The Potential for Constitutional Devolution in South Africa

Martin van Staden

The African National Congress (ANC) today rules South Africa, formally a federation, as though it were a unitary state. There has been increasing agitation in recent years for the secession of the Western Cape province, which since South Africa ended apartheid in 1994 has never returned a majority vote in favor of the ANC.

Room exists in South Africa's Constitution, adopted in 1996, for substantive political devolution, which, it is argued, must be attempted before blood is spilled in the name of national independence. However, calls for more autonomy—whether secession or devolution—are routinely derided as merely attempts to entrench the interests of right-wing whites. Yet the facts reveal that such calls are increasingly supported by representatives of all racial groups, united around disillusionment with the central government in Pretoria.

The ANC, which controls the central government and eight of the nine provinces of South Africa, does not allow the various governments it controls to pursue policies incompatible with the party's political program. This, among other factors, has led to calls for secession, particularly of the Western Cape province, which has never returned a majority vote for the party ruling nationally.

Secession, as opposed to devolution, is complete political and constitutional separation by a region from its mother state. Prominent protagonists of secession have, however, also noted that they regard

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Cato Journal, Vol. 41, No. 3 (Fall 2021). DOI:10.36009/CJ.41.3.11.

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the devolution of power as a next best option.[1] Devolution means a grant of power by central governments in unitary states to lower levels ("spheres" in South African constitutional terminology).

Recognizing that secession is usually best reserved as a last resort in political and constitutional disputes, given that secessionist agitation often flares up into violence, this article proposes an alternative—namely, the constitutional path to devolved government. It begins with a brief recent history of federalism in South Africa, analyzes the provisions regarding decentralization in the present Constitution, concludes that a reasonable reading of the Constitution leaves room for substantive political devolution, and recommends that option as a peaceful and ordered alternative to secession.

Federalism at the End of Apartheid

South Africa's transition out of apartheid can be said to have started in 1990 (Humphries and Slack 1991: 165), although the National Party (NP) by the late 1980s was consciously seeking to move away from the policy that had defined it since 1948 (Van Rooyen 1988: 21–23). The transition can be said to have ended in 1996, with the adoption of the Constitution. During this period, after a hiatus, interest in federalism and devolution again came about, with only the Democratic Party (DP) at the time having been a consistent advocate of federalism since the 1960s (Asmal 1994: 49).[2]

After the provincial governments were abolished in 1986, representatives of all South Africa's major racial groups gathered in Durban at the KwaZulu-Natal *Indaba*.[3] They sought to address the issue of South Africa's apartheid system within the context of the Natal province and KwaZulu homeland, and the general loss of provincial autonomy (Lynch 1986: 232). This was the first time in decades that Natal, this time joined by many other types of formations, once again

[1] Craig (2020b), a popular media spokesperson for Cape Independence who runs the Cape Independence Advocacy Group, has noted, "Genuine federalism and outright independence are both stations on the same train track."

[2] The Democratic Alliance, which today governs the Western Cape province, is the direct descendant of the Democratic Party, which in turn was the direct descendant of the Progressive Federal Party, previously also known as the Progressive Reform Party, and initially simply the Progressive Party.

[3] *Indaba* is a Zulu word for an important gathering.

found itself at the forefront of calling for federalization of South Africa. Any suggestion of secession was, however, expressly excluded (ibid.: 233). Formations in the western part of the Cape province, always more liberal than the remainder of South Africa, indicated their interest in a similar *indaba* for their region (ibid.: 247).

The *Indaba*'s proposals, which Lynch (1986: 235–41) discusses comprehensively, were rejected by conservative Afrikaner racialists and by the ANC, at the time still a banned organization. The former averred that there was insufficient power-sharing, which Lynch in his analysis disputes, and the latter claimed to be interested only in an unqualified nonracial, unitary arrangement. Lynch opines that the ANC's rejection of the *Indaba* proposals revealed "their political intentions" of "a monopoly of power" after the end of the white regime (ibid.: 242–43).

The NP, however, despite having publicly committed to ending apartheid by this time, still practiced political centralization, and did not want the *Indaba*'s proposals to undermine its abolition of provincial government and their replacement by regional services councils (Lynch 1986: 244).

Probably the most well-known and radical decentralizationists before and during the transition were Louw and Kendall, who wrote the best-selling *South Africa: The Solution* in 1986. Cameron (1991: 157) summarized their proposal as follows:

> [They suggest] that the Swiss canton system would be most appropriate for South Africa's circumstances. The major features of their model are the creation of cantons based on the present 306 magisterial districts as a starting point. Each canton would have its own parliament and possibly its own constitution, would be free to devolve power down to local authorities, and would determine its own economic, labour, transport, education, tax, subsidization, welfare and race policies.

The central government would be responsible only for foreign affairs, national finance, defense, infrastructure, and internal affairs (Louw and Kendall 1986: 152).[4]

[4] "Internal affairs" encompasses "registration of births, marriages, deaths and population distribution, national statistical services, appeal court, environment, functions delegated [to the federal government] by cantons."

The ANC, on the other hand, proposed a unitary state with "only one central legislature, executive, judiciary and administration," which could delegate functions to lower spheres of government (Cameron 1991: 159). Humphries and Slack (1991: 179) note that the ANC wanted a unitary state *inter alia* so that it may "oversee the redistribution of resources." Cameron (1991: 159–60) argued that this proposal "diminishes avenues for citizen participation in public policy" and that it would "be highly unresponsive to local demands and conditions." However, given political realities, the ANC's model was more viable than substantive devolution, as local governments would have access to greater finance through the central state and the central government could deploy its skilled staff to the local level.

Asmal (1994), who had been associated with the ANC, explained that the September 1991 federalist proposals from the NP government limited the post-apartheid government's functions to national defense and security, foreign affairs, and constitutional planning. All other functions would be borne by regional governments. The DP also sought a federal arrangement whereby the federal government was limited exclusively to foreign affairs, economic policy, water, labor policy, citizenship, currency, interregional commerce, defense, borrowing on government credit, immigration, trade, customs and excise, national transportation, and mineral and energy affairs (ibid.: 51).

Asmal (1994) criticized the NP and DP suspicion toward central government authority, arguing that limiting the central government too much "is a recipe for constitutional immobility and constitutional warfare" (ibid.: 53). Asmal labeled these parties' proposals for federalism as smokescreens for

> locking wealth and resources into smaller units of government, where consensus decision making enables a veto to be used or where inordinately large majorities at the provincial executive level result in constitutionally protected walls of privilege—a recipe for the entrenchment of segregation and privilege [ibid.: 55].

Asmal argued that the social engineering "macropolicies" for "the reconstruction of the country" of the new majority central government would be hindered by allowing minorities to control regional governments. "It is crucial" that South Africa be a unitary state,

argued Asmal, "for the central management of the economy and for the redistribution of resources in favor of the less prosperous parts of South Africa." This would be impossible under a federal arrangement (ibid.: 55–7). While Asmal and the ANC apparently favored a decentralized unitary system where provincial and local governments would have original constitutional authority (with an arrangement of "concurrent powers"), in the final analysis "the central authority must have the power to insist that national policies are not vitiated by recalcitrant or obscurantist regions" (ibid.: 60–61).

Horowitz (1991) noted this suspicion that black political formations had toward federalism and devolution, not only in South Africa during the transition but also across Africa during the period of decolonization. This kind of decentralization was perceived to be intended "to evade the consequences of Black representation at the center by centralization, by substituting local autonomy for democracy in the country as a whole." He cautioned against this shortsightedness, however, given the important contribution federalism could make to peaceful accommodation. "Federalism," commented Horowitz, "generally remains only the wisdom of hindsight in Africa" (ibid.: 215–16).

There was, however, support for federalism among some black formations. Buthelezi (1986), for instance, speaking on behalf of the government of the homeland of KwaZulu and the black political movement Inkatha, lambasted the 1984 Constitution's "massive centralized power," which ignored

> the urgent necessity for the maximum devolution of power which should be taking place to make the first and second tier government arenas in which Black and White can find each other politically and in which the total economic interdependency between Black and White can be translated into co-operative goodwill in the social and political fields [ibid.: 304–5].

To Buthelezi, the "centralization of power militates against the translation of goodwill into practical politics" (ibid.: 305). During the transition itself, Inkatha, now the Inkatha Freedom Party (IFP), favored "extensive provincial autonomy" with "enhanced legislative and financial powers as well as the entrenchment of provincial governance" (Steytler and Mettler 2001: 95). During the drafting of the

current Constitution by the Constitutional Assembly after a Government of National Unity was elected, the IFP recommended "a fully-fledged federal constitution like that of the United States" (ibid.: 99).

Far from being constituted along racial or ethnic lines, Horowitz (1991) suggested, "South Africans can benefit from [federalism] without in any way conceding the utility of devolution to homogenous units on the [racial] homeland model" (ibid.: 217). Horowitz elaborated that, if South Africa adopted federalism, it would "proliferate the points of power and so make control of the center less vital and pressing," thus averting "the zero-sum quality of the stakes" of a general election. This lowers "the high temperature of politics." Horowitz mentioned that apartheid itself might have been avoided had South Africa opted for a federal arrangement in 1910 (ibid.: 221–22). Quite relevant to the hook of this article is Horowitz's following remark: "The fact of the matter is that early, generous devolution is far more likely to avert than to abet ethnic separatism" (ibid.: 224).

The reason he gives is that it would be better to allow a region where a certain political formation dominates some measure of self-determination if that formation does not form part of the governing coalition at the national level. Excluding such a formation from the national government—and denying it substantial control over regional affairs—creates the risk of alienation (Horowitz 1991: 223). This point, it is submitted, applies quite starkly in the case of the Western Cape today.

Because the federal option is not open to dissidents in the Western Cape, secession is being advocated (Craig 2020b). However, should the federal option become available, it is submitted that much of the agitation for secession might fall away.

Since the adoption of the Constitution, the Western Cape has been the only province to successfully adopt its own provincial constitution, subject, however, to a Constitutional Court that refused to adopt "a pro-provincial interpretation" of the guarantees for provincial autonomy in the national Constitution. This provincial constitution therefore does not deviate substantially from what the national Constitution provides (Steytler and Mettler 2001: 103).

As Steytler and Mettler argue correctly, however, "the 'federal process' had a beginning but no clear end" (ibid.: 104). Indeed, the federal process has not yet ended even today, and the dynamism in the concept must again be showcased in light of developing realities.

Agitation for Western Cape Independence

The Cape Party was formed in 2009 and attracted 2,552 votes in that year's provincial elections (Smook 2011). In 2010, the party argued that it was

> fed up with racial quotas, black empowerment and affirmative action and argues that there was never a mandate from Western Cape residents to join the Union of South Africa in 1910. It wants a full-fledged Cape Nation set up, complete with border posts, immigration policy and its own national budget [Evans 2010].

In the 2016 municipal elections, the Cape Party attracted 4,473 votes (Independent Electoral Commission 2016), and 9,331 votes in the 2019 provincial elections (Independent Electoral Commission 2019).

A 2018 study by Hancké concluded that the Western Cape, if it had its own currency, would be able to "heighten existing economic advantages" and "protect new industries." This was the same year a Khoi-San king, Khoebaha Calvin Cornelius III, declared the independence of the Cape "Sovereign State of Good Hope" from South Africa, due to a lack of "proper recognition" by the central government of the indigenous Khoi and San ethnic groups. Nothing came of this declaration (Cilliers 2018).

More recently, the Cape Independence Advocacy Group (CIAG), associated with Phil Craig, has brought various Cape Independence groups together to coordinate advocacy. According to its website (CIAG 2020a):

> The ANC government is leading us into an economic and social disaster. The Western Cape has consistently rejected their agenda, yet our democratic voice is rendered redundant by a system where our government is not chosen by us, but despite us. Our best hope is creating our own first world nation on Africa's southern tip—the Cape of Good Hope. Together, let's build Africa's newest country.

Victory Research, an independent survey company, was commissioned to measure the extent of support for the secession of the Western Cape. The survey of 802 individuals "was fully representative and comprised only adults residing in the Western Cape"

(CIAG 2020b). According to the survey (Victory Research 2020), 67.9 percent (82.5 percent of whites, 67.9 percent of coloreds, and 58.9 percent of blacks in favor) of respondents want provincial governments to be given more constitutional power; and 35.8 percent (64.5 percent of whites, 38.6 percent of coloreds, and 16 percent of blacks in favor) of respondents support the Western Cape becoming an independent state. It is noteworthy that support for devolution is far higher than support for secession, at least within this sample.

Craig (2020a) notes that, since the Western Cape was established during the transition, the ANC has never won a majority of votes there. "The people of the Western Cape," argues Craig, "aren't getting the government they're voting for." CIAG (2020c) ascribes the move in favor of independence to the national government's "racial crusade which permeates every corner of our society," a collapse in municipal government, a stagnant economy, unemployment, endemic corruption, violent crime, high national debt, and a beleaguered tax base.

To Cape secessionists, Asmal's (1994) assurance that a democratic government adhering to the separation of powers, judicial review, and a justiciable bill of rights would be "a surer basis" than substantive decentralization such as federalism, "for the protection of the rights of all individual and minorities" (ibid.: 61), has not proven true.

The Alternative of Devolution

Secession is a radical, but not necessarily unreasonable option in political and constitutional disputes. It is submitted, however, that despite its reasonableness it should be regarded as a measure of last resort. It ought not be attempted before South Africa has experimented with substantive devolution, which would grant a great deal of power to autonomous regions while at the same time preserving the integrity of the territory and the Constitution. It is also, according to the survey quoted above, what most Western Cape residents would prefer.

If proponents of secession are willing to concede to devolution, the Cape Independence movement will not only appear more reasonable and politically mature, but will also in a very real sense open the door to potential future independence if devolution proves unsuccessful. Devolution is only one step away from complete self-determination and will not undermine ultimate independence unless

devolution works, in fact, to create an acceptable dispensation for the dispersion of political power in South Africa.

Constitutional Basis for Devolution

This article discusses how bringing about devolved government throughout South Africa is possible without amending the Constitution. Like peaceful secession, however, this will require the cooperation of the ruling party and governments at both national and provincial levels. And, even though a constitutional amendment would not be necessary to bring about the contemplated devolution, a generous interpretation and construction of constitutional provisions by the courts would be necessary.

For devolved governments to be regarded as akin to provincial governments—or the second tier of administrative division, the norm in most cases of devolved government around the world—a constitutional amendment would be required. To make the concept of devolution more readily and politically palpable, this article assumes it is undesirable to do so.

This article therefore approaches devolution from the lowest sphere of government in South Africa: municipal government. In certain material respects, municipal government is already in a more advantageous constitutional position than provincial government.

Provincial Authority

There are three spheres of government—national, provincial, and municipal—each of which has its own original constitutional authority over certain matters.[5] Schedule 5 of the Constitution reserves certain "functional areas" for exclusive provincial legislative competence; however, Section 44 (2) of the Constitution bestows on Parliament the power to intervene in any such areas under certain broad circumstances. Section 44 (3), furthermore, essentially allows the central government to legislate on any "exclusive" provincial competence if it is "reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4." Schedule 4 sets out the areas of concurrent national and provincial legislative competence. This provision evidently detracts

[5] Not all constitutional provisions relating to the division of powers are considered here.

from the exclusivity of provincial competence and is a substantive limit on the federal characteristics of the Constitution.

Section 139 allows provinces to intervene in municipal affairs under certain circumstances, although the national government has supervening authority in this respect as well. Parliament may adopt legislation regulating how such interventions are to take place.

Asmal (1994) writes that in a federal constitution "the allocation of power between a federal and a provincial government is [expressly] delineated" rather than left to the discretion of the central government (ibid.: 48). According to this conception, South Africa today is, according to the Constitution, clearly a federation. Indeed, as of March 10, 2021, the Center for the Study of Federalism (2021) at Lafayette College has South Africa listed as a federation on its online homepage. Both provinces and municipalities in South Africa are vested with original authority and legislative competence by the Constitution. However, one would be forgiven for regarding South Africa as a unitary state, for indeed that is largely how it is governed (Broschek 2016: 44–45). One could regard South Africa as a centralized federation or a decentralized unitary state.

Self-Determination

Section 235 of the Constitution, a provision that has not been invoked since the Constitution was adopted, provides that "recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, [may be] determined by national legislation." In other words, the power to devolve "self-determination" to "a territorial entity in the Republic" is vested in Parliament. It is this provision that forms the constitutional basis of the devolution contemplated in this article.

There are three requirements set out in Section 235 for such a "territorial entity" to qualify for the grant of self-determination: (1) it must be or represent a community, and that community must share a (2) common culture and (3) language. This is not a particularly high threshold to attain, as each of these requirements can, and must, be construed generously.[6]

[6]The Supreme Court of Appeal held in *Libazi v S* 2010 (2) SACR 233 (SCA) at para 11 that rights must be construed generously to ensure the widest protection possible.

The Constitution adopts an inclusive conception of "community" by referring to community in senses other than merely ethno-racial (e.g., Sections 25 (6) and (7), 31 (1), 151 (3), 153 (a), and 206 (3) (c)).

South Africa is in the fortunate position that particular languages and cultural traditions dominate in large, continuous areas. But the Constitution also goes out of its way to emphasize (in provisions like Sections 184 and 234) that "culture," too, is not merely ethno-racial.

Finally, Section 30 of the Constitution guarantees freedom of choice in matters of language and culture, specifying that "everyone has the right to use the language and to participate in the cultural life of their choice." Thus, "culture" and "language" as they appear in Section 235 must receive a generous construction that takes into account that culture and language are chosen, not inborn.

Smoke and Mirrors

De Vos (2020) avers that Section 235 "is one of those typical smoke-and-mirrors provisions inserted into the Constitution to placate right-wing whites without creating any legal rights or obligations," repeating a similar point raised by Steytler and Mettler (2001: 100).

It is correct that Section 235 provides for self-determination only within South Africa (therefore precluding political and constitutional secession),[7] but it is incorrect that any demand for the recognition of the right of self-determination "can happily be laughed off." It is a well-known presumption of statutory (and constitutional) interpretation that statutes or constitutions do "not contain invalid or purposeless provisions" (Van Staden 2015: 564). In the case of a supreme constitution like South Africa's, this presumption is not rebuttable, as rebutting it when dealing with a provision in the Constitution would logically mean rejecting the supremacy of the Constitution, entrenched in Sections 1 (c) and 2 of the Constitution.

Section 235 must give rise to some type of legal consequence. For, indeed, if Section 235 had been omitted, Parliament would *still* have been empowered to recognize such a right (to self-determination) in terms of Section 39 (3) of the Constitution, which provides that "the

[7] Secession is, however, not a constitutional phenomenon, at least not in domestic law. Indeed, those advocating for secession deny the legitimacy or authority of the mother state's constitution and its instruments over them per se.

Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill." Section 235 must be assumed to contemplate something more than a residual power of Parliament. While Parliament does have discretion, a malicious refusal of Parliament to exercise this power would evidently be inconsistent with the spirit and purpose of the Constitution.

It is moreover unfortunate that Section 235, and the entire notion of self-determination, is identified so completely with "right-wing whites," as if nobody else has an interest in self-determination. One of the purposes of the United Nations Charter as a whole is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples," and Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights guarantees "the right of self-determination" of "all peoples," which means they have the "right" to "freely determine their political status and freely pursue their economic, social, and cultural development." South Africa is a founding member of the United Nations and a party to both mentioned covenants.

Furthermore, as Steytler and Mettler (2001) note, Afrikaners "as a language or cultural community [are] fractured across the political spectrum." The Afrikaner right wing to a large extent lost its support, and the constitutional self-determination provision excludes racialism (ibid.: 105). It would be incorrect therefore to regard any contemporary call for the realization of the self-determination guarantee in the Constitution as somehow merely Afrikaner right-wingers or racists seeking to return to apartheid. Indeed, self-determination is in fact a principle that underlies the whole Constitution and particularly the Bill of Rights. The enterprise of constitutionalism is about subjecting governments to legal constraints so as to ensure the ability of the public to be free and decide their own affairs (in other words, individual and collective self-determination) is maintained.

Whatever the intentions of those who inserted Section 235 into the Constitution might have been, Section 235, in fact and in law, exists; and its existence in the Constitution is reason enough for it to be regarded as a provision that deserves the same respect and adherence as any other in the highest law.

Section 156

Whereas Section 235 provides the broad constitutional foundation for devolution, Section 156 of the Constitution brings about more technical clarity on how the widest possible kind of devolution can occur within the framework of South African constitutional law, at the municipal level.

Section 156 (1) (b) of the Constitution empowers Parliament and provincial legislatures to assign to a municipality any executive authority in addition to those that municipalities already possess.

Section 156 (4) provides that matters "necessarily" relating to local government but falling within either concurrent national and provincial (Schedule 4), or exclusive provincial (Schedule 5), legislative competence *must* be assigned to a municipality if "that matter would most effectively be administered locally" and "the municipality has the capacity to administer it." The assigning government (national or provincial) must come to an agreement with the municipality and may subject the agreement to "any conditions." In other words, this provision *obliges* both Parliament and the provincial legislatures to assign areas of their own competence to municipalities if local governments can more effectively administer those areas, provided such matters relate to local government. In a similar vein, Section 104 (1) (c) empowers a provincial legislature "to assign any of its legislative powers to a Municipal Council in that province."

These provisions mean that national and provincial government-level powers can legally—and in fact must—be transferred to municipalities under certain circumstances.

Whether something does and does not necessarily relate to local government should be construed generously. To not do this would fall foul of the constitutional principle of subsidiarity: "governance should take place as close as possible to the citizens" (De Visser 2008: 1). The democratic principle of representation central to the Constitution and the principle of subsidiarity are interrelated. The closer one is to one's government, the more one's voice in government is amplified. A practical illustration might be a town council of 50 that governs a town of 500 people. It takes only 10 inhabitants to return a single councilor, thus giving a more meaningful weight to each vote. In contrast, a Parliament of 400 that governs a country of 40 million requires some 100,000 votes to return a single parliamentarian. For these reasons it is hardly surprising that the principle of

subsidiarity receives such important recognition in Section 156 of the Constitution.

Furthermore, Section 152 (1), which sets out the objects of local government, is instrumental to determining what does and does not relate necessarily to local government. These include providing democratic government for local communities, providing services, and promoting social and economic development. In other words, there is an obligation on the national and provincial governments to assign (from their own legislative competencies) to municipalities matters that necessarily relate to any of these municipal constitutional objectives.

Finally, Section 156 (5) provides that a "municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions." This must be read with Section 151 (4), which provides that "national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions," and Section 156 (2), which provides that municipalities "may make and administer by-laws for the effective administration of the matters which it has the right to administer."

This provision places the *right* in the hands of a municipality to exercise that power, rather than a power in the hands of national or provincial government to delegate or assign that power.

Constitutionalism

Davis (1997) notes correctly that the textualist approach adopted under the previous headings would be insufficient under South Africa's present constitutional dispensation (ibid.: 179–80). The Constitution is a value-laden legal text—primarily the tripartite values of *freedom*, *dignity*, and *equality*—and therefore, over and above faithfulness to the constitutional text, certain values and principles must also be recognized and advanced.

It is submitted that it speaks for itself that devolution is an exercise in recognition and advancement of freedom and dignity. As the Supreme Court of Appeal recently noted in *Esau* (2021), freedom of choice is an underlying aspect of dignity, thus binding these values (ibid.: 118). Devolution as a matter of course is aimed at amplifying freedom of choice in the form of self-determination. By devolving more powers of governance to a more local level, the citizens who

find themselves in those territories would enjoy greater involvement in their daily governance, thus improving responsiveness, and allowing citizens to insist on greater accountability in circumstances where their fundamental freedoms are being curbed. Finally, they may still rely on the central government and particularly the courts for the vindication of their constitutional rights, safeguarding the right to equality.

One of the most forceful arguments against federalism during the transition from apartheid, as discussed earlier, was that, in order to pursue its social-welfare objectives, the central South African government would need to collect as much resources from as broad a tax base as possible, and that federalism would undermine this by having wealthier regions withhold such resources.

This criticism has been supervened by reality. The central government's tax base is narrowing largely because of its overzealous desire to extract and redistribute wealth from the productive sectors of the economy, at the expense of the imperative of economic growth. Indeed, in the absence of growth, there is by necessary implication less wealth to extract and redistribute (Nattrass and Seekings 2018; Roodt 2020). With such collapsing revenues and collapsing government competence to engage in service delivery more broadly, it seems to follow that at least attempting a constitutionally viable alternative, which might yield greater revenues for the central government by forcing it to be more fiscally disciplined, would not undermine the achievement of material equality.

This argument against devolution is related to a similar argument that decentralization would undermine the unity of South Africans envisaged by the Constitution. According to Thompson (1990), a similar argument was made by D. F. Malan, the leader of the NP who would go on to be the first apartheid-era prime minister, who claimed in September 1931 "that decentralization would divide, not unite, the people" (ibid.: 61). This argument, too, is unconvincing.

Prima facie decentralization might seem to operate away from unity, although this is an incorrect assumption. The individual right to privacy guaranteed in Section 14 of the Constitution operates in the same way as political decentralization (whether secession or devolution). Individuals are afforded a space of their own where nobody else may enter without permission. There are good reasons for this right: the protection of human dignity, the safeguarding of spheres of free action, and the recognition of agency.

Yet the argument has not been made with any force that privacy is somehow disunifying or uncommunal. The mere phenomenon of deciding certain things without the (unnecessary) involvement of others does not mean disunity. In fact, it might promote unity by removing certain areas of extreme contestation from the table, and thus allowing the focus to shift to areas of agreement and consensus.

One must also bear in mind how advocacy for federalism during apartheid, in some respects, sought to create unity rather than undermine it. Lynch (1986) noted how the KwaZulu-Natal *Indaba*, if its proposals had been accepted by the NP government, which itself had already ideologically abandoned apartheid, would have turned South Africa into a federation, where certain regions were governed multiracially. This would have led black South Africans, oppressed in the white supremacist provinces, to move to the pockets of freedom, thus depriving the former provinces of human capital. "In short," argued Lynch, "the Indaba pointed to a way for South Africa to use federalism as a peaceful solution to eliminating apartheid" (ibid.: 244).

Toward a Devolution Act

Parliament should enact legislation providing a framework for devolution in South Africa and, where appropriate, provincial legislatures should enact similar legislation.

A devolution act should formally recognize devolved governments as municipal governments to fit in the constitutional spheres-of-government dispensation. The act would amount to an agreement (per Section 156(4)) by Parliament and provincial legislatures to not legislate on any matter falling within those parts of Schedules 4 and 5 of the Constitution that set out the areas of municipal competence. The act should further transfer ample executive authority to devolved governments in terms of Section 156 (1) (b). A commitment to not intervene in devolved government affairs (Section 139), too, would be useful. The act should also exempt devolved governments from other ordinary legislation dealing with municipal affairs, which the act itself will replace.

Another important competence to devolve in the act is law enforcement. As noted above, the central government's inability to deal with South Africa's high violent crime rates is one of the motivators for calls for secession in the Western Cape. Section 199 (1) of the Constitution provides that the "security services of the Republic

consist of a single defense force, a single police service and any intelligence services established in terms of the Constitution." Section 199 (3) provides that other "armed organizations or services may be established only in terms of national legislation." Section 205 (1) refers to the "national police service." It is therefore evident that only a single police service may exist nationally, for the entire South Africa, but this does not preclude the existence of police services established by and for devolved governments. The devolution act should include a provision that, in terms of Section 199 (3), allows devolved governments to establish such police services.[8]

Finally, if a devolution act is adopted, devolved governments should take the initiative and, in terms of Section 156 (5) of the Constitution, in fact exercise as much governing power over matters within their territories as reasonably possible, while respecting the constitutional rights of inhabitants.

Conclusion

The NP government consistently favored a unitary, centralized approach to government, and throughout its existence repeatedly rejected calls for substantive decentralization. This suddenly changed when violence spilled into South Africa's streets. The NP became open to decentralization and indeed started pursuing decentralization as official policy (Lynch 1986: 234). Violent protest action in South Africa has not ceased since the first democratic elections in 1994. Indeed, they have recently become worse as desperate South Africans lose faith in the ability of government to provide services promised (Patel and Graham 2019).

As of now, no blood has been spilled in the name of decentralization, but it is not inconceivable that this might in the near future happen given the increasing volatility of South African governance and politics (Lancaster and Mulaudzi 2020). One hopes this can be avoided, and instead South Africa can proceed, in a peaceful and ordered fashion, along a constitutional path to devolved power.

As a matter of legal realism, it will be entirely within the hands of South African judges whether they will prefer the construction of constitutional meaning made in this article, which it is submitted

[8]There already exist various, mostly municipal, police departments that are independent of the national service.

does not stretch the constitutional text, or whether they will regard substantive devolution to be legally impossible. Both are conceivably reasonable interpretations of the Constitution, but the courts might be called upon to choose one or the other. Much will depend upon the choice the judiciary makes.

But this is in any event a necessary debate. There are secessionists, and many largely poor South Africans, who are growing more disillusioned with governance by the day. It would be unsurprising if there were to be a sudden upsurge in support for such radical measures as secession, perhaps not necessarily in the suburbs of the Western Cape, but in the rural areas of KwaZulu-Natal or the townships of Gauteng. It is, therefore, useful to sketch out a peaceful and lawful process that might avoid such an unfortunate event that, likely, would entail armed conflict.

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