutional protection that predated the federal constitution. As Justice Stanley Mosk of the California Supreme Court noted:

  > "It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon corresponding provisions of the first state constitutions, rather than the reverse."[7]

- The language of state constitutional provisions often is more detailed than that contained in the federal Bill of Rights. Such detail focuses attention on the text of the provision at issue and related provisions of the state constitution.
- State constitutions may contain individual rights having no analogue in the federal constitution. For example, equal rights provisions barring discrimination on the basis of sex, requirements of open access to courts for redress of injuries, rights of privacy, and specific protections for the incarcerated may be found in state constitutions but not in the federal constitution. Lawyers therefore often have wide-ranging opportunities under state constitutions for formulating novel arguments.

  Because of the absence of federal analogues, state courts necessarily have interpreted these constitutional provisions independently of US Supreme Court cases. Therefore, the state courts have developed a truly independent constitutional jurisprudence under some of these provisions. This body of law can provide an approach for state courts to emulate when they seek to develop an independent interpretation of state constitutional provisions that do have federal analogues.
- When the US Supreme Court interprets the federal constitution in cases challenging state laws, notions of federalism often constrain it in ways that do not affect state supreme courts. For example, when the Supreme Court declined to invalidate Texas' school finance law on equality grounds in *San Antonio Independent School District v Rodriguez*,[8] the Court revealed its concerns about federalism and deference to the states:

  > "It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a state's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny."

  Despite the fact that public schools in Texas were financed with local property taxes, leading to extreme inequalities based on the value of the property in different school districts, the Supreme Court refused the claim. Several state supreme courts, however, striking down

school financing schemes despite *Rodriguez*, indicated their own lack of concern for the federalism issue.[9] State supreme court interpretations of their own constitutions have no binding force outside the state. They apply only within a single state. Of course, questions regarding the proper judicial function in reviewing actions of the other branches of government remain, but they are horizontal, intrastate matters without the additional vertical federalism concerns.

- State supreme courts may reject the US Supreme Court's technique of analysis in constitutional interpretation. Thus, not just the result may be different; the underlying state judicial approach to constitutional analysis also may diverge from the more familiar federal constitutional doctrine.
- The federal constitutional requirement of state action,[10] restricting federal constitutional challenges to only those actions of governmental officials, as opposed to private persons, may not be present in state constitutional protections.[11] Many state constitutional provisions, such as statutes, grant positive rights in specific terms and therefore sometimes may also apply to non-governmental action.[12] The education finance cases referred to earlier are examples of positive rights interpretation.
- Constitutional doctrines long ago repudiated by the US Supreme Court may still be viable as matters of state constitutional law. The most important examples are "substantive due process" limitations on state statutes that interfere with contract rights in the field of economic regulation,[13] which many states still utilise, and the doctrine of non-delegation of legislative authority.
- Even if a state supreme court is convinced that its constitution provides more extensive rights than the federal constitution, the state court must consider carefully whether these greater rights for one litigant would interfere with the federal constitutional rights of other litigants. Going beyond the federal minimum guarantees for one party may in some circumstances deprive the losing party of other federal minimum guarantees.[14]
- State constitutions themselves can address the question of whether they should be interpreted to provide greater protections than the federal constitution. In 1974, for example, the voters in California adopted a state constitutional provision distinguishing the coverage of the state and federal constitutions: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[15] The next year, the California Supreme Court observed:

  > "Of course this declaration of constitutional independence did not originate at that recent election; indeed the voters were told the provision was a mere reaffirmation of existing law."[16]

  A 1978 attempt in Florida to adopt a similar constitutional provision failed with the rejection by the electorate of the entire package of proposals by the 1977-1978 Constitution Revision Commission.[17]

  Interpretations of a state constitution expanding upon federal constitutional protections are therefore not governed solely by the attitude of state courts. Textual changes to the constitution, as in California, can also influence courts' decisions. This aspect of the process of state constitutional lawmaking – textual change – can, however, be a two-way street. In 1979, just five years after ratifying the provision quoted above, the California voters amended Article I, section 7. The amendment prohibited California courts from going beyond the requirements of the federal equal protection clause of the Fourteenth Amendment in the use of pupil assignment and school busing remedies. The amendment was intended to overrule a long series of California decisions ordering such remedies in the absence of intentional segregation, a prerequisite under federal law.[18] The US Supreme Court upheld Proposition 1 against a federal constitutional challenge[19] illustrating the possibility of using amendments to the constitutional text either to stimulate or overrule independent state constitutional interpretations.
- Judicial interpretation of state constitutions or amendment of the texts is not the only means by which states may provide greater protection to their citizens than is required by the federal constitution. Means of expanding such protection, which are often overlooked, are by state statute, common law, or administrative regulation. The New York Court of Appeals noted that the federal constitution "leaves the States free to provide greater

rights for its citizens through its Constitution, *statutes or rulemaking authority*".[20] One familiar example of expanded protection is the passage of state "press shield laws" after the Supreme Court ruled in *Branzburg v Hayes*[21] that reporters had no First Amendment (freedom of the press) privilege to refuse to appear before grand juries or refuse to answer grand jury questions about the sources of their information. Another example is the state legislative decision to continue Medicaid funding for abortions for poor women by at least nine states after the Supreme Court's decision in *Harris v McRae*[22] left states without any federal constitutional restriction on terminating such funding.

Thus, if an attempt to establish a right fails at the federal level, the right may be pursued in state courts, legislatures and administrative agencies. Moreover, state laws, other than the state constitution, offer many protections beyond those required by the federal constitution.

- As a procedural matter, a final decision of a state court is insulated from review by the US Supreme Court if the decision is based on an adequate and independent state ground.[23] Insulation results even if the case also decides a federal constitutional issue because the state ground would have been adequate to support the state court decision even in the absence of the federal ground. Interestingly, however, state courts are still slow – now almost two decades after the Supreme Court's clear pronouncement – to take advantage of the opportunity to insulate their decisions from Supreme Court review.[24]

Whether a state court should reject a US Supreme Court interpretation of a similar constitutional provision is a difficult question. Until now, most scholars have focused on courts that have already done so.[25] The following questions are still confounding US state judges and lawyers: How can courts make this decision and how can counsel develop meaningful arguments addressing this question? Should a state court resolve state constitutional issues before it resolves federal issues? What is the value of uniform, nationwide rules on rights protections?

2. METHODOLOGY AND LEGITIMACY

Although state courts have always possessed the power to interpret their constitutions to provide more individual rights than recognised at the federal level, the recent, highly visible independent interpretation cases involving criminal procedure, abortion financing, and freedom of expression have focused attention on state courts as constitutional decision makers in controversial cases. This is a role that had previously been reserved for the US Supreme Court and federal judges. This attention has raised questions about the legitimacy of state court decisions rejecting Supreme Court reasoning and result. These legitimacy questions in state cases "evading"[26] Supreme Court precedent have encouraged some state courts to attempt to formulate standards or criteria by which to justify their rejection of Supreme Court decisions.[27]

The legitimacy of a state court decision interpreting a state constitutional provision is not questioned in cases dealing with such areas as government structure or separation of powers, where there are no federal constitutional restrictions applicable to the states. Nor does the question of legitimacy arise in cases involving the many state constitutional provisions to which no comparable or analogous federal constitutional provision exists. Arguments about independence do not arise in these situations simply because there is nothing from which the state courts need to assert independence. Also, state courts need not (and may not) exercise independence when the Supreme Court has previously invalidated a state policy similar to the one currently before the state courts.

The perceived legitimacy problem arises only when the US Supreme Court has upheld state legislative or executive action under a federal constitutional provision which is similar or identical to a state constitutional provision. The Supreme Court decision casts a shadow over subsequent state litigation on what otherwise would be purely a question of state constitutional interpretation. The shadow seems to create a presumption of correctness, thus requiring a state court clearly to articulate reasons justifying a contrary result. In other words, the Supreme Court decision is sometimes viewed as presumptively applicable to state constitutional interpretation. This presumption is not necessarily based on the persuasiveness of the Supreme Court's reasoning, but rather on its position as the highest court in the nation.

3. THE MISTAKEN PREMISE OF UNITED STATES SUPREME COURT CORRECTNESS

Most of the methodological problems state courts encounter when interpreting state rights provisions which are analogous to those contained in the federal Bill of Rights arise – in Oregon Justice Hans Linde's words – from:

> "the *non sequitur* that the United States Supreme Court's decisions under such a text not only deserve respect but presumptively fix its correct meaning also in state constitutions."[28]

The often unstated premise that US Supreme Court interpretations of the federal Bill of Rights are presumptively correct for interpreting analogous state provisions is simply wrong. But it still exerts a significant amount of intuitive force upon US lawyers and judges grappling with problems of state constitutional interpretation. It is important, therefore, to understand the sources of this mistaken premise.

First, the premise is based on a conception of the power and authority of the US Supreme Court in the American legal system. Most judges and legal practitioners, as well as members of the media, formed their attitudes about the US Supreme Court when it was *recognising* rights. Federal constitutional decisions recognising new constitutional rights are extremely powerful. Under the Supremacy Clause, these decisions have the power to reach into every single state trial court in the country because state judges must follow them. Based on this experience, it is an odd feeling for lawyers and state judges to think about having a "choice" as to whether they should follow decisions of the US Supreme Court. But, in fact, state courts do have a choice as to whether to follow decisions rejecting asserted federal constitutional rights.

It is critical to remember that it is very different for the Supreme Court to hold that people *have* certain rights that must be respected under the federal constitution than for it to hold that people *do not have* such rights. Because both are decisions of the US Supreme Court, however, judges and lawyers "feel" both kinds of decisions should have the same force. Upon closer examination, however, it is clear that just because some action is not prohibited by the federal constitution, it is not therefore automatically, as Justice Linde has noted:

> "'authorised' in the absence of contrary state law, for the Constitution only *limits* the actions of state officials; *authority* to take these actions must be found in state law."[29]

The justices of the US Supreme Court have been referred to as "teachers in a vital national seminar."[30] But their lessons, like those of all teachers, differ. When they teach us that the federal constitution does not provide certain rights, the issues are not foreclosed at the state level under the state constitution. Justice Brennan of the US Supreme Court advised:

> "[S]tate court judges, and also practitioners, do well to scrutinise constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees."[31]

Despite the clear distinction between Supreme Court cases which recognise rights and those which do not recognise rights, there still remains a certain aura of correctness to all decisions of the US Supreme Court. This can, unfortunately, lead to what Nebraska Justice Thomas M. Shanahan called a "pavlovian conditioned reflex in an uncritical adoption of federal decisions . . .".[32] The only way to combat this mistaken premise – often so powerful it is like a reflex – is to understand clearly its origins and work to overcome its force upon the legal system.

4. RELEVANCE OF AMERICAN EXPERIENCE ABROAD: SOUTH AFRICA

In South Africa, according to the terms of the Interim Constitution, a provincial constitution could not take effect until the Constitutional Court had certified that it complied with the requirements of the national constitution. Therefore, the draft provincial constitution of KwaZulu-Natal was submitted to the Constitutional Court. The Court refused to certify the draft constitution of KwaZulu-Natal.[33] In this case, the Constitutional Court found that "there are fundamental respects in which the provincial Constitution is fatally flawed".[34]

One of the most interesting elements of the Court's decision deals with Chapter 3 of proposed KwaZulu-Natal Constitution, the Bill of Rights. The Court concluded that there "can in

principle be no objection to a province embodying a bill of rights in its constitution".[35] The Court noted that most constitutions had bills of rights, and that the Interim Constitution "neither prescribes nor proscribes any form or structure or content for such [provincial] constitution".[36]

The Court noted that the only restriction on a provincial bill of rights would be the requirement that it could not be inconsistent with the national constitution. The Court reserved for another day the question of whether such inconsistency would arise if national legislation seemed to "cover the field" that a provincial bill of rights provision purported also to cover, citing the example of Australia.[37]

The Court concluded that just because the interim national constitution contained a Bill of Rights, that would not make a bill of rights in a provincial constitution "without more, inconsistent with the Interim Constitution or the Constitutional Principles".[38]

The Court went on to note that a provincial constitutional bill of rights could not operate with respect to matters over which the provincial legislature or executive did not have power.[39] Finally, the Court made the following important pronouncement:

> "A provincial bill of rights could (in respect of matters falling within the province's powers) place greater limitations on the province's powers or confer greater rights on individuals than does the Interim Constitution, and it could even confer rights on individuals which do not exist in the Interim Constitution. An important question is whether such provisions would be "inconsistent with" ("*onbestaanbaar met*") the provisions of the Interim Constitution."[40]

The Court stated that such greater rights were possible even within a circumstance where both the national and provincial bill of rights covered topics.

> "They are not inconsistent when it is possible to obey each without disobeying either. There is no principle or practical reason why such provisions cannot operate together harmoniously in the same field."[41]

The Constitutional Court cited the well-known late Justice William J. Brennan, Jr., of the US Supreme Court in support of these important propositions.[42] This comparative subnational constitutional law focus that the South African Constitutional Court used fits with the recent observation by US scholar Robert Shapiro:

> "At the same time that we are looking inward to state constitutions, we are also looking outward to the growth of constitutionalism in the international realm. Federalism has been said to be the great contribution of the United States to political theory. So, too, a theory of state constitutions in our federalist system may contribute to the ongoing international discussions about extending the rule of law into an ethnically and culturally pluralistic world."[43]

Despite this general endorsement of a provincial bill of rights, the Court concluded that the KwaZulu-Natal Constitution's Bill of Rights "is deeply flawed . . . and will have to be thoroughly redrafted should the KZN Legislature still wish to embody a bill of rights in a provincial constitution".[44]

Despite the fact that the KwaZulu-Natal provincial constitution was denied certification under the Interim Constitution, the Constitutional Court's pronouncements concerning provincial bills of rights seem valid even after adoption of the national constitution in 1996. In certifying the new national constitution, the court noted that Constitutional Principle XVIII(2) required the national constitution not to provide "substantially less . . . or substantially inferior" power to a province to adopt a constitution than that provided in the Interim Constitution.[45] Importantly, the Court concluded that the power of provinces to adopt constitutions was "substantially the same" under both constitutions.[46] Thus, its conclusions in the KwaZulu-Natal case seem to have continuing validity.

The Western Cape provincial constitution, although certified and currently in effect, does not contain a bill of rights. It remains to be seen whether other provinces will engage in constitution making any time soon. If they do, there are now a few judicial benchmarks to be followed. Through this series of Constitutional Court rulings, a South African jurisprudence of subnational rights protection is beginning. The South African Constitutional Court justices thus have served, and will continue to serve, as "teachers in a vital national seminar."[47]

CONCLUSION

The American experience with the new judicial

federalism, as South Africa has now shown, may have real importance for those in other federal systems. John Kincaid recently observed:

> "Given that it is increasingly necessary to think globally while acting locally, it is pertinent to suggest that this American experience with the new judicial federalism . . . may have useful implications for an emerging federalist revolution worldwide . . . The new judicial federalism, moreover, is situated at a critical intersection between individual rights and local autonomy, a matter of increasing importance and conflict in the post–Cold War era.
>
> The new judicial federalism, however, suggests a model that would enable rights advocates to continue pressing for vigorous national and even international rights protections, while also embedding in regional constitutions and local charters rights that cannot be embedded in the national constitution, effectively enforced by the national government, or enforced only at minimal levels. Such an arrangement would produce peaks and valleys of rights protection within a nation, but this rugged rights terrain is surely preferable to a flat land of minimal or ineffectual national rights protection. The peak jurisdictions can function, under democratic conditions, as rights leaders for a levelling-up process. In an emerging democracy culturally hostile to women's rights, for example, such an arrangement could embolden at least one subnational jurisdiction to institutionalise women's rights, thus establishing a rights peak visible to the entire society without plunging the nation into civil war or back into reactionary authoritarianism."[48]

Comparative study, though, is a two-way endeavour. There is much for Americans to learn from the experience of other federal systems with subnational constitutions. Such reciprocal information is the basis for studying comparative subnational constitutional law.

ENDNOTES

1) John Kincaid and Robert F. Williams, "The new judicial federalism: the States' lead in rights protection", 65 *Journal of St. Gov't* 50, 52 (April-June, 1992). See also G. Alan Tarr, "The past and future of the new judicial federalism", 24 *Publius: The Journal of Federalism* 63 (Spring, 1994); Robert F. Williams, "Foreword: looking back at the new judicial federalism's first generation", 30 *Valparaiso U.L. Rev.* xiii (1996).
2) *Alderwood Associates v Washington Environmental Council*, 635 P.2d 108, 115 (Wash. 1981). (Supreme Court interpretation of the Fourteenth Amendment "must operate in all areas of the nation and hence it invariably represents the lowest common denominator".)
3) Jose Alvarez-Gonzales, "The protection of civil rights in Puerto Rico", 6 *Ariz. J. Int'l & Comp. L.* 88 (1989).
4) William J. Brennan, Jr., "State constitutions and the protection of individual rights", 90 *Harv. L. Rev.* 489 (1977). Justice Brennan served on the New Jersey Supreme Court from 1952 to 1956. See generally Robert F. Williams, Justice Brennan, "The New Jersey Supreme

Court, and state constitutions: the evolution of a state constitutional consciousness", 29 *Rutgers L.J.* 763 (1998).

5) See Kincaid, *infra* note 48.
6) *Baker v City of Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970) (footnote omitted).
7) *People v Brisendine*, 531 P.2d 1099, 1113 (Cal. 1975). Donald S. Lutz, "The state constitutional pedigree of the US Bill of Rights", 22 *Publius: The Journal of Federalism* 19 (1992).

   Of course, some later state constitutions now contain material taken from the federal constitution. See, e.g., *Student Public Interest Research Group v Byrne*, 432 A.2d 507 (N.J. 1981).
8) 411 US 1, 44 (1973). See Lawrence G. Sager, "Fair measure: the legal status of underenforced constitutional norms", 91 *Harv. L. Rev.* 1212, 1217-18 (1978) (referring to federalism concerns as "institutional" rather than "analytical" limitation on Supreme Court's rulings). See also Lawrence G. Sager, "Foreword: state courts and the strategic space between the norms and rules of constitutional law", 63 *Tex. L. Rev.* 959 (1985).
9) See, e.g., *Serrano v Priest*, 557 P.2d 929, (Cal. 1976); *Robinson v Cahill*, 303 A.2d 273 (N.J. 1973), *cert. denied*, 414 US 976 (1973).
10) See generally *Flagg Bros., Inc. v Brooks*, 436 US 149 (1978).
11) John Devlin, "Constructing an alternative to 'state action' as a limit on state constitutional rights guarantees: a survey, critique and proposal", 21 *Rutgers L.J.* 819 (1990).
12) Burt Neuborne, "Foreword: state constitutions and the evolution of positive rights", 20 *Rutgers L.J.* 881 (1989).
13) "Developments in the law – the interpretation of state constitutional rights, 95 *Harv. L. Rev.* 1324, 1498-99 (1982).
14) *Pruneyard Shopping Center v Robins*, 447 US 74 (1980).
15) Cal. Const. art. 1, § 24.
16) *People v Brisendine*, 531 P.2d 1099, 1114 (Cal. 1975).
17) Talbot D'Alemberte, *The Florida State Constitution: a reference guide* 15 (1991).
18) *Crawford v Los Angeles Bd. of Educ.*, 102 S. Ct. 3211 (1982).
19) Id.
20) *Cooper v Morin*, 399 N.E. 2d 1188, 1193 (N.Y. 1979) (emphasis added).
21) 408 US 665 (1972).
22) 448 US 297 (1980). For a discussion of this issue under state constitutional law, see Robert F. Williams, "In the Supreme Court's shadow, legitimacy of state rejection of Supreme Court reasoning and result", 35 S. *Car. L. Rev.* 353 (1984), "In the glare of the Supreme Court: continuing methodology and legitimacy problems in independent state constitutional rights adjudication", 72 *Notre Dame L. Rev.* 1015 (1997).
23) *Michigan v Long*, 463 US 1032 (1983)
24) Note, "Fulfilling the goals of *Michigan v Long*, the state court reaction", 56 *Ford. L. Rev.* 1041 (1988).
25) Ronald K.L. Collins and David M. Skover, "The future of liberal legal scholarship", 87 *Mich. L. Rev.* 189, 217-18 (1988).
26) Donald E. Wilks, Jr., "More on the new federalism in criminal procedure", 63 *Ky. L.J.* 873 n. 2 (1975).
27) I have criticised this movement in Williams, *supra* note 22.
28) *State v Kennedy*, 666 P.2d 1316, 1322 (Or. 1983).
29) *State v Scharf*, 605 P.2d 690, 691 (Or. 1980) (emphases added). Justice Linde's point in this opinion is very important and should shift attention away from limits on actions in either the state or federal constitutions, to the underlying authority for such action. This can be a very different kind of argument, often shifting the focus from constitutional law to statutory law.
30) Rostow, "The democratic character of judicial review", 66 *Harv. L. Rev.* 193, 208 (1952).
31) Brennan, *supra* note 4, at 502.
32) *State v Havlat*, 222 neb. 554, 573, 385 N.W. 2d 436, 447 (1986) (Shanahan, J., dissenting).
33) *Certification of the Constitution of the Province of KwaZulu-Natal, 1996* (Case CCT 15/96, September 6, 1996) (Hereinafter "Certification of KwaZulu-Natal.")
34) Id., at ¶ [13].
35) Id., at ¶ [17].
36) Id.

37) Id., quoting Blackshield, Williams and Fitzgerald, *Australian Constitutional Theory* (1996) p. 473. (Internal quotations omitted.)
38) Id., at ¶ [17].
39) Id., at ¶ [19].
40) Id., at ¶ [23].
41) Id., at ¶ [24] (footnote omitted).
42) Id., at note 13, citing William J. Brennan, Jr., "The Bill of Rights and the states: the revival of state constitutions as guardians of individual rights", 61 *NYU L. Rev.* 535 (1986).
43) Robert A. Shapiro, "Identity and interpretation in state constitutional law", 84 *VA. L. Rev.* 389, 457 (1998).
44) *Certification of KwaZulu-Natal*, *supra* note 33, at ¶ [31].
45) *Certification of the Constitution of the Republic of South Africa, 1996* (case CCT 23/96, September 6, 1996), ¶ [342].
46) Id., at ¶ [344]–[347].
47) *Supra*, note 30.
48) John Kincaid, "Foreword: the new federalism context of the new judicial federalism", 26 *Rutgers L.J.* 913, 946-47 (1995). See generally, *Federalism and Rights* (Ellis Katz and G. Alan Tarr, eds., 1996); Michael E. Solimine and James L. Walker, "Federalism, liberty and state constitutional law", 23 *Ohio Northern U.L. Rev.* 1457 (1997).

Controlling Competency Conflicts: Subnational Constitutions, National Constitutions and the Allocation of Authority

Alan Tarr

INTRODUCTION

A renowned justice of the United States (US) Supreme Court, Oliver Wendell Holmes, once observed that the US would not collapse if the Supreme Court lost its power to strike down congressional enactments. But the nation *would* be imperiled if the Court could not invalidate state laws. For, according to Holmes, the states tended to consider only the local advantages of policy measures, while failing to recognise the broader national implications of their actions.[1]

I quote Justice Holmes at the outset of this paper because he identifies a problem common to all governmental systems that divide authority between a national government and subnational governments: the subnational governments are tempted to invade national authority in order to secure benefits for their citizens. Of course, this is not the only possible problem in a system of divided power – the national government may also invade the prerogatives of the subnational units. Guarding against these problems is difficult because, once one decides to divide governmental power, it is difficult to delineate clearly where the authority of one government ends and that of the other begins. Thus, honest mistakes about the scope of national powers and those of the subnational units are common. Bad motives are a concern as well: the absence of clear divisions of authority allows those seeking to aggrandise themselves to claim that their actions are constitutionally permissible or, failing that, to insist that their constitutional violations were inadvertent. Nor are the problems I have identified transitory problems, confined to the early years of a constitutional system. Assessing the American experience, Chief Justice John Marshall concluded that:

> "the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."[2]

The question, then, is not how to eliminate conflicts over the division of power, over competencies, once and for all; such conflicts are inevitable. Rather, one must ask how to minimise those conflicts and how to resolve them when they do occur. In addressing these questions, I shall focus primarily on the approaches pioneered in the US – the system I know best – but I shall also seek to compare those with the approaches adopted in various other systems. My hope is that the experiences I recount may be of interest not only to scholars but also to those officials who must deal with the competencies issue on a day-to-day basis.

At the outset, it is important to recognise that there are two basic ways to deal with conflicts about the competencies of national and subnational governments. One way is through constitutional design: that is, by constructing both the national and subnational constitutions so as to minimise opportunities for conflict. The other way is through conflict resolution: that is, by devising mechanisms for dealing with conflicts when they do occur. Neither constitutional design nor conflict resolution is adequate by

itself. Not even the wisest constitution maker can anticipate all potential conflicts over competencies and devise constitutional language that will prevent them from occurring. And if constitutions were drafted without consideration of how to prevent potential conflicts from occurring, one suspects that such conflicts would become endemic and that the constant conflicts would shred the constitutional fabric of the nation. Let me turn first to how constitutional design – and particularly subnational constitutional design – can help to minimise constitutional conflict.

1. MINIMISING INTERCONSTITUTIONAL CONFLICT

1.1 Subnational constitutional design

One way to minimise conflict between national and subnational constitutions is for the national constitution to give the national government some control over the content of subnational constitutions at the time they are being created. This, of course, requires that the national government pre-date the creation of those constitutions, and this is not always the case. In Australia, for example, state constitutions were established prior to the adoption of the Commonwealth Constitution, and that constitution specifically provided for the continued operation of the existing state constitutions.[3] In the US, the situation was even more complicated. The 13 states that declared independence from England in 1776 devised their initial constitutions prior to the adoption of the nation's first constitution – indeed, four states had drafted constitutions even prior to the Declaration of Independence. Thus, there was no possibility of a national authority imposing conditions on what would be contained in the constitutions of the original 13 states. Most of the other 37 states, however, were formed from territory governed by the US, with Congress controlling the admission of states and the delineation of their boundaries.[4] This gave the national government an opportunity to exert direct influence on state constitutions at the point that the states were applying for admission to the Union. The US Constitution implicitly confers on Congress the power to do so: by empowering Congress to admit new states to the Union, it in effect gives Congress the power to establish the conditions under which they will be admitted.[5]

Acting under this authority, Congress has imposed conditions on what state constitutions should contain in the acts by which it authorised prospective states to devise constitutions and apply for statehood. State constitution makers know that they have to meet those conditions in order to secure a favourable vote on admission.[6] If a proposed constitution contains provisions of which Congress or the President disapprove, either of them can refuse their consent to legislation admitting the state until the offending provisions are altered or removed. This congressional and executive power, together with the states' eagerness to attain statehood, has in several cases served a deterrent function. State constitution makers have refrained from including provisions in their charters because they expected those provisions would likely excite opposition in Congress and might jeopardise or delay admission to the Union.

The system I have described is not common to all federal systems.[7] Germany, for example, imposed no special requirements on the constitutions drafted by the five *Länder* that became part of the country following the collapse of the German Democratic Republic.[8] And Russia has established no principles to guide constitution making in the 89 constituent units that comprise the Russian Federation.[9] However, there are interesting parallels in the processes established in the US and in South Africa for the approval of proposed constitutions. In both countries there are pre-existing standards to which proposed constitutions must conform in order to win approval. Whereas in the US, these standards are contained in congressional enabling acts (the acts authorising prospective states to draft constitutions), in the South African case, these standards are the well-known 34 principles enunciated in the transitional constitution. In both countries as well, there is a supervisory authority empowered to scrutinise whether proposed constitutions comply with the applicable principles.

In the US, this supervisory authority is a political body, Congress; but in South Africa a judicial body, the Constitutional Court, performs this function. Finally, in both countries the supervising body can require changes in a proposed constitution as a condition for its acceptance – indeed, in both the US and South Africa, this has occurred.

But South Africa has introduced a distinctive

element. Typically, the supervision of constitutional content is a one-time process: in the US, for example, once a state is admitted, Congress no longer has authority over the content of its constitution, even if subsequent constitutional changes introduce departures from the principles that governed it initially.[10] In contrast, South Africa has established a continuing judicial scrutiny of constitutions and constitutional changes before they take effect. No amendment to a provincial constitution is valid until the Constitutional Court certifies that it complies with the guidelines of section 143 of the South African Constitution.

Given the similarities between the American and South African models, it might be worth considering what effect congressional mandates have had on the substance of American state constitutions. My answer would be: very little. Many of the conditions that Congress imposed on prospective states were non-controversial and, most likely, superfluous.[11] Enabling acts of the late 19th century, for example, required that state governments be "republican in form" and "not be repugnant to the Constitution of the US or the principles of the Declaration of Independence."[12] Yet even without these congressional directives, no prospective state would have adopted a monarchial or oligarchic constitution, nor one blatantly inconsistent with the national constitution. Even some more specific congressional requirements may have been unnecessary. For example, state constitutional conventions were instructed to secure a "perfect toleration of religious sentiment" and to provide for "the establishment and maintenance of systems of public schools . . . free from sectarian control."[13] Yet even without such mandates, the constitutions of most states by the late 19th century already provided for a system of public schools and banned sectarian influences in those schools. Finally, some states were obliged by enabling acts to adopt or eliminate particular constitutional provisions as the price of statehood. As a condition for admission, Congress required Oklahoma to locate its capital in the town of Guthrie until 1913. And after Arizona proposed a constitution that included the recall of judges, President Taft vetoed the statehood bill, forcing Arizona to delete the provision.[14]

Nevertheless, even the impact of these specific requirements has been minimal. For one thing, only infrequently has Congress imposed such requirements. Moreover, as the US Supreme Court's decision in *Coyle v Smith* recognised, states – once admitted – possess "all of the powers of sovereignty and jurisdiction which pertain to the original States".[15] They are therefore free to repudiate any inconvenient restrictions that Congress placed on them under its power to admit states to the Union. And in fact they have done so. Oklahoma moved its capital from Guthrie three years prior to the date specified by Congress, and Arizona reinstituted the recall of judges immediately upon admission to the Union.[16]

Of course, if the US had South Africa's system of continuing scrutiny of state constitutional revision and amendment, such post-admission repudiations of congressional mandates could not have occurred. So there are certainly benefits in the South African system. There may, however, be costs as well. For one thing, continuing supervision by the Constitutional Court impinges on the independent political judgment of provincial constitution makers. In addition, such supervision has the potential of embroiling the Constitutional Court in politically charged issues, and requiring it to rule on such issues could undermine the Court's authority or jeopardise its independence. Finally, constitutional principles that might have seemed appropriate at one point in time might no longer be viewed so favourably when conditions and political perspectives shift. Thus, continuing enforcement of detailed principles might preclude constitutional changes warranted by shifts in opinion and in circumstances.

Another possible way to minimise conflicts between national and subnational constitutions is to prescribe the contents of the subnational constitutions in the national constitution. Indeed, the national constitution could obviate the need for subnational constitutions altogether by prescribing in detail the form of government for subnational units. India and Canada have shown that federal systems can get along quite well without subnational constitutions.[17] But even if a country has subnational constitutions, mandates in the national constitution can restrict the range of choice for subnational constitution makers or can induce the subnational units to alter their constitutions to bring them into conformity with national requirements.

The US, of course, has opted *for* state consti-

tutions. Interestingly, the basic decision was reached in 1775, the year before the American colonies declared their independence from England. Massachusetts petitioned the Continental Congress for instructions as to the form of government the colony should institute in the event of a break with England. But the Continental Congress declined to provide such guidance; and this unwillingness to prescribe, to interfere with the state's opportunity to engage in the most fundamental act of self-determination, has set the precedent for American political practice ever since.

This is evident in the fate of the US Constitution's so-called Guarantee Clause, which obliges the national government to "guarantee to every State in this Union a Republican Form of Government".[18] Although this clause appears to offer a basis for close national supervision of state constitutional arrangements, in fact its effect on state constitutionalism has been minimal.[19] In part, this reflects the US Supreme Court's refusal to use the clause as a basis for reviewing the structure and operation of state governments. During the mid-19th century, in *Luther v Borden*, the Supreme Court ruled that the determination as to whether a state had a republican government was a political question, assigned by the Constitution to Congress, and that congressional determinations on the matter were binding on all other branches. In subsequent cases it has consistently reaffirmed this position.[20]

In part, too, the limited impact of the Guarantee Clause testifies to a reluctance on the part of the national government to oversee the internal politics of the states. During the first half of the 19th century, for example, opponents of slavery argued that the clause prohibited Congress from recognising any new states that permitted slavery; but perhaps because of the presence of slave states already in the Union, this argument did not succeed. In fact, the only instance in which the clause has proved important was in the unique circumstances of the Dorr Rebellion, when the national government had to determine which of two competing governments in Rhode Island was the state's legitimate government.[21]

Other provisions in the US Constitution have had somewhat more effect on state constitution makers, although typically their effect has been indirect. Under the so-called Supremacy Clause of the US Constitution, national law is superior to state law, so that in cases of conflict, valid national enactments – be they constitutional provisions, statutes or administrative regulations – prevail over state constitutional provisions. This has led state constitution makers to seek to avoid such conflicts, even if that has meant foregoing provisions they would have wished to adopt.[22]

1.2 National constitutional design

Since the focus of this conference is on subnational constitutions, my remarks on national constitutional design and competency disputes will be quite brief. Let me make three points.

First, a clear delineation of national and subnational powers in the national constitution can do much to forestall competency disputes – when the allocation of powers is clear, there is no basis for dispute. Such clarity may also make it more difficult for national authorities to invade subnational powers. Nevertheless, there may be reasons, other than ineptitude in constitutional drafting, why national constitutions do not clearly delineate national powers. A too detailed delineation of those powers, particularly in a system in which residual powers lie with the subnational governments, may deprive the national government of the flexibility necessary to deal with new and unanticipated contingencies. With this in mind, it was initially proposed at the convention that drafted the US Constitution that Congress have the power to:

> "legislate in all cases to which the separate States are incompetent, or in which the harmony of the US may be interrupted by the exercise of individual Legislation."

Even when concerns about a too powerful national government led the delegates to enumerate congressional powers, the language they employed – for example, "regulate commerce among the several states" and "all powers necessary and proper to carry out the foregoing powers" – reflected a preference for flexibility over precision. They were, in sum, willing to risk a proliferation of competency disputes in order to avoid handicapping the national government in its efforts to achieve national objectives.

Second, in most systems of divided powers, some powers are shared, and these concurrent powers can also produce competency disputes. Most national constitutions confirm the supre-

macy of national law in cases of conflict, but disputes may still arise about whether the national and state laws conflict, or whether the state law frustrates the achievement of national goals. Under the US Constitution, not only are some powers exclusive and others concurrent, but some powers are partially concurrent. The power to regulate interstate commerce is a prime example of a partially concurrent power and a historically important one as well. As one commentator wryly put it:

> "Congress may regulate interstate commerce; the states may also regulate interstate commerce, but not too much."[23]

Even the most skilled drafter cannot draw the line between "all right" and "too much", so disputes inevitably arise that can only be resolved on a case-by-case basis.

Third, the structure of the national government – and particularly of the national legislature – can also reduce the likelihood of competency disputes. In systems of divided power, most national constitutions provide representation for subnational units in a second chamber of the national legislature.[24] The assumption is that these representatives will prevent the enactment of national legislation that invades the prerogatives of subnational units. In some systems, such as the US, the second chamber is equal in authority to the first chamber – all bills must be approved by both chambers in order to become law. In others, the legislative powers of the second chamber depend upon the character of the bill under consideration. In Germany and South Africa, for example, the second chamber exercises only a suspensive veto on bills that do not implicate subnational concerns. But on bills that do implicate those concerns, the German *Bundesrat* has an absolute veto, and the South African National Council of Provinces can only be overridden by a two-thirds vote in the National Assembly. This makes it unlikely that legislation will be adopted that invades the powers of subnational governments, and that in turn reduces the frequency of competency disputes.

Yet, paradoxically, subnational participation in the national legislative process may have adverse effects as well. The protection afforded by participation in the enactment of national law can become an excuse for inadequate enforcement of constitutional limits on national power. At least that is what occurred in the US. From the late 1930s to the early l990s, the US Supreme Court gave only cursory attention to claims that congressional enactments invaded state prerogatives, because, it insisted, state interests were sufficiently protected by senatorial participation in the process of enacting the laws.[25]

2. RESOLVING COMPETENCY DISPUTES

I turn now from strategies for preventing competency disputes to mechanisms for resolving them. In the US, and in most other systems of divided powers, the judiciary has the main responsibility to resolve competency disputes. That, of course, is not the only possible solution. The constitution of the Russian Federation, for example, authorises the president of the Federation to suspend the acts of subnational executives if he believes them in violation of the federal law or human rights.

The Justice Ministry also has the power to revoke regional laws that are in violation of the Federation Constitution and, as of early 1998, it had used that power to revoke nearly 2000 regional laws.[26]

Indeed, in the convention that drafted the US Constitution, it was initially proposed to give Congress (rather than the Supreme Court) a veto over state laws that appeared to contravene the national constitution. Under this proposal, no state law would take effect without congressional approval. A moment's reflection reveals that such a system would encounter overwhelming theoretical and practical difficulties. How could Congress be prevented from using its veto power to aggrandise itself at the expense of the states? And how could a Congress that finds itself pressed to meet its other responsibilities take on the additional task of supervising the legislative output of all the states? Given these difficulties, the fact that the delegates could seriously contemplate such a fundamental intrusion into subnational self-government is instructive. It underscores just how seriously the delegates took the problem of competency disputes and to what lengths they were willing to go to prevent subnational governments from intruding into the domain of the national government.

Those who favoured a congressional veto over state legislation warned that the only alternative to such a veto was the exercise of military force against recalcitrant states. Such a

solution was no solution at all – no country could long survive the repeated use of force against its constituent units. Ultimately, of course, the delegates discovered a third alternative, which involved three basic features: a constitutional delineation of the powers of nation and state; a constitutional recognition of the supremacy of national law within its sphere; and judicial enforcement of constitutional guidelines. This third alternative had important advantages. It placed the resolution of competency disputes in the hands of a neutral party, rather than in the hands of one of the disputants. It also substituted the more gentle force of law for the harsh force of arms. The fact that many other nations have adopted similar solutions testifies to the attractiveness of this alternative. But what has been the experience with this system?

In the US, judicial resolution of competency disputes has primarily served to prevent the states from invading the sphere of the national government. The numbers speak for themselves: the Supreme Court has invalidated more than 1100 state laws and more than 50 state constitutional provisions as in conflict with the national constitution, but it has struck fewer than 140 congressional enactments.[27] Striking as these figures are, they do not tell the whole story. Recall that under the Supremacy Clause of the US Constitution, valid national law – whether enshrined in the Constitution, in statutes, or in administrative regulations – prevails over state law, including state constitutional provisions, whenever the two are in conflict. During the nation's first century, collisions between national law and state constitutions were rare – not until 1867 did the Supreme Court overturn a state constitutional provision as inconsistent with the US Constitution.[28]

During the 20th century, however, national policy initiatives have proliferated, often in areas previously regulated by state law. This expansion of national power has increased the opportunities for conflict between national policies and state policies, including policies enshrined in state constitutions, and has led to the invalidation of state enactments when such conflicts have occurred.[29] The adoption of the Fourteenth Amendment and the application to the states of most provisions of the national Bill of Rights have also imposed new constitutional restraints on the states, and during the 20th century the judiciary has become more aggressive in its review of state policies and practices. These new requirements and more searching judicial scrutiny are reflected in the increasing number of state constitutional provisions that have been invalidated. In recent years, for example, the US Supreme Court has struck down a Colorado constitutional amendment affecting the rights of homosexuals, a Missouri provision requiring property ownership as a qualification for appointment to a local government board, and an Arkansas limitation on the consecutive terms that a member of Congress could serve.[30] Often the effects of such rulings on state constitutions have extended beyond the provisions that have been invalidated. The rulings have also rendered unenforceable analogous provisions in other state constitutions and have encouraged states to amend their constitutions to eliminate provisions inconsistent with the Supreme Court's interpretations of the Constitution.[31]

The success of the Supreme Court in keeping the national government within its constitutional bounds is less clear. During the late 19th and early 20th centuries, the Supreme Court aggressively policed national initiatives that allegedly threatened the powers of the states, although the justices' rulings may have reflected a hostility to governmental regulation of the economy rather than a solicitude for state power. This judicial activism led in the 1930s to a confrontation with President Franklin Roosevelt, whose New Deal sought to rescue the nation from economic depression by vigorous national action.

After a series of rulings invalidating key elements of the New Deal prompted a presidential effort to pack the Court, the justices capitulated, reversing course and upholding the expansion of national power. In the aftermath of this confrontation, the Supreme Court for more than half a century abdicated its constitutional responsibility to ensure that the national government respected the legitimate interests of the states. From 1937 to 1992, the Court invalidated 59 congressional enactments, but only a single law was struck down as intruding on the powers reserved by the states, and nine years later the Court overruled that decision.[32] Academic commentators applauded the Court's refusal to police the allocation of power, insisting that the states could protect themselves

through their representation in the Senate and that the Court should devote its limited resources of time and prestige to human rights cases.[33] The result, as Justice Sandra Day O'Connor has noted, was that the only thing "stand[ing] between the remaining essentials of state sovereignty and Congress [was] the latter's underdeveloped capacity for self-restraint".

Only in the past few years has the Supreme Court resumed policing the scope of national power. Since 1992, the Court has invalidated a congressional statute that directed state legislatures to enact legislation on the disposal of nuclear wastes, struck down another that relied on the national commerce power to justify handgun restrictions in the area of schools, and invalidated a third that enlisted state and local officials in conducting background checks on gun purchasers.[34]

These rulings are welcome signs of a renewed appreciation of federalism on the part of the Supreme Court. Yet they scarcely signal a fundamental shift in direction. The rulings do not attempt to reverse the course of national expansion that the Court's abdication had encouraged; they merely stem further expansion. Moreover, the rulings have coincided with the development of a political consensus in America in favour of greater devolution to the states, so the Court's renewed willingness to check unconstitutional expansions of national power comes at the very time that the national government is already curtailing its activities. Finally, the contrast between the Court's recent rulings and those of the preceding decades highlights the fluctuating character of the Court's jurisprudence; its inconsistency in ensuring the proper allocation of powers between national and subnational governments.

Of course, the experience I have recounted is unique to the US. In other countries, such as Germany, constitutional courts have more steadfastly protected subnational units against national intrusions.[35] Nevertheless, the American experience is instructive because it shows just how difficult it is to ensure that competency disputes are resolved in a way that maintains the balance of power between national and subnational governments. How difficult and yet how crucial, because systems with divided powers – particularly new constitutional systems with divided powers, such as South Africa – constantly have to guard against centripetal and centrifugal tendencies. I would like to close by wishing South Africans success in this most important task.

ENDNOTES

1) Oliver Wendell Holmes, *Collected Legal Papers* (New York: Harcourt, Brace, 1923), pp. 295-296.
2) *McCulloch v Maryland*, 17 US 316 (1819).
3) Christine Fletcher and Cliff Walsh, "Comparative fiscal constitutionalism in Australia and the US – the power of state politics," in Bertus de Villiers, ed., *Evaluating Federal Systems* (Dordrecht: Martinus Nijhoff Publishers, 1994), p. 348.
4) Six states are exceptions to this statement. Texas was an independent republic before its annexation by the US, and five states – Vermont, Kentucky, Tennessee, Maine and West Virginia – were carved out of the territory of existing states.
5) The main provision dealing with the admission of new states is Article IV, sec-

tion 3 of the US Constitution. Further constitutional support for congressional conditions on admission is provided by Article IV, section 4 of the Constitution, which directs the federal government to "guarantee to each State in the Union a Republican Form of Government".

In addition to imposing conditions on prospective states, Congress also supervised the constitutions that Southern states adopted in the aftermath of the Civil War, requiring an acceptable constitution as a condition for "readmission" to the Union. However, the effects of these congressional efforts were short-lived. Most Southern states repudiated their Reconstruction constitutions as soon as they could, typically replacing them with documents that by the late 19th century entrenched white political control, and Congress did nothing to prevent this undermining of republican government.

6) Some prospective states – for example, Wyoming in 1889 – called conventions and drafted constitutions even without congressional authorisation. In such circumstances, however, Congress still had to approve the proposed constitution and confer statehood. On the Wyoming example, see Robert B. Keiter and Tim Newcomb, *The Wyoming State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1993), pp. 4-5.
7) For a discussion of somewhat similar processes in other countries, such as Switzerland and Spain, see Bertus de Villiers, "The constitutional principles: content and significance," in Bertus de Villiers, ed., *Birth of a Constitution* (Kenwyn: Juta & Co., 1994).
8) For a discussion of this process of reunification and constitution making, see Peter E. Quint, *The Imperfect Union; Constitutional Structures of German Unification* (Princeton, N.J: Princeton University Press, 1997), chapter 9.
9) See G. Alan Tarr, "Creating federalism in Russia," *South Texas Law Review* (forthcoming in 1999).
10) Of course, such supervision can occur through judicial review, if state constitutional changes conflict with national law. This topic is discussed below.
11) For more detailed discussion of this point, see G. Alan Tarr, *Understanding State Constitutions* (Princeton, N.J.: Princeton University Press, 1998), pp. 39-41.
12) See, for example, the Enabling Act of 1864 (13 Stat. 30), which authorised the people of Nevada to form a constitution and apply for admission; and the Enabling Act of 1889 (25 Stat. 676), which authorised the Dakotas, Montana and Washington to form constitutions and apply for admission. These enabling acts are reprinted in William F. Swindler, ed., *Sources and Documents of United States Constitutions* VI (Dobbs Ferry, N.Y.: Oceana Publications, 1976), pp. 261 and 64.
13) Swindler, *Sources and Documents* VI, pp. 261 and 64.
14) John D. Leshy, *The Arizona State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1993), pp. 17-18.
15) *Coyle v Smith*, 221 US 559 (1911).
16) Requirements imposed by Congress that are not based on its power to admit states, even if contained in the enabling act, do continue in force and cannot be ignored by the states. See *Fain Land & Cattle Co. v Hassell*, 790 P.2d 242 (Ariz. 1990).
17) For a listing of those federal systems that have subnational constitutions and those that do not, see Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama, 1987), p. 178, table 5.1.
18) United States Constitution, Article IV, section 4. Several other restrictions on the states are found in Article I, section 10 of the Constitution, but there is no evidence that these have affected state constitutions.
19) However, one commentator, Deborah Jones Merritt, has read the Guarantee Clause as restricting federal power to interfere with state autonomy. She argues that the clause's promise to the states of a "republican form of government" necessarily includes the right to structure their own political processes, provided that they structure them in a republican manner. See her "The Guarantee Clause and state autonomy," *Columbia Law Review* 88 (January 1988): 1-78; and "Republican governments and autonomous states: a new role for the Guarantee Clause,"

University of Colorado Law Review 65 (1994): 815-833.

20) *Luther v Borden*, 7 Howard 1 (1849). The Court reaffirmed this position in *Pacific States Telephone & Telegraph Co. v Oregon*, 223 US 118 (1912), in which it rejected a challenge under the Guarantee Clause to Oregon's use of the initiative for law making, and in *Baker v Carr*, 369 US 186 (1962), even as it indicated its willingness to address the issue of legislative apportionment under the equal protection clause of the Fourteenth Amendment.
21) On the controversy in Rhode Island, see Marvin E. Gettleman, *The Dorr Rebellion: A Study in American Radicalism* (New York: Random House, 1973).
22) For an interesting account of this in the field of inchoate national water rights, see Donald J. Pisani, *From Family Farm to Agribusiness: The Irrigation Crisis in California and the West, 1850-1931* (Berkeley: University of California Press, 1984), p. 159 and *passim*.
23) Thomas Reed Powell, *Vagaries and Varieties in Constitutional Interpretation* (New York: Columbia University Press, 1956), p. ix.
24) The actual composition of these second chambers varies considerably from one system to another. The German *Bundesrat*, for example, comprises members of the subnational (*Länder*) governments; the US Senate originally was elected by state legislatures; and the South African National Council of Provinces represents a cross between those institutions, including both the premiers of the provinces and other members appointed by the provincial legislatures. As a result of the adoption of the Seventeenth Amendment to the US Constitution, senators are now directly elected, although each state continues to have equal representation in the Senate.
25) See, for example, *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985).
26) Constitution of the Russian Federation, Article 85, section 2. The estimate of subnational laws invalidated was supplied by State Prosecutor Yuri Skuratov, quoted in "Constitution watch," *Eastern European Constitutional Review* 7 (1998): 32.
27) These data are drawn from *The Constitution of the United States; Analysis and Interpretation* (Washington, D.C.: Congressional Reference Service, 1996), pp. 2017-2219. Some state enactments that were struck down invaded national powers, and some national enactments that were struck down invaded state powers. However, others involved violations of constitutional prohibitions on the exercise of governmental power, found primarily in the Bill of Rights and in the Fourteenth Amendment.
28) *Cummings v Missouri*, 4 Wall. 277 (1867).
29) For examples of federal legislation preempting state constitutions, see *North Carolina ex ref. Morrow v Califano*, 445 F.Supp. 532 (E.D.N.C. 1977), and *Utility Workers of America v Southern California Edison Co.*, 852 F.2d 1083 (9th Cir. 1988, *cert. denied*, 489 US 1078 (1989)). For an example of federal common law preempting a state constitution, see *Hinderlider v La Plata River & Cherry Creek Ditch Co.*, 304 US 92 (1938). Even federal regulations override state provisions – see *Fidelity Federal Savings & Loan Association v De La Cuesta*, 458 US 141, 153-154 (1982). It is worth noting that several of these cases involve invalidation of state provisions by lower federal courts, suggesting that the figures in the text do not encompass all instances in which state constitutional provisions have been struck down as in conflict with national law. For an excellent overview, see Robert F. Williams, *State Constitutional Law: Cases and Materials*, 2nd ed. (Charlottesville, Va.: Michie, 1993), pp. 117-144.
30) *Romer v Evans*, 517 US 620 (1996); *Quinn v Millsap*, 491 US 95 (1989); and *US Term Limits, Inc. v Thornton*, 514 US 779 (1995).
31) For example, in response to the US Supreme Court's ruling in *Gideon v Wainwright*, 372 US 335 (1963), Hawaii in 1968 constitutionalised the right of indigent defendants to have counsel provided by the state. Hawaii Constitution, Article I, section 14. See Anne Feder Lee, *The Hawaii State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1993), pp. 61-62.

32) *National League of Cities v Usery*, 426 US 833 (1976), overruled in *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985).
33) See, for example, Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: University of Chicago Press, 1980).
34) *New York v United States*, 505 US 144 (1992), *United States v Lopez*, 511 US 1029 (1995), and *Printz v United States*, 117 S.Ct. 2365 (1997).
35) For a discussion of the jurisprudence of the German Constitutional Court in federalism cases, see Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (Durham, N.C.: Duke University Press, 1997), especially chapter 3.

Where There's Political Will, There Might Be a Way: Subnational Constitutions and the Birth of Democracy in South Africa

Ralph Lawrence

INTRODUCTION

What price subnational constitutions in South Africa today? I can only respond as a humble political scientist, one who has a perennial fascination with governance and public policy, especially the organisational aspects. So I asked myself: "Would the introduction of subnational constitutions be useful for South Africa as a newly emerging democracy?". And my blinding revelation? "It depends . . ." A trite and obvious response, you'll agree, I'm sure. But let me show you that it is as much a considered view as a spontaneous quip.

At bottom, constitutions are political vehicles; they are expressions of political will. Of course, they are legal instruments besides; crafted, measured, protected, adapted, sifted and shifted by legal wit and ingenuity in many a circumstance. And the legal and political domains rapidly become intertwined as constitutions endure as living manifestations of civil and political life. Thus, if constitutions in general are a reflection of political sentiment, circumstances and conditions, the same is just as true of subnational variations.

What, then, is the political backdrop to a discussion about subnational constitutions in the South African context?

1. THE PATH TAKEN

Through happenstance, skill, timing, coupled with a potent mix of endogenous and exogenous political and economic pressures, a domestic settlement was forged in South Africa during the early 1990s, which heralded the demise of apartheid and the beginnings of democracy. Social engineering characteristic of the former has given way to counter social engineering, for the present government – led by the African National Congress (ANC) – is seeking to remedy the systemic ills of the past and to address immediate societal needs by equally, if not more, ambitious synoptic planning. Now, however, societal transformation, manifest as the ruling ideology and as the yardstick for governance, is the means to realising social justice. And social justice, in turn, rests on the twin pillars of democracy and development, which have to be built simultaneously. Neither imperative can be sacrificed for the sake of the other; not if both are to survive, let alone flourish.

The values of social justice, democracy and development are enshrined in South Africa's national constitution, first unveiled in 1994 and then finalised and adopted two years later. The particular salience of democracy and development lies in how they convey a marked departure from the preceding political regime.

Democracy bespeaks inclusiveness: equal membership *of* society is assured for all. This is the bedrock of basic equality – namely, that everyone is entitled to be treated with equal respect in civic and political terms by virtue of our equal standing as human beings. The very principle of *belonging* – and, moreover, belonging as equals – had been denied most South Africans until the mid-1990s. Indeed, strong efforts were made to eradicate their very identity as South Africans, as apartheid rule took to a logical conclusion the patterns of history to exclude, alienate and render unequal most of those who were governed.

Apart from establishing terms of citizenship

and public participation, democracy is at the same time a form of governance. Apartheid by its very nature subjected people partly by fragmenting their land into racially – more particularly, ethnically – differentiated enclaves. The onset of democracy reversed this. Instead, there is one people, one territory; in other words, a unified South Africa, meaning a unified territory as the foundation of the South African state.

Of course, there is much more besides to discuss about the character of democracy in South Africa, but my purpose here is merely to highlight those aspects most pertinent to any consideration of subnational constitutions. I shall treat development, the other pillar of social justice, in identical fashion.

Stark poverty, extraordinary socio-economic inequality, whether construed as life-chances or outcomes, and pronounced regional imbalances, with increasingly depopulated and underdeveloped rural areas, greeted President Mandela and his team when they took office in April 1994. Emancipation, for them, is not only political freedom, but also enjoying a material quality of life that allows people to take full advantage of opportunities made open to all South Africans. At a minimum, therefore, government is charged with the constitutional responsibility to ensure that every individual's, and every community's, basic socio-economic needs come progressively closer to being fulfilled. Equally, South Africans know that fundamental socio-economic requirements are constitutional entitlements, even though these probably cannot be enforced as legal guarantees, but can be regarded as measures of a government's performance. Incorporating indicators and beacons of development as constitutional imperatives reveals acutely felt national priorities which are integral to the ideology of societal transformation that underpins constitutional democracy in South Africa.

How the twin pillars of democracy and development are changed in shape or substance depends on a cluster of key political and socio-economic variables. It is their combined impact and timing, I believe, that help to show whether, and to what extent, subnational constitutions become serious factors in South African public life. The political variables are four in number: historical legacy; political trajectory; public philosophy; and style of governance. Socio-economic ones? Public management, public finance and local governance are the three. To each in turn now.

2. POLITICAL VARIABLES

In addition to what has already been mentioned about divide and rule under apartheid, it must be remembered that South Africa is still a political adolescent – still uncertain and searching for an identity, as a people and as a territory. Not even a century has lapsed since the union that is now South Africa was conceived in 1910; and nearly half that has been spent trying to fragment it anew. The issue of unsettled boundaries bedevils many a society undergoing a transition to democracy, especially those that were formerly colonised. South Africa fits the mould. Although its national boundaries have been called into question since Namibia's assertion of sovereignty in the later 1980s, South Africa's internal division into nine new provinces has not been without controversy. Where the lines are drawn has immense consequences for people's lives, especially for their welfare. The more tricky disputes, like the location of parts of East Griqualand in either KwaZulu-Natal or the Eastern Cape, have simply been shelved for the time being, hoping that pragmatic administration at the local level will let matters reach some natural political conclusion.

While apartheid rule unleashed centrifugal forces, splitting the country asunder, this was accompanied by a greater and greater concentration of political power at the centre under P.W. Botha's stewardship during the 1980s. A form of authoritarian corporatism arose, whereby government became increasingly militarised, clandestine, introspective and xenophobic. A global leper, South Africa's international isolation increased apace. But within, political turbulence reigned. Civil wars raged too throughout Southern Africa, with the apartheid government often far more than an interested spectator. Botha's response was to batten down the hatches. His government – and more particularly, his chosen executive team – hollowed out the state by instituting political reform and control while the public technocrats commanded a rigidly structured administration.

To blend or to separate? And to what degree? To centralise or to devolve? These are not abstract issues for any South African. They lurk in our historical consciousness and impinge on

contemporary political debate. Never more so than when our democracy was crafted out of bitter conflict and extraordinary political compromise. The political trajectory taken this decade draws strongly on our memories and experiences as South Africans.

Deep-seated beliefs and fears surfaced when political representatives came to decide the fundamental architecture of democratic governance. Should the state be unitary or federal? This proved to be the litmus test of ideology and identity. The liberation movements, principally the ANC and the Pan African Congress then in the vanguard, favoured the unitary form: one person, one vote in one country under one government. Put differently, majority rule in a unified and unitary state. This was viewed as the essential recipe for emancipation, the very philosophy that was the touchstone of political struggle since at least the mid-1950s. On the brink of victory, why be denied the prize that also symbolised an end to subjugation and territorial fragmentation? Federalism, in whatever guise, seemed too close for comfort to the machinations of apartheid.

Federalists, by contrast, rested more easily with qualifying or dividing majoritarianism. This brought together strange bedfellows, including principled opponents of apartheid, as well as leaders of apartheid "homelands", the political beneficiaries of the old order. The sponsors of apartheid, the National Party (NP), became latter-day federalists too. We can encapsulate this diversity by alluding to positive and negative reasons prompting support for federalism.

On the positive side, democrats argued that a sizable country with a diversified population required a complex form of government that would best represent regional sensitivities and sensibilities in an intimate way. Only federalism fitted the bill. Others supported federalism because the alternative seemed "too ghastly to contemplate". Putative minorities of whatever description simply feared losing political power altogether and becoming victims of majority rule. Strong, centralised government would be punitive, arrogant, profligate and wasteful. Having done its best to build a corporate economy as a vehicle for Afrikaner patronage, the NP government began rapidly to dismantle it during the waning years of apartheid, not only to protect wealth and privilege, but also to deny the same to its political successors. Privatisation and federalism were strategies borne out of identical motivation; that is, to preserve and to withhold the spoils of victory more easily garnered in a unitary state.

Astonishingly enough, the unitarians and the federalists managed to reach a messy sort of compromise, where each had to yield but both could save political face. "Regionalism" became the new watchword. Whether this is really a unitary arrangement with federal elements, or a centralised version of federalism, is a moot point, although perhaps an irrelevant one. The price for achieving consensus was to dodge intractable areas of dispute. The role of traditional leaders, for example, remains unresolved until now. Just how autonomous are the nine provinces? Tussles between the centre and the provinces have rarely been referred to the Constitutional Court. Instead, the spirit of cooperative governance, which infuses the national constitution, impels the national, provincial and local spheres of government to accommodate one another in partnership. Accordingly, intergovernmental relations are, for the most part, conducted in the inner sanctums of the state.

Still, how far can regionalism go? A subnational constitution for a province? Yes. But why bother? The first democratic elections held in April 1994 were an overwhelming triumph for the ANC. They produced a comfortable majority in both houses of the national legislature, as well as in seven of the nine provinces. The NP took the Western Cape and the Inkatha Freedom Party (IFP) came to office in KwaZulu-Natal. The seven provinces governed by the ANC saw no need whatsoever to try to adopt a subnational constitution. Their party, their government, was decisively in power and the national constitution offered them an adequate political framework. This explanation can be embellished, as I shall a few paragraphs hence.

Understandably, therefore, the Western Cape and KwaZulu-Natal became the provinces where there was a real incentive to draft subnational constitutions. The Western Cape was the simpler case. In this well-established region with settled boundaries, the NP itself wanted to assert the identity of the province, to become associated with it and thus to consolidate its hold at the expense of the ANC, its main rival for office. The Western Cape represented the

only hope for the NP, its sole claim on the reins of power in the democratic era. Its political survival and means of patronage depended on being seen as the guardian and protector of the province. Furthermore, in practical terms, the NP leadership could draw on its organisation throughout the province, and within the ranks of its supporters and the provincial bureaucracy it could find the technical expertise to formulate a provincial constitution that would pass muster in the Constitutional Court.

In KwaZulu-Natal, the IFP led by Mangosuthu Buthelezi enjoyed a fairly slim majority over its foe, the ANC. This province amalgamated Natal with the erstwhile homeland of KwaZulu, the IFP's virtually unthreatened fiefdom. The formation of a new province offered an open opportunity to both the ANC and the IFP. Neither spurned it; and the upshot was considerable violence in a territory where political conflict had already exacted a terrible toll during the 1980s. Having won the provincial election, the IFP sought to impose its stamp on KwaZulu-Natal in order to protect a potentially larger fiefdom, to thwart the ANC and to project the IFP – and especially the figure of Buthelezi – on to the national stage as forces to be reckoned with.

Up until the elections in question, the IFP espoused Zulu nationalism as a rallying cry for political affiliation. Thus the claims of the Zulu monarchy were championed, with the thought voiced that the entire province could be regarded as a Zulu kingdom and its residents subjects of the king. In some respects, then, a provincial constitution might be a means of establishing the authority of the Zulu Royal House. Not long after the elections, however, a serious rift opened up between Buthelezi and King Goodwill Zwelethini. The King asserted his independence as a monarch and distanced himself from Buthelezi's overbearing leadership.

Despite these developments, the IFP pressed hard for a provincial constitution. The main aim was to acquire as much autonomy as possible for KwaZulu-Natal. The plans afoot were running in tandem with the process at national level to transform the Interim Constitution into a final version by 1996. Thus it could be argued that deliberations in KwaZulu-Natal over the terms of a provincial constitution were being used as a bargaining ploy to wrest greater powers for the provinces in the national document. Because once the national constitution was approved, steam ran out of efforts to promote a constitution in KwaZulu-Natal. Coincidence?

Curiously, the fate of KwaZulu-Natal's provincial constitution was immaterial to the political capital that either the IFP or the ANC could gain. Even with abandoning this effort, the IFP could argue that it had championed the cause of the province, and of the Zulus, and that failure should be laid at the door of the ANC-led government in Pretoria. You win even if you lose, reinforcing the sense of aggrievement that many a white Natalian has experienced with central government through the decades. Likewise, the ANC in KwaZulu-Natal could not afford the opprobrium of refusing to participate in constitutional discussions; but it could rest easy in the knowledge that the Constitutional Court would strike down provisions that were contrary to the terms of the national constitution. These were difficult times, yet, in the end, the deliberations, paradoxically, furthered channels of communication between the IFP and the ANC, and might have had some bearing on damping the political violence in communities scattered about KwaZulu-Natal.

We now come to more nebulous political variables that reinforce historical legacies and political trajectories. The dominant public philosophies in South Africa have tended to be rooted in collectivism. For the apostles of apartheid, racial categorisation and ethnicity predominated, leading to an emphasis on group rights and entitlements. It was only in the course of hammering out a national political settlement that the NP finally conceded that group rights should give way to individual rights. The principal liberation movement, the ANC, is communitarian in orientation, where the collective will of the organisation supersedes all else. The emphasis in recent years on an African Renaissance is associated with the notion of *ubuntu*, "peopleness", or "people-in-communities". How cogent all this is for subnational constitutions, quite frankly, I am not sure, but it is worth noting that the South African democratic constitutional order is not contractarian: it is not an aggregation of prior independent units, nor have individuals traded autonomy for civic and political benefits, like Hobbesians and Lockeans. (Maybe the closer parallel in the South African context would be with Rousseau, but even this is rather tenuous.)

The prevailing style of governance in South Africa – that is, outside the Western Cape and KwaZulu-Natal – is antithetical to the cause of provincial constitutions. Two factors here. In the first place, the communitarian public philosophy of the ANC finds expression in systemic, holistic means of governance. There is a predilection for social engineering on a grand scale, reinforced by the necessity felt to overturn the legacy of the apartheid system. The ANC has been conscious, too, of the political pressure to meet the high expectations of their followers, and of the world at large. This also predisposes them to plan ambitiously and at the highest level in a concerted attempt to produce dramatic results swiftly. Catering for any regional variation here would be viewed as not only superfluous, but also as an unwelcome obstacle. Although it could, of course, be maintained that securing the goodwill of the provinces would yield political dividends for the ANC should the provinces prove to be vigorous agents of development. But having conquered so comprehensively on the political front, why should the ANC risk compromising such a cherished prize?

Secondly, with such a pronounced political mandate and the confidence that emanates from being firmly in charge, the interests of the ANC are becoming blurred with those of the state. This tendency is fuelled by the electoral system, which is the party-list variant of proportional representation. In practice, this means that members of Parliament, as well as members of provincial legislatures, are not representatives of territorially demarcated local constituencies. Instead, political parties decide on their preferred candidates, and how they should be ranked.

This amounts to a kind of electoral clientelism, where candidates for office are subject to the patronage of their party. Given that a political career depends on the blessing of a political party's leadership, anyone elected to a national or provincial legislature could be forgiven for placing the interests of the party above all else. Otherwise, find another party, another type of employment.

Furthermore, the ANC as an organisation is managed according to democratic centralism. Wide-ranging participation, debate and consultation is encouraged, so it is averred, as part of the decision-making process. But once a decision is taken, party members are expected to close ranks, to toe the line agreed on, and to be loyal. The party caucus overshadows the operation of government at every level, so that plenary sessions in the legislature are little more than set-piece theatre choreographed in advance. "Free votes" simply do not happen. More extreme still, the ANC itself decides to move elected personnel from position to position without receiving the prior approval of the legislature(s) concerned. For instance, premiers of provinces are replaced in mid-term on the whim of the central party leadership. The IFP has behaved in identical fashion in reshuffling its members in executive office.

The implication is clear. With the extraordinary powers of party patronage that now prevail in South Africa, subnational constitutions will emerge only if the ruling party at the time deems it to be in its best interest. And this is why the ANC in the seven provinces that it commands has eschewed this option, and the IFP in KwaZulu-Natal has pursued it.

3. SOCIO-ECONOMIC VARIABLES

In theory, socio-economic variables can be significant in determining the necessity for subnational constitutions. This is not really so in the South African case, where the rawness of political power comes to the fore as democracy is still becoming established. Nevertheless, it is worth mentioning the salience of certain socio-economic factors which have a decided bearing on the public management of development.

I mentioned previously that the overall management of governance on a national scale suits the ANC's ideology of societal transformation and is the preferred way of dealing holistically with meeting people's and communities' urgent, basic needs. An indicative system of planning and control is articulated throughout the state sector.

Cooperative governance provides the administrative means for national government to ensure that public policies emanating from the centre are observed properly in the provinces too. It is believed that substantial redistribution can best be effected by a national government which has an overall view of what outcomes should be realised across the country. Furthermore, because the South African economy now is far more fully exposed to global vicissitudes, the national government has to remain ever vig-

ilant to sustain development, and to accelerate it according to particular needs.

Extending this theme, public finance in the provinces is a pertinent socio-economic variable as well. Whatever ambitions provinces may harbour, present circumstances suggest that national government controls the public purse. The taxation powers of provinces are almost nil, which also limits, then, their borrowing powers in the financial markets. True, intergovernmental allocations are earmarked for provinces according to formulae administered by South Africa's Financial and Fiscal Commission, but provinces themselves have little latitude to expand the total allocation to their level. Discretionary grants remain more significant, but these are subject to central government's pleasure. The trend is patently obvious. A subnational constitution might extract an additional modicum of autonomy in policy matters for provinces, but there is no indication that the requisite financial power will ever be torn from central government's grasp.

Finally, more of the same. Local government now enters the constitutional frame for the first time in South Africa as a specifically designated and guaranteed sphere of government. Its major responsibility is to attend to the basic needs of citizens and communities, and to foster development with this in mind. Consequently, local government shifts from becoming merely the bottom tier of the administrative structure carrying out the bidding of its superiors in the public sector. Rather, local government, be this rural, urban or metropolitan, has to become an enterprising, active agent and catalyst, formulating independent development plans and overseeing their introduction. This managerial brief is taking some authorities out of the confines of city hall in search of public-private partnerships, leading to networks of policy governance.

Given such tasks, local government is an increasingly important sphere of political rule. So much so that the continuing relevance of provinces has been called into question. After all, the metropolitan areas have as much developmental muscle as the provinces in which they are located. If the web of governance becomes ever more complex, yet coordinated and integrated, then the opportunities to introduce provincial constitutions might shrink even further.

4. THE SECOND PHASE OF DEMOCRACY

On 2 June 1999, South Africans went to the polls to pass their verdict on those who initiated democracy. The ANC was met with even greater approval than before. It came within a whisker of securing a two-thirds majority in the national parliament. The seven provinces that were theirs to govern remain so. The Western Cape will require a coalition at the helm. The New National Party (old wine in a new bottle) has conspired with all the opponents of the ANC to keep the latter out of power there. At least this is the position in late June. The coalition appears to be somewhat fragile, however, united in its opposition, but not much else besides.

The IFP again took the most votes in KwaZulu-Natal, but it does not enjoy an absolute majority. Some rapprochement with the ANC has been sought, leading to cabinet posts being shared in the province. Indeed, there appears to have been a fair degree of horse-trading between the ANC and the IFP in order to assure rewards for both.

The IFP's aspirations seem to have been accommodated with positions in central government; and the ANC has retained a significant share of executive power in the KwaZulu-Natal province. Generally, the animosity has declined between the two political parties, or, at least, rivalry has been tempered by the quest for peace in the province.

Admittedly, the recent arrival on the scene of the United Democratic Movement, which has drawn on disaffected individuals from many of the other political parties, created some uncertainty, with both the ANC and the IFP having a vested interest in defeating this interloper at the ballot box.

In the few weeks since these general elections there have been reports in the press intimating that talk about a provincial constitution in KwaZulu-Natal is on the rise again. This might just be rhetoric as the political parties seek to position themselves in the run-up to forming a new government. As I related before, the plight of traditional leaders remains ambiguous at best. And the endless tussle over the location of the capital of the province – Pietermaritzburg or Ulundi – continues. These sorts of issues, while important in their own right, tend to be highlighted during election battles. Now that the race for electoral office is

over for a while, perhaps such matters will recede into the background again.

CONCLUSION

Well, I warned you: a humdrum conclusion. To me, the intriguing question is whether the introduction of provincial constitutions in South Africa would be beneficial for development. I have tried to sketch the variables most relevant to this. But while the issues need to be aired more fully than was feasible for me here, I kept on coming back to the same inference – namely, that political factors would always trump socio-economic ones in South Africa nowadays. This being so, provincial constitutions are relegated to being little more than a bargaining chip used by minority political parties for essentially political purposes. Consequently, an all-conquering ANC government has no need for subnational constitutions which it regards as superfluous, and even counterproductive, in striving for democracy and development in South Africa. Political will, indeed, proves decisive.

Programme

Tuesday 16 March 1999

12:00–16:00 **Registration**

16:00–17:00 **Planning meeting for speakers**

17:00–18:30 **Reception**

18:30 **DINNER**
Welcoming Remarks
Dr Michael Lange, *Resident Representative, Konrad Adenauer Foundation – Johannesburg, South Africa*
Conference Overview
Professor Alan Tarr, *Director: Centre for State Constitutional Studies, Rutgers University, Camden, New Jersey, United States*
Welcoming Address
Justice Yvonne Mokgoro, *Constitutional Court, South Africa*

Wednesday 17 March 1999

9:00–10:30 **Provinces, States, *Länder* and Cantons: Content and Variations Among Subnational Constitutions of the World**
Professor Ronald Watts, *Professor Emeritus of Political Studies; Fellow of the Institute of Intergovernmental Relations, Queen's University, Ontario, Canada*

11:00–12:30 **The Relationship Between National and Subnational Constitutions**
Professor Cheryl Saunders, *Centre for Comparative Constitutional Studies, Faculty of Law, University of Melbourne, Australia*

13:30–14:45 **Development of Concurrent Legislation – a New South African Perspective**
Advocate Dirk Brand, *Director: Legal Services, Western Cape Provincial Government, South Africa*

15:15–16:30 **Cooperative Government, Devolution of Powers and Subsidiarity: the South African Perspective**
Professor Gretchen Carpenter, *Professor of Constitutional Law, University of South Africa*

16:30–19:00 **Informal discussion among participants**

19:00–20:30 **DINNER**
The Other Sphere of Government: South African Provincial and Local Structures in Practice
Mr Mathews Phosa, *Premier, Mpumalanga Province, South Africa*

Thursday 18 March 1999

9:00–10:30 **Relations Between Subnational and Local Governments, Structured by Subnational Constitutions**
Professor Jörn Ipsen, *Director: Institute for Local Government Law, University of Osnabrück, Germany*

11:00–12:30 **The New Judicial Federalism in the United States: Expansive State Constitutional Rights Decisions**
Professor Robert Williams, *Rutgers University, Camden, New Jersey, United States*

13:30–14:45 **Controlling Competency Conflicts: Subnational Constitutions, National Constitutions and the Allocation of Authority**
Professor Alan Tarr, *Director: Centre for State Constitutional Studies, Rutgers University, Camden, New Jersey, United States*
Professor Cheryl Saunders, *Centre for Comparative Constitutional Studies, Faculty of Law, University of Melbourne, Australia*

15:15–16:30 **Where There's Political Will, There Might Be a Way: Subnational Constitutions and the Birth of Democracy in South Africa**
Professor Ralph Lawrence, *Professor of Government and Public Policy; Director: Centre for Government and Policy Studies, University of Natal, Pietermaritzburg, South Africa*

16:30–16:45 **Concluding remarks**

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