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The constitutional conversation between the federal structure and a bill of rights

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Contents

A) Introduction.....	3
B) Comparative conversations.....	5
1. A conversation over rights and powers.....	5
1.1 Starting the conversation	5
1.2 Balancing the conversation.....	6
1.3 Setting new norms from below	7
2. Bill of Rights shaping the federal structures themselves	8
C) Constitutional conversation in South Africa.....	10
1. Introduction	10
2. The conversation on rights and powers	11
2.1 Managing the conversation.....	11
2.2 Setting new norms from below.....	12
2.3 Bill of Rights shaping the federal structures themselves	14
2.4 Concluding remarks.....	16
D) Conclusion	17
References.....	19

A) Introduction

It is often assumed that a constitution speaks with one voice and that all parts are in harmony with each other. Although different provisions can be given higher status than others (as reflected in the more arduous amendment procedures concerning, for example, national values), the general assumption is that they are all of equal value. Where provisions are seemingly at odds with one another, such as cases where there are two rights in a bill of rights lead to conflicting outcomes, the deft interpreter can nevertheless produce a balanced or harmonious end-result. While this approach is necessary for a purposive interpretation of a constitution, it blocks from view a different reality in which parts of the constitution are in constant conversation with each other. A particular instance of this is the conversation between the federal structure and a bill of rights.

Tuning into this conversation is not only pertinent from a theoretical perspective but also has practical consequences. The Community Law Centre at the University of the Western Cape in South Africa, to which I have been attached for the past two decades, has a dual focus: multi-level government and human rights. We have organised ourselves into projects focusing, on the one hand, on local government and federalism, and, on the other, socio-economic rights, gender rights, children's rights and prisoners' rights. This dual focus was not by design so much as historical accident. The first director of the Centre, Advocate Dullah Omar, was a leading legal activist in the African National Congress who eventually became the first Minister of Justice in the Mandela cabinet and had played a strong hand in the drafting of the interim Constitution in 1993; his focus was on the structures of government. Other staff members, such as Brigitte Mabandla (who, in the Mbeki cabinet, also became a Minister of Justice), were more interested in the Bill of Rights, in particular the rights of women and children. Since then there has been the split in the Centre between the structuralists (focusing on multi-level government) and the normativists (concerned with human rights). As in many an organisation, persons with different areas of specialisation are often not in conversation with each

other. The Centre was no different, and the two areas did not talk much to one another – until it happened that we met up in South Africa's Constitutional Court.

The occasion was the first major case on socio-economic rights concerning the right of access to adequate housing.¹ A destitute, homeless woman called Irene Grootboom sued every level of government – national, provincial and local – for a roof over her head. The Centre's socio-economic rights project filed an *amicus curiae* brief presenting a minimum core-content argument that the State must provide a shelter for Mrs Grootboom. The Centre's local government project also filed a brief; while agreeing on the rights argument, it argued that the obligation to provide a shelter rested on the province or national government because housing was, in terms of the Constitution's division of powers, a concurrent national and provincial function in terms of which local government bore no obligation.²

The Constitutional Court rejected both arguments.³ First, although it recognised that this socio-economic right was subject to judicial review (a major victory for human rights activists), the Court rejected the minimum core-content argument as being too prescriptive and onerous on the state. It found that the state's obligations are confined to taking reasonable measures, which in the case at hand involved no more than having a policy on emergency housing for the destitute. Second, the Court declined to impose an obligation on any specific sphere of government. It held that the state – national, provincial and local government – should work cooperatively, as the Constitution demanded, when taking reasonable measures. The outcome of the decision was that, when Mrs Grootboom died eight years later, she was still without a roof over her head as the three spheres of government somehow could not agree on who should do what.

The case illustrated to us that there was a dynamic tension between the Bill of Rights and the federal structure. One could not assume a harmonious relationship between the two parts: on the one hand, a Bill of Rights that limits state power, and a federal structure concerned with the division of powers between the centre and provinces and local government. On the contrary, there were overlaps and competition between them.

Over the next decade we saw this dynamic interaction develop even further. The Bill of Rights impacted on the federal structure by limiting provincial and local powers; in turn, provinces and local government affected the protection of human rights. What we have witnessed is a conversation between the Bill of Rights that seeks to protect universal human rights norms and the federal structure that seeks enhance subnational autonomy. This conversation was moderated by the Constitutional Court, but with subnational governments adding their voices to the conversation.

The South African conversation raises a number of questions. Where does it fit into the international debate on federalism and human rights, and does it have anything to contribute to it? In this context, is it inevitable that the Bill of Rights will predominate over federal structures, or is there a suitable

¹ *Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 (11) BCLR 1169 (CC). Section 26 reads:

(1) Everyone has the right to have access to adequate housing;

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

² Schedule 4A, Constitution.

³ On the importance and the jurisprudence of the case, see Liebenberg 2010.

equilibrium that allows for the pursuit of both federalism and the protection of human rights? If so, what factors shape such an equilibrium?

This paper first sketches a broad comparative picture of the conversation between federalism and the protection of human rights; thereafter it examines the South African conversation more closely, and finally draws together the two conversations.

B) Comparative conversations

In the international debate there appear to be at least two types of conversations. The first concerns how a bill of rights shapes (or, more accurately, restrains) the exercise of power by subnational governments, and how, conversely, federal structures influence the content of rights. The second, more muted, conversation is about how the Bill of Rights may shape the very structures of a federation.

1. A conversation over rights and powers

1.1 Starting the conversation

Initially, the conversation between human rights and subnational powers was slow to develop. In the United States, the oldest federation with a Bill of Rights, there was no conversation to start with. The federal Bill of Rights did not apply to the states, as it was designed to protect citizens against an overzealous federal government. Federalism thus protected slavery in the South until the adoption of 14th Amendment after the Civil War;⁴ thereafter, it took more than a hundred years to make the full federal Bill of Rights applicable to the states through the 14th Amendment.⁵ In the words of Justice William Brennan, the effect of this was that the US Supreme Court, by «nationalising» civil rights, «fundamentally reshaped the law of [the] land»⁶ and «profoundly altered the character of [the US] federal system».⁷ The application of the Bill of Rights to the states meant that the Southern states could no longer apply racial segregation and that all states had to respect a common standard of due process in criminal justice.

The fear that a bill of rights means the end of subnational autonomy was also present in established federations that sought to introduce a bill of rights. The introduction of the Charter of Fundamental Rights and Freedoms into the Canadian federal constitution in 1982 was thus described as a deliberate nationalising policy by Pierre Trudeau to trump Quebec separatism and extreme provincial decentralisation.⁸ To placate federalist fears, a provision was included that allowed a province to pass legislation trumping the Charter for a period of five years, a provision that could be renewed.⁹ As Kincaid explains it, the latter «shields provincial autonomy from federal intervention as well and, in effect, allows the provinces to drill holes in the federally established floor of individual rights protec-

⁴ See Kincaid 2001, 251.

⁵ Brennan 1986.

⁶ Brennan 1986, 540.

⁷ Brennan 1986, 545.

⁸ See Gibbons, Knopff and Morton 1984.

⁹ Section 33 of the Charter of Rights.

tion».¹⁰ He argues that provinces refrained from drilling too many such holes for fear of being seen as hostile to individual rights.

Following hot on the heels of the Canadian success, the Labour Government in Australia – after having made various attempts to introduce a comprehensive Bill of Rights in the Commonwealth Constitution of 1900 – sought more modestly in 1988 to make only the rights in that Constitution (trial by jury, freedom of religion and a limited property right) applicable to the states. This, too, failed, as the initiative was rejected by the Senate and a national referendum, partly because a bill of rights was perceived as a centralising instrument that would limit state powers.¹¹

The Australian voters were right, of course. A national bill of rights has the effect of centralising power and standardising subnational conduct. José Woehrling identifies the ways in which a bill of rights centralises power.¹² First, it transfers some decision-making power from subnational governments and locates it in federal courts (to which one should add that constitutional courts world-wide have a tendency to favour the centre's priorities over those of subnational governments).¹³ Second, a bill of rights consolidates national identity to the detriment of regional identities by creating a sense of common citizenship, with Canada serving as a good example of this. Third, where social and economic rights are included in a bill, this justifies federal intervention to ensure uniformity of services: national social solidarity is preferred over the protection of subnational autonomy.¹⁴ Fourth, a bill of rights standardises subnational conduct; by virtue of being fundamental and universal, rights do not admit local exceptions.¹⁵ Further, where a constitutional court invalidates a law of one subnational government, the same rule applies to all subnational governments; it sets a single standard.¹⁶

1.2 *Balancing the conversation*

Until this point the conversation was one-directional: a bill of rights impinges on federal autonomy. The federalists responded: some form of balance was needed to allow a measure of federal diversity. The question, then, was how federal diversity could be balanced with the uniform protection of human rights, or as John Kincaid puts it, how individual liberty could be balanced with a communitarian liberty, the latter referring to the liberty of a subnational unit. Which powers of communitarian liberty are to be tolerated in the union and which are to be rejected for unduly infringing on individual liberty?¹⁷ He thus poses the question: «[W]hich rights should be treated as fundamental, universal, and uniform and which rights can be subjected legitimately to variations among communities of people holding diverse values?»¹⁸

In the US the answer appears to be the following: Where a common view of individual liberty has been consolidated, there can be no trade-offs, but where the different components of the union have

¹⁰ Kincaid 2001, 252.

¹¹ Galligan, Knopff and Uhr 1990, 54.

¹² Woehrling 2011, 149–152.

¹³ Hrischl 2004.

¹⁴ Woehrling 201, 151.

¹⁵ Fercot (2008, 320) writes that federal courts «‘shape’ the state constitutional orders, and in the name of the protection of rights, impose on federal entities implicit and ‘indirect’ standards that limit the ability to make choices in the exercise of state constitutional powers».

¹⁶ Woehrling 2011, 152.

¹⁷ Kincaid 2011, 251.

¹⁸ Kincaid 2011, 252–3.

vastly different views on individual liberties, based on their religious or cultural perspectives, then diversity is allowed. Supreme Court decisions since the 1950s show that racial discrimination cannot be tolerated, and a consensus view also applies to certain due-process rights. However, the Court has shied away from setting clear lines on issues such as the right to die, prayers at schools, and gay marriages. On the latter question, it has been argued that the Supreme Court started to protect gay rights only when public opinion shifted in that direction;¹⁹ the Court was thus not an agent of social change but a follower. This approach commenced in 1995 with the Rehnquist Court's limiting of national power over the states.²⁰

What emerges is the notion of a minimum floor of rights based on widely shared common values, a notion that is, of course, well-entrenched in many jurisdictions. In Germany, for example, the Basic Law also provides a minimum standard below which Länder constitutions may not go.²¹ A similar notion underlies the doctrine of the European Court of Human Rights, which allows a margin of appreciation within member states; this has often been criticised for bringing in a moral relativism at odds with the supposed universality of human rights.²² The same debate unfolds at national level.²³ There is thus a search for a balance between the universality of rights and subnational diversity.

The first element of this balance is that local diversity per se is at least not seen as discriminatory or objectionable.²⁴ Going further is more difficult, of course. Some try to locate the balance in the interpretation of the right itself; the proportionality test for limiting rights balances individual rights against legitimate state interests. In the case of subnational governments, the value of subnational diversity and interests can then be considered appropriately.²⁵

1.3 *Setting new norms from below*

Setting a minimum floor of rights does not prevent subnational governments from improving on such a floor. As Justice William Brennan argued, the federal protection of civil and political rights should set a federal floor of rights, which allows «diversity only above and beyond this federal constitutional floor».²⁶ In the US, when the Rehnquist Court restrictively interpreted the federal Bill of Rights on the grounds of federalism, Justice Brennan perceived it as «a plain invitation to state courts to step into the breach» as «coequal guardians» of civil rights and liberties.²⁷ The state courts

¹⁹ Calabresi and Bickford 2012, 58.

²⁰ Calabresi and Bickford 2012, 3.

²¹ Fercot 2008, 310.

²² Benevenisti 1999, 843.

²³ A further manifestation of the problem is the relationship between the Charter of Fundamental Rights of the European Union and subsidiarity (Carozza 2003, 39). In terms of the Maastricht Treaty decisions should be taken as closely as possible to the citizens, and the Community may take action only as far the task at hand cannot be sufficiently achieved by a member state. It is said that this acts in the context of international human rights law, as a mediator between «supranational harmonization and unity, on the one hand, and local pluralism and difference, on the other» (Carozza 2003, 40). Carossa further writes (2003, 40): «Despite the risk of legal pluralism, the links between subsidiarity and human rights are too important and potentially fruitful to set aside if we are to continue to seek an international law that protects *both* the dignity of the human person *and* the diversity of human society» (emphasis in original).

²⁴ Woehrling 2011, 152.

²⁵ Woehrling 2011, 153.

²⁶ Brennan 1986, 550.

²⁷ Brennan 1986, 548.

did take up the invitation, not only exceeding the minimum federal guarantees but also guaranteeing new rights in state constitutions.²⁸

There thus developed a new interest in state constitutions in respect of the extent to which they went beyond the federal Bill of Rights. In these constitutions, subnational governments could perform their famous role as «laboratories for innovation and experimentation» in which new ideas could be tested at state level before introduction at national level.²⁹ The guaranteeing of more rights was not limited to the US. There are examples in German *Länder*, Swiss cantons³⁰ and Argentinian states. The constitution of the state of Cordoba granted women the franchise in 1927, 20 years before the federal constitution followed suit.³¹ In addition, it referred to certain international human rights treaties long before the national constitution did so.

Subnational constitutional may also experiment with new social and economic rights.³² In Switzerland and Germany, some cantons and *Länder* have included socio-economic rights that imposed positive obligations such as the right to education, a right to shelter and the right to work.³³ The «third-generation» right to the environment was also included in the Cordoba Constitution long before the national Argentinian constitution reflected it in 1994.³⁴ In the case of Argentina, the rights in the state constitutions have remained paper rights in that they have been largely unenforced.³⁵

However, although there are numerous positive examples of subnational constitutions increasing human liberty, it is not axiomatic that subnational legislatures, executives or courts will provide a better level of protection than the federal constitution or courts. It may even be the exception rather than the rule, and human rights violations are often more pervasive at subnational than at national level. Certain commentators thus view federalism as dangerous in contexts where the rights of minority populations could be abused systematically at subnational level,³⁶ leading them to conclude that subnational constitutionalism is a «promising tool to promote social justice and political legitimacy. However, these outcomes are not inherent to the system.»³⁷

2. Bill of Rights shaping the federal structures themselves

The question of minorities introduces the second conversation, which concerns the issue of whether the federal bill of rights may shape the federal structures themselves and thereby even lead to the formation or expansion of subnational powers.

When a leading federal scholar like Ronald Watts discusses the role of a bill of rights and federalism, he focuses on the right to self-determination of minorities, or group rights claimed by such linguistic or ethnic groups, and the question of whether such rights can be given territorial expression.³⁸

²⁸ Kincaid 2011, 252; Smith and Hansen 2008, 65.

²⁹ *New State Co. v Liebmann* 285 US 262, 311 (1932) per Justice Brandeis.

³⁰ Frecot 2008, 312.

³¹ Hernandez 2010, 923.

³² Woehrling 2011, 144.

³³ Fercot 2008, 314.

³⁴ Hernandez 2010, 919.

³⁵ Hernandez 2010.

³⁶ White 2004, 2.

³⁷ White 2004, 19.

³⁸ Watts 1999, 104.

If that is not possible, his focus shifts to how minorities in subnational entities can be protected from these governments through the entrenchment in the national constitution of individual rights related to language, culture and religion.

The bottom-line of this conversation is whether there are group rights that can be expressed in territorial autonomy on the basis of language, culture, ethnicity or religion. The Ethiopian Constitution is one of the few constitutions that as of right entitles (in its ambiguous words) any «nationality, nation, or people» to self-government.³⁹ This right applies not only to the large ethnic groups dominating the main regions but to small ethnic minorities who can claim their own ethnic local government in the ethnically-based regions.⁴⁰ The right of self-government is expressed separately from the bill of rights, but is supported nevertheless by the bill of rights through the individual rights to language and culture.

The clear expression in a constitution of the right of ethnic groups to self-determination or even local self-government is rare. More often it is the case that group rights are claimed on the basis of international law. An example is the claim for self-determination under the African Charter on Human and Peoples' Rights made before the African Commission on Human and Peoples' Rights. In 1992 the Katangese Peoples' Congress, a political formation from the Katanga Province in the erstwhile Zaire (today the Democratic Republic of Congo), asked the Commission to recognise the independence of Katanga on the basis of the right to self-determination. The claim was based not on the fact that the Katangese were culturally or linguistically different; the claim instead was they were oppressed and discriminated against on the grounds of those differences. In response, the Commission noted that self-determination could be exercised in a number of ways – «independence, self-government, local government, federalism, confederalism, unitarism or any other form [that accords with the people's wishes]». Because the Katangese could not show that their right to participate in government was denied, they had no claim to independence. They could, however, «exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire».⁴¹ This could mean only a form of federalism, which was realised 13 years later when the 2005 DRC Constitution instituted a hybrid-federal system of government.⁴²

In the case that the Anglophone Cameroonians brought against the unitarist Cameroon government (which was dominated by francophones), they claimed independence on the basis of the right to self-determination and the systematic violation of numerous human rights. Again, the Commission did not entertain the self-determination claim, although it did find there was a range of discriminatory practices and laws that should be remedied. It recommended that the parties «enter [...] into constructive dialogue» to resolve the constitutional issues, which centred on forms of self-determination within a single state.⁴³ Both communications implied that a federal-type arrangement should flow from a conversation between the central government and the excluded and marginalised community.⁴⁴

³⁹ See Fessha 2010.

⁴⁰ Ayele 2012.

⁴¹ *Katangese Peoples' Congress v Zaire* 75/92.

⁴² See Kabemba 2005; Putzel et al 2008.

⁴³ *Kevin Mgwanga Gunme et al v Cameroon*, 266/2003, African Commission Communication decided at 45th Ordinary Session 13-27 May 2009.

⁴⁴ See, for example, Awasom 2011.

A diluted variant of the right to self-determination is the claimed «right to local self-government». The claim is based not on nationhood but the right of political participation founded in both national and international human rights instruments. I have encountered this argument among those of my students who, having completed Masters' degrees in human rights and democracy, look through the prism of human rights and see the possibility of a better world. The «right to local government» is then envisaged as the true culmination of democracy, a culmination expressed through the rights of political participation. The argument for decentralisation is not only that it enhances the quality of democracy, but that democracy itself requires decentralised government. The Council of Europe's Charter on Local Self-Government and its principle of subsidiarity are cited in support of this view. In particular, decisions should be taken at the lowest possible level where decision-makers would be accountable to those subject to their decisions.⁴⁵ To date, little headway has been made with an enforceable principle of subsidiarity that would result in the guaranteeing of local self-government. Although the principle of local self-governance is not entertained by courts, it is gaining ground also in Africa in the «soft» regional instruments on democracy and good government.⁴⁶

In summary, while it is recognised that a national bill of rights closes down subnational space, a restrictive interpretation of that bill has allowed in some cases a modicum of federal diversity: having set a minimum floor of rights, subnational governments can go beyond that floor. But thus far the expression of minority group rights in a demarcated territory has found limited traction, with the «right to local self-government» holding even less appeal.

C) Constitutional conversation in South Africa

1. Introduction

Turning to South Africa, we see similar conversations under way but articulated in a distinctive local dialect. The new democratic Constitutions of 1993 and 1996 introduced both a Bill of Rights and provincial and local governments. The former enjoys an exalted place in the Constitution, providing extensive protection of individual rights after the ravages of apartheid and positing «human dignity, the achievement of equality and the advancement of human rights and freedoms» as the new constitutional order's founding values.⁴⁷ By contrast, the «federal» provisions relating to provinces were a reluctant compromise made in the course of the negotiated revolution – reluctant, because it was feared that these provisions would spark a return to the ethnic divisions of the apartheid era.⁴⁸ Consequently, a federal or devolved system of government was not included in the list of founding values, where the emphasis was instead on South Africa being «one sovereign, democratic state».⁴⁹ A provincial sphere of government was established with a limited but entrenched list of exclusive powers and a more extensive list of concurrent powers shared with the national government. It is a highly centralised system, as provinces have no direct access to tax bases of their own. In contrast, local

⁴⁵ International Human Rights Council 2002: 9.

⁴⁶ See Fessha and Kirkby 2008.

⁴⁷ Section 1(a) Constitution 1996.

⁴⁸ Steytler 2005.

⁴⁹ Section 1 Constitution 1996.

government, now recognised as a constitutional order of government with entrenched powers, has the constitutional power to levy property taxes and surcharges on fees.⁵⁰

From the outset the Constitutional Court, sitting at the apex of an integrated judiciary, did not value provincial autonomy highly and gave mostly pro-centre decisions when it came to the division of powers between the provinces and the national government.⁵¹ However, it has been more accommodating towards local government, with the result that we see the proverbial hourglass federation – a large national government at the top, strong local government at the bottom, and a small provincial waist in the middle.⁵²

2. The conversation on rights and powers

2.1 *Managing the conversation*

The first conversation on how the Bill of Rights shaped and limited the powers of provinces and local government followed much of the international script. The Bill of Rights, applicable to all three spheres of government, constrained the powers of the subnational governments in equal measure to that of the national government. First, the equality clause ensured that provinces did not discriminate on any of the grounds enumerated in Section 9, and a provincial statute dating from the apartheid era was invalidated because it indirectly discriminated on the basis of race.⁵³ However, the Court made it clear that provincial diversity per se did not constitute unfair discrimination provided it did not differentiate on the prohibited grounds (including race, language, sexual orientation, etc.) or analogous grounds – all of which are based on personal characteristics, not on territory.⁵⁴

When applying socio-economic rights, the Constitutional Court was also hesitant to set an inflexibly uniform standard applicable to all municipalities. When a township dweller sought to enforce his right of access to adequate water, he argued that the City of Johannesburg's policy of providing 25 litres per day for free was inadequate; he wanted double that amount because it was reasonable and within the City's resources. One should note here that the socio-economic rights of access to health-care services, sufficient food and water, adequate housing and social security, are circumscribed in that the state needs to take only reasonable measures within its available resources to achieve the progressive realisation of these rights.⁵⁵

However, the Constitutional Court refused to set a specific amount of water per day. All that was required is for the municipality to take reasonable measures, which should aim at progressively realising the right. The measures taken could hence differ from one municipality to the next depending

⁵⁰ See Steytler 2005.

⁵¹ Steytler 2009; Steytler forthcoming.

⁵² Steytler 2007.

⁵³ *Zondi v MEC for Traditional and Local Government Affairs* 2005 (4) BCLR 347 (CC).

⁵⁴ *Weare and Another v Ndebele and Others*, 2009 (4) BCLR 370 (CC) para. 70. A bookie, taking bets at horse-racing, complained that he was discriminated against in KwaZulu-Natal because in terms of that province's gambling legislation only a person in his or her personal capacity could obtain a betting licence, contrary to the position that prevailed in all other provinces, where both a natural and a juridical person could ply the bookmaking trade. The Court found that, because the gambling law was within the province's competence, it did not offend the right against unfair discrimination.

⁵⁵ Sections 26(2) and (27)(2) Constitution.

on their circumstances, and in the circumstances the City's policy was regarded as reasonable. These qualifications allowed the City some autonomy in terms of how the right is implemented, but the decision was, of course, criticised by human rights activists who sought a concrete and uniform standard.⁵⁶

Although the «reasonableness» requirement afforded the Court an opening to grant a measure of diversity, on the whole it has established a floor of rights that is very high by all accounts. The next question, then, is whether provinces and municipalities have shown diversity by increasing the level of rights in their jurisdictions.

2.2 *Setting new norms from below*

Provinces have the competence, through the adoption of a provincial constitution, to include their own bill of rights.⁵⁷ Such power, however, is limited by two constraints. First, in terms of the principle of homogeneity, a provincial bill should not detract from any of the rights in the national Bill of Rights, even though it could add more rights.⁵⁸ Second, such additional rights could be included only within the functional areas of provincial competence.

For this reason, KwaZulu-Natal province's attempt to include a bill of rights in an otherwise fatally flawed constitution failed as the rights included stretched far beyond the province's competences.⁵⁹ When the Western Cape province drafted its provincial constitution shortly after the KwaZulu-Natal attempt, it, too, wanted a bill of rights. The perception was that any self-respecting subnational government should, like the German Länder or US states, have one. When it dawned on lawmakers that a provincial bill of rights would add further constraints to the provincial government, the politicians quickly downgraded the proposed bill of rights to Directive Principles of Provincial Policy – which are unenforceable.⁶⁰ But while the Western Cape's politicians backed off from a bill of rights, a year later the very same politicians did indirectly shape the content of the important socio-economic right of access to health care services.

After the ascendancy of Thabo Mbeki as president in 1999, and at the height of the HIV/AIDS pandemic in South Africa, the National Department of Health and eight provincial departments of health reluctantly allowed Nevirapine, a new drug preventing mother-to-child infection by HIV, to be provided at only two test sites per province. This restrictive policy flowed from President Mbeki's denial that there is a link between HIV and AIDS. One province, the Western Cape, was convinced that the government's policy was wrong, and rolled out the drug to all clinics in the province. In a legal challenge by an NGO (in which the Community Law Centre acted as an *amicus curiae*), founded on the «the right to have access to health care services, including reproductive health care»,⁶¹ the reasonableness of the actions of the national government and the eight provinces was attacked.⁶² The

⁵⁶ See Bond and Dugard 2008.

⁵⁷ Section 142 Constitution. See generally Woolman 2007.

⁵⁸ Section 143 Constitution.

⁵⁹ *In re: Certification of the Constitution of the Province of KwaZulu-Natal*, 1996, 1996 (11) BCLR 1419 (CC).

⁶⁰ Section 82 Constitution of the Western Cape 1 of 1998. On the provincial constitution, see *In re: Certification of the Constitution of the Western Cape*, 1997 (9) BCLR 1167 (CC).

⁶¹ S 27(1)(a) Constitution.

⁶² *Minister of Health and other v Treatment Action Campaign* (1), 2002 (10) BCLR 1033 (CC) para. 93.

claimant had to show that this conduct was «unreasonable» and that providing the drug in all clinics was «within available resources» of all provinces, the two qualifications of the right.

To both questions the Western Cape's conduct provided the answer. It showed that by providing the drug the desired outcome was achieved. Mother-to-child infection was prevented, thus saving the lives of thousands of infants; any conduct to the contrary was obviously unreasonable. Furthermore, it showed that providing the drug in all clinics was well within the resources of the Western Cape. As all provinces were reliant on national transfers for 97 percent of their income, it was within the available resources of the other provinces as well. The Constitutional Court agreed with both arguments and ordered the roll-out of the drug to all clinics nation-wide. The end-result was a fine example of how innovation and experimentation by a province (such innovation being part of the rationale for federalism) gave content to the right of access to health-care services.⁶³ It is also a clear example of how standard-setting by a federal court took away the discretion of eight provinces. No one pushed, however, the argument for federal diversity where misguided provincial decisions were costing the lives of babies.

In 2010 the Constitutional Court went further with standard-setting by creating a new right – the right to basic municipal services, including electricity. A right of access to electricity is not included in the list of socio-economic rights (the rights of access to water, food, health services and housing). In order to force municipalities to provide electricity, human rights lawyers have argued that in an urban setting access to electricity is an integral part of realising the right of access to housing⁶⁴ (the need for heating), or food⁶⁵ (the need to prepare food), as well as other rights.

In a case where apartment dwellers could not rely on a private law contract with the City of Johannesburg to restore their access to electricity, they had to base their claim on a public duty of the municipality to provide electricity.⁶⁶ The City strongly objected because this would turn its competence to provide electricity in terms of private law contracts into an enforceable constitutional obligation. The Constitutional Court came to the assistance of the applicants, but chose not to base its order for the restoration of electricity supply on the right of access to housing.⁶⁷ Instead it formulated a new right, the right to basic municipal services, which includes access to electricity. Although no such right is mentioned in the chapter in the Constitution devoted to local government, the Court derived it from what was previously regarded as the unenforceable «objects» of local government,⁶⁸ namely, the general function of providing basic services.⁶⁹

⁶³ See Steytler 2003.

⁶⁴ S 26(1), quoted above.

⁶⁵ S 27(1)(b) reads: «Everyone has the right to have access to [...] sufficient food and water».

⁶⁶ *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC). The tenants in an apartment building made payment for their electricity consumption to their landlord, who was the contracting party with the municipality for the provision of electricity. The landlord received the money from the tenants, but never paid the electricity account to the municipality. The municipality thereupon cut off the supply to the building, leaving the tenants in a dire situation without electricity, one which was not due to any fault of their own. They could not sue the municipality for re-connection because there was no private law contractual relationship between them and the municipality, only between the municipality and the landlord, who was now bankrupt. The only avenue open was to claim a public right to electricity.

⁶⁷ Section 26(1) Constitution.

⁶⁸ Section 152 Constitution.

⁶⁹ At para 33. See further Steytler and De Visser 2012, ch 9.

From a federal perspective it is clear that the Court effectively transformed a municipal competence into an obligation; a discretionary power became a duty. How is the creation of a new right and obligation squared with a federal discourse of subnational autonomy? Although access to electricity is important for one's quality of life, it is not on the same scale as access to a life-saving anti-retroviral drug. Nevertheless, this decision can be justified if the matter is considered in a broader context, namely, the failure of local government in many parts of the country. One of the primary values of federalism is the democracy argument that subnational governments are more accountable to their electorate because they are closer to the people; accordingly, poor service delivery would in theory be punished at the polls. This rationale, however, does not hold with municipalities in South Africa, where, despite dismal performances by the majority of municipalities, the same majority party gets voted in year after year.⁷⁰ The country's current political configuration makes subnational accountability a far-flung prospect, and in the meantime the courts do not appear to be willing to sit back and accept the bitter fruits of federal diversity – that is, a lack of poor services and the rule of impunity. Instead they have commenced governing from the centre.

2.3 *Bill of Rights shaping the federal structures themselves*

The impact of poor governance by subnational governments also featured prominently in the second type of constitutional conversation about how the Bill of Rights may shape the federal structures themselves by either subtracting, or adding, functions or creating new structures.

2.3.1 Taking powers away

The central feature of provincial governments is that they share power with the national government with respect to a list of concurrent functional areas. Due to the fact that new provinces were created in 1994, a transitional arrangement held that, in the field of concurrent jurisdiction, the power of administering existing national legislation would be assigned to provinces should they have the capacity to administer them effectively. The administration of social security (pensions as well as various disability grants) was thus entrusted in 1994 to provinces, but ten years later an individual complainant, Mr Mashava, showed that the province of Limpopo was violating his right of access to social security⁷¹ through rank incompetence and maladministration.⁷²

Although «social welfare» is a national and provincial concurrent competency, Mashavha argued that the administration of the Social Security Act, 1992, in terms of which disability grants were dispensed, should never have been assigned to provinces because they did not have the capacity to undertake it. The Constitutional Court agreed: on the basis of a single case brought against one province, it declared invalid the assignment of the Social Assistance Act to all nine provinces ten years after the assignment became effective. The Court thus approached the problem as a single symmetrical issue and disregarded the diversity of performance by other provinces, some which did well and others of which, such as Limpopo, did badly. It applied the second, corrective, aspect of the principle of subsidiarity, namely, that if a lower level government fails in a task, the higher level government

⁷⁰ Booysen 2012.

⁷¹ S 27(1)(c) Constitution reads: Everyone has the right to have access to [...] social security, including, if they are unable to support themselves and their dependents, appropriate assistance.

⁷² *Mashavha v President of the Republic of South Africa and Others*, 2004 (12) BCLR 1243 (CC).

should step into the breach. However, the Court ignored the first, and primary, aspect of subsidiarity, namely, that an action should be performed by the government closest to the beneficiaries unless it is unable to do so effectively. Through the application of a single standard, all of the provinces were punished for the sins of a single one.

2.3.2 Adding powers

The primary aspect of subsidiarity was, however, the implicit basis for the Court's expansion of local government's obligations if not its powers. As noted at the beginning, in the first case on the right of access to housing, the Constitutional Court did not directly expand local government's mandate to provide emergency housing, but instructed the three spheres of government to provide collectively a roof over the head of the destitute woman, Irene Grootboom.⁷³ Because the question of whom was responsible was not determined, the three spheres of government squabbled uncooperatively among themselves about who was to provide shelter, and, at the end, Irene Grootboom died without a roof over her head.

When it was again confronted by an emergency housing case, the Constitutional Court – perhaps having learned from the Grootboom matter – did not hesitate to impose an obligation on the municipality alone to provide temporary shelter for persons evicted and left homeless. The City of Johannesburg was once more at the receiving end, arguing unsuccessfully that in terms of the constitutional division of powers it was not responsible for housing, including emergency accommodation: this was the function of the province of Gauteng, or of the national government.⁷⁴ For the first time the Court acknowledged that, in the case of homelessness, a right in the Bill of Rights «competes» with the constitutional allocation of powers between the three spheres of government.⁷⁵ However, the Court reasoned, the very situation of the City as «the main point of contact with the community»⁷⁶ was determinative of the resolution of the competition. The City is «best situated to react to, engage with and prospectively plan around the needs of local communities».⁷⁷ The City was thus ordered to provide, from its own resources, emergency housing for evictees left homeless.

What the Court did was in effect to rewrite the constitutional provisions outlining the powers and functions of local government. This foray into constitutional redrafting has, however, broad policy support; in the national government's current policy review of the allocation of powers and functions among the three spheres of government, there is broad unanimity that housing should belong to local government since it is key to the governance of urban areas and directly linked to important municipal functions such as water, sanitation, electricity and planning.⁷⁸ The underlying rationale for the Court's decision and the policy position on housing is the principle of subsidiarity,⁷⁹ a rationale which flowed not from a pre-existing norm but the necessities of practice: here, the question is which sphere of government is best situated to give the homeless shelter.

⁷³ *Government of the RSA and Others v Grootboom and Others*, 2000 (11) BCLR 1169 (CC).

⁷⁴ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (Lawyers for Human Rights as Amicus Curiae)*, 2012 (2) BCLR 150 (CC).

⁷⁵ At para 16.

⁷⁶ At para 45.

⁷⁷ At para 57.

⁷⁸ See National Planning Commission 2012, 434–435.

⁷⁹ De Visser 2011.

Although the Court expanded the functional areas of municipalities to include housing, it did so in a way that denuded this «new» competence from much of its discretionary content. Again, the only justification for the Court's «governing from the centre» is the plight of homeless people, people who deemed to be falling through the cracks in a system of cooperative government that does not offer them effective protection.

2.3.3 Source of new structures

The last question is whether the Bill of Rights may give rise to claims to further or new federal structures. In the Bill of Rights a faint whiff of group rights can be detected in the heavily circumscribed right to mother-tongue education⁸⁰ even though it has no territorial dimension. However, the Constitution does contain the right to self-determination, albeit that it is not included in the Bill of Rights but mentioned in a separate section at the end of the Constitution. This right was part of the compromise reached between the liberation movement and right-wing Afrikaners who sought to claim their own «volkstaat». Section 235 gives recognition to the «right of self-determination of any community sharing a common cultural and language heritage within a territorial entity» in the country.⁸¹ Although Section 235 couches this supposed right in the phraseology of a rights-based discourse, its value is undercut by the provision that it is to be determined by national legislation. In other words, if expressed in national legislation, section 235 could well lead to a new federal structure. Nevertheless, in the current dispensation this is a very distant likelihood; the provision is regarded as little more than a relic and souvenir from the era of the negotiated peace settlement.⁸²

2.4 *Concluding remarks*

To sum up, the South African conversations between the Bill of Rights and the federal structure have been mostly one-sided. The pre-eminent position of the Bill of Rights – the finest product of the new democratic dispensation – towers above the Constitution's federal elements, the utility of which have been consistently questioned by the ruling party. The Court's implementation of the Bill of Rights has had a strong centralising effect as well as having set uniform standards for provinces and municipalities, thereby limiting their scope for diversity. The Court's role can be explained partly by the lack of credibility of the federal system itself. Vital sustaining elements of a successful federal system are absent. First, a democratically accountable system is largely absent at provincial and local level in that poor governance is not punished at the polls, and, second, as a result of the first, poor service delivery continues with impunity. Most provinces have not been laboratories of innovation or experimentation but institutions instead for party-political patronage; for similar reasons many are all-but dysfunctional. In this milieu the Court has not taken the Constitution's federal aspects seriously. With the human needs of the poor crying out for state intervention, the Court – rather than protecting or increasing subnational autonomy – has used the Bill of Rights as a means of ruling from the centre.

⁸⁰ S 29(2) Constitution.

⁸¹ S 235 Constitution.

⁸² Steytler and Mettler 2001.

D) Conclusion

In conclusion, it is clear that the South African conversation echoes the international debate and may even contribute something to it, if only in a negative sense.

First, in most countries the conversation between the two parts of a federal constitution – the bill of rights and federal structure – is not between equals. Most often the Bill of Rights predominates, resulting in the centralisation of power and the standardisation of federal diversity. South Africa offers as an extreme example of this tendency.

Second, the centralising and standardising effects of a bill of rights have been moderated by some federal courts by establishing a minimum floor of rights, thereby inviting subnational governments to increase rights protection and allowing a margin of appreciation where the core values of particular rights have not yet been widely settled. Where the core values of life and dignity are at stake, the South African courts echo the international practice of allowing little or no subnational autonomy.

Third, the dynamics of the conversation between the federal structure and the bill of rights depend on a number of factors, including the text of the constitution, the political and historical context of the federal system, as well as the functioning of the federation. Where the federal structure lies at the heart of the constitutional enterprise (or later settles there), a more moderated constitutional conversation is likely. The Brazilian Constitution, which provides that no amendment may abolish the federal form, or the Indian Constitution, where the Supreme Court regarded the federal structure as an unamendable part of the Constitution,⁸³ may produce a very different conversation than that in South Africa, where the provincial structure is more of an irritant reminder of the negotiated past than something deeply valued by the state.

Whether this hypothesis holds will be nicely tested in the new Kenyan Constitution of 2010, which came into operation on 4 March 2013.⁸⁴ The Constitution lists, as national values, the «sharing and devolution of power, the rule of law, democracy and the participation of the people» and then continues with the values of «human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised».⁸⁵ Furthermore, both the Bill of Rights and the chapter on devolution are at the core of preventing the abuse of centralised power by an autocratic presidency. The protection of both devolution and human rights could arguably carry equal weight.

The functioning of the federal system is also critical. The impact of a bill of rights is unlikely to be moderated where the federal structures do not deliver on the basic values of federalism. The South African courts illustrate that federal diversity will not enjoy much consideration in situations where accountable democratic government and effective service delivery are not routinely produced by subnational governments and where rule from the centre becomes the only answer. This is of particular importance for fragile countries emerging from conflict and hoping that federal or devolved systems of government will enable them to address the causes of conflicts.

⁸³ Singh 2000, 510.

⁸⁴ See Ghai and Cotterill Ghai 2011.

⁸⁵ Article 10(2)(a) and (b) Kenya Constitution.

The final point to make concerns the role of federal structures in the protection of human rights. The notion originally underpinning federalism was that the diffusion of state power would limit the possibility of the abuse of power at the centre;⁸⁶ in addition, this would allow people greater access to participation in governance at lower levels as well as protect minorities.⁸⁷ Once again, South Africa provides a supporting example in the fact that a province contested a misguided national policy on HIV/AIDS, which led to it being overturned.

Subnational governments also have the potential to provide a complementary, or even better, system for the protection of human rights; but, of course, there is no guarantee they will do so. While the national rights discourse may predominate, subnational governments can make their voice better heard when they perform their function as constitutional laboratories, experimenting and finding innovative solutions to old and new problems, solutions which can then be replicated at federal level and so advance human security. It is a characteristic unique to federal systems, and gives them an enduring advantage over centralised systems.⁸⁸

This has also been the approach adopted by the Community Law Centre in its work in South Africa and elsewhere on the continent. Federal structures are not an end in themselves but important state institutions that can uniquely pursue the primary objectives of building peace, promoting development and limiting the abuse of centralised government. They can do so by means of innovative and effective governance that can realise human security within the transformative framework of human rights.

⁸⁶ Singh 2010.

⁸⁷ Woehrling 2011, 140.

⁸⁸ Fercot 2008, 321.

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