

European Diversity and Autonomy Papers
EDAP 01/2008

Asymmetry in the Federal Systems - Constitutional Arrangements in South Africa

Dirk J. Brand



Managing editors:

Emma Lantschner / Francesco Palermo / Gabriel N. Toggenburg

Editorial Board:

In alphabetical order:

Craufurd Smith Rachel (University of Edinburgh, UK)
Dani Marco (Università di Trento, I)
De Witte Bruno (European University Institute, I)
Gamper Anna (Universität Innsbruck, A)
Henrard Kristin (University of Rotterdam, NL)
Hoffmeister Frank (Free University of Brussels, BE)
Kujovich Gil (Vermont Law School, US)
Kymlicka Will (Queens University, CAN)
Marko Joseph (Universität Graz, A)
Nic Shuibhne Niamh (University of Edinburgh, UK)
Ortino Sergio (Università di Firenze, I)
Packer John (Tufts University, US)
Poggeschi Giovanni (Università di Lecce, I)
Sasse Gwendolyn (London School of Economics, UK)
Tarr William (Rutgers University, US)
Teachout Peter (Vermont Law School, US)
Toniatti Roberto (Università di Trento, I)
Woelk Jens (Università di Trento, I)

Assistant to the Managing editors:

Verena Wisthaler

Europäische Akademie Bozen
Drususallee, 1
39100 Bozen - Italien
Tel. +39 0471 055200
Fax +39 0471 055299
edap@eurac.edu
www.eurac.edu/edap

Accademia Europea Bolzano
Viale Druso, 1
39100 Bolzano - Italia
Tel. +39 0471 055200
Fax +39 0471 055299
edap@eurac.edu
www.eurac.edu/edap

Copyright Information:

Any sort of reproduction - including excerpts - is permitted only when indicating the exact EDAP source. Please quote EDAP as indicated in the following example: Gabriel N. Toggenburg, "The Debate on European Values and the Case of Cultural Diversity", 1 *European Diversity and Autonomy Papers- EDAP* (2004), 10, at www.eurac.edu/edap.

Abstract

Asymmetry is characteristic of federal systems of government in the world, although the nature and extent of the asymmetry differs from one system to another. A distinction could be made between political asymmetry and constitutional asymmetry, which could be structured in different ways. The notion of asymmetry featured in the constitutional negotiation process in the nineties in South Africa. During the final stage of negotiations a political compromise was reached to have a more inclusive process, which opened the door for some form of constitutional asymmetry. The accommodation of cultural and regional diversity influenced the particular form and scope of asymmetry created by the Constitution. Two examples of how the constitutional asymmetry is utilised in practice is the adoption of the Western Cape Constitution, which also created own institutions particular to the Western Cape; and the recognition of the Zulu Monarch by the KwaZulu-Natal Provincial Government. This is done by way of legislation, specific budget allocations and special functions such as the opening of the KwaZulu-Natal Provincial Legislature. In a country with much diversity, such as South Africa, it is appropriate to accommodate diversity by way of some form of constitutional asymmetry.

Author

Dirk Johannes Brand was a constitutional advisor in the Western Cape Provincial Government from the end of 1995, which included being a co-ordinator of a team of technical advisors responsible for the drafting of the Western Cape Provincial Constitution, 1998. As legal advisor his responsibilities included the drafting of legislation and provision of legal opinions. Mr. Brand started the first office for intergovernmental (local as well as international) relations for the Western Cape Provincial Government in 1999 and headed that office till March 2006. During that period he was responsible for the negotiation, drafting and management of international co-operation agreements and the management of the Western Cape's international relations. He is currently an international relations consultant and legal advisor.

The author can be reached at: e-mail dirkjb@mweb.co.za

Key words

Asymmetry - diversity - languages - provincial constitution - Zulu King - constitutional asymmetry - constitutional principles.

Table of contents

1. Introduction	5
2. South African Constitutional Approach to Asymmetry	7
2.1 Constitutional Negotiation Process	7
2.2 Constitutional Principles	8
2.3 Current Constitution	9
3. Asymmetry in Practice - Some Examples	15
4. Conclusion	17

Asymmetry in Federal Systems - Constitutional Arrangements in South Africa

Dirk J. Brand

1. Introduction

Asymmetry is characteristic of federal systems of government in the world, although the nature and extent of the asymmetry differs from one system to another. Watts distinguishes between “political asymmetry” and “constitutional asymmetry”. He describes political asymmetry, which is a common feature in all federal systems, as the relative influence of the various constituent units within a federation that arises from the impact of cultural, economic, social and political conditions.¹ Constitutional asymmetry, according to Watts, implies the constitutional assignment of different powers to different constituent units, which is not such a common feature in many federal systems.

There are different approaches to constitutional asymmetry. Firstly, a constitution could provide for an increase in national or federal powers over specific provinces² for some specified functions. Such an arrangement reduces provincial autonomy. It could be done as a temporary measure if some provinces do not have sufficient capacity to perform their constitutional functions, for example in India where the national government assisted some less developed provinces for a couple of years.³ Secondly, there could be an asymmetric assignment of powers to the various provinces to increase provincial or regional autonomy, illustrated by the following examples. In Canada the status of the French language as an official language in Quebec is guaranteed, and in Malaysia two Bornean states received some specified powers on joining the Malaysian Federation, which are ordinarily under federal jurisdiction.⁴ There is also a third approach found in some constitutions, namely a formal symmetrical allocation of powers to all the provinces, but allowing asymmetrical execution of powers by the various provinces. Such an approach would enable provinces to delegate some powers to another government or would allow provinces to develop their full

¹ Ronald L. Watts, *Comparing Federal Systems* (McGill-Queen’s University Press, Kingston, 2nd ed. 1999), 63.

² The term ‘provinces’ is used in this paper in reference to sub-national constituent units that could be labelled provinces, states or regions in different countries.

³ Céline Auclair, “Federalism: Its principles, flexibility and limitations”, paper delivered at the 2nd International Conference on Decentralisation, Manila, Philippines, 25-27 July 2002, at <http://www.forumfed.org>

⁴ Watts, *Comparing Federal Systems* ..., 66.

constitutional autonomy at different speeds. Although there is a *de jure* symmetrical assignment of powers, the constitution accommodates a *de facto* asymmetrical development of provincial powers and functions.

The constitutional development of Spain since 1978 provides an interesting example of constitutional asymmetry in practice, which could perhaps be described as a fourth approach. There existed various historical nationalities and regions with different economic profiles at the time when the Spanish Constitution was adopted in 1978. The existing diversity was acknowledged in the constitutional design. Provision was made for *de jure* asymmetrical constitutional development of the Autonomous Communities (provinces), which the respective Communities could develop on a bilateral basis with the national government.⁵ There is also provision in the Spanish Constitution that “bordering provinces with common historic, cultural and economic characteristics, island territories and provinces with historic regional status may accede to self-government and form Autonomous Communities”.⁶ In practice the various communities developed their respective constitutional autonomy at different speeds with Catalonia and the Basque Country normally leading the way and the others following, and by 1982 all of the constituent territories have become Autonomous Communities. There is also an asymmetric approach regarding specific functional areas, for example Navarre and the Basque Country initially enjoyed more fiscal autonomy than the other communities.⁷ Catalonia later successfully negotiated some fiscal reform measures with the national government that provided more financial autonomy at the Community level.⁸ Financial and fiscal issues, however, remain a complex and difficult matter that is currently a hotly debated issue within the discussions on constitutional reform in Spain. The recognition of the relative fiscal autonomy of the various Autonomous Communities gives rise to issues about sharing of revenue or financial equalisation. The existence and recognition of asymmetry, whether it relates to the constitutional allocation of powers or the differences in economic profile of Autonomous Communities, should be an important part of the discussions on fiscal reform or the design of any financial equalisation mechanisms.

In federal states a fiscal disparity between the provinces normally leads to some form of financial equalisation. The existence of an asymmetric economic

⁵ Luis Moreno, “Decentralization in Spain”, 36(4) *Regional Studies* (2002), 399-408, at 400, at <http://www.regional-studies-assoc.ac.uk>; Watts, *Comparing Federal Systems ...*, 68; Robert Agranoff, “Federal Evolution in Spain”, 17(4) *International Political Science Review* (1996), 385-401, at 387.

⁶ Art. 143 of the Constitution of Spain; Siobhan Harty, “Spain”, in Ann L. Griffiths (ed.), *Handbook of Federal Countries 2005* (McGill-Queen’s University Press, Montreal, 2005), 324-341, at 328.

⁷ Moreno “Decentralization ...”, 401; see also Art. 148 of the Constitution of Spain.

⁸ Violeta R. Almendral, “Fiscal rights for Communities in the Spanish constitution”, 6(1) *Federations* (February/March 2007), 16-20, at 17.

and fiscal situation at provincial level is thus accommodated on the one hand, while financial equalisation mechanisms are also instituted on the other hand. The economic reasoning behind financial equalisation is to provide an adequate and equitable provision of public goods and services to all citizens.⁹ In financial intergovernmental relations there is always a balancing act to find the appropriate balance between different, and sometimes opposing, notions such as competition, solidarity, asymmetry and equality. Competition between provinces is quite common, whether it is to be the best or the most innovative or the most tax friendly province, and it is often built on the unique characteristics that distinguish the one province from the other. Solidarity, on the other hand, suggests an acknowledgement of the differences that exist between provinces and the need to develop actions or mechanisms through which the stronger or richer provinces could support the weaker or poorer provinces. Solidarity could be an important motivating factor in the development of financial equalisation mechanisms.¹⁰

2. South African Constitutional Approach to Asymmetry

2.1 Constitutional Negotiation Process

The issue of creating unity while also accommodating diversity was a critical question during the constitutional negotiations in the early nineties. While there was common cause that the new constitutional order in South Africa must be an inclusive democracy where all the citizens had equal rights, there were conflicting views on the nature of the constitutional system, in particular relating to the status and powers of the provinces. The ANC (African National Congress) favoured a strong centralised system with relatively weak provinces, while the other major political parties, namely the Democratic Party, National Party and Inkatha Freedom Party, supported the idea of a federal type system where the provinces would have constitutionally entrenched legislative and executive powers and functions. Inherent in this view was the notion of asymmetry, namely that provinces should be allowed some scope for reflecting their own specific needs and characteristics. This matter remained a major issue throughout the constitutional negotiations during the Multi-Party Negotiation Process, in the Constitutional Assembly as well as during the certification process before the Constitutional Court.

The two main opposing views about the constitution making process were that of the African National Congress (ANC) on the one hand, which was quite determined that an elected body should draft the new constitution and be bound as little as possible by the outcome of the negotiation process

⁹ Richard A. Musgrave, *Public Finance in a Democratic Society*. Vol. 3 (Edward Elgar Publishing Ltd, Cheltenham, 2000), 413.

¹⁰ Dirk J. Brand, *Financial Constitutional Law* (Konrad Adenauer Stiftung, Johannesburg, 2006), 19-23.

conducted by non-elected representatives of various organisations and parties. The National Party (NP) Government, with support from other parties, on the other hand held the view that the negotiating parties at Kempton Park should negotiate the constitutional text as far as possible and the constitutional assembly should then be bound by such decisions.¹¹ Neither of these two approaches was acceptable to all the parties and a new way had to be negotiated out of this deadlock. The negotiating parties have thus agreed to the following two-phase process, namely that a first or interim constitution should be drafted by the negotiating parties at the Multi-Party Negotiating Process (MPNP). The next phase would be an election for a new parliament that would also act as the constitution drafting body for the new or final constitution. A crucial element of this agreement on process was the adoption of a set of Constitutional Principles.¹²

The final part of the constitutional development process consisted of two stages, namely the negotiation of a new constitution by an elected Constitutional Assembly, and certification of the new constitutional text by the newly established Constitutional Court. The new text had to be measured against a set of 34 Constitutional Principles (CP's)¹³ agreed to at the Multi-Party Negotiation Process in Kempton Park near Johannesburg. At a critical point in the negotiation process where the opposing views about the future processes were clearly emphasized, this agreement on process and principles was really ground-breaking and it paved the way for all the negotiating parties to go forward on the constitution making path.

2.2 Constitutional Principles

This compromise was referred to as a 'solemn pact', which clearly indicated the importance and nature of this agreement.¹⁴ These principles formed the framework for the development of the new constitution, and it therefore contained principles that referred to the most important elements for the establishment of a constitutional democracy, for example the structure of government, a justiciable bill of rights, and separation of powers.¹⁵

The following CP's relate to the structural or organisational elements of government, namely:

¹² Bertus de Villiers, "The Constitutional Principles: Content and Significance", in *id.* (ed.), *Birth of a Constitution* (Juta, Cape Town, 1994), 37-49, at 40-41.

¹³ The Constitutional Principles are contained in Schedule 4 to the 1993 Constitution.

¹⁴ Preamble to the 1993 Constitution; *In Re: Certification of the Constitution of the Republic of South Africa 1996*, 1996(10) BCLR 1253 CC, 1996 (4) SA 744 CC, para. 15.

¹⁵ De Villiers, "The Constitutional Principles ...", 42; Iain Currie and Johan de Waal, *The New Constitutional and Administrative Law. Vol. 1 Constitutional Law* (Juta, Cape Town, 2001), 60-71.

- CP VI - separation of powers between the legislature, executive and judiciary;
- CP XVI - structuring of government at three levels;
- CP XVIII, XIX, XX, XXI, XXII, XXIII - powers and functions of national and provincial governments;
- CP XXIV - local government powers, functions and structures
- CP XXV, XXVI - fiscal powers

As far as the structural arrangements are concerned, the basic premise as reflected in the CP's was that of symmetry or equal treatment of the provinces. The CP's did not make special provision for specific circumstances of any one province. It did, however, create space for any province to adopt a provincial constitution, which is an important source of constitutional asymmetry.

The following CP's make provision for asymmetry:

- CP XVIII.2 - Reference is made in this constitutional principle to the competence of a provincial legislature to adopt a constitution for its province. This was potentially a significant source of constitutional asymmetry. Some of the political parties such as the Inkatha Freedom Party favoured a more autonomous provincial dispensation, which included the possibility that those provinces who wanted it could develop their own provincial constitutions. In this way provincial autonomy could be strengthened.
- CP XIII - The institution, status and role of traditional leadership, including a traditional monarch are acknowledged by this CP. Not all the provinces had traditional leaders, in particular not a traditional monarch. This CP also stipulated that a provincial constitution could provide for the institution, role, authority and status of a traditional monarch and that the national constitution should protect it.

Although various parties supported the notion of asymmetry, the recognition thereof was of particular importance for the Inkatha Freedom Party and the Conservative Party who both wanted more autonomy for their particular constituencies. CP XXXIV was specifically included during the final stages of the negotiating process to allow for "the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way." The inclusion of this CP made the constitutional negotiation process more inclusive and contributed to the elimination of serious conflict.

The CP's formed a crucial mechanism in the constitution making process and provided a bridge between the 1993-Constitution and the 1996-Constitution. The Constitutional Court, in its certification of the new text of

the constitution, confirmed the foundational nature of the Constitutional Principles to the new constitution.¹⁶

2.3 Current Constitution

In assessing the accommodation of asymmetry in the current South African Constitution various provisions, discussed in the following paragraphs, are relevant.

In contrast to Canada where specific provision is made for the recognition and protection of the French language in Quebec (asymmetric accommodation of languages in Canadian provinces), the issue of language is dealt with on a symmetric or equal basis in the South African Constitution. Section 6 (1) of the Constitution¹⁷ provides for 11 official languages in South Africa and in section 6 (4) it is determined that “all official languages must enjoy parity of esteem and must be treated equitably.” Most of these languages have a regional geographic basis and are not commonly used everywhere in the country. There is therefore some flexibility in the Constitution which provides that provinces may use at least two official languages for the purposes of government, thus recognising the regional importance of languages.¹⁸ Despite these provisions regarding equality of languages, the *de facto* official language in South Africa is English and not much is done by the Government to give effect to the equal and equitable treatment of the official languages. At a provincial level various provinces have adopted policies or practical measures to recognise the official languages spoken in that province, for example Afrikaans, English and isiXhosa are the official languages used in the Western Cape, and in KwaZulu-Natal English, isiZulu, isiXhosa and Afrikaans are used for official purposes. The Western Cape has taken it a step further and has adopted specific legislation, namely the Western Cape Provincial Languages Act, 13 of 1998, to give effect to the provisions regarding the use of official languages in the Constitution.¹⁹

Further provisions regarding the use of languages are found in the Bill of Rights in Chapter 2 of the Constitution, namely:

Sec 29(2): “Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practical.”

¹⁶ *Certification judgment*, para. 15.

¹⁷ These languages are: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

¹⁸ Sec. 6(3) of the Constitution; Rassie Malherbe and Dirk J. Brand, “South Africa - Subnational Constitutional Law” in André Alen *et al.* (eds.), *International Encyclopaedia of Laws* (Kluwer Law International, The Hague, 2001), 148.

¹⁹ Dirk J. Brand, “Constitutional language rights in Canada and South Africa” *Tydsrif fir suid-afrikaanse Reg* (1997) No. 4, 689-699.

Sec 30: “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”

The constitutional approach to languages is thus one of equality and equity, while allowing for regional differences, thus supporting an asymmetric development. Language diversity is thus protected and promoted by the Constitution, but unfortunately the practice signifies the dominance of English to the detriment of the other official languages. In education it also means that language communities have to battle for the practical implementation of this right.²⁰ On the structural elements of government the constitutional negotiation process resulted in a decentralised system of government, consisting of the national government, nine provincial governments and local government, with a constitutional distribution of functions between the three spheres of government.²¹

South Africa is a large country and its nine provinces are quite diverse - in terms of history, geography, economic profile and demographic factors. These provinces were newly created by the 1993-Constitution²² and their establishment was based on an independent report presented to the Multi-Party Negotiating Process.²³ The size and characteristics of the nine provinces differ a lot and the provincial level of government thus have an asymmetric profile, which is in itself not unique and in fact quite common to federal systems of government. The system of provincial government and the establishment of the nine provinces were re-confirmed in the ‘final’ Constitution in 1996.²⁴

The possibility of adopting a provincial constitution was a contentious and much debated issue during the constitutional negotiation process. There was strong support from some minority parties and from two provinces, namely Western Cape and KwaZulu-Natal, for the development of own provincial constitutions as an expression of provincial autonomy. As part of the political compromise specific provisions were included in the Constitution that allow for the development of an own provincial constitution within the framework of the national Constitution.²⁵ Specific provision is made that a province may decide to create legislative or executive structures and procedures that differ

²⁰ Rassie Malherbe, “’n Universiteit se taalbeleid as ‘n uitdrukking van grondwetlik-beskermede diversiteit”, *Tydsrif fir suid-afrikaanse Reg* (2005) No. 4, 708.

²¹ Brand, *Financial Constitutional Law ...*, 54; Malherbe and Brand, *South Africa - Subnational Constitutional Law ...*, 21.

²² Constitution of the Republic of South Africa Act, No. 200 of 1993.

²³ Brand, *Financial Constitutional Law ...*, 107.

²⁴ Constitution of the Republic of South Africa, 1996; Malherbe and Brand, *South Africa - Subnational Constitutional Law ...*, 19.

²⁵ Sec. 142-145 of the Constitution. Similar provisions were included in the 1993 Constitution.

from those in the Constitution, and to provide for the institution, role, authority and status of a traditional monarch. A provincial constitution must first be certified by the Constitutional Court before it can become law.²⁶ These provisions are in line with CP XVIII.2 and are an important element of constitutional asymmetry in South Africa.

The Constitution makes provision for concurrent and exclusive legislative jurisdiction.²⁷ Most of the functional areas of provincial government fall within the concurrent field. Due to the development of concurrency, the provinces do not have complete authority over a particular functional area, and as a result the scope of legislative authority of provinces may differ.²⁸ This could lead to an asymmetrical relationship between the national and provincial spheres of government - some provinces may occupy the legislative terrain more actively than others and thus develop more autonomy. In practice, however, Parliament has legislated extensively in the concurrent field since 1994 while provinces have not optimally utilised that constitutional space.

The Constitution provides that national legislation within the concurrent field will prevail over provincial legislation on the same subject if it applies uniformly in the country and it establishes “uniform norms and standards” throughout the country (so-called overriding provisions).²⁹ This approach has so far been used often by the national Parliament in various concurrent fields to the detriment of provincial autonomy and the accommodation of asymmetry. Such an approach to a concurrent field, for example education, negates diversity and the potential benefits of asymmetry. Despite the fact that it might sometimes be necessary to lay down uniform standards in specific fields for the whole country, it is constitutionally problematic if the national Parliament uses the guise of uniform standards to simply cover the field on a specific concurrent functional area and thus encroaching on provincial autonomy or ‘functional integrity’ of provinces.³⁰

At the executive level there is also scope for asymmetric development. The Constitution makes specific provision for the delegation of executive powers from one executive organ of state in any sphere of government to another and for the provision of agency services on behalf of another executive organ of

²⁶ Sec. 144 of the Constitution.

²⁷ Sec. 44 (national legislative authority), Sec. 104 (legislative authority of provinces), Schedule 4 (Functional areas of concurrent national and provincial legislative competence) and Schedule 5 (Functional areas of exclusive provincial legislative competence).

²⁸ Ig Rautenbach and Rassie Malherbe, *Constitutional Law* (Butterworths, Johannesburg, 4th ed. 2004), 250.

²⁹ Sec. 146(2)(b) of the Constitution.

³⁰ Sec. 41(1)(g) of the Constitution.

state.³¹ It is thus possible that for example the Department of Home Affairs could delegate some of its functions, which are delivered on a regional basis, to a specific province or provinces to perform those functions on behalf of the Department. Also legislative powers may be delegated by Parliament to a provincial legislature and by a provincial legislature to a municipal council.³² These provisions have not been utilised to any significant extent, but creates space for asymmetric developments and some flexibility in the exercise of authority.

There is also provision in the Constitution for asymmetry in a negative sense, namely the establishment of intervention mechanisms to deal with problems regarding the non-execution of obligations in terms of the Constitution or legislation. Provision is made for legislative (section 44) and executive intervention (section 100) into provincial government affairs and provincial executive intervention in municipal government affairs (section 139). These provisions are somewhat controversial since they allow one sphere of government to intervene in the exercise of functions of another sphere of government and thus impeding their constitutional integrity. These powers are however defined in the Constitution and aimed at exceptional circumstances.³³ There were already a few occasions of provincial intervention in specific crisis situations where there was a breakdown in effective delivery of services in some municipalities.³⁴

The Constitution further provides for the assignment of the administration of a matter listed in Schedules 4 (functional areas of concurrent national and provincial legislative competence) and 5 (functional areas of exclusive provincial legislative competence) of the Constitution to a municipality, thus also creating space for an asymmetrical development of administrative authority at the local government level.³⁵ The assignment can only take place if the particular municipality has the capacity to administer it and the matter would be most effectively administered locally. Again, within this legislative framework there is scope for asymmetric development of functions at the local government level.

Another area where asymmetry sometimes occurs in federal systems is in the provincial representation in the second chamber of the national legislature. The drafters of the Constitution deliberately decided on an equal

³¹ Sec. 238.

³² Sec. 44(1)(a)(iii) and 104(1)(c) of the Constitution. Malherbe, "Centralisation of power in education ...", 245.

³³ *Certification judgment*, paras. 254-257, 262-266.

³⁴ Brand, *Financial Constitutional Law ..*, 111; Christina Murray, "Municipal integrity and effective government: the Butterworth intervention" 14 *SA Publiekreg/Public Law* (1999), 332-380.

³⁵ Sec. 156(4) of the Constitution; Malherbe and Brand, *South Africa Sub-national Constitutional Law ...*, 126.

representation of the nine provinces in the second chamber of Parliament, namely the National Council of Provinces (NCOP) and thus chose against asymmetry. Each province is represented in the NCOP by ten delegates (six permanent and four special delegates).³⁶ This stands in contrast to the German situation where the *Länder* have an unequal or asymmetrical representation in the *Bundesrat*, loosely based on their respective population size.³⁷

The fact that the provinces when they were established did not have the same economic and developmental profiles is acknowledged in the Constitution, where section 125(3) specifically provides that the national government must assist provinces in developing the required administrative capacity so that a province could fulfil its constitutional mandate.³⁸ This provision creates the possibility of an asymmetric development of provinces as individual provinces might increase their autonomy. Such national assistance does in practice unfortunately not happen much.³⁹

As part of the transitional arrangements, section 235(8) of the 1993-Constitution made provision for the assignment of national legislation, which fell within the sphere of provincial legislative competence, to a province, provided that the province has the necessary administrative capacity. A similar provision is contained in the current Constitution.⁴⁰ These provisions were necessary to fill the vacuum that existed when the new provinces were created and their executives had to govern the respective provinces even before any provincial legislation had been developed. In practice, not all national legislation within the concurrent field was assigned to provinces and Parliament rather developed new legislation within concurrent functional areas, thus replacing the old laws.⁴¹ These provisions clearly allow for an asymmetric development of provincial legislation. Assigned legislation becomes provincial legislation and a provincial legislature thus has the authority to amend such assigned legislation.⁴²

³⁶ Sec. 60 of the Constitution.

³⁷ Art. 51 of the Basic Law.

³⁸ Sec. 125(3): "A province has executive authority in terms of subsection (2)(b) only to the extent that the province has the administrative capacity to assume effective responsibility. The national government, by legislative and other measures, must assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions referred to in subsection (2)." *Certification judgment*, para. 267.

³⁹ Malherbe, "Centralisation of power in education ...", 244.

⁴⁰ Schedule 6 Item 14(1). See also discussion on assignment of legislation in Dirk Brand, "Development of Concurrent Legislation - a New South African Perspective", Seminar Report on Subnational Constitutional Governance Konrad Adenauer Stiftung, Johannesburg, 1999), 37-44, at 39.

⁴¹ Some examples of assigned legislation are: the Social Assistance Act, No. 59 of 1992, and a series of old education laws such as the Education Affairs Act, No. 70 of 1988, which were assigned to provinces as part of the transitional measures.

⁴² *Ex parte Western Cape Provincial Government: In Re DVB Behuising (Pty) Ltd v. North West Provincial Government* 2000 4 BCLR 347 CC.

3. Asymmetry in Practice - Some Examples

The Western Cape is the only province in South Africa that successfully adopted a provincial constitution, which was done within the framework of the national Constitution.⁴³ Only one other province, KwaZulu-Natal, embarked on a constitution drafting exercise, but was unsuccessful since the constitutional text was not certified by the Constitutional Court.⁴⁴

An important motivating factor in the development of the Constitution of the Western Cape, 1997, was the support of most of the political parties for the constitutional recognition of matters typical of the Western Cape and to strengthen provincial autonomy.

The key features of the Western Cape Constitution (WCC) which are different from the basic provisions in the South African Constitution are:

- The size of the Provincial Legislature is fixed at 42 members, whereas national legislation determines the number of members of all the other provincial legislatures, and it is based on a formula.⁴⁵
- The composition of the Provincial Cabinet included the possibility to have two members who are not members of the Provincial Parliament, with the view to bring expertise from outside the Provincial Parliament into the Provincial Cabinet. This provision only applied until the second election of the Provincial Parliament under the Western Cape Constitution, which has already occurred. So, the Provincial Cabinet now consists of between five and ten members who must all be members of the Provincial Parliament.⁴⁶
- It is determined that there are three official languages for the Western Cape, namely Afrikaans, English and isiXhosa, and that additional provincial legislation had to be developed to monitor the use of official languages and to develop indigenous languages.⁴⁷
- Provision is also made for the establishment of specific constitutional institutions, namely cultural councils, a Commissioner for the Environment and a Commissioner for Children.⁴⁸

⁴³ Dirk J. Brand, *The Western Cape Provincial Constitution: Comments, Text and Judgements*, Konrad Adenauer Stiftung Occasional Papers (Konrad Adenauer Stiftung, Johannesburg, July 1999); Dirk J. Brand, "The Western Cape Provincial Constitution", 31(4) *Rutgers Law Journal* (2000), 961-970; *Ex parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape*, 1997, 1997 9 BCLR 1167 CC, 1997 4 795 CC.

⁴⁴ *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In Re Certification of the Constitution of the Province of KwaZulu-Natal*, 1996, 1996 4 SA 1098 CC, 1996 11 BCLR 1419 CC.

⁴⁵ Sec. 13 of the Constitution of the Western Cape, 1997; Sec. 105(2) of the Constitution.

⁴⁶ Sec. 42 read with Schedule 3 of the WCC.

⁴⁷ Sec. 5 of the WCC.

⁴⁸ Sec. 70-80 of the WCC. The Western Cape Cultural Commission and Cultural Councils Act, No. 14 of 1998, was adopted in accordance with the provisions on cultural councils, and as a consequence of this Act the Western Cape Cultural Commission has been established in 1999.

- The Western Cape Provincial Constitution also provides for the development of provincial symbols and the conferral of provincial honours.⁴⁹
- An innovative section on directive principles of provincial policy was also included in the Western Cape Constitution.⁵⁰ These principles, which are mere guiding principles, include issues such as the promotion of a market-orientated economy, the protection of the natural environment and the promotional development of the youth.

The South African Constitution created a narrow scope for provincial constitutions, but it nevertheless acknowledged asymmetry in allowing provinces to embark on the constitutional development road.

It is noteworthy that the only two provinces which embarked on the provincial constitutional development road are the two provinces where political parties other than the ANC played a significant role since 1994. Parties such as the Inkatha Freedom Party, the New National Party (now dissolved) and the Democratic Party (now the Democratic Alliance) which enjoyed significant support in KwaZulu-Natal and the Western Cape, all favoured more autonomy for provinces, which included the adoption of provincial constitutions. Better constitutional accommodation of cultural diversity was an important issue in the constitutional debates in these two provinces.

Another example of asymmetrical development is the particular recognition of the Zulu Monarch by the KwaZulu-Natal Provincial Government. The Constitution has a short chapter, chapter 12, on the recognition and role of traditional leaders throughout the country. Various provinces have traditional leaders and recognise such leaders by way of legislation and executive structures, such as a provincial house of traditional leaders. In KwaZulu-Natal there is a further dimension to traditional leadership, namely the Zulu Monarch, who is described as the Monarch of the whole Province and is regarded as someone with significant cultural and political status in the Province as well as in the rest of South Africa.⁵¹

The KwaZulu-Natal Traditional Leadership and Governance Act, 5 of 2005, deals in detail with the recognition of traditional leaders, including the Zulu King, the establishment of a house of traditional leaders and their responsibilities. Some of the responsibilities of the Zulu King are the opening of the Provincial Legislature, conferring honours, and receiving foreign

⁴⁹ Sec. 6 of the WCC. The Western Cape has adopted its own coat of arms in terms of provincial legislation and also has a system of provincial honours in place.

⁵⁰ Sec. 81 of the WCC.

⁵¹ It is currently King Goodwill Zwelithini. See at <http://www.zuluroyals.com/> for details about the history of the Zulu Royal Dynasty.

dignitaries.⁵² The creation of constitutional space for the asymmetrical developments regarding the Zulu Monarch played an important role in accommodating cultural diversity in South Africa. If this space was not created, it could have led to serious opposition against the further constitutional negotiations and even violence in various communities. The recognition of provincial autonomy and cultural diversity, in particular in the context of KwaZulu-Natal, was one of the key issues promoted by the Inkatha Freedom Party during the constitutional negotiations.

4. Conclusion

South Africa is a country with many contrasts and which is home to a variety of cultures, languages and religions. There are also significant economic differences within communities as well as between different parts of the country. Issues such as equality, unity, diversity and asymmetry remain topical issues within the political sphere as well as within various communities, and it finds expression in different ways. When people protest in the streets for better service delivery within their communities, it is often motivated by a need for equitable and equal treatment within the particular community. The issues of equality and diversity become very tangible in such cases. When people within the Afrikaans community argue that their language rights are negatively affected by government policies and legislation, it is a question of equality of languages as well as the accommodation of diversity. Similarly, the ongoing debates about the need for more mother tongue education in public schools throughout South Africa also relates to the accommodation of diversity. In arguing for proper recognition of the Zulu Monarch, the Inkatha Freedom Party as well as the people from KwaZulu-Natal argued for the accommodation of diversity and, in fact, recognition of asymmetry.

It is evident that, in particular in a country which such diversity as is the case in South Africa, one cannot over-emphasize either equality or diversity in order to promote your own political agenda. It would simply create more problems than solutions and could even be disastrous. A better approach would clearly be to be more receptive for the accommodation of diversity and recognition of asymmetry, whether it is in the development of policies or legislation. It is thus important to have some degree of flexibility within the constitutional system. The constitutional scope for provinces in South Africa to create their own constitutions that could have distinguishing features as well as the recognition of traditional leaders within the particular provinces, are examples of how a constitution could accommodate asymmetry.

⁵² Sec. 18 of the KwaZulu-Natal Traditional Leadership and Governance Act, No. 5 of 2005.

In promoting unity, it is important to accommodate diversity and the principle of asymmetry. This approach could have been used more extensively and creatively in South Africa to the benefit of the country.

Bibliography

Agranoff Robert, "Federal Evolution in Spain" 17(4) *International Political Science Review* (1996), 385.

Almendral Violeta R., "Fiscal rights for Communities in the Spanish constitution" 6(1) *Federations* (February/March 2007), 16.

Auclair Céline, "Federalism: Its Principles, Flexibility and Limitations", paper delivered at the 2nd International Conference on Decentralization: "Federalism: The Future of Decentralizing States?", Manila, Philippines (25-27 July 2002).

Brand Dirk J., *Financial Constitutional Law - a comparison between Germany and South Africa* (Konrad Adenauer Stiftung, Johannesburg, 2006).

Brand Dirk J., "The Western Cape Provincial Constitution", 31(4) *Rutgers Law Journal* (2000), 961-970.

Brand Dirk J., "Development of Concurrent Legislation - a New South African Perspective" Seminar Report on *Subnational Constitutional Governance* (Konrad Adenauer Stiftung, Johannesburg, 1999), 37-44.

Brand Dirk J., *The Western Cape Provincial Constitution: Comments, Text and Judgements*, Konrad Adenauer Stiftung Occasional Papers (Konrad Adenauer Stiftung, Johannesburg, July 1999).

Brand Dirk J., "Constitutional language rights in Canada and South Africa" *Tydsrkif vir suid-afrikaanse Reg* (1997) No.4, 689-699.

De Waal Johan, *Constitutional Law* (Juta, Cape Town, 2001).

De Villiers Bertus, "The Constitutional Principles: Content and Significance" in id. (ed.) *Birth of a Constitution* (Juta, Kenwyn, South Africa, 1994) 37-49.

Harty Siobhan, "Spain" in Ann L. Griffiths (ed.) *Handbook of Federal Countries 2005* (McGill-Queen's University Press, Montreal, 2005), 324-341.

Moreno Luis, "Decentralization in Spain" 36(4) *Regional Studies, Debates and Surveys* (2002), 399-408, at <http://www.regional-studies-assoc.ac.uk> .

Malherbe Rassie, “Centralisation of power in education: have provinces become national agents?” *Tydrskrif vir suid-afrikaanse Reg* (2006) No. 2, 237-252.

Malherbe Rassie, “’n Universiteit se taalbeleid as ‘n uitdrukking van grondwetlik-beskermd diversiteit” *Tydskrif vir suid-afrikaanse Reg* (2005) No. 4, 708.

Malherbe Rassie and Brand Dirk J., “*South Africa - Subnational Constitutional Law*” in André Alen *et al* (eds.) *International Encyclopaedia of Laws* (Kluwer Law International, The Hague, 2001).

Murray Christina, “Municipal integrity and effective government: the Butterworth intervention” *14 SA Publiekreg/Public Law* (1999), 332-380.

Musgrave Richard A., *Public Finance in a Democratic Society* Vol 3, (Edward Elgar Publishing Ltd, Cheltenham, 2000).

Rautenbach Ig and Malherbe Rassie, *Constitutional Law* (Butterworths, Johannesburg, 4th ed. 2004).

Watts Ronald L., *Comparing Federal Systems* (McGill-Queen’s University Press, Kingston, 2nd ed. 1999).

Internet

www.forumfed.org

http://europa.eu/index_en.htm

www.kinggoodwill.co.za

www.regional-studies-assoc.ac.uk

Case law

In Re: Certification of the Constitution of the Republic of South Africa, 1996 1996 10 BCLR 1253 CC, 1996 (4) SA 744 CC.

Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In Re Certification of the Constitution of the Province of KwaZulu-Natal, 1996 1996 4 SA 1098 CC, 1996 11 BCLR 1419 CC.

Ex parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape, 1997 1997 9 BCLR 1167 CC, 1997 4 795 CC.

Ex parte Western Cape Provincial Government: In Re DVB Behuising (Pty) Ltd v North West Provincial Government 2000 4 BCLR 347 CC.

Published in the EDAP series:

4/2007

Sara Parolari, “La *English Question* e il regionalismo inglese” 4 *European Diversity and Autonomy Papers - EDAP* (2007), at www.eurac.edu/edap.

3/2007

Alice Engl, “Future Perspectives on Territorial Cooperation in Europe: The EC Regulation on a European Grouping of Territorial Cooperation and the Planned Council of Europe Third Protocol to the Madrid Outline Convention concerning Euroregional Co-operation Groupings.” 3 *European Diversity and Autonomy Papers - EDAP* (2007), at www.eurac.edu/edap.

2/2007

Dimitry Kochenov, “Commission’s Approach to Minority Protection during the Preparation of the EU’s Eastern Enlargement: Is 2 Better than the Promised 1?”, 2 *European Diversity and Autonomy Papers - EDAP* (2007), at www.eurac.edu/edap.

1/2007

Armin von Bogdandy, “Die Europäische Union und das Völkerrecht kultureller Vielfalt - Aspekte einer wunderbaren Freundschaft”, 1 *European Diversity and Autonomy Papers - EDAP* (2007), at www.eurac.edu/edap.

5/2006

Doria Giancarlo, “The Paradox of Federal Bicameralism”, 5 *European Diversity and Autonomy Papers - EDAP* (2006), at www.eurac.edu/edap.

4/2006

Ringelheim Julie, “Diversity and Equality: An Ambiguous Relationship. Reflections on the US Case Law on Affirmative Action in Higher Education”, 4 *European Diversity and Autonomy Papers - EDAP* (2006), at www.eurac.edu/edap.

3/2006

Prisching Margareth, “The Headscarf as a Symbol of Non-Integration? Integration of Muslims in Austria”, 3 *European Diversity and Autonomy Papers - EDAP* (2006), at www.eurac.edu/edap.

2/2006

Palermo Francesco, “Linguistic Diversity within the Integrated Constitutional Space”, 2 *European Diversity and Autonomy Papers - EDAP* (2006), at www.eurac.edu/edap.

1/2006

Blokker Paul, “The Post-enlargement European Order: Europe ‘United in Diversity?’”, 1 *European Diversity and Autonomy Papers - EDAP* (2006), at www.eurac.edu/edap.

4/2005

Marko Joseph, “Post-conflict Reconstruction through State- and Nation-building: The Case of Bosnia and Herzegovina”, 4 *European Diversity and Autonomy Papers - EDAP* (2005), at www.eurac.edu/edap.

3/2005

Ferri Delia, “EU Participation in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Some Constitutional Remarks”, 3 *European Diversity and Autonomy Papers - EDAP* (2005), at www.eurac.edu/edap.

2/2005

De Schutter Olivier and Verstichel Annelies, “The Role of the Union in Integrating the Roma: Present and Possible Future”, 2 *European Diversity and Autonomy Papers - EDAP* (2005), at www.eurac.edu/edap.

1/2005

Toggenburg Gabriel N., “Die Sprache und der Binnenmarkt im Europa der EU: Eine kleine Beziehungsaufstellung in 10 Punkten“, 1 *European Diversity and Autonomy Papers - EDAP* (2005), at www.eurac.edu/edap.

7/2004

Marko Joseph, “Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance”, 7 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

6/2004

Petričušić Antonija, "Wind of Change: The Croatian Government's Turn towards a Policy of Ethnic Reconciliation", 6 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

5/2004

Henrard Kristin, "The European Convention of Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity", 5 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

4/2004

Neuwirth Rostam J., "The 'Cultural Industries': A Clash of Basic Values? A Comparative Study of the EU and the NAFTA in Light of the WTO", 4 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

3/2004

Herold Anna, "EU Film Policy: between Art and Commerce", 3 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

2/2004

Bia Maria Teresa, "Towards an EU Immigration Policy: Between Emerging Supranational Principles and National Concerns", 2 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

1/2004

Toggenburg Gabriel N., "The Debate on European Values and the case of cultural diversity", 1 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.