

Why the Unitary Nature of the South African State Cannot Survive the Assertion of Self-Determination by a Sub-National Community

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Phil Craig is Director and co-founder of the Cape Independence Advocacy Group (CIAG), and the leading public figure in the movement for Western Cape self-determination. A British national who has lived in South Africa for over two decades, he is widely published across South African media and a frequent public speaker and debater on constitutional and self-determination questions. He has drafted multiple pieces of legislation at both provincial and national level, including the Constitution Twenty-Second Amendment Bill (popularly known as the Non-Racialism Bill) at national level and the Western Cape People's Bill at provincial level, and established the Western Cape Devolution Working Group. His work is grounded in six years of sustained, first-principles research into the legal architecture of self-determination in South African and international law. His advocacy has drawn sustained national attention, including formal debate within Parliament's Home Affairs Portfolio Committee over calls — ultimately rejected by the Minister of Home Affairs — for his deportation.

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Abstract

This paper examines whether the legitimate assertion of self-determination by a qualifying sub-national community is compatible with the continued unitary character of the South African state. It argues that the right to self-determination carries the status of a peremptory norm (*jus cogens*) in international law and has been domesticated into South African law, and that this status qualifies the Constitution's own supremacy rather than being subordinate to it. The paper distinguishes between power held by right, which the state cannot withdraw without consent, and power held by grace and favour, which it can, and argues that a legitimate assertion converts a community's position from the latter to the former. It is not the assertion itself but the resulting *de facto* redistribution of power — whether through state accommodation or unilateral action following unlawful refusal — that ends the state's unitary character. This claim is tested against two South African applications, addressing the territorial and cultural forms self-determination may take: the devolution of policing powers to the Western Cape, and Afrikaner control of single-medium Afrikaans schools as cultural institutions. A postscript chapter extends the analysis, at a lower evidentiary register, to fiscal autonomy. The paper concludes that where a community's claim meets the legal threshold of legitimacy, the state's obligation to accommodate it is a matter of legal duty rather than political discretion.

Keywords: self-determination; *jus cogens*; peremptory norm; *erga omnes*; unitary state; territorial integrity; section 235; BELA; Western Cape; Afrikaner rights; remedial secession

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Executive Summary

This paper argues that South Africa's constitutional order cannot resist the legitimate assertion of self-determination by a qualifying sub-national community — and that any such assertion, whether the State accommodates it or refuses it, ends South Africa's character as a unitary state as a matter of fact.

The argument turns on a single point of law, not a matter of political preference. The right to self-determination carries the status of a peremptory norm (*jus cogens*) in international law — binding, non-derogable, and beyond the reach of any state's own constitutional text — and this right has been domesticated into South African law. The widely held assumption that the Constitution's supremacy is absolute, and that it therefore forecloses any such claim, does not survive contact with this fact: a peremptory norm takes precedence over a state's constitution where the two conflict, and self-determination is such a norm. Whether a community meets the legal threshold to make such a claim is itself a defined legal question, addressed in Chapters 4 and 5.

This produces a distinction that runs through the whole paper: power a community holds *by right*, which the State cannot withdraw without its consent, and power a community holds *by grace and favour*, which the State can. Where the State accommodates a legitimate assertion of self-determination, power passes to the community by right, and the unitary state is at an end. Where it unlawfully refuses, the community retains the capacity — and, this paper argues, a justification grounded in the contested but increasingly accepted doctrine of remedial secession — to acquire that power regardless, and the unitary state is at an end by a different route. Parliament bears a constitutional duty to give effect to a legitimate assertion through enabling legislation; failure to do so gives rise to a constitutional crisis with consequences beyond South Africa's own domestic courts.

Two current South African political tension points provide the opportunity to test this claim whilst examining both principal forms self-determination takes in international law — territorial and cultural — allowing its practical application to be considered.

The first is policing in the Western Cape. The Western Cape Government has, for years, unsuccessfully pursued the devolution of policing powers under section 99 of the Constitution, which allows the Minister of Police to assign policing functions to a province voluntarily. Successive Ministers — Cele in 2021, and Cachalia since — have failed to do so; the current Minister's stated openness to discussion has produced no more than an appeal to 'cross-party consensus,' itself still absent. This is a position the President has publicly affirmed, notwithstanding the well-documented collapse of policing capacity nationally and in the province. Section 100 of the Constitution allows national government to intervene where a province fails its constitutional obligations; no reciprocal provision exists allowing a province to act where national government fails its own. This paper asks what changes if the Western Cape instead asserts a right to self-determination, rather than requesting a discretionary assignment of power — and concludes that the legal position changes fundamentally, from a request the State may indefinitely decline, to an entitlement the State has an obligation to accommodate.

The second is Afrikaans single-medium schools. The Basic Education Laws Amendment Act empowers the State to override School Governing Bodies' authority to set schools' language policy — authority that had, until recently, given effect to the wishes of the parent and community bodies who ran and often built these schools. This paper asks whether Afrikaners have a right to take control of their own schools, as cultural institutions, by asserting their right to self-determination — and, applying the same framework, concludes that they do, and that the State's obligation to accommodate that claim does not depend on its willingness to grant it.

Chapter 8 extends the same analysis to a third, more speculative domain: fiscal autonomy. Unlike policing and schooling, no current South African community has yet asserted a grievance in these terms — funding dependency is, at present, a constraint on exercising other rights rather than a claim in its own right. This chapter is treated throughout as a postscript, at a deliberately lower evidentiary register than the paper's core argument, and its conclusions are illustrative rather than load-bearing: the paper's central proposition stands independently of it.

Two conclusions follow from this argument. First, the unitary character of the South African State does not survive a legitimate assertion of self-determination — but not by virtue of the assertion itself. It is the de facto redistribution of power that ends it. Where the State accommodates the claim, power passes to the community by right. Where the State unlawfully refuses, the unitary state persists only for as long as that refusal stands unchallenged: a community with sufficient determination, capacity, and political will retains the capacity to assume the power regardless of the State's consent, at which point the unitary state ends by a different route. Second, once a claim meets the legal threshold of legitimacy, the State has no discretion over whether to accommodate it. Its only remaining latitude lies in negotiating, in good faith, how the claim is accommodated without infringing the rights of others, including the South African people as a whole.

Introduction

This paper argues that the dominant constitutional orthodoxy in South Africa — that the state's unitary character is settled and defensible in perpetuity, secured by the principle of territorial integrity and by a parliamentary arithmetic sufficient to foreclose any realistic prospect of constitutional amendment — is mistaken. It is mistaken not as a matter of political preference, but as a matter of law.

That orthodoxy rests, in the end, on a single premise: the assumed absolute supremacy of the Constitution. In South African constitutional discourse, this premise is rarely defended because it is rarely challenged — it is treated not as a proposition but as an axiom, and to question it is, in many and perhaps most quarters, heresy. This paper challenges it directly. The right to self-determination carries the status of a peremptory norm (*jus cogens*) in international law, rendering it obligatory and non-derogable, and this right has been domesticated into South African law. A peremptory norm binds a state irrespective of what its own constitution provides and takes precedence over that constitution where the two conflict. The Constitution's supremacy is accordingly not absolute; it is supreme only within the space that international law's peremptory norms leave open to it — a space that does not extend to self-determination.

It follows that the South African constitutional order cannot resist the legitimate assertion of that right by any qualifying sub-national community, and that any such assertion — whether accommodated willingly or unwillingly — alters South Africa's character as a unitary state as a matter of fact. Where the state willingly accommodates the assertion, power passes to the community concerned by right, not by the grace and favour of the central government; where it refuses, the community can elect with potential justification, to acquire that power regardless. Either outcome is incompatible with the state's continued unitary character. Parliament bears a constitutional duty to give effect to a legitimate assertion of the right through enabling legislation — a duty this paper establishes in Chapters 4 and 5 — and failure to discharge that duty would give rise to a constitutional crisis with international-law consequences beyond South Africa's own domestic forums.

This distinction — between power held by right, which the state cannot withdraw without consent, and power held by grace and favour, which it can — is a recurring theme of this paper and is discussed in different applications, from Chapter 3 to Chapter 8.

The argument proceeds by a defined method. It is doctrinal in its core, tracing the right to self-determination through international law and its reception into South African constitutional law; it is comparative where comparison sharpens the doctrinal claim, particularly in its treatment of fiscal autonomy; and it is applied throughout to two South African communities, chosen as a lens rather than as an exhaustive catalogue. The people of the Western Cape illustrate the territorial form the right may take; the Afrikaner people illustrate its cultural and linguistic form. Between them, the paper's central claim is therefore tested against the principal forms which self-determination takes in international law. The selection is not a claim that these two communities' entitlement is stronger than that of others — the Zulu people, among others, could sustain a parallel analysis — but a reflection of the depth of engagement available to this analysis, and a deliberate choice to test the argument against two cases rather than assert it in the abstract.

The paper's argument unfolds in three movements. Chapters 1 to 3 establish the problem: that South Africa is, in fact and in its own self-description, a unitary state; that its sub-national communities are real and constitutionally recognised; and that the constitutional architecture designed to accommodate them in practice subordinates them to an enduring national majority, including through the safeguard institutions intended to check that majority's power. Chapters 4 and 5 establish the right: that self-determination is a peremptory norm in international law, non-derogable and binding regardless of domestic constitutional text, and that this status has been received into South African law without the limitation popular and political discourse has assumed it carries. Chapters 6 and 7 apply this right to two current South African tension points — policing in the Western Cape, and Afrikaner control of single-medium Afrikaans schools as cultural institutions — and conclude that the unitary character of the South African

state cannot survive the legitimate assertion of self-determination by a qualifying community, whichever way the state responds to it.

Chapter 8 stands apart from this structure and is treated throughout as a postscript rather than as a further stage of the core argument. It considers fiscal autonomy — a domain which, unlike policing or schooling, has currently not yet crystallised into a concerted political grievance — and does so at a deliberately lower evidentiary register than Chapters 1 to 7. Its inclusion reflects the paper's broader method of applying an abstract right to concrete examples, but its conclusions are illustrative rather than load bearing: the paper's central proposition is established, and stands, without it.

The paper does not take a position on whether Cape or Afrikaner self-determination is desirable, nor does it directly encourage either community to assert its right as described. Its claim is narrower and, the paper argues, more secure: that where a qualifying community does assert that right, the legal consequence follows regardless of the desirability of the outcome. This is a paper about what the law requires, not about what any party — including its author — might prefer.

Chapter 1: South Africa as a Unitary State

1.1 The Constitutional Concept of a Unitary State

- [1.1] The internal distribution of power is inherent to the nature of all states. This distribution can take numerous forms — for example, an absolute monarchy, in which decision-making authority vests in the sovereign, or a parliamentary system, in which elected representatives collectively fulfil that function. In states operating under a supreme constitution, it is the Constitution itself which determines this distribution of power.
- [1.2] South Africa operates as a constitutional democracy, and the focus of this paper is accordingly directed towards the constitutional distribution of power.
- [1.3] Whilst the constitutions of states which have adopted them are each unique, they can be broadly categorised according to how they distribute power internally. At one end of the spectrum are unitary states, where power is ultimately consolidated in a single central decision-making authority. At the other are federal states, in which multiple other entities hold constitutionally entrenched authority of their own, not derived from the central government.¹
- [1.4] It is important to note that the existence of regional or provincial governments is not, of itself, indicative of a federal state; such structures are a standard administrative feature of most states.² It is the nature and character of the power any such entity holds — territorial or otherwise — which determines the state's status: specifically, whether that power is merely devolved and revocable at the centre's discretion, or constitutionally entrenched and irrevocable without the entity's own consent.³

¹ Watts, R. L. (2008). *Comparing Federal Systems* (3rd ed.). Montreal & Kingston: McGill-Queen's University Press, p. 8.

² Ibid., p. 10 (Table 1, "Constitutionally decentralized unions").

³ Watts, R. L. (2007). *The Federal Idea and its Contemporary Relevance*. Kingston: Institute of Intergovernmental Relations, Queen's University, pp. 3–4.

1.2 Essential Characteristics of a Unitary State

- [1.5] The essence of a unitary state is that, whilst certain powers may be devolved or assigned to other spheres of government, final authority — whether exercised directly or through the processes by which the constitution itself may be amended — remains with the central constitutional authority, without requiring the consent of the specific entity whose powers are affected. This is the same test already identified in the preceding section: authority that is devolved and revocable without that entity's consent, rather than constitutionally entrenched and irrevocable without it.⁴
- [1.6] South Africa's own unitary structure is, in this sense, singular in its governance despite the South African people as a whole being demographically and culturally plural in their composition — a mismatch this paper returns to at the close of Chapter 2.

1.3 South Africa's Constitutional Self-Identification

- [1.7] In the democratic era, South Africa has firmly defined itself as a unitary state. This is not a matter of inference from constitutional structure — it is a description which the South African state has repeatedly and explicitly applied to itself, at the highest level, across successive administrations.
- [1.8] In his 2013 Freedom Day address, President Zuma described the democratic transition in these terms: "From the fragmented public administrations of the apartheid era we constructed a unitary state, nine provinces and a reconfigured municipal landscape."⁵
- [1.9] A decade later, announcing a review of the Intergovernmental Relations Framework Act, President Ramaphosa used the same characterisation: "In the design of our democratic unitary state, we introduced cooperative governance to ensure that the three spheres of government worked together to meet the needs of the people."⁶

⁴ Ibid.

⁵ President Jacob Zuma, Address at the Freedom Day Celebrations, Union Buildings, Pretoria, 27 April 2013.

⁶ President Cyril Ramaphosa, quoted in "Govt reviews Intergovernmental Relations Framework Act," SAnews, 6 September 2023.

- [1.10] The clearest and most consequential instance came in March 2025, when the Presidency responded directly to the Cape Independence Advocacy Group (CIAG), reaffirming the same position in terms that leave no room for accommodation: "Our constitutional democracy that we forged in 1994 created a unitary state."⁷ The Presidency went further still: "There is no part of our beautiful land that can be allowed to secede."⁸
- [1.11] Constitutional scholarship reaches the same conclusion. Coetzee and Wessels, having analysed South Africa's constitutional dispensation in detail, conclude in their own English-language summary that "the form of state is still unitary"; their fuller Afrikaans analysis finds that South Africa's form of state, having regard to the Constitution, is unitary with federal characteristics, and leans more towards a unitary form of state than a federal one.⁹
- [1.12] It is therefore clear that, regardless of how South Africa's constitutional arrangements may be independently characterised, the South African government firmly and consistently holds that South Africa is a unitary state and conducts itself accordingly — including in direct response to the specific claim this paper advances.
- [1.13] As President of a unitary state, where power is exercised singularly based upon the will of the national majority, and limited only by the Constitution itself, President Ramaphosa believed himself fully entitled to assert that no part of South Africa could be permitted to secede — where secession represents the ultimate expression of the right to self-determination. The purpose of this paper is to test the assumption that South Africa can deny qualifying communities a legitimate assertion of their right to self-determination, against the law.

⁷ The Presidency, Presidential Spokesperson media briefing on the programme, Pretoria, 20 March 2025.

⁸ Ibid.

⁹ Coetzee, T. & Wessels, D.P. (2003). "Suid-Afrika se staatsvorm: Unitêr of federaal?" *Southern Journal for Contemporary History*, 28(3), 114–133, at 114, 129.

Chapter 2: Sub-National Communities in South Africa

2.1 The South African People as a Whole

- [2.1] The majority of states are heterogeneous in nature.
- [2.2] In his study on Ethnic and Cultural Diversity by Country, James Fearon found that whilst 70% of states had a national ethnic majority, that majority only composed on average 65% of the population, and that in only 21% of states did the ethnic majority comprise 90% or more of the national population.¹⁰
- [2.3] Multiethnic states are, in fact, the global norm. Hislope and Mughan identify only six states as ethnically homogeneous in any meaningful sense — South Korea, North Korea, Lesotho, Algeria, Morocco, and Egypt — each having a single ethnic group comprising 99% or more of its population.¹¹
- [2.4] South Africa is strongly heterogeneous. Statistics South Africa's own census classifies the national population into four official population groups,¹² and the Constitution recognises twelve official languages, including South African Sign Language.¹³ There is accordingly no singular South African ethnic, cultural, or linguistic identity. South Africa is a plural society.

2.2 Diversity and Pluralism in the South African Constitution

- [2.5] The South African Constitution does not dispute the plural nature of the South African state; to the contrary, it embraces it. Its own preamble is evidence of this, having been

¹⁰ Fearon, J. D. (2003). "Ethnic and Cultural Diversity by Country." *Journal of Economic Growth*, 8(2), 195–222.

¹¹ Hislope, R. & Mughan, A. (2012). *Introduction to Comparative Politics: The State and its Challenges*. Cambridge University Press, ch. 7 ("Ethnic Nationalism").

¹² Statistics South Africa, *Census 2022 Statistical Release* (P0301.4), 10 October 2023.

¹³ Constitution of the Republic of South Africa, 1996, s. 6, as amended by the Constitution Eighteenth Amendment Act, 2023.

negotiated between South Africa's founding political traditions precisely to accommodate their distinct constituencies and histories.¹⁴

[2.6] The Constitution's substantive text makes this distinction explicit. Section 235 distinguishes the collective "South African people as a whole" from the sub-national communities who collectively comprise that people:

[2.7] "The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, 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, determined by national legislation."¹⁵

2.3 Sub-National Communities in South Africa

[2.8] There are numerous sub-national communities in South Africa, some tightly defined, others more loosely so, with considerable overlap between them — an individual may belong to more than one. It is not the purpose of this paper to catalogue each such community. It is, rather, to establish that where a sub-national community meets the criteria of a people as envisaged by international law, the implications for a unitary state are legally profound.

[2.9] This paper focuses on two such communities: the people of the Western Cape and the Afrikaner people. They are used, throughout, as the lens through which the paper's argument is tested — the first because it illustrates territorial self-determination, the second because it illustrates cultural and linguistic self-determination. Between them, they allow the paper's central claim to be examined against both principal forms the right may take.

¹⁴ Savage, K. and Netshitenzhe, J., oral history interviews, in "Negotiating the Preamble," *Our Constitution* (Constitution Hill Trust). Available at: <https://ourconstitution.wethepeoplesa.org/south-african-constitution/writing-one-law-for-one-nation/negotiating-the-preamble/>.

¹⁵ Constitution of the Republic of South Africa, 1996, s 235.

[2.10] The choice of these two communities is, in an important sense, arbitrary. Other South African communities could equally be analysed through the same framework — the Zulu people prominently among them, given their scale, institutional continuity, and territorial concentration.¹⁶ The selection made here reflects the author's own knowledge and direct engagement, not a judgment that these two communities' claims to self-determination are stronger than others'. A parallel paper, written from within a different community's experience, could as easily have been built around a different pair of case studies, and the analysis that follows would apply to them with no less force.

2.3.1 The People of the Western Cape

[2.11] With the advent of the democratic era, South Africa was, for the first time, divided into nine provinces under the Interim Constitution of 1993 — a division carried forward, substantially unchanged, into the final Constitution of 1996.¹⁷ Whilst each of those provinces forms a sub-national community and could be used as an example, the Western Cape is of particular interest.

[2.12] The Western Cape is demographically, linguistically, culturally, territorially, and ideologically distinct from the rest of South Africa. Its provincial election results have consistently diverged from national voting patterns since 1994, reflecting a distinct political character not found elsewhere in the country.¹⁸ The majority of its population is drawn from ethnic minorities,¹⁹ it has an overtly different character to the rest of South Africa — a perception widely enough shared in South African commentary to have become something of a cliché²⁰ — and it has adopted just three of South Africa's official

¹⁶ See section 3.3.1.2 below, discussing the Zulu monarchy's institutional and territorial position, including the Ingonyama Trust.

¹⁷ Constitution of the Republic of South Africa, Act 200 of 1993, s 124 and Schedule 1; Constitution of the Republic of South Africa, 1996, s 103.

¹⁸ Electoral Commission of South Africa, National and Provincial Election Results, 1994–2024, available at: <https://results.elections.org.za/home/Downloads/NPE-Results>.

¹⁹ Statistics South Africa, *Census 2022 Statistical Release* (P0301.4), 10 October 2023.

²⁰ "Western Cape: A different country on its own," *The Citizen*, 14 April 2023; Lewis, M., "South Africa's Western Cape Exceptionalism and the Coloured Vote," *GeoCurrents*, 15 June 2024; "The Western Cape is not a country," *LitNet*, 26 August 2025.

languages.²¹ It has passed its own Constitution, renamed its legislature to the Western Cape Parliament, and established its own cabinet of ministers.²² It has actively pursued greater autonomy from South Africa, and there are regular calls for its independence, with independent polling repeatedly establishing widespread sympathy for the idea.²³

[2.13] Defenders of the unitary state assert that the Western Cape is simply an administrative division of South Africa, and that the people of the Western Cape have no inherent rights beyond those conferred upon them as residents or citizens by the Constitution — itself the supreme law of the Republic.

[2.14] This paper takes the contrary position: that a distinct people, once established as such, inherently holds the rights which international law attaches to peoplehood.²⁴ It cannot be that a distinct group of people exists without enjoying the rights associated with that status. This argument is put to the test directly in Chapter 6.1, once Chapter 4 has set out what international law requires of a qualifying people — but the case for testing it against the Western Cape specifically is already strong on the evidence.

[2.15] That evidence is not merely political sentiment. The Western Cape Constitution itself records the existence of "the people of the Western Cape," in terms certified by South Africa's own Constitutional Court.²⁵ A province whose own founding text — accepted by the country's apex court — speaks of its inhabitants as a people is not a speculative or contrived candidate for this analysis. It is, on the state's own terms, exactly where the question belongs.

²¹ Constitution of the Western Cape, 1997, s 5.

²² Constitution of the Western Cape, 1997, Schedule 6 (transitional provisions).

²³ Feather, D. J., Anderson, P., & Phillips, T. J. (2026). "The Western Cape independence movement: motivations, justifications and critique." *The Round Table: The Commonwealth Journal of International Affairs and Policy Studies*, DOI: 10.1080/00358533.2026.2635604.

²⁴ See Chapter 4 below.

²⁵ Constitution of the Western Cape, 1997, Preamble; certified in *Ex parte Speaker of the Provincial Legislature of the Western Cape: In re Certification of the Constitution of the Western Cape, 1997* 1997 (4) SA 795 (CC).

2.3.2 The Afrikaner People

- [2.16] The Afrikaners are an ethnocultural community that developed in southern Africa from the seventeenth century onward. Their ancestry derives predominantly from Dutch, German, and French Huguenot settlers — the Huguenots arriving from 1688 as Protestant refugees fleeing persecution in France — together with smaller contributions from indigenous Khoisan peoples and enslaved populations brought to the Cape from Africa and Asia.²⁶ Religious identity developed alongside this mixed ancestry: Dutch Calvinism, French Huguenot Protestantism, German Lutheranism, and later Moravian missionary influence all shaped the community's early religious life, out of which the Dutch Reformed Church emerged as the dominant institutional expression.²⁷ This emerging community produced a language found nowhere else in the world: Afrikaans, which developed in the Cape as a creole from Dutch, before maturing into a language with its own literary, scientific, and educational tradition.²⁸
- [2.17] Afrikaner history is marked by the repeated pursuit of self-government. Denied continued autonomy at the Cape under British rule, tens of thousands migrated inland in the Great Trek to found their own independent republics.²⁹ Two Anglo-Boer Wars were fought to defend that independence, the second marked by a British scorched-earth policy and concentration camps, and ending in defeat and incorporation into the Union of South Africa in 1910.³⁰ Self-government and the protection of Afrikaner

²⁶ J.A. Heese, *Die Herkoms van die Afrikaner, 1657–1867* (Cape Town: A.A. Balkema, 1971), finding Afrikaner ancestry to be 34.8% Dutch, 33.7% German, 13.2% French, 6.9% Khoisan and enslaved population, 5.2% British, 2.7% other European, and 3.5% unknown.

²⁷ See "The Dutch Reformed Church in South Africa," Reformed Family Forum; "From Orange to Pink: A History of Politics and Religion in South Africa's Cape Town," *Modern Reformation*; Witmer, O. (2022). "Between Compliance and Resistance: Lutherans and the Dutch Reformed Church at the Cape of Good Hope, 1652–1820." *The Journal of Ecclesiastical History*, 73(2), 326–347, on the Huguenot, Lutheran, and Moravian contributions to the Cape's early religious history and the Dutch Reformed Church's subsequent institutional consolidation.

²⁸ Afrikaanse Taalmuseum en -monument (Afrikaans Language Museum and Monument), Paarl; Ponelis, F.A. (1993). *The Development of Afrikaans*. Frankfurt am Main: Peter Lang; see also "Genootskap van Regte Afrikaners," on the 1875 founding of the society that produced the first Afrikaans-language publications and advanced the language's recognition as distinct from Dutch.

²⁹ "Great Trek," *Encyclopaedia Britannica*; see also Norman Etherington, *The Great Treks: The Transformation of Southern Africa, 1815–1854* (Harlow: Pearson Education, 2001).

³⁰ On the Anglo-Boer Wars generally, see Thomas Pakenham, *The Boer War* (London: Weidenfeld & Nicolson, 1979); on the scorched-earth policy and concentration camps specifically, see S.B. Spies, *Methods of Barbarism? Roberts and Kitchener and Civilians in the Boer Republics, January 1900 – May*

identity were the stated motivations of apartheid.³¹ The transition to democracy saw Afrikaner negotiators secure the Afrikaner Accord and the short-lived Volkstaatraad, seeking a dedicated Afrikaner territory as the old order dissolved.³² Orania, a self-governing Afrikaner settlement in the Northern Cape, continues today, and in 2024 the Afrikaner Declaration — signed by Solidarity, AfriForum, organisations at the heart of Afrikaner civil-society, and prominent public figures — identified Afrikaners as an indigenous cultural community and called for a Cultural Accord to secure community rights, including, for a substantial number of signatories, an aspiration to territory.³³

[2.18] This paper examines the more recent history of this struggle, and the constitutional and political context from which section 235 arose, in later sections.³⁴

[2.19] Numerically, Afrikaners today number approximately 2.75 million — smaller than many nations, but larger than Botswana, Lesotho, or Eswatini, and broadly comparable in scale to Namibia.³⁵

[2.20] Just as with the Western Cape, this paper takes the position that a distinct people, once established as such, inherently hold the rights which international law attaches to peoplehood.³⁶ Whether Afrikaners meet the threshold required to be recognised as

1902 (Cape Town: Human & Rousseau, 1977); on the formation of the Union of South Africa in 1910, see the South African History Online overview of the period.

³¹ Hendrik Verwoerd characterised "separate development" as securing "white self-determination"; see Marx, C. (2010). "From Trusteeship to Self-Determination: L.J. du Plessis' Thinking on Apartheid and his Conflict with H.F. Verwoerd." *Historia*, 55(2), 50–75. See also Verwoerd's own 1958 address to Parliament upon becoming Prime Minister: "The tendency in Africa for nations to become independent and, at the same time, the need to do justice to all, does not only mean being just to the black man of Africa but also being just to the white man of Africa," quoted in Moodie, T.D. (1975). *The Rise of Afrikanerdom: Power, Apartheid, and the Afrikaner Civil Religion*. Berkeley: University of California Press, p. 283.

³² See section 5.5.1 below.

³³ Orania Beweging, orania.co.za; see also "Orania Representative Council," on its retained pre-2000 municipal status, underpinned by the Local Government Transition Act 209 of 1993 and Municipal Structures Act 117 of 1998, s 12, and confirmed following Orania's Transitional Representative Council's successful application in the Kimberley High Court; see "Court quashes Orania's case for poll deferral," *IOL*, 27 November 2000; "History of Orania," Karoo-Southafrica.com. On the Afrikaner Declaration, see section 3.3.1.3 below.

³⁴ See sections 3.2.2, 5.5.1 below.

³⁵ Statistics South Africa, *Census 2022 Statistical Release* (P0301.4), 10 October 2023.

³⁶ See Chapter 4 below.

such a people is examined directly in Chapter 6.2, once Chapter 4 has set out the applicable legal criteria — but the case for testing it against the Afrikaner people specifically is, on the evidence already before us, a strong one.

2.4 A Singular State Serving a Plural Society

[2.21] Chapter 1 established that South Africa defines itself as a unitary state: singular in its governance, in the sense already discussed, despite being demographically and culturally plural in its composition, as this chapter has shown.³⁷ That combination raises an obvious question: can a governance structure organised around a single central authority accommodate a population as plural as South Africa's, without at some point imposing the will of a national majority onto communities who do not, or who no longer, consent to it?

[2.22] This is not a hypothetical concern. The Western Cape and the Afrikaner people, introduced above, are already pursuing a greater measure of autonomy than the current constitutional order affords them.³⁸ Whether that pursuit reflects a structural limitation inherent to South Africa's unitary form of government, or the ordinary friction of a functioning democracy, is the question the next chapter is built to answer.

³⁷ See section 1.2 above.

³⁸ See sections 2.3.1, 2.3.2 above.

Chapter 3: South Africa's Constitutional Framework

3.1 An Untested System of Government

- [3.1] South Africa's current constitutional dispensation came into effect under the Interim Constitution in 1994, and was then entrenched by the current Constitution in 1996, introducing majority democratic rule.³⁹ Measured from the founding of the Union in 1910, South Africa's constitutional history spans little more than a century — a period that included government as a self-governing dominion of the British Crown, a republic under minority rule, and a system of apartheid which had itself been framed, at least in the rhetoric of its architects, as a vehicle for group self-determination.⁴⁰ Each of these dispensations marginalised some community within South Africa's borders.⁴¹ Whether the current dispensation has broken this pattern, or merely redirected it, is a question this paper returns to throughout.
- [3.2] Sustained global pressure contributed to bringing this new constitutional settlement about.⁴² It was by nature untried and untested.
- [3.3] This settlement was also the product of a negotiation between parties of starkly unequal strength. The African National Congress held the dominant position at the table, and its approach to the resulting constitutional architecture was shaped by its Strategy and Tactics doctrine — first adopted in 1969 and periodically revised since, including during the negotiation period itself⁴³ — reflecting a preference for a strong central state,

³⁹ Constitution of the Republic of South Africa, Act 200 of 1993 (commencement 27 April 1994); Constitution of the Republic of South Africa, 1996.

⁴⁰ See section 2.3.2 above.

⁴¹ "South Africa Act," *Encyclopaedia Britannica*; "Constructing the Union of South Africa; negotiations & contestations, 1902–10," South African History Online, on the exclusion of Black, Coloured, and Indian communities from the 1910 constitutional settlement, and on apartheid's own marginalisation of Afrikaners and others discussed in section 2.3.2 above; Thompson, L. (2001). *A History of South Africa*, 3rd ed. New Haven: Yale University Press, on the successive marginalisation of different communities across South Africa's constitutional dispensations.

⁴² Klotz, A. (1995). *Norms in International Relations: The Struggle against Apartheid*. Ithaca: Cornell University Press.

⁴³ *Strategy and Tactics of the African National Congress* (Morogoro, 1969; Kabwe, 1985); *Advance to National Democracy: Guidelines on Strategy and Tactics of the African National Congress*, adopted at

understood as instrumentally necessary to the ANC's broader programme of social transformation, rather than arising solely as a product of compromise in the negotiations. This was met by a countervailing push for a more federal system of government from several other parties to the negotiations, including the Inkatha Freedom Party, the National Party, the Democratic Party, the Conservative Party, and the leadership of several of the apartheid-era homelands.⁴⁴

3.2 Marginalisation in Perpetuity

- [3.4] The 1996 Constitution consolidated power in the hands of the national majority, and in doing so deprived any sub-national community whose democratic will diverges from that majority of the power to determine how, and by whom, it is governed. Such a community is locked into a system it can never realistically vote itself out of, regardless of the merits, mandate, or success of the alternative it seeks — a proposition this paper demonstrates in section 3.3.1.5 below.⁴⁵
- [3.5] This reality is best demonstrated by evaluating the position two such communities have found themselves in, from 1994 to the present day.

3.2.1 Policy Divergence Between the Western Cape and the National Majority

- [3.6] Section 2.3.1 above noted that the Western Cape's electorate has consistently diverged from national voting patterns since 1994. The pattern is stark and consistent. The ANC won an outright majority at every national election from 1994 to 2019, based on the support of the national majority. In 2024, for the first time, that majority was lost — but little or none of the support the ANC shed migrated to their ideological opponents. It went overwhelmingly to the EFF and MK, both breakaway parties from the ANC itself,

the ANC's 48th National Conference, Durban, July 1991, reflecting the ANC's approach during the negotiation period itself; see also section 3.3.1.1 below.

⁴⁴ South African History Online, "The Convention for a Democratic South Africa (CODESA): CODESA 1"; "Assessing the Performance of the South African Constitution," International IDEA/ConstitutionNet, on the National Party's, Inkatha Freedom Party's, and African National Congress's respective negotiating positions; see section 5.5.1 below.

⁴⁵ See section 3.3.1.5 below.

sharing its broader African Nationalist political tradition rather than departing from it.⁴⁶ For the purposes of this analysis, this paper treats the ANC, EFF, and MK as expressions of that single tradition rather than as three separate parties; understood this way, they effectively comprise a voting bloc which has collectively won an outright majority at every national election since 1994, without exception.⁴⁷ Not once in that period did a majority of the Western Cape's electorate vote for the ANC, EFF, MK, or all three combined.⁴⁸ Across every national election from 1994 to 2024, even had every vote actually cast in the Western Cape reached absolute consensus behind the Democratic Alliance, or its predecessor the Democratic Party, this would not have delivered the Western Cape's voters the national government they voted for.⁴⁹

- [3.7] The Western Cape's electorate was, however, able to elect a non-ANC provincial government at every election except one. In 2004, at the peak of South Africa's initial post-transition economic success, the ANC achieved a plurality, though not a majority, and governed the province in coalition with the New National Party. From 2009 to the present, the Democratic Alliance has secured outright provincial majorities in every election.⁵⁰
- [3.8] Defenders of the current constitutional system point to this provincial track record as evidence that the people of the Western Cape possess genuine agency over their own governance. South Africa is routinely described as "quasi-federal" — a description this paper does not dispute, but whose practical content bears examination. Stander

⁴⁶ See section 3.3.1.5 below, on the African Nationalist bloc as a single political tradition expressed through three successive vehicles rather than three distinct parties.

⁴⁷ Electoral Commission of South Africa, National Election Results, 1994–2024.

⁴⁸ Electoral Commission of South Africa, National Election Results, 1994–2024.

⁴⁹ Electoral Commission of South Africa, National and Provincial Election Results, 1994–2024, available at: <https://results.elections.org.za/home/Downloads/NPE-Results>. Author's calculation based upon IEC published provincial and national vote totals from the sources cited, comparing the Western Cape's total votes actually cast against the African Nationalist bloc's national margin of victory in each election from 1994 to 2024.

⁵⁰ Electoral Commission of South Africa, Western Cape Provincial Election Results, 1994–2024; Eldridge, M. and Seekings, J. (2006). "Partisan Realignment in Cape Town 1994–2004." *Journal of African Elections*, 5(1); Ferree, K. (2010). "Party Support and Voter Behaviour in the Western Cape." *Journal of African Elections*, 9(2), on the 2004 ANC–NNP coalition government and Democratic Alliance majorities from 2009 onward.

summarises the position precisely: "Although the Constitution avoids the use of the term 'federal', it displays the federalist characteristic of a multi-level system of government, but it remains unitary in spirit. In other words, national government retains the most power and influence over policies and laws."⁵¹

- [3.9] The Constitution itself confirms the limit of this provincial agency. Economic policy, fiscal policy, and foreign policy fall outside provincial competence entirely, and policing is restricted to provincial oversight — monitoring, liaison, and complaint investigation — falling short of any actual competence over policing itself.⁵² This is a matter of constitutional allocation, not political preference. Since 1994, national government has used this authority to entrench racial classification and race-based quotas in employment and procurement policy, to pursue land expropriation without compensation, to maintain loss-making state monopolies such as Eskom and SAA rather than privatise them, and to align South African foreign policy with states such as Russia, positions the Western Cape's own provincial government has publicly and repeatedly opposed.⁵³ The Western Cape's electorate has voted consistently against parties advancing these policies. Its provincial government, despite an outright and sustained electoral mandate, has no constitutional means of giving effect to that democratic will in any of these areas.

⁵¹ Stander, A. (2020). "Multi-level Government." In Cohen, E. et al. (eds.), *Constitutional Law for Students* (pp. 60–109). Cape Town: UCT Libraries Press. Available at: <https://openbooks.uct.ac.za/uct/catalog/view/25/32/1272>

⁵² Constitution of the Republic of South Africa, 1996, ss 205–207 (national control of the police service), s 206(3)–(5) (provincial oversight powers); Schedule 5 (exclusive provincial competencies, containing no reference to economic, fiscal, or foreign policy); Constitutional Principles, Schedule 4 (Interim Constitution), principle v, on national economic policy as a national government function; on the Constitutional Court's confirmation that provincial powers are confined to monitoring, oversight, and liaison, see *Minister of Police and Others v Premier of the Western Cape and Others* (CCT 13/13) [2013] ZACC 33; 2013 (12) BCLR 1365 (CC); 2014 (1) SA 1 (CC) (1 October 2013).

⁵³ On racial classification/quotas: Employment Equity Amendment Act 4 of 2022, s 15A; Minister of Employment and Labour, "Determination of Sectoral Numerical Targets," Government Gazette, 15 April 2025. On land expropriation: Expropriation Act 13 of 2024, s 12(3). On state-owned monopolies: Minister Pravin Gordhan, "Minister Pravin Gordhan on restructuring of state-owned companies," South African Government, 14 August 2023, confirming Eskom's subsidiaries "remain 100 percent owned by the State." On foreign policy: DIRCO, "Presidency asserts responsibility and stance on South Africa's foreign policy," quoting President Ramaphosa's description of President Putin and the Russian people as "valuable friends and allies"; see also TheSouthAfrican.com, "Banned in the Western Cape! Premier Winde gives Russia 'cold shoulder'," 10 March 2022 (see section 6.1 below).

[3.10] The result is not merely that the Western Cape votes differently from the rest of the country. It is that doing so has no bearing on the policies under which it is governed in the domains the Constitution places beyond provincial reach. A province may appear to be federal in form and remain, in the outcomes that matter to its own electorate, entirely unitary in substance.

3.2.2 Forced into Unity Whilst Denied Belonging

[3.11] The 1994 settlement which gave birth to South Africa's current constitutional order was intended to provide, for the first time since the country's founding in 1910, a fair and just solution — one which recognised the complex nature of South Africa's past, the inherent injustice of race-based policy, and the principle that South Africa belonged equally to everyone who lived in it, including the Afrikaner. The essence of this promise was recorded in the preamble of the 1996 Constitution itself: "We, the people of South Africa... believe that South Africa belongs to all who live in it, united in our diversity."⁵⁴ Building Afrikaner trust in the new arrangements, and securing that trust, formed a central element of the pre-1994 negotiations. It concluded, under significant pressure from the US Government, in the signing of the Afrikaner Accord between the ANC and the Freedom Front — an Afrikaner political formation established specifically to advance Afrikaner self-determination during the negotiations.⁵⁵ The Accord committed the parties to negotiate Afrikaner self-determination after the transition, including the possibility of a dedicated Afrikaner territory, a Volkstaat. On the strength of these assurances, the available electoral evidence strongly suggests that most Afrikaners

⁵⁴ Constitution of the Republic of South Africa, 1996, Preamble.

⁵⁵ Matthee, H. (2026). "Political leadership during a low-intensity conflict: the case of Conservative Party MPs Schalk Pienaar and Koos Botha in South Africa, 1990–1994." *Small Wars & Insurgencies*, DOI: 10.1080/09592318.2026.2616355, on Ambassador Princeton Lyman's intervention averting Viljoen's threat to disrupt the 1994 election, leading to the Accord's signing on 23 April 1994; see also Lyman, P.N. (2002). *Partner to History: The U.S. Role in South Africa's Transition to Democracy*. Herndon, VA: United States Institute of Peace Press, ch. "Courting a Troubled General," p. 180. On the Accord's full negotiating history and the Volkstaatraad's subsequent defunding, see section 5.5.1 below.

accepted the new constitutional order and took part in South Africa's democratic transition.⁵⁶

- [3.12] This context matters, because the 1994 settlement has since come to be treated as final and irrevocable — as though the consent Afrikaners gave then binds every subsequent generation regardless of the state's own conduct since, regardless of whether the understandings reached in the negotiations have been honoured, and regardless of the democratic will of Afrikaners today, thirty years and a full generation later.
- [3.13] There is strong evidence that the South African state has not honoured the assurances it gave, and that as a result the desire for self-determination has strengthened, rather than faded, amongst Afrikaners.⁵⁷ The 1996 Constitution promised a country "united in our diversity." Since 1994, the state has instead pursued a policy of exact demographic representativity across society, introducing Employment Equity — an extreme form of affirmative action — and Black Economic Empowerment, together with race-based quotas in business, education, and sport, aimed at forcing unity around a singular South African identity rather than accommodating the country's own diversity.⁵⁸ Each of these measures has actively excluded Afrikaners and constrained their ability to advance, individually and collectively, within their own country. At the same time, and in apparent tension with that same assimilationist drive, Afrikaners have found themselves excluded even from the identity the state claims to be building: successive State Presidents have invoked "our people" in terms that implicitly exclude Afrikaners, and senior figures

⁵⁶ Independent Electoral Commission, 1994 General Election results; on national turnout (86.9%), see Apartheid Museum, "1994 Election"; on the Conservative Party's boycott and the Afrikaner Volksfront's split between the Freedom Front (participation) and its far-right rump (rejection), see "Accord on Afrikaner Self-Determination"; "S. African Right Bitterly Divided," *Christian Science Monitor*, 24 March 1994.

⁵⁷ Visagie, R. (2018). *Struggle(s) for Self-determination: Afrikaner Aspirations in the Twenty-first Century*. MA thesis, Stellenbosch University, finding that Afrikaner self-determination "runs like a golden thread throughout Afrikaner history," and that contemporary Afrikaner self-determination discourse and action remain active, driven by "the non-accommodation of majoritarianism and the resultant sense of political impotency."

⁵⁸ Employment Equity Act 55 of 1998, as amended by the Employment Equity Amendment Act 4 of 2022; Broad-Based Black Economic Empowerment Act 53 of 2003, as amended by Act 46 of 2013; on race-based quotas in sport, see "'Affirmative' (measures in) action? Revising the lawfulness of racial quotas (in South African (professional) team sports)." See further section 3.3.1.4 below; cf. section 3.2.1 above, on the same policies' effect on the Western Cape.

within government have openly asserted that Afrikaners do not hold the same status as the true owners of the land.⁵⁹

[3.14] In 2022, South Africa's Equality Court held that the singing of "Dubul' iBhunu" — "Kill the Boer" — did not constitute hate speech, a finding subsequently upheld on appeal by the Supreme Court of Appeal in 2024.⁶⁰ The consequences of this broader pattern are measurable in the population itself: the Afrikaner population has declined significantly as a proportion of South Africa's total population, and is ageing; Afrikaner youth, disproportionately affected by these policies, are leaving the country in substantial numbers.⁶¹

[3.15] In response, Afrikaners have built strong civil society institutions — organisations such as AfriForum and Solidarity have waged sustained legal battles to protect Afrikaner interests and have begun constructing parallel institutions where state institutions have become increasingly unviable, or unwelcoming, to Afrikaners.⁶²

[3.16] This is the position in which Afrikaners find themselves today: bound permanently into a unitary state which recognises no exit and no right to govern themselves differently, whilst denied, in practice, full and equal belonging within that same state. Forced into

⁵⁹ On "our people" rhetoric: President Ramaphosa's use of the phrase in the 2018 land debate drew a direct parliamentary challenge from Mosiuoa Lekota, State of the Nation Address debate, National Assembly, 13–14 February 2018: "If you are going to give the land to our people, please tell us: Who is not our people in this country? Am I not one of you?" On senior figures asserting Afrikaners' unequal status: President Zuma's 2015 remarks describing the ANC as "a formation of indigenous people," and attributing the country's troubles to the 1652 arrival of Jan van Riebeeck, prompted a formal hate speech complaint by the Freedom Front Plus, whose spokesman argued the remarks implied that white, Coloured, and Indian South Africans could not be regarded as indigenous, and were treated instead "as second-rate citizens, as colonists" — directly contrary to the Constitution's own preamble. See "FF+ charges Zuma with hate speech," *Weekend Argus*, 17 January 2015.

⁶⁰ *AfriForum v Economic Freedom Fighters & Others* (1105/2022) [2023] ZASCA 82 (28 May 2024); see section 3.3.1.4 below.

⁶¹ Statistics South Africa, *Census 1996* and *Census 2022* Statistical Releases (population share and ageing); on emigration, Statistics South Africa estimates 612,000 white South Africans emigrated between 1985 and 2021, with 70% of that total occurring since 2001, disproportionately concentrated among younger, skilled professionals; see Helen Suzman Foundation, "Migration III: Interpreting the data on South African migration."

⁶² See section 3.3.1.3 below.

unity. Denied belonging. It is against this reality that the remainder of this paper tests whether the law affords Afrikaners any remedy.

3.3 The Question of Agency

- [3.17] South Africa's constitution is considered by many commentators to be amongst the best and most progressive in the world.⁶³ It contains a comprehensive Bill of Rights and provides for the protection of minorities.⁶⁴ Since 1994, there have been regular free and fair elections, and no election's overall legitimacy has been successfully challenged in the courts.⁶⁵
- [3.18] The question then is how, under such a constitution, sub-national communities such as the people of the Western Cape and Afrikaners can find themselves unable to realise their democratic will. Two answers compete.
- [3.19] Conventional wisdom holds that this is simply the reality of a constitutional order agreed in 1994: any amendment now requires the consent of the national majority, via the two-thirds threshold in the National Assembly and the support of six of the nine provinces in the National Council of Provinces.⁶⁶ On this view, sub-national communities necessarily have limited control over their own affairs — not as a flaw in the system, but as the price any workable constitutional democracy pays for a stable, functioning centre capable of governing a plural society at all.

⁶³ Albie Sachs, former Justice of the Constitutional Court, Prestige Lecture, University of the Free State, 30 October 2024, reported in "SA's Constitution remains one of the most progressive in the world," SABC News, 2024; "Drafting the South African Constitution: an account by Justice Albie Sachs," University of the Free State, 6 November 2024; see also Government of South Africa, "The Constitution," gov.za.

⁶⁴ Constitution of the Republic of South Africa, 1996, Chapter 2 (Bill of Rights); ss 30–31; s 235.

⁶⁵ Modise, N, "An exercise in electoral integrity: reviewing the role of the IEC in the 2024 national and provincial elections." *Politikon* (2025), DOI: 10.1080/02589346.2025.2488566, on the Electoral Court's role in upholding electoral integrity.

⁶⁶ Constitution of the Republic of South Africa, 1996, s 74; see section 3.3.1.2 below. On the two-thirds threshold as a specific barrier to Cape independence, see De Vos, P., "Fringe talk of Western Cape secession is reactionary – and unachievable," *Daily Maverick*, 12 August 2020; see also Mpofu-Walsh, S., "Why Western Cape Independence is Foolish and Delusional," YouTube, 25 April 2024.

[3.20] This paper argues a different reality: that sub-national communities enjoy an "unquestionable and inalienable" right to self-determination⁶⁷ — the legal basis for which this paper develops in Chapter 5. Accordingly, they may assert the right to be governed differently from the national majority and to take greater control of their own affairs. The state is entitled to protect the legitimate rights and interests of its other citizens and communities, and it is entitled to establish a mutually agreeable framework through which sub-national communities exercise that right within the state. What the state cannot do is derogate from or deny the right itself — it is legally obliged to accommodate and give effect to any legitimate assertion of it.

3.3.1 The Constitutional Assignment of Powers in South Africa

[3.21] In the context of this paper, the question of whether South Africa's current constitutional architecture allows qualifying sub-national communities to meaningfully exercise their right to self-determination is fundamental.

3.3.1.1 Singularity Despite Diversity a Design Choice

[3.22] In seeking to answer this question, it is instructive to examine the historical record of the ANC's own constitutional objectives during the negotiations, and the extent to which South Africa's resulting constitutional architecture, and the ANC's conduct within it since 1994, bear out those objectives.

[3.23] Writing on the constitutional negotiations, Steytler and Mettler observe that the ANC's approach to the question of federalism was neither incidental nor purely reactive: "The ANC saw federalism simply as a method of thwarting majority rule... The ANC favoured a strong central-state authority in order to effect the fundamental restructuring of South African society."⁶⁸ This suggests that centralised state authority was, on this account, not merely the ANC's negotiating fallback, but understood as instrumentally necessary to the transformative programme the ANC sought to pursue.

⁶⁷ African Charter on Human and Peoples' Rights, 1981, art 20(1); see section 5.2 below.

⁶⁸ Steytler, N., & Mettler, J. (2001). Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy. *Publius: The Journal of Federalism*, 31(4), 93–106, at 95.

- [3.24] This preference did not emerge in the negotiations themselves, nor can it be attributed to the ANC alone. The ANC's own leadership overlapped substantially with that of the South African Communist Party (SACP) throughout this period: following the ANC's July 1991 National Executive Committee elections, an estimated 25 of the NEC's 50 members held dual membership with the SACP.⁶⁹ Joe Slovo — SACP General Secretary and later Chairperson, and a member of the ANC's National Executive Committee from 1985 — personally represented the ANC at CODESA's working group on constitutional principles, and was responsible for the "sunset clause" compromise that produced the eventual Government of National Unity.⁷⁰ The ANC's constitutional position was accordingly negotiated, in significant part, by individuals for whom SACP doctrine was not an external influence but a first-hand political commitment.
- [3.25] That doctrine, elaborated in the SACP's 1962 programme, *The Road to South African Freedom* — itself presented as framed "within the framework of the Freedom Charter" the ANC had endorsed in 1955⁷¹ — left no doubt as to its preferred constitutional form: "The Party stands for a unitary South African state with a Republican form of government."⁷² Nor was this vision confined to constitutional structure alone; the same document anticipated that, following the transfer of power, "a vigorous and vigilant dictatorship must be maintained by the people against the former dominating and exploiting classes"⁷³ — a formulation which, whatever its allowances for continuing democratic participation, presupposes a state with the centralised authority necessary to exercise it.
- [3.26] The ANC's commitment to this trajectory did not end with the adoption of the 1996 Constitution. In the *Strategy and Tactics* documents adopted at successive national conferences since 1994, the ANC has repeatedly reaffirmed the objective of

⁶⁹ South African Communist Party (SACP). *The O'Malley Archives*, Nelson Mandela Foundation. <https://omalley.nelsonmandela.org/index.php/site/q/03lv02424/04lv02730/05lv03188/06lv03217.htm>

⁷⁰ "Joe Slovo," Our Constitution, ourconstitution.wethepeoplesa.org; Waldmeir, P. (1997). *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa*. New York: W.W. Norton.

⁷¹ Freedom Charter, 1955.

⁷² South African Communist Party (1962). *The Road to South African Freedom*.

⁷³ South African Communist Party (1962). *The Road to South African Freedom*.

consolidating and extending its hold over, in its own words, "all centres of power" — from the 1997 Mafikeng conference's commitment to "a cadre policy ensuring that the ANC plays a leading role in all centres of power,"⁷⁴ through to the 2017 conference's continued emphasis on positioning its cadres "in all these centres" of state, economic, and civil-societal power.⁷⁵ As the following sections demonstrate, the ANC's conduct since 1994 continues to bear out this consistent record of intent.

3.3.1.2 Gatekeeping By The National Majority

[3.27] In Chapter 1, this paper establishes that the South African State and the ANC — who have led it for most of the democratic era and remain the dominant political party to the present day — consider South Africa to be a unitary state.

[3.28] Many commentators, however, including the Organisation for Economic Co-operation and Development (OECD), of which South Africa is a member, define South Africa as "quasi-federal."⁷⁶ Constitutional scholars including Stander characterise this same arrangement as "unitary in spirit" despite its federal form, since "national government retains the most power and influence over policies and laws."⁷⁷ The essence of this disparity is a critical input to the argument being advanced in this paper. During the pre-1994 constitutional negotiations, the establishment of provinces represented a concession to the federalist demands of several negotiating parties, secured against an ANC preference for centralised authority.⁷⁸ These concessions support the conclusion that the constitutional autonomy afforded sub-national communities is, in practical

⁷⁴ African National Congress (1997). *Strategy and Tactics of the African National Congress*. Adopted at the 50th National Conference, Mafikeng.

⁷⁵ African National Congress (2017). *Strategy and Tactics of the African National Congress*. Adopted at the 54th National Conference, Nasrec, paras 142–143.

⁷⁶ OECD/UCLG. *SNG-WOFI Country and Territory Profiles: South Africa*. https://www.sng-wofi.org/country_profiles/south_africa.html

⁷⁷ Stander, A. (2020). "Multi-level Government." In Cohen, E. et al. (eds.), *Constitutional Law for Students* (pp. 60–109). Cape Town: UCT Libraries Press. Available at: <https://openbooks.uct.ac.za/uct/catalog/view/25/32/1272>

⁷⁸ Steytler, N., & Mettler, J. (2001). Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy. *Publius: The Journal of Federalism*, 31(4), 93–106.

terms, largely illusory — an assertion which, by self-identification, the South African state has fully affirmed.

- [3.29] In a country as diverse as South Africa, there will always be an extremely fine line between majoritarianism and constitutional democracy. Without meaningful agency for sub-national communities, South Africa would find itself an example of the former. Yet, the South African Constitution has, in almost every arena, established the national majority as the gatekeeper for decisions which sub-national communities may legitimately wish to make for themselves.
- [3.30] South Africa has adopted a system of proportional representation which, perfectly reasonably, ensures that the national parliament reflects and is controlled by the national majority.
- [3.31] The President is assigned significant constitutional powers, including the ability to either sign legislation into law or to refer it back to the National Assembly or to the Constitutional Court; the ability to appoint and dismiss ministers and the cabinet, which themselves then wield significant constitutional power; the ability to appoint, after consultation with the Judicial Service Commission, the Chief Justice and Deputy Chief Justice and the President and Deputy President of the Supreme Court of Appeal; the ability to appoint Ambassadors; and the ability to appoint, on the recommendation of the National Assembly, the heads of the six "Chapter 9 Institutions" — the constitutional watchdogs, including the Public Protector, the Auditor-General, and the Electoral Commission.
- [3.32] The President, however, is appointed, and can be removed through a vote of no confidence, by a straight majority in the National Assembly, and all of his powers are therefore ultimately exercised and conditional upon the support of the national majority.
- [3.33] Provinces and municipalities are assigned powers in Schedules 4 and 5 of the Constitution. However, these powers are limited in scope and, in most instances, remain subject, both directly and indirectly, to the consent of the national majority via the National Assembly, the President, and the national executive — not merely as a

response to provincial failure, but as a structural feature of the Constitution itself, applicable equally to a province that is succeeding on its own terms and wishes to chart a course distinct from that of the national majority.

[3.34] This is most clearly illustrated where a province seeks to exercise its own legislative competence differently from the national government. Where national and provincial legislation conflict within an area of concurrent competence, national legislation prevails over provincial legislation wherever national uniformity is deemed necessary — whether for reasons of national security, economic unity, or the maintenance of common norms and standards.⁷⁹ A province is accordingly free to legislate differently from the national majority only for as long as the national majority permits it to do so; the moment a provincial policy diverges meaningfully enough to be seen as inconsistent with national uniformity, the national majority's legislation prevails, regardless of the merits, mandate, or success of the provincial alternative.

[3.35] The determination of when this threshold is met does not rest with the province. It falls, in the final instance, to the courts, whose most senior appointments trace back to the President, who is himself elected by, and accountable to, the National Assembly. This is a description of the constitutional appointment mechanism, not a claim that judicial interpretation of section 146 is not independent; the courts' record in this area, discussed further in section 3.3.1.4 below, is one of applying the constitutional text on its own terms.

[3.36] The same pattern holds at the constitutional level. Provinces, as a class, may be restructured, or their powers, functions, and institutions altered, by a Bill amending the Constitution — requiring only a two-thirds majority in the National Assembly and the support of six of the nine provinces in the National Council of Provinces (NCOP).⁸⁰ No individual province's consent is required for such a change, however well governed that province may be, and however clearly its own electorate may have expressed a contrary

⁷⁹ Constitution of the Republic of South Africa, 1996, s 146(1)–(2); on the framework's operation, see *Maccsand (Pty) Ltd v City of Cape Town and Others* [2012] ZACC 7; 2012 (4) SA 181 (CC), holding that section 146 is engaged only where a genuine conflict exists between legislation falling within a Schedule 4 functional area, and that no such conflict arose on the facts of that case.

⁸⁰ Constitution of the Republic of South Africa, 1996, s 74(3).

democratic will. The Constitution reserves an individual veto only for a province targeted in isolation: the NCOP may not pass a Bill concerning a specific province alone unless that province's own legislature has first approved it.⁸¹ A thriving, successful province, seeking greater autonomy on its own initiative rather than resisting an imposed change, receives no comparable protection — it has no constitutional mechanism through which to compel the national majority to accommodate its own democratic will, only a defensive veto against changes forced upon it from outside.

- [3.37] The National Council of Provinces, ostensibly the institution through which provinces exercise collective influence, illustrates the same constraint from the opposite direction. No province may pursue constitutional change alone, however clear or successful its own governing mandate: any such change first requires the agreement of six of the nine provinces before it can even reach a vote in the NCOP⁸² — and even then, remains subject to the consent of a two-thirds majority in the National Assembly.⁸³
- [3.38] Even the national executive's intervention powers, whilst most readily justified in cases of provincial or municipal failure,⁸⁴ rest on the same underlying architecture: they exist because the Constitution ultimately locates final authority over provincial and municipal affairs in the national sphere, not because that authority is confined to cases of failure. The same national majority that may step in when a province fails is the same national majority whose consent a successful province requires before it may do anything differently at all.
- [3.39] Cultural communities are in no better a position and also depend entirely upon constitutional grace and favour for whatever autonomy they currently enjoy.
- [3.40] There is a clear asymmetrical distinction in how different cultural communities are managed within the constitutional provisions, but in the final reckoning, all remain

⁸¹ Constitution of the Republic of South Africa, 1996, s 74(8).

⁸² Constitution of the Republic of South Africa, 1996, s 74(1)(b), (2)(b), (3)(b).

⁸³ Constitution of the Republic of South Africa, 1996, s 74(1)(a), (2)(a), (3)(a).

⁸⁴ Constitution of the Republic of South Africa, 1996, ss 100(1), 139(1), 139(7).

wholly dependent upon the consent of the national majority for their legal existence in anything other than a nominal form.

[3.41] At the bottom end of this asymmetric scale are communities such as the Afrikaner people who enjoy no formal collective legislative or constitutional recognition. The Afrikaans language enjoys protected status, and the cultural rights of individual Afrikaners enjoy a degree of legal protection in sections 30 and 31 of the Constitution. As such, Afrikaners are entitled to use their language and to participate in the cultural life of their choosing, and to develop and join cultural associations. They are then theoretically provided with an additional layer of protection by the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, which is a Chapter 9 institution (CRL Rights Commission).⁸⁵

[3.42] The reality for Afrikaners collectively is that they are not officially recognised as a community, the limited rights they enjoy in sections 30 and 31 can be amended or removed by a two-thirds super majority in the National Assembly⁸⁶ — something which this paper will demonstrate is entirely feasible when considered against election outcomes since 1994 — whilst the CRL Rights Commission is led by a Presidential appointee⁸⁷ and has, since its establishment in 2004, a history of antagonism towards Afrikaners.⁸⁸ The only constitutional body established for and managed by Afrikaners, the Volkstaatraad, which was created in compliance with the Afrikaner Accord, had its funding terminated by the State in 1999 without the State ever substantively responding to its core recommendations.⁸⁹

⁸⁵ Constitution of the Republic of South Africa, 1996, ss 30, 31, 181(1)(c).

⁸⁶ Constitution of the Republic of South Africa, 1996, s 74(2).

⁸⁷ Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002, ss 9, 12.

⁸⁸ CRL Rights Commission, "The CRL Rights Commission response to the Afriforum article 'Afriforum launches campaign to save Afrikaans schools,'" South African Government (gov.za), 17 January 2012; Kruger, J, "The Plight of Afrikaans: Has the Demise of Afrikaans-Medium Public Schools Been Pronounced Within the Educational Framework of South Africa?" *Obiter*; Politicsweb (2012), "CRLRC meant to support not oppose minority rights - AfriForum"; Weekend Argus (2018), "Student residence sees CRL findings as 'attack on Afrikaans'."

⁸⁹ Volkstaat Council Act 30 of 1994; Robbertze, H.C.G. (1999). *Volkstaat Council Final Report: Findings and Recommendations*. Pretoria: Volkstaat Council; Parliamentary Monitoring Group (1999).

- [3.43] Traditional communities enjoy a materially greater level of constitutional protection than communities such as the Afrikaners — though, as this paper will go on to argue, this greater protection remains equally dependent upon the consent of the national majority.
- [3.44] Unlike section 31, which protects only the individual and associational rights of persons belonging to a cultural, religious or linguistic community — the position of, for example, the Afrikaner people — Chapter 12 of the Constitution recognises traditional leadership as an institution in its own right. Section 211 recognises "the institution, status and role of traditional leadership, according to customary law," and requires courts to apply customary law where it is applicable.⁹⁰ Section 212 permits national legislation to give traditional leadership a role at local government level, and to establish provincial and national Houses of Traditional Leaders.⁹¹ This is a materially different order of recognition from anything available under sections 30 and 31: it is the recognition of an institution of governance, not merely of a set of individual or associational rights.
- [3.45] This constitutional foundation has been given substantial legislative content. The Traditional and Khoi-San Leadership Act 3 of 2019 — since declared unconstitutional and invalid for want of adequate public participation, and, at the time of writing, still unreplaced⁹² — provides for the recognition of kingships, queenships, principal traditional communities, traditional communities, and Khoi-San communities and their respective councils, as well as provincial and national Houses of Traditional and Khoi-San Leaders.⁹³ The Traditional Courts Act, once in force, will confer genuine adjudicative jurisdiction on these structures, extending their authority beyond a merely advisory or associational role.⁹⁴ Traditional communities have accordingly been afforded something

Department of Constitutional Affairs Budget Review, Constitutional Affairs Portfolio Committee, 3 March 1999.

⁹⁰ Constitution of the Republic of South Africa, 1996, s 211(1), (3).

⁹¹ Constitution of the Republic of South Africa, 1996, s 212.

⁹² *Mogale v Speaker of the National Assembly* [2023] ZACC 14; Traditional and Khoi-San Leadership Bill [B 11—2026], Parliament of South Africa.

⁹³ Traditional and Khoi-San Leadership Act 3 of 2019, ss 3, 5.

⁹⁴ Traditional Courts Act 9 of 2022.

Afrikaners have not: functioning institutions of self-government, recognised and elaborated by the Constitution and national legislation alike.

[3.46] This greater protection is nonetheless subject to the same underlying limitation identified throughout this paper. Section 211(1) recognises traditional leadership only "subject to the Constitution," and Schedule 4 confirms traditional leadership as a functional area "subject to Chapter 12."⁹⁵ The Constitutional Court itself confirmed the practical effect of this qualification when it rejected the argument, raised during certification, that CP XXXIV should also be read to entrench the status of traditional authorities: the Court held that their continued existence "is not entrenched but is subject to amendment and repeal."⁹⁶ The same principle finds direct expression in the governing legislation itself. The Traditional and Khoi-San Leadership Act provides, in the same sections, both for the recognition of a kingship, queenship, or traditional community, and for the withdrawal of that same recognition — a power exercised, in each case, by the President or the relevant Premier.⁹⁷ The institutional apparatus available to traditional communities is accordingly more extensive than anything available to the Afrikaner people, but its foundation is no more secure: it exists, and persists, only for as long as the national majority — acting through the Constitution, national legislation, and the national and provincial executive — continues to permit it.

[3.47] In South Africa's constitutional architecture, the Zulu people enjoy a uniquely elevated status — one not built upon equal rights, but upon placating Zulu nationalism and averting potential violence. Even then, Zulu autonomy is a constitutional house of cards.

[3.48] It should be noted that this paper fully endorses the legitimate rights of the Zulu people. Where it advances an argument, it is not to deny the Zulu people those rights, but to ensure that those rights are realisable and protected, and that the same rights extend to all other legitimate sub-national communities.

⁹⁵ Constitution of the Republic of South Africa, 1996, s 211(1); Schedule 4.

⁹⁶ First Certification Judgment, 1996 (4) SA 744 (CC), para 221.

⁹⁷ Traditional and Khoi-San Leadership Act 3 of 2019, ss 3–4.

- [3.49] The Zulu monarchy is, on paper, the single most institutionally powerful sub-national arrangement in South Africa. Beyond the ordinary recognition afforded to a kingship under national legislation, the King holds sole trusteeship of the Ingonyama Trust — a body controlling some 2.8 million hectares of land, comprising roughly 30 per cent of the entire province of KwaZulu-Natal.⁹⁸ No other community in this survey, traditional or otherwise, has been afforded anything approaching this scale of institutional and territorial control.
- [3.50] This scale is precisely what makes its origin instructive. The Ingonyama Trust was established in 1994 by the outgoing KwaZulu government, on the eve of the country's first democratic election, as one of the preconditions extracted by the Inkatha Freedom Party for its participation in that election.⁹⁹ It is, in origin, a payment for political cooperation and the avoidance of violence at a fragile moment in the transition — not the outcome of any principled assessment of self-determination capable of being claimed, on equal terms, by any other qualifying community.
- [3.51] Nor is the arrangement any more secure for its scale. The Trust exists by virtue of a pre-1994 provincial statute, entirely outside the constitutional and national legislative architecture examined elsewhere in this section, and two separate government-commissioned panels have recommended its repeal or substantial review.¹⁰⁰ The King's own recognition as monarch, meanwhile, remains subject to the same national recognition-and-withdrawal mechanism as any other traditional leader under the Traditional and Khoi-San Leadership Act,¹⁰¹ and is, at the time of writing, itself the subject of an unresolved challenge before the Constitutional Court.¹⁰² Control of the Trust itself is presently contested between the King and the KwaZulu-Natal provincial

⁹⁸ Ingonyama Trust Act 3 of 1994; Minister of Rural Development and Land Reform, reply to parliamentary question, reported in "Land reform dept and Ingonyama Trust control 17% of SA land: DA," eNCA, 2 June 2018; Custom Contested (2022), "King Misuzulu and the Ingonyama Trust: Land in KwaZulu-Natal."

⁹⁹ Polity (2023). "Ingonyama Trust millions spent on Zulu royal family contrary to disbursement policy."

¹⁰⁰ Motlanthe High-Level Panel (2017); Presidential Advisory Panel on Land and Agrarian Reform (2019), as reported in Business Day.

¹⁰¹ Traditional and Khoi-San Leadership Act 3 of 2019, ss 3–4.

¹⁰² IOL (2026). "Power struggle over Ingonyama Trust deepens between King Misuzulu and KZN government."

government, with each seeking to have final authority vested in a different sphere of the state.¹⁰³ Even at the summit of this asymmetric scale, then, no community has secured anything beyond the continued forbearance of the national majority — and, in the Zulu case, even that forbearance is presently in dispute.

3.3.1.3 Agency: A Record of Denial

[3.52] The question of whether sub-communities can exercise legitimate and meaningful control over their own affairs is not just an academic question. Since 1994, a clear pattern has emerged demonstrating that many such communities have attempted to achieve greater autonomy within the South African state, only for their seemingly reasonable ambitions to be stymied. Unsurprisingly, as confidence in the state's competence and performance has declined, the desire for autonomy by sub-national communities has become more commonplace and urgent.

[3.53] In the Western Cape, the provincial government, based upon a clear and enduring election mandate from an outright majority of the people, actively sought control over provincial policing, rail, electricity generation, ports, and a change in the fiscal arrangements between the province and the national government. Of these, policing offers the clearest illustration of the agency problem.

[3.54] The City of Cape Town Metropolitan Municipality — an administrative area extending well beyond the city itself, and housing close to two-thirds of the Western Cape's population¹⁰⁴ — has repeatedly ranked among the most violent cities in the world by international comparative measures.¹⁰⁵ It has a deeply entrenched gang problem, and, in common with the rest of South Africa, a culture of relative lawlessness. Policing in the province borders on dysfunctional. There are inadequate policing numbers combined

¹⁰³ Ibid.

¹⁰⁴ Statistics South Africa (2016). *Community Survey 2016: Cape Town Trends 1996 to 2016*. City of Cape Town.

¹⁰⁵ Consejo Ciudadano para la Seguridad Pública y la Justicia Penal, "Ranking de las 50 ciudades más violentas del mundo en 2025," 11 February 2026, ranking Cape Town 15th globally (68.77 murders per 100,000 population); see also BusinessTech (2026), "The city in South Africa that has just been ranked as the third most violent place in the world" (on Gqeberha/Nelson Mandela Bay's 3rd-place ranking in the same report).

with poor training and discipline: a 2018 Public Service Commission report found 85% of Western Cape police stations understaffed, and a 2019 report by the province's own Police Ombudsman found the officer-to-population ratio falling far short of the UN-recommended standard.¹⁰⁶ Detection and conviction rates fall far below international norms.¹⁰⁷ SAPS's own stated national target for murder detection stood at just 11.33% in 2025/26 — itself an aspiration rather than an achievement, with the actual clearance rate for 2021/22 standing at only 14.5%¹⁰⁸ — national murder conviction rates over the preceding three years stood at only 12%,¹⁰⁹ and individual detectives in many areas — reaching 300 or more dockets each in high-burden precincts such as the Cape Flats — carry a caseload far beyond what effective investigation allows.¹¹⁰ The Western Cape High Court has itself found that SAPS leadership in the province has been compromised, with Judge Daniel Thulare holding in 2022 that "the senior management of the SAPS in the province has been penetrated" by organised crime.¹¹¹

- [3.55] Somewhat unusually, South Africa has a national police service (SAPS), controlled by the national government. It is clearly failing to fulfil one of its most basic constitutional obligations — under section 12(1) of the Constitution, everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence

¹⁰⁶ Public Service Commission (2018) report on Western Cape police station staffing; Western Cape Police Ombudsman (2019) annual report.

¹⁰⁷ Liem, M. et al. "Homicide clearance in Western Europe." *European Journal of Criminology*; international comparison data cited therein (South Korea 96%, Japan 95%, New Zealand 91%, Australia 87%, Switzerland 87%, England & Wales 85%, Sweden and the Netherlands approximately 80%, United States 65%).

¹⁰⁸ Written reply to a parliamentary question posed by Ian Cameron, Chair of the Police Portfolio Committee, reported in "Here's how many murders are successfully investigated by police," *The Citizen*, 6 May 2026; South African Federation of Trade Unions, "SAFTU welcomes crime decrease but demands greater action to tackle unacceptably high crime levels," on the 2021/22 murder detection rate of 14.5%.

¹⁰⁹ Lamb, G., "South Africa's police are losing the war on crime — here's how they need to rethink their approach," *The Conversation*, 20 November 2023.

¹¹⁰ "GBV docket goes missing at Delft police station..." *GroundUp*, 4 August 2022; Ian Cameron, reported in "Detective shortages in South Africa: a looming national crisis for crime investigations," *Cape Argus/Weekend Argus*, 31 May 2025; "DA: Heavy caseload of WC detectives a threat to justice," *EWN*, 4 September 2025, on the Western Cape's province-wide average of 111 dockets per detective, against a best-practice benchmark of 60.

¹¹¹ *Adams and Another v S* (A135/2022; CC47/2021) [2022] ZAWCHC 201 (17 October 2022).

from either public or private sources.¹¹² Emergency calls routinely go unanswered: a 2026 nationwide audit of over 1,000 police stations found that 56% did not answer their phones at all.¹¹³ Between 2000 and 2023, five of seven National Police Commissioners were removed from office for corruption or other forms of impropriety — together accounting for some 23 years of SAPS leadership.¹¹⁴ Almost unbelievably, one of them, Bheki Cele, was then appointed Minister of Police. A further commissioner, appointed in 2022, was suspended in 2026 pending a corruption inquiry, suggesting the pattern has not been broken.

[3.56] Devolved policing has been a stated commitment of the Western Cape's governing party across consecutive election cycles. Its 2019 provincial manifesto pledged to "lead the fight to devolve policing powers and budgets from national to provincial government to establish a provincial police service that is modern, honest and professional,"¹¹⁵ and its 2024 provincial manifesto again pledged to "push for control of policing, transport and the ports."¹¹⁶ On both occasions, the Western Cape electorate returned the DA to office with an outright majority.¹¹⁷

[3.57] The Western Cape Government has repeatedly requested permission to establish a provincial police service — in the Western Cape Provincial Parliament (WCPP), in the National Council of Provinces (NCOP), and by formal request to the national government. Premier Winde has raised the devolution of policing in successive State of

¹¹² Constitution of the Republic of South Africa, 1996, s 12(1)(c).

¹¹³ Democratic Alliance, *South African Police Station Communications Audit*, 18 June 2026, available at: <https://press-admin.voteda.org/wp-content/uploads/2026/06/18.06.2026-DA-POLICE-REACHABILITY-AUDIT-REPORT.pdf>; see also Politicsweb (2026), "56% of SAPS stations do not answer their phones - Ian Cameron."

¹¹⁴ "South Africa's top cops: A history of reform, scandal and unfinished clean-up," *The Africa Report*, 23 April 2026; "Revamping SAPS: The urgent need for credible police commissioner appointments," *IOL*, 23 April 2026; Cameron, I. (2022). "Lost faith in the SAPS makes devolution an attractive option." *News24*, 12 December 2022.

¹¹⁵ Democratic Alliance (2019). *Fighting for You: A Plan of Action for the Western Cape*, Western Cape provincial manifesto, p. 6–7.

¹¹⁶ Democratic Alliance (2024). *The Western Cape Works: Our Plan to Keep Delivering for the People of the Western Cape*, Western Cape provincial manifesto, 6 April 2024, p. 3, 6.

¹¹⁷ 2019 Western Cape provincial election results (DA 55.45%); 2024 Western Cape provincial election results (DA 55.29%).

the Province Addresses delivered to the WCPP,¹¹⁸ and personally opened a dedicated debate on the devolution of SAPS in the NCOP in September 2021, arguing that "policing is not working at the moment."¹¹⁹ Police Minister Bheki Cele's response was direct and dismissive: "This government is forging ahead in fully implementing the ideals of a single police service as directed by the Constitution. The rogue conduct by certain metros of creating parallel structures of law enforcement aimed at undermining the Constitution cannot be left unchallenged."¹²⁰ The same position was subsequently confirmed in writing by President Ramaphosa himself, who stated in a September 2022 parliamentary reply that "Government does not have a policy on devolving policing powers to provinces as SAPS is a national competency."¹²¹

- [3.58] Given the catalogue of policing failures and the State's inability to fulfil its most basic security obligations, the case against devolved policing appears difficult to justify on objective policing grounds. The National Government is adamant that it will retain control of policing in the Western Cape, pointing to its constitutional mandate and its right to do so, whatever the democratic will and best interests of the people of the Western Cape may be.
- [3.59] The evidence strongly suggests that the people of the Western Cape have been knowingly and intentionally deprived of agency.
- [3.60] The Afrikaner people find themselves in a very similar position — with the legitimate desire for autonomy and sound factual basis for requiring it. Where they perhaps differ, and where the Afrikaner will therefore need to consider their strategy moving forward,

¹¹⁸ Western Cape Government (2025). "Premier Alan Winde: Western Cape State of the Province Address 2025." 26 February 2025; Western Cape Government (2026). "2026 Western Cape State of the Province address delivered by Premier Alan Winde." 25 February 2026.

¹¹⁹ SABC News (2021). "Western Cape reiterates call for provinces to run their own police services." 9 September 2021.

¹²⁰ South African Government (2021). "Minister Bheki Cele: National Council of Provinces debate on devolution of SAPS." 16 September 2021.

¹²¹ President Cyril Ramaphosa, "Oral replies to questions in the National Assembly," South African Government (gov.za), September 2022.

is that they have been significantly less deliberate in asserting specific claims for autonomy.

- [3.61] Some blame for this can be apportioned to the Constitution's architecture which, as we have already established, asymmetrically denies Afrikaners a cultural authority to represent them and therefore it is difficult for them to speak with one voice. This, however, is a shortcoming that Afrikaners can and arguably should have addressed themselves by establishing and mandating their own cultural council — an action which the Constitution does tacitly provide for.
- [3.62] In recent years, perhaps the clearest statement of intent made by Afrikaners was the Afrikaner Declaration made in 2024, which identified Afrikaners as an indigenous cultural community, called for a Cultural Accord which would establish community rights for Afrikaners, and recognised that a substantial number of Afrikaners held a legitimate desire for territory.¹²² This declaration was signed by, amongst others, Solidarity and AfriForum, prominent Afrikaner civil society organisations, prominent Afrikaner public figures, and individual Afrikaners.¹²³
- [3.63] The declaration was in many ways an evolution of the 1994 Afrikaner Accord and the work of the Volkstaatraad, with the South African state ultimately frustrating and leaving that earlier effort unresolved.¹²⁴ Dr Flip Buys provided a clear continuity between the two, having been a member of the Volkstaatraad before establishing the Solidarity Movement, which was the primary author of the declaration.¹²⁵
- [3.64] The clearest example of Afrikaners being purposefully denied agency, however, lies in home language education, which is an internationally established human right, and which is further accommodated, at least in part, in section 29 of the Constitution — a

¹²² *The Afrikaner Declaration*, media statement, 19 April 2024. <https://afrikanerverklaring.co.za/en/>

¹²³ *Ibid.*

¹²⁴ Volkstaat Council Act 30 of 1994; Robbertze, H.C.G. (1999). *Volkstaat Council Final Report: Findings and Recommendations*. Pretoria: Volkstaat Council; Parliamentary Monitoring Group (1999). *Department of Constitutional Affairs Budget Review*, 3 March 1999.

¹²⁵ Visser, W. (2002). *Van MWU tot Solidariteit: Geskiedenis van die Mynwerkersunie, 1902 tot 2002*. Pretoria: University of Pretoria; Solidarity Movement, "Flip Buys," solidaritymovement.co.za.

provision which expressly names single-medium institutions among the "reasonable educational alternatives" the state must consider in giving effect to this right.¹²⁶

[3.65] Since 1994, Afrikaans institutions of learning have been the target of ongoing political opposition. This has resulted in a significant reduction in the number of single-medium primary, secondary, and tertiary institutions. Whilst demographic changes can account for some degree of legitimate realignment, the quantum of change has extended well beyond that. For example, in 1994 there were five public universities in South Africa where Afrikaans was the primary medium of instruction; today there are none.¹²⁷ This transition was bitterly contested, most notably at Stellenbosch.¹²⁸ Pointedly, the universities in question were often not historically established by the state, but by Afrikaans communities themselves — Stellenbosch developed from a church theological seminary, and Potchefstroom from a seminary of the Reformed Churches, both decades before either received formal state university status.¹²⁹

[3.66] In secondary education, there has been an ongoing national transition from single-medium Afrikaans schools to dual Afrikaans and English medium, which in the majority of cases then became single-medium English shortly after.¹³⁰ In the many cases this was driven by a lack of capacity in English medium schools, resulting from inadequate planning over a number of years. The Basic Education Laws Amendment Act (BELA), signed into law in 2024, removed final authority over school language policy from school governing bodies (SGBs) — typically comprised of parents and members of the local

¹²⁶ Constitution of the Republic of South Africa, 1996, s 29(2).

¹²⁷ Hill, L. (2025). "What one university's 30-year transformation reveals about Afrikaans and language planning in South Africa." *The Conversation*; Ministry of Education (2002). *Language Policy for Higher Education*, November 2002; Du Plessis, T. (2006). "From monolingual to bilingual higher education: The repositioning of historically Afrikaans-medium universities in South Africa." *Language Policy*, 5(1), 87–113.

¹²⁸ Ibid.; Stellenbosch University Department of Sociology & Social Anthropology, "The decline of Afrikaans and institutional bilingualism at Stellenbosch University."

¹²⁹ South African History Online, "University of Stellenbosch"; North-West University, "History of North-West University," on the Potchefstroom Campus's origins in the Theological School of the Reformed Churches in South Africa, founded 29 November 1869 in Burgersdorp and relocated to Potchefstroom in 1905.

¹³⁰ Stellenbosch Papers in Linguistics, Vol. 39 (2010), "Transitions and translations from Afrikaans to English"; PRAESA Occasional Papers No. 17, "Dual-medium and parallel-medium schooling in the Western Cape."

community — and handed it to provincial governments.¹³¹ AfriForum and the Solidarity Movement characterised the Act, and its implementation by leaders such as Gauteng Premier Panyaza Lesufi, as effectively waging war on Afrikaans-medium education¹³² — a characterisation Lesufi himself has publicly disputed, insisting his objection is to single-medium schooling rather than to the Afrikaans language itself.¹³³ Whatever the intent, the effect of clause 5 was to strip Afrikaans-medium schools of the final say over their own survival. This followed years in which the former Minister of Higher Education and Training, Blade Nzimande, had himself classified Afrikaans as a "foreign" and "not indigenous" language,¹³⁴ a position his own department was ultimately compelled to revise following legal challenge.¹³⁵

[3.67] This triggered protest action that clearly demonstrated BELA was being implemented against the democratic will of the Afrikaner people. The overwhelming majority of Afrikaners vote either for the Democratic Alliance (DA) or the Freedom Front Plus (FF Plus),¹³⁶ and both parties fiercely opposed BELA's language provisions.¹³⁷ On 5 November 2024, more than 10,000 people marched from the Voortrekker Monument in Pretoria in protest — the largest gathering of Afrikaans speakers since 1994.¹³⁸

¹³¹ Parliament of South Africa, "Media Statement: Basic Education Portfolio Committee Chairperson Welcomes Signing of Bela Bill," 13 September 2024; Department of Basic Education, "Education stakeholder engagements on the BELA Act continue ahead of full-scale implementation," education.gov.za.

¹³² AfriForum, "Lesufi has to go"; Solidarity Movement (2024), "More than 10 000 protest participants made it heard – Bela is our red line."

¹³³ Polity (2019). "'I don't hate Afrikaans' — Panyaza Lesufi."

¹³⁴ TimesLIVE (2022). "DA welcomes Nzimande's opinion that Afrikaans, Khoi, San languages are indigenous to SA"; Language Policy Framework for Higher Education Institutions, Department of Higher Education and Training, 30 October 2020.

¹³⁵ Nzimande, B., reply to written parliamentary question from Leon Schreiber MP, reported in "Language at universities: Nzimande insists the govt does not discriminate against Afrikaans," *News24*, 27 February 2023.

¹³⁶ Fruits and Votes (2019), "South African vote and census data" (electoral analysis rather than official demographic fact); Inside Politics (2024), "Election 2024 [15]: Mapping ANC, DA, MK and EFF support by race."

¹³⁷ Parliament of South Africa, "Media Statement: Basic Education Portfolio Committee Chairperson Welcomes Signing of Bela Bill," 13 September 2024.

¹³⁸ Solidarity Movement (2024), "More than 10 000 protest participants made it heard – Bela is our red line"; independently reported at the same figure by *The Citizen* and *EWN*, 5 November 2024. No independent police or SAPS crowd estimate was located.

- [3.68] As was the case with the people of the Western Cape, the state proceeded with BELA regardless, thus intentionally and knowingly denying the Afrikaner people agency.¹³⁹ Once again, it relied on the provisions of the Constitution to assert that it had the legitimate right to do so.

3.3.1.4 Courts: A Constitutionally Constrained Safety Valve

- [3.69] South Africa's constitutional order rests on an implicit separation of powers, under which the judiciary is intended to act as a check upon the legislature and executive, safeguarding the Constitution against the overreach of the political branches — including, for the purposes of this paper, enabling majoritarianism to infringe upon the legitimate rights and expectations of sub-national communities.¹⁴⁰
- [3.70] In reality, however, the courts have progressively been shaped by the dominant political ideology to the point where their ability to act as an equally trusted constitutional safeguard for all of South Africa's diverse communities has increasingly been called into question. This compromise was summed up perfectly by constitutional scholar Koos Malan when he stated, "You can still get a procedurally fair judgement at the Constitutional Court, but you can no longer get an ideologically fair one."¹⁴¹ This sentiment was in essence echoed by Senior Counsel and director of Accountability Now Paul Hoffman, when he stated that the ANC's "revolutionaries" prefer judges who "embrace the values of the NDR unquestioningly" over "counter-revolutionary judges" prepared to strike down the ruling party's own programmes as unconstitutional.¹⁴²
- [3.71] This is not a fringe accusation levelled only by critics of the governing party. It is, in substance if not in its critical framing, an open and often celebrated feature of South African constitutional scholarship. The doctrine of transformative constitutionalism —

¹³⁹ Mail & Guardian (2024). "Ramaphosa signs Bela Act without amendments after a three-month consultation period."

¹⁴⁰ See, e.g., *De Lange v Smuts NO* 1998 (3) SA 785 (CC); *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).

¹⁴¹ K. Malan, personal communication, 13 September 2022.

¹⁴² Hoffman, P. (2020). "Cyril's ANC vs ANC NDR; what's bubbling under the murky surface." Accountability Now, 3 September 2020.

an explicitly avowed commitment to using judicial power in pursuit of large-scale, ideologically directed social change — was named by Karl Klare in 1998 and has since become the leading account of the Constitutional Court's own self-understanding.¹⁴³ Then-Chief Justice Pius Langa devoted a dedicated address to the subject, delivered as a prestige lecture at Stellenbosch University, describing transformation as the animating purpose of the Constitution the Court exists to apply.¹⁴⁴ Where mainstream scholarship divides is not over whether the courts pursue this project — that is treated as settled, and by most of its proponents as a virtue — but over whether they pursue it energetically enough. Some of the doctrine's own leading scholars, in a joint retrospective a decade after Klare's founding article, faulted the courts not for excessive ideological commitment but for insufficient boldness in applying it, citing "the reluctance to interrogate the distributive consequences of private law rules" and "the emergence of a neo-liberal strand in constitutional application" among their chief disappointments.¹⁴⁵ The disagreement within this literature is over whether that departure from strict judicial neutrality is a defect or the design — not over whether the departure exists.

[3.72] This state of affairs is the almost inevitable consequence of an appointment process which, though designed with the appearance of independence, ultimately answers to the national majority. The Judicial Service Commission, which recommends candidates for judicial appointment, comprises 23 members, the majority of whom are political appointees, with only three seats guaranteed to opposition parties.¹⁴⁶ Independent analysis has concluded that "one political party can control the JSC, since decisions are taken on a majority basis."¹⁴⁷ The President — who both nominates members of the Commission and makes the final appointment from its recommendations — is himself

¹⁴³ Klare, K. (1998). "Legal Culture and Transformative Constitutionalism." *South African Journal on Human Rights*, 14(1), 146–188.

¹⁴⁴ Langa, P. (2006). "Transformative Constitutionalism" (prestige lecture delivered at Stellenbosch University, 9 October 2006). *Stellenbosch Law Review*, 17(3), 351.

¹⁴⁵ Davis, D. and Klare, K. (2010). "Transformative Constitutionalism and the Common and Customary Law." *South African Journal on Human Rights*, 26(3), 403–509.

¹⁴⁶ Constitution of the Republic of South Africa, 1996, s 178(1).

¹⁴⁷ Helen Suzman Foundation. *In the Interests of Justice: Reform of the Judicial Service Commission*.

appointed, and can be removed, by a majority in the National Assembly. At every stage, the process by which the judiciary is constituted therefore traces back to the same national majority whose exercise of power the judiciary is meant to check.

[3.73] The consequences of this dependency are not merely theoretical, though it is worth being precise about their scope. This is not to claim that the courts never constrain the political branches. In *Economic Freedom Fighters v Speaker of the National Assembly*, a unanimous Constitutional Court held that President Zuma had breached the Constitution by failing to implement the Public Protector's binding remedial findings on the Nkandla security upgrades — a serious check on the sitting head of state, exercised without dissent.¹⁴⁸ Similar constraints have followed in cases involving state capture and administrative accountability more broadly. Those constraints, however, have operated at the level of individual rights, procedural legality, and anti-corruption oversight — not at the level of protecting a community's collective right to shape its own governance. The two examples that follow — concerning speech directed at a specific community, and concerning race-based policy affecting that community's economic prospects — illustrate that narrower, harder limit.

[3.74] The first concerns the courts' treatment of the phrase "Dubul' iBhunu" — "Kill the Boer" — sung repeatedly by senior figures of a governing coalition party. In 2003, South Africa's own Human Rights Commission found the song to constitute hate speech. In 2011, the High Court, sitting as an Equality Court, reached the same conclusion, ordering Julius Malema to stop singing it. That finding was progressively reversed over the following decade: the Equality Court (2022), the Supreme Court of Appeal (2024), and finally the Constitutional Court (2025) each held that the words, read in their historical and performative context, do not meet the threshold for hate speech or incitement.¹⁴⁹ Whatever the merits of that contextual reading, its consistent application to a chant that names a specific sub-national community — the Boer, understood synonymously with

¹⁴⁸ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC).

¹⁴⁹ *Freedom Front v South African Human Rights Commission*, 2003 (11) BCLR 1283 (SAHRC); *Afri-Forum and Another v Malema and Others* (20968/2010) 2011 (6) SA 240 (EqC); *Afriforum v Economic Freedom Fighters and Others* (EQ 04/2020) [2022] ZAEQC 2; 2022 (6) SA 357 (GJ) (25 August 2022); *AfriForum v Economic Freedom Fighters & Others* (1105/2022) [2023] ZASCA 82 (28 May 2024).

Afrikaners — and calls, in its plain words, for that community's killing, sits uneasily beside section 12(1)(c)'s guarantee that everyone be free from violence, and beside the Constitution's own preamble, which calls on South Africans to "respect those who have worked to build and develop this country." The Constitutional Court's refusal to hear a final appeal was, notably, unaccompanied by any reasons of its own.¹⁵⁰

[3.75] This approach is not confined to the "Dubul' iBhunu" litigation. South Africa's own Human Rights Commission has acknowledged, through one of its own representatives, that it is "purposefully lenient to black offenders in incidents concerning racial utterances made to white victims because of the historical context," while considering "racism from whites towards other races" to be "more pervasive."¹⁵¹ The Constitutional Court has itself adopted a formal version of the same asymmetry, holding that "recognition of the country's history of apartheid and its legacy should be the starting point" in any inquiry where the alleged perpetrator is white and the victim is black.¹⁵² Both the country's foremost human rights institution and its apex court have therefore said, in terms, that the identity of the parties should determine the standard applied — and the treatment of "Kill the Boer" is consistent with, rather than an exception to, that stated approach.

[3.76] The second concerns the courts' treatment of race-based policy. The categories on which South Africa's current employment equity and empowerment framework depends — African, Coloured, Indian, and White — are, without material alteration, the same categories established by the Population Registration Act of 1950, the foundational statute of apartheid racial classification, repealed in 1991.¹⁵³ These categories persist not because they retain any scientific or constitutional basis, but

¹⁵⁰ *AfriForum v Economic Freedom Fighters and Others* (Constitutional Court Case Order, 27 March 2025): "The Constitutional Court has considered the application for leave to appeal. It has concluded that the application should be dismissed as it bears no reasonable prospects of success. Leave to appeal is refused." *IRR/Sara Gon* (2025), "ConCourt shuts door on AfriForum over 'Kill the Boer'".

¹⁵¹ Priscilla Jana, SAHRC Commissioner, quoted in Geldenhuys, J. and Kelly-Louw, M. (2020). "Hate Speech and Racist Slurs in the South African Context: Where to Start?" *Potchefstroom Electronic Law Journal* 23.

¹⁵² *Rustenburg Platinum Mine v SAEWA obo Meyer Bester* [2018] ZACC 13.

¹⁵³ Population Registration Act 30 of 1950 (repealed 1991); Employment Equity Act 55 of 1998, s 1.

because the policy apparatus built upon them requires them to determine access to employment on a scale that now approaches the near-total exclusion of a defined minority from entire occupational categories.¹⁵⁴ This outcome is made possible by a deliberate judicial choice. In its foundational affirmative action judgment, the Constitutional Court expressly rejected the stricter standard of review applied to race-based measures in comparable democracies, adopting instead mere rationality, and holding that the state need not show "there is no less onerous way in which the remedial objective may be achieved."¹⁵⁵ No requirement exists, in other words, that race-based measures be shown to be necessary, or that non-racial alternatives be genuinely considered and exhausted first — the very safeguard that led Sweden's own Supreme Court, applying an ordinary proportionality standard, to strike down a far more modest ethnicity-based admissions quota as unlawful.¹⁵⁶ That the continued legal use of apartheid's own racial taxonomy, tested against so undemanding a standard, has been consistently upheld as lawful redress rather than scrutinised as discrimination on the grounds section 9 itself prohibits, is difficult to reconcile with the Constitution's founding commitment to non-racialism.

[3.77] The point is not that any individual judge has acted in bad faith, or that transformative constitutionalism lacks a respectable intellectual pedigree. It is that the judiciary's own account of its constitutional role — avowed, not alleged — is one of committed engagement in a specific programme of social transformation, articulated by a former Chief Justice and defended, not disputed, by the scholars who study it most closely. Where the courts have constrained the political branches, that constraint has operated at the level of individual rights and administrative legality, not at the level of collective, structural self-determination claims of the kind this paper examines. A court that describes its own function this way cannot simultaneously be assumed to provide the sub-national communities examined in this paper with the independent, non-ideological safeguard ordinary separation-of-powers theory promises.

¹⁵⁴ Government Gazette No. 52514 (15 April 2025), "Determination of Sectoral Numerical Targets."

¹⁵⁵ Minister of Finance and Another v Van Heerden [2004] ZACC 3, para 39 (Moseneke J).

¹⁵⁶ Supreme Court of Sweden (Högsta domstolen), Uppsala University case (2006).

3.3.1.5 Why Voting Alone Cannot Be The Solution

[3.78] A basic premise underlies the legitimacy of any functioning democracy: that today's electoral loser may become tomorrow's winner, and that this cyclical possibility is what makes accepting defeat tolerable. This is not merely intuitive; it is a well-established principle in democratic theory, generally termed "losers' consent" — the proposition, developed most fully by Anderson, Blais, Bowler, Donovan and Listhaug, that "being able to accept losing is one of the central, if not the central, requirement of democracy."¹⁵⁷ Losers' consent depends on a system being genuinely regarded as legitimate by those who lose within it — which in turn depends on losing being a temporary, reversible condition, not a permanent one.

[3.79] Many of South Africa's sub-national communities have never been afforded the realistic prospect of winning. Since the first democratic election in 1994, the main African Nationalist bloc — the African National Congress and its subsequent breakaway parties, the Economic Freedom Fighters and uMkhonto weSizwe — has never once fallen below 60% in national elections, even as the ANC's own support has collapsed from 69.7% (2004) to 40.2% (2024).¹⁵⁸ These are not three ideologically distinct political traditions that happen to draw similar support. The EFF was founded in 2013 by Julius Malema, the former president of the ANC's own Youth League, expelled from the ANC in 2012.¹⁵⁹ MK was founded in 2023 by Jacob Zuma, the ANC's own former president, who insisted at the time that he remained "a loyal member" of the ANC even as he led a party against it, and who named his new party after the ANC's own historic military wing.¹⁶⁰ Weeks before the 2024 election, Zuma directly appealed to Malema to combine their support: "we must win with two-thirds majority... be ready that we must have our two thirds as the black majority in this country. We will sort out other things thereafter" — echoing

¹⁵⁷ Anderson, C. J., Blais, A., Bowler, S., Donovan, T., & Listhaug, O. (2005). *Losers' Consent: Elections and Democratic Legitimacy*. Oxford University Press.

¹⁵⁸ Electoral Commission of South Africa, National Election Results, 1994–2024, available at: <https://results.elections.org.za/home/Downloads/NPE-Results>; national election results, 1994–2024 (author's compilation from IEC data).

¹⁵⁹ Britannica, "Julius Malema"; South African History Online, "Julius Sello Malema."

¹⁶⁰ Daily Maverick (2023). "Jacob Zuma ditches ANC in 2024 elections, vows 'total liberation'"; The Herald (2024). "We will discipline Zuma after the elections — Mantashe."

an almost identical appeal Zuma had made as ANC president a decade earlier, seeking "a huge majority... because we want to change certain things that couldn't be changed with a small majority."¹⁶¹ Malema's own 2024 manifesto made explicit that "sorting out other things" included revisiting section 25 of the Constitution to permit land expropriation without compensation, once a two-thirds majority could be secured.¹⁶² Following the election, the two parties formalised this alignment by jointly founding the Progressive Caucus in Parliament.¹⁶³ The 2024 fragmentation of the ANC vote therefore is more accurately understood as the progressive radicalisation of a single political tradition, now expressed through three vehicles rather than one, as opposed to the emergence of a competitive, cyclical party system.

[3.80] This permanent majority is not evenly distributed throughout South Africa, and its pattern of distribution reveals why it cannot realistically be dislodged by persuasion. Across the last three national elections, the African Nationalist bloc has consistently secured close to 70% of the vote outside the Western Cape, while falling below a third of the vote within it — a gap that has widened, not narrowed, with each successive election.¹⁶⁴ This "ideological divide" tracks demography rather than policy preference with striking precision.

[3.81] South African elections have long been described in the academic literature as "racial censuses": Karen Ferree's foundational, peer-reviewed study found that "in all South African elections since 1994, race has been an overwhelming predictor of voting

¹⁶¹ TimesLIVE (2024). "Zuma's ambitious MK party woos Malema's EFF ahead of 2024 elections"; The Herald (2014). "Zuma wants 'certain hurdles' in constitution changed."

¹⁶² IOL (2024). "EFF Manifesto: Malema vows to revive section 25 motion on land expropriation in parliament."

¹⁶³ "The charter of the Progressive Caucus," Politicsweb, 13 June 2024; "Four reasons why DA decided to join the government of national unity," *Daily Maverick*, 14 June 2024, on the Caucus's founding press conference and initial membership.

¹⁶⁴ Electoral Commission of South Africa, Provincial Election Results, 1994–2024, available at: <https://results.elections.org.za/home/Downloads/NPE-Results>; Cape Independence Advocacy Group (2024). *White Paper: What does the outcome of the 2024 elections mean for Cape Independence?*, drawing on IEC results and Victory Research analysis.

behaviour for most of the South African electorate."¹⁶⁵ Detailed post-election analysis of the 2024 result by Gareth van Onselen, a leading South African political statistician and pollster, confirms this with granular precision: 98.5% of the African Nationalist bloc's votes came from black voters, and 86.6% of all black voters nationally supported one of these three parties; conversely, only 4.3% of black voters supported the DA, the largest party outside that bloc.¹⁶⁶

[3.82] The point of setting out this data is not to make any claim about the character or legitimacy of any community's political choices. It is to demonstrate that the permanence described above is structural rather than contingent: in a system where voting aligns this closely with demographic identity, and one demographic group constitutes a substantial supermajority of the electorate, the ordinary mechanism by which minorities become majorities — persuading enough voters to change their minds — cannot function in the way democratic theory assumes it will.

[3.83] Nor is there any reasonable basis to expect this to change. The pattern has held for thirty years and seven elections, across periods of ANC dominance, ANC decline, and ANC fragmentation alike; if anything, the 2024 result shows the underlying bloc adapting and reorganising itself precisely to preserve its majority rather than losing it.

[3.84] For a sub-national community positioned permanently outside that bloc, voting is not a mechanism of self-determination but a ritual without prospect of success — losers' consent extended indefinitely, to a system that offers no realistic path to becoming anything other than a loser. Such a community cannot vote itself into a different outcome, regardless of the merits of its case or the quality of its governance. Its only democratic recourse is contingent on a shift in the political preferences of a community

¹⁶⁵ Ferree, K. E. (2006). "Explaining South Africa's Racial Census." *The Journal of Politics*, 68(4), 803–815; Ferree, K. E. (2010). *Framing the Race in South Africa: The Political Origins of Racial Census Elections*. Cambridge University Press.

¹⁶⁶ van Onselen, G. (2024). "Election 2024 [15]: Mapping ANC, DA, MK and EFF support by race." *Inside Politics*, 24 June 2024; Cape Independence Advocacy Group (2024), *White Paper*. As South Africa's electoral system does not collect racial voting data directly, these figures are statistical estimates derived from polling and demographic modelling of voting patterns, not official IEC racial data.

other than its own — a possibility it has no right to compel, and no reasonable basis to expect. It is, in the fullest sense, a passenger on a ship steered entirely by others.

[3.85] The argument here is not that South Africa's black majority should be disempowered — given South Africa's past, this should be inconceivable to all. It is that, by any reasonable logical or moral measure, South Africa should not be operating as a unitary state in which a perpetual majority imposes its will on sub-national communities against their own. In this regard, South Africa is completely out of step with international norms and, arguably, its own international obligations. It has a positive obligation to ensure that sub-national communities can live according to their chosen values and democratic will, provided that, in doing so, they do not infringe upon the rights of others.¹⁶⁷

[3.86] Article 20 of the African Charter on Human and Peoples' Rights, to which South Africa is a signatory and which Parliament has ratified, expresses this sentiment eloquently: "All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen."¹⁶⁸

¹⁶⁷ De Zayas, A. (2018). *Report of the Independent Expert on the promotion of a democratic and equitable international order*, A/HRC/37/63, para 10(d): "The rights-holders of self-determination are peoples. The duty bearers are States"; *Reference re Secession of Quebec* [1998] 2 SCR 217, para 92: "The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others."

¹⁶⁸ African Charter on Human and Peoples' Rights, 1981, art 20(1).

Chapter 4: The Right to Self-determination

- [4.1] In Chapters 1 to 3, this paper has established that the South African State considers itself to be unitary in nature, that it acts accordingly, and that the dominant political powers have intentionally pursued a constitutional architecture which concentrates power within the central government, exercised in accordance with a mandate from a permanent national majority.
- [4.2] It has further established that the constitutional architecture established in 1996 deprives sub-national communities of legitimate agency, and that they have limited functional recourse through the judicial and electoral systems — arriving at a position where sub-national communities can be compared to passengers stranded upon a ship entirely within the control of others.
- [4.3] This constitutional predicament is not unique to South Africa. To varying degrees, the tension between permanent national majorities and territorially or culturally distinct sub-national communities is a recurring feature of states throughout the world.¹⁶⁹ It is precisely because this tension is neither novel nor exceptional that international law has progressively developed a body of principles governing the rights of peoples within existing states. Central among these is the repeated affirmation that "all peoples have the right to (or of) self-determination."¹⁷⁰
- [4.4] This paper argues that where a sub-national community capable of constituting a "people" in international law legitimately asserts its right to self-determination within the South African State, the State becomes legally obliged to give constitutional effect to that assertion. In doing so, South Africa can no longer continue to function as a constitutionally unitary state.

¹⁶⁹ Fearon, J. D. (2003). "Ethnic and Cultural Diversity by Country." *Journal of Economic Growth*, 8(2), 195–222.

¹⁷⁰ International Covenant on Civil and Political Rights, 1966, art 1(1); International Covenant on Economic, Social and Cultural Rights, 1966, art 1(1); African Charter on Human and Peoples' Rights, 1981, art 20(1).

4.1 Nature of self-determination

- [4.5] Self-determination is a group right. It is premised upon the fact that, by nature, individual persons organise themselves into groups based around common factors or characteristics such as geographical proximity, ideological and religious beliefs, language, or shared cultural values.¹⁷¹
- [4.6] The essence of the right to self-determination is that these communities, once they have come to exist, have an inherent and inalienable right to make decisions for themselves - about how and by whom they are governed, about the rules that operate within their community, and about how they manage their own resources.¹⁷² The only absolute constraint then placed upon them by the law is that in deciding for themselves how they want to live, they do not in doing so infringe upon the rights of others - both individuals within their own community, and in how they interact with other communities.¹⁷³
- [4.7] The implication for linguistically and culturally diverse societies like South Africa, even more so on account of a dominant national majority which is ethnically and culturally delineated, is that the national majority may not unilaterally impose its decisions onto sub-national communities against their will - where those communities legitimately wish to pursue a different course of action which does not infringe upon the rights of others.
- [4.8] This then leads to a critical distinction: equal participation in a democracy, even when it is free and fair, does not of itself satisfy a community's right to self-determination. It is the outcomes which that democratic participation achieves which determine whether a

¹⁷¹ International Covenant on Civil and Political Rights, 1966, art 1(1); International Covenant on Economic, Social and Cultural Rights, 1966, art 1(1).

¹⁷² De Zayas, A. (2014). Report of the Independent Expert on the promotion of a democratic and equitable international order, A/69/272, para 3, citing Western Sahara, Advisory Opinion, ICJ Reports 1975, p 12: "In its essence, the right of self-determination means that individuals and peoples should be in control of their destinies and should be able to live out their identities, whether within the boundaries of existing States or through independence."

¹⁷³ Reference re Secession of Quebec, [1998] 2 SCR 217 at para 92.

community is genuinely exercising self-determination. This distinction formed a key element in the Supreme Court of Canada's seminal judgement on Quebec.

[4.9] In that case, Quebec already had substantial federal powers, but the Court considered whether Quebecers already exercised meaningful internal self-determination through Canada's constitutional arrangements, including their ability to participate effectively in national political decision-making. The answer to this question then determined whether Quebecers were exercising self-determination.¹⁷⁴

4.2 Qualifying Communities

[4.10] Once it is accepted that a right to self-determination exists, and taking into consideration international law, and in the context of South Africa, the three international treaties it has signed and ratified since 1994 which formally recognise it — the international law position is unambiguous: South Africa has expressly and repeatedly bound itself, through ratification, to recognise this right — leaving no room to conclude otherwise.¹⁷⁵ The question then becomes "to whom does it apply?"

[4.11] At face value, this is an easy question to answer. International law is consistent and clear on this question: "all peoples have a right to, or of, self-determination."¹⁷⁶ There are no exceptions: to read this repeated phrasing in "peoples" as anything other than genuinely universal would itself be to accept an unequal application of the law, contrary to the guarantee of equality before the law.¹⁷⁷

¹⁷⁴ Ibid at para 136.

¹⁷⁵ International Covenant on Civil and Political Rights, 1966. South Africa signed 3 October 1994 and ratified 10 December 1998; art 1(1) provides: "All peoples have the right of self-determination." International Covenant on Economic, Social and Cultural Rights, 1966. South Africa signed 3 October 1994 and ratified 12 January 2015, becoming the 163rd state party; art 1(1) is in materially identical terms to ICCPR art 1(1). African Charter on Human and Peoples' Rights, 1981. South Africa signed and ratified on 9 July 1996; art 20(1) provides: "All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination."

¹⁷⁶ International Covenant on Civil and Political Rights, 1966, art 1(1); International Covenant on Economic, Social and Cultural Rights, 1966, art 1(1); African Charter on Human and Peoples' Rights, 1981, art 20(1).

¹⁷⁷ Universal Declaration of Human Rights, 1948, art 7; International Covenant on Civil and Political Rights, 1966, art 26.

- [4.12] What complicates this situation is that international law offers no definitive definition of who qualifies as a people, and as such, it has become a contested concept — although over time a broad consensus has progressively emerged. This has been shaped by state practice and judicial findings.¹⁷⁸
- [4.13] The closest thing we have to a clear definition is what has come to be referred to as the 'Kirby Description' which was developed at the UNESCO 'International Meeting of Experts on further study of the concept of the rights of peoples, 1989'.¹⁷⁹
- [4.14] The experts recognised that the terms 'people', despite its frequent use in international law, remained undefined, and whilst consciously not providing a finite definition, they identified and described the likely characteristics of a people as imagined by international law.
- [4.15] They concluded that there were two overarching elements that would need to be satisfied, an objective element and a subjective element.
- [4.16] Objectively, a group must exhibit some or all of the following characteristics: a common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; and common economic life — and must be of a certain number, which need not be large, but which must amount to more than a mere association of individuals within a state.
- [4.17] Subjectively, the group must exhibit the will to be identified as a people, or the consciousness of being a people, accepting that not everyone included in the group may share this will. This claim becomes more compelling where the group has established institutions or other means of expressing its common characteristics and identity.
- [4.18] Whilst the Kirby description has never been recognised as a definition, the African Commission on Human and Peoples' Rights — the most authoritative regional body to

¹⁷⁸ De Zayas, A. (2014). Report of the Independent Expert on the promotion of a democratic and equitable international order, A/69/272, para 4.

¹⁷⁹ UNESCO (1989). International Meeting of Experts on further study of the concept of the rights of peoples: Final report and recommendations, SHS-89/CONF.602/7, para 22.

have applied the term — has adopted criteria that track this description almost point for point.¹⁸⁰

[4.19] One counter claim, which at least up until recently has regularly been made by those who seek to limit the right of self-determination, is that it applies only in the context of decolonisation. The evidence already presented, combined with the repeated acceptance by apex courts in constitutional and parliamentary democracies of a legitimate right to self-determination outside of the decolonisation context — most notably Quebec, with Scotland recognising the relevance of the same constitutional framework¹⁸¹ — should by itself be sufficient to disprove this notion.

[4.20] However, should any doubt remain, De Zayas — who served as the UN's Independent Expert on the Promotion of a Democratic and Equitable International Order from 2012 to 2018 — addressed this objection directly in his 2017 paper, *The Law on Self-Determination Today*, itself grounded in the criteria set out in his earlier report to the UN General Assembly.¹⁸² He wrote: "Some antiquated writings on international law sought to freeze the progressive development of international law, contending that self-determination applied only to decolonization. Whoever is aware of the historical development of the norm will shake his head, because law is a living thing... What has followed is a steady development toward letting people decide on their futures by way of plebiscite or referendum."¹⁸³

4.3 Erga Omnes

[4.21] International law recognises that, when it comes to certain rights, duties, or legal obligations, the international community as a whole has a legitimate interest in ensuring

¹⁸⁰ Kevin Mgwanga Gunme et al v Cameroon, Communication 266/03, African Commission on Human and Peoples' Rights (2009), paras 170, 179.

¹⁸¹ Reference re Secession of Quebec [1998] 2 SCR 217; Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998 [2022] UKSC 31, paras 88–90 (applying the Quebec framework to Scotland without reference to any colonial context).

¹⁸² De Zayas, A. (2014). Report of the Independent Expert on the promotion of a democratic and equitable international order, A/69/272, paras 63–77.

¹⁸³ De Zayas, A. (2017). *The Law on Self-Determination Today*.

that all states fulfil their obligations, and carries a duty to help bring non-compliance to an end. In such cases, the right or duty in question is said to carry an *erga omnes* obligation.

[4.22] The right of self-determination carries an *erga omnes* obligation.

[4.23] This was established by the International Court of Justice (ICJ) in 1995, in the *East Timor* case, when the Court held directly that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character."¹⁸⁴ The International Law Commission's own codification of the law of state responsibility affirms the same point: in cataloguing the obligations owed to the international community as a whole — a category that includes the outlawing of aggression and genocide, and the basic rights of the human person, including protection from slavery and racial discrimination — the Commission records that "in its judgment in the East Timor case, the Court added the right of self-determination of peoples to this list."¹⁸⁵

[4.24] The ICJ has confirmed this finding on two further occasions since, each time adding to what an *erga omnes* obligation in practice requires of states. In 2004, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ held that where the right to self-determination is breached, all states — not only the state responsible for the breach — are under a duty not to recognise the resulting unlawful situation, and a duty not to render aid or assistance in maintaining it.¹⁸⁶ In 2019, in its Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius*, the ICJ reaffirmed the *erga omnes*

¹⁸⁴ *East Timor (Portugal v Australia)*, [1995] ICJ Rep 90, para 29.

¹⁸⁵ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), commentary to art 48, para (9).

¹⁸⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, paras 155–159.

character of the right once more, and held that all states bear a positive obligation to cooperate with the United Nations to bring the unlawful situation to an end.¹⁸⁷

[4.25] The result is that a breach of the right to self-determination is never a matter for the state responsible, or the people affected, alone. It is a matter in which every state in the international community holds a legal interest — an interest which itself gives rise to obligations: to not recognise the breach as lawful, to not assist in maintaining it, and to cooperate in bringing it to an end.

4.4 Jus Cogens

[4.26] A *jus cogens* norm — a peremptory norm of general international law — is a rule considered so fundamental that no state may derogate from it, whether by treaty, by domestic law, or by consent. Where an ordinary rule of international law can generally be varied or excluded by agreement between the states concerned, a *jus cogens* norm cannot: any rule or agreement in conflict with it is void.¹⁸⁸ *Jus cogens* status is reserved for a small category of norms — the prohibitions on genocide, slavery, torture, and aggression are the standard examples — treated as binding on every state, regardless of that state's individual consent or objection.

[4.27] The right to self-determination carries *jus cogens* status.

4.4.1 The International Court of Justice (ICJ)

[4.28] For most of its history, the Court had been notably reluctant to identify the right of self-determination as peremptory. That changed in 2024. In its Advisory Opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*, the Court held, for the first time, that "in cases of foreign occupation such as the present case, the right to self-determination constitutes a

¹⁸⁷ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, [2019] ICJ Rep 95, para 180.

¹⁸⁸ Vienna Convention on the Law of Treaties, 1969, art 53.

peremptory norm of international law."¹⁸⁹ This is the first occasion on which the Court itself, rather than an individual judge or a subsidiary body, has expressly characterised self-determination as *jus cogens*. What matters at the outset is that the Court has now said, in terms, that the right carries peremptory status; the "foreign occupation" qualifier in that holding is addressed directly in section 4.4.6 below.

[4.29] That holding is best understood not as an isolated or novel pronouncement, but as the Court arriving, in 2024, at a position the International Law Commission, a succession of UN Special Rapporteurs, and several of the Court's own judges had already reached independently.

4.4.2 The International Law Commission (ILC)

[4.30] The ILC's 2022 Draft Conclusions on Peremptory Norms of General International Law list the right to self-determination among the recognised examples of *jus cogens*, in the same unqualified terms as the prohibitions on genocide, aggression, and racial discrimination.¹⁹⁰ The Annex list is expressly non-exhaustive — it does not purport to be a closed catalogue of every peremptory norm, only a record of those the Commission has already identified as such¹⁹¹ — which if anything understates rather than overstates the position: self-determination's inclusion is a floor, not the outer limit, of what the ILC recognises. Of the 86 states that formally commented on the Draft Conclusions, only five objected to self-determination's inclusion.¹⁹²

[4.31] Underlying this is the ILC's own definition of what peremptory status actually consists of. Draft Conclusion 3 states that such norms "reflect and protect fundamental values of the international community" and "are universally applicable and are hierarchically

¹⁸⁹ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, ICJ, 19 July 2024, para 233.

¹⁹⁰ International Law Commission (2022). Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries, A/77/10, Annex.

¹⁹¹ *Ibid.*, Annex, chapeau.

¹⁹² International Law Commission, Peremptory norms of general international law (*jus cogens*): Comments and observations received from Governments, A/CN.4/748; Declaration of Judge Tladi, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory (2024), para 27, n 35.

superior to other rules of international law."¹⁹³ Peremptory status, on the Commission's own account, is a quality attaching to the norm as such — universal, hierarchical, general — not a status contingent on the particular facts of any one dispute.

4.4.3 Separate Opinions of ICJ Judges

[4.32] In the 2019 *Chagos* Advisory Opinion, Judge Cançado Trindade stated directly: "The fundamental right of peoples to self-determination indeed belongs to the realm of *jus cogens*, and entails obligations *erga omnes*, with all legal consequences ensuing therefrom."¹⁹⁴ He criticised the Court's own majority for failing to reach this conclusion, and grounded his own position not in the facts of *Chagos* but in the general text of Article 1, common to the ICCPR and ICESCR, tracing it through the ILC's own drafting debates on the Vienna Convention on the Law of Treaties across the 1960s and through Ian Brownlie's 1966 treatise.¹⁹⁵ Judges Robinson and Sebutinde independently reached the same conclusion in the same case.¹⁹⁶

4.4.4 De Zayas's Reports to the United Nations

[4.33] As early as 2014, De Zayas, then the UN's Independent Expert on the Promotion of a Democratic and Equitable International Order, recorded that this was already the settled position among the relevant authorities: "There is consensus among States, judges of international tribunals and professors of international law that self-determination is not only a principle but also a right that has achieved the status of *jus cogens*."¹⁹⁷ He restated the conclusion four years later, in his final report to the Human Rights Council: "The right of self-determination of peoples constitutes *jus cogens*."¹⁹⁸

¹⁹³ International Law Commission (2022), Draft Conclusion 3.

¹⁹⁴ *Chagos* Advisory Opinion [2019] ICJ Rep 95, Separate Opinion of Judge Cançado Trindade, para 119.

¹⁹⁵ *Ibid.*, paras 118, 122–128, citing I. Brownlie, *Principles of Public International Law* (1st ed., 1966), pp 417–418.

¹⁹⁶ *Ibid.*, Separate Opinion of Judge Sebutinde, para 30; Separate Opinion of Judge Robinson, paras 71–73.

¹⁹⁷ De Zayas, A. (2014). Report of the Independent Expert on the promotion of a democratic and equitable international order, A/69/272, para 15.

¹⁹⁸ De Zayas, A. (2018). Report of the Independent Expert on the promotion of a democratic and equitable international order, A/HRC/37/63, point (d).

4.4.5 Héctor Gros Espiell, UN Special Rapporteur

[4.34] Long before any of the above, Héctor Gros Espiell, UN Special Rapporteur, reached the same position in 1980: "Today no one can challenge the fact that, in the light of contemporary international realities, self-determination necessarily has the character of *jus cogens*."¹⁹⁹ This was not a reaction to *Chagos*, the 2022 ILC conclusions, or the 2024 Advisory Opinion — all of which lay decades in the future. It reflects a position that international legal opinion had already reached well before the modern case law began to catch up with it. Special Rapporteurs do not themselves create law; their reports carry weight as persuasive evidence of the state of expert and institutional opinion at the time they were written, not as binding authority in their own right. What De Zayas and Gros Espiell supply, across a gap of more than three decades between them, is exactly that kind of evidence — independent expert consensus reached long before, and confirmed again by, the Court's own eventual holding.

4.4.6 The Principal Counter-Argument: Does Jus Cogens Status Extend to Internal Self-Determination, or Only to External Self-Determination in Cases of Occupation?

[4.35] The Court's 2024 holding was framed precisely: "in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law."²⁰⁰ This paper's argument depends on that peremptory character reaching further — to communities seeking accommodation within an existing state, not liberation from an occupying power. The qualification must be confronted directly.

[4.36] Two questions are in play here. The objection that *jus cogens* status is limited to cases of occupation blurs them. The first is a question of status: is self-determination's *jus cogens* character universal, or limited to particular circumstances? The second is a question of consequence: once that status is established, what does it oblige a state to

¹⁹⁹ Gros Espiell, H. (1980). The Right to Self-Determination: Implementation of United Nations Resolutions, UN Doc. E/CN.4/Sub.2/405/Rev.1; cited in *Chagos Advisory Opinion* (2019), Separate Opinion of Judge Cançado Trindade, para 127.

²⁰⁰ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, ICJ, 19 July 2024, para 233.

do in practice? The first question is binary. The second is not. Conflating the two is what gives the occupation objection its apparent force.

[4.37] Question one is binary by definition. A peremptory norm, under Article 53 of the Vienna Convention on the Law of Treaties, is one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."²⁰¹ There is no category, in that definition, for a norm that is non-derogable in some contexts and ordinary in others. Either self-determination has the universal character the Convention describes, or it does not meet the Convention's definition at all — whatever narrower status it might otherwise carry. This is a claim about the character of the norm, not about the uniformity of everything that follows from it; what follows from it is addressed separately below, as question two. A doctrinal split into two rights, one peremptory and one not, sharing a single name, would be the only way around the binary itself. No authority anywhere in the record advances that split. The textual argument below forecloses it in any case.

[4.38] The affirmative case for universal status is substantial and can be stated plainly. The ICJ's 2024 Advisory Opinion on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory reached its *jus cogens* finding as a majority holding, not a separate opinion.²⁰² Three judges dissented in that case on a separate question: whether the self-determination violation, combined with unlawful annexation, was sufficient to render Israel's continued presence in the territory unlawful as such.²⁰³ Nothing in their joint opinion disputes the Court's characterisation of self-determination as *jus cogens*. No judge on that bench, majority or dissenting, challenged the right's peremptory character. The ILC's 2022 Draft Conclusions list self-determination among the recognised examples of *jus cogens*.²⁰⁴ Alfred de Zayas — the UN's own Independent Expert on this exact question, across a decade of reports to the

²⁰¹ Vienna Convention on the Law of Treaties, 1969, art 53.

²⁰² Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, ICJ, 19 July 2024, para 233.

²⁰³ Joint Opinion of Judges Tomka, Abraham and Aurescu, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory (2024).

²⁰⁴ International Law Commission (2022). Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries, A/77/10, Annex.

General Assembly and Human Rights Council — reaches the same conclusion repeatedly and without qualification.²⁰⁵

- [4.39] Against that affirmative case, the objection does not offer a competing case of its own. It is worth being precise about what is actually being claimed on each side, because the two are not symmetrical. This paper asserts that the right holds *jus cogens* status universally, and supports that assertion with a majority holding, an unopposed ILC position, and a decade of direct expert authority. In the specific context of internal self-determination, evidence is not being presented that self-determination exercised internally lacks *jus cogens* status — only that, in the objector's view, the case that it holds that status has not yet been conclusively proven. One side is proving a point. The other is disputing whether the proof is sufficient, without offering rival proof.
- [4.40] That asymmetry is not static. Each fresh pronouncement from the Court narrows the ground available to the doubt itself. In 2004, the Court found Israel's wall violated Palestinian self-determination and grounded the consequences in the right's *erga omnes* character — extending the norm's application from classic decolonisation to belligerent occupation, a legally distinct category, without waiting for a case to compel it.²⁰⁶ In 2019, several judges went further. Judge Robinson surveyed the Court's case law, state practice, and scholarly writing and concluded that "the right to self-determination is a norm of *jus cogens*," listing among his own stated reasons that "it is a norm that is universally applicable in that it applies to all States."²⁰⁷ Judge Sebutinde wrote, in the same vein, that characterisations of the right as peremptory "stretch back many decades and are now far too common to ignore" — though her own proposed holding for that case was framed specifically around the right "in the context of decolonisation," the only question actually before her.²⁰⁸ Judge Cançado Trindade's

²⁰⁵ De Zayas, A. (2014). Report of the Independent Expert on the promotion of a democratic and equitable international order, A/69/272; De Zayas, A. (2018). Report of the Independent Expert on the promotion of a democratic and equitable international order, A/HRC/37/63.

²⁰⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p 136, paras 88, 149, 155–156.

²⁰⁷ Chagos Advisory Opinion [2019] ICJ Rep 95, Separate Opinion of Judge Robinson, paras 50, 77(d).

²⁰⁸ *Ibid.*, Separate Opinion of Judge Sebutinde, paras 30–31.

separate opinion developed the same conclusion at length.²⁰⁹ In 2024, the Court's majority went further still, naming the *jus cogens* character outright as a matter of holding, not separate opinion.²¹⁰ The 2024 holding then drew academic scrutiny of its own. Deng's published critique, for instance, examines sharply how the Court reasoned to its conclusion — but the published criticism has focused overwhelmingly on the Court's methodology, not on advancing a developed alternative doctrine under which self-determination is *jus cogens* only in occupation cases.²¹¹ If such a doctrine existed, this is the literature in which it would surface. It has not.

[4.41] There is also a danger of reading too much into the context-specific language of a single ICJ ruling — including, it is worth noting, the "in cases of foreign occupation" language this section opened with. Israel demonstrated the risk directly in its submission to the ILC, arguing that the Court's silence on *jus cogens* in the earlier Chagos opinion showed it did not consider self-determination peremptory.²¹² Judge Tladi — the ILC's own Special Rapporteur on *jus cogens*, sitting on the bench that decided this case — rejected the argument: the Court's silence in Chagos reflected economy of reasoning, not doubt, since *erga omnes* already carried it there.²¹³ Of the 86 states that commented on the ILC's 2022 Draft Conclusions, only five questioned self-determination's peremptory status. Judge Tladi suggested that this challenge — feared by some as a serious threat to the norm's long-settled *jus cogens* status — was no longer an elephant in the room, but a gentle cat sitting quietly in the corner minding its own business.²¹⁴

[4.42] Two further arguments close question one.

²⁰⁹ *Ibid.*, Separate Opinion of Judge Cançado Trindade, paras 120–150.

²¹⁰ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, ICJ, 19 July 2024, para 233.

²¹¹ Deng, H. (2024). "Reflections on the Identification of *Jus Cogens* by the ICJ in the Advisory Opinion on the Legality of Israel's Occupation of Palestinian Territories: Taking into Account the ILC Draft Conclusions on *Jus Cogens*," *EJIL:Talk!*, 27 August 2024.

²¹² Peremptory norms of general international law (*jus cogens*): Comments and observations received from Governments, A/CN.4/748, 9 March 2022, p 104.

²¹³ Declaration of Judge Tladi, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory (2024), paras 17–21.

²¹⁴ *Ibid.*, paras 25–26.

- [4.43] The first is textual. Common Article 1 of the ICCPR and ICESCR recognises one right: "the right of peoples to self-determination." The treaty text creates no separate external right and no separate internal right — those are later doctrinal categories, describing modes of fulfilling the one right the treaty recognises, not two rights of differing legal weight. The Court in 2024 did not invent a new category of right for occupied territory. It identified the consequences of breaching the right Article 1 already recognises — a provision silent on any internal/external distinction. A single right cannot carry two different normative statuses depending on who happens to be denying it.
- [4.44] The second is structural, drawn from Quebec. The *Reference re Secession of Quebec* is domestic jurisprudence, not international law, and does not itself bind anyone beyond Canada. Its value here is interpretive: the Supreme Court of Canada was applying the international right to self-determination, not inventing a domestic substitute for it. It did not hold that Quebecers held some lesser, separate internal right. It held that Quebecers held the right to self-determination, full stop, and that the right was being satisfied through internal means — because those means were, on the facts, adequate.²¹⁵ Internal and external self-determination are not two rights. They are two ways of satisfying one right, and the choice between them turns on the adequacy of what is on offer, not on any difference in the norm's underlying character.
- [4.45] That resolves question one. Self-determination is jus cogens without qualification by context, or it is not jus cogens in any sense the Vienna Convention recognises. The evidence for the former is substantial, direct, and growing. No positive authority has yet been identified supporting the contrary proposition — only doubt about whether the former has been sufficiently shown, and that doubt has less room to stand in after each judgment than it had before it.
- [4.46] Question two is different and needs to be handled with different care. Granted that the right binds universally, what must a state actually do? Here real, positive authority exists on the other side of the ledger. The Friendly Relations Declaration's safeguard clause, the African Union's rigid institutional posture on territorial integrity, Quebec's insistence

²¹⁵ *Reference re Secession of Quebec* [1998] 2 SCR 217, paras 136, 154.

on negotiation over unilateral outcome, and the Court's own choice in 2024 to speak to the facts before it — all of this carries genuine weight.²¹⁶ None of it touches question one. All of it bears on question two: it establishes that states retain real discretion over how the right is realised, not whether it must be.

[4.47] From this, two propositions follow directly from the authorities themselves. The first, that the substance of the duty to accommodate is non-discretionary — this follows closely from the resolution of question one, read together with the second, the duty to negotiate recognised in Quebec, since a state cannot hold discretion to disregard a norm from which no derogation is permitted. The specific mechanism of accommodation is a matter for good-faith negotiation, exactly as Quebec requires.

[4.48] Two further propositions go beyond what any single authority holds, and are offered here as this paper's own synthesis, not as black-letter law. Firstly, that neither party holds a veto over that negotiation: the state cannot foreclose it by declining to engage, and the claimant community cannot dictate its outcome by insisting on one preferred form to the exclusion of every workable alternative. And secondly, that a state that offers no genuine engagement at all — that meets repeated, legitimate requests with indefinite deferral rather than any process capable of producing accommodation — has not exercised the discretion the authorities above describe. It has exhausted it.

[4.49] This last step extends Quebec's logic; it does not restate its holding. The Court there did not decide what follows a negotiation genuinely conducted in good faith that nonetheless fails. This paper does not claim that it did. What can be said without extension is narrower, and enough: a process that never begins in substance cannot be mistaken for one that failed in good faith.

²¹⁶ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, GA Res 2625 (XXV), 1970, Annex; Constitutive Act of the African Union, 2000, art 4(b); Reference re Secession of Quebec [1998] 2 SCR 217, paras 92–93; Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory (2024), para 233.

4.5 Legitimate Forms of Self-determination

- [4.50] Once it is accepted that the right to self-determination exists and possesses the status of a peremptory norm (*jus cogens*), and that it gives rise to *erga omnes* obligations, the next question is not whether it must be respected but how international law permits it to be realised.
- [4.51] Self-determination is not an abstract concept. To the contrary, the application of the right has progressively developed through its practical application in averting or resolving conflict between different groups, encompassing both peoples and states.²¹⁷
- [4.52] Accordingly, a number of accepted forms in which self-determination may be exercised has naturally developed through state practice. These applications of the right fall into two broad forms:
- [4.53] those which take place within the confines of an existing state and do not challenge the ultimate sovereignty of the state over the people in question — these applications are referred to as internal self-determination; and
- [4.54] those which end the sovereignty of the state over the people in question — these applications are referred to as external self-determination.²¹⁸
- [4.55] It is widely but not universally accepted that the default application of self-determination should be internal, with external applications reserved for situations where a state is unable or unwilling to accommodate internal self-determination, or

²¹⁷ De Zayas, A. (2014). *Report of the Independent Expert on the promotion of a democratic and equitable international order*, A/69/272, para 71: "International law evolves through practice and precedents."

²¹⁸ Committee on the Elimination of Racial Discrimination, General Recommendation XXI, 8 March 1996, para 4; De Zayas, A. (2014). A/69/272, paras 11–12.

where the state is committing gross human rights abuses against the people concerned.^{219 220}

[4.56] Accepted forms in which the right may be exercised include:

[4.57] **Internal:** Fully protected cultural, linguistic, and religious group rights;²²¹ cultural or regional autonomy;²²² and federalism or alternative special constitutional status.²²³

[4.58] **External:** Integration or unification with another state;²²⁴ free association with another state;²²⁵ and sovereign independence.²²⁶

4.6 Consequences of Denial - the 'Safeguard Clause'

[4.59] The preceding sections establish that peoples possess a right to self-determination, that the right is owed erga omnes, and that it carries the status of jus cogens.²²⁷ A question follows: what are the legal consequences where a state nevertheless refuses to accommodate the right?

²¹⁹ *Reference re Secession of Quebec* [1998] 2 SCR 217, para 138: "the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination."

²²⁰ The qualification "not universally accepted" reflects the International Court of Justice's own refusal, in its 2010 Advisory Opinion on the *Declaration of Independence of Kosovo*, to rule on "the extent of the right of self-determination and the existence of any right of 'remedial secession'", holding the question to fall outside the scope of what it had been asked (para 83).

²²¹ De Zayas, A. (2014). A/69/272, para 66.

²²² *Ibid.*, paras 3, 6, 63, 66.

²²³ *Ibid.*, paras 3, 7, 63, 66; De Zayas, A. (2018). *Report of the Independent Expert on the promotion of a democratic and equitable international order*, A/HRC/37/63, point (d).

²²⁴ General Assembly resolution 2625 (XXV), 1970; De Zayas, A. (2014). A/69/272, para 6; De Zayas, A. (2018). A/HRC/37/63, point (d).

²²⁵ General Assembly resolution 2625 (XXV), 1970; De Zayas, A. (2014). A/69/272, para 6.

²²⁶ General Assembly resolution 2625 (XXV), 1970; De Zayas, A. (2014). A/69/272, paras 3, 66; De Zayas, A. (2018). A/HRC/37/63, point (d).

²²⁷ See sections 4.3 and 4.4 above.

- [4.60] In their constitutional or legal architecture, almost all states affirm their sovereignty over their territory and the peoples who live within it. Jus cogens reflects the contrary proposition that, in respect of certain fundamental norms, sovereignty is not legally absolute.²²⁸ A state's authority remains extensive, but it is no longer the final source of legal authority in matters governed by peremptory norms. The result is an underlying tension between domestic and international law, one which many states purposefully seek to minimise by domesticating the provisions of international law. The right to self-determination lies directly on this faultline.
- [4.61] This tension consistently plays out geopolitically, including in a number of high-profile examples such as Taiwan, Catalonia, Scotland, Quebec, Somaliland, Western Sahara, Hong Kong, Tibet, Kashmir, and Kurdistan.²²⁹ In some of these cases the state refuses to accommodate the people in question's right to self-determination, asserting instead its right to territorial integrity.
- [4.62] For this reason, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States has taken on a critical function in international law.²³⁰ The Declaration affirms the inherent right of sovereign and independent states to territorial integrity, but it establishes a caveat: that this protection — extending to a state's territorial integrity and political unity — applies, and is therefore conditional, only where that state is "conducting themselves in compliance with the principle of equal rights and self-determination of peoples... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour."²³¹
- [4.63] This caveat has come to be known as 'the safeguard clause', and has subsequently been repeated and confirmed in the Vienna Declaration and Programme of Action, adopted

²²⁸ Vienna Convention on the Law of Treaties, 1969, art 53.

²²⁹ These examples are illustrative of a recurring global pattern and are not intended as a claim that each shares an identical legal posture.

²³⁰ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, GA Res 2625 (XXV), 24 October 1970.

²³¹ Ibid.

by the World Conference on Human Rights in 1993²³² — with one change. Where 1970 excluded discrimination "as to race, creed, or colour," 1993 excludes discrimination "of any kind."²³³ The category of exclusion capable of stripping a state of the clause's protection was widened, not narrowed, in the twenty-three years between the two instruments.

[4.64] In turn, this has given rise to the contested, but increasingly accepted, doctrine of remedial secession. The essence of remedial secession is that in instances where a state is unable or unwilling to conduct itself in compliance with the principle of equal rights and self-determination of peoples, the people negatively affected by this failure may secede from the state in order to remedy the state's failure.²³⁴ Remedial secession is considered by most as an act of last resort, but its credibility has been strengthened both by the Supreme Court of Canada's reasoning in the Quebec judgment,²³⁵ and by the International Court of Justice's holding, in its Kosovo advisory opinion, that a unilateral declaration of independence is not itself prohibited by international law — a holding the Court reached while explicitly declining to resolve the broader question of whether a right of remedial secession exists at all.²³⁶

[4.65] The key point being made here is that the denial of self-determination to a people who are legitimately asserting it within a state has potentially far-reaching consequences. The logic runs, if anything, a fortiori. If a unilateral declaration of independence — the most complete rupture available to a people denied self-determination — is not itself prohibited by international law, measures far short of secession cannot coherently be treated as more objectionable. A community's acquisition of policing powers, language authority, or fiscal autonomy is a proportionate, lesser consequence of a state's unlawful refusal, not a greater one. If the most extreme remedy available to an unlawfully denied people survives scrutiny under international law, remedies that leave

²³² Vienna Declaration and Programme of Action, 1993, Part I, para 2.

²³³ *Ibid.*, compared with GA Res 2625 (XXV), 1970.

²³⁴ *Reference re Secession of Quebec* [1998] 2 SCR 217, para 138.

²³⁵ *Ibid.*

²³⁶ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 403, paras 83–84.

the state's territorial integrity and constitutional structure entirely intact do so more easily still.

- [4.66] This is a point about the consequences of refusal, not a restatement of the as-of-right duty to accommodate developed in section 4.4.6 above; the two tracks should not be conflated. Quebec is again instructive on the shape of the limit it describes. The Supreme Court of Canada did not hold that Quebec could unilaterally dictate the terms of any eventual accommodation — the duty to negotiate in good faith runs in both directions, and neither party may impose a unilateral outcome on the other.²³⁷ Quebec's own subsequent legislative response, Bill 99, illustrates the same principle from the other side: it asserts that "no other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Québec people to determine its own future" — a claim that the federal government, in turn, cannot unilaterally dictate terms to Quebec either.²³⁸ The boundary between a negotiated outcome and a legitimate unilateral one is not arbitrary; it tracks whether the underlying right is being given genuine effect or subjected to a sustained and serious denial. Where negotiation has been exhausted through the state's persistent refusal to negotiate in good faith, the same reasoning that permits a wronged people to contemplate the most extreme remedy available under international law applies with even greater force to remedies considerably short of it.

²³⁷ *Reference re Secession of Quebec* [1998] 2 SCR 217, paras 92–93, 150.

²³⁸ National Assembly of Québec, *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, SQ 2000, c 46 ("Bill 99"), Explanatory Notes.

Chapter 5: South Africa and Self-determination

- [5.1] Chapter 4 of this paper has defined the right to self-determination which originates in international law. It is not a right, therefore, which the South African constitutional order gives rise to. Neither, on account of its status as a peremptory norm of international law (*jus cogens*), is it a right which the South African State is legally empowered to grant or deny.²³⁹ Accordingly, South Africa's constitutional order simply chooses how to accommodate the right, which will still exist whether it chooses to do so or not.
- [5.2] South Africa has chosen to actively accommodate both international law generally, and the right to self-determination specifically. This chapter examines how it has done so.

5.1 International Law

- [5.3] South Africa's constitutional order is deliberately open to international law. Rather than treating international law as external to the domestic legal order, the Constitution provides for its reception through several distinct mechanisms, which this chapter now maps before examining each in turn.
- [5.4] Two provisions govern how courts interpret domestic law in light of international law. Section 39(1)(b) requires a court, when interpreting the Bill of Rights, to consider international law.²⁴⁰ Section 233 requires that, when interpreting any legislation, a court must prefer any reasonable interpretation consistent with international law over one that is not.²⁴¹

²³⁹ Vienna Convention on the Law of Treaties, 1969, art 53 (no derogation permitted from a peremptory norm); International Law Commission, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), 2022, Annex (h); see sections 4.3 and 4.4 above; De Zayas, A. (2017). *The Law on Self-Determination Today*.

²⁴⁰ Constitution of the Republic of South Africa, 1996, s 39(1)(b).

²⁴¹ Constitution of the Republic of South Africa, 1996, s 233.

- [5.5] Beyond interpretation, the Constitution directly recognises international law as a source of obligation. Section 231 governs international agreements — treaties.²⁴² Section 232 governs customary international law.²⁴³
- [5.6] The Constitutional Court has further held that even where an international obligation has not been formally incorporated into domestic law, it may nevertheless play a decisive role in determining the content of a constitutional duty. In *Glenister v President of the Republic of South Africa*, the majority held that South Africa's obligations under an international anti-corruption convention were of the foremost interpretive significance in determining what the state's duty under section 7(2) — to respect, protect, promote and fulfil the rights in the Bill of Rights — required.²⁴⁴
- [5.7] These mechanisms do not all perform the same constitutional function, nor do they operate in the same way. Some govern only how existing law is to be interpreted; others determine whether, and on what terms, international law itself becomes part of South African law. That distinction becomes critical where a rule of international law — whether arising from treaty or from custom — possesses the additional status of a peremptory norm (*jus cogens*), a question this chapter addresses in section 5.4.

5.2 Treaty Law

- [5.8] Treaties enter South African law through a distinctly dualist mechanism. Dualism treats international law and domestic law as two separate legal orders: a state may bind itself internationally by treaty without that treaty having any automatic effect within its own domestic courts. An additional step — an act of the domestic legal order itself — is required before the treaty's provisions become part of the law its own courts will apply. South Africa's Constitution adopts this model for treaties, in contrast to the more monist approach it takes to customary international law, discussed in section 5.3 below.

²⁴² Constitution of the Republic of South Africa, 1996, s 231.

²⁴³ Constitution of the Republic of South Africa, 1996, s 232.

²⁴⁴ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), para 194.

- [5.9] Under international law, a state becomes bound by a treaty at the point it expresses its consent to be so bound — for multilateral human rights treaties, this is ordinarily ratification rather than signature alone.²⁴⁵ Signature alone does not bind a state to a treaty's substantive obligations; it creates only the narrower obligation not to act in a manner that would defeat the treaty's object and purpose pending ratification.²⁴⁶
- [5.10] In the South African Constitution, section 231 deals with treaty law. It requires a further step still: an international agreement binds the Republic once approved by resolution of Parliament — ratification — but does not become law in the Republic until enacted by national legislation, save for a self-executing provision of an approved agreement, which becomes law upon approval alone.²⁴⁷ Section 231 therefore answers a domestic constitutional question: when may a South African court enforce the provisions of a treaty as domestic law? It does not answer the distinct international question of whether South Africa is bound by that treaty — a question determined by international law itself, and one to which non-incorporation is a domestic omission, not an international release.
- [5.11] Section 5.1 above noted that even an unincorporated international obligation may play a decisive role in shaping a constitutional duty.²⁴⁸ *Glenister* is itself a treaty case: the international anti-corruption convention at issue had been ratified but never incorporated into domestic law by Act of Parliament under section 231. Non-incorporation did not render the obligation domestically inert. It meant only that the obligation could not be enforced as a term of the convention itself, and instead operated through the interpretation of an existing constitutional duty.
- [5.12] Three treaties to which South Africa is a party bear directly on the right to self-determination.

²⁴⁵ Vienna Convention on the Law of Treaties, 1969, arts 11–16.

²⁴⁶ Vienna Convention on the Law of Treaties, 1969, art 18.

²⁴⁷ Constitution of the Republic of South Africa, 1996, s 231.

²⁴⁸ See section 5.1 above; *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), para 194.

5.2.1 The International Covenant on Civil and Political Rights

- [5.13] South Africa signed the ICCPR on 3 October 1994 and ratified it on 10 December 1998.²⁴⁹ Article 1(1) provides: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."²⁵⁰ The right is stated without qualification or limitation to any particular historical or colonial context.

5.2.2 The International Covenant on Economic, Social and Cultural Rights

- [5.14] South Africa signed the ICESCR on 3 October 1994 and ratified it on 12 January 2015.²⁵¹ Article 1(1) is worded identically to its ICCPR counterpart.²⁵²

5.2.3 The African Charter on Human and Peoples' Rights

- [5.15] South Africa signed and ratified the ACHPR on the same day, 9 July 1996.²⁵³ Article 20(1) states: "All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen."²⁵⁴ Like article 1(1) of the ICCPR and ICESCR, this right is stated in general terms, without limitation to any particular historical or political circumstance.
- [5.16] South Africa is accordingly bound, in international law, by three separate treaty guarantees of the right of all peoples to self-determination, each ratified after full and voluntary parliamentary process. None has been incorporated into South African law by

²⁴⁹ United Nations Treaty Collection, International Covenant on Civil and Political Rights, status as at date of access (accessed 16 August 2026).

²⁵⁰ International Covenant on Civil and Political Rights, 1966, art 1(1).

²⁵¹ United Nations Treaty Collection, International Covenant on Economic, Social and Cultural Rights, status as at date of access (accessed 16 August 2026).

²⁵² International Covenant on Economic, Social and Cultural Rights, 1966, art 1(1).

²⁵³ African Union, *List of Countries which have Signed, Ratified/Acceded to the African Charter on Human and Peoples' Rights*, https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf, status as at date of access (accessed 16 August 2026).

²⁵⁴ African Charter on Human and Peoples' Rights, 1981, art 20(1).

Act of Parliament. That omission determines what a South African court may directly enforce. It does not determine what South Africa, as a state, is bound to observe. Any breach of these treaty obligations engages South Africa's international responsibility under the law of treaties and the law of state responsibility.²⁵⁵

5.3 Customary International Law

[5.17] Customary international law is a rule of international law that arises not from treaty, but from the general practice of states, accepted by those states as legally binding rather than as mere courtesy or convenience.²⁵⁶ Unlike a treaty, it does not require signature or ratification by any individual state to bind that state; once a rule has crystallised as custom, it binds states generally, not because they have consented to a particular treaty, but because the rule has become part of general international law.

[5.18] Customary international law enters South African law by a different, and more direct, route than treaty law. Section 232 of the Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.²⁵⁷ No further legislative act is required. Whereas a ratified treaty remains, absent incorporation, purely an international obligation — as section 5.2 above explained — a rule of customary international law is, subject to that proviso, already part of South African domestic law, automatically, by direct constitutional operation. As Dugard observes, "there can be little doubt that the 'constitutionalization' of this rule gives it additional weight," and customary international law is, as a result, "no longer subject to subordinate legislation" — only the Constitution itself or an Act of Parliament can displace it.²⁵⁸

²⁵⁵ Vienna Convention on the Law of Treaties, 1969, art 26 ("Pacta sunt servanda": "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, art 1.

²⁵⁶ International Law Commission, Draft Conclusions on Identification of Customary International Law, 2018, Conclusion 2.

²⁵⁷ Constitution of the Republic of South Africa, 1996, s 232.

²⁵⁸ Dugard, J. (1997). "International Law and the South African Constitution." *European Journal of International Law*, 8(1), 77–92, at 79.

- [5.19] Self-determination is such a rule. The International Court of Justice has held that the right to self-determination crystallised as a customary rule binding on all states, at the latest with the adoption of General Assembly resolution 1514 (XV) in 1960, and that this customary status was subsequently confirmed by the 1970 Declaration on Principles of International Law concerning Friendly Relations.²⁵⁹ This is a finding independent of, and prior to, the right's further status as a peremptory norm, addressed in section 5.4 below; a rule may be customary without being peremptory, but a peremptory norm of this kind is also, necessarily, customary.
- [5.20] The consequence for South African law is direct. Self-determination, as a rule of customary international law, is already part of the law of the Republic today, without any need for Parliament to legislate it into existence — a position markedly different from the three treaties examined in section 5.2, none of which has been so incorporated. But its presence in South African law by this route carries a further consequence, easily overlooked. Section 232 does not create a South African rule that happens to share its name with an international one; it receives the international rule itself. The right's content, and the limits of its content, remain governed by international law, not by any independent domestic elaboration. Should the international understanding of self-determination's scope or requirements develop, what section 232 admits into South African law necessarily develops with it — not as a matter of judicial discretion, but as the direct consequence of receiving the international rule itself rather than a fixed domestic copy of it. South Africa has not domesticated a fixed formulation of self-determination frozen at some past date; it has admitted, on a continuing basis, whatever the right to self-determination is understood in international law to mean.
- [5.21] That, subject only to section 232's own proviso, is where matters would rest — save that self-determination possesses a further legal characteristic: it is not merely customary

²⁵⁹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, [2019] ICJ Rep 95, paras 150–153, 180; International Law Commission (2022), Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), Draft Conclusion 5(1): "Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*)."

international law but also a peremptory norm. What that additional status means for the proviso itself is the subject of section 5.4.

5.4 Jus Cogens

[5.22] Section 5.3 established that self-determination, as a rule of customary international law, enters South African law automatically under section 232 — subject only to that section's own proviso: unless inconsistent with the Constitution or an Act of Parliament. That proviso is unremarkable for an ordinary rule of custom. Self-determination, however, is not an ordinary rule of custom. It is also, as Chapter 4 has established, a peremptory norm (*jus cogens*) — binding upon all states without derogation.²⁶⁰ Section 232, as currently written, cannot logically operate as intended when applied to such a right, because it purports to derogate a non-derogable norm.²⁶¹

[5.23] The distinction is not that South Africa is free to disregard an ordinary customary rule and bound only by a peremptory one; sections 5.2 and 5.3 above have already shown that South Africa remains bound by its international obligations regardless of what any domestic provision purports to say about them. The distinction lies elsewhere. Section 232's proviso governs only the domestic reception of a rule — whether South African courts will give it direct effect as domestic law. For an ordinary rule of custom, that is a question section 232 is entitled to answer conditionally, because the rule's domestic status, not its international validity, is what the proviso addresses; South Africa's international obligation stands regardless. Applied to a *jus cogens* norm, the proviso purports to make the reception and operation of the norm as law within the Republic contingent upon constitutional and legislative consistency.²⁶² That is precisely what a peremptory norm does not permit. A state may decide how its courts give effect to many

²⁶⁰ See section 4.4 above.

²⁶¹ Vienna Convention on the Law of Treaties, 1969, art 53 (no derogation permitted from a peremptory norm); International Law Commission, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), 2022, Draft Conclusion 3.

²⁶² Constitution of the Republic of South Africa, 1996, s 232.

international rules. It may not condition the binding force of a jus cogens norm upon the content of its own domestic law.

[5.24] As Malan asserts, absolute constitutional supremacy has become an article of faith amongst most constitutional scholars in South Africa,²⁶³ appearing in the constitutional text,²⁶⁴ and having been affirmed by the Constitutional Court.²⁶⁵ This paper contests the notion that the Constitution is, in all cases, supreme.

[5.25] Perhaps the most effective way to do so is to use a legal equivalence which should demonstrate the point beyond any reasonable doubt. Like the right to self-determination, the prohibition of genocide carries jus cogens status.²⁶⁶ It should be self-evident to all that no State can convey upon itself the right to commit genocide by including it in its constitution, by passing enabling legislation, or upon the authority of a domestic court. The entire purpose of the principle of jus cogens is to eliminate such a possibility.

[5.26] There is no hierarchy between recognised jus cogens norms: a right either carries the status of jus cogens or it does not, and the right to self-determination does.²⁶⁷

[5.27] When dealing with a jus cogens right, the Constitution is not supreme. International law is.

5.5 Section 235 - Self-determination

[5.28] Section 235 is the only clause in the South African Constitution which deals expressly with the right to self-determination.

²⁶³ Malan, K. (2019). *There is no Supreme Constitution: A Critique of Statist-Individualist Constitutionalism*. Stellenbosch: African Sun Media.

²⁶⁴ Constitution of the Republic of South Africa, 1996, s 2.

²⁶⁵ In re: Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC), para 45.

²⁶⁶ International Law Commission, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens), 2022, Annex (h).

²⁶⁷ International Law Commission, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens), 2022, Draft Conclusion 3.

[5.29] It states, "The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, 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, determined by national legislation."²⁶⁸

[5.30] At first reading, the section appears both permissive and restrictive. It appears to make recognition of community-level self-determination contingent upon national legislation, and to confine that recognition to communities sharing a common cultural and language heritage, exercised within a territorial entity or otherwise as Parliament may determine. Properly understood, however, section 235 performs a narrower constitutional function than either its proponents or its critics have generally assumed. It has been consistently misread, not because of its wording alone, but because it has repeatedly been read in isolation from both its history and the wider constitutional and international law framework within which it operates. As section 5.5.1 below shows, section 235 was not drafted to accommodate the right to self-determination as that right exists in international law; it emerged from a specific domestic political settlement, generalised in its drafting so as not to name the community it was negotiated to satisfy.²⁶⁹ It has, nonetheless, come to be treated by both its proponents and its critics as though it were the source of that right in South African law, and as though its terms marked the outer limit of what South Africa's Constitution has to say on the subject. It is neither. It is one domestic provision, with a particular and traceable history, sitting within a right that originates, and continues to be defined, in international law.

[5.31] This understanding is reflected in the work of constitutional scholar Pierre de Vos, who has written that "the section does not create a right to self-determination. Instead, it permits recognition of such a right by the national legislature. The national legislature does not have a legal obligation to recognise this right for anyone."²⁷⁰ The first of these

²⁶⁸ Constitution of the Republic of South Africa, 1996, s 235.

²⁶⁹ See section 5.5.1 below.

²⁷⁰ Pierre de Vos, "Fringe talk of Western Cape secession is reactionary - and unachievable," *Daily Maverick*, 12 August 2020.

propositions is correct, and is one this paper itself advances. The second does not follow from it, and fails on two independent grounds addressed in this section: as a matter of international law, which sections 5.1 to 5.4 above have shown binds South Africa regardless of section 235; and, separately, as a matter of the proper construction of section 235 itself, including the meaning already given to it by the Constitutional Court when certifying the provision against Constitutional Principle XXXIV. De Vos has separately described section 235 as "one of those typical smoke-and-mirrors provisions inserted into the Constitution to placate right-wing whites without creating any legal rights or obligations."²⁷¹

[5.32] Section 235 has, in political and public debate, repeatedly been read as subordinating the self-determination of some peoples to that of the South African people as a whole; as strictly limiting the right of self-determination to cultural and linguistic communities; as strictly limiting self-determination to internal solutions; and as placing the exercise of self-determination entirely at the discretion of Parliament — a discretion that, given the two-thirds majority required to amend the Constitution, is realistically unachievable to invoke against the will of the national majority.²⁷² The MK Party has proposed a Constitutional Amendment Bill seeking the repeal of section 235 from the Constitution altogether.²⁷³

[5.33] The sections that follow trace section 235's origin, examine its treatment in the Certification Judgment, consider its proper application, and finally ask what, if anything, would be lost were it removed from the Constitution altogether.

5.5.1 Origin and Purpose

[5.34] Section 235 did not emerge from any settled theory of self-determination, domestic or international. It emerged from a specific, high-stakes political negotiation in the final

²⁷¹ Ibid.

²⁷² Constitution of the Republic of South Africa, 1996, s 74.

²⁷³ MK Party, "Notice of Intention to Introduce a Private Member's Bill, 2025, and Invitation for Comment."

months before South Africa's first democratic election, and its text bears the marks of that origin.

[5.35] Afrikaner groups had been pressing for self-determination, and specifically for a Volkstaat, since before the Interim Constitution itself was adopted. By October 1993, that drive was not being pursued in isolation. The Inkatha Freedom Party, together with the governments of Bophuthatswana and Ciskei and the white Conservative Party, had formed the Concerned South Africans Group, and then the Freedom Alliance, uniting around a shared objection to being sidelined by the ANC and National Party in the constitutional negotiations, and a shared demand for the decentralisation of power in the new order.²⁷⁴ The Afrikaner Volksfront joined this alliance. Not every member's demand was resolved the same way: the Inkatha Freedom Party was ultimately drawn back into the process through a separately negotiated settlement concerning KwaZulu land administration; Bophuthatswana's position collapsed in an armed crisis in March 1994; the Afrikaner Volksfront's demand for a Volkstaat took a different path, and it is that path which produced section 235.

[5.36] On 21 December 1993, the ANC and the Afrikaner Volksfront reached an unsigned Memorandum of Agreement, opening formal negotiations on the idea of Afrikaner self-determination and a Volkstaat.²⁷⁵ On 2 March 1994, the Constitution of the Republic of South Africa Amendment Act, 1994 inserted a new principle, Constitutional Principle XXXIV, into Schedule 4 of the Interim Constitution — adding a territorial component to self-determination that the existing Constitutional Principle XII, addressed to associational rights alone, did not provide.²⁷⁶ On 23 April 1994, four days before the election, the Accord on Afrikaner Self-Determination was signed by the Freedom Front, the ANC, and the South African Government and National Party, "taking note of

²⁷⁴ Matthee, H. (2026). "Political leadership during a low-intensity conflict: the case of Conservative Party MPs Schalk Pienaar and Koos Botha in South Africa, 1990–1994." *Small Wars & Insurgencies*, DOI: 10.1080/09592318.2026.2616355; Robinson, J. (2015). "Fragments of the Past: Homeland Politics and the South African Transition, 1990–2014." *Journal of Southern African Studies*, 41(5), 953–967; O'Malley Archives, Nelson Mandela Foundation, "Freedom Alliance (FA)."

²⁷⁵ Accord on Afrikaner Self-Determination between the Freedom Front, the African National Congress and the South African Government/National Party, 23 April 1994, preamble.

²⁷⁶ Constitution of the Republic of South Africa Amendment Act, 1994; Schedule 4, Constitutional Principle XXXIV.

Constitutional Principle XXXIV" and committing the parties to address, through negotiation, the idea of Afrikaner self-determination, including the concept of a Volkstaat.²⁷⁷

[5.37] The Constitutional Assembly then drafted what would become section 235 from Constitutional Principle XXXIV. The text is not confined to Afrikaners. It speaks of "any community sharing a common cultural and language heritage" — general language, addressed to no particular group. Dugard, writing as a technical adviser to the Constitutional Assembly, records that the provision's purpose was "to hold out hope to disaffected communities of a greater degree of territorial or community autonomy," and identifies its origin in demands "pressed" by both Afrikaner groups seeking a Volkstaat and the Inkatha Freedom Party seeking federal autonomy — though, as noted above, the documentary history indicates that it was the Afrikaner demand specifically, carried through CP XXXIV, that produced this provision's text.²⁷⁸

[5.38] The documentary record consistently explains section 235 as the product of a specific domestic constitutional settlement. From the December 1993 Memorandum of Agreement, through Constitutional Principle XXXIV and the Accord on Afrikaner Self-Determination, to the Constitutional Court's own explanation in the Certification Judgment, the provision is presented as a mechanism for accommodating a particular constitutional negotiation, not as an attempt to provide a comprehensive constitutional statement of the international law right to self-determination. Section 235 was, in this sense, generalised in its drafting so as not to name the community it was negotiated to satisfy.

²⁷⁷ Accord on Afrikaner Self-Determination, 23 April 1994, cl 1.

²⁷⁸ Dugard, J. (1997). "International Law and the South African Constitution." *European Journal of International Law*, 8(1), 77–92, at 87.

5.5.2 Certification

- [5.39] Section 235 was tested against Constitutional Principle XXXIV by the Constitutional Court in the First Certification Judgment.²⁷⁹ Objectors raised several arguments; one bears directly on the misreadings this section addresses.
- [5.40] It was contended that self-determination, including the right to secession, is internationally accepted as a right and should not be subject to the discretion of Parliament — that any dispute should be decided by international law's objective criteria, not by whether Parliament had passed the requisite legislation.²⁸⁰ The Court neither adopted nor rejected the objectors' premise. Instead, it declined to determine the international law question, holding that its task was confined to testing compliance with the Constitutional Principles: "we are bound in our present task by the limits of the 34 CPs, and by them alone."²⁸¹
- [5.41] The Court was clearer about the character of the provision itself. Its "basic thrust," it held, "is that constitutional provision for the notion of the right to self-determination by any community sharing a common cultural and language heritage within a territorial entity shall not be precluded... This is clearly a permissive rather than an obligatory provision."²⁸² That permission is general, not particular. Considering and rejecting an argument that CP XXXIV should extend to traditional authorities as well, the Court treated the principle as addressed to "any community," not drawn narrowly around any one group.²⁸³
- [5.42] More significant is what the Court said "determined by national legislation" actually means. Addressing a related objection, it explained that "the provision that national legislation should determine the matter simply provides the mechanism for giving legal

²⁷⁹ *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

²⁸⁰ *Ibid.*, para 217.

²⁸¹ *Ibid.*, para 220.

²⁸² *Ibid.*, para 218.

²⁸³ *Ibid.*, para 221.

form to any agreement that might be reached."²⁸⁴ National legislation gives effect to an agreement; on the Court's own account, it is not what determines whether negotiations occur or an agreement is reached. The distinction the Court draws is properly characterised this way: section 235 does not make Parliament the gatekeeper of self-determination. It makes Parliament the body that gives legislative effect to what has already been negotiated.

- [5.43] That is a narrower finding than a general duty to negotiate, and this paper does not rest on that broader claim on the Certification Judgment. The duty to engage with a legitimate claim arises from international law, independently of section 235, as sections 5.1 to 5.4 above have shown. What the Certification Judgment establishes is more modest, and purely domestic: that section 235 cannot properly be construed as granting Parliament an unfettered discretion to refuse engagement altogether.

5.5.3 Understanding the Text

- [5.44] As this paper has already established, the correct reading of section 235 is a subject of ongoing debate. At times, the prevailing view — including on Parliament's ability to veto self-determination — has been at odds not only with international law, but with the Constitutional Court's own certification of the provision.
- [5.45] What follows is the interpretation this paper considers most plausible, and best supported by the available evidence.

5.5.3.1 "The right of the South African people as a whole to self-determination, as manifested in this Constitution"

- [5.46] This clause locates the South African people's right to self-determination not in any single provision, but in the Constitution as a whole. "Manifested" is not a word of creation; it describes something already capable of existing being shown, or given visible form. The Constitution is presented, on this reading, not as the source of the South

²⁸⁴ Ibid., para 216.

African people's self-determination, but as its record — the content of a right already exercised, set out in full across the document that follows.

[5.47] Nor is that manifestation static. The Constitution is, by its own terms, amendable — what it manifests is not frozen at 1996, but capable of revision as the people who adopted it choose to revise it.

[5.48] This interpretation is entirely compatible with how international law conceives the realisation of a people's right to self-determination. It is not exercised at a single finite moment in time, it is an ongoing process. As de Zayas puts it, "self-determination cannot be understood as a one-time choice, nor does it extinguish with lapse of time because, like the rights to life, freedom and identity, it is too fundamental to be waived" — exercised, on his account, through "an ongoing democratic exercise" and "continuous dialogue," not a single historical moment.²⁸⁵

5.5.3.2 "does not preclude"

[5.49] This phrase is not rights-creating language. It is anti-prohibition language. As section 5.5.2 above has already shown, the Constitutional Court read the provision containing these words as "clearly a permissive rather than an obligatory provision." Section 235 does not compel recognition of community self-determination. It simply confirms that nothing in the Constitution stands in its way.

5.5.3.3 "within the framework of this right"

[5.50] The most plausible reading of "this right" is the right just named — the South African people's collective right to self-determination. "Within the framework of this right" then does not narrow what forms community self-determination may take; it fixes a constraint on how that right is exercised: community self-determination may not infringe upon the self-determination of the South African people as a whole.

²⁸⁵ De Zayas, A. (2014). *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, A/69/272, para 3.

[5.51] This mirrors a principle already established in international law. In *Reference re Secession of Quebec*, the Supreme Court of Canada held that even a clear referendum majority in favour of secession would have no legal effect on its own, and could not "push aside... the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole."²⁸⁶ Self-determination, in other words, is exercised subject to one absolute constraint: it may not be exercised in a way that denies the corresponding rights of others. Section 235's "framework" clause reads as the domestic expression of the same principle. It does not subordinate community self-determination to the will of the national majority, nor confine it to forms the majority happens to prefer. It requires only that its exercise not deny the self-determination of the South African people as a whole — the same non-infringement condition international law already imposes.

5.5.3.4 "recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage"

[5.52] This phrase should be read as a single unit. Three ideas are at work within it, and they only make sense together.

[5.53] First, recognition. The Constitution does not say this right is created, conferred, or granted. It says it is recognised — a declaratory act, presupposing something already capable of existing independently of the act of recognising it. This is consistent with sections 5.1 to 5.4 above: the right to self-determination does not originate in section 235, or in the Constitution at all. It originates in international law.²⁸⁷

[5.54] Second, the notion. This word is not incidental. It is most plausibly read as signalling that what is recognised is not precisely defined — not only as to whether the right exists, but as to what satisfies the description that follows.

²⁸⁶ *Reference re Secession of Quebec* [1998] 2 SCR 217, para 151.

²⁸⁷ See sections 5.1 to 5.4 above.

[5.55] Third, the community described. Section 235 recognises the right of "any community sharing a common cultural and language heritage"²⁸⁸ — both elements, culture and language, appear to be required together, not as alternatives. Territory plays no part in this description at all. A group's geographic concentration, however distinct or coherent, does nothing to satisfy this threshold; only a shared cultural and linguistic heritage does. Territory reappears later in the sentence, but only as one possible means by which a community that has already satisfied this test might choose to exercise self-determination — not as a further way of qualifying for it.

[5.56] Taken together with "does not preclude," discussed above, these three elements point to a further conclusion. Section 235 is not, and was never intended to be, an exhaustive statement of who may claim self-determination in South Africa. As section 5.5.1 above has shown, the provision gives constitutional expression to Constitutional Principle XXXIV, itself the product of a negotiated settlement between Afrikaner representatives and the ANC.²⁸⁹ Its generalisation from that specific origin to "any community sharing a common cultural and language heritage" was, on this account, only partial — broadened enough to avoid naming the community it was written to accommodate, but not so far as to constitute a considered, general definition of who may claim self-determination. It confirms that one category, born of one specific settlement, is not precluded. It says nothing about, and does not foreclose, any other.

[5.57] The Constitution's own heading over section 235 — simply "Self-determination" — promises more generality than the provision itself delivers.²⁹⁰

5.5.3.5 "within a territorial entity in the Republic or in any other way"

[5.58] This phrase is of critical importance and its far-reaching consequences are often overlooked. Section 235 has adopted an open-ended formulation. It does not prescribe

²⁸⁸ Constitution of the Republic of South Africa, 1996, s 235.

²⁸⁹ See section 5.5.1 above.

²⁹⁰ Constitution of the Republic of South Africa, 1996, Chapter 14, table of contents ("235. Self-determination").

how self-determination may be exercised within, or conceivably outside,²⁹¹ of the South African constitutional order. Instead it provides a potential default "within a territorial entity in the Republic," before adding "or in any other way"²⁹² — deliberately open-ended drafting, according to Professor Andries Raath, a member of the Constitutional Assembly's ad hoc committee on self-determination and the Volkstaat, who has confirmed that the residual phrase was intended to leave open forms of self-determination beyond the territorial default named immediately before it.²⁹³ It leaves every potential legitimate expression of the right to self-determination on the table.

- [5.59] In the context of the Afrikaner people, who were the driving force behind section 235,²⁹⁴ this has real significance. As a people who are geographically dispersed throughout South Africa,²⁹⁵ it provides for non-territorial self-determination, for example, cultural autonomy,²⁹⁶ as well as the establishment of a Volkstaat.²⁹⁷

5.5.3.6 "determined by national legislation"

- [5.60] This phrase has already been addressed in full in section 5.5.2 above. As the Constitutional Court held when interpreting the equivalent language in Constitutional Principle XXXIV, it does not vest Parliament with a discretion to refuse to engage with a

²⁹¹ See Dugard, J. (1997). "International Law and the South African Constitution." *European Journal of International Law*, 8(1), 77–92, at 86, warning that Afrikaner self-determination demands, then confined to internal forms, might in future be "converted into claims for external self-determination — secession," rendering section 235 "politically dangerous."

²⁹² Constitution of the Republic of South Africa, 1996, s 235.

²⁹³ A. Raath, private communication, 1 September 2025. Raath's standing to speak to the drafting intent behind section 235 is independently confirmed by his own contemporaneous proposals to the Constitutional Assembly's Theme Committee 2 (Structure of Government), addressing self-determination and the Volkstaat: Raath, A.W.G., "Addendum to the Third Progress Report on Self-Determination/Volkstaat," available at: <https://www.justice.gov.za/constitution/history/REPORTS/tc2RA28085.PDF>

²⁹⁴ See section 5.5.1 above.

²⁹⁵ De Villiers, B. (2018). "Managing Diversity in Deeply Divided Societies: The Quest for Self-Determination by the Afrikaans-Speaking Community in South Africa." *Journal on Ethnopolitics and Minority Issues in Europe*, 17(2), 47–76, at 50–51 (Afrikaans-speaking community present in all nine provinces, with majorities only in the Western Cape and Northern Cape).

²⁹⁶ De Villiers, B. (2018), *ibid.*, at 60–62 (discussing the proposed Afrikaans community council as a form of non-territorial cultural autonomy).

²⁹⁷ See section 5.5.1 above.

legitimate claim at all; it provides the mechanism for giving legal form to an agreement already reached.²⁹⁸

[5.61] Read as a whole, section 235 is striking for what it does not attempt to do. It neither creates the right to self-determination, nor defines its content, nor exhaustively identifies those entitled to exercise it, nor exhaustively prescribes the forms its exercise may ultimately take. Its function is narrower: it confirms that the Constitution does not preclude recognition of community self-determination, and identifies national legislation as the mechanism by which a negotiated agreement is given legal effect.

5.5.4 Dispensability

[5.62] As has already been noted, the uMkhonto weSizwe Party (MK Party) has proposed that section 235 be removed from the South African Constitution.²⁹⁹ Whilst this is unlikely to occur, such an amendment would carry an evident irony. It would place on official record South Africa's decision to remove the only express constitutional reference to self-determination at the very time it relies, before the International Court of Justice, on the same categories of *jus cogens* and *erga omnes* obligation this chapter has shown apply equally to self-determination — invoked forcefully when the claim runs against another state, resisted when its logic runs toward South Africa's own constitutional order.³⁰⁰ It nonetheless offers a valuable insight into the dispensability of section 235.

[5.63] As this chapter has demonstrated, the right to self-determination arises in international law, is binding upon all states as a peremptory norm (*jus cogens*), and carries the protection of the international community as an obligation *erga omnes*.³⁰¹ Were there to be no recognition whatsoever of the right to self-determination in the South African Constitution, it would remain a right enjoyed by all peoples in South Africa.

²⁹⁸ See section 5.5.2 above.

²⁹⁹ MK Party, "Notice of Intention to Introduce a Private Member's Bill, 2025, and Invitation for Comment."

³⁰⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel), Application Instituting Proceedings, 29 December 2023.

³⁰¹ See sections 4.3, 4.4 and 5.4 above.

- [5.64] This chapter has also shown that both the Constitution and the wider constitutional order accommodate that right independently of section 235. South Africa has signed and ratified three international treaties which affirm it at the international level;³⁰² the Constitution compels South African courts and forums to consider international law, and to prefer any reading of domestic legislation compatible with international law over any interpretation which is not;³⁰³ and, as section 5.4 above has established, self-determination is not merely a principle of customary international law which South Africa has domesticated through section 232 — it is a peremptory norm (*jus cogens*), and South Africa's domestic acceptance of it cannot lawfully be made conditional upon the Constitution or an Act of Parliament in the first place.³⁰⁴
- [5.65] Whatever section 235 does or does not say, the right of self-determination does not depend upon it for its existence or its force within South African law.
- [5.66] Section 235 therefore adds no right that would otherwise be absent, and removes no right were it itself removed. Its significance lies not in creating or limiting self-determination, but in providing one express constitutional mechanism through which South Africa may give domestic legal effect to a right that already exists independently of it.
- [5.67] Legally, the removal of section 235 would not diminish the right to self-determination enjoyed by any people in South Africa. That right would continue to arise from, and be governed by, international law, while remaining accommodated elsewhere within South Africa's constitutional order. Practically, however, the removal of the provision might have one unintended consequence: it would expose the widespread misconception that section 235 is the source of the right to self-determination, defines its content or limits, or subjects it to the will of the parliamentary majority. This chapter has shown that section 235 neither creates, defines nor limits the right to self-determination.

³⁰² See section 5.2 above.

³⁰³ Constitution of the Republic of South Africa, 1996, ss 39(1)(b), 233.

³⁰⁴ See section 5.4 above.

Chapter 6: Implications

- [6.1] At its outset, in its title, this paper asserted that were a qualifying sub-national community to assert its legitimate right to self-determination, the unitary nature of the South African State could not survive. The rationale for this assertion was that the right to self-determination is a peremptory norm (*jus cogens*) of international law, to which all peoples are entitled, and which South Africa cannot legally deny. Were any qualifying sub-community to legitimately invoke this right, subject to the provisions of international law, South Africa would be forced to accommodate it. Such an accommodation would redistribute power away from the central government and vest it, by right, with the sub-national community in question. The unavoidable consequence of this redistribution of power would be that the nature of the South African State would no longer be unitary.
- [6.2] In Chapters 2 and 3, we established that two communities, the people of the Western Cape and the Afrikaner people, were already pursuing greater autonomy within the state. Testing what would happen were they to pursue this autonomy by asserting their right to self-determination will demonstrate whether the paper's founding proposition holds true.

6.1 Western Cape

- [6.3] Section 3.3.1.3 above established that the Western Cape Government (WCG), based upon successive outright majority provincial election victories by the Democratic Alliance (DA) who had campaigned on the issue, has been unsuccessfully pursuing the devolution of policing powers to the Western Cape and the creation of a provincial police force.³⁰⁵
- [6.4] The WCG pursued these powers under section 99 of the Constitution, which permits a Cabinet minister — in this case, the Minister of Police — to assign any power or function

³⁰⁵ See section 3.3.1.3 above.

that is to be exercised or performed in terms of an Act of Parliament to a member of a provincial Executive Council.³⁰⁶

- [6.5] Given the well documented collapse in policing in both South Africa and the Western Cape,³⁰⁷ it is noteworthy that section 100 of the Constitution permits the national government to step in where a provincial government has failed to fulfil its constitutional or legislative obligations, but no such reciprocal provision exists.³⁰⁸ In the case of policing, therefore, despite the national government failing to fulfil its constitutional obligations, the Western Cape has no direct constitutional mechanism by which to rectify the national government's failure. The section 99 approach, which the WCG has tried and failed to secure, relies upon the Minister of Police voluntarily electing to assign powers to the province. Minister Cele made clear in 2021 that no such assignment would be forthcoming,³⁰⁹ and despite repeated calls, no Minister of Police has granted it since. The current Minister, Firoz Cachalia, signalled openness to discussion in August 2025, but by mid-2026 had committed to nothing more concrete than the need for "cross-party consensus" — itself, he acknowledged, still absent.³¹⁰ That framing is worth pausing on: a call for cross-party consensus, made by a minister drawn from the African Nationalist bloc whose permanent electoral dominance and gatekeeping role sections 3.2.1 and 3.3.1.2 above have already documented, restates rather than resolves the underlying problem this paper describes — consensus remains, as it has throughout, conditional on the agreement of the very bloc with no structural incentive to grant it. A related but narrower dispute, over Cape Town's Metro Police investigative powers, was formally escalated by the City in August 2026; Cachalia

³⁰⁶ Constitution of the Republic of South Africa, 1996, s 99.

³⁰⁷ See section 3.3.1.3 above.

³⁰⁸ Constitution, s 100.

³⁰⁹ Bheki Cele, statement, September 2021; see section 3.3.1.3 above, fn 15.

³¹⁰ "Police minister open to talks as Western Cape pushes for devolved policing powers," News24, 20 August 2025; "Cross-party consensus needed on municipal policing, says Cachalia," Smile 90.4FM, August 2026.

refused that specific request on the stated ground that it was inconsistent with section 205 of the Constitution.³¹¹ This is a position the State President has publicly affirmed.³¹²

- [6.6] The question then becomes what would happen were the WCG to assert that the people of the Western Cape have a right to self-determination, and that, within the framework of this right, they wished to police themselves.

6.1.1 Qualification

- [6.7] The first question this proposition raises is whether the people of the Western Cape qualify as a people for the purposes of international law.
- [6.8] Section 4.2 above established that international law contains no strict definition of a people, but that the Kirby Description provides the most explicit and credible guidance as a starting point.³¹³
- [6.9] Kirby started with a range of inherent characteristics that a people may well exhibit some or all of, and these were: a common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; and common economic life.³¹⁴ The people of the Western Cape clearly exhibit some, but not necessarily all.
- [6.10] There is a common historical tradition, albeit that the boundaries of the Cape have been changed under various governments. This is evidenced by its well recorded place in history, which is distinctly separate from the remainder of South Africa, which the Cape

³¹¹ "Cross-party consensus needed on municipal policing, says Cachalia," Smile 90.4FM, August 2026; "DA Western Cape backs City of Cape Town's fight to give Metro Police the powers they need," DA WCPD Newsroom, 4 August 2026; "'We refuse to accept this': Hill-Lewis escalates fight over Metro Police powers," CapeTownEtc, August 2026.

³¹² President Cyril Ramaphosa, parliamentary reply, September 2022; see section 3.3.1.3 above, fn 16.

³¹³ See section 4.2 above.

³¹⁴ Ibid.

predated by several centuries.³¹⁵ It is also evidenced by the traditions it gave rise to, with Cape Liberalism being a very clear example and delineator.³¹⁶

- [6.11] The Western Cape does not possess a singular ethnic, cultural, or linguistic identity in the strict sense — but under Kirby's "some or all" framework, that is not what qualification requires. Its population is itself diverse, in ways that nonetheless distinguish it markedly from South Africa as a whole, and it is more accurate to speak of the peoples of the Western Cape collectively constituting a Western Cape people.
- [6.12] However, the people of the Western Cape clearly meet the remaining three criteria. Election results since 1994 have demonstrated, with increasing clarity, that they share a set of ideological views which differ markedly from the rest of South Africa.³¹⁷ The Western Cape is geographically defined and contiguous, so the people clearly share a territorial connection. Finally, the Western Cape has its own sizeable economy, which even the South African Government itself maintains independent data on,³¹⁸ and therefore, the people of the Western Cape clearly have a common economic life.
- [6.13] That the people of the Western Cape may not necessarily meet all of these objective components has led some to suggest that this disqualifies them from qualifying as a people.³¹⁹
- [6.14] Kirby's own criteria already answer this. The list was framed, from the outset, as characteristics a people "may well exhibit some or all of" — not a checklist demanding

³¹⁵ Davenport, T.R.H. and Saunders, C. (2000). *South Africa: A Modern History*, 5th ed. Basingstoke: Palgrave Macmillan, chs 1–3 (Cape Colony's founding, 1652, through Union in 1910); South Africa Act 1909 (Union of South Africa constituted from the Cape, Natal, Transvaal, and Orange River Colonies, 31 May 1910).

³¹⁶ Trapido, S. (1964). "The Origins of the Cape Franchise Qualifications of 1853." *Journal of African History* 5: 37–54.

³¹⁷ See section 3.3.1.3 above / election-data material in Chapter 3.

³¹⁸ Statistics South Africa, Provincial Gross Domestic Product, 2024.

³¹⁹ Swanepoel, D. (2026). "Cape Independence and the Ethics of Constitutional Misrepresentation." IOL, 4 June 2026: "The Western Cape is not a singular cultural or linguistic community. It is one of South Africa's most diverse provinces."

uniform satisfaction across every category.³²⁰ The Western Cape's position, meeting some criteria fully and others in a qualified form, is not a departure from Kirby's test; it is the kind of case Kirby's own language was framed to accommodate.

[6.15] A stricter reading — one requiring singular ethnic identity, cultural homogeneity, and linguistic unity in an unqualified sense — would in any event prove too much. Applied consistently, it would disqualify the South African people as a whole, a population spanning eleven official languages, excluding sign language, and a far greater range of ethnic and cultural identity than the Western Cape itself contains, more severely than it could ever disqualify the Western Cape specifically. A reading of Kirby that cannot certify the very state invoking it cannot coherently be used to deny a sub-national community within that state.

[6.16] Nor is this a merely theoretical point. South Africa's own government has already applied a materially more permissive standard to a far more heterogeneous population than the Western Cape's, and did so through its own former head of state. Thabo Mbeki chaired the African Union's High-Level Implementation Panel for Sudan from its establishment in October 2009, a mandate extended in October 2012 to cover Sudan and South Sudan specifically, placing him at the centre of the mechanism that facilitated South Sudan's independence on 9 July 2011.³²¹ South Sudan's population comprises dozens of distinct ethnic groups, no single dominant indigenous language, and multiple religious traditions spanning African traditional religion, Christianity, and Islam.³²² If South Africa's own recent constitutional leadership accepted so permissive a standard for a population markedly more heterogeneous than the Western Cape, it is difficult to

³²⁰ Kirby's "some or all" formulation is set out in section 4.2 above; UNESCO (1989), "International Meeting of Experts on further study of the concept of the rights of peoples: Final report and recommendations," SHS-89/CONF.602/7, para 22.

³²¹ African Union High-Level Implementation Panel for Sudan, mandated by the AU Peace and Security Council, 29 October 2009; renamed African Union High-Level Implementation Panel for Sudan and South Sudan, 24 October 2012.

³²² South Sudan is home to more than 60 ethnic groups and over 70 languages, with English as the sole official language; its population is approximately 60.5% Christian, 32.9% adherent to traditional African religions, and 6.2% Muslim. Minority Rights Group International, "South Sudan"; Pew Research Center, "Religion in South Sudan."

see on what principled basis it could insist on a stricter one for a province within its own borders.

[6.17] To these objective components, Kirby then adds subjective elements — that the group as a whole must have the will to be identified as a people or the consciousness of being a people — allowing that not everyone in the group must agree, and that the group should have institutions or other means of expressing its will.³²³

[6.18] In the Western Cape Government, the people of the Western Cape have the means to express their will, and when it comes to the desire to police themselves, they have done so by voting for a party promising to create a Western Cape provincial police force.³²⁴ Should the WCG wish to obtain a more explicit mandate, the Premier of the Western Cape is constitutionally empowered to call a referendum on the issue.³²⁵

[6.19] There then should be little doubt that the people of the Western Cape have a consciousness of being a "people" or community. The act of asserting the right to self-determination would itself be evidence of this consciousness — a community cannot assert a right reserved to peoples without, in doing so, claiming to be one. To remove any reasonable doubt, however, the people of the Western Cape have passed their own constitution, and, in its preamble, they explicitly refer to themselves as the "people of the Western Cape."³²⁶

[6.20] Both Kirby's objective and subjective elements are accordingly satisfied. That conclusion should be read for what it is, and no more: Kirby was never presented as a definition — as section 4.2 above established, no binding legal definition of a people currently exists, and Kirby has been treated throughout this paper as guidance, not law. What gives Kirby its force is not legal authority but the quality of the reasoning behind it: a considered, expert application of logic and common sense to a genuinely unsettled question. That reasoning is the true standard against which any community's claim must ultimately be

³²³ See section 4.2 above.

³²⁴ Democratic Alliance, Western Cape Provincial Manifestos, 2019 and 2024; see section 3.3.1.3 above.

³²⁵ Constitution of the Western Cape, 1997, s 37(2)(f).

³²⁶ Constitution of the Western Cape, 1997, Preamble.

tested, and it points toward a case-by-case, contextual judgment rather than the mechanical application of a fixed checklist.

[6.21] Applied on that basis, the context surrounding the Western Cape reinforces the case beyond Kirby's own list. The people of the Western Cape did not define the boundary of their province — the national majority did, and without their explicit consent. The establishment of those boundaries has given rise to a Western Cape population of 7.6 million.³²⁷ These people have a provincial government and provincial elections in which they express their will — apart from the people of South Africa. Their economy is bigger than that of Namibia and Botswana combined.³²⁸ They have their own sports teams, and musical traditions. A unique language, Afrikaans, was developed within the Western Cape's borders and remains the most widely spoken home language in the province.³²⁹ These 7.6 million people could not reasonably be denied recognition as a people merely because they do not satisfy every one of Kirby's non-exhaustive characteristics.

[6.22] The position of this paper is therefore that the people of the Western Cape, by any reasonable measure, qualify as a people for the purposes of international law and are therefore entitled to an "unquestionable and inalienable" right to self-determination — a right which, because of its jus cogens status, South Africa is obliged to accommodate.

6.1.2 The Section 235 Question

[6.23] At this point, however, it would be remiss not to consider section 235, given it appears in the constitutional text and deals expressly with self-determination. A core tenet of this paper has been that the right to self-determination originates in, and is defined by, international law, which remains the source of the right; as section 5.5.4 above demonstrated, section 235 is, in this sense, dispensable. Yet it remains part of the

³²⁷ Statistics South Africa, Mid-Year Population Estimates, 2025 series.

³²⁸ Statistics South Africa, Provincial Gross Domestic Product, 2024; World Bank, GDP (current US\$), Namibia and Botswana, 2024.

³²⁹ Poneis, F.A. (1993). *The Development of Afrikaans*. Frankfurt am Main: Peter Lang; Statistics South Africa, Census/Community Survey language data.

Constitution and, for many, is the primary lens through which self-determination in South Africa is imagined.

- [6.24] As established above, section 235 is permissive by its own terms — its operative language is that the Constitution "does not preclude" recognition of the right, not that it creates, confers, or requires such recognition.³³⁰ Nor does it exhaustively define who may claim the right.³³¹ It therefore does not constitute a right which can be asserted directly through it; it confirms only that a right which may arise elsewhere is not foreclosed by the Constitution's silence on the point.
- [6.25] Section 235 confines its own recognition to "any community sharing a common cultural and language heritage." Whether the people of the Western Cape, given the internal plurality already discussed, satisfy that specific, conjunctive threshold is genuinely open to debate, and this paper does not attempt to resolve it. It is, however, immaterial to the claim advanced here, which rests not on section 235 but on the Western Cape's status as a people under international law and the peremptory character of the right that status carries.

6.1.3 A Legitimate Form of Self-Determination

- [6.26] The next question then becomes whether seeking to establish a provincial police force, or the lesser ask of securing constitutional control of policing in the Western Cape as exercised by the national police service, is a legitimate expression of the right to self-determination.
- [6.27] Section 4.5 above identified the accepted forms in which self-determination may be exercised, and classified regional autonomy and federalism, or an alternative special constitutional status, among the recognised internal forms — those which operate within an existing state's sovereignty rather than displacing it.³³² Control over policing,

³³⁰ Constitution, s 235; see section 5.5.3 above.

³³¹ See section 5.5.3 above; Certification Judgment, para 218.

³³² See section 4.5 above.

as one of the core functions historically associated with regional government under both federal and devolved constitutional arrangements, falls squarely within this category.³³³

[6.28] This is not merely a theoretical classification. State practice bears it out with striking consistency. Where meaningful sub-national autonomy exists, devolved or state-level control over policing is the ordinary consequence, not the exception. In the United Kingdom, policing has been devolved to both Scotland and Northern Ireland — Scotland's own police service operates under devolved competence conferred by the Scotland Act 1998 and exercised through the Police and Fire Reform (Scotland) Act 2012, and Northern Ireland's policing and justice functions were formally devolved in 2010 pursuant to the Northern Ireland Act 1998; Wales, by contrast, has not received the same devolution, and is routinely treated in British constitutional discourse as the anomaly requiring correction, not Scotland or Northern Ireland as the beneficiaries of some exceptional concession.³³⁴ In Spain, the 1978 Constitution's autonomous framework permits Autonomous Communities to establish their own police forces, a power the Basque Country, Catalonia, and Navarre — the communities holding the deepest constitutional autonomy — have each fully exercised, maintaining full-range regional police services operating alongside the national force.³³⁵ Among federal states more broadly — the United States, Germany, Australia, Canada, India — decentralised, sub-national policing is close to a universal structural feature.³³⁶

[6.29] South Africa's position is, by comparison, the outlier. Unlike most other former British colonial territories, which typically inherited a mixture of national and regional or

³³³ Maillard, J. de (2022). *Comparative Policing*. Global Issues in Crime and Justice series. New York: Routledge.

³³⁴ Scotland Act 1998, Schedule 5; Police and Fire Reform (Scotland) Act 2012; Northern Ireland Act 1998, Schedule 3, as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010; "The case for policing to be devolved to Wales," Nation.Cymru, 6 July 2023 (noting that, unlike Scotland and Northern Ireland, no equivalent Welsh devolution has occurred).

³³⁵ Constitution of Spain, 1978, Title VIII, art 149.1.29 (public security as a competence Autonomous Communities may assume via their Statutes of Autonomy); Ley Orgánica 2/1986, de Fuerzas y Cuerpos de Seguridad; "Autonomous communities of Spain," on the Basque Country, Catalonia, and Navarre's full-range regional police forces (Ertzaintza, Mossos d'Esquadra, Policía Foral) versus other communities' more limited or absent policing competence.

³³⁶ Maillard, J. de (2022). *Comparative Policing*. Global Issues in Crime and Justice series. New York: Routledge.

municipal policing structures, South Africa is policed by a single, centrally commanded national force.³³⁷ A country's insistence on retaining exclusive, undivided control over policing is not, on the evidence of comparative state practice, the constitutional default that devolution must overcome. It is itself the departure from an otherwise well-established norm.

[6.30] It follows that were the Western Cape to assert a right to control its own policing as an exercise of self-determination, it would not be asking South Africa to recognise some exceptional or unprecedented form of autonomy. It would be asking South Africa to extend to the Western Cape a form of self-government that is, internationally, closely tracked by the depth of autonomy a region already holds — and one South Africa itself already recognises in principle, having built machinery for provincial oversight of policing into the Western Cape's own Constitution, even as it has declined to extend that machinery to operational control.³³⁸

[6.31] The combination of the people of the Western Cape meeting the definition of a people as envisaged in international law, and the confirmation that regional control of policing is a valid and widely practiced exercise of the right to self-determination, establishes that the Western Cape Government would have a legitimate and valid claim to assert should they choose to do so.

[6.32] With the paper's founding proposition in mind, the next question to consider is how such an assertion might be made, what obligations it would place on the South African State, and what the range of likely outcomes would be.

6.1.4 Assertion

[6.33] The first of these questions has largely been answered in a legal opinion prepared by the Western Cape Provincial Parliament (WCPP). Following the tabling of the Western Cape People's Bill³³⁹ — which asserted that the people of the Western Cape comprised

³³⁷ Ibid.

³³⁸ Constitution of the Western Cape, 1997, ss 66–69 (Police).

³³⁹ Western Cape People's Bill [B 6–2023]. The Bill was drafted by the Cape Independence Advocacy Group; the present author is CIAG's Director and co-founder.

a people as envisaged by international law and, as such, enjoyed an "unquestionable and inalienable" right to self-determination — by Peter Marais MPP, the member in charge of the Bill,³⁴⁰ the committee dealing with the Bill requested a legal opinion on the competence of the WCPP to pass such legislation.

[6.34] The subsequent legal opinion did not dispute that the WCPP was an appropriate venue for the people of the Western Cape to assert their democratic will, but concluded that passing legislation on self-determination was beyond its authority, since section 235 required self-determination claims to be "determined by national legislation."³⁴¹ The opinion went on to state that, should the people of the Western Cape wish to assert their right to self-determination, they could do so by bringing a motion in the WCPP.³⁴² Whatever the merits of this opinion — and its interpretation of the source of the right to self-determination is, as will be apparent, at odds with the reasoning set out in Chapter 5 above — a legal opinion from the WCPP's own legal service confirming that an assertion of self-determination can be made by ordinary motion is extremely valuable: it establishes a clear course of action available to the WCG.

6.1.5 Obligation

[6.35] The next question is then what obligation this places on the South African State.

[6.36] Were the WCPP to pass a motion asserting their wish to assert their right to self-determination and to exercise it by policing themselves, the South African State would be obliged to accommodate it, subject to a number of provisos.

[6.37] The first obligation upon the State would be to enter into good faith negotiations with the Western Cape Government (WCG). The state would represent the interests of the people of South Africa, whilst the WCG would represent the interests of the people of the Western Cape. It is important to note that this obligation is not directly stated, but

³⁴⁰ Standing Rules of the Western Cape Provincial Parliament, Definitions, s.v. "member in charge." A "member in charge" is the member formally responsible for a Bill's introduction — here, Peter Marais MPP — a procedural designation carrying no substantive authority over the Bill's content.

³⁴¹ Legal Opinion on the Legislative Competence of Provincial Legislatures on Self-Determination, WCPP Senior Legal Adviser A Le Roux, 10 November 2023, paras 37–38.

³⁴² *Ibid.*, paras 39–44.

so heavily implied, reflected in related rulings, and borne out by state practice, that no other conclusion is reasonably possible.

- [6.38] The initial basis for this assertion is that it would not be possible to accommodate self-determination without it. By nature, the assertion of self-determination by one people directly impacts upon others. In this case, the rights of the people of the Western Cape must be measured against the rights of the people of South Africa, who also enjoy a right to self-determination, and against the State's own right to territorial integrity. None of these rights are absolute.³⁴³ The only alternative to imposition by one party upon the others is a negotiated settlement, in which good faith is required.
- [6.39] This interpretation is then borne out in state practice, where negotiation is an ever-present element in matters of self-determination, even where those negotiations may ultimately fail³⁴⁴ — a pattern consistent with the reciprocal duty to negotiate in good faith identified by the Supreme Court of Canada in Quebec, discussed in section 4.1 above. Finally, this interpretation is reflected by the courts, including in the certification of section 235 by the South African Constitutional Court which, as established in section 5.5.2 above, ruled that "determined by national legislation" refers to the mechanism by which Parliament gives effect to the outcome of an "agreement."³⁴⁵
- [6.40] As has been discussed in section 5.5.3 above, these negotiations are not intended to be horse-trading or power plays; they are intended to balance the potentially competing

³⁴³ De Zayas, A. (2014). *Report of the Independent Expert on the promotion of a democratic and equitable international order*, A/69/272, para 69: "Neither the right of self-determination nor the principle of territorial integrity is absolute. Both must be applied in the context of the Charter and human rights treaties so as to serve the purposes and principles of the United Nations."

³⁴⁴ See, e.g., the collapse of negotiations between the Awami League and the Government of Pakistan in March 1971, followed by the military crackdown of 25 March 1971 and Bangladesh's war of independence; the Catalan government's repeated requests for a negotiated referendum — including Artur Mas's letter to Mariano Rajoy of July 2013 and Carles Puigdemont's letter of September 2017 — each refused, culminating in Rajoy's statement of 11 October 2017 that "there is no mediation possible between democratic law and disobedience"; the sustained negotiation process between the Sudan People's Liberation Movement and the Government of Sudan culminating in the 2005 Comprehensive Peace Agreement and its Machakos Protocol, leading to South Sudan's 2011 independence referendum; and the Bougainville Peace Agreement of 2001 between the Bougainville parties and the Government of Papua New Guinea, providing for autonomy and a subsequent independence referendum held in 2019.

³⁴⁵ See section 5.5.2 above.

rights of the parties involved and to reach an agreement which, to the extent that this is possible, does not infringe upon them.

[6.41] At face value, it would be hard to sustain a reasoned argument that the people of the Western Cape wishing to police themselves infringed upon the right of either the South African people as a whole, or the state. Provided that both parties act in good faith, agreement should be possible.

[6.42] Once an agreement has been reached, responsibility then falls upon the state to enact it. Once again this is not defined by a specific provision of international law; it is the only reasonable conclusion, and one which is once again supported by both state practice and related judgments in the courts. If the State concludes an agreement which it has negotiated in good faith, and is the only party which is constitutionally empowered to give effect to it, as would be the case with Western Cape policing, then it clearly carries the obligation to do so.

[6.43] Spain and New Caledonia are both examples of States who have followed this path.³⁴⁶ Section 235 and its certification then provide the clearest legal indicator within South Africa. As discussed in section 5.5.2 above, the court determined that the phrase "determined by national legislation" referred to the mechanism by which parliament — acting on behalf of the state — gave legal effect to the outcome of negotiations. There is no conceivable argument why the State must give effect to enacting legislation to self-determination agreements arrived at via section 235, but not to ones arrived at under section 232.³⁴⁷

³⁴⁶ Statute of Autonomy of the Basque Country ("Gernika Statute"), approved by referendum 25 October 1979 and ratified by the Cortes Generales, 29 November 1979 (Congress of Deputies) and 12 December 1979 (Senate); Statute of Autonomy of Catalonia ("Sau Statute"), approved by referendum 25 October 1979 and ratified by the Cortes Generales, 29 November 1979 — both pursuant to Article 151 of the Constitution of Spain, 1978. Nouméa Accord, 5 May 1998; Loi organique n° 99-209 du 19 mars 1999 relative à la Nouvelle-Calédonie, giving domestic legal effect to the Accord, read with Title XIII of the Constitution of France.

³⁴⁷ Constitution of the Republic of South Africa, 1996, ss 232, 235.

6.1.6 Non-Compliance

- [6.44] The preceding sections assumed that South Africa complies with its obligations under international law. A qualifying people asserts the right to self-determination, the State engages in good-faith negotiations, agreement is reached, and Parliament gives that agreement legal effect. That process necessarily alters the constitutional distribution of power within South Africa and, to that extent, modifies its unitary constitutional order.
- [6.45] The question remains, however, what follows if South Africa does not comply.
- [6.46] Non-compliance may occur at several stages. The State may refuse to engage with a legitimate assertion of the right altogether. It may enter negotiations without any genuine intention of reaching agreement. It may negotiate in good faith but fail to reach agreement despite reasonable efforts by both parties — a situation which, without more, need not itself constitute a breach. Or it may reach agreement, only for Parliament to refuse to enact the legislation necessary to give that agreement legal effect. Each must be assessed against the international obligations established in Chapters 4 and 5, but a genuine, good-faith impasse is not to be equated with an unlawful refusal to engage at all.
- [6.47] The first consequence of unlawful non-compliance is not constitutional but international. South Africa breaches an obligation owed to the claimant people and, because the right to self-determination possesses both *jus cogens* and *erga omnes* character, an obligation owed to the international community as a whole.³⁴⁸ The question therefore ceases to be whether the right exists. It becomes whether South Africa has fulfilled the obligations that accompany it.
- [6.48] Section 4.6 above established that international law protects the territorial integrity of existing states because, and only because, those states have conducted themselves in compliance with the right of all peoples to self-determination.³⁴⁹ A State cannot invoke the protection of a clause whose own terms it is failing to satisfy. Persistent, unjustified

³⁴⁸ See sections 4.3–4.4 above.

³⁴⁹ See section 4.6 above.

refusal to accommodate a legitimate claim does not leave that protection untouched while breaching some separate rule. It goes to the direct condition upon which the protection itself depends. When a state refuses to accommodate a legitimate assertion of a people's right to self-determination, it calls into question the state's continued absolute authority over them.

[6.49] The question then becomes what happens next. The people who have been illegitimately denied self-determination realistically face two options. The first is to pursue legal relief, initially through the domestic courts, and where that does not produce a successful outcome, through the international courts and forums who, in most cases, require that all domestic legal avenues available have first been pursued and exhausted. The second is to take matters into their own hands and to take unilateral measures which rectify the infringement of their legitimate rights — in other words, remedial action.

[6.50] Legal relief is fraught with complication, not least the timescales required to achieve satisfaction even where the claim is straightforward. Domestic remedies by necessity conclude with a Constitutional Court finding, which in most cases is a multi-year process. Thereafter the admission requirements to the various international courts and forums narrow the available legal options and, even in a best-case scenario, add many more years to the process. In the author's estimate, it would not be unreasonable to anticipate a 10–15 year timeframe to reach a final conclusion, which, even then, may only be advisory in nature. This, in many cases, makes unilateral action the much more appealing option.

[6.51] As a result of this, combined with the significant practical challenges of enforcing an international law judgment even if successful, the safeguard clause has given rise to the legal doctrine of remedial secession.

[6.52] Remedial secession, which remains a contested area of law but increasingly less so,³⁵⁰ reasons that where the State has seriously infringed upon the rights of a people living under its authority, that people are entitled to reject the sovereignty of that state over

³⁵⁰ See section 4.6 above.

them and to establish their own government, redrawing the borders of the parent state in order to exclude them in the process — compromising its territorial integrity. The credibility of the remedial secession doctrine was significantly enhanced by the ICJ's Kosovo opinion, when the court declared that in international law, there exists no prohibition on the unilateral declaration of independence.³⁵¹

- [6.53] Even by its proponents, remedial secession is understood to be an act of last resort, but it introduces the concept of unilateral action — the notion that the party whose lawful rights have been infringed upon can sidestep the courts and take matters into their own hands. This is the classic *de facto* versus *de jure* differentiation — *de facto* referring to the reality on the ground, *de jure* to the position in law, which may be radically different. Somaliland, which declared itself independent of Somalia in 1991, is a textbook example. For over three decades Somaliland achieved no international legal recognition while operating, in practice, as an independent, highly functional democratic state; in December 2025, Israel became the first UN member state to formally recognise it — itself illustrating how a sustained *de facto* reality can eventually reshape *de jure* status.³⁵² Taiwan, which has never technically declared its independence from China, continues to operate in much the same way it always has: a fully functioning, self-governing state, without the international legal recognition that would normally accompany that status.³⁵³
- [6.54] Unilateral action is not limited to declarations of independence, nor to the state level alone. It is a key driver of change when the will of the people becomes misaligned with the actions of the state.

³⁵¹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, p. 403.

³⁵² Reuters, "Israel becomes first country to officially recognize Somaliland as independent state," 26 December 2025; Assistant Secretary-General Khaled Khiari, Remarks to the UN Security Council on Israel's Recognition of "Somaliland" as an Independent State, 29 December 2025; Pegg, S., on Somaliland as a paradigmatic example of a "de facto state."

³⁵³ "Taiwan," Max Planck Encyclopedia of Public International Law (Oxford Public International Law).

- [6.55] Even without the element of legal justification that a denial of a legitimate claim to self-determination would bring, unilateral action is already a feature of the South African political landscape, including specifically policing arrangements in the Western Cape.
- [6.56] In seeking to address precisely the policing problems which have given rise to the Western Cape's desire for policing autonomy, the province has, in effect, already begun the process of establishing a provincial police force. It has done so on moral rather than legal authority, whilst knowingly operating within the grey areas of the law, and in the analysis of some, well beyond them.³⁵⁴
- [6.57] In conjunction with the City of Cape Town, which is conducting its own campaign for greater policing powers to be assigned to it by the state — detective powers for its metro police — the Western Cape has established LEAP, the Law Enforcement Advancement Plan. LEAP operates by utilising the "peace officers" established under City by-laws and in broad accordance with the powers assigned to municipalities under the Constitution. The province is the primary funder of LEAP, which is then jointly operated by the City and Province. There are currently 1,258 LEAP officers in the Western Cape.³⁵⁵
- [6.58] This is far from the only example of unilateral action, often driven by moral authority regardless of the law, which has occurred in post-democratic South Africa. In Gauteng, mass action and outright defiance of the law saw e-tolls brought to an end.³⁵⁶ In the Northern Cape, the exclusive Afrikaner cultural settlement of Orania operates within legal impunity despite operating outside the letter of the law.³⁵⁷ In the Western Cape, the City of Cape Town has procured electricity from independent power producers ahead of clear legal authority to do so,³⁵⁸ and at the outset of the Russia-Ukraine crisis,

³⁵⁴ Herron, B. "WCape's LEAP programme illegal, as are Gauteng CPWs." Politicsweb, 17 July 2023: "The problem is that both structures are illegal."

³⁵⁵ PMG, "Department of Community Safety & CoCT on Law Enforcement Advancement Plan," committee briefing.

³⁵⁶ South African National Roads Agency SOC Ltd, Integrated/Annual Report 2023/24; Government Gazette 50418 of 28 March 2024.

³⁵⁷ Labuschagne, P., "Uti Possidetis versus Self-Determination: Orania and an Independent 'Volkstaat'", *Journal for Contemporary History* 33(2) (2008).

³⁵⁸ *City of Cape Town v National Energy Regulator of South Africa* (51765/17) [2020] ZAGPPHC 800.

the Western Cape banned Russian diplomats from its functions, engaged in direct international diplomacy with Ukraine, and later stated it would use its own law enforcement officers to arrest a visiting head of state — all in outright defiance of the Constitution.³⁵⁹

[6.59] If unilateral action is already an integral part of South Africa's political landscape even when there is limited or no legal justification, then its potential for radical intervention — such as establishing a provincial police force where the state is in clear contravention of the law and the province is acting not out of defiance but to restore lawfulness — is enormous and far-reaching. The ultimate limit in such circumstances is no longer the provisions of the Constitution. It is the ambition and fortitude of the province.

[6.60] This reality will not be lost on the State — to the contrary. The primary purpose of the safeguard clause is not to encourage unilateral action; it is to ensure that the State fully understands the potential consequences of non-compliance with its obligation to respect the right of all peoples to self-determination. It is this knowledge which provides a strong motivation to negotiate in good faith, and which ensures that those negotiations are not dominated by the State acting as the dominant party.

6.1.7 Conclusion

[6.61] Section 6.1 tests the paper's founding proposition — that the unitary nature of the South African State cannot survive the assertion of self-determination by a sub-national community — in the context of the people of the Western Cape and their desire to police themselves.

[6.62] It has established that the people of the Western Cape comprise a people as envisaged by international law, and that the desire to police themselves is a legitimate and, in fact, normative expression of the right to self-determination exercised within the confines of

³⁵⁹ Winde, A., Premier of the Western Cape, statement on banning Russian diplomats from provincial functions, 10 March 2022; "If Putin comes to WCape, LEAP officers will be instructed to arrest him," Politicsweb/Western Cape Government, 27 April 2023: "If the South African Police Service is not instructed to act, we will"; "'Western Cape is not an independent republic': Minister slams Winde over Putin arrest comments," Polity, 28 April 2023.

the State — internal self-determination. It has further established that a process already exists by which the people of the Western Cape can express their desire to police themselves, and that in doing so, they create an obligation on the national government to accommodate that desire whilst not infringing upon the rights of other South Africans, to negotiate in good faith how to achieve that, and to enact the necessary legislative and constitutional changes to give effect to the outcome of those negotiations. In doing so, the Western Cape will hold authority over its own policing not as a grant made at the discretion of Parliament, the Constitution, or any Minister, but as of right — a right neither conferred nor capable of being withdrawn unilaterally by the State that granted every other provincial power it presently exercises. It is this feature, rather than the mere fact of devolution, that marks the boundary between a unitary and a federal arrangement. This is not federalism in the sense of the state as a whole; it is what Watts, following Elazar, terms a "federacy"³⁶⁰ — an arrangement in which a single constituent unit holds guaranteed autonomy dissoluble only by mutual agreement, while the remainder of the state's constitutional order continues to operate as before.

[6.63] Section 6.1 has also established that, in the event that the South African State elects not to honour its legal obligations, the people of the Western Cape retain the capacity to assert their right to self-determination unilaterally — a capacity the province has, to a limited extent, already begun exercising through LEAP, as section 6.1.6 above discussed — by establishing their own provincial police force regardless. Doing so will still end the unitary nature of the South African State.

6.2 Afrikaners

[6.64] Chapters 2 and 3 of this paper have established that throughout their history, Afrikaners have relentlessly pursued self-governance and self-determination.³⁶¹ Section 3.3.1.3

³⁶⁰ Watts, R. L. (2008). *Comparing Federal Systems* (3rd ed.). Montreal & Kingston: McGill-Queen's University Press, ch. 1, on the "federacy" as a category on the spectrum of federal political systems, coined by D. Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987), pp. 7, 54–57.

³⁶¹ See sections 2.3.1, 3.2.2 above.

detailed how the fight to preserve educational institutions which are exclusively devoted to using the Afrikaans language as the medium of instruction has animated the Afrikaner people and set them on a collision course with the South African State, recording that the number of single-medium Afrikaans universities has been reduced from five in 1994 to none by 2025, and that there has been significant reduction in single-medium Afrikaans schools, many of which have transitioned through a brief period of dual medium — English plus Afrikaans — before becoming single-medium English thereafter.³⁶²

- [6.65] The frustration of Afrikaners and their lack of trust in the State has been evidenced by the quite extraordinary lengths the Afrikaner community has gone to develop parallel institutions of learning which are beyond the State's direct control, among them Akademia, widely referred to as an Afrikaans "university,"³⁶³ and Sol-Tech, an accredited private vocational training college using Afrikaans as its medium of instruction.³⁶⁴
- [6.66] As section 3.3.1.3 records, the Basic Education Laws Amendment Act (BELA) has brought matters to a head, and most specifically clause 5, which empowers the State to override School Governing Bodies (SGBs) who, up until then, had determined the language policy of schools, and which represented the wishes of the communities they served through the parents and community members who ran them.³⁶⁵
- [6.67] Section 6.2 asks the question: do Afrikaners have a right to take control of their own schools by asserting their right to self-determination, and, were they to do so, what would the effect of such an assertion be?

³⁶² See section 3.3.1.3 above.

³⁶³ Akademia, "Overview," akademia.ac.za, describing itself as "a Christian, classical and independent higher education institution from and for the Afrikaans language and cultural community"; Department of Higher Education and Training registration no. 2011/HE08/005 (2017); "New R3 billion private Afrikaans university in South Africa is coming," BusinessTech, 22 January 2026, on the DHET's October 2025 policy first permitting private institutions to be classified as universities; "Afrikaans university set for major growth," The Citizen, 29 August 2025.

³⁶⁴ Solidarity Movement, "Sol-Tech" (<https://beweging.co.za/en/sol-tech/>).

³⁶⁵ See section 3.3.1.3 above.

6.2.1 Qualification

- [6.68] The first question to answer is whether Afrikaners comprise a people as envisaged by international law. Whilst the answer to this question should be much more self-evident than with the people of the Western Cape given that, as a homogeneous community with cultural, linguistic, and religious unity, Afrikaners fit the traditional image of a people, this paper will apply the same qualification process as it did to the people of the Western Cape. In doing so, this creates a valuable framework through which to address the status of other South African sub-national communities.
- [6.69] Applying the Kirby description discussed in sections 4.2 and 6.1 above,³⁶⁶ Afrikaners can be said to possess most, if not all, of its characteristics.
- [6.70] Afrikaners established themselves as a unique community in Southern Africa, drawing together immigrants from the Netherlands, France, Germany and elsewhere, and to some extent mixing with the indigenous peoples. Thereafter they were pioneers, contributing heavily to the development of the region, migrating as a community, establishing their own Republics, and fighting wars to defend themselves and their way of life.³⁶⁷ It is therefore indisputable that they have a common historical tradition.
- [6.71] Ethnic and linguistic unity are equally beyond dispute, and the evidence for each is worth separating. That Afrikaners regarded themselves as ethnically and linguistically distinct is one proposition; that they consistently and consciously organised and acted as one, politically, is a stronger and more direct one. For 46 years, Afrikaner voters returned the National Party to government by decisive majorities, a party whose policy of racial classification and separation served, among its purposes, to isolate and preserve a distinct Afrikaner ethnic identity, while its promotion of the Afrikaans language — already elevated to official status in 1925³⁶⁸ — was pursued as a deliberate state project throughout its tenure. That a community, over five decades and multiple

³⁶⁶ See sections 4.2, 6.1 above.

³⁶⁷ Hermann Giliomee, *The Afrikaners: Biography of a People* (Cape Town: Tafelberg / Charlottesville: University of Virginia Press, 2003).

³⁶⁸ Constitution and Election Amendment Act, 1925.

generations, consistently and by clear majority chose a government committed to entrenching its own ethnic and linguistic distinctiveness is not merely evidence of self-regard. It is direct evidence of sustained, collective political action, taken as one, in pursuit of that distinctiveness.

[6.72] Religious affinity is demonstrated with equal clarity. The Dutch Reformed Church, described even by its own critics as Afrikaners' "traditional mother church,"³⁶⁹ provided the explicit theological justification for the National Party's policy from 1948 onward³⁷⁰ — a party whose founding Prime Minister, D.F. Malan, was himself a former minister of that church.³⁷¹ For decades, the governing ideology of the state and the doctrine of a single church, serving one people almost exclusively, were one and the same.

[6.73] Cultural unity is, if anything, the clearest of Kirby's criteria, and deserves to be treated as such rather than assumed. Afrikaans possesses its own substantial literary tradition, from the poets of the Second Afrikaans Language Movement — Eugène Marais and N.P. van Wyk Louw foremost among them — to the generation of writers, including André Brink and Breyten Breytenbach, who took up the language in the decades that followed.³⁷² That tradition is sustained today by dedicated language and cultural bodies, and by no fewer than five major Afrikaans-language arts festivals held annually across the country, the largest of which, the Klein Karoo Nasionale Kunstefees, was founded in 1995 explicitly "to establish, and indeed, defend, the place of Afrikaans culture" after 1994.³⁷³ It is further sustained by the institutions discussed later in this chapter — Solidarity, AfriForum, Akademia, and others — each of which has been built and funded independently of the South African state.

³⁶⁹ Britannica, "Dutch Reformed Church."

³⁷⁰ South African History Online, "Dutch Reformed Church (DRC)"; "The Dutch Reformed Church and its Contribution to Apartheid," European Academy of Religion and Society (2022).

³⁷¹ Ibid.

³⁷² Britannica, "Afrikaans literature"; "South African Literature," FactMonster.

³⁷³ South African History Online, "KKNK — Klein Karoo Nasionale Kunstefees"; LitNet, "An Investigation into Afrikaans Family Festival Attendees... at Aardklop Nasionale Kunstefees."

- [6.74] Of Kirby's characteristics, only two, a territorial connection and a common economic life, require any real examination.
- [6.75] Afrikaners no longer live in a clearly defined geographical area, but are spread out throughout Southern Africa. If a territorial connection is to be narrowly defined and viewed as an exclusive territorial connection, then it no longer exists, recognising that historically it did and they were deprived of it through an act of war.³⁷⁴ If it is to be applied more broadly, however, Afrikaners are clearly connected to Southern Africa, where they established themselves as a people, and where the overwhelming majority of their population remain.
- [6.76] Precisely the same argument exists for a common economic life, where Afrikaners would not meet this criterion on a narrow reading, but would on a broad one.
- [6.77] Since the Kirby description requires some and not all of these traits to be present, Afrikaners meet, by any reasonable definition, the objective element of Kirby.
- [6.78] The subjective element is equally emphatic. Kirby requires the people to have either the will or the consciousness of being a people. In the case of Afrikaners, the latter is easily demonstrable. Afrikaners overtly identify as such, they have established monuments to their history, language, and leaders.³⁷⁵ They have a vibrant and thriving artistic and literary canon which celebrates the Afrikaner identity, and they are currently building more cultural institutions than any other cultural group in South Africa under the motto "Ons sal self" — we will do it ourselves.³⁷⁶
- [6.79] Once again, however, it must be restated that the Kirby description is not a binding definition but the logical derivation of international subject matter experts.³⁷⁷

³⁷⁴ Treaty (Peace) of Vereeniging, 31 May 1902.

³⁷⁵ See, e.g., the Voortrekker Monument, Pretoria (opened 1949); the Afrikaans Language Monument, Paarl (opened 1975).

³⁷⁶ Solidarity Movement, "Afrikaner Ascendancy in the 21st Century" (solidaritymovement.co.za).

³⁷⁷ See section 4.2 above.

[6.80] The common sense test is equally emphatic that Afrikaners constitute a people as envisaged by international law. Their domestic population is approximately 2.75 million³⁷⁸ — larger than Botswana, Lesotho, or Eswatini, and comparable to Namibia³⁷⁹ — a figure which does not include the substantial Afrikaner community of Namibia itself, estimated at over 30,000,³⁸⁰ nor the further communities present throughout the Afrikaner diaspora in Australia, the United Kingdom, and elsewhere. Their impact, relative to their numbers, has nonetheless been considerable across the arts, the sciences, and sport: Christiaan Barnard, an Afrikaner, performed the world's first human-to-human heart transplant in 1967;³⁸¹ their government secretly developed a nuclear weapons capability, and then became the only state in history to voluntarily dismantle a completed nuclear arsenal;³⁸² and they are, at the time of writing, the subject of a dedicated United States refugee resettlement programme.³⁸³ There is no credible argument to suggest Afrikaners do not comprise a people.

6.2.2 Section 235

[6.81] Section 6.1 questioned the applicability of section 235 to the people of the Western Cape, before concluding it was genuinely contestable but ultimately immaterial. For Afrikaners, the position differs in one important respect. Unlike the people of the Western Cape, Afrikaners unquestionably fall within the class of communities section 235 was drafted to accommodate. As section 5.5.1 demonstrated, section 235

³⁷⁸ Statistics South Africa, Census 2022 (4,504,252 White South Africans, of whom 61% speak Afrikaans as a home language).

³⁷⁹ World Bank/UNFPA population data, 2025.

³⁸⁰ Namibia Statistics Agency, 2023 Population and Housing Census, on the White Namibian population (53,773), approximately 60% of whom report Afrikaans as a first language.

³⁸¹ Britannica, "Christiaan Barnard"; South African History Online, "Dr Chris Barnard performs the world's first human heart transplant."

³⁸² Nuclear Threat Initiative, "South Africa: Nuclear Disarmament"; Atomic Heritage Foundation, "South African Nuclear Program."

³⁸³ Executive Order 14204, "Addressing Egregious Actions of the Republic of South Africa," 7 February 2025.

originated as the constitutional expression of the negotiations surrounding Afrikaner self-determination and the proposed Volkstaat.³⁸⁴

[6.82] That does not, however, make section 235 the best legal foundation for asserting the right. As demonstrated in section 5.5.4 above, the right to self-determination arises in international law as a peremptory norm (*jus cogens*) and binds South Africa regardless of section 235.³⁸⁵ The practical significance of section 235 is therefore secondary rather than fundamental. Section 235 remains permissive rather than an explicit constitutional right which can itself be asserted. Accordingly, Afrikaners are better served by asserting the right to self-determination recognised in international law and accommodated throughout South Africa's constitutional order, rather than by treating section 235 as the source of that right.

[6.83] What section 235 and the Certification Judgment do provide is a constitutional roadmap for the domestic implementation of an agreement reached through the exercise of that right: negotiation, agreement, and legislative implementation. Section 235 does not create the right; it identifies one means by which the State may give constitutional effect to it. For Afrikaners, unlike the people of the Western Cape, section 235's application is not merely uncertain and immaterial. It is confirmatory evidence that the Constitution itself already contemplated accommodating precisely this community's claim.

6.2.3 A Legitimate Form of Self-Determination

[6.84] Having determined that Afrikaners constitute a people as envisaged by international law, the next question to answer is whether community control of schools and other educational institutions constitutes a legitimate and accepted form of self-determination.

[6.85] Section 4.5 above identified cultural autonomy among the accepted internal forms self-determination may take, and cultural development as a core component of the right as

³⁸⁴ See sections 6.1, 5.5.1 above.

³⁸⁵ See section 5.5.4 above.

international law defines it.³⁸⁶ The treaty provisions underlying this paper's central argument confirm why: they define the right not only as the freedom to determine political status, but as the freedom to pursue economic, social, and cultural development.³⁸⁷ Critically, the African Charter goes further still, specifying that this development is to be pursued "according to the policy they have freely chosen."³⁸⁸ The right, on its own terms, is not simply a right to development in the abstract. It is a right to choose, for oneself, the means by which that development occurs.

[6.86] Education is the principal institutional mechanism through which a people gives practical effect to its chosen policy of cultural development. For a people whose qualification rests substantially on cultural and linguistic unity, as established above, cultural development is inseparable from its transmission to the next generation. A culture that is not passed on does not develop; it ends. Meaningful control over the language and content of a people's own children's education is not, therefore, an incidental extension of the right to self-determination. It is close to what the pursuit of cultural development, according to a freely chosen policy, concretely requires.

[6.87] For a culture to survive, it requires institutions dedicated to fostering, celebrating, and transmitting its language and traditions. The primary such institutions, in any society, are schools and places of worship. Neither exists to provide equal access to all. Both exist, by their nature, to serve a specific community, and are, in that sense, inherently exclusive — though not, for that reason, unfairly so. A mosque is not expected to accommodate Christian worship, nor a synagogue to hold Hindu services, and this has never been regarded as discrimination in any objectionable sense. It is understood, without controversy, that such institutions exist to serve a particular community's needs.

[6.88] The same logic applies with equal force to schools built by and for a specific cultural or linguistic community. Control over schools — including language of instruction,

³⁸⁶ See section 4.5 above.

³⁸⁷ International Covenant on Civil and Political Rights, 1966, art 1(1); International Covenant on Economic, Social and Cultural Rights, 1966, art 1(1).

³⁸⁸ African Charter on Human and Peoples' Rights, 1981, art 20(1).

governance, and admissions consistent with that language of instruction — is not a novel or radical proposition. It is a widely recognised, comparatively unremarkable feature of how states with meaningful sub-national or cultural autonomy accommodate the education rights of distinct communities within them.

[6.89] Comparative constitutional practice bears this out directly. Belgium places control over education, including language of instruction, directly in the hands of its three constitutionally recognised linguistic Communities — Flemish, French, and German-speaking — rather than its territorial regions, making the linguistic community itself, not a province or state, the basic constitutional unit of educational authority.³⁸⁹ Switzerland's twenty-six cantons each determine their own language of instruction, a competence the Federal Constitution expressly reserves to them, subject to respecting the traditional territorial distribution of languages and protecting established linguistic minorities.³⁹⁰ In Quebec, provincial jurisdiction over education, held by every Canadian province, has been used since 1977 specifically to protect the primacy of French as the language of instruction.³⁹¹ In South Tyrol, the right of the German-speaking minority to be educated in German was secured through sustained international pressure and a negotiated settlement between Austria and Italy, and remains protected today as one of the most enduring examples of linguistic educational autonomy in Europe.³⁹²

[6.90] South African constitutional law itself already accepts the underlying premise. Section 29(2) of the Constitution names single-medium institutions among the "reasonable educational alternatives" the state must consider in giving effect to the right to education in the language of one's choice, where reasonably practicable.³⁹³ South Africa's own constitutional order, in other words, already recognises single-medium, community-oriented schools as a legitimate form of educational provision — not as a

³⁸⁹ Constitution of Belgium, 1994, arts 127, 130 (Communities' competence over education and language of instruction).

³⁹⁰ Constitution of the Swiss Confederation, 1999, arts 62 (Education), 70 (Languages).

³⁹¹ Charter of the French Language (Bill 101), Quebec, 1977.

³⁹² Second Statute of Autonomy for South Tyrol, 1972 (Package/Paket), implementing the 1946 Gruber-De Gasperi Agreement between Austria and Italy.

³⁹³ Constitution of the Republic of South Africa, 1996, s 29(2).

concession to Afrikaners specifically, but as a general constitutional principle of which Afrikaner-medium schools would simply be one application.

- [6.91] What Afrikaners seek is not, therefore, some novel or unprecedented form of self-determination. It is a widely recognised, internationally practiced, and domestically already-contemplated expression of the right to pursue cultural development according to a freely chosen policy — applied, in this instance, to the institutions through which that development is transmitted to the next generation.

6.2.4 Representation

- [6.92] Unlike the people of the Western Cape, Afrikaners have no single, undisputed institution capable of speaking for the community as a whole. In the case of the people of the Western Cape, the Western Cape Government exists, is elected, and requires no further step before it can assert a claim on the people's behalf. No equivalent body currently exists for Afrikaners.
- [6.93] This absence does not, of itself, disturb the qualification already established. Kirby's subjective element requires the will or consciousness of being a people, and notes that this claim becomes more compelling where the group has established institutions capable of expressing that will.³⁹⁴ It does not require that will to be unanimous, nor expressed through a single institution. The absence of one voice is a practical obstacle to assertion. It is not a defect in the underlying claim.
- [6.94] The obstacle is, nonetheless, real, and it has specific historical roots. The Volkstaatraad, established as the direct institutional expression of the 1994 Accord, was not dissolved of its own volition. Its funding was terminated by the State in 1999, without the State ever substantively responding to its core recommendations.³⁹⁵ The Commission established in its place, ostensibly to protect the same interests, has since 2004 shown a documented history of antagonism toward Afrikaners specifically, rather than the

³⁹⁴ See section 4.2 above.

³⁹⁵ Volkstaat Council Act 30 of 1994; Parliamentary Monitoring Group, Department of Constitutional Affairs Budget Review, Constitutional Affairs Portfolio Committee, 3 March 1999; see section 3.3.1.3 above.

protection its mandate promises.³⁹⁶ Both examples demonstrate the same point: an institution genuinely capable of representing Afrikaners cannot be one the State controls, funds, or may simply defund once its findings become inconvenient to the State. It must be independent of the State, and answerable to the community alone.

[6.95] What remains are bodies built for other purposes: Solidarity, a trade union; AfriForum, a civil rights organisation; FF Plus, a political party directly representing only those Afrikaners who voted for it. Each represents a defined constituency. None can credibly claim to express the will of the Afrikaner people as a whole.

[6.96] A vehicle capable of holding and asserting the collective claim is therefore required. Real-world precedent already shows what form it might take. AfriForum, an individual-mandate model resting on the direct commitment of its 315,000 paying members, has used exactly this structure to speak and act on behalf of those who have attached themselves to it.³⁹⁷ CapeXit has used the same model, without a membership fee, reporting over 800,000 signed mandates for Western Cape independence.³⁹⁸ In the example of schooling, there is good reason to think that obtaining a mandate from the majority of parents with children in single-medium schools would not prove unduly onerous to achieve. Another advantage of a mandate system is that it resolves, rather than presupposes, the question of who counts as an Afrikaner for this purpose: each person who signs the mandate, subject to reasonable objective criteria, thereby identifies themselves as one. A referendum, by contrast, requires that question to be settled first, since a voters' roll must exist before a vote can be held — though a disclaimer of self-identification could still be required of anyone seeking to be enrolled on it.

[6.97] Veneto, a region of Italy, illustrates a different mechanism, developed for exactly the problem this section addresses: how a people demonstrates its collective will where the State itself controls, and may simply refuse, the official means of doing so. When Italy's

³⁹⁶ Politicsweb, "CRLRC meant to support not oppose minority rights — AfriForum" (2012); Weekend Argus, "Student residence sees CRL findings as 'attack on Afrikaans'" (2018); see section 3.3.1.3 above.

³⁹⁷ IOL, "Revealed: How AfriForum is raking in the cash from member fees," 11 March 2025.

³⁹⁸ TimesLIVE, "800,000 residents register to try to make Western Cape its own country," 26 May 2021.

government showed no willingness to sanction a referendum on Venetian independence, a private, cross-party committee organised one anyway — unofficial, online, entirely outside state involvement — and over 2.3 million people took part, some 63% of the eligible electorate.³⁹⁹ This demonstrated, unambiguously and at scale, a democratic will the state could no longer credibly deny existed. The regional government's own parallel attempt at an official independence referendum was struck down by Italy's Constitutional Court; a narrower official referendum on enhanced autonomy, brought under Article 116(3) of the Italian Constitution, was upheld and passed in 2017 with 98% support on a 57% turnout.⁴⁰⁰ Like any referendum, this established the people of Veneto's will rather than giving effect to it directly — that, as with any referendum, required a separate negotiated process, which followed and remains ongoing.

[6.98] Ultimately, Afrikaners will need to demonstrate their collective will for self-determination — and in this context, explicitly their desire to take control of their cultural institutions — and they will need to do so in a way that is credible, objectively fair, and clearly establishes their democratic will as a community. The practical examples provided demonstrate that this is eminently achievable.

6.2.5 Assertion

[6.99] Self-determination is not self-executing. As De Zayas has observed, the right, "like all rights, is not self-executing";⁴⁰¹ it requires the community entitled to it to actually assert it.

[6.100] The South African Constitution already provides an appropriate means of assertion. Section 17 guarantees everyone the right to present petitions.⁴⁰² Afrikaners can use this provision to formally notify the Office of the President — as head of state and head of

³⁹⁹ 2014 Venetian independence referendum.

⁴⁰⁰ "Referendum in the regions of Lombardy and the Veneto," 22 October 2017; A new phase for Italy's regional system? The referendums in Lombardy and Veneto on greater autonomy, Constitution Unit Blog, 30 October 2017.

⁴⁰¹ De Zayas, A. (2017). "The Law on Self-Determination Today," p. 1.

⁴⁰² Constitution of the Republic of South Africa, 1996, s 17.

the national executive — of their collective assertion of the right to self-determination, and of their intention to exercise it through control of Afrikaans-medium educational institutions.

6.2.6 Obligation

[6.101] The next question is what obligation this places on the South African State. Section 6.1 above established that this obligation is to negotiate in good faith and to reach an agreement that does not infringe the rights of others.⁴⁰³ That obligation applies to Afrikaners' claim in the same way. What this section addresses is the only question that could, in principle, defeat it: whether accommodating Afrikaners' desire to control their own schools infringes the rights of others.

[6.102] This paper contends that it does not, and this point is best tested against an example few would think to dispute. A cultural or religious institution serving a specific community is not, by its nature, unfair to those outside it. Section 6.2.3 argues that a mosque is not expected to accommodate Christian worship, nor a synagogue to hold Hindu services, and no one regards this as discrimination.⁴⁰⁴ Nor does this change merely because the State faces a genuine shortage of space elsewhere. A mosque could not lawfully be compelled to open its services to other faiths because those faiths had a shortage of space, however urgent that shortage may be. The reason is not because alternatives could always be found elsewhere. It is that the character of the institution is itself protected, independently of the competing need. The same is true of a school.

[6.103] Nothing in this analysis disputes the State's ability to accommodate genuine demographic change. Under the ordinary feeder-zone system, where a school's actual local community changes, its governing body's composition, and in turn its language policy, may change with it — a process no one disputes, and one this paper does not

⁴⁰³ See section 6.1 above.

⁴⁰⁴ No South African case law addresses this precise scenario directly, likely because no state has attempted it; the principle nonetheless follows from the broader jurisprudence on religious freedom and institutional autonomy (see, e.g., *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC); *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC)).

seek to disturb.⁴⁰⁵ What is not permitted is the State overriding that governing body's own decision where the local community has not, in fact, changed. This is precisely what section 5 of the Basic Education Laws Amendment Act does: rather than measuring demand at the level of the school's own feeder zone, it measures demand against education-district demographics — a metric which, on the available research, no education district in the country records Afrikaans as the language required by more than 30% of its population, thereby structurally biasing outcomes against Afrikaans-medium schools irrespective of whether their own community has changed at all.⁴⁰⁶ The distinction this section has drawn is not, therefore, an abstraction. It is precisely the distinction South Africa's own recent history illustrates: courts have already upheld a school's right to rely on its own governing body's language and admission policy against an attempt by the State to override it by force, before this specific legislative mechanism existed to do so instead.⁴⁰⁷

[6.104] The obvious objection is that the State's need here is real: South Africa does face a genuine, severe shortage of school capacity. Gauteng's own Department of Education reports enrolment more than doubling since 1995, a shortage of over 5,500 classrooms, and a shortfall of 88,000 secondary school places specifically — against only 48 schools built or refurbished in the nine years to 2024.⁴⁰⁸ But the shortage itself does not diminish the rights of the Afrikaner people. The primary obligation of a state faced with a severe lack of capacity, especially when it is observable years in advance, is to increase it. A state that fails to do so is not then entitled to solve its own failure by converting an

⁴⁰⁵ See discussion above [feeder-zone system].

⁴⁰⁶ Solidarity Research Institute, report on the impact of BELA on Gauteng (referred to in coverage as "Lesufi's Gauteng will use BELA as an axe"), presented by Connie Mulder, Head of the Solidarity Research Institute, 21 October 2024. Solidarity Movement, "Report: Lesufi's Gauteng will use BELA as an axe," 21 October 2024, <https://solidaritymovement.co.za/report-lesufis-gauteng-will-use-bela-as-an-axe/>.

⁴⁰⁷ *Hoërskool Overvaal* litigation, Gauteng Department of Education, 2018.

⁴⁰⁸ Gauteng Department of Education, briefing by MEC Lebogang Maile, 12 April 2026, reported in "70 pupils per teacher: Gauteng's classroom overcrowding crisis deepens," *The Citizen*, 14 April 2026, and "Education MEC outlines urgent plan to ease Gauteng school overcrowding," *Kempton Express*, 30 April 2026.

existing community's institution to purposes it was not established to serve. The example of Gauteng illustrates this point perfectly.

[6.105]The point is sharper still once the nature of the actual demand is considered. Were it demand for mother-tongue education in isiZulu, isiXhosa, Sesotho, or any of South Africa's other official languages, a genuine competition between two peoples' cultural claims would arise. The available evidence does not support the characterisation of this as a conflict between competing claims to mother-tongue cultural preservation. Research consistently shows that most Black South African parents prefer English, not their own home language, as the medium of instruction, a preference driven by its perceived economic value rather than any competing cultural claim.⁴⁰⁹ What is actually occurring is not the reconciliation of two self-determination claims. It is the conversion of a cultural institution to meet demand which, in principle, could be accommodated through adequately resourced English-medium provision.

[6.106]Accommodating Afrikaners' claim, then, does not infringe the rights of others. The general obligation established in section 6.1 above therefore applies to it without qualification.

6.2.7 Non-Compliance

[6.107]Section 6.1 above established the general architecture of non-compliance: its stages, the international consequence that follows regardless of constitutional form, the conditionality of the safeguard clause, and the general availability, and limits, of both formal legal remedy and unilateral action.⁴¹⁰ That architecture applies here without

⁴⁰⁹ See, e.g., Naudé, M. & Meier, C. (eds.), 2014. *Teaching Foundation Phase Mathematics: A Guide for South African Students and Teachers*. Pretoria: Van Schaik Publishers; Manyike, T.V. & Lemmer, E.M. (2014). "Research in language education in South Africa: Problems & Prospects." *Mediterranean Journal of Social Sciences*, 5(8), 251–258; Maluleke, M.J. (2019). "Using code-switching as an empowerment strategy in teaching mathematics to learners with limited proficiency in English in South African schools." *South African Journal of Education*, 39(3), 1–9; South African Social Attitudes Survey, cited in "Policy options to crack the mother tongue versus English riddle in South African schools," *The Conversation* (2024).

⁴¹⁰ See section 6.1 above.

alteration. What follows addresses only what is different about the Afrikaner claim to educational self-determination specifically.

[6.108]Solidarity's institutions — Akademia, Sol-Tech, and others — are frequently, and rightly, cited as evidence of Afrikaner capacity, determination, and independent will.⁴¹¹ They are not, on their own, a solution to the problem this chapter addresses. Private, fee-based institutions of this kind cannot substitute for an entire basic education system serving hundreds of thousands of Afrikaans-speaking children. There is a further, and less obvious, reason they cannot be relied upon alone. Afrikaners have built and funded such institutions before. Stellenbosch developed from a church theological seminary; Potchefstroom from one as well — both genuinely community-founded, community-funded institutions in their origin.⁴¹² Since 1994, within a single generation, both have lost their character as institutions where Afrikaans was the primary medium of instruction, along with every other Afrikaans university in the country.⁴¹³ Nothing in Akademia's or Sol-Tech's current independence guarantees against the same trajectory over time. Parallel institutions, however genuinely built by and for the community, remain a supplement to this chapter's argument. They are not, on their own, its conclusion.

[6.109]The more direct form non-compliance is likely to take, therefore, is confrontation within the existing public system itself: a school governing body simply continuing to apply its own language policy, in direct non-compliance with a state directive purporting to override it, rather than waiting for litigation or building an alternative from scratch. This is the logical continuation of a conflict already tested once, through litigation, in the Hoërskool Overvaal dispute — the same underlying confrontation between a governing body's language policy and state override, but escalated beyond the courtroom to open non-compliance.

⁴¹¹ See section 3.2.2 above.

⁴¹² See section 3.3.1.3 above.

⁴¹³ See discussion above \u2014 introduction to section 6.2, on the reduction of Afrikaans-medium universities from five to none since 1994.

[6.110] Such non-compliance carries an obvious risk: unlike Akademia, an existing public school depends in part on state funding, which the State may simply withdraw. This risk, however, invites a response South Africa's own recent history already supplies. As Margaret Thatcher observed, "the State has no source of money other than money which people earn themselves... there is no such thing as public money; there is only taxpayers' money."⁴¹⁴ In substance, therefore, a school's state funding was never the State's own to withhold. It was the community's own taxation, returned. Once the state fails to provide a service for which the community is paying via taxation, the community could reasonably conclude that withholding that portion of its taxation is justified.

[6.111] This is not a hypothetical response. Financial non-compliance of precisely this kind is already a documented feature of South African civic life, entirely independent of this issue. Residents of Sea Point withheld rates from the City of Cape Town in 2020 over undelivered services.⁴¹⁵ Ratepayers in Westville, Durban, have done the same against eThekweni Municipality.⁴¹⁶ The residents of Koster took over their own town's water, sewage, and refuse services after their municipality ceased, in fact, to provide them.⁴¹⁷ Millions of Gauteng motorists simply stopped paying e-tolls for over a decade, until the scheme was abandoned as unenforceable.⁴¹⁸ None of these examples concerns Afrikaners, or education, or self-determination at all. Each demonstrates the same underlying and unremarkable fact: where South Africans conclude they are paying for a service they no longer receive, withholding payment is not a fringe or novel response. It is, empirically, one of the more common ones.

⁴¹⁴ Margaret Thatcher, Speech to the Conservative Party Conference, 14 October 1983.

⁴¹⁵ IOL, "Sea Point residents hits City of Cape Town's pockets with a rates boycott," 2020.

⁴¹⁶ Discourse ZA, "The Durban Ratepayers Rebellion" (podcast/article).

⁴¹⁷ Kgetlengrivier Ratepayers' Association interim orders, North West High Court, 5 June 2018 and February 2021.

⁴¹⁸ South African National Roads Agency SOC Ltd, Integrated/Annual Report 2023/24; Government Gazette 50418 of 28 March 2024.

6.2.8 Conclusion

[6.112] Section 6.2, like section 6.1, tests the paper's founding proposition — that the unitary nature of the South African State cannot survive the assertion of self-determination by a sub-national community — in this case, the Afrikaner people and their desire to control their own Afrikaans-medium educational institutions.

[6.113] It has established that Afrikaners comprise a people as envisaged by international law, and that the desire to control their own schools is a legitimate and well-established expression of the right to self-determination exercised within the confines of the State — cultural, rather than territorial, self-determination. It has further established that, although no single institution presently holds the mandate to assert this claim on Afrikaners' behalf, precedent already exists for how such a mandate might be built. Thereafter, section 17 of the Constitution provides Afrikaners with a lawful and immediately available means of asserting such a mandate.

[6.114] Section 6.2 has then established that the Afrikaners' claim does not infringe the rights of other South Africans, and that the obligation this creates upon the national government — to negotiate in good faith, to reach an agreement which does not infringe those rights, and to enact the legislative changes necessary to give effect to that agreement — applies to Afrikaners' claim in precisely the same terms as it applies to the Western Cape's. In doing so, Afrikaners will hold authority over their own educational institutions not as a grant made at the discretion of Parliament, the Constitution, or any Minister, but as of right — a right which originates in international law and bears *jus cogens* status.

[6.115] As established in section 6.1 above, it is this feature — whether authority is held by grace of the centre or as of right against it — that marks the boundary between a unitary and a non-unitary arrangement, not the presence or absence of any particular institutional model. Once Afrikaners hold authority over their own educational institutions on that basis, the State's claim to unitary authority over education, in that domain, no longer holds.

[6.116]Section 6.2 has also established that, in the event the South African State elects not to honour its legal obligations, Afrikaners are neither without recourse nor without precedent. Parallel institutions, non-compliance within the existing public system, and the withholding of resources the State has failed to earn through its own performance are each, individually, modest measures — and each, individually, already a documented feature of South African civic life. Should the State persist in refusing to accommodate a right it cannot lawfully deny, the cumulative effect of these measures, exercised together and over time, is no less capable of ending the unitary character of the South African State than the Western Cape's own path to the same end.

Chapter 7: Conclusions

7.1 Founding Proposition

- [7.1] This paper set out to prove its founding proposition: that the unitary nature of the South African State could not survive the legitimate assertion of the right to self-determination by any qualifying sub-national community — a proposition which appeared in abbreviated form in the paper's title.
- [7.2] The argument was not that such an assertion would bring about a formal change in the constitutional text or architecture, although that could very conceivably also be true; it was that, as a matter of fact and therefore logic, the act of successfully asserting the right to self-determination redistributed power away from the central government to the sub-national community concerned. The consequence of this is that, in practice, the South African State is no longer unitary in nature.
- [7.3] A key distinction which this paper establishes is between power which is assigned at the grace and favour of the State and which can be revoked without the consent of the sub-national community exercising it — such an arrangement remains unitary; and power which a sub-national community holds and which the State cannot remove or revoke without its explicit consent and approval — this arrangement is not unitary.⁴¹⁹

7.2 Elements Required for Proof

- [7.4] To prove the founding proposition, the paper needed to establish three truths:
- [7.5] that the South African State is presently unitary in character;
- [7.6] that sub-national communities hold a right to self-determination which they can legitimately assert, and that the South African State has a correspondingly non-

⁴¹⁹ See sections 5.5.3–5.5.4, and Chapter 6 above.

derogable obligation to respect and accommodate any legitimate assertion of that right; and

- [7.7] that even were the South African State to unlawfully refuse to accommodate self-determination once asserted, sub-national communities would possess the capacity and potential justification to acquire the powers they seek by means of unilateral action.

7.3 Establishing the Unitary Nature of the South African State

- [7.8] The unitary nature of the South African State is established in Chapter 1 - primarily through the State's own explicit declarations of the fact. It is then affirmed in Chapters 2 and 3, which examine the position South Africa's sub-national communities find themselves in, and analyse South Africa's democratic and constitutional architecture — not just in word, but also in deed.
- [7.9] These chapters demonstrate that South Africa's demographic and cultural composition, which in turn heavily shapes its ideological character, has given rise to an entrenched and all-powerful national majority which imposes its will — directly and indirectly, over time — on every aspect of the South African constitutional order. This includes the intended safeguard mechanisms - the judiciary and the Chapter 9 institutions – who sub-national communities depend upon for minority protection, but over whom ultimate control traces back to the national majority.
- [7.10] The result is that, where their views diverge from those of the dominant and enduring national majority, sub-national communities are perpetually denied the level of agency to which they would be entitled, as legitimate expressions of their right to self-determination, should they wish to assert it.

7.4 Establishing the rights and obligations of self-determination

- [7.11] The second element of proof has two components, which are correlative in nature. Chapter 4 establishes that the right to self-determination, which is unquestionable and inalienably owed to all peoples, arises in international law, and places a correlative positive obligation on all states to accommodate it.

- [7.12] The first question which this paper therefore needed to answer is whether South Africa's sub-national communities comprised peoples as envisaged by international law, thus entitling them to assert a right to self-determination. Section 4.2 examined the determining criteria in general terms, whilst sections 6.1.1 and 6.2.1 examined specifically whether the people of the Western Cape and the Afrikaner people respectively met these criteria. This same process of examination can be applied to any of South Africa's many sub-national communities to arrive at a similar determination. The paper concluded that in the case of both the people of the Western Cape and Afrikaners, they did.
- [7.13] As a result of the correlative nature of the rights and obligations of self-determination outlined above, the second question is then also answered. South Africa bears a corresponding obligation to accommodate the rights of all people to self-determination, and this includes the people of the Western Cape, Afrikaners, and in reality, many others.
- [7.14] South Africa does not dispute the right of all people to self-determination. To the contrary, as Chapter 5 records, since 1994, South Africa has signed and ratified three international treaties which explicitly recognise it and bind South Africa to it. South Africa has not, however, taken the additional step of passing supporting legislation and domesticating these obligations in accordance with section 231 of the Constitution. As such, under treaty law, South Africa is bound internationally, but not domestically — noting, however, that as Section 5.1 records, the South African courts have elected to give treaties which South Africa has signed legal weight beyond that which section 231 of the Constitution requires.
- [7.15] This does not, however, leave the right without domestic force. Self-determination also forms part of customary international law, which South Africa explicitly domesticates in sections 39, 232, and 233 of the Constitution — an accommodation which is not dependent upon the passing of additional supporting legislation.
- [7.16] On this customary-law basis, there is therefore no question that the right of all peoples to self-determination, and the correlative obligation this places on South Africa to

accommodate such a right, exists in South African domestic law. All that then remains in question is the level of discretion South Africa retains over the exercise of this right.

[7.17] Section 232 of the Constitution purports to subordinate international law, and by inference the right of self-determination, to the South African constitutional order, of which the Constitutional Court is then the final arbiter. This presents a contradiction which becomes a key inflection point of this paper.

[7.18] The right to self-determination is a peremptory norm (*jus cogens*) of international law and as such is, by definition, non-derogable and binding on all states. Consequently, where in the normal course of events section 232's subordination of international law in the domestic arena would not be problematic, this is not the case when it comes to self-determination, which is a right that cannot be derogated or subordinated. In other words, South Africa does not retain any discretion over whether it accommodates the right to self-determination.

[7.19] The reason for this is profound. In the narrow context of *jus cogens* rights, South Africa's Constitution is not supreme; it is subordinate to international law.

[7.20] Section 4.4 uses the example of the prohibition of genocide, which, like self-determination, also carries *jus cogens* status, to illustrate this legal hierarchy clearly. It points out that no state, either through its constitution, legislation, parliament, courts, or by any other means, can confer upon itself the right to commit genocide. Understanding this self-evident truth demonstrates, in the sharpest possible terms, the relationship between the South African State and international law when it comes to the right of self-determination and the level of discretion South Africa does or does not enjoy over adherence to, and accommodation of, this right.

[7.21] The paper recognises that there is a body of opinion which does not accept that the status of self-determination as a peremptory norm of international law (*jus cogens*) is settled in all contexts, arguing that this status is limited to specific applications. Given the significance of *jus cogens*, this counter-argument is dealt with at length in section 4.4.6. Ultimately, this paper affirms that the *jus cogens* status of self-determination is universal, and is not confined to the specific applications these critics propose.

- [7.22] This paper therefore concludes that suitably qualified sub-national communities enjoy a right to self-determination, which the South African State is obliged to accommodate — a matter over which it has no legal discretion.
- [7.23] The paper then examines the practical application of this right. Section 4.5 records the forms that self-determination may legitimately take, whilst Chapter 6 applies this to the specific examples of policing in the Western Cape and the control of single-medium schools by Afrikaners. It draws upon state practice to demonstrate that these applications are normative, and details the process — representation, assertion, negotiation, and implementation — through which self-determination would be realised.
- [7.24] Should any qualifying sub-national community assert a legitimate right to self-determination, and the South African State then act in accordance with its obligations — which Chapters 4 to 6 establish are to negotiate in good faith how to accommodate the assertion, and to give legislative effect to the outcome of those negotiations — the unitary nature of the South African State will be at an end. This is because that community would have acquired a right which is not dependent upon the grace and favour of the State, and which cannot be revoked without the community's consent.

7.5 Establishing that Obstruction by the State would not be Fatal

- [7.25] The third element of proof required to satisfy the paper's founding proposition is the consequence of non-compliance and obstruction by the state.
- [7.26] If a qualifying sub-national community possesses a right to self-determination which it then asserts, but which the South African State refuses to accommodate and is successful in preventing, then the unitary nature of the State would remain intact — thus disproving this paper's founding proposition. Alternatively, were the qualifying sub-national community able to realise its desire for self-determination despite the State's refusal to willingly accommodate it, then the founding proposition would instead hold true.

- [7.27] This paper has examined the two conceivable pathways through which a sub-national community could achieve self-determination despite the opposition of the state, and these can be categorised as judicial and extra-judicial.
- [7.28] As has been demonstrated above, the right of all peoples to self-determination arises in international law and has been domesticated into South African law, and there is a legal obligation on the State to accommodate the assertion of this right and to positively provide for this possibility. Should the State fail to do so, a qualifying sub-national community has the option to approach the courts to demand the State's compliance with the law.
- [7.29] In section 3.3.1.4, this paper establishes that, over time, the courts have taken on the ideological character of the national majority, to the point where some constitutional scholars assert that whilst a procedurally fair judgement is still achievable at the Constitutional Court, an ideologically fair one is not.
- [7.30] Notably, the primary nature of any application compelling the State to abide by its legal obligations, and even more so when those obligations relate to a peremptory norm of international law and are *erga omnes* in character, is procedural as opposed to ideological. The observable conduct of apex courts in high functioning democracies, including the South African Constitutional Court, provides additional reassurance for sub-national communities seeking relief. As this paper has previously identified, the Supreme Courts of Canada and the UK, as well as the South African Constitutional Court in its certification of section 235, have carefully and intentionally avoided challenging the authority of international law over the domestic application of the right to self-determination. It would therefore not be unreasonable to expect the South African courts to compel the South African State to honour its legal obligations.
- [7.31] However, as this paper has also recorded, on the issue of self-determination, the South African Constitutional Court is not the final arbiter. Whilst the international courts and forums expect sub-national communities to exhaust all available domestic legal remedies first, they offer, subject to a complex and nuanced set of admission requirements, a further escalatory pathway to hold the South African State legally

accountable for its non-compliance, which could conceivably result in South Africa being legally compelled to accommodate the relevant community's desire for self-determination.

- [7.32] This paper notes, however, that international judgements are extremely slow to obtain, and difficult to enforce. As a result, beyond the domestic courts, and conceivably as an alternative or pursued in parallel, this paper records that in practice extra-judicial remedies are more often pursued because they offer a significantly quicker resolution and typically do not require external enforcement.
- [7.33] As section 4.6 demonstrates, extra-judicial does not by necessity mean unlawful. To the contrary, international law has already considered the consequences of a state failing to accommodate and provide for the self-determination of qualifying sub-national communities within its borders, and they are profound — the state's sovereignty over that community is wholly dependent upon it.
- [7.34] This is established in the so-called "safeguard clause" found in the 1970 Declaration of Principles concerning the Friendly Relations and Co-operation amongst States, which has given rise to the doctrine of remedial secession — the assertion that a people may unilaterally secede from the state to secure self-determination — and has been given considerable authority by rulings of the ICJ, and the Supreme Courts of Canada and the UK when considering this issue.⁴²⁰
- [7.35] The departure point for extra-judicial action is that the state is acting unlawfully, and that the subsequent actions taken by the qualifying sub-national community are done on the basis of restoring lawful compliance.
- [7.36] The safeguard clause's own structure is not merely theoretical; it has been tested and applied by two apex courts.

⁴²⁰ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, GA Res 2625 (XXV), 24 October 1970.

[7.37] In their rulings on Quebec⁴²¹ and Scotland⁴²², the Supreme Courts of Canada and the UK respectively had to consider whether each of these sub-national communities had a right to unilateral secession. Both concluded that they did not — because their right to self-determination had already been meaningfully and substantively accommodated internally within the state. This was the safeguard clause's stated condition for territorial integrity being applied by both courts: Canada and the United Kingdom retained their territorial integrity not because they were unconditionally entitled to it, but because they had each satisfied the condition that the safeguard clause attached to it. Consequently, should Quebec and Scotland wish to pursue secession, they must do so through a process of negotiation — noting that in both cases an independence referendum had already, or subsequently took place, which informed these negotiations. In its landmark ruling on Kosovo⁴²³, the ICJ affirmed that international law contained no prohibition on unilateral declarations of independence.

[7.38] Section 4.6 does not offer this evidence in support of secession — accepting, however, that this may be a legitimate application — it offers it to establish the potential legitimacy of unilateral action taken without the consent of the state. It argues that if international law justifies the ultimate act of legal defiance, that by clear inference, lesser and far more mundane remedial actions must also be defensible.

[7.39] Sections 6.1.6 and 6.2.7 then demonstrate that the principle of unilateral action taken by communities to restore what they believe to be the correct legal or moral equilibrium is already a feature of the South African political landscape, and that it has been used successfully to force compliance by the State. It is not just theoretical.

[7.40] Unilateral action therefore offers a clear, legally justifiable pathway through which an appropriately motivated and capable sub-national community can achieve self-determination within the South African State, extra-judicially.

⁴²¹ Reference re Secession of Quebec [1998] 2 SCR 217, paras 138, 154.

⁴²² Reference by the Lord Advocate of Devolution Issues under Paragraph 34 of Schedule 6 to the Scotland Act 1998 [2022] UKSC 31, paras 88–90.

⁴²³ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, [2010] ICJ Rep 403.

- [7.41] Accordingly, should a qualifying sub-national community assert a legitimate right to self-determination, and where that community then successfully utilises the judicial or extra-judicial means of enforcement lawfully available to it, unlawful defiance by the South African State will not prevent the unitary nature of the State coming to an end. Once again, this is because that community would have acquired a right which is not dependent upon the grace and favour of the State, and which cannot be revoked without the community's consent.

7.6 Final Conclusion

- [7.42] The paper now arrives at its crux.
- [7.43] The South African State considers itself to be unitary in nature, a view which is supported by expert opinion.
- [7.44] The South African people as a whole are extremely heterogenous and diverse in composition, a fact supported by both the State's own constitutional declaration and objective analysis. This includes the existence of sub-national communities, at least some of which this paper has demonstrated can be defined as a people as envisaged by international law.
- [7.45] All peoples have an unquestionable and inalienable right to self-determination, a right which the South African State is compelled by law to accommodate, which it has repeatedly sworn to uphold, and which by nature of its status as a peremptory norm (*jus cogens*) of international law it cannot derogate in any way – including by a constitutional declaration, legislative act, or parliamentary determination.
- [7.46] Once legitimately asserted, therefore, the South African State is legally obliged to accommodate the desire of any qualifying sub-national community for self-determination, subject only to the requirements of international law. These are that the exercising of self-determination by a qualifying sub-national community may not infringe upon the rights of others – a matter which is then resolved through good-faith negotiation.

- [7.47] A failure by the South African State to accommodate a legitimate assertion of self-determination would be an unlawful act. Not only would this provide grounds for legal action to be taken against the State, it would also establish the legal justification for the sub-national community unlawfully denied its rights to act unilaterally, in defiance of the State, to restore lawful compliance, and to realise its right to self-determination.
- [7.48] Ultimately, the only potential limitation, therefore, of the realisation of the right to self-determination by any qualifying South African sub-national community is not the law, but whether that community possesses sufficient determination, capacity, and political will.
- [7.49] Regardless of whether the sub-national community realises its right to self-determination through consensual negotiation, enforcement through the courts, or through unilateral action, the effect on the unitary nature of the South African State will be the same – it will come to an end when power is taken away from the central government and vested, by right as opposed to grace and favour, with the community concerned.
- [7.50] On this basis, the paper concludes that its founding proposition has been proven.

Chapter 8: Fiscal Autonomy

- [8.1] Chapter 7 concluded that, where a sub-national community possesses sufficient determination, capacity, and political will, the State cannot ultimately prevent it from exercising its right to self-determination.⁴²⁴ Capacity, however, deserves further consideration on its own terms. It is an essential enabling mechanism for a sub-national community to exercise its right to self-determination in practice, acutely so where the State, either actively or passively, chooses to act obstructively. An extremely effective method by which the State may elect to do so is through leveraging fiscal constraints. As the idiom observes, "he who pays the piper, calls the tune."
- [8.2] This is already clearly evidenced in the specific examples addressed in Chapter 6: policing in the Western Cape, and control of Afrikaans single-medium schools.⁴²⁵
- [8.3] In reference to the devolution of powers to the Western Cape, senior Democratic Alliance (DA) figures have advanced the principle that funding must follow function.⁴²⁶ Meanwhile, Premier Alan Winde has publicly confirmed that the joint City of Cape Town and Western Cape LEAP programme has been funded in part by reallocating R1.1 billion from the province's combined health and education budget.⁴²⁷ Without independent access to sufficient revenue, meaningful control over policing becomes contingent upon continued financial support from the very State whose authority is being redistributed.

⁴²⁴ See Chapter 7 above.

⁴²⁵ See section 6.1 (Western Cape policing) and section 6.2 (Afrikaans single-medium schools) above.

⁴²⁶ Geordin Hill-Lewis, then DA mayoral candidate for the City of Cape Town, proposed in 2021 that a portion of the national VIP protection budget be devolved to fund a Cape Town policing pilot, calculated on the province's 14.4% equitable share ("DA mayoral candidate proposes devolution of R1bn VIP protection budget to metros," IOL, 27 October 2021). Thomas Walters, Chairperson of the Western Cape Provincial Parliament's Standing Committee on Police Oversight and Community Safety, made the same argument in 2025, calling for legislative reform to "transfer the accompanying funding to the Western Cape" alongside any devolved SAPS functions (Walters, T., "Why devolving policing to the Western Cape Government is essential for local safety," Weekend Argus, 7 June 2025).

⁴²⁷ Winde has acknowledged that R1.1 billion was redirected from the province's combined health and education budget to fund its Safety Plan in 2019, representing just over 1% of that combined budget. "Opposition parties want Western Cape premier to redirect funding to save 2 400 teaching posts," News24, 6 September 2024; "Save our teachers: WC opposition call for WCED funding adjustments," IOL/Cape Argus, 13 September 2024.

- [8.4] This situation is mirrored when it comes to Afrikaans single-medium schools, the overwhelming majority of which are jointly funded by the state and parents through what is generally referred to as the former Model C system.⁴²⁸ Community control of these schools without independent funding does not resolve the underlying dependency; it merely relocates it. The State retains an indirect veto over such schools through the financial dependence their funding model still requires. The parallel institutions built by AfriForum and Solidarity do not rely on the state for funding, but as a consequence, remain limited in scale.⁴²⁹ They cannot replace the national network of Afrikaans single-medium schools.
- [8.5] This dependency on funding raises a further potential application of the right to self-determination: fiscal autonomy. Unlike the examples of policing and schooling, which are grounded in current community grievances, fiscal autonomy remains largely theoretical. As such, this paper has resolved to address the concept of fiscal autonomy in a postscript chapter. Since there are significant differences in how fiscal autonomy might be exercised once asserted, Chapter 8 will once again discuss fiscal autonomy for the Western Cape and for Afrikaners separately. As with the initial selection of these communities in Chapter 2, fiscal autonomy has a wider potential application than just these two communities; they are used here, as before, to provide a practical, plausible, and relevant lens through which to examine fiscal autonomy in practical terms.

8.1 Control over the Disposal of Wealth

- [8.6] Chapter 4 of this paper identified the accepted forms through which self-determination may legitimately be exercised, among them cultural or regional autonomy and federalism or an alternative special constitutional status.⁴³⁰ In state practice, arrangements of this kind are rarely, if ever, exercised without a corresponding fiscal dimension. A right to determine one's own political status and to "pursue economic and

⁴²⁸ "Model C," Dictionary of South African English; Institute of Race Relations, Research and Policy Brief: 'Model C' is the model to emulate, 1 February 2011.

⁴²⁹ See sections 6.2.3–6.2.7 above.

⁴³⁰ See section 4.5 above.

social development according to the policy... freely chosen" is not confined to the choice of policy in the abstract; it extends, necessarily, to the means of giving that choice effect.⁴³¹ A chosen policy that cannot be funded is not being freely pursued. It is a preference the State may honour or withdraw at will — precisely the condition Chapter 3 of this paper found to render provincial and cultural agency illusory, and precisely the condition this chapter's own opening section found to leave devolved policing and Afrikaans-medium schooling equally exposed.⁴³² Self-determination exercised while a third party retains unaccountable control over the means of exercising it is not self-determination. It is self-determination on licence. Fiscal autonomy, on this reading, is not a separate or additional right requiring its own independent justification. It is the practical condition on which every other form of self-determination this paper has examined actually depends.

- [8.7] This does not license an unbounded claim. Article 19 of the African Charter on Human and Peoples' Rights supplies the necessary limit: "all peoples shall be equal" and "nothing shall justify the domination of a people by another."⁴³³ Domination, not magnitude, is the relevant test. A people that contributes a substantial share of its wealth to a state it remains part of is not thereby dominated, provided it retains genuine agency over the terms of that contribution. A people that contributes a modest share, fixed and revised entirely at another's discretion, with no means of contesting or constraining that discretion, is dominated regardless of the amount. Self-determination does not entail exemption from funding the state; it entails a negotiated, rather than imposed, relationship governing what is owed and what is retained.
- [8.8] State practice confirms this is a workable and already-tested principle, not an abstraction invented for this paper. The Basque Country's contribution to the Spanish state, the *Cupo*, is calculated as the Basque share of state expenditure on competences the Basque Country has not itself assumed — defence, foreign affairs, the organs of central government — fixed by joint agreement between Basque and Spanish

⁴³¹ African Charter on Human and Peoples' Rights, 1981, art 20(1).

⁴³² See section 3.3.1.2 above; introduction to section 8 above.

⁴³³ African Charter on Human and Peoples' Rights, 1981, art 19.

representatives and revised only by negotiation, not by unilateral central decision.⁴³⁴ The arrangement is not new or experimental: it has operated, with periods of interruption, since 1878, and the Basque Country is today among the wealthiest regions in Spain by most conventional measures.⁴³⁵ South Tyrol offers a comparable precedent specifically involving an ethnic and linguistic minority rather than a territorial majority: the province retains some 90 per cent of taxes raised within it under a constitutionally-entrenched Autonomy Statute, remitting a fixed 10 per cent to Rome for the functions Rome continues to perform on the province's behalf, an arrangement widely regarded as one of the more successful minority power-sharing settlements in Europe.⁴³⁶ Scotland illustrates the same principle operating incrementally, negotiated between the Scottish and UK governments over successive Scotland Acts within an otherwise unitary state not unlike South Africa's own self-description: funding is adjusted using a "comparability factor" specific to each area of devolved spending, governed by a "no detriment" principle designed to ensure that devolution of power is not quietly undone by a mismatched devolution of funding.⁴³⁷ Belgium supplies a further, structurally distinct example directly relevant to a non-territorial community: its constitutionally-recognised linguistic Communities are full fiscal and constitutional actors in their own right, financed through the state's general system without requiring a defined exclusive territory of their own, alongside a constitutional requirement that changes to the underlying financing law secure an absolute majority within each linguistic group before they can take effect at all.⁴³⁸ Quebec supplies a related but distinct model again: rather than the centre calculating and remitting a function-proportionate share, Quebec collects its own income tax directly within domains it already constitutionally controls,

⁴³⁴ "The Quota Concept," *Ad Concordiam – Concierto Económico*; Ley 12/2002, de 23 de mayo, por la que se aprueba el Concierto Económico con la Comunidad Autónoma del País Vasco, art 52 ("Cargas del Estado no asumidas por la Comunidad Autónoma").

⁴³⁵ "The Government maintains the Basque quota (6.24%)," *The Corner*, 19 November 2022; Basque GDP per capita rankings, Eurostat regional data.

⁴³⁶ Autonomy Statute of Trentino–Alto Adige/Südtirol, 1972 (as amended); Alcock, A., *The South Tyrol Autonomy: A Short Introduction*, Südtirol Autonomy Experience.

⁴³⁷ "Fiscal Framework: Agreement between the Scottish and UK Governments," gov.scot; Fraser of Allander Institute, "Scottish Budget Guide," on the comparability factor.

⁴³⁸ Special law of 16 January 1989 on the financing of the Communities and Regions (Law No. 021010/1989); Constitution of Belgium, art 4.

an assertion of the same underlying principle by a different mechanism, unremarkable today after seven decades of practice.⁴³⁹

- [8.9] None of these arrangements is exotic, experimental, or peculiar to the community that holds it. Each has operated for decades, in some cases longer than South Africa's constitutional order has existed at all, within democracies not otherwise regarded as unstable or fiscally reckless. A territorial community with the administrative capacity to collect its own revenue may do so directly, as Quebec does; a community without that apparatus, or without a defined territory at all, will necessarily rely on a negotiated formula or a constitutionally recognised community structure instead, as the Basque Country, South Tyrol, and Belgium's linguistic Communities each do in different ways.
- [8.10] The mechanism differs according to a community's own circumstances. The underlying principle — contribution proportionate to function, determined by agreement rather than discretion — does not.
- [8.11] A further, and more novel, line of support for the same principle can be found closer to home in the text of the African Charter itself. Article 21 provides that "all peoples shall freely dispose of their wealth and natural resources," to be exercised "exclusively in the interest of the people" and never to the point of depriving a people "of the means of subsistence."⁴⁴⁰ The African Commission has already confirmed that this right is not confined to a state's dealings with a colonial or foreign power: in the Ogoni case, the Commission found a violation of Article 21 in the Nigerian government's own conduct toward the Ogoni people, an ethnic minority within Nigeria itself.⁴⁴¹ A sub-national community, not merely a colonised nation, can invoke Article 21 against its own state. Article 21's text and the jurisprudence built on it concern natural resources specifically — oil, minerals, land — not general tax revenue, and this paper does not pretend the distinction is immaterial. But the distinction goes to the *form* of wealth in question, not

⁴³⁹ Godbout, L. & Robert-Angers, M. (2023). "Policy Forum: How Does Quebec Exercise its Fiscal Autonomy?" *Canadian Tax Journal*, 71(3), 779–794.

⁴⁴⁰ African Charter on Human and Peoples' Rights, 1981, art 21(1)–(2).

⁴⁴¹ Social and Economic Rights Action Centre (SERAC) & Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) para 56.

to the underlying principle Article 21 exists to protect. The same logic that has already carried self-determination itself beyond its original, narrower context supplies the answer. Chapter 4 of this paper has shown that self-determination was once treated as a right confined to decolonisation, and that this confinement has not survived contact with state practice, judicial reasoning, or the considered view of the international community.⁴⁴² De Zayas put the point directly: self-determination "cannot be understood as a one-time choice, nor does it extinguish with lapse of time," and is exercised through "an ongoing democratic exercise" and "continuous dialogue," not a single historical moment.⁴⁴³ A right of this character does not remain frozen in the factual circumstances of its first recognition. If the right to control one's own wealth was first vindicated in the paradigm case of a colonised people and its natural resources, that is the context in which the principle happened to be tested first — not the outer limit of what the principle protects. This paper treats the point as a reinforcing one rather than a load-bearing one: the case for fiscal autonomy as a legitimate form of self-determination is already established by sections above, without needing Article 21 at all. What Article 21 adds is a textual home for the same conclusion, already reached by other means.

[8.12] Measured against this principle, South Africa's own system for dividing nationally-raised revenue among the provinces fails it, structurally and demonstrably. The provincial equitable share is calculated using a formula of six weighted components — education, health, a basic component, an institutional component, poverty, and economic activity — driven overwhelmingly by population, enrolment, and poverty data.⁴⁴⁴ Nowhere does the formula ask what a province has itself assumed responsibility for, or what the national government continues to do on a province's behalf. It is a needs-based redistribution formula, not a devolution-accounting one; it asks how many people live

⁴⁴² See section 4.4 above.

⁴⁴³ De Zayas, A. (2014). Report of the Independent Expert on the promotion of a democratic and equitable international order, A/69/272, para 3.

⁴⁴⁴ Donaldson, A. (2026). "South Africa's provincial and municipal fiscal allocations," Actuarial Society of South Africa; Financial and Fiscal Commission/National Treasury briefing to the Standing Committee on Appropriations, 17 September 2024.

in a province and how poor they are, not what has been devolved to that province and what has not.

[8.13] Provincial input into this system is real in form and negligible in substance. Section 214(2) of the Constitution requires the annual Division of Revenue Act to be passed only after consulting provincial governments and the Financial and Fiscal Commission, and after the Commission's recommendations have been "considered."⁴⁴⁵ The Commission's own constitutional description of itself is unambiguous: it is "a constitutional advisory institution" that "makes recommendations."⁴⁴⁶ Neither Parliament nor National Treasury is bound by them. The point is not academic. In July 2026, National Treasury froze R13.5 billion in equitable share transfers to 69 municipalities over the Commission's own stated legal objections to the move; the Commission could object, and did, but could not stop it.⁴⁴⁷ Where the Bill itself reaches the National Council of Provinces, the Western Cape's position is structurally no different: the Division of Revenue Bill is processed as a section 76 money bill, in which each province casts one vote among nine, determined by a mandate from its own legislature.⁴⁴⁸ No threshold, floor, or veto is available to a single province, however large its documented contribution or however well-founded its objection. The Western Cape's own permanent delegate to the NCOP has described his role in the process, in his own words, as one of needing "to advocate for fair funding" and to "recognise the provincial needs" — the language of persuasion, not of negotiation or agreement.⁴⁴⁹

[8.14] This is not a system in which the Western Cape, or any other province, negotiates the terms of its fiscal relationship with the centre. It is a system in which those terms are set for it. Measured against the Article 19 test this section has set out — genuine agency

⁴⁴⁵ Constitution of the Republic of South Africa, 1996, s 214(1)–(2).

⁴⁴⁶ Financial and Fiscal Commission, "About," ffc.co.za; Financial and Fiscal Commission Act 99 of 1997.

⁴⁴⁷ "Treasury defends R13.5bn funding freeze to 69 municipalities after FFC raises legal concerns," TimesLIVE, 23 July 2026.

⁴⁴⁸ Money Bills and Related Matters Act 9 of 2009; "Media Statement: NCOP Passes the Division of Revenue Bill," Parliament of South Africa, 26 May 2026.

⁴⁴⁹ Division of Revenue Amendment Bill: NCOP delegate and National Treasury briefing, Standing Committee on Appropriations, PMG, remarks of Mr Paul Swart (DA), Western Cape permanent delegate.

over the terms of contribution, not merely the amount contributed — South Africa's current arrangements place every province, and every non-territorial community with no province to speak through at all, on the wrong side of a line that international and comparative practice has already shown, repeatedly and over many decades, is capable of being drawn differently. What follows in this chapter examines what a negotiated alternative would look like for the Western Cape and for Afrikaners respectively — communities differently positioned to exercise the same underlying right, but entitled, in principle, to exercise it in full.

8.2 Fiscal autonomy for the Western Cape

[8.15] Section 6.1 above established that the people of the Western Cape qualify as a people as envisaged by international law, applying the Kirby Description's objective and subjective elements and concluding that the province's shared ideological outlook, territorial connection, and common economic life, together with its own constitutional self-identification as "the people of the Western Cape," place the matter beyond reasonable doubt.⁴⁵⁰ Section 8.1 above established, independently of that case study, that fiscal autonomy is not a separate or additional right requiring its own justification, but the practical condition on which every other form of self-determination examined in this paper actually depends — and that this principle is already a workable, tested feature of comparative constitutional practice, not a novel proposition.⁴⁵¹

[8.16] What follows in this chapter does not, therefore, need to reprove either point. The Western Cape's qualification as a people, and fiscal autonomy's status as a legitimate and necessary expression of the right to self-determination, are both already established. What remains is to show that the general principle set out in section 8.1 applies to the Western Cape's own circumstances with particular, and mounting, force — first by examining the structural terms on which the Western Cape currently participates in South Africa's fiscal system, then by quantifying what those terms cost

⁴⁵⁰ See section 6.1 above.

⁴⁵¹ See section 8.1 above.

the province in practice, and finally by considering what a negotiated alternative might look like, and how it might be pursued.

- [8.17] The Western Cape is, in this sense, the least contentious possible application of the principle 8.1 established. It is not a novel or speculative case. It is a qualifying people, already recognised as such earlier in this paper, to which a fiscal principle already shown to be sound in law and in international practice applies directly.

8.2.1 The Current System Examined

- [8.18] Section 8.1 above established that South Africa's provincial equitable share formula is needs-based rather than function-tracking, that the Financial and Fiscal Commission's role is advisory rather than binding, and that no single province holds any meaningful voice in the Division of Revenue Bill's passage through the National Council of Provinces.⁴⁵² Applied to the Western Cape specifically, each of these features operates exactly as the general critique predicts — and one respect in which South African law already, if unused, permits something better makes the case for reform harder to resist rather than easier to dismiss.
- [8.19] The Western Cape's own Provincial Equitable Share allocation illustrates the formula's insensitivity to what the province actually contributes with particular clarity, and this is not a claim advanced only by this paper — it is one the Western Cape's own government has repeatedly made in its own right. Between 2015 and 2024, the province's share of national personal income tax assessed by SARS rose from 16.4% to 18.4%, while its population grew by 19.6% over the same period.⁴⁵³ Its Provincial Equitable Share allocation, over the same decade, moved from 10.0% to barely 10.3% of the national total.⁴⁵⁴ Premier Alan Winde has himself stated that, over the four budgets from 2021 alone, the Western Cape's equitable share was cut by R8.4 billion in real terms, and has summarised the resulting position in these terms: "our funding shrinks, [while] our

⁴⁵² See section 8.1 above.

⁴⁵³ Econometrix, *Western Cape Fiscal Flows*, 13 July 2026, Part II ("Western Cape"), 19–20; Premier Alan Winde, Western Cape State of the Province Address 2025, 26 February 2025.

⁴⁵⁴ Econometrix, *ibid.*; "Western Cape supports Division of Revenue as National Treasury responds to provincial recommendations," DA WCP Newsroom, 17 May 2026.

responsibilities grow."⁴⁵⁵ The Western Cape's own health department went further still in 2024, stating formally that the national formula "has decreased the percentage allocation to the Western Cape despite the fact that its percentage population and burden of disease has increased" — a complaint serious enough that the Premier threatened court action over it.⁴⁵⁶ The formula did not merely fail to adjust to the Western Cape's growing fiscal contribution and growing population simultaneously. As section 8.1 above demonstrated, it was never designed to: its components are driven by population, enrolment, and poverty data taken in the aggregate, not by what a province generates, nor — on the Western Cape's own repeated, official experience — reliably, even by how its population is actually changing in real time.

[8.20] Nor is the Western Cape's position within the wider process any different from that of any other province, however large its documented contribution or however loudly its own government has objected. The Division of Revenue Bill, which gives the equitable share formula its annual effect, passes through the National Council of Provinces as a section 76 money bill, with each province casting a single vote determined by a mandate from its own legislature.⁴⁵⁷ The Western Cape therefore holds one vote among nine, irrespective of the scale of its contribution to national revenue. No threshold, floor, or veto exists for a province whose contribution to the system materially exceeds its return from it. The Western Cape's own permanent delegate to the NCOP has himself described his function in the process, in his own words, as needing "to advocate for fair funding" — the language of persuasion addressed to eight other votes, not of a negotiating party with any capacity to bind the outcome.⁴⁵⁸

[8.21] What makes this arrangement harder to defend, not easier, is that South African law already provides a mechanism through which a province could begin to exercise genuine fiscal agency, and it has simply never been used. Section 228(1) of the Constitution

⁴⁵⁵ Outcomes of regular Western Cape Cabinet meeting, Western Cape Government, 3 December 2024.

⁴⁵⁶ "Alan Winde threatens national government with court action if Western Cape is not given more money," *The Star*, 14 August 2024.

⁴⁵⁷ Money Bills and Related Matters Act 9 of 2009; see section 8.1 above.

⁴⁵⁸ Division of Revenue Amendment Bill: NCOP delegate and National Treasury briefing, Standing Committee on Appropriations, PMG, remarks of Mr Paul Swart (DA), Western Cape permanent delegate.

grants every province the right to impose a flat-rate surcharge on the national personal income tax base.⁴⁵⁹ Unlike the equitable share, this is not something a province must request from national government: no ministerial or presidential authorisation is required, only the regulatory framework Parliament enacted in 2001 to give the power practical effect.⁴⁶⁰ The Financial and Fiscal Commission itself, at the time, described a provincial income tax surcharge as "the only viable source for provincial revenue."⁴⁶¹ In the twenty-eight years since section 228 came into force, no province has ever exercised it.

- [8.22] The reason is not difficult to identify. A surcharge imposed without any corresponding adjustment to a province's equitable share allocation would function as a straightforward tax increase on that province's residents, making the power politically indefensible. Section 228 has therefore existed, since 1997, as a power with no practical route to being exercised without harming the people it was meant to empower. This is not evidence that fiscal autonomy is unworkable within South Africa's existing constitutional architecture. It is evidence that a genuine transfer of fiscal agency requires more than the power to add a new charge — it requires a negotiated basis for the relationship as a whole, of the kind section 8.1 above showed operating successfully in comparable systems elsewhere, and which section 8.2.4 below considers in detail.

8.2.2 The Quantum

- [8.23] Section 8.2.1 above established that South Africa's provincial equitable share formula bears no relationship to what a province actually generates, or to what it has itself

⁴⁵⁹ Constitution of the Republic of South Africa, 1996, s 228; Provincial Tax Regulation Process Act 53 of 2001; Financial and Fiscal Commission, Seventh Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa (1997); Khumalo, B. and Mokate, R., "Republic of South Africa," Forum of Federations, tax assignment table for provincial own-revenue sources, listing no personal income tax surcharge among actual provincial tax categories; Gauteng Provincial Treasury, Own Revenue Enhancement Strategy, still describing the section 228 surcharge as an unexercised, prospective option as of 2020.

⁴⁶⁰ Provincial Tax Regulation Process Act 53 of 2001; Seventh Interim Report of the Commission of Inquiry, National Treasury, quoting the Financial and Fiscal Commission's assessment of a provincial PIT surcharge as "the only viable source for provincial revenue."

⁴⁶¹ Provincial Tax Regulation Process Act 53 of 2001; Seventh Interim Report of the Commission of Inquiry, National Treasury, quoting the Financial and Fiscal Commission's assessment of a provincial PIT surcharge as "the only viable source for provincial revenue."

assumed responsibility for, and that the Western Cape's own government has explicitly and repeatedly raised this concern. The scale of this structural failure is significant.

[8.24] Independent economic modelling conducted by Econometrix, jointly commissioned by the Cape Independence Advocacy Group and Lex Libertas, measures it directly.⁴⁶² Using a provincial attribution framework applied to publicly available government and Statistics South Africa data, and excluding the distortionary effects of national borrowing and debt-servicing costs, the analysis finds that the Western Cape generated approximately 36% more government revenue than it received back in attributable public expenditure over the period 2015 to 2024 — an average net fiscal contribution of some R98 billion per year.⁴⁶³ All figures are expressed in inflation-adjusted terms; the trends identified below are accordingly real, not merely nominal, movements. This is not a static or historical figure. The net contribution has grown consistently over the period: by 2024, it had reached approximately R140 billion for that year alone, a real increase of some 100% since 2015 — more than double the rate of increase recorded over the same period by Gauteng, South Africa's only other net contributor province.⁴⁶⁴ Expressed per household, the burden this represents rose from an average of approximately R55,695 per year across the decade to R74,437 in 2024 alone.⁴⁶⁵

[8.25] The scale of this revenue concentration in just two provinces is worth setting against the country as a whole. Two provinces, Gauteng and the Western Cape, together generate some 57% of all revenue raised nationally, while together accounting for only 47% of national GDP and 37% of the population — the only two provinces in the country whose share of revenue raised nationally exceeds their share of national GDP.⁴⁶⁶ Every other province is, on this analysis, a net beneficiary of the resulting redistribution to a greater or lesser degree.⁴⁶⁷ This is not, in itself, an unusual feature of a fiscal system; wealthier

⁴⁶² Econometrix, *Western Cape Fiscal Flows*, 13 July 2026, commissioned jointly by the Cape Independence Advocacy Group and Lex Libertas.

⁴⁶³ *Ibid.*, Part I ("Results").

⁴⁶⁴ *Ibid.*, Part I ("Results"), ("Changes over time").

⁴⁶⁵ *Ibid.*, Part I ("Household-adjusted Net Fiscal Position").

⁴⁶⁶ *Ibid.*, Part I ("Results").

⁴⁶⁷ *Ibid.*

regions subsidise poorer ones in most functioning states, including several of the very comparator systems examined in section 8.1 above.⁴⁶⁸ What distinguishes the Western Cape's position is not the fact of net contribution, which this paper does not dispute, but its scale, its rate of increase, and the complete absence, established in section 8.2.1 above, of any negotiated mechanism through which the province has a voice in either.

- [8.26] Article 21 of the African Charter provides that "all peoples shall freely dispose of their wealth and natural resources," to be exercised "exclusively in the interest of the people."⁴⁶⁹ Section 8.1 above established that this right extends, by the same logic that has already carried self-determination itself beyond its original confines, to a people's fiscal wealth more broadly.⁴⁷⁰ On that reading, the figures above represent a conservative measure of the wealth with which Article 21 is concerned.

8.2.3 Funding an Ideological Project the Western Cape Opposes

- [8.27] Article 20 of the African Charter provides that a people shall "freely determine their political status" and "pursue their economic and social development according to the policy they have freely chosen."⁴⁷¹ Section 8.1 above read this provision as requiring, at minimum, that a chosen policy be capable of being funded — that a right to choose one's own development path is hollow if the resources needed to pursue it may be withheld at another's discretion.⁴⁷² What follows makes a sharper and more specific claim. The Western Cape's position is not merely that its own chosen policies go unfunded. It is that the revenue quantified in section 8.2.2 above is being used to fund a governing project the majority of Western Cape voters have consistently and explicitly rejected, at every opportunity to do so, for more than three decades.
- [8.28] That project is not a matter of inference. Section 3.3.1.1 above set out, from the ANC's own record and that of its senior officials, that its constitutional and governing

⁴⁶⁸ See section 8.1 above.

⁴⁶⁹ African Charter on Human and Peoples' Rights, 1981, art 21(1)–(2).

⁴⁷⁰ See section 8.1 above.

⁴⁷¹ African Charter on Human and Peoples' Rights, 1981, art 20(1).

⁴⁷² See section 8.1 above.

programme has never been merely administrative.⁴⁷³ Centralised state authority was understood, on the ANC's own account and that of the SACP with which its leadership was substantially intertwined during the negotiations, as instrumentally necessary to "the fundamental restructuring of South African society."⁴⁷⁴ That objective has been restated by the ANC at successive national conferences since 1994, most recently in its commitment to consolidating and extending its hold over "all centres of power" — state, economic, and civil-societal alike.⁴⁷⁵ This is the National Democratic Revolution: a specific, avowed, and continuing project to remake South African society along explicitly transformative lines, oriented toward a state-directed rather than a market-ordered economy, and toward the eventual, if gradual, dissolution of forms of independent power the governing project does not itself control.

[8.29] The majority of Western Cape voters have never endorsed this project, through any of its three successive parliamentary vehicles, in any national election since 1994.⁴⁷⁶ This is not a claim about a single policy dispute. Section 3.3.1.5 above demonstrated that the African Nationalist bloc — the ANC and its subsequent breakaway parties, the EFF and MK — has never once fallen below 60% of the national vote, while falling below a third of the vote within the Western Cape specifically, a gap that has widened rather than narrowed with each successive election.⁴⁷⁷ This rejection, in other words, is not opposition to this or that policy the governing project has produced. It is a sustained, undeviating rejection of the project itself.

[8.30] Nor is that rejection unreasoned. The project's own record, measured not against South Africa's own past but against its peers, does not bear out its central premise — that centralised, state-directed transformation delivers superior development outcomes to

⁴⁷³ See section 3.3.1.1 above.

⁴⁷⁴ Steytler, N., & Mettler, J. (2001). Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy. *Publius: The Journal of Federalism*, 31(4), 93–94; South African Communist Party (1962), *The Road to South African Freedom*; see section 3.3.1.1 above.

⁴⁷⁵ African National Congress (1997), *Strategy and Tactics of the African National Congress*, 50th National Conference, Mafikeng; African National Congress (2017), *Strategy and Tactics of the African National Congress*, 54th National Conference, paras 142–143; see section 3.3.1.1 above.

⁴⁷⁶ See section 3.2.1 above.

⁴⁷⁷ See section 3.3.1.5 above.

the alternative it displaced. On growth, employment, public debt, and violent crime alike, South Africa has significantly underperformed its own comparator group over the past decade.⁴⁷⁸ None of this is offered as a comprehensive verdict on thirty years of governance, still less as the basis of the argument advanced in this section: the majority of Western Cape voters' entitlement to reject the governing project does not depend on that project having failed, and would stand equally were its record more favourable. It is offered only to show that this rejection is not the reflexive discontent of a wealthy minority unwilling to share its prosperity. It is a judgment about the project's own performance, measured against its own stated peers, and it is a judgment the underlying data does not obviously contradict.

[8.31] The specific policy examples already canvassed elsewhere in this paper illustrate the project's character with more precision than the macro data alone can supply. Race-based classification and quotas in employment and procurement, extended and entrenched rather than reduced since 1994, illustrate the project's core commitment to managed demographic outcomes over neutral process.⁴⁷⁹ The maintenance of loss-making state monopolies such as Eskom and SAA, resisted from privatisation despite their own well-documented failures, illustrates its preference for state-directed economic control over market allocation.⁴⁸⁰ The consistent refusal to devolve policing, examined in detail in sections 6.1 and 8.2.1 above, illustrates its determination to retain "all centres of power" in the most literal sense available to a government — control over the means of coercion itself.⁴⁸¹ Each of these is not a discrete grievance to be weighed

⁴⁷⁸ World Bank data shows South African GDP growth of just 0.7% per year over the past decade — "much slower than other middle-income countries" — leaving real GDP per capita below its 2007 level ("South Africa," Overview, [worldbank.org](https://data.worldbank.org/country/za)). On employment, the OECD states that South Africa has "the lowest employment rate and the highest unemployment rate among G20 economies," with an employment rate of 40% against a 60% average among emerging G20 economies specifically (OECD, *Economic Surveys: South Africa 2025*). Government debt has risen by nearly 30 percentage points of GDP over the past decade, against 17 points across emerging markets generally and 9 points across advanced economies (Deloitte, "South Africa Economic Outlook," June 2025). Violent crime, while showing a genuine recent improvement, remains extraordinary by international standards: 58 murders recorded per day in the most recent reporting quarter ("South Africa murder rate falls 9.5% in Q4 crime statistics," *Swisher Post*, 23 May 2026, reporting SAPS quarterly crime statistics for January–March 2026).

⁴⁷⁹ See section 3.2.1 above.

⁴⁸⁰ See section 3.2.1 above.

⁴⁸¹ See sections 3.3.1.1, 6.1, 8.2.1 above.

on its own terms. Each is a specific, concrete instance of the same general project the majority of Western Cape voters have rejected at every election since the project's own founding document called for it.

[8.32] The result is that the revenue identified in section 8.2.2 above does not merely leave the province without a voice in its own allocation. It actively finances the continuation of a governing project the majority of Western Cape voters have never endorsed, have consistently opposed, and have good reason, on the project's own record against its own stated peers, to continue opposing. This is not an absence of funding for a freely chosen policy, of the kind section 8.1 above identified as sufficient in itself to hollow out the right in Article 20. It is something more exacting: the conscription of a people's own extracted wealth into the active service of the alternative it has repeatedly and explicitly declined to choose.

8.2.4 A Negotiated Alternative

[8.33] Sections 8.2.1 to 8.2.3 above have established that the Western Cape's current fiscal relationship with the national government is set unilaterally, without negotiated agreement; that the resulting extraction is large and growing; and that the funds extracted are used to finance a governing project the majority of the province's own voters have consistently rejected. Section 8.2.4 considers what a negotiated alternative, consistent with the principle established in section 8.1 above, might actually require.

8.2.4.1 What Section 228 Shows, and What It Does Not

[8.34] South Africa's Constitution already contains an acknowledgment that provincial fiscal agency is not foreign to its own design. Section 228(1) grants every province the right to impose a flat-rate surcharge on the national personal income tax base, requiring no permission from national government beyond the regulatory framework Parliament enacted in 2001 to give the power practical effect.⁴⁸² The Financial and Fiscal

⁴⁸² Constitution of the Republic of South Africa, 1996, s 228(1)(b); Provincial Tax Regulation Process Act 53 of 2001.

Commission itself, at the time, described a provincial income tax surcharge as "the only viable source for provincial revenue."⁴⁸³ No province has ever used it.

[8.35] The reason, examined in section 8.2.1 above, is structural rather than incidental. A surcharge under section 228 is, by its own terms, additive: it is levied on top of the existing national rate. A national rate of, say, 30% combined with a five-point provincial surcharge does not remain 30% for the residents of the province concerned. It becomes 35%. Section 228 grants a province the power to add such a surcharge; it neither grants, nor requires, any corresponding reduction in the national rate applying to that province's own residents. Absent such a reduction, the power's only practical effect is to increase, unilaterally and visibly, the total tax burden borne by the province's own population — which is neither a workable outcome nor a legitimate one, and explains precisely why the power has sat unused for twenty-eight years.

[8.36] Section 228 is, in this sense, valuable evidence rather than a workable solution in its own right. It shows that the South African constitutional order already contemplates provinces exercising genuine fiscal agency over their own residents' taxation. It does not, on its own text, supply the further element — a mechanism by which the transfer of that agency does not simply increase what is owed — that would be required to make the power usable.

8.2.4.2 Two Comparative Mechanisms, One Underlying Reform

[8.37] The reform this section considers is not, principally, a change in what any individual taxpayer owes. It is a change in the *basis* on which the Western Cape's ongoing fiscal relationship with the national government is calculated: from the needs-based, unilaterally-set equitable share formula examined and found wanting in section 8.2.1 above, to a negotiated formula tracking what the national government continues to do on the province's behalf — defence, foreign affairs, debt service, and the organs of national government — agreed and periodically revised jointly rather than set

⁴⁸³ Seventh Interim Report of the Commission of Inquiry, National Treasury, quoting the Financial and Fiscal Commission's assessment of a provincial PIT surcharge as "the only viable source for provincial revenue"; see section 8.2.1 above.

unilaterally by National Treasury.⁴⁸⁴ Comparative practice, examined in detail in section 8.1 above, supplies two distinct models for how such a reform might actually be realised, differing principally on a single question: whether the province itself sets the applicable tax rate, or whether national government continues to do so.

[8.38] *The Basque model: national rate-setting, negotiated division.* Under the Basque *Concierto Económico*, the province's contribution to the central state — its *Cupo* — is calculated as its share of state expenditure on competences it has not itself assumed, fixed by joint agreement and periodically revised by the same process.⁴⁸⁵ Applied to the Western Cape, this model would require no change to how national government sets or collects any national tax, and no new provincial collection apparatus. What would change is the formula governing the Provincial Equitable Share transferred back to the Western Cape: fixed at the point of agreement and thereafter indexed to a national benchmark, so that any divergence between the Western Cape's own revenue growth and that benchmark — the precise divergence documented in section 8.2.2 above — accrues to the province rather than being reabsorbed into the national pool. This is the less institutionally disruptive of the two mechanisms, since it leaves rate-setting and collection exactly where they are today, and adjusts only the allocation of what results.

[8.39] *The Scottish model: provincial rate-setting, negotiated offset.* Scotland's approach differs from the Basque model in the respect that matters most: the Scottish Parliament itself sets the rates and bands applying to Scottish taxpayers' income tax, replacing rather than supplementing the UK-wide rate for that purpose, with HMRC continuing to collect on Scotland's behalf through the ordinary PAYE system.⁴⁸⁶ The corresponding block grant is then adjusted using a baseline fixed at the point of transfer and indexed thereafter to revenue growth across the rest of the UK, so that Scotland — not Westminster — bears the consequences, favourable or unfavourable, of its own rate-

⁴⁸⁴ See section 8.1 above.

⁴⁸⁵ Ley 12/2002, de 23 de mayo, por la que se aprueba el Concierto Económico con la Comunidad Autónoma del País Vasco, art 52 ("Cargas del Estado no asumidas por la Comunidad Autónoma"); see section 8.1 above.

⁴⁸⁶ HM Revenue & Customs, "Scottish Income Tax," gov.uk, available at: <https://www.gov.uk/scottish-income-tax>; "Fiscal Framework: Agreement between the Scottish and UK Governments," gov.scot.

setting decisions. Applied to the Western Cape, this model would go further than the Basque approach: the Western Cape Provincial Parliament itself would set the applicable rate for personal income tax, and potentially other tax bases where a comparable provincial base can be identified, with the national rate applicable to Western Cape taxpayers correspondingly reduced, and the Provincial Equitable Share adjusted on the same indexed basis described above. This mechanism carries greater institutional and administrative demands than the Basque model, but it delivers something the Basque model, on its own, does not: direct provincial control over the rate-setting decision itself, and with it, direct democratic accountability to the Western Cape's own voters for whatever rate is ultimately chosen.

8.2.4.3 Choosing Between Them

[8.40] The indexed, function-tracking formula is common to both mechanisms, and the comparative precedent for it, examined in section 8.1 above, is well established. The choice between the Basque approach — national rate-setting, provincial allocation reformed — and the Scottish approach — provincial rate-setting, national collection retained — is a narrower and more practical question, turning principally on institutional readiness, administrative capacity, and political preference, and is properly a matter for negotiation between the Western Cape and national government rather than a question this paper resolves in advance. What this section has sought to establish is narrower, but sufficient for the purposes of this chapter: that a negotiated alternative to the current arrangement is neither hypothetical nor unprecedented, that South Africa's own Constitution already gestures toward the underlying principle without yet supplying the architecture to give it effect, and that at least two distinct, real-world-tested mechanisms exist by which that architecture could be constructed.

8.2.5 Assertion, Obligation, and Non-Compliance

[8.41] Sections 8.2.1 to 8.2.4 above have established that the Western Cape's current fiscal position is set unilaterally rather than negotiated, that the resulting extraction is substantial and growing, that it finances a governing project which the majority of the province's own voters have consistently rejected, and that at least two real, working

mechanisms exist by which a negotiated alternative could be constructed. What remains is the question addressed for policing and education in sections 6.1 and 6.2 above: how such an assertion would actually be made, what obligation it places on the state, and what follows if that obligation is not honoured.

8.2.5.1 Assertion

[8.42] The mechanism for assertion is already established and requires no new procedural innovation. Section 6.1 above recorded that the Western Cape Provincial Parliament's own legal opinion, given in response to the Western Cape People's Bill, confirmed that an assertion of the right to self-determination may properly be made by ordinary motion in the WCPP, notwithstanding that any resulting legislative change must ultimately be given effect nationally.⁴⁸⁷ There is no reason this route would be any less available for a fiscal assertion than for the policing assertion already examined. A motion asserting the Western Cape's right to fiscal self-determination, calling on the national government to enter negotiations toward one of the two mechanisms set out in section 8.2.4 above, would constitute a clear, low-cost, constitutionally unremarkable first step, consistent with precedent the WCPP has itself already established.

8.2.5.2 Obligation

[8.43] The obligation this would place on the national government is the same obligation established for every other legitimate assertion of self-determination examined in this paper: an obligation to accommodate the assertion, subject only to the rights of others, of which good-faith negotiation is the necessary means, not a substitute end in itself.⁴⁸⁸ As sections 4.6 and 6.1 above have shown, a state confronted with a legitimate assertion of this right may not simply absorb it into an existing consultative process and decline to alter the substance of what that process produces; it must negotiate toward accommodation. In the fiscal context specifically, this has real content. As section 8.2.1 above demonstrated, the Western Cape's existing avenues for raising this precise concern — consultation with the Financial and Fiscal Commission, the annual Division

⁴⁸⁷ See section 6.1 above.

⁴⁸⁸ See sections 4.6, 6.1, 8.1 above.

of Revenue process, the province's own NCOP delegation — already exist, and the province has already used every one of them repeatedly, without securing any change to the underlying formula.⁴⁸⁹ An assertion of the right to fiscal self-determination is not, therefore, a request for a new channel through which to repeat an existing complaint. It is an assertion that the national government's obligation extends to negotiating in good faith toward a genuinely negotiated, function-tracking basis for the relationship — of the kind illustrated, though not limited to, the two mechanisms set out in section 8.2.4 above — not merely to continuing to receive representations about a formula it retains sole discretion to set.⁴⁹⁰

8.2.5.3 Non-Compliance

- [8.44] Should the national government decline to accommodate a legitimate assertion of this right, or purport to negotiate without any genuine intent to reach agreement, the consequences already established in section 6.1 above apply without modification. The international legal consequences of a state failing to honour a legitimate assertion of self-determination, and the resulting conditionality of the safeguard clause examined in section 4.6 above, are not specific to any one domain of self-determination, and apply to a refused fiscal assertion exactly as they apply to a refused assertion over policing or education.⁴⁹¹
- [8.45] This paper neither recommends nor discourages any particular course. Its purpose is to identify the legal consequences of state non-compliance and to record the forms of political response already present within South African public life.
- [8.46] Fiscal non-compliance of this kind is neither a novel proposition in South African politics nor confined to any one constituency. In January 2019, then-Western Cape Premier Helen Zille repeatedly and publicly called for a national "tax revolt," explicitly framed as a means of forcing an unresponsive and unlawfully-conducted government to account, telling voters directly that a further electoral mandate for a government failing to

⁴⁸⁹ See section 8.2.1 above.

⁴⁹⁰ See section 8.2.4 above.

⁴⁹¹ See sections 4.6, 6.1 above.

prosecute state capture would leave no option but "additional methods."⁴⁹² The proposal drew both support and criticism from across the political spectrum, and even Zille's own party publicly distanced itself from it — evidence that the idea is genuinely and seriously contested in South African public life, not that it is fringe or unprecedented.⁴⁹³ AfriForum has since gone further still, formally declaring what it terms a "dispute" with the South African government over the use of public funds, and stating in its own published tax manifesto that "a general tax revolt will be unavoidable" absent reform.⁴⁹⁴ Tellingly, AfriForum's own stated alternative to such a revolt is not a request for lower taxes, but a demand for "greater tax autonomy for communities" — the same underlying principle this paper has argued for throughout this chapter, advanced independently by a civil society organisation with no connection to this paper's own analysis.⁴⁹⁵ The Institute of Race Relations has since catalogued the practical forms such resistance has taken or been proposed to take elsewhere in South Africa, including taxpayers redirecting funds through independent trust structures to fund services the state has failed to provide, a pattern already documented in this paper in relation to LEAP and the parallel institutions examined in section 6.2 above.⁴⁹⁶

[8.47] Should the national government's obligation under this chapter go unmet, the Western Cape would not be without genuine and precedented recourse. Recourse of this kind is already a live and mainstream feature of South African political debate, not a novel escalation introduced by this paper.

8.2.5.4 Conclusion

[8.48] Section 8.2 has tested this chapter's founding proposition against the Western Cape's own specific circumstances. It has established that the province's current fiscal

⁴⁹² "Zille slammed over tax boycott call," IOL/Weekend Argus, 27 January 2019; "Helen Zille wants you to stop paying taxes - this is why," News24, 27 January 2019.

⁴⁹³ "A tax revolt is already happening in South Africa," BusinessTech, 28 January 2019 (recording the Democratic Alliance's formal statement that "a tax revolt would be illegal and against the rule of law").

⁴⁹⁴ AfriForum, "AfriForum publishes tax manifesto; declares dispute with government over taxes," 2021.

⁴⁹⁵ Ibid.

⁴⁹⁶ "Communities in South Africa are actively investigating tax revolts," BusinessTech, 27 May 2021 (Institute of Race Relations); see section 6.2 above.

relationship with the national government is set unilaterally rather than negotiated; that the resulting extraction is substantial, growing, and used to finance a governing project which the majority of the province's own voters have consistently rejected; that a negotiated alternative is neither hypothetical nor unprecedented, but modelled on real, working comparative systems; and that the mechanism for asserting this claim already exists within South Africa's own constitutional order. Should the national government engage with that assertion in good faith, the Western Cape stands to hold genuine fiscal agency for the first time since 1994 — not as a grant made at the discretion of National Treasury, but as of right, negotiated and secured. Should it decline to do so, the same consequences already shown, in Chapter 6 above, which follow a bad-faith refusal to accommodate self-determination in any other domain, follow here as well.

8.3 Afrikaners

[8.49] Section 6.2 above established that Afrikaners constitute a people as envisaged by international law, applying the Kirby Description's objective and subjective elements and concluding that Afrikaners meet the threshold by any reasonable measure.⁴⁹⁷ This section addresses fiscal autonomy specifically, for a people with no defined territory, no provincial government, and no officially published fiscal base of the kind section 8.2 above was able to quantify for the Western Cape — though the state itself holds the underlying data from which such a figure could, if it chose to, be produced.

[8.50] Section 8.3 considers the case for at least some degree of fiscal autonomy for the Afrikaner people through four analytical stages, before setting out a concrete mechanism by which the resulting entitlement could be exercised. These stages are: recognition that a people's cultural survival depends on funded institutions; understanding why that dependency engages Articles 19 and 20 of the African Charter directly; demonstrating through state practice that recognising and funding a non-territorial cultural community's own institutions is neither novel nor untested but an established feature of several functioning democracies; and reviewing South Africa's own domestic arrangements, to demonstrate that this principle is already recognised

⁴⁹⁷ See section 6.2 above.

there for other communities, but not for Afrikaners. Having done so, this section considers how the resulting entitlement might actually be asserted.

8.3.1 Principle: Funding as the Condition of Cultural Survival

[8.51] Article 20 of the African Charter provides that a people shall "pursue their economic and social development according to the policy they have freely chosen."⁴⁹⁸ Section 8.1 above read this as requiring, at minimum, that a chosen policy be capable of being funded.⁴⁹⁹ For a territorial community exercising self-determination over policing or fiscal policy, an unfunded policy is a policy denied in practice though not in form. For a cultural community whose self-determination is exercised primarily through its institutions — its schools, its language bodies, its cultural and educational associations — the same failure carries a more severe consequence. It is not merely that a chosen policy goes unrealised. It is that the institutions through which the culture itself is transmitted to the next generation cease to be viable at all.

[8.52] This is not a new argument for this paper. Section 6.2 above, addressing Afrikaans-medium education specifically, put the point directly: "a culture that is not passed on does not develop; it ends."⁵⁰⁰ That section was concerned with a single institutional battleground — the survival of single-medium Afrikaans schools under the Basic Education Laws Amendment Act. The principle it identified is not, however, confined to schools. It applies with equal force to every institution through which a culture sustains its own continuity: language and cultural bodies, the arts festivals and literary institutions already canvassed in section 6.2 above,⁵⁰¹ and the parallel structures — Akademia, Sol-Tech — Afrikaners have built where the state's own institutions have become unavailable or unwelcoming to them.⁵⁰² Each depends on funding to remain

⁴⁹⁸ African Charter on Human and Peoples' Rights, 1981, art 20(1).

⁴⁹⁹ See section 8.1 above.

⁵⁰⁰ See section 6.2 above.

⁵⁰¹ See section 6.2 above.

⁵⁰² See section 6.2 above.

operational. None can operate, develop, or transmit what it exists to transmit without it.

- [8.53] Article 19 of the same Charter supplies the reason this dependency matters constitutionally, not merely practically. "All peoples shall be equal," and "nothing shall justify the domination of a people by another."⁵⁰³ A people whose cultural survival depends, in practice, on the continued financial forbearance of a state it does not control, and which it has no guaranteed means of compelling to fund the institutions its own survival requires, holds its continuity at another's discretion.
- [8.54] This is not a hypothetical concern. It is South Africa's own recent and current history. The Volkstaatraad, established under the Accord on Afrikaner Self-Determination as the one state-recognised institutional expression of Afrikaner self-determination, had its funding terminated by the state in 1999, without the state ever substantively responding to the recommendations the Council had itself been established to produce.⁵⁰⁴ A quarter of a century later, the pattern has repeated in a different domain. In September 2025, the Minister of Sport, Arts and Culture withdrew state funding from a broad range of the country's major cultural festivals, stating that the reallocation was intended "to open funding to 'other language festivals too.'"⁵⁰⁵ Among the festivals affected were several of the country's major Afrikaans cultural events — the Klein Karoo Nasionale Kunstefees, the Woordfees, Innibos, Aardklop, and the Vrystaat Kunstefees, several of which this paper has already cited as evidence of the vitality of Afrikaans cultural life. Afrikaners believed they had been disproportionately affected, an assertion independent commentary outside Afrikaner civil society itself has supported.⁵⁰⁶ Neither

⁵⁰³ African Charter on Human and Peoples' Rights, 1981, art 19.

⁵⁰⁴ Volkstaat Council Act 30 of 1994; Parliamentary Monitoring Group (1999), Department of Constitutional Affairs Budget Review, Constitutional Affairs Portfolio Committee, 3 March 1999; see section 3.3.1.2 above.

⁵⁰⁵ "Afrikaans festivals in limbo after government pulls funding," *Newsday*, 24 September 2025; "Backlash grows against Gayton McKenzie over cultural festival funding cuts," *Cape Times*, 18 September 2025; "Gayton McKenzie dodges parliament questions on R110 million arts funding," *Newsday*, 11 February 2026 (quoting McKenzie's stated justification: "it is time to open funding to 'other language festivals too'").

⁵⁰⁶ "Gayton McKenzie's broken promises risk festivals collapse and job losses," *Daily Maverick*, 27 September 2025 ("It is significant that all these festivals... are Afrikaans-language, which may have piqued McKenzie's interest"); see section 6.2 above (KKNK).

episode required any change in the law. Both required only a decision, taken unilaterally and at the state's sole discretion, to withdraw funding the affected institutions had no independent means of replacing.

[8.55] This is the same structural condition section 8.1 above identified as "self-determination on licence" in the fiscal domain generally, applied here to its most severe possible consequence: not merely that a chosen policy cannot be pursued, but that the community pursuing it may, over enough time and enough institutional attrition, cease to reproduce itself as a distinct people at all.

[8.56] None of this requires Afrikaners to demonstrate an immediate or existential crisis to establish the principle. It requires only that funding be recognised as what section 6.2 above has already shown it to be for education specifically, and what this section extends to Afrikaner cultural institutions generally: not a convenience attached to self-determination, but one of its necessary conditions.

8.3.2 State Practice: Non-Territorial Cultural Communities Elsewhere

[8.57] The principle established in section 8.3.1 above — that a people's cultural survival depends on funded institutions, and that funding held at another's discretion leaves that survival correspondingly insecure — is not a novel proposition tailored to the Afrikaner case. It is already recognised, in different institutional forms, in states whose democratic credentials are not in question. Two distinct features of that recognition are relevant here: first, that a cultural community without a defined territory of its own can nonetheless hold genuine constitutional and fiscal standing; and second, that a mechanism already exists, tested across several jurisdictions over several decades, by which individual citizens may direct a portion of their own tax contribution toward the cultural or civil-society institutions of their choosing.

8.3.2.1 Non-Territorial Constitutional Standing: Belgium

[8.58] Belgium's federal structure recognises two distinct kinds of constituent unit: territorial Regions — Flanders, Wallonia, and Brussels-Capital — and linguistic Communities —

Flemish, French-speaking, and German-speaking.⁵⁰⁷ The Communities are not subordinate to the Regions, nor are they a lesser or merely symbolic category. They are full constitutional actors in their own right, holding legislative competence over precisely the domains section 8.3.1 above identified as the institutional infrastructure of cultural survival: education, language, and cultural affairs.⁵⁰⁸ The German-speaking Community in particular, though it exercises its powers within a defined territory — the German-speaking municipalities of Liège province — holds that territory nested within Wallonia rather than as an independent Region of its own kind, and its constitutional competences are held and exercised by virtue of language and culture rather than by virtue of separate regional status.⁵⁰⁹ Belgium's own financing law governing how the Communities are funded can be amended only with the agreement of an absolute majority within each linguistic group, in both chambers of the federal parliament — a structural guarantee, examined already in section 8.1 above, that the financing of a linguistic community's own institutions cannot be altered by the numerical weight of the other group alone.⁵¹⁰

- [8.59] The relevance of the Belgian model to the Afrikaner case is not that Belgium's specific institutional architecture should be replicated wholesale. It is that Belgium demonstrates, as a matter of established constitutional practice rather than theory, that a community whose constitutional standing is defined by language and culture, rather than by exclusive regional territory, can be a full constitutional subject, with genuinely funded, protected institutions of its own.

8.3.2.2 A Mechanism for Individual Designation: Italy and Central and Eastern Europe

- [8.60] The second question is not whether a non-territorial community can hold institutional standing, but how its institutions might practically be funded without either a territorial tax base to draw on or a new tax being imposed. Italy supplies a mechanism that

⁵⁰⁷ Constitution of Belgium, arts 1–4.

⁵⁰⁸ Constitution of Belgium, arts 127–130.

⁵⁰⁹ See section 8.1 above.

⁵¹⁰ Special law of 16 January 1989 on the financing of the Communities and Regions (Law No. 021010/1989); Constitution of Belgium, art 4; see section 8.1 above.

answers this directly. Italian taxpayers may designate a fixed, small percentage of their existing tax liability — not an additional payment, but a redirection of tax already owed — toward a category of recipient of their own choosing.⁵¹¹ The *otto per mille* (0.8%) allows designation toward a recognised religious confession or the state; the *cinque per mille* (0.5%) extends this to non-profit organisations, scientific research, and cultural and environmental heritage bodies; a further *due per mille* (0.2%) applies specifically to cultural associations.⁵¹² None of these schemes cost the taxpayer anything beyond what they already owe. Each is voluntary, and each depends entirely on the taxpayer's own act of designation, among the categories of recipient the scheme recognises.

[8.61] This is not an isolated Italian arrangement. Hungary pioneered a structurally similar "1% law" in 1996, which taxpayers may direct one per cent of their tax liability to a registered civil-society organisation of their choice, explicitly intended to fund civil society independently of state discretion.⁵¹³ Slovakia, Lithuania, Poland, and Romania each adopted comparable legislation between 1999 and 2003, once Hungary's model had demonstrated its practicality. In Poland specifically, churches and religious communities are not themselves eligible recipients under the scheme, though organisations affiliated with or derived from them may qualify; Slovakia's equivalent mechanism is likewise structured around civil-society organisations rather than religious bodies as such. Both are, in this respect, a closer structural fit for a secular cultural or educational institution than the Italian model, which explicitly includes religious confessions among its designated categories.⁵¹⁴

[8.62] Taken together, Belgium and the Italian/Central European precedents answer the two obvious objections a sceptical reader might raise. Belgium shows that a non-territorial cultural community can hold genuine institutional and constitutional standing without a province or state of its own. Italy and its Central European counterparts show that

⁵¹¹ Agenzia delle Entrate, "8x1000, 5x1000 e 2x1000," Italian Revenue Agency.

⁵¹² Ibid.

⁵¹³ Act CXXVI of 1996 on the Use of a Specified Amount of Personal Income Tax in Accordance with the Taxpayer's Instructions (Hungary).

⁵¹⁴ Nilda Bullain and Radost Toftisova, "A Comparative Analysis of European Policies and Practices of NGO-Government Cooperation," *International Journal of Not-for-Profit Law*, 7(4), September 2005.

individual citizens can be given a lawful, voluntary, and administratively straightforward means of directing a portion of their own tax contribution toward the institutions of a cultural community they belong to or wish to support, without any increase in what they are already required to pay. Neither proposition is speculative. Both are established, functioning features of contemporary democratic states, tested over decades rather than years.

8.3.2.3 A Domestic Near-Miss: Section 18A

- [8.63] South Africa's own tax law already recognises the underlying principle that individual choice, not state expenditure alone, may properly determine which institutions receive support: section 18A of the Income Tax Act allows a taxpayer's donation to an approved public benefit organisation to reduce that taxpayer's own tax liability.⁵¹⁵ It is worth being precise, however, about how far this domestic precedent actually reaches, and why it does not answer the question this section has been addressing. Three features distinguish it sharply from both the international mechanisms examined above and from what this paper goes on to propose. First, section 18A requires an *additional* payment from the donor — money given over and above the donor's own tax liability, which the deduction then only partially offsets — rather than the designation of a portion of tax already owed, at no net cost to the taxpayer, on the Italian and Central European model. Second, the state, through the Minister of Finance and SARS, determines in advance which categories of activity may receive deductible donations at all; general cultural and heritage activity is, as it happens, expressly excluded from this list, leaving only education among the categories most relevant to Afrikaner institutional life eligible even in principle.⁵¹⁶ Third, and most fundamentally, every scheme examined in this section, including section 18A, requires some prior legal determination of which categories or organisations are eligible; what distinguishes section 18A from the Italian and Central European models is not the presence of that threshold, but what happens after it. In those models, the state defines the eligible category and the individual

⁵¹⁵ Income Tax Act 58 of 1962, s 18A; Ninth Schedule, Parts I and II.

⁵¹⁶ "Understanding Section 18A," Hashtag Nonprofit; "South Africa: New requirements for section 18A certificates," Bowmans, 17 March 2023.

taxpayer then chooses the specific recipient within it, unassisted. Under section 18A, the state approves specific organisations one by one, and the taxpayer's choice is confined to the list the state itself has already assembled. Section 18A demonstrates that South African law is not unfamiliar with the idea that a taxpayer's own choices may direct support toward institutions the state does not itself fund directly. It does not demonstrate, and should not be mistaken for, the mechanism this paper considers in section 8.3.4 below — one in which the taxpayer's own choice operates within a legally defined category, rather than a state-assembled list of individually pre-approved recipients.

8.3.3 South African Confirmation

[8.64] Section 8.2 above established the principle that should govern a people's fiscal contribution to the state it remains part of: a people should fund the services which they receive from the state through taxation, but they should not be expected to fund services which the state does not provide to them and from which they objectively derive no benefit.⁵¹⁷ This principle was discussed in the context of a territorial government's relationship with national fiscal transfers. It applies with no less force to a non-territorial cultural community's relationship with the general taxation to which its members contribute as individuals.

[8.65] In the context of fiscal autonomy, the people in question, in this case Afrikaners, do not require that the state fund their cultural institutions — this is the opposite of autonomy. They require that the portion of their fiscal contribution to the state reasonably allocatable to cultural matters should be under the people's direct control and not the state's.

[8.66] The commonality in each of the international examples presented in section 8.3.2 is that taxpayers, and not the state, determine the allocation of funds which the tax system ring-fences for cultural purposes.

⁵¹⁷ See section 8.2 above.

- [8.67] South Africa's own system does the opposite. The Department of Traditional Affairs was allocated some R900 million for the 2026/27 financial year, funding the National House of Traditional and Khoi-San Leaders and six provincial Houses of Traditional Leaders across the country — state-funded institutions associated with, and representing, specific cultural and traditional communities.⁵¹⁸ Every Afrikaner taxpayer contributes to this allocation, on exactly the same basis as every other taxpayer in South Africa. No part of it is directed toward any Afrikaner institution, and no equivalent allocation exists for Afrikaner institutions. Afrikaners are, in this respect, required to contribute through general taxation to institutions selected entirely by the state, whilst having no equivalent ability to direct the portion of their own contribution allocated to the institutions of their own community.
- [8.68] This asymmetry is compounded, not merely mirrored, by South Africa's own constitutional and institutional history. The Zulu monarch holds sole trusteeship of some 2.8 million hectares of land under the Ingonyama Trust, together with the rental and lease income that land generates in its own right, in addition to direct funding from general revenue.⁵¹⁹ The Volkstaatraad, the one institution ever established for Afrikaner self-determination, was defunded by the state in 1999 and never replaced.⁵²⁰ One community's institutions were endowed with land and income, and have kept both. The other's institution was created, then had its funding taken away.
- [8.69] South Africa, in short, already accepts the principle that a cultural community's institutions may properly be funded from the state's general revenue. It has simply never extended that principle to Afrikaners, nor allowed Afrikaners any means of extending it to themselves. What a mechanism capable of doing so would actually look like is the question section 8.3.4 now turns to.

⁵¹⁸ Minister Velenkosini Hlabisa, Budget Vote Speech 2026/27, Department of Cooperative Governance and Traditional Affairs, 20 May 2026.

⁵¹⁹ See section 3.3.1.2 above.

⁵²⁰ See section 8.3.1 above.

8.3.4 The Mechanism

[8.70] Section 8.3.2 above showed that taxpayer-directed cultural funding is an established and normal feature of state practice internationally. Section 8.3.3 above showed that South Africa itself already accepts the underlying principle that a cultural community's institutions may properly be funded from general revenue — but only ever at the state's own discretion, never through any mechanism by which a taxpayer directs their own contribution. Section 18A of the Income Tax Act, examined in section 8.3.2 above, is the only domestic gesture toward taxpayer choice at all, and, as already shown, it does not reach cultural funding and does not permit designation of tax already owed.⁵²¹ What follows sets out how that gap might actually be closed.

[8.71] The mechanism operates at two distinct levels, and it is important not to conflate them. The rate at which a portion of tax is diverted to a people's cultural fund is not a matter of individual choice. It is negotiated, and periodically renegotiated, between the state and each people that has asserted its own right to self-determination, on the function-tracking principle already established throughout this chapter: a people assuming responsibility for a comparatively extensive range of its own institutional provision — its own schools, chief among them — negotiates a correspondingly larger designation; a people assuming less negotiates less.⁵²² The individual taxpayer's choice operates at a different level entirely, and a narrower one: it determines whether, for the purposes of this mechanism, the taxpayer designates themselves as belonging to a particular people, and in consequence, to have the rate already negotiated for that people applied to their own contribution. The act of designation confers no personal financial advantage on the taxpayer; it affects only the destination of the designated portion of tax already payable.

[8.72] It follows directly from this structure that the mechanism creates no automatic entitlement. A people that has not asserted its right to self-determination, and has not negotiated a rate or established the representative structure necessary to receive and allocate one, has no fund into which any individual designation could flow. Nothing in

⁵²¹ See section 8.3.2 above.

⁵²² See sections 8.1, 8.2 above.

this mechanism confers a payment on any community by default. It confers only the opportunity, already available in principle to any qualifying people under this paper's own analysis, to assert the right and negotiate its terms — consistent with the Assertion, Obligation, and Non-Compliance framework applied throughout this paper, and specifically to the Afrikaner case in section 8.3.5 below.

[8.73] This is, in essence, the same mechanism already examined in section 8.1 above by which HMRC administers Scottish income tax.⁵²³ A taxpayer resident in Scotland is flagged in HMRC's own systems with an "S" prefix, and the rates and bands set by the Scottish Parliament, rather than those applying elsewhere in the United Kingdom, are applied to that taxpayer automatically as a consequence. The rate itself is not something the individual taxpayer negotiates or selects; it has already been fixed, collectively, for the group to which the code applies. What varies between taxpayers is only the fact of the flag, not the rate that follows from it. A South African mechanism could operate identically in structure, save for one difference consistent with the discipline already established in section 6.2 above regarding Afrikaner representation: where the Scottish flag follows automatically from residence, the South African flag would follow from the taxpayer's own act of self-designation, not from any criterion — racial, linguistic, or otherwise — imposed or verified by the state.⁵²⁴ A taxpayer who designates themselves as Afrikaner, for the purposes of this mechanism, has their contribution diverted at whatever rate has been negotiated for the Afrikaner people's fund; a taxpayer designating as belonging to any other qualifying people has their contribution diverted at whatever rate that people has separately negotiated for itself.

[8.74] The people, not any single institution, holds the right this mechanism gives effect to, consistent with this paper's treatment of self-determination throughout: the right belongs to a people, not to any institution that people may establish.⁵²⁵ A taxpayer's act of designation identifies the people to whose fund their contribution is directed. It is the people itself, through whatever representative structure it has established for this

⁵²³ See section 8.1 above.

⁵²⁴ See section 6.2 above.

⁵²⁵ See sections 2.3, 4.1 above.

purpose, that then determines how the resulting fund is allocated among its own institutions — a school, a language body, an arts trust, or any other institution through which that people sustains its own cultural continuity, as identified in section 8.3.1 above.⁵²⁶ The institution in question need not be, and should not be assumed to be, an educational one. This paper has discussed Afrikaans-medium schools, Akademia, and Sol-Tech at length elsewhere because they are the clearest existing examples of Afrikaner institutional life, not because the mechanism proposed here is confined to education.⁵²⁷

[8.75] Unlike a direct state grant, an institution's continued viability under this model depends on the ongoing decisions of the people it serves and the taxpayers who sustain it, not on the continuing political favour of whichever government happens to hold office. This is the mechanism's central constitutional virtue: it makes an institution accountable to the community it serves, not to a minister.

[8.76] Two further design features are necessary to the mechanism's integrity rather than incidental to it. The first concerns eligibility. For the reasons already explained, self-identification occurs through the taxpayer's own act of designation, not through any prior state classification.⁵²⁸ The second concerns universality. The mechanism this paper considers is not proposed as an Afrikaner-specific privilege. It is the general principle established in section 8.3.3 above — that taxpayers should determine which people's fund receives the designated portion of their own contribution, and that each people, in turn, should determine how that fund is applied among its own institutions — applied consistently, and available to any people capable of asserting the right and organising itself to negotiate on the same basis. A Zulu, Venda, or any other qualifying people could negotiate its own rate and establish its own fund on precisely the same terms; nothing in the mechanism confines it to Afrikaners, and its logic in fact anticipates that different peoples, assuming different functions, will arrive at different rates.⁵²⁹

⁵²⁶ See section 8.3.1 above.

⁵²⁷ See section 6.2 above.

⁵²⁸ See section 6.2 above.

⁵²⁹ See section 8.3.3 above.

[8.77] This is why this paper does not propose a specific percentage, and considers the exercise of deriving one from the comparative examples in section 8.3.2 above to be of limited use. Those examples span a wide range, from the 1% designation laws of Hungary, Poland, and Romania to South Tyrol's retention of some 90% of locally-raised tax revenue, and the range reflects what each mechanism was actually built to fund, not any common international norm capable of being transplanted directly.⁵³⁰ The figure appropriate to any given people's negotiated rate should follow the same principle already established throughout this chapter: contribution, and by extension retention, should track function. If Afrikaner communities are to fund and operate their own schools — a central proposition of this paper — a nominal designation on the scale of the Hungarian or Polish laws, built to fund general civil society rather than an entire parallel education system, would plainly be inadequate. Education alone accounts for some 23.7% of South Africa's consolidated government expenditure.⁵³¹ Each people's negotiated rate must be sized to the function it actually assumes, not anchored to figures drawn from schemes built for an unrelated purpose. What figure any particular people's negotiation implies in practice is a matter for that negotiation itself, and this paper leaves it to be settled, for the Afrikaner case specifically, through the process described in section 8.3.5 below.

8.3.5 Assertion, Obligation, and Non-Compliance

[8.78] Sections 8.3.1 to 8.3.4 above have established that Afrikaner cultural survival depends on funded institutions, that this principle is well established elsewhere and already applied selectively within South Africa itself, and that a specific, workable mechanism exists by which it could be extended to Afrikaners on the same basis. What remains, as with the Western Cape in Section 8.2.5 above, is how such an assertion would actually be made, what obligation it places on the state, and what follows if that obligation is not honoured. For Afrikaners, the first of these questions is genuinely harder than it was for the Western Cape, because although the right belongs to the Afrikaner people, no

⁵³⁰ See section 8.1 (South Tyrol), section 8.3.2 (Hungary, Poland, Romania) above.

⁵³¹ "Education and Health Prioritised in 2026 Budget, as Provinces and Municipalities Receive Major Allocations," Parliament of South Africa, 2026.

single institution presently exists that is capable of asserting and administering it on the people's behalf.

8.3.5.1 Assertion

[8.79] Section 6.2 above identified the obstacle directly: unlike the Western Cape, which has an elected government capable of asserting a claim on the province's behalf by ordinary motion, Afrikaners have no single, undisputed institution currently capable of speaking for the community as a whole.⁵³² This is not a defect in the underlying claim. The Kirby Description's subjective element requires only the will or consciousness of being a people, not that this will be expressed through one voice, and section 6.2 above has already established that Afrikaners satisfy it.⁵³³ It is, however, a genuine practical obstacle to the assertion this section considers, and section 8.3.4 above has made the point sharper still: without a representative structure capable of receiving a negotiated fund and deciding how it is allocated, the mechanism this chapter proposes has no institution to negotiate on Afrikaners' behalf or to administer the result.

[8.80] Section 6.2 above has already identified two distinct routes by which this obstacle might be overcome, and this section does no more than apply them to the fiscal claim specifically. The first is the individual-mandate model, of the kind AfriForum already operates on the strength of the direct, individual commitment of some 300,000 paying members, or CapeXit on the strength of over 800,000 signed mandates gathered without any membership fee at all.⁵³⁴ The second is the unofficial-referendum model, illustrated by Veneto's experience, where an independent, privately organised process — in that case, an unofficial referendum in which over 2.3 million people took part — established a community's collective will beyond credible dispute, and led directly to a negotiated outcome, notwithstanding that the state itself controlled, and had declined to authorise, the official means of testing that will.⁵³⁵ Either route resolves, rather than presupposes, the question of who counts as Afrikaner for this purpose: each person who

⁵³² See section 6.2 above.

⁵³³ See sections 4.2, 6.2 above.

⁵³⁴ See section 6.2 above.

⁵³⁵ See section 6.2 above.

signs a mandate, or who takes part in such a process, identifies themselves as one, exactly as this paper has proposed the tax-designation mechanism itself should operate.⁵³⁶ This paper does not propose which of the two Afrikaners should adopt; either is capable, on its own terms, of establishing a mandate sufficient to negotiate and administer the mechanism set out in section 8.3.4 above.

- [8.81] A body constituted on either basis, and mandated specifically for the purpose of negotiating and administering the fiscal mechanism set out in section 8.3.4 above, is accordingly both achievable and already within reach of existing Afrikaner civil society capacity. Its formal assertion of the right considered in this chapter could then proceed by the same route section 6.2 above identified for cultural self-determination generally: notice to the Office of the President under section 17 of the Constitution, formally asserting the collective right and the intention to exercise it through the fiscal mechanism this chapter has described.⁵³⁷

8.3.5.2 Obligation

- [8.82] Once made, the obligation this assertion places on the national government is the same obligation established throughout this paper for every other legitimate assertion of self-determination: an obligation to accommodate the assertion, subject only to the rights of others, of which good-faith negotiation toward the mechanism set out in section 8.3.4 above is the necessary means, not a substitute end in itself.⁵³⁸ Section 6.2 above has already shown that accommodating Afrikaners' claim to control their own cultural institutions does not infringe the rights of others; the same reasoning applies with no less force to the narrower fiscal mechanism by which that control would actually be funded.⁵³⁹ The obligation extends, specifically, to negotiating in good faith the rate applicable to an Afrikaner cultural fund, on the function-tracking basis section 8.3.4 above describes, and to establishing the administrative architecture — comparable in

⁵³⁶ See section 8.3.4 above.

⁵³⁷ See section 6.2 above.

⁵³⁸ See sections 4.6, 6.1, 8.1 above.

⁵³⁹ See section 6.2 above.

kind to the Scottish "S" prefix already examined — necessary to give that negotiated rate effect.

8.3.5.3 Non-Compliance

[8.83] Should the national government decline to accommodate a legitimate assertion of this right, or negotiate without genuine intent to reach agreement, the consequences already established in sections 4.6 and 6.1 above apply without modification, and extend to this domain exactly as they extend to the Western Cape's fiscal claim in section 8.2.5 above.⁵⁴⁰

[8.84] This paper neither recommends nor discourages any particular course. Its purpose is to identify the legal consequences of state non-compliance and to record the forms of political response already present within South African public life, exactly as section 8.2.5 above did for the Western Cape.

[8.85] Fiscal non-compliance of this kind is not a hypothetical response for Afrikaner civil society specifically; it has already been formally invoked. In August 2021, AfriForum published a tax manifesto declaring what it termed a formal dispute with the South African government over the use of public funds, stating plainly: "we cannot continue to finance a corrupt system," and, "it is time that government is called to order."⁵⁴¹ The manifesto warned that "a general tax revolt will be unavoidable" absent reform, while stating explicitly that AfriForum's own goal was to avert such a revolt, not to organise one.⁵⁴² Central to the manifesto's own demands was the recognition of an independent civil tax secretariat, through which affected communities would secure "more say and oversight of the appropriation of taxes" — a body whose function is materially close to the representative structure section 8.3.4 above already identifies as necessary to negotiate and administer the mechanism this chapter proposes. AfriForum's own stated alternative to a revolt was not lower taxes, but "greater tax autonomy for communities"

⁵⁴⁰ See sections 4.6, 6.1, 8.2.5 above.

⁵⁴¹ "AfriForum's tax manifesto," Politicsweb, 31 August 2021.

⁵⁴² "AfriForum publishes tax manifesto; declares dispute with government over taxes," Polity, 31 August 2021.

— the same underlying principle this chapter has independently argued for, stated by an organisation representing a substantial and committed constituency within, though not speaking on behalf of, the Afrikaner people as a whole.⁵⁴³

- [8.86] Should the national government's obligation under this chapter go unmet, Afrikaner civil society would not be without genuine and precedented recourse. Recourse of this kind is already a live and formally declared feature of South African political life, not a novel escalation introduced by this paper.

8.3.5.4 Conclusion

- [8.87] Section 8.3 has tested this chapter's founding proposition against Afrikaners' own specific circumstances, distinct in kind from the Western Cape's but resting on the same underlying principle. It has established that Afrikaner cultural survival depends on funded institutions in the same way, and to the same degree, that this paper has shown funding to be a condition of self-determination generally; that recognising and funding a non-territorial cultural community's institutions is neither novel nor untested in comparative practice; that South Africa's own constitutional order already extends this recognition to other communities, without extending it to Afrikaners; and that a specific, workable mechanism exists by which that omission could be corrected, requiring no new tax, no state discretion over which institutions benefit, and no institution beyond one Afrikaners are already capable of constituting for themselves. Should the national government engage with that assertion in good faith, Afrikaners stand to hold genuine control over the funding of their own cultural continuity — not at the state's discretion, but as of right. Should it decline to do so, the same consequences already shown, throughout this paper, which follow a bad-faith refusal to accommodate a legitimate assertion of self-determination, follow here as well.

8.4 Closing Remarks

- [8.88] This postscript chapter has applied the paper's method to fiscal autonomy at a deliberately lower evidentiary register than Chapters 1 to 7, illustrating rather than

⁵⁴³ Ibid.

extending the paper's central claim. That claim — that the unitary character of the South African State cannot survive the legitimate assertion of self-determination by a qualifying community — was established in Chapters 4 to 7, and stands independently of the analysis offered here.