



Summary

This issue of **Constitutional *INSIGHTS*** deals with the questions presented by constitutional or legal arrangements that treat one region of a state differently from others. Differential treatment of this kind is sometimes described as ‘asymmetry’. Asymmetry is a feature of constitutional arrangements in all parts of the world. Examples of asymmetry on which this issue of *Constitutional INSIGHTS* draws include Jammu and Kashmir in India; Aceh in Indonesia; the Bangsamoro region in the Philippines; the Autonomous Region of Bougainville in Papua New Guinea; Sabah and Sarawak in Malaysia; and the Oecusse in Timor-Leste.

About this series

The Melbourne Forum on Constitution-Building in Asia and the Pacific is a platform co-organized by the Constitution Transformation Network and International IDEA.

It brings together scholars and practitioners of constitution building from across the region, to share their perspectives on critical issues, as a contribution to global understanding of the field.

This series captures insights from the Melbourne Forum in an accessible and practice-oriented format.

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Asymmetric Territorial Arrangements in Decentralized Systems

Introduction

This issue of *Constitutional INSIGHTS* deals with the questions presented by constitutional or legal arrangements that treat one region of a state differently from others. Differential treatment of this kind is sometimes described as ‘asymmetry’. It can be a useful tool in constitutional design. It may be particularly important in constitution building after conflict. For obvious reasons, however, it also may create envy or resentment on the part of other regions. Accommodating asymmetry in an existing constitution may, in some contexts, present other challenges as well.

Asymmetry is a feature of constitutional arrangements in all parts of the world. This issue of *Constitutional INSIGHTS* explores when, how and with what consequences it has been used in Asia and the Pacific. Practice in the region is integral to an understanding of global constitutional experience. The use of asymmetry in Asia and the Pacific offers insights for constitution building in states and regions elsewhere.

Examples of asymmetry on which this issue of *Constitutional INSIGHTS* draws include: Jammu and Kashmir in India; Aceh in Indonesia; the Bangsamoro region in the Philippines; the Autonomous Region of Bougainville in Papua New Guinea (PNG); Sabah and Sarawak in Malaysia; and the Oecusse in Timor-Leste. As these examples show, asymmetry can be used in a range of different systems: federations, devolved systems of government and more centralized unitary states. States in the region in which asymmetry could be a useful tool in the future include Myanmar and Sri Lanka.

This issue of *Constitutional INSIGHTS* addresses four key questions:

1. What does asymmetry involve?
2. In what circumstances is it useful?
3. What legal framework is needed for asymmetry?
4. What issues arise in the course of implementing asymmetry?

Asymmetry typically involves greater autonomy for one or more parts of the country than for others. Usually this means that a particular region has more legislative, executive or, sometimes, judicial powers to govern its own people than is the case elsewhere

1. What does asymmetry involve?

1.1. Symmetrical federalism or decentralization

There are inevitable differences between parts of the same country in terms of, for example, population size, wealth, access to natural resources and territory. There may be other differences, also: culture, language, history or religion. If these differences are sufficiently marked, they may be a catalyst for ‘asymmetry’ in constitutional arrangements. They do not themselves amount to tensions, however, within the meaning of this issue of Constitutional *INSIGHTS*.

Symmetry exists when parts of a state are treated equally for constitutional purposes. Most states are formally symmetrical. In some contexts, however, asymmetry may be useful and feasible. Asymmetry may involve differences in the autonomy of parts of the country vis-à-vis each other, or differences in the relationship of parts of the country to national institutions.

1.2. Asymmetrical federalism or decentralization

Asymmetry typically involves greater autonomy for one or more parts of the country than for others. Usually this means that a particular region has more legislative, executive or, sometimes, judicial powers to govern its own people than is the case elsewhere. Autonomy also can include distinctive governance arrangements; greater access to fiscal resources than other parts of the country; and privileges of various kinds, of which immigration control is an example.

Several examples illustrate the possibilities. For example, in Indonesia, five of the 34 provinces have special status: Jakarta (as capital city) Aceh, Jogjakarta, Papua and West Papua. Of these five, Aceh has the most extensive autonomy. The province has its own flag, crest and hymn and retains Sharia law. The administration of Aceh has the authority to govern all aspects of public affairs apart from those that are clearly national, such as foreign and defence policy; it has the right to retain 70 per cent of the revenues from current and future hydrocarbon deposits and other natural resources in its territory and territorial seas; it has the right to a special autonomy fund from the state budget, equal to 2 per cent of the national general allocation budget; and it has the right to form local political parties (which are otherwise prohibited in the rest of the country).

Malaysia offers another example. The states of Sabah and Sarawak joined the Malaysian Federation in 1963, under the Malaysia Agreement 1963, subsequently given effect in the Federal Constitution. Under the agreement, these two states retained legislative, executive and some judicial power over matters that fall under federal authority elsewhere in the country including, for example, employment and labour, merchant shipping, immigration, and native laws, including the establishment of native courts. There is fiscal asymmetry as well: Sabah and Sarawak are entitled to annual grants to cover state services; they also receive revenue from lands, mines, forests, water supply and entertainment duty. Sabah and Sarawak also are entitled to control immigration into their states from other parts of Malaysia. While the terms of the 1963 agreement have

been eroded in practice over the years, a degree of asymmetry remains and there are ongoing discussions about establishing a special task force to study the restoration of autonomy.

A third example comes from Timor-Leste, where Law No. 3/2014 created the Special Administrative Region of Oecusse (SARO) with a Special Zone of Social Market Economy. This has enabled the Timorese Government to transfer significant responsibility and powers over SARO's economic development to the authority of the Special Zone, including powers to enact policies and regulations aimed at facilitating investment.

1.3. Asymmetry in national institutions

Asymmetry is also possible, although less usual, in the way in which the interests of parts of the country are reflected in the design of central institutions. This might take the form, for example, of a guarantee of a minimum number of reserved seats in the legislature or the appointment of judges from particular parts of the country to an apex court. For example, in Australia, the island state of Tasmania elects five Members to the Commonwealth House of Representatives, relying on a constitutional guarantee of minimum representation, notwithstanding population size. In Canada, a minimum of three of nine Supreme Court judges must come from one of the 10 provinces, Quebec, which has a distinct legal system.

2. When might it be relevant to consider use of asymmetry?

Many different factors may influence consideration of asymmetry as a useful tool for constitution building and design. Often the factors are cumulative. The following are some of the most common.

2.1. Building peace and mitigating conflict

Asymmetry may be useful for conflict mitigation and peacebuilding. Asymmetrical arrangements can meet claims for (relative) autonomy and self-determination, counteract secessionist movements and resolve conflicts between the central government and substate units, while at the same time maintaining the integrity of the state as a whole.

PNG offers one of many examples. Following almost a decade of violent conflict, the Autonomous Region of Bougainville currently has special status, with its own constitution and its own President, legislature and courts. The 2003 Bougainville Peace Agreement, embedded in Part XIV of the 1975 PNG National Constitution and reflected in the 2005 Bougainville Constitution, sets out a list of powers would that continue to be exercised by the PNG Government, but leaves all residual powers to Bougainville. This includes specifically giving Bougainville 'power to decide on foreign investment applications for Bougainville', as investment (in particular in relation to extractive industries) was a particular issue of contention during the conflict. The Peace Agreement also provided that a referendum on Bougainville's independence would take place within five years of June 2015; a date of 15 June 2019 has been set.

Devolution arrangements often reflect religious, ethnic or other forms of cultural diversity in territorial divisions across a state. In such contexts, asymmetry may also be useful, to respond to the demands of particular communities for special status to meet their distinctive needs

A quite different example of the use of asymmetry to mitigate conflict is Jammu and Kashmir in India. This area has been bitterly contested between India and Pakistan since the partition of India in 1947. The circumstances in which the state acceded to the Union of India is reflected in its special autonomous status under Article 370 of the Indian Constitution. The asymmetrical autonomy of the state under Article 370 now is effectively permanent.

2.2. Managing multiculturalism and diversity

Devolution arrangements often reflect religious, ethnic or other forms of cultural diversity in territorial divisions across a state. In such contexts, asymmetry may also be useful, to respond to the demands of particular communities for special status to meet their distinctive needs. For example, in the Philippines, the Bangsamoro Basic Law (BBL) creates a special autonomous region with distinctive governance arrangements for Muslim Mindanao, a community that is part of the otherwise predominantly Catholic Philippines. In India, the Constitution includes asymmetric sub-state arrangements to support the special governance needs of India's unique tribal communities.

In West Papua in Indonesia, special autonomy arrangements have been enacted (though poorly implemented) in order to address the secessionist demands of the Papuan community who identify as being historically and culturally separate from Indonesians. In accordance with these arrangements, only native Papuans may be elected to the positions of governor and vice governor, while Javanese and other Indonesian ethnic groups are not allowed to become candidates. A new body also has been created that does not exist elsewhere in Indonesia, namely, the provincial level Papuan People's Assembly (MRP), which reserves a third of the seats for traditional or customary leaders, one third for women and one third from the religious establishment.

Aceh in Indonesia is another example of how special autonomy arrangements can be used to reaffirm the cultural identity of certain parts of a country. Aceh's special autonomous status reflects its distinct political, religious and ethnic identity, and Muslims in Aceh are generally considered to be more religious as compared to those in other regions of Indonesia. Accordingly, pursuant to *Law No. 6/2006 on the Governing of Aceh*, Aceh is the only province of Indonesia authorized to implement Sharia law.

2.3. Territories that are distinct for other reasons

There are many other reasons why parts of a country may be distinct in ways that make asymmetry useful.

Asymmetrical arrangements may be put in place where a territory is geographically separate from the rest of the country. Oecusse in Timor-Leste is an example. Asymmetry sometimes is used also for the governance of capital cities, to reflect their shared status by the whole of the country and the special circumstances of being the seat of national government. Delhi in India is an example.

Asymmetry may also prove useful in the administration of territories with distinct historical origins or other political significance. Hong Kong and Macau are examples, in the People's Republic of China.

While asymmetry is possible whether a state is federal, decentralized or unitary, it may be relevant to take into account the form of the state when designing asymmetrical arrangements

These territories were governed, respectively, by the United Kingdom and Portugal for a long period of time. They returned to China on conditions of special autonomy. As Special Administrative Regions (SAR) of China, they maintain their own economic, financial and administrative systems and enjoy considerable autonomy in relation to internal governance, trade and legal matters. Each SAR also has its own executive, legislative and judicial branches. However, foreign relations and military matters are the responsibility of the Central People's Government in Beijing, which also retains ultimate control.

3. How is asymmetry established?

Asymmetry is normally structural, involving the use of legal and/or institutional arrangements for part of a state that differ from those that apply elsewhere. Often, as in India and PNG, these arrangements have a constitutional basis. Sometimes, as in Indonesia, China and the Philippines, asymmetry relies largely on legislation. In some circumstances, this leaves the arrangements for asymmetry vulnerable to constitutional challenge.

While asymmetry is possible whether a state is federal, decentralized or unitary, it may be relevant to take into account the form of the state when designing asymmetrical arrangements. (Kwa 2017).

3.1. Asymmetrical arrangements in federal states

In a federal state, the constitution will set out arrangements for self-rule and shared rule. In such circumstances, specific provisions will be necessary to vary these for the purposes of asymmetry. For example, in India, which is a federal country, the Chapter on 'The States' outlines the norm for constitutional authority for States in India. However, the Constitution explicitly exempts the State of Jammu and Kashmir, which has special status, stating for example, 'In this Part, unless the context otherwise requires, the expression "State" does not include the State of Jammu and Kashmir.' This special status is strengthened by Article 370 (1)(b)(ii) which limits the power of the Parliament to make laws for the State of Jammu and Kashmir to foreign affairs, defence, currency and communications (as specified in the Instrument of Accession through which the state joined the Union of India in October 1948).

3.2. Asymmetrical arrangements in unitary states with decentralizing features

In a state that is unitary but with substantial decentralizing features contained in the constitution, constitutional change to authorize asymmetrical devolution of powers to particular sub-national governments is likely to be necessary.

PNG offers an example. The original Constitution merely made it possible for a system of provincial government to be established by organic law. A threat of secession from Bougainville led to the first amendment to the Constitution, to provide a framework for the provincial system. Later amendments weakened devolution, contributing to conflict in Bougainville and renewed pressure for

independence. A Peace Agreement in 2001 required Bougainville to be given special status as an autonomous region, which was achieved by further constitutional change (Wallis 2014).

As noted by Erik Kwa at the Second Melbourne Forum on Constitution-Building in Asia and the Pacific,

‘The lesson to be learnt from PNG’s experience is that people in different parts of a country who aspire to have a greater say and control over their development must be given that opportunity. This can be achieved through various levels of devolution without sacrificing the unity of a country. The constitutional framework of a country must therefore provide for devolution to achieve and maintain unity’ (Kwa 2017: 4).

3.3. Asymmetrical arrangements in unitary states lacking devolution

In a state that is unitary but where the constitution says little or nothing about devolution, asymmetry may be attempted through ordinary law, on the assumption that this is consistent with the constitution. This may create difficulties though, if the degree of special autonomy granted by a new law is argued to be greater than that allowed by a constitution implicitly based on unitary principles.

For example, in the Philippines, a long-running conflict between the Government and the Moro Islamic Liberation Front (MILF) resulted in a 2014 peace agreement which called for the establishment of an autonomous region covering Muslim Mindanao. The Bangsamoro Basic Law (BBL) was drafted to create the region, but some commentators argued that the BBL conflicted with the 1987 Constitution (e.g. because it establishes a parliamentary system for the region which is different to the national presidential system). If that were correct, inconsistencies would need to be resolved by amending the Constitution.

3.4. Hybrid arrangements

A hybrid approach also may be used to give effect to asymmetric arrangements. For example, Hong Kong’s governing system was established via the Basic Law of the Hong Kong Special Administrative Region. The Basic Law serves as Hong Kong’s ‘mini-constitution’ and was drafted in accordance with the Sino–British Joint Declaration of 1984 between China and the United Kingdom.

Similarly, the Basic Law of the Macau Special Administrative Region is the constitutional document of Macau and was drafted in accordance with the Sino–Portuguese Joint Declaration of 1987. Although both laws serve as the constitutional basis for each region, these laws were adopted by the National People’s Congress of China. Moreover, Article 31 of the Constitution of the People’s Republic of China allows China to establish Special Administrative Regions pursuant to legislation.

Whatever method or type of asymmetry is employed, there is an overarching need to ensure that the region has the capacity to exercise the authority conferred on it

4. What issues may arise in the course of implementing asymmetry?

4.1. Similar demands from other regions

One of the most challenging aspects of asymmetry is the perceived threat such arrangements sometimes present to the integrity of the nation as a whole.

As the cases of Aceh, Bougainville and Mindanao demonstrate, asymmetric arrangements are often the response to conflict and/or secessionist movements, causing central governments to be wary of embracing them in case they trigger additional calls for greater devolution of power from other subnational units.

This has been the case in Indonesia for example, where West Papua continues to demand stronger autonomy (and/or independence) and in PNG, where other provinces from throughout the country have witnessed Bougainville's development and demanded greater autonomy from the centre. In recent months, the PNG Government has responded positively, by pushing forward with a decentralization programme designed to enable provinces to obtain greater autonomy once they meet certain criteria.

4.2. (Lack of) capacity

As with decentralization of powers in general, whatever method or type of asymmetry is employed, there is an overarching need to ensure that the region has the capacity to exercise the authority conferred on it. Capacity requires consideration of the ability to govern; the effectiveness and integrity of institutions; and the adequacy of fiscal resources.

Greater autonomy is likely to require the allocation of greater resources, whether in transfers from the centre or the right to retain own-source resources or both. Considerations of capacity should be taken into account both in designing asymmetry and in the course of transition to asymmetrical arrangements.

4.3. Consistency with the constitution

If asymmetry for a particular region or regions is implemented by ordinary law, it will be necessary to consider whether these arrangements and any consequences that follow from them are consistent with the constitution of the state as a whole.

This has been an issue in the Philippines, where successive versions of legislation to provide autonomy for the Bangsamoro have been claimed, sometimes successfully, to be inconsistent with the Constitution.

As that example shows, inconsistency may not be explicit but may lie in implications about the extent of asymmetrical autonomy that can be granted under an otherwise unitary constitution. In a case of this kind, constitutional amendment may be needed to safeguard the validity of the autonomy law and to dispel any uncertainty about it.

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The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.

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About the Constitution Transformation Network

The Constitution Transformation Network within Melbourne Law School brings together researchers and practitioners to explore the phenomenon of constitutional transformation.

<http://law.unimelb.edu.au/constitutional-transformations>

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Colophon

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Aceh, in Indonesia, offers an example of another kind. Implementation of significant autonomy in Aceh gave rise to several points of potential inconsistency with the Constitution of Indonesia, which needed to be resolved by the Constitutional Court. Thus, for example, Article 256 of the Law on the Governing of Aceh, which precluded independent candidates from running for elections in Aceh, was found unconstitutional by the Constitutional Court on the ground that it breached certain legal rights enshrined in the Constitution.

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