

**Ask Forgiveness, Not Permission**

**Practical Steps Towards  
Home Rule in South Africa**

Martin van Staden



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HOME RULE IN SOUTH AFRICA

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# ASK FORGIVENESS, NOT PERMISSION

## PRACTICAL STEPS TOWARDS HOME RULE IN SOUTH AFRICA

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### ABSTRACT

The Constitution of the Republic of South Africa is per definition a federal one. It entrenches original authority for all three spheres of government – central, provincial, and municipal – whereas in a unitary state the scope of provincial or municipal government would be left entirely to the discretion of the central government.

Nonetheless, given the ideological convictions of the political party that has controlled South Africa's central government since the Constitution's adoption, the country's political scene has been one of centralisation. South Africa is a federation without federalism.

The collapse of the central government and the immense harm it has done to the economy and to society however necessitates widespread decentralisation – or, stated positively, Home Rule – to be brought about. This will in all likelihood not occur as a result of devolution (a concession by the central government) but must increasingly occur as a result of unilateral action on the part not only of provinces and municipalities, but also of organised communities and businesses.

This paper explains in detail how South Africa's constitutional federation provides scope for benign and pro-decentralisation governments and communities to start 'getting things done.' This is not a riskless or easy exercise, but a necessary one.

### CONTENTS

Introduction – Commit no nuisance here .....	1
Centralisation and Home Rule – The problem and the solution.....	2
In and beyond the Constitution.....	10
Community federalism .....	20
<i>Do, don't ask</i> – Implementing (and maintaining) Home Rule .....	23
Conclusion – From <i>ex unitate vires</i> to <i>unitas in diversitate</i> .....	42

## INTRODUCTION

### COMMIT NO NUISANCE HERE

'Commit no nuisance here' were the words that William Porter, Attorney General of the Cape Colony, chose to relay to his superiors in Britain when they sought to designate the Cape as a prisoner colony in 1849.<sup>1</sup> While he was formally and legally subordinate to the Imperial government, Porter was accountable to the people of the Cape, and he decided to protect and serve their interests rather than give in to the political preferences that emanated from afar.

Porter's contemporary, Saul Solomon, later to be a prominent member of the Cape Parliament – equally subordinate to Britain – complained that the Imperial government's attempt to impose itself on the colony amounted to a government that is:

[...] virtually irresponsible, necessarily distant and therefore ignorant of the circumstances and indifferent to the interests of the colonists. Is it any wonder that a government so constituted should be embarrassed and crushed to the earth by its own burdens? Is it any wonder that such a government should obstruct when it is inactive, and injure when it is in motion?<sup>2</sup>

The federalist tradition in the Republic of South Africa is an old and proud one.

It was revived in the first half of the twentieth century by English South Africans in Natal who saw centralised power as a threat to their linguistic and cultural institutions and bonds. In the 1970s, black South Africans in KwaZulu realised that federal decentralisation would be a potent antidote to the authoritarian racial ideology of the National Party (NP) government.

This lesson was learnt, and in the 1990s a federal Constitution was adopted. What hindered the Constitution's federal character from shining through was the absence of a committed federalist

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<sup>1</sup> McCracken JL. *New Light at the Cape of Good Hope – William Porter: The Father of Cape Liberalism*. (1993). Belfast: Ulster Historical Society. 117.

<sup>2</sup> Solomon WEG. *Saul Solomon: THE Member for Cape Town*. (1948). Oxford: Oxford University Press. 19.

ecosystem, alongside the presence of a committed centralist political party in the form of the African National Congress (ANC) that would be the first to govern under it.

Despite the anti-authoritarian pedigree of South Africa's federalist movement, due to the NP government's lip-service to decentralisation with the ethnic homelands, any calls for federalism or even unitary devolution in South Africa today are often met with accusations of a racist desire to bring about 'neo-Apartheid.'

But the decentralisation of political power is no less important in South Africa today than it was during the previous century. Three decades after the democratic dispensation came into being, centralised control has brought ruin to the country's socio-economy.

The time to revive the drive for decentralisation is upon us.

Decentralisation, however, is an inapt word, for 'centralisation' remains its root. To say one favours 'the opposite of centralisation' would not do.

Instead, the agenda is a positive one: that, in general, most important social, political, and economic affairs in people's lives should be determined by the people involved themselves, rather than faraway, usually unaccountable bureaucrats or politicians. This is the agenda of *Home Rule*.

## **CENTRALISATION AND HOME RULE**

### **THE PROBLEM AND THE SOLUTION**

#### **Three decades of centralisation**

Most people would ascribe the collapse of South Africa's economy to the incompetence and incapacity of the ANC central government. The reality is that incompetence and incapacity is found in all political parties at different times and in different forms. The reason the ANC's incompetence and incapacity has been so ruinous, is because of the phenomenon of *concentration risk*.

If all the roads and highways into Johannesburg were demolished and only the N1 remained, it follows that if anything or anyone caused the N1 to be blocked or impassable, ruin would follow for the city. This is because a single fatal point of failure (the N1) was created in the place of having multiple, dispersed potential points of failure (the various roads and highways that today grant access to the city). Risk was concentrated, in other words.

The political system is no exception.

If the central labour department is responsible for setting labour policy for the whole country, if it sets the wrong policy it means the whole country would have to live with the consequences. Similarly, if the central police service is responsible for policing the whole country, if that service is incompetent or incapacitated for any reason, the whole country would sit with a gap in law enforcement.

Getting things wrong or lacking skills and resources are a relatively benign risk inherent in centralisation. But there is also the possibility of having a malicious actor gaining access to the immense power represented by centralisation. Political abuses – such as the central government denying funding to political opponents in provincial or municipal governments, or outright using the security services to victimise dissidents – are also a distinct possibility.

The cure here is not simply to attempt to ‘fix’ the central labour department or the central police service. This might be a temporary solution, but the reality is that at any point in the future, and for any presently unforeseeable reason, the labour department or police service could once again set the wrong policy or become incompetent or incapacitated, or seek to use their powers for malicious purposes. Sorting out corruption, appointing key functionaries based on merit, and making more resources available, is only one, small part of solving the problem.

The most important reform is the elimination of concentration risk.

## The benefits of Home Rule

### *Diffusion of risk*

When the responsibility to do something is spread across a wide variety of points of authority, a failure at one point need not mean the failure of the whole. This is why a market-based economy is necessarily better equipped to deal with economic problems like shortages than a centrally planned economy would be.

If there are many large petroleum companies in the country, some of which import from the United States, some from the Middle East, and some from Russia, if for any reason imports from the Middle East need to slow down or cease, it would not mean the whole country will run out of petroleum. The risk is not concentrated.

Allowing every municipality to have its own fully-fledged police service – even without abolishing the central police service – means that if something goes awry with the central police service, people’s liberty and property will still be protected. Where a given municipality lacks the capacity to have its own police service, it could contract with neighbouring municipalities, with the province, or with the central government – as is the case in Canada, for example.

Furthermore, allowing every province to generate its own revenue means that provinces and the municipalities that fall under them would be protected from potential political victimisation by the centre.

### *Lower political temperature*

The more centralisation there is, the more resources and power are necessarily concentrated in a single point of *capture*. What this means is that this single point becomes a target, a temptation, for political forces that seek access to significant resources or power. This raises the stakes, intensity, and temperature of politics and democratic discourse significantly.

If the central government represents R1 trillion in collected tax revenue, it would be a significantly more handsome bounty to win than if tax collection was decentralised to the municipal level. Those

who seek to loot tax coffers would under such circumstances have to win elections in every individual municipality, rather than in a single countrywide election.

So desperately did the NP want to hang onto the immense power and resources of the centre during its 'reformist' phase, that it spent the better part of the 1980s clinging onto the notion of 'power-sharing' when it could and should have been adopting federalist reforms. The NP only became, for the briefest of moments, a federalist party after its 1991 Bloemfontein congress. This came decades after federalism had already appeared as part of the value-statements of the Progressive and Liberal parties, Inkatha, and held out as a viable solution to South Africa's woes by various independent academics and organisations that were opposed to the NP's system of racial authoritarianism.

By the time that the negotiations to end Apartheid were fully underway between late 1991 and 1993, the NP had abandoned any federalist designs it may have had.

The ANC, in the 1990s, also made it clear that it sought access to centralised power so that it may rent-seek and redistribute wealth at a grand scale.

'Who' controls the central government today, then, is a question of huge importance, due to the degree of authority it exercises and the amount of resources it has control over. Had there been a higher degree of decentralisation – or if Home Rule is embraced in the future – South Africans would not be in a constant state of worry about the identity of those occupying the Union Buildings.

### *Enrichment of democracy*

Whether it is an ANC province or municipality, or a Democratic Alliance (DA) subcentral government, it has become routine for provincial or municipal officials and politicians to say, 'that is Pretoria's responsibility, not ours.'

This shifting of the buck hinders local democracy. South Africans are most in touch with their municipal councillors, often in WhatsApp



groups or simply living nearby to them. For councillors to shrug in the face of a service delivery issue and say the municipality cannot solve the problem often places residents in a position of hopelessness.

The more power is decentralised – the greater the degree of Home Rule – the more difficult it becomes for local politicians and officials to shirk responsibility. The principle of subsidiarity, recognised as a principle of the Constitution, states simply that if an issue *can* be handled at a more local level, it *should* be handled at a more local level.

Alongside this greater sense of responsibility comes a greater scope for self-government.

As things stand, local and provincial residents are receivers of policy, rather than originators of it. One of the consequences of this is that most of South Africa's municipalities have lost their distinct identities. Joblessness, crime, and a lack of service delivery are virtually indistinguishable problems across the country – with some notable exceptions – because the causes of these problems are all centrally decided and entrenched. Diversity suffers as a result.

When more local dispensations acquire the authority and responsibility for making these determinations themselves, South Africa will become a laboratory of hundreds of experiments in public policy.

People all around the country will be enabled to see for themselves what works and what does not. Those municipalities that have done well will be rewarded with both new businesses and skilled people migrating towards them, but also recognition as other municipalities seek to implement the same good ideas in their own areas.

## **Responsibility: The key ingredient**

*Tired, old argument*

In the 1980s and 1990s, the most notable argument against federalism was that of so-called 'distributive justice.' If South Africa federalises, the argument went, there would be a few extremely wealthy areas and many extremely poor areas. The wealthy areas would have hidden

behind federalism to hoard their wealth while the poor areas collapsed.

The superficial details of this argument remain largely true today. But there is a new, added dimension, which is more popular among the federalist opposition formations than it is with the central government. This is the reality that most of South Africa's provinces and municipalities tend to be governed by corrupt, inept, and incompetent institutions. The notion that these entities must be given even greater responsibility and authority is rejected with contempt.

Some of these formations have gone as far as to say that, should they win the general election and take over the reins of the central government, certain functions will only be devolved to 'competent' provincial and municipal authorities.

But the honeymoon is over.

South Africa has been experimenting with the centralised fiscal arrangement for three decades, yet the same areas tend to remain wealthy, and the same areas tend to remain poor. Centralisation did not yield the distributive gains the centralists said that it would.

Instead, it yielded exactly the abuses that the federalists warned about: protections for minority interests have had to migrate out of the legal realm into the private realm, respect for individual liberties are quickly evaporating with Parliament in the process of destroying one of the most important constitutional rights, private property. At the same time, the wealth that was ostensibly to be redistributed has largely been looted and lost to waste and incompetence.

This is to say that too much water has passed under the bridge for the centralists, today, to regurgitate the same, tired argument that fuller decentralisation would allow certain regions to hoard wealth at the ostensible expense of poorer regions.

The centralists have had their chance – they ate and drank away every opportunity for growth.

## Consequences

Home Rule does not merely refer to ‘more localised power.’ Rather, responsibility for failure is just as crucial. If a federally-minded central government were to come to power in South Africa, it should certainly decentralise *power*, but it must also allow provincial and municipal governments – and their voters – to face the *consequences* of their decisions.

If we take the view that municipalities and provinces must be allowed to govern themselves well, we must necessarily also take the view that they must be allowed to govern themselves poorly. If this is not the case, we do not truly believe they must be allowed to govern themselves at all.

A central government that respects Home Rule understands that it is not parental figure, with the provinces and municipalities being its children.

Federalism is preferable to mere devolution – both forms of Home Rule, nonetheless – because it takes responsibility seriously. In a federal dispensation, if any sphere of government fails, it must pick up the pieces, or its residents must pick someone else to do the job. The faraway central government is not available to stand in as surety.

If voters in a municipality choose an administration that has a history of looting and pillaging, those voters must live with the consequences of that decision. In a federal dispensation, the central government must respect those voters’ wishes.

Of course, voters will not mindlessly keep voting for their own ruin, especially if the locus of authority is close by.

Indeed, poorer areas, in a South Africa that takes Home Rule seriously, will be disciplined by reality and not protected by faraway corrupt elites.

To succeed, they will have to free their internal markets and incentivise investment. All South Africa’s areas have something to offer – poverty is not part of their environmental genetics. They can

succeed if they decide to. And federalism will take away the incentives for failure – they will be forced to succeed, or to collapse.

Putting them in charge of their own lot will bring things into focus. It will finally enable provincial and municipal constituencies to hold those responsible accountable, and it will incentivise creativity in the generation (and, crucially, retention) of government revenue.

Cutting these territories off from Pretoria's teat is the first most important step in teaching responsible governance. This is especially true in light of their lack of willingness to appropriately steward scarce taxpayer resources.

It is true that such a cut-off will be painful. But it is necessary. Local communities must stop allowing their mayors and councillors to point to Pretoria and say, 'not my problem.' Only local residents can *make* it the local government's problem.

Shifting blame does not impress, nor does it help anyone. Opposition-controlled provinces and municipalities believe that it revs people up when it points to the central government when they are criticised for failing to address serious local issues. The reality it is that it looks pathetic.

Opposition governments should instead just do what needs doing, even if the central government is formally 'responsible' for that function.

### *Start from zero*

It is also not an accident, or determined consequence of history, that municipalities largely cannot afford the things they want today. If they had not been hotbeds of corruption or mismanagement local businesses would not have fled for the hills.

In other words, they must regain the confidence of business and attract entrepreneurship, and in so doing capacitate themselves.

Indeed, one of the crucial points missed by the centralists during the transition who complained of recognising responsibility and authority

in poorer regions, is that there is nothing wrong with starting at zero and building up from there.

Singapore and Hong Kong were not wealthy from year zero. They implemented policies that were attractive to local and international commerce, and they exuded competence and professionalism every step of the way. This can be true for any South African municipality or province that takes its responsibility to its people seriously enough.

True Home Rule will doubtless mean short-term pain for municipal and provincial governments that have grown accustomed to misbehaviour and corruption, and then being bailed out by the central government. However, in the long-term – if communities hold their local representatives to account – significant political decentralisation will turn out to be just what the doctor ordered for a flourishing future.

## IN AND BEYOND THE CONSTITUTION

### Doing versus asking

#### *Devolution*

Federation and devolution are both concepts of political decentralisation and recognise the principle of Home Rule.

Devolution is a concept known primarily within unitary states. A unitary state is one where constitutional authority vests in a single sphere of government: the central or 'national' sphere. This government, in all unitary states, has the discretion to create other subcentral governments, and to delegate some of its own powers to them and to retrieve those powers back from them. This is an act of *devolution*, known in Afrikaans as *die afwenteling van magte* – the passing of powers downwards.

In a unitary state, if a subcentral government wants to do something outside of what has been delegated to it, it needs to ask and negotiate for the power to do so.

#### *Federation*

Federation, on the other hand, is an institutional arrangement where constitutional authority is not vested exclusively in a single sphere of government, but rather dispersed, usually across two spheres, but in South Africa across three. These spheres of government have original constitutional authority (and hence power) that they may wield without permission from above.

There are three characteristics that define a federal state, according to constitutional expert Douglas Irvine:

- The federal component (the subcentral unit) cannot be abolished without its own consent;
- The federal component has an area of original (constitutional) legislative and administrative competence; and
- The federal component has the right to participate in the governance of the whole federation.<sup>3</sup>

Kader Asmal, a senior ANC lawyer during the transition, acknowledged in 1994 that in a federal state 'the allocation of power between a federal and a provincial government is [expressly] delineated' as opposed to left to the discretion of the central government.<sup>4</sup>

Daniel J Elazar, a globally recognised authority on federalism, right before the transition in South Africa began, recommended federalism as a solution to South Africa's seemingly intractable problems. He wrote:

"If a political system is established by compact and has at least two "arenas," "planes," "tiers," or "levels" of government, each endowed with independent legitimacy and a constitutionally guaranteed place in the overall system

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<sup>3</sup> Irvine D. 'Federalism and the new constitution' in Johnston A, Shezi S, and Bradshaw G (eds). *Constitution-Making in the New South Africa*. (1993). London: Leicester University Press.

<sup>4</sup> Asmal K. 'Federalism and the proposals of the National and Democratic parties' in Licht, RA (ed). *South Africa's Crisis of Constitutional Democracy: Can the US Constitution Help?* (1994). Washington DC: AEI Press. 47-61.

and possessing its own set of institutions, powers, and responsibilities, it is deemed to be federal.<sup>5</sup>

Today South Africa is, evidently, a federation in law, and not a unitary state.

### *Degree of centralisation*

Some unitary states, like the United Kingdom, devolve significant powers and functions to subcentral units like Scotland and Northern Ireland. Some federations, on the other hand, like Russia, are quite centralised.

Devolution also exists in federal states, to be sure, meaning that the federal government often has the discretion to devolve powers that have been constitutionally entrusted to it, to subcentral units.

It may therefore happen that some unitary states are more functionally decentralised than some federations. The status of a country as a unitary state or a federation, in other words, says less about the *degree* of centralisation, but simply distinguishes between those countries where decentralisation is a matter of central government discretion, or a matter of constitutional entrenchment.

## **South Africa, the federation: Constitutional provisions**

### *Original, not discretionary, authority*

In South Africa, the provinces and municipalities have original constitutional authority, as opposed to the unitary model where authority is not constitutional but discretionary on the part of the central government.

The provinces have constitutionally defined authority, including a set of exclusive provincial areas on which they may legislate, found in

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<sup>5</sup> Elazar, DJ. 'Peace and justice in South Africa are still possible.' (1985). Jerusalem: Jerusalem Center for Public Affairs. 12 (hereafter *Peace and justice in South Africa are still possible*).

Schedule 5 of the Constitution.<sup>6</sup> They may also legislate concurrently with the central government on certain matters found in Schedule 4 of the Constitution, subject generally to the rule that conflicts will be resolved in favour of the central government.<sup>7</sup>

The provinces are equally represented in the upper house of Parliament, the National Council of Provinces (a classical federal institution), which must consent to the alteration of any provincial boundaries, powers, or institutions. Even municipalities have central representation through the South African Local Government

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<sup>6</sup> Insofar as the province as a whole relates, these are the matters of exclusive provincial legislative competence: abattoirs; ambulance services; archives other than national archives; libraries other than national libraries; liquor licences; museums other than national museums; provincial planning; provincial cultural matters; provincial recreation and amenities; provincial sport; provincial roads and traffic; and veterinary services excluding regulation of the profession.

Insofar as municipalities within the province relate, these are the matters of exclusive provincial legislative competence: beaches and amusement facilities; billboards and the display of advertisements in public places; cemeteries, funeral parlours, and crematoria; cleansing; control of public nuisances; control of undertakings that sell liquor to the public; facilities for the accommodation, care, and burial of animals; fencing and fences; licensing of dogs; licensing and control of undertakings that sell food to the public; local amenities; local sport facilities; markets; municipal abattoirs; municipal parks and recreation; municipal roads; noise pollution; pounds; public places; refuse removal, refuse dumps, and solid waste disposal; street trading; street lighting; and traffic and parking.

<sup>7</sup> Insofar as the province as a whole relates, these are the matters of concurrent national and provincial legislative competence: administration of indigenous forests; agriculture; airports other than international and national airports; animal control and diseases; casinos, racing, gambling, and wagering, excluding lotteries and sports pools; consumer protection; cultural matters; disaster management; education at all levels, excluding tertiary education; environment; health services; housing; indigenous law and customary law; industrial promotion; language policy and the regulation of official languages; media services directly controlled or provided by the provincial government; nature conservation, excluding national parks, national botanical gardens, and marine resources; police; pollution control; population development; and property transfer fees.

Insofar as municipalities in the province relate, these are the matters of concurrent national and provincial legislative competence: air pollution; building regulations; child care facilities; electricity and gas reticulation; firefighting services; local tourism; municipal airports; municipal planning; municipal health services; municipal public transport; municipal public works; pontoons, ferries, jetties, piers, and harbours, excluding the regulation of international and national shipping; stormwater management systems in built-up areas; trading regulations; water and sanitation services limited to potable water supply systems and domestic wastewater and sewage disposal systems.



Association (SALGA), an institution required by section 163 of the Constitution.

The central government in South Africa cannot revoke the authority that the provinces and municipalities enjoy in terms of the Constitution.

South Africa is therefore not 'unitary' and not 'quasi-federal.' It is simply federal. There is a high degree of centralisation, especially in legislation but also in the Constitution, but this does not mean the Constitution is not federal.

The Constitution was written in this way because federalism was, in all but name, required by Principles 16 to 27 of the 34 non-negotiable constitutional principles contained in the interim Constitution, adopted during the transition. South Africa is unique in that even local government has constitutionally defined authority, which in a traditional federation is usually left entirely to the discretion of provincial legislatures.

By virtually any constitutional definition, South Africa is a federation. And with the unique position of local government in our constitutional dispensation, South Africa is doubly federal.

### *Federation without federalism*

The mere fact that South Africa is, legally, a federation, does not mean South African political culture is one of *federalism*.

The Center for the Study of Federalism distinguishes between federalism as a form of government (federation), and the principle of federalism. As a principle, a federal arrangement must check the 'forces of centralization [on the one hand] and anarchy [on the other]' and aim 'at establishing justice among the consenting partners and ensuring liberty.'<sup>8</sup> Elazar, too, notes that it has long been clear 'that many polities with federal structures were not federal in practice.'<sup>9</sup>

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<sup>8</sup> Center for the Study of Federalism. 'Exploring federalism.' <https://federalism.org/about/what-is-federalism/>.

<sup>9</sup> Elazar *Peace and justice in South Africa are still possible* 13.

The fact that it escapes most people that South Africa is a federation is reason enough to conclude that the federalist principle is absent from our political culture for the time being.

The United States of America is rarely referred to as a 'federation' – usually it is called a 'republic' or a 'union' – but everyone in America knows that it is in fact a federation. Often, although not always, American state governments stand up for their autonomy and sometimes push the boundaries of that autonomy, much to the annoyance of a federal government that can only issue threats and withhold grants. In South Africa, by contrast, the governments of most – perhaps all – provinces, behave as though they are satellite offices of Pretoria.

While our model of federation is more constitutionally centralised than one would find elsewhere, the outer boundaries of South Africa's federation have not yet been tested. Indeed, this is another indication of the lack of federalism among South Africa's political elites, even in opposition parties. As Shelley Loe and Russel Crystal once wrote, the DA, despite governing a province and various municipalities, still allows the central government (its opponents, the governing ANC), to set its political agenda.<sup>10</sup>

One further indication of this is the dearth of litigation between provinces and municipalities and the central government to define the scope of subcentral authority more clearly. Were provincial and municipal governments truly committed to testing the limits of constitutional decentralisation, many such cases would have been evident in South Africa's law reports.

### *The mighty municipality*

One distinguishing mark of South Africa's federation is its hourglass shape. As a centralised federation, the bulk of authority resides at the

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<sup>10</sup> Loe S and Crystal R. 'Alternative opinion: Steenhuisen must put back those posters!' (2021). *The Citizen*. <https://www.citizen.co.za/news/opinion/2700546/alternative-opinion-steenhuisen-must-put-back-those-posters/>.

centre. The residual power is not vested in the provinces, however, but with the municipalities.

This is counterintuitive, and a reality not yet grasped by federalist politicians who remain preoccupied with provincial government.

According to sections 156(4) and, in particular, 156(5) of the Constitution, municipalities have *general* constitutional authority. This effectively means that they may do *whatever is necessary* to fulfil their constitutional mandate, found in section 152(1), which is broad and includes the promotion of 'social and economic development.' In other words, despite the list of 'items' that provinces may legislate on as found in Schedules 4 and 5 of the Constitution, municipalities may govern any and everything should it prove necessary to the municipal mandate.

Provinces, then, do not have comparable general constitutional authority. They have a limited, enumerated list of things in which they may be involved. Any other functions must be expressly delegated to them from the centre or from municipalities.

Section 156(4) further strengthens the municipal hand by obliging (this is not a matter of discretion) both provincial governments and the central government to assign matters 'necessarily' relating to local government but falling within the competences of the central or provincial government in Schedules 4 and 5 of the Constitution, to municipalities. The only real requirement is that the respective municipality must have the requisite capacity to administer that matter.

The central and provincial governments are also expressly prohibited from '[compromising] or [impeding] a municipality's ability or right to exercise its powers or perform its functions,' by section 151(4) of the Constitution. Outside of a general reading of section 41 of the Constitution which provides for cooperative governance, no similar express provision exists for central government impeding provincial governments.

The municipal sphere of government, in other words, is the ideal sphere to focus efforts towards Home Rule. While provinces have

more limited authority, they remain important. But the focus must shift from the province to the municipality, leaving the province, in general, in a coordinative, supporting, and oversight function.

### *Neither subservient nor dominant*

Sections 40 and 41 of the Constitution are explicit about the fact that the three spheres of government are not subservient to or dominant over one another.

This means that provincial premiers do not have to seek permission from the President to do their work. They need only look to the Constitution to see the scope of their authority. Similarly, mayors do not have to seek permission from premiers to do their work in their municipalities either. They, too, need only look to the Constitution and legislation that respects constitutional bounds.

That our subcentral governments have deferred (too much) to the central government is not a question of legality, but one of political will and obsequy.

## **Constitutionalist principles**

### *Subsidiarity*

The written text of the Constitution is not the only source of constitutional law nor principle. In the context of Home Rule, perhaps the preeminent principle not explicitly found in the Constitution, but nonetheless rightly regarded as a constitutional principle in South Africa, is subsidiarity.

Subsidiarity is the notion that governance must take place at the lowest possible level where it would nonetheless remain effective. If something can be done more locally, it should be done more locally.

At some point, Cedar Road in Fourways, which used to be a Johannesburg municipal road, was taken over by the Gauteng provincial government. Whenever there is a service delivery issue on that road, such as potholes or a broken traffic light, municipal councillors shrug their shoulders and say, 'It's a provincial matter.'

This is, evidently, a negation, not a promotion, of subsidiarity. Residents have significantly less access to the provincial government – provincial elections are indirect and there are no constituency-based officials or politicians to hold accountable. In this context, subsidiarity would have demanded that traditionally municipal concerns on Cedar Road – like potholes, traffic lights, etc. – remain within the purview of the municipality, even if other aspects, like road expansion, upgrade, or tolling, had to reside within the provincial sphere.

Nonetheless, provinces have generally been at the losing end of authority.

In promoting subsidiarity in the provincial sphere, even though they have a small list of things that they may hypothetically legislate on ‘exclusively,’ provinces could potentially go about constructive decentralisation by interpreting that list generously.

For example, provinces have the exclusive authority to legislate on ‘provincial planning.’ This is a broad, undefined, and vague term that ultimately allows provincial governments to establish authority across a wide range of domains that they deem necessary for their ‘provincial planning.’ Since South Africa is, in fact, a federation, with the Constitutional Court having recognised that subsidiarity is a constitutional principle,<sup>11</sup> vague terms like this must be construed as in favour of lower levels of government.

### *Interposition and nullification*

Section 7(2) and section 8(1) of the Constitution provides that all organs of state and spheres of government must ‘respect, protect, promote, and fulfil the rights in the Bill of Rights.’ Section 2 of the Constitution, in turn, provides that ‘law or conduct inconsistent with’ the Constitution ‘is invalid.’

Interposition and nullification are associated federalist terms from the United States.

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<sup>11</sup> *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 at para 161 read with para 49.

Interposition, in a federalist context, means to intervene on behalf of the people, or another sphere of government, when (for example) the central government conducts itself unconstitutionally. The central government may also interpose itself when a provincial or municipal government acts unconstitutionally.

One pertinent example of where interposition would have been appropriate, was during the COVID-19 lockdown, when police minister Bheki Cele, a civilian, was going around Cape Town beaches harassing beachgoers for supposedly violating lockdown regulations. He was accompanied by reporters and police officers in riot gear.

The Western Cape government responded by putting out a statement of condemnation, when it and the Cape Town municipal government should have sent metropolitan police officers to protect peaceful beachgoers from the ridiculous harassment and invasion to their privacy that this charade represented. Cele should have been asked to leave the scene with his entourage – or arrested if he refused – before utilising normal (not tactical or riot) police officials to enforce the regulations appropriately.

If this had been done, the municipal or provincial government would have engaged in interposition to protect the civil liberties of Cape Town residents against brazenly unconstitutional conduct by a civilian politician of the central government.

Another, certainly more contentious example of interposition, would be if the South African government's new unconstitutional expropriation without compensation (EWC) law is enforced.

This law claims to allow the Minister of Public Works to 'expropriate' (in reality, confiscate) private property without paying any compensation. The Constitution explicitly provides that compensation is always payable in the event of expropriation. Simply seizing property without compensation is confiscation – a formal term for legalised plunder or robbery – which is not authorised by the

Constitution, despite creative interpretations by jurists without constitutionalist grounding.<sup>12</sup>

If this law is implemented – unconstitutional as it is – it will certainly be challenged in court. However, in the meantime, the central government might attempt to enforce it.

Under such circumstances, municipal and provincial authorities would be well-placed to interpose themselves whenever central government officials attempt to ‘expropriate’ property without compensation within their jurisdictions. They must secure the property at least until judgment has been delivered in the matter. This form of interposition – where the application of an unconstitutional law emanating from another sphere of government is ‘nullified’ – is known as *nullification*.

## COMMUNITY FEDERALISM

### Non-partisan self-determination

Home Rule is fundamentally concerned with the ability of communities to self-determine those things that properly relate to those communities. This certainly has a political and a constitutional dimension – which is the primary concern of this paper – but it would be inappropriate to omit mention of the various forms of community federalism currently developing in South Africa.

Community federalism is perhaps the most relevant form of Home Rule – certainly more relevant than municipal and provincial decentralisation. This is because communities have shown themselves willing to take substantial steps to secure their own vital interests, whereas the municipalities and provinces have tended to sit idly by and defer to the dictates of the central government.

Community federalism is something for which no delay is necessary. It is already happening and can happen at a far greater scale when

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<sup>12</sup> See Van Staden M. ‘*Fraus legis* in constitutional law: The case of expropriation “without” or for “nil” compensation.’ (2021). 124: *Potchefstroom Electronic Law Journal*. 1-31.

more and more communities themselves simply decide to take responsibility for the issues that affect them.

The most notable instance of community federalism is the Solidarity Movement, in particular its civil rights group, AfriForum. By March 2024, AfriForum had 172 community safety structures across South Africa, which includes neighbourhood and farm watch associations, security coordination mechanisms, and widespread consulting on safety in rural areas and even churches. AfriForum is also involved in the electricity space, seeking to allow local communities to generate their own power without necessarily going through municipal mechanisms. AfriForum's community branches have also long been involved in fixing potholes and maintaining municipal sidewalks. The Solidarity Movement also sports two higher education institutions, Akademia and Sol-Tech, and is in the process of establishing its first school, Gymnasium Pretoria.

There is also what is effectively the commercial federalism of the business group Sakeliga. In addition to undertaking significant litigation in the South African courts on behalf of the business community, Sakeliga has gone about organising business chambers across the country. Ultimately, these chambers are to bring order to the chaos of municipal collapse and reignite much-needed economic activity.

Another kind of commercial federalism which is in fact simply the market mechanism being allowed to function, is how private businesses, largely uncoordinated, have begun the arduous task of solving South Africa's electricity crisis. Electricity generation is being decentralised at a rapid pace, despite the desire by the central government to retain its monopoly.

A more hidden, but perhaps even more powerful, form of community federalism is the self-government of South Africa's townships. It has long been the case – perhaps since the 1970s – that the central government has been largely unable to impose its political agenda on township residents. Whatever luxurious laws the central government adopts – from minimum wages to lockdown regulations, etc. – these are reserved for the meekly obedient suburbs, while townships have



made it clear that they will not allow the central government to commit a nuisance in their midst.

The problem with township federalism is that it is not based on a cohesive plan – not a ‘plan’ in the sense of a ‘central plan’ that harms spontaneity, but rather a lack of direction. Townships know they do not want to be dictated to, but they also lack a sense of building up to something. The landscape of self-determination in South Africa will change fundamentally if even just a handful of townships organise themselves on the Solidarity or AfriForum model.

### **Sphere sovereignty**

Community federalism relates to another constitutionalist principle that could have been mentioned under the previous heading: sphere sovereignty.

Effectively, sphere sovereignty is the notion that it is not the state that is sovereign over all things, but rather that sovereignty depends on which sphere one finds oneself in. In the sphere of military and foreign affairs, the state might be sovereign, but in the sphere of cultural affairs, the community is sovereign, and in the sphere of commercial affairs, business is sovereign.

The relevance of sphere sovereignty to municipal and provincial Home Rule is especially important in the realm of scarce revenue at those levels of government.

Rather than a municipality trying to exercise a monopoly over the fixing of potholes, water or electricity infrastructure, it could decide to recognise the sphere sovereignty of the communities within its jurisdiction and delegate to them the responsibility of taking care of their own potholes, water, or electricity. This would need to be judged on a case-by-case basis, but the general rule must be that if a given community is willing to see to its own affairs, it must be allowed to do so.

**DO, DON'T ASK**  
**IMPLEMENTING (AND MAINTAINING) HOME RULE**

**Forgiveness, not permission**

*Criminal cabal*

The political elite detests Home Rule, and therefore it is something that will have to come at the initiative of ordinary South Africans and those from outside the political elite they elect.

Privately, this has already begun, with various communities having stepped into the void left by a collapsing state and taking the reins of control for themselves. In the public sphere, however, much is left to be desired, including and especially from those governments controlled by opposition parties at the municipal and provincial levels.

There is too great an eagerness among opposition-controlled governments today – not necessarily evident among communities organising themselves – to play nicely with the central government.

In a mature constitutional democracy, this might be commendable and desirable. But in a context where the central government is effectively a criminal cabal seeking out any opportunity for corruption and destructive economic policy, playing nice with such a syndicate is akin to being complicit in its country-scale looting.

It is entirely within the political interests of the ANC and other political parties that seek to secure the big pie of resources controlled by the central South African government to paint federalism and devolution as nefarious or even evil.

The temptation to rent-seek and loot is strong among revolutionary socialists, and they are easily offended by the notion their power should be limited.

One owes no deference or respect to thugs.

And municipalities and provinces owe no allegiance to the central government. Their allegiance is to the Constitution and their own constituents. This decision was taken consciously when the

Constitution was being adopted, with levels of government being regarded as 'spheres' rather than 'levels,' the latter of which implies a hierarchical relationship.

That means that where the Constitution conceivably allows 'lower' spheres any room to dissent from the detrimental and backward priorities of the central government, they can and should exploit that room to its fullest potential. And the Constitution – both its written provisions and the principles that animate it – allows much room for such dissent.

Pleading, then, with the ANC government (or any committed centralist governing party in the future) for devolution will yield nothing, given the party's predisposition in favour of centralisation.

Opposition-controlled municipalities and provinces, then – if they want to do certain things – must simply roll up their sleeves and get it done.

One cannot blame the ANC for a lack of decentralisation because the ANC is being consistent – it has never supported decentralisation. But one can and must blame those who do nominally support Home Rule but are prepared to do very little about it.

It is high time that municipalities and provinces governed by the opposition tell the central government in no uncertain terms: *Commit no nuisance here.*

### *Bottom-up*

Home Rule in South Africa cannot be bequeathed from the top down. It must – simply given the political reality of the past three decades – be a stateproof approach to federalism, where responsibilities are either negotiated for in Machiavellian fashion, replete with ultimatums, threats, and the leveraging of power, or seized outright as a matter of legally recognised necessity.

Meekly pleading for devolution is politically unattractive – as it looks pathetic to desperate voters – and will yield nothing. According to the Constitution, there are functions that would, legally, have to be

devolved for them to operate provincially or locally, and it is right, in these circumstances, for advocates of decentralisation to make the necessary demands. But where devolution is necessary, it must be engineered – again, if need be, in Machiavellian fashion – from the bottom up.<sup>13</sup>

One should never have to request permission from one's enemies to protect oneself from the very harm that those same enemies bring about. One does not seek the consent of a robber before one may defend oneself from the robber, so why does one seek the consent of a malicious, harmful central government to defend oneself from the conduct of that government?

The South African Constitution is a living constitution, in the sense that it was written to be adaptable to changing circumstances. But for its living nature to shine through, it must be *read* as a living constitution with all the constitutionalist principles listed above foremost in mind.

### *Retribution*

Some might be understandably concerned that if a municipality or province begins to truly 'flex its muscles,' the central government would exact retribution, either through direct police action or budgetary cuts.

There will naturally be resistance to doing rather than asking. The mere fact that the provisions of the Constitution and the principles underlying it allows one to take constructive action does not mean that malicious forces would not seek to utilise the courts or even the police to secure compliance with their centralist dictates.

But if the fear of resistance is so debilitating that it leads to inaction, public service is not one's calling.

For anyone who can afford it, private security and neighbourhood watches have all but replaced reliance on the South African Police

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<sup>13</sup> See Van Staden M. 'The potential for constitutional devolution in South Africa.' (2021). *Cato Journal*. 691-710.

Service (SAPS). It is common nowadays, after a crime has been committed, for victims to either roll their eyes or give a light chuckle when someone asks whether they reported it to the police.

Provision for safety and security has been almost entirely localised or commercialised. With about 86 reported murders per day and about five reported rapes per hour in South Africa, it is safe to say that the SAPS basically exists in name only.

Analysing the constitutional negotiations of the 1990s, James Hamill notes that the ANC was willing to make certain concessions to the NP so as to assuage primarily the concerns of the still NP-dominated security services.<sup>14</sup> The ANC was simply biding its time until *it* gained control of South Africa's police and military forces. In the late 1990s and 2000s, this was a powerful tool in the arsenal of the centralist ANC.

But thanks in no small part to the ANC's own efforts, both the SAPS and military are today mere symbols of power, rather than actually being powerful themselves.

After the July 2021 riots, for instance, South African televisions were showing troops half-heartedly walking around largely quiet streets telling law-abiding citizens to leave the area. The SAPS themselves were hunkered down in their stations during the riots, as ordinary communities banded together and defended their homes.

We tell ourselves the police are out there, and therefore comply with some of the most harmful edicts issued by the central government, but the reality is far more basic: As the French liberal, Etienne de la Boétie, theorised in his *The Discourse of Voluntary Servitude*, our subservience to the state is by and large voluntary.<sup>15</sup>

As far as police action is concerned as retribution for municipalities and provinces 'doing, not asking,' there is no good reason to be worried.

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<sup>14</sup> Hamill J. 'A disguised surrender? South Africa's negotiated settlement and the politics of conflict resolution.' (2003). 14: *Diplomacy & Statecraft*. 19.

<sup>15</sup> De la Boétie E. *The Discourse of Voluntary Servitude*. (1577) [1942].

But dissenting municipalities and provinces have to accept that a confrontational approach will endanger the funding they receive from the central government. That is the way of the world. They will have to start exploring other avenues for funding, or gain a new understanding of the limited revenue options available to them in the Constitution.

By way of example, the Solidarity Movement recently raised upwards of R300 million exclusively through voluntary contributions and built an entire private university, Sol-Tech.

It can be done.

What should not be done, however, is to allow municipal and provincial governments to turn a blind eye to central government policies that harm their own constituents, simply because they want to keep the channel of revenue open and greased. Even if it means imperilling their funding, these governments must first and foremost protect their populace.

The ANC government has lost all expertise and capacity and can, to a significant degree, be ignored.

### *Constitutional supremacy*

Provinces, and municipalities in particular, must always address themselves to the Constitution – not legislation – when determining their own responsibility. Indeed, section 152(1) of the Constitution provides that the promotion of a ‘safe’ environment and ‘social and economic development’ – but, above all, ‘democratic and accountable government for local communities’ – are key functions of local government.

Section 151(4) provides that the central or provincial governments ‘may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions.’ Any legislation that ostensibly prohibits municipalities from securing safety and security or protecting society and growing the economy is unconstitutional.

Giving effect to constitutional prescripts must always weigh heavier than giving effect to the partisan dictates of ANC comrades in Parliament. The Constitution, and the local electorate, are the sources of a province or municipality's authority, not Parliament and certainly not the central executive.

Municipalities must, of course, comply with national and provincial legislation that is congruent with the Constitution. Provinces have less room for action in the written Constitution, but they can rely on constitutional principles like subsidiarity, to achieve much the same.

### *Necessity*

Given the resistance that dissenting municipalities, provinces, and even self-organising communities can expect from the central government, the legal doctrine of *necessity* becomes crucially important.

'It would be against the law' is an accusation that the implementers of Home Rule should expect to encounter routinely.

The reality is that 'the law' is a small term for a big concept. Legislation is not the be-all and end-all of law. Legislation and their associated regulations must, firstly, be consistent with the Constitution to be valid. Moreover, 'the law' recognises – and has long recognised – the right to 'break' the law if that is the only real option available.<sup>16</sup>

Although the doctrine of necessity is not well-developed for this context, it is nonetheless an existing part of South African law. Bringing it into the realm of constitutional law appears to be a logical step given the reality of governance in South Africa.

Necessity, stripped to its most basic, is a legal defence against an accusation of unlawful conduct.

Necessity, for example, is what people use to protect themselves against lawsuits if they had to break open locked car windows to save children or even pets succumbing to heatstroke. Intentionally driving

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<sup>16</sup> This would not in reality amount to breaking the law, for in fact the doctrine of necessity makes such action – by implication – lawful.

into other people's cars would ordinarily be criminal conduct – or at least a civil delict – but if one does so in an attempt to escape hijackers, that is, as a matter of necessity, no longer criminal.

'Necessity is a defence to both the criminal law and the civil law, that is, if an action was "necessary" to prevent a greater harm, that can be used to avoid both criminal and civil liabilities.'<sup>17</sup>

For this defence to be successfully invoked:

- The defendant must show that the damage they caused was less severe than the harm that would have resulted if they did not take action;
- That the defendant reasonably believed that the action was necessary to prevent such harm;
- That there was no practical alternative to avoid the harm; and
- That the defendant did not themselves instigate the harm.

It is evident how the doctrine of necessity would apply in the context of South African municipalities, provinces, and communities, taking constructive action to limit or reverse the collapse of their local socio-economies. This is especially the case in light of an intransigent central government.

To cover one's bases, however, it would nonetheless be important to ensure one collects copious amounts of evidence of the harm caused by the action or inaction of the central government (or, indeed, a provincial government from a municipal perspective). Thereafter, one must be able to show that one repeatedly and in good faith attempted to get the central government to do its duty, and provided reasonable time for it to do so. If any dispute resolution mechanisms are available, they must – within reason – be exhausted.

Having done all of that, and the central government still did not resolve the issue, it is clear that taking action to limit further harm – even against the unconstitutional prescripts of legislation or regulations – would have to qualify under the doctrine of necessity. Certainly, acting out of necessity must not exacerbate the problem or

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<sup>17</sup> Sehgal DR. 'Necessity and authorities of necessity as a defence in tort.' (2019). *IPleaders*. <https://blog.ipleaders.in/necessity-a-defence-in-tort/>.



worsen the harm – under such circumstances, it would be clear that any attempted invocation of necessity must fail.

Even if power changes nationally to a more benign force in the 2024 or 2029 elections, the way South Africa has been set up it is clear that any malign force at the central sphere can do immense harm to all corners of the country.

This means that substantial reform must occur, whatever the outcome of the elections.

Ideally, a new benign central government would take hands with provincial and municipal governments and communities to decentralise, but failing that, bottom-up action becomes imperative.

## **Practical steps**

### *Central government*

South Africa's latent federalism needs to be foregrounded – primarily by provinces, municipalities, and communities themselves. But there are some things that a central government more accommodative of Home Rule can do.

These are, in order of the (least to most) political capital<sup>18</sup> necessary to achieve the desired outcome:

**1** Changing the name of the current 'national government' to the 'Federal Government.' The Constitution continuously refers to the 'national government,' however this is as a common noun. There is no constitutional provision or rule that says this is, in fact, the 'name' of the government. The present proper noun of the national government, found on its website and elsewhere, is the 'South African Government.'

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<sup>18</sup> Political capital refers to an intangible currency used by political reformers to bring about legal and policy change. Simpler, less drastic reforms require less political capital and are therefore less risky. Bigger changes are more risky – to the reputation of those introducing them, to their donor relationships, and often to their constituents – and therefore require more of this 'capital' to achieve.

By changing this proper noun to the 'Federal Government of South Africa,' such a small reform will go a significant distance in changing the way in which South Africans think and talk about governance. It would also give due recognition to the formally federal nature of the Constitution.

**2** Executive devolution. Section 99 of the Constitution empowers any Cabinet member to 'assign any power or function that is to be exercised or performed in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council.'

Given the centralist posture of the ANC over the three decades of democratic government, many ministers in the central sphere are responsible for things that properly should be subjected to the principle of subsidiarity and assigned downwards.

Such assignments should, ideally, be formulated in a way that requires the consent of the assignee – the provincial or municipal executive – before the assigned power or function can be revoked. While such irrevocability would not be enforceable in court, it could assist with the cultivation of a federalist culture among politicians in the central sphere.

**3** Legislative devolution. Section 44(1)(a)(iii) of the Constitution empowers the National Assembly 'to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.'

There is no greater scope for devolution than this.

Where a constitutional provision, including those in the Bill of Rights, requires the adoption of 'national legislation,' Parliament could in that legislation assign dealing with that matter to provincial legislatures or municipal councils. This is in addition to any other matter that would ordinarily fall within Parliament's legislative authority.

Rather than having Parliament adopt a piecemeal approach whereby it devolves responsibilities on an *ad hoc* basis, Parliament could instead adopt a Devolution Act that makes provision for widespread devolution in one fell swoop.

**4** Federalisation Act. Parliament should adopt a Federalisation Act that entrenches a list of federalist principles that must be observed by all organs of state and spheres of government, including the courts.

Among other things, this Act could oblige the courts explicitly to apply the principle of subsidiarity in any dispute about the division of government power. The Act could – in fact, it should – also reform fiscal relations between the central government, provincial governments, and municipal governments, to ensure the central government cannot unduly dictate political agendas to the other spheres of government via the treasury.

**5** Constitutional amendment. While the Constitution is a federal constitution, it nonetheless created a centralised federal dispensation. Through constitutional amendment, the excessive centralist aspects of the Constitution could be modified to introduce substantive federalism.

This could include abolishing the ‘national’ judiciary and making the various high courts of South Africa provincial institutions, appointed by provincial judicial service commissions and provincial legislatures. This would leave the Supreme Court of Appeal and the Constitutional Court in the central sphere.

Most prominently, a constitutional amendment could and should fundamentally reform the taxation system in South Africa and decentralise it. It is not necessary to have multiple new tax authorities operating in all spheres of government. A single taxation system can be kept – to save the beleaguered taxpayer the pain of having to pay even more of their shrinking economic resources to the state – however its monopolisation by the central government should ideally end.

An Act of Parliament would need to be adopted after the constitutional amendment to spell out the details of such a reform, but it could include placing provinces in charge of their respective offices of the South African Revenue Service, and ensuring that most of the taxes collected *within* a particular municipality or province,

must be utilised for the benefit of *that* jurisdiction, and not redistributed elsewhere.

### *Provincial governments*

Provinces are not where South Africa's true federalist potential lies, but that does not render them irrelevant. There are certain steps that provinces can take – with or without cooperation from the central government – to help make Home Rule a reality.

These are again stated in the order of how much political capital would be necessary to achieve the desired outcome, the easiest being first:

**1** Executive devolution. Section 126 of the Constitution empowers provincial executives to 'assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act, to a Municipal Council.'

As the true potential for federalism in South Africa lies with municipalities, provinces governed by formations that support the principle of Home Rule should not guard their powers too jealously from the municipalities within their jurisdiction. Rather, they should freely assign any power or function that is conceivably exercisable at the local level, downwards.

**2** Legislative devolution. Section 104(1)(c) of the Constitution empowers provincial legislatures 'to assign any of its legislative powers to a Municipal Council in that province.'

The same principle stated above applies in this case.

**3** Provincial coordination. Provinces should increasingly regard themselves as support and coordination mechanisms for the municipalities within their jurisdictions. Everything the municipalities have done and are doing to promote Home Rule should fall under some kind of provincial protection and assistance.

If, for instance – as is proposed below – municipalities form their own police services, provinces should introduce specialised inter-municipal police services that individual municipalities might not

have use for or cannot afford. This could include a provincial forensics laboratory, a tactical unit, or an air support unit. To do this, municipalities could be expected to provide all or some of the funding necessary to the province.

**4** Provincial constitutions. Only one out of the nine provinces currently have adopted its own constitution. This will not do. Section 143 of the Constitution gives provincial legislatures the authority to adopt constitutions for their provinces, which allow – provided it is consistent with the rest of the South African Constitution – provinces to have different structures from what the Constitution formally assigns them.

Provinces could turn their unicameral legislatures into multicameral institutions that would enrich democracy and/or give municipalities in the province a say at the provincial level. Additional executive positions, such as deputy premier(s), a larger provincial cabinet, and other provincial institutions not contemplated by the Constitution could also be introduced.

Provincial constitutions must press every boundary and assign as much self-governing power – even if it is only a symbolic power – as is constitutionally allowable to the province and municipalities as possible.

### *Municipal and provincial governments*

Most federalists simply assume – and understandably so – that talk of federalism means South Africa's provinces must gain greater authority. This is an error, and the clearest path of least resistance – and therefore potential for Home Rule – lies at the municipal level.

Provinces as they currently exist are important, of course, at least to the extent that control over them must be denied to political parties with centralising ambitions. Provinces can do significant *harm* to Home Rule (via provincial interventions in municipal affairs, for example), even if they themselves cannot fully realise Home Rule.

Here follows the steps that municipalities – but, in some sense, provinces as well – can take to make Home Rule a reality in South Africa.

These, too, are stated in the order of political capital necessary to achieve the desired outcome, the easiest being first:

**1** Find and appoint federalist lawyers. The phenomenon of appointing attorneys, advocates, and legal advisors – whether inside government or on a consulting basis – on the basis of credentials and ‘merit’ only, to the exclusion of values, has become a key problem.

Older lawyers were trained in a very conservative legal culture that resists pushing boundaries and adopts a very narrow conception of legal interpretation. Younger lawyers were trained in a more open legal culture but within the context of highly ideologised courts and a very centralist government. There are not many among either of these groups who normatively buy into federalism, or even devolution.

One instance of this was when the Western Cape provincial government’s own legal advisors advised it that the Western Cape Provincial Powers Bill – a relatively tame provincial Act that does no more than ‘empower’ the provincial government to request additional powers from the central government – was somehow unconstitutional. Such a position is absurd, given that provincial governments already have the authority, in terms of the Constitution, to request additional powers from the centre.

The notion that provinces and municipalities would start doing things that the central government has been responsible for, on paper, over the past century, is something that many legally trained individuals have trouble accepting.

The lawyers must, however, not lead. They must follow the political decisions of their client.

The question must never be ‘may a province establish a police service?’ but rather an instruction: ‘The province wishes to establish a provincial police service: find a way in law for it to do so.’

Of course, many cases will be lost. This is an inevitability when one seeks to forge new pathways of good governance.

The conservative attitude of avoiding disputes, conflicts, and litigation due to the potential of loss, however, is a guarantee that Home Rule will not be realised, and that centralisation will continue to wreak havoc on South Africa's socio-economy.

**2** Real private partnerships. We have established that, compared to the central government, municipal and particularly provincial resources are limited. While these spheres of government rightly feel a sense of duty to their constituents to provide services directly, this has led to excessive delays and immense harm to local communities.

Provinces and municipalities should instead outright assign – as opposed to contracting out (no money exchanges hands) – the responsibility for maintaining roads, electricity infrastructure, and even safety and security, to communities that can afford to take care of those functions themselves. These communities can then contract the functions out to appropriate firms, or set up structures to handle them within the community itself.

This will allow governments to focus their attention on those communities that do require the direct intervention of the municipality or province.

**3** Fix and replace collapsing central government functions. Where the central government – or in the case of a municipality, even the provincial government – is unwilling or unable or simply unnecessarily tardy in providing a necessary service, the municipal or provincial government must simply step in and provide it itself.

Constituents should – and, in fact, already do – not look kindly upon their municipal councillors or provincial representatives seeking to shift blame upwards. Even if the central government is formally responsible for something, such formalities do not bring any closure to problems that are not in fact being addressed. Diligent municipal and provincial governments should stop blaming the central

government and start doing what voters expect them to do as a matter of *necessity*.

**4** Establish police services. Every municipality has the authority in terms of the South African Police Service Act to establish its own municipal police service. Any municipality that has not yet done so, should do so immediately, even if the service exists only on paper.

The mandate of municipal police services in terms of that Act – the ‘prevention of crime’ – must be interpreted generously. Up to now, it has not been interpreted to include detective bureaus and other specialised functions. This must change, especially in light of the collapse of the SAPS.

The authority to establish a provincial police service is less clear, but not entirely unclear. The Constitution provides that there can only be a single police force ‘for the Republic’ – this does not exclude provincial services, as they are for specific provinces and not countrywide entities. Schedule 5 of the Constitution, additionally places ‘provincial planning’ and ‘provincial roads and traffic’ within the exclusive legislative mandate of the provinces. These terms are wide enough to enable provincial legislatures to adopt a Provincial Police Act that creates a provincial service that could, among other things:

- Under the rubric of ‘provincial planning,’ provide specialised support services to municipal police departments, including detectives, air support, tactical support, a police training academy, and forensic services.
- Under the rubric of both ‘provincial planning’ and ‘provincial roads and traffic,’ the Act could establish a uniformed *security police* service. Security police are law enforcement officers that primarily provide security to government institutions and functionaries. Such a provincial entity could be tasked primarily with patrolling and protecting provincial roads and highways, as well as being stationed in and around provincial buildings. This would render provincial infrastructure of whatever nature and the areas immediately surrounding them into ‘safe zones.’
- The municipalities themselves could also, in terms of section 238 of the Constitution, delegate the whole (in the case of municipalities without capacity) or part of their own power or function over municipal law enforcement *upwards* to the province. The Provincial Police Act could set out a procedure and entrench certain principles regarding how this could



be done. This would include requiring the municipalities to substantially assist in the financing of the institution, as intergovernmental pooling of resources is authorised by section 41(1)(h)(ii) of the Constitution.

The added benefit of having, particularly, an existing Provincial Police institution established unilaterally at the instance of the province – even if it is quite limited in capacity – is that when litigation over the *devolution* of more substantive policing powers from the centre inevitably takes place, provinces will be able to show the courts that the province has already taken steps that are *effective* in combating crime, compared to the SAPS' *ineffectiveness*.

If, for instance, the Constitutional Court is presented with a Provincial Police that can do (and has done) the job, it will be much easier for the judges to order that SAPS and the central government allow it and fund it to do – and continue doing – so. If the Constitutional Court is only presented with the 'idea' of a provincially controlled police service on the one hand and the central SAPS on the other, it is far more likely for the court to make some ineffectual order that simply commands the SAPS to 'do better.'

Conceivably, the central government could amend or repeal the South African Police Service Act to remove the power of municipalities to have their own police services. But like the provinces, municipalities have an inherent right to establish security police (effectively, a public security company) that protects and patrols municipal property. Such threats from the centre must therefore not be given too much consideration.

**5** Provincial and municipal prosecutions and watching-briefs. The National Prosecuting Authority (NPA) will never be capable of keeping up with South Africa's staggering rates of violent crime. The decentralisation of prosecution is as important as the decentralisation of policing.

Municipalities and provinces could establish municipal attorneys' offices and provincial attorney-general offices. These would utilise the right of private prosecution that is recognised in the Criminal Procedure Act. While these offices would not be able to prosecute in their own names – private prosecution must be in the name of the

victim – they could provide all the associated funding and legal services to the victim. In effect, while the institution of private prosecution is utilised, these offices would be public *law-firms*.

The municipal attorneys' and provincial attorney-general offices, when not engaged in prosecutions, could also act on behalf of victims in their jurisdictions whose cases are being handled by the SAPS and the NPA, by offering a comprehensive watching-brief service. This would allow the municipal and provincial governments to ensure the central police and prosecuting services are held accountable.

**6** Engage in foreign affairs. South Africa is a federation, and subcentral units conducting their own foreign affairs in federations is not unheard of. The Canadian province of Quebec and the Belgian provinces of Flanders and Wallonia have their own foreign offices.

The Constitution does not explicitly reserve all foreign policy business to the exclusive domain of the central government. Instead, section 231 only reserves the exclusive mandate to engage in the 'negotiating and signing of all international agreements' that are binding on South Africa *as a whole* to the centre.

Any South African province could set up a foreign office with a foreign affairs minister, who would be responsible for the foreign and international dimensions of their provincial competencies. In Belgium this principle is known as *foro interno, foro externo*.

Additionally, given that municipalities have a far greater scope for self-government than provinces do, these entities could delegate the international dimensions of their competencies upwards to their provinces as well.

**7** Confrontational approach with the central government. Provinces and municipalities must continue to cooperate with the central government where appropriate, but given the centrally-engineered collapse of South Africa's society and economy, this cooperation cannot continue to be compromising and conciliatory.

Instead, provinces and municipalities must increasingly begin to communicate through (reasonable) ultimatums: 'Fix the Port of Cape Town or devolve control over the port by this reasonable date, or the provincial or municipal government will declare an intergovernmental dispute. If this proves unsuccessful, we will solve the problem ourselves.'

In this confrontational approach, the province or municipality must ensure that it is nonetheless still the more reasonable party. When any court looks at the case, it must be painfully clear that the municipality or province exhausted every reasonable avenue to have a real, tangible problem solved cooperatively with the central government, before it took drastic action of solving the problem unilaterally. The court must be made to understand (by the aforementioned federalist lawyers) that in the absence of unilateral municipal or provincial action, the problem would have grown more deleterious and harmful to the municipal or provincial populace.

**8** Act against central government abuse. Whether it is a police minister – a civilian – harassing beachgoers or a soldier beating a compliant person to death inside their own yard during the COVID-19 lockdown, provincial or municipal authorities should have, and must in the future, protect ordinary South Africans, their communities, and businesses, from abuse by the central government.

Neither the police minister nor the South African Army had the lawful authority to do what they did. This means that they conducted themselves *unlawfully*, which necessarily allows provincial or municipal governments to take remedial action. This would apply in many other contexts wherein civilians and businesses experience victimisation from an ideologically-driven central government as well.

## **Funding federalism**

### *Unfunded mandates*

Practically every proposal for the implementation of Home Rule, if implemented, necessarily threatens the funding that the provincial and municipal spheres receive from the central government.

As a matter of course, provinces must immediately adopt a posture whereby they will not provide any services that the Constitution or central government imposes upon them, without funding from the National Revenue Fund. This is not to adopt an anti-constitutional posture, but rather to align with the fiscal relations system that the Constitution sets up. According to this system, the central government collects the overwhelming bulk of government revenue and, as such, must pay for state obligations in terms of the Constitution. It is clearly evident from the Constitution that there is no real intention for provinces to carry these financial burdens.

All funds received as part of the province's equitable share of national revenue and raised by the province itself, must be utilised in accordance with the democratic mandate bestowed upon the province by its own electorate. These funds must be expended on the province's own political agenda.

#### *Limited in scope, unlimited in depth*

The unilateral fundraising potential of the provinces is limited in scope but unlimited in depth. In addition to the limited taxation power of provinces, these governments could engage in voluntary fundraising, they could pool money from the municipalities within their jurisdiction, and they could offer paid-for services.

Nothing necessarily stands in the way of a provincial chamber of commerce and its members agreeing to supply a provincial government with hundreds of millions of rands so that the province may establish a world-class police service that nullifies South Africa's extreme levels of violence within its jurisdiction.

When the Solidarity Movement decided it wanted a high-quality Afrikaans technical college, it simply went about raising funds for it. It ended up collecting R300 million voluntarily from its members specifically to launch Sol-Tech.

The provinces, then, could hold similar public 'crowdfunding' fundraisers.

For instance, if there is a widespread demand to build a modest new, provincially controlled harbour, and this would cost R5 billion, the province could create a website that sets R5 billion as a target and allows anyone to donate towards that goal. If it would cost R100,000 per month to appoint an expert forensic investigator to lead a new, state-of-the-art provincial crime lab, a similar website could be set up that tracks donations towards that goal.

This would amount to real participatory democracy, where citizens have agency and true involvement in the governance of the jurisdiction that they live in.

And all of this can be done in the place of saying 'blame Pretoria.'

Provinces and municipalities in South Africa, given its unique circumstances, can revolutionise fundraising for government projects. They can take the public and financiers into their confidence on the road out of the mess that the central government has spawned.

## CONCLUSION

### **FROM EX UNITATE VIRES TO UNITAS IN DIVERSITATE**

#### *A single polity*

Donald Horowitz lamented in 1991 that 'federalism generally remains only the wisdom of hindsight in Africa.'<sup>19</sup> While South Africa adopted a federal dispensation in the transition that followed, this federation has been governed as though it were a unitary state given the predilections of the first ruling party.

If concrete and immediate steps towards Home Rule are not taken, the pace of social and economic collapse will in time create conditions conducive to secessionism.

Indeed, if decentralisation is not undertaken, secessionism is an entirely reasonable avenue for aggrieved South Africans. They cannot be expected to wait endlessly for a 'good government' to become

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<sup>19</sup> Horowitz DL. *A Democratic South Africa? Constitutional Engineering in a Divided Society*. (1991). Berkeley: University of California Press. 215-216.

indefinitely entrenched at the centre. Having a benign and constructive central government is something that will be very difficult to achieve in the era of coalition politics, at least for the foreseeable future.

But in the 2020s, federalism has become emergent in South Africa. While the central government is recognised as a lawful authority, years of mismanagement, corruption, and endemic incompetence have ensured that the centre is increasingly relegated to the background and, where applicable, completely ignored.

During the previous dispensation, South Africa's motto was *ex unitate vires* ('from unity, strength,' otherwise stated as *eendracht maakt macht*). With the new, democratic dispensation, this was changed to 'unity in diversity,' or *unitas in diversitate*.

One of the biggest contemporary criticisms of decentralisation is that it somehow undermines the unity of South Africa, and that it would offend the statement in the founding provisions of the Constitution that South Africa is 'one.'

In reality, decentralisation does not detract from unity. In its recognition of diversity, it strengthens unity.

Indeed, Elazar writes that, 'Federalizing does involve both the creation and maintenance of unity and the diffusion of power in the name of diversity.'<sup>20</sup>

Those who value the South African polity and the promise of a prosperous single South African state should be at the forefront of a movement for Home Rule, as to not decentralise condemns South Africa to collapse.

### *Advancing the cause of Home Rule*

No central structure – whether the Free Market Foundation or its Campaign for Home Rule – however, can drive a decentralisation

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<sup>20</sup> Elazar *Peace and justice in South Africa are still possible* 13.

movement alone. This is, naturally, in the nature of Home Rule. Only those 'on the ground' can know their own local conditions.

Any movement for Home Rule must come from within that community itself.

In the runup to the National Convention of 1908-1910 that led to the creation of the Union of South Africa, various 'Closer Union Societies' were established throughout the region to champion the cause of unification at a local level. Home Rule Societies throughout South Africa in the 2020s to champion the cause of decentralisation would be appropriate.

Even if one is happy with the performance of one's own municipality, that is all the more reason to advocate that the municipality take on more functions from the failing provincial or central government. If one is unhappy with the performance of the provincial or municipal governments where one lives, that is also reason to insist on Home Rule: so that those governments can be held significantly more accountable.

### *A reality to be articulated*

The seeds of Home Rule have already been sown in the hearts of many South Africans, without them being able to articulate it.

The township businesspersons who continued to do business during the lockdown, in defiance of the tone-deaf edicts of the central government, did not think of themselves as activists for decentralisation. They regard themselves as people simply trying to eke out a living, while some faraway officials engage in a largely academic and suburban enterprise of formulating inapplicable rules. When the Solidarity Movement establishes another university, it does not do so because it is committed to federalism, but because it has identified a demand among its members that cannot be served by the central Department of Higher Education.

The task of conscious federalists is to positively articulate these inarticulate premises underlying much of what is already happening in South Africa.

The Home Rule agenda must be revived and pursued, this time, uncompromisingly. During the unification of South Africa and during the transition out of Apartheid, federalists allowed themselves to be railroaded.

That cannot be allowed to happen again.

Unlike then, federalists now need to organise, strategise, and advocate, without fear or equivocation. They must expect to suffer much abuse, particularly in the age of political correctness and an abusive central political elite. But the fact that South Africa really has no other option but to decentralise must weigh heavier than the desire to seem popular or diplomatic.

Home Rule is the (perhaps bitter) medicine that South Africa desperately requires.





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