The Free Market Foundation's submissions to the Constitutional Assembly

The Free Market Foundation
of Southern Africa
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Introduction

One of the main tasks of the newly-elected government is to draw up and vote into law a constitution that will replace the interim constitution negotiated at the World Trade Centre. The ***Constitutional Assembly***, made up of the two houses of national government - the Senate and the National Assembly, has stated that the new constitution should be the result of an integrated process that includes the ideas and input of political parties, civil society and the broader public.

To this end six constitutional theme committees were established to make an in-depth examination of all issues pertaining to the Constitutional Assembly mandate. The theme committees are responsible for receiving and collating views from political parties and the public, developing and processing these views, referring them to technical committees for drafting, and submitting the processed concepts to the Constitutional Assembly. Each theme committee consists of 30 Constitutional Assembly members and each technical committee has three or more legal and other experts.

There are six constitutional theme committees each dealing with a different aspect of our future constitution. **Theme Committee I** deals with the ***Character of the State***. This includes issues such as sovereignty, the supremacy of the constitution, elections, proportional representation, freedom of information and accountability. **Theme Committee II** is responsible for investigating all matters dealing with the ***Structure of Government*** including separation of powers, minority participation, traditional leadership and constitutional amendments. The ***Relationship between Levels of Government*** is the topic given to **Theme Committee III**. This covers the establishment, status and powers of provincial and local government, legislative competence and concurrency. Issues of language, association and collective bargaining, amongst others, will fall under ***Fundamental Rights*** and be dealt with by **Theme Committee IV**. **Theme Committee V** will debate and comment on the ***Judiciary and Legal Systems*** taking into account all matters dealing with the functions of and appointment of judges to both the ordinary and constitutional courts, and the role of traditional authorities. And finally, **Theme Committee VI** will deal with ***Specialised Structures of Government***. These include the independence and impartiality of the Reserve Bank, the role of the public service and the performance of police and military functions in the national interest.

The Free Market Foundation's 16 submissions to the theme committees are included in this report.

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1. Democracy; Character of the state; Single sovereign state; Supremacy of the constitution

Summary

The question of **sovereignty** is central to constitutional theory because it determines in any society who shall have the final say in questions of state, and, therefore, the degree of freedom and democracy in that society. That **people** should be sovereign is central to the democratic ideal. In this submission we argue, therefore, that South Africans will benefit most if the character of our future state is one in which sovereignty lies with the people. Their right to overrule governments should be included in the Constitution. To this end the Constitution should state: ***The Republic of South Africa shall be one, independent state in which the people are sovereign.***

The **constitution** should be the supreme law of the land. A constitution forms the basis of all the rules which directly or indirectly affect the exercise of power by the state. These include rules which aim to contain the exercise of state power within specified parameters. The state should be prohibited through **constitutional safeguards** from revoking or infringing upon the *natural rights* of the people. The functions which government may not undertake, such as control of religion, press censorship and the invasion of property rights should be listed.

Democracy is achieved, not only through **universal franchise** -- which ensures that the will of the majority prevails -- but through **checks and balances** that aim to contain the exercise of state power within certain well-defined limits. In this submission we argue that the three most important checks and balances which characterise a democratic state are a **bill of rights, devolution of power** and **direct democracy**.

The **bill of rights** should include the right to personal freedom and its corollaries of *habeas corpus;* freedom of movement, assembly, and speech; the right to own property; the right to vote for political representatives and in referenda and plebiscites; and equality before the law.

Most democratic governments **devolve power** to regional and local levels of government and in this way help to prevent its abuse. When democratically-elected regional and local governments have real decision-making powers there are numerous benefits. These include: Legislative diversity, flexibility, accountability, competition, and more democracy.

Direct democracy is the only way of ensuring that sovereignty rests with the people, and that elected representatives remain accountable to them. In modern democracies direct democracy takes the following forms:

- the **obligatory referendum** that forces the government to put proposed constitutional amendments to the vote of the people;
- the **optional referendum** that allows people to call for a vote on a new law passed by the legislature - provided a specified number of people sign a petition to that effect - and to revoke that law if a majority vote to do so;
- the **constitutional initiative** that allows people to make changes to the constitution provided a specified number of people sign a petition and a majority vote in favour of the change;
- the **legislative initiative** that allows people to introduce new laws provided a specified number of people sign a petition and a majority vote in favour of the law;
- and the **recall** that allows people to de-elect politicians provided a number of people sign a petition and a majority vote in favour of the recall.

These rights should be written into the constitution.

Democracy

The word *democracy* is derived from the Greek words for *people* and *govern*. In its original sense the word means that the people, rather than politicians, should control the decisions which affect their lives by voting directly on specific issues or by choosing accountable representatives to carry out their wishes. Thus the idea that people should be sovereign is central to the democratic ideal.

The extent of democracy in a society depends on the relationship between the state and people. In highly democratic societies people can ensure that their chosen representatives remain answerable to them and take their wishes into consideration when making decisions.

All governments fall somewhere along the spectrum between pure democracy, in which the state acts only to carry out the will of the people and is completely answerable to them, and an unlimited autocracy, in which the rulers exact obedience to their whims and have no concern for any interests but their own.

Although unpopular dictatorships cannot be ousted peacefully via the ballot box, in the final analysis both elected governments and dictators depend on the acquiescence of the governed for their survival. Even extremely authoritarian regimes have self-imposed limits on the exercise of power so as to avoid the possibility of a coup or revolution.

One-person-one-vote

Universal franchise is an essential prerequisite for democracy but *on its own* is no guarantee of democracy or personal freedom.

For example, if 100% of people have the vote and 51% vote to chop off the left ears of the remaining 49%, the will of the majority will have prevailed, but few would call the decision democratic. If whites were the majority in South Africa and they voted in favour of apartheid, then apartheid could be reinstated under a system of one-person-one-vote with no checks and balances.

Unlimited democracy can lead to the destruction of democracy. A classic example is the popular vote which led to national socialism (Nazism) in Germany.

Clearly universal franchise alone is not an adequate guarantee of democracy or freedom.

Checks and balances

Because governments are legally entitled to use force (the army, police and prisons) to compel obedience , all democratic constitutions are based to some degree on trust. The people elect and empower representatives trusting that they will not abuse their position.

Trust alone is clearly insufficient to prevent power from being abused, so in constitutional democracies various checks and balances aim to contain the exercise of state power within certain well-defined limits.

In this submission we argue that the three most important checks and balances which characterise a democratic state are a **bill of rights, devolution of power** and **direct democracy.**

Bill of Rights

While the right of the majority to govern is acknowledged, in a true democracy there are some rights which neither the majority nor its representatives can override.

A bill of rights should provide a clear statement on the importance of fundamental individual rights, including personal freedom and its corollaries of *habeas corpus*; freedom

of movement, assembly, and speech; the right to own property; the right to vote for political representatives and in referenda and plebiscites; and equality before the law. The bill should be subject to change only through a significant majority in a national referendum and agreement by all the provincial legislatures.

Maximum devolution of power

Many people define democracy as a society in which a government chosen by 51% of the people has the right to make decisions that affect not only the 51% who support it, but the 49% (nearly half of the population) who don't. What is lacking in such a model is genuine freedom and accountability.

South Africans often take for granted the degree of centralisation which existed under apartheid. Consequently they assume that most decisions will continue to be made by the central government. However, none of the world's major liberal democracies centralise power as we do -- they all spread power through regional and local levels of government and in this way help to prevent its abuse. The only other countries which approach our degree of centralisation, such as the Scandinavian countries, are geographically small and have homogeneous populations.

When democratically-elected regional and local governments have real decision-making powers there are numerous benefits.

Legislative diversity

Firstly, regional and local power allows and fosters the legislative diversity which characterises a free society. Instead of one law imposed upon all, different regions have their own laws which represent special needs and values. For example, in the USA, laws regarding liquor, gambling, education, licensing, taxation and so on vary from state to state.

Don Caldwell recommended in his book *No More Martyrs Now* (Conrad Business Books, March 1992) that regional and local governments in South Africa be allowed to make laws on a wide variety of issues including: abortion, capital punishment, policing, education, health, language, culture, recreation, housing, roads, town planning, business regulation, industrial development, liquor laws, shop hours, gambling, prostitution, monument building, pollution control, conservation and tax. He pointed out that these laws, by reflecting the norms of the people living in a particular area, would be seen as legitimate and would, therefore, be more likely to be obeyed.

Flexibility

Small governments are more flexible and responsive to change than big ones. Changing the course of a mammoth oil tanker takes hours, a small boat minutes and a canoe seconds. A big central state sometimes takes years to make policy changes.

Accountability

Local power encourages accountability. It is easier to keep an eye on local politicians who live nearby than on those in remote central government. It is also far easier for the people to influence a small local government.

Competition

When regional and local governments wield meaningful powers they are forced to compete with each other for workers, investors and taxpayers by offering the best packages of policies. People are free to move away from areas with bad policies and into areas that govern well. In time unpopular policies are driven out and workable policies are adopted.

Minority participation

Small political parties and groupings that are outnumbered and therefore barely heard or acknowledged in a centralised society can win a majority of seats in a local government and thus play an active role in the decision-making processes that affect them.

More devolution means more democracy

Perhaps the most important benefit of vesting power in local communities is that many more people would live under the laws of their choice than in centralised systems.

As a member of a large state an individual possesses an infinitesimal degree of sovereignty. In South Africa, for example, he is only one of more than forty million people represented by central government. As a member of a neighbourhood or community, however, he is one of a few hundred or a few thousand people and has a far better chance of influencing decision-making.

Imagine two democracies in which all the citizens vote on whether cinemas should be open on Sundays. In the first country, Alpha, decisions are made centrally and imposed uniformly nation-wide. In the second country, Beta, there are strong and autonomous local governments.

The Figure below represents four polling stations in Alpha, and four communities in Beta. There are one hundred voters in each area.

***Referendum issue*: Cinemas should be open on Sundays**

AREA 1	**AREA 2**
For 20 Against 80	For 19 Against 81
AREA 3	**AREA 4**
For 80 Against 20	For 80 Against 20

Total votes cast: 400
Votes against Sunday cinemas: 201
Votes for Sunday cinemas: 199

Alpha

No Sunday cinemas

201 happy voters

In Alpha 201 people get what they want.

Beta

AREA 1	**AREA 2**
No cinemas 80 happy	No cinemas 81 happy
AREA 3	**AREA 4**
Cinemas 80 happy	Cinemas 80 happy

In Beta 321 people get what they want.

A total of 400 votes are cast, 199 in favour of Sunday cinemas and 201 against. In Alpha, Sunday cinemas are forbidden throughout the country, which means 201 people get what they want, but the rest lose out.

In Beta, Areas 3 and 4 allow Sunday cinemas, whereas Areas 1 and 2 do not. Thus 321 people get what they voted for (and in Areas 1 and 2 the 39 people who want to see movies on Sundays but have none in their own regions can go to cinemas in Areas 3 and 4!). Moreover, in Alpha the will of the minority prevails in Areas 1 and 2, whereas in Beta the majority view prevails in all four areas.

Majority rule still applies when power is devolved, but even more so: The size of each majority is increased, and so democracy prevails.

Direct democracy

The world's first democracies were the city states of ancient Greece, these were *direct democracies* in which all adult male citizens voted directly on major issues.

Direct democracy is still the basis of much decision-making in Switzerland and the USA today, and traditional African societies are based on a similar kind of participatory democracy.

The next step was from direct to representative democracy, in which a small number of people are elected to act on behalf of others, is an obvious one, and easily made.

However, direct democracy through referendum and recall remains the only way of ensuring that sovereignty rests with the people, and that elected representatives remain accountable to them.

In modern democracies direct democracy takes the following forms:

- the **obligatory referendum** that forces the government to put proposed constitutional amendments to the vote of the people. Without the people's consent changes to the constitution cannot be made;

- the **optional referendum** that allows people to call for a vote on a new law passed by the legislature - provided a specified number of people sign a petition to that effect - and to revoke that law if a majority vote to do so;

- the **constitutional initiative** that allows people to make changes to the constitution provided a specified number of people sign a petition and a majority vote in favour of the change. This allows the constitution to reflect the changing needs of society;

- the **legislative initiative** that allows people to introduce new laws provided a specified number of people sign a petition and a majority vote in favour of the law;

- the **recall** that allows people to de-elect politicians provided a number of people sign a petition and a majority vote in favour of the recall.

Simple majority rule versus real democracy

> *In discussing democracy, people tend to confuse "the majority" with "the people". They say a law passed democratically reflects the will of the people. Though widely used, this phrase is correct only when there is unanimous agreement, which is rare. The correct term is "the will of the majority." And it's not clear why 49 percent or 10 percent or even 1 percent must become slaves of everybody else.*
>
> **(Don Caldwell, *No More Martyrs Now*)**

Governments based exclusively on majority rule are more likely to abuse their power than those that entrench devolution of power, direct democracy and an unambiguous bill of rights in their constitutions.

Character of the state

In this submission we argue that South Africans will benefit most if the character of our future state is one in which sovereignty lies with the people.

What is a free society?

In the simplest terms, a free society is one in which all individuals are free to do as they choose as long as they do not coerce others. In a free society people can, therefore, also live without fear of coercion or the threat of coercion by others.

This principle has been the basis of common law for centuries and, in recent years, there has been a revival of interest in its application to political, social and economic analysis.

Perhaps the easiest way to acquire a clear understanding of what a free society entails is to contrast it with its opposite -- a centrally planned or regulated society. A free society is characterised by limited government, decentralisation, devolution of power to local levels, individualism and personal responsibility. Individuals are supreme: the purpose of government is to serve people. In an unfree society, the state is supreme and people serve the state. The political characteristics of an unfree society are powerful central government, collectivism, paternalism, coercion and social engineering.

A free society has a free economy, governed primarily by market forces. It is characterised by individual planning, entrepreneurial activity, competition and spontaneity. These factors lead to rapid wealth creation and high living standards. In an unfree society, the economy is centrally planned and people with ability and resources are compelled by the state to provide for the needs of others. Advocates of this type of society generally, though not necessarily, prefer government ownership of the means of production and distribution, and government control of human and non-human resources.

In a free society, social relationships are voluntary and result from free choice and consent. In an unfree society, relationships between people are regulated.

A free society is based on the rule of law and common law, an unfree society on the rule of men and discretionary law.

Economic, social, legal and political freedoms are completely interdependent. For instance, voluntary exchange between individuals cannot take place unless there is private ownership of property, and freedom of speech is meaningless if the media are not permitted to publish and disseminate ideas which criticise the existing order.

Sovereignty

Sovereignty should be vested in the people, and their right to overrule governments should be included in the Constitution. To this end the Constitution should state: ***The Republic of South Africa shall be one, independent state in which the people are sovereign.***

The question of sovereignty is central to constitutional theory because it determines in any society who shall have the final say in questions of state, and, therefore, the degree of freedom and democracy in that society. Sovereignty may be vested in the people, in parliament, in a dictator, a council, the judiciary or elsewhere.

Parliamentary sovereignty in Britain

Over the centuries, British sovereignty has passed from the monarch to parliament. Because the British constitution makes no distinction between ordinary laws and fundamental laws which may not be changed or overruled, parliament may pass laws on any matter whatsoever, and amend any or all parts of the constitution. Individual rights are protected by common law, but parliament may override the common law at will. Judges cannot overrule parliament, but parliament can and does override judicial decisions. "It is a fundamental principle with English lawyers," said De Holme, "that parliament can do everything but make a woman a man, and a man a woman."

Some theoreticians argue that acts of the British parliament are not valid if they are immoral or contravene international law, but this is not so: even a bad law must be obeyed. All laws can be passed or changed by a simple majority in the House of Commons, and there is no competing legislative power. The voters have neither the right nor the means to initiate, sanction or repeal legislation. Prior to this century the House of Lords could veto legislation, but with the passing of the Parliament Acts of 1911 and 1949 that is no longer the case. The Crown's veto has long since fallen into disuse.

Until it joined the European Union, the UK had the most flexible constitution in the world. Every part of it could be expanded, curtailed, amended or abolished with equal ease.

There *are* limitations on the British parliament. One is the possibility of popular resistance. Parliament, like governments everywhere, depends for its authority on the willingness of the people to obey its laws. Secondly, it is limited from within by the attitudes of its members, which are conditioned by the same factors and governed by the same morality as British society in general. Thirdly, it is restricted by the existence of opposing parties which have always counterbalanced one another. Whichever party is in power governs in the knowledge that if it oversteps the bounds of convention and tradition, it will lose the next election.

Many of the unwritten conventions of the British parliament were written into the South African Union constitution of 1909. Consequently, the South African government enjoyed the same powerful and flexible political system, in which almost any law could be changed by a simple majority of one house, and there were no legal limitations on the ruling party. But because of the recent overwhelming National Party majorities, there was no effective opposition to provide a political constraint, no convention of local decision-making, nor any traditional respect for individual rights and the rule of law.

We will not dwell on the consequences of untrammelled parliamentary sovereignty in South Africa, which are well known, except to say that the degree of centralisation, authoritarianism and abuse of power which resulted caused so much bitterness and anger that many people were willing to risk their lives to change the system.

Sovereignty in the USA

In theory *the American people* are sovereign and express their will primarily through their representatives in the state legislatures, which are entitled to amend the constitution. However, the process of calling the State legislatures into action is extremely difficult and complicated.

This means that while in theory the people have the final say, in practice ultimate power is balanced between Congress, the president and the judiciary.

Because the terms of the constitution are broad, Congress can pass many laws without being challenged on constitutional grounds. When legislation *is* challenged, the rulings of the Supreme Court judges are heavily influenced by their personal attitudes and values.

Sovereignty in Switzerland

In Switzerland the people are truly sovereign, and in this they are unique in the developed world. Governments at all three levels are no more than the agents of the people, who can and do intervene directly, via the referendum and the initiative, to register their approval or disapproval of all important acts of parliament. As an important constitutional commentator said:

> In Switzerland, in short, the nation is sovereign in the sense in which a powerful king or queen was sovereign in the time when monarchy was a predominant power in European countries, and we shall best understand the attitude of the Swiss nation towards its representatives, whether in the Executive or in Parliament, by considering that the Swiss people occupies a position not unlike that held, for example, by Elizabeth I of England. However great the Queen's authority she was not a tyrant, but she really in the last resort governed the country, and her ministers were her servants and carried out her policy. The Queen did not directly legislate, but by her veto and by other means she controlled all important legislation. Such is, roughly speaking, the position of the Swiss people.
>
> (AV Dicey)

Sovereignty should rest with the people

As mentioned above, sovereignty determines who shall have the final say regarding questions of state.

Switzerland is the only country in the western world in which the people are genuinely sovereign. They exercise their power through the referendum (or people's veto) and the initiative, voting frequently on national, regional and local laws. This has ensured that the Swiss people have more democracy and greater freedom (as well as peace and prosperity) than any other nation on earth.

Under South Africa's interim constitution the constitutional court plays a similar role to that of the US Supreme Court and the situation is also somewhat similar to the US in that the final say is shared between parliament and the constitutional court.

We believe that to vest sovereignty in a small group of elected representatives and appointed judges is dangerous and undemocratic. Sovereignty in South Africa should be vested, as in Switzerland, in the people.

This is not to say that the judiciary and legislature should lose their important roles. National, regional and local governments should continue to legislate, and execute their decisions. The judiciary should continue to interpret legislation in the light of the constitution. But the people should have the right to intervene and overrule legislation through direct democracy, if they see fit to do so.

The right to vote directly on laws and amendments to the constitution, and to make popular proposals should be entrenched in our bill of rights. *(Direct democracy and accountability will be discussed in more detail in another submission to your theme committee.)*

Supremacy of the constitution

Principles of good government

A limited government democracy is based above all on entrenched constitutional prescriptions of what government may not do. The most popular view of this style of government is that the state should be prohibited through constitutional safeguards from revoking or infringing upon the *natural rights* of the people.

Specific limitations have been attempted in various constitutions, the most famous of which is the United States Constitution. In this and other constitutions, the functions which government may not undertake, such as control of religion, press censorship and the invasion of property rights are listed.

The purpose of a constitution

The constitution of a country forms the basis of all the rules which directly or indirectly affect the exercise of power by the state. These include rules which aim to contain the exercise of state power within specified parameters.

They are necessary because government, by its nature, is allowed to use force where others may not. There are many ordinary laws from which only the state is exempt.

Government is legally entitled to force people to obey its laws, and as a consequence most societies have special constraints and conventions, over and above the ordinary law, which aim to prevent the state from abusing its power. These special constraints are often embodied in a written constitution.

The constitution should be the supreme law of the land.

2. Separation between church and state

Proposal

The South African Constitution should contain articles forbidding the government from involvement in any religious organisations and religious affairs. No religion should be given special treatment by the law. No state funds should be spent on the promotion of any particular religion.

These articles should complement the freedom enshrined within the Bill of Rights to practice the religion of one's choice, compatible with the freedom of others to do likewise and compatible with the common law. Every person should have the right to freedom of conscience, thought, belief and opinion, including academic freedom in institutions of higher learning.

Religion in South Africa

South African people subscribe to a wide variety of different religious faiths. Even within faiths, forms of worship can differ significantly. Interference in people's religious lives by the State would only serve to antagonise them. Rarely does state interference in religion improve people's moral and spiritual lives.

Countries with formal church-state links

Only in countries where the population is homogenous can the binding together of Church and State ever be widely accepted by the people. It is impossible to force people to believe in a religion. The only countries where a system of state religion is workable are those in which the people would believe in it even if it were not a state religion. This is the case in Iran, where the nation as a whole subscribes to the Islamic faith. Even there, secular and spiritual authorities are responsible for the administration of strictly defined areas of competence: President Rafsanjani has secular authority while Ayatollah Khameni is the supreme religious leader.

Other states which formally give a particular religion a protected status within the constitution, such as the United Kingdom, give it no protection in reality. Even the Archbishop of Canterbury has accepted that the links between the Church of England and the State are negligible and that the establishment of the Church of England arose from a mere `historical accident'. Certainly, if the British government sought to instruct Church leaders how to behave, the clamour for the Church to be disestablished would become irresistible. The Church of England has no widespread following in the United Kingdom, where only 2 million people regularly attend its services from a population of 55 million, and more people regularly attend Roman Catholic services. The Church of England remains established in name only.

The advantages of independent churches

Through the ages, religious organisations have served to act as a check on the ambitions of overzealous rulers. By remaining independent of government, churches can protect people's freedom of conscience from a government which attempts to impose moral, cultural and religious values. The Church can act as a bastion of liberty and a haven for the oppressed. Lord Acton, writing at the turn of the century, recognised that in Western Europe, where the first seeds of democracy were sown, 'if the Church had sought to buttress the thrones of the Kings whom they anointed, then all Europe would have sunk under a Muscovite or Byzantine despotism'.

Brutal and oppressive regimes have been resisted by religious groups operating outside the state apparatus all over the world. The Jewish and Christian orthodox churches are credited with ensuring that hard-line Soviet Communism gave way to a regime which, through

'Glasnost' and 'Perestroika', took on a greater acceptance of basic human and civil rights. In South Africa itself, the work of churchmen such as Archbishop Tutu and Rev Trevor Huddleston was crucial in fighting the injustice of apartheid. If the Church had been a part of the State, their freedom of expression would have been undoubtedly curtailed.

The best way in which religion can be safeguarded is to ensure that it is kept outside all state affairs. Where it is practised at state or state-aided institutions, such as in Parliament or at Universities, state funds should not be spent, since that is tantamount to the state promoting a particular religion. If citizens wish to practise religion at state or state-aided institutions, they should fund it themselves.

3. Economic constitution

A democracy ... can only exist until a majority of voters discover that they can vote themselves largesse out of the public treasury. From that moment on, the majority always votes for the candidate who promises them the most benefits from the public treasury .... [1]

(I) Introduction

South Africa has, at long last, entered a period of democracy; one in which all adult persons, regardless of colour of skin, language group, religion, etc. have the right to vote. Those who assisted in the establishment of this democracy have, of course, no idea where this democracy will take the people in that nation - in this regard, the establishment of the 'New South Africa' is not unlike the birth of an individual. One never knows whether the new born infant will prove to be a 'saint' or 'sinner'; whether the new life will lead to improvement in the well-being of those who encounter it, or whether they will come to rue its very birth. What one does know, however, is that things will happen and occur in the life of the nation-state, just as in the life of the individual, which cannot be at all anticipated by those now living and present. While the 'midwives' of the new South Africa had, and continue to have, visions of what the new nation-state would become, there is faint likelihood that in as short a time as 50 years their visions will be matched by the turn of events. It may well be that the widespread democracy will degenerate into a bureaucratic nightmare presided over by a "New Class", to employ Djilas' term regarding the bureaucrats who ruled socialist Yugoslavia before its demise. It is also possible that, as time passes and majorities are formed, the majority will come to oppress, most severely if not brutally, the minority. Or, it may come to pass that some measure of modern western democracy is able to exist in the new South Africa. Any of these scenarios, and others, are possible. We simply do not, nor can we, know.

In contrast, what we do know, and for sound reasons which will be enumerated below, is that there is an inherently logical, if not necessarily desirable, reason for the growth of government in modern democratic states. This growth in government brings with it increased command over economic resources, and thus over the lives of the inhabitants of the nation-state.

It is our contention here that, inasmuch as we cannot know the direction and nature of the alterations which will take place in our nation, and since - for reasons we shall see - there are inherent reasons to believe the State, if not fettered, will grow and could become an instrument of oppression in the future, just as it has been in the past, South Africans should ensure there are constitutional restraints on the ability of the State to take economic resources away from them. Put differently, there is a strong case, since we know not what the Future will bring, to restrain Leviathan now; tomorrow we may be unable to do so. There are, of course, those who perceive the State as being an endless cornucopia of "good" - who rather naively think that any state-produced good or service is inherently desirable. This, of course, overlooks the fact that the State, an abstract concept and creature of the persons therein, has no resources to produce anything ! Rather, the State can produce goods and services only to the extent that it first takes away goods and services from the underlying population.

While many of us find such "takings" inherently undesirable, this essay will not address that important issue. Rather, in developing this essay, we shall make several assumptions, which we think can well be supported by the great weight of history. They are: (1) that the major function of the state historically has been, and will continue to be, the redistribution of income [2]. Whether this is desirable, or not, is not within the scope of this essay; we suggest that, as a matter of fact, that is the raison d'etre of states, now and since their inception; (2) as a corrolary to this first observation, that, ultimately, the State necessarily will employ either overt force and coercion, or the threat thereof, to effect such redistributions; (3) as suggested above,

we further assume that the State is devoid of any power to produce anything until it first takes away resources from the private, or civil, society and employs those resources for the ends of the State; and (4) we shall assume, perhaps most crucially, that the 'State' is not some amorphous body separate from the individual agents who are the agents of the State - its elected and appointed officials. Thus, we assume that decisions regarding those resources which the State has, or commands, are made by individuals who are in the employ of the State - the decisions are not made by an amorphous 'mass'. As we shall see, this is both a crucial assumption, as well as a realistic one, and it has vast implications for the behaviour, and future direction, of "the State".

(II) The Rise of the Modern State

Introduction

While there is a huge literature emanating from economists who study such matters, there is widespread agreement with Mueller's statement "that government has grown, and grown dramatically, cannot be questioned." [3] That the growth of government expenditures has attracted so much attention, reflects the fact that, to the extent government spends more, individuals have less to spend; thus, the growth of government represents a basic and potential threat to the general proposition that individuals are the best decision-makers regarding that which will make them better off.

The Twentieth Century has been described as the 'Age of the Loss of Innocence'. An early, and largely discredited, view of the public sector was that the people employed therein had a 'mystique of public service' - that there was a special 'ethos' among 'public servants' (and politicians) which imbued them with a desire to serve the body public; that decisions made by those in the public sector were devoid of selfishness and were calculated only to serve the 'public interest' - whatever that was.

While most modern readers, and particularly those who have viewed the satirical television show, Yes, Minister, can hardly harbour such naive illusions about the nature of the 'public sector' (especially given the accumulated knowledge about the 'New Class', which governed and abused the citizens and states of the former Soviet Union), it is surprising the number of persons who do. That there are still those who believe in the 'disinterested British civil servant ' reflects the 'Law of Distant Belief' - the 'law' regarding beliefs which says that one can only sustain a belief in a myth according to the distance which separates one from the myth. Those acquainted with the mechanics of government generally harbour no such illusions; nor do those acquainted with the often self-interested, self-serving nature of politicians and public officials. Indeed, given the rapacious nature of the South African public service - especially in its treatment of non-whites - from, roughly, 1948 to 1992, it is difficult to understand why all too many continue to cling to such a discredited belief.

Rent-Seeking by Public Officials

Over the last 30 years, a sub-discipline of Economics, called "Public Choice" theory, has developed a generally accepted explanation of the nature of the public sector, generally, and of the behaviour of politicians and bureaucrats, specifically. This explanation also serves to explain the phenomenal growth in the public sector, worldwide, and it has especial relevance to South Africa.

Simply put, the Public Choice explanation of government, and of governmental behaviour, is that those in the public sector are no different from the rest of us - that they attempt to maximise what economists call "rents" or "monopoly rents."

The Nature of Rents

The term "rents", like much of the economist's jargon, requires some special explanation, as the term is not what is commonly meant by the word 'rent'. To the economist, a "rent" is said to exist when the price which a consumer is willing to pay for a good is less than he has to pay, in the marketplace. For example, I personally value cigarettes very highly, and, given my income, preferences, etc. would be willing to pay, say, R6 per pack of cigarettes. However, since there are many consumers in the market, many of whom do not value cigarettes so highly, the market price of cigarettes is, say, only R2. That is, I receive value of R6 while paying only R2. In the jargon of the economist, I receive a "rent", or 'consumer surplus', of R4, which, of course, is quite nice for me.

On the producer's side of the market 'rents' also exist as, frequently, producers receive a price for their goods which is well in excess of that which they would have been willing to take for those goods. A prime example is that of a rock-star who thoroughly enjoys his work: he is paid, say, R10 000 per performance, but, given the fact he likes his work, etc. would have cheerfully performed had he been paid only R200. Thus he has received a "rent" of fully R9 800 - nice work if you can get it!

Armed with these definitions, we can better understand the 'rent-seeking' nature of government, and begin to understand why modern governments have grown virtually without bounds. There are at least three "culprits" which have caused the growth of modern government: voters, bureaucrats, and politicians. Let us consider each in turn.

Voters and Rent-Seeking

Voters go to the polls, not unlike consumers to the market, with various wants. These wants are conveyed - more or less efficiently - to political candidates or parties. But voters are not some monolithic mass; they differ among themselves. Some are male, some female, some have children, some don't; some are farmers, some trade unionists; some Moslems, some Christian; some are engaged in export trade, some in import trade; some are young, some old. Simply put, they all have differing characteristics and these characteristics lead them to desire that "government", i.e. other voters, redistribute income to them. Thus, we find that farmers want subsidies from 'the State', i.e. from non-farmers; and the old also want subsidies from 'the State', i.e. from younger voters. Similarly, trade unionists want subsidies from 'the State', i.e. from 'employers' and 'consumers' and other 'non-trade unionists' in the form of especial legislation which will enable them to advance the goals of their officials and members. All of which is to say, there is not some uniform, amorphous, non-descript voter; voters have 'flesh and blood'. The have desires and wants which they want their elected officials to meet - which, in reality, is a demand that their elected officials coerce other voters to satisfy these demands.

Voters and Rational Ignorance

It is easy, i.e. 'cheap', for voters who have very closely aligned common interests, e.g. farmers or trade unionists, to band together and lobby politicians to satisfy those common interest. On the other hand, for those outside such a coalition, it is very difficult to organise to oppose the "State's" granting the wishes of the coalition, particularly if the overall cost (in terms of the public budget, or as measured by changes in prices of other goods in the economy), is small for any given voter outside the coalition.

Put differently, on a wide range of issues about which politicians are 'lobbied' by special interests, it is quite rational for any given voter to remain ignorant, especially if the likely effect of the lobbying efforts will have but a small increase in the consumer-voter's tax bill. For example, if farmers find that a particular method of allocating water will benefit them by, say, R10 each, they will be willing to contribute up to that amount in 'rent seeking', i.e. in lobbying politicians for the passage of such a bill. If the bill passes, the total benefits to farmers will be

R10 times the number of farmers - and among farmers, some will get benefits far in excess of only R10. On the other hand, I, an urban dweller-taxpayer, am rather more knowledgeable about the quality of the roads I drive on to get to work than I am about the nature of agricultural irrigation systems. The reason I am is that, since the benefits of irrigation come to me only most indirectly, i.e. in the form of the prices I pay for the produce I buy at the supermarket, I have no real and direct reason to become knowledgeable about irrigation, or its cost, in the nation-state. I have no reason to really think about the cost of irrigation since any given irrigation proposal is likely to cost me only a modest amount added to my overall tax bill. Put differently, I am rationally ignorant - my ignorance is rational in that it would "cost" me, in terms of time, effort, etc., rather a lot to become knowledgeable and conversant about the vast number of issues which confront parliamentarians, and since the direct cost to me of any one of those issues is likely to be small, I concentrate my efforts on knowing only about those which have a more immediate impact on my life and pocketbook. That is, I remain rationally ignorant of those expenditures that have a relatively small impact on me.

Thus we see that special interest groups can combine and advance their interests with very little opposition since voters are "rationally ignorant" about issues which affect them only modestly or indirectly. We can decry this and say that the electorate has a 'civic duty' to be better informed; but the simple fact is that unless I perceive that a given act of government will have a reasonably direct, or large, impact on my life or pocketbook, it is not rational for me to expend my limited time and energy becoming conversant about all issues and, rather, I become conversant only about those of direct interest to me.

Accordingly, special interest groups are, with little opposition, able to lobby politicians and successfully push for legislation which will enable them to receive 'rents', i.e. value from the public treasury (directly or indirectly) which far exceeds the 'cost' (broadly conceived and not confined to monetary costs only, but including labour expended in lobbying) to them . In doing so they know that their efforts will generally not be vigorously opposed since, on any given issue, other voters will remain 'rationally ignorant' of the bounty they seek from 'the State', i.e. their fellow citizen.

Politicians and Rent-Seeking

Politicians, despite the myth of the public servant, are not really different from all the rest of us. That is, they, too, are endeavouring to 'maximise' something - and that something is either power, tenure in office, or something similar. It will be noted that we have not here suggested that the politician is attempting to 'maximise income.' The reason is that despite myths to the contrary, most politicians are no more dishonest than the rest of us. There are some, of course, who would 'sell their soul' for the proverbial bowl of porridge, but they are, in fact, relatively rarer than common mythology would have it. Rather, what they in fact do is 'rent-seek' and receive the 'rents' which attach to public office. These 'rents' are often general honour and prestige, or large and obsequious staffs, etc. rather than exceptional material wealth.

Although in its last election South Africa altered its electoral system away from the more common 'constituency' to the 'proportional representation' system, it is likely that that electoral system will not endure and, instead, we shall return to the more conventional 'constituency' system, in some form or another. In such a system, even if it is a 'Westminster' system in which power over parliamentarians is lodged in those at the top in the various political parties, parliamentary candidates respond to 'lobbying' efforts from various constituencies in an effort to win votes - and thus remain secure in office. In doing so, the politician is not unlike a 'stockbroker' or other 'broker' - an intermediary who matches various groups with each other. In the case of the politician, or political party, the 'brokering' function is rather more complex. A politician who is 'lobbied' by farmers for, say, the passage of a particular water bill must do a rather intricate mental calculation to determine how this will affect, for example, his

traditional trade union supporters. If the 'farmer's bill' will have but an indirect, and undramatic, effect on his traditional constituency, the politician will find that supporting the farmers has but little 'cost' to him in terms of electoral support; and, on the other hand, by supporting the farmers, he finds that he can broaden his electoral support and thus make more secure his tenure in office. Thus, in such cases, there is every incentive for the politician to 'broker' the deal and approve the bill which aids farmers. In the language of the economist, the politician/office-holder balances the "marginal costs", as measured by loss of support, with the "marginal benefits", as measured by the increase in support, which is to be had from any particular stance he (or his party) may take on any given issue.

Tenure in office brings with it power and increasing control over those resources commanded by the State. Put differently, continued tenure in office brings with it increased control over those who, on a day-to-day basis, control government - the bureaucrats. And, as this control is increased, it becomes increasingly easy, and less 'costly' for the politician, or political party, to pass legislation, and, of vastly more importance in the modern state, to enact and promulgate regulations which will serve the interests of the politician's constituents which, in turn, serves to make continued tenure in office easier as the constituents thus favoured find it in their interest to maintain the politician in office.

Recent South African history provides rich examples of precisely the 'rent-seeking' behaviour we have described above. Upon winning the election of 1948, the National Party found that, rather than increase its constituency among the electorate, it was easier to 'shrink' the size of the electorate, and then ensure its support among the remaining voters. Thus, almost immediately upon seizing office, the Party altered electoral boundaries and 'gerrymandered' districts so as to ensure its opposition would be banded together in districts in which they were almost the sole voters, which, of course, explains Houghton in Johannesburg and the election of Helen Suzman; or that the opposition would be fragmented into districts in which they were overwhelmed by National Party supporters, and thus, under a 'first-past-the-post' electoral system, sure to remain unrepresented. And, in the extreme, the Party simply eliminated potential opposition from the voter's roll, as they did in 1952 with coloured voters. The Party was able then to increase the probability of its tenure in office by narrowing the range of its support. And, having done so, it was then able to maximise its support among the remaining electorate by passing legislation which enabled its supporters to receive large 'rents' from the State, i.e. from the remaining electorate and population. This was, then, a most successful example of 'rent seeking' by an electorate and its politicians.

As our example illustrates, the ability of politicians and/or political parties to avoid coalitions, and to 'rent seek' is, curiously, particularly great in conventional "Westminster" parliamentary systems where the majority party is, during its tenure in office, able to virtually totally disregard the wishes of all other parties. Indeed, it has been noted that, to the extent the 'winning' party in such a system has rather larger parliamentary majorities, not only is it able to ignore the wishes of opposition parties, but, in fact, is - on any given issue - able to ignore its own supporters since the 'value' to the party of any given voter, or modest number of voters, is small. Thus we have the curious result that the larger the winning coalition, the greater the likelihood it will be less responsive to the electorate.

Rent-Seeking and the Bureaucracy

Politicians, and voters, can propose; but in the modern State, bureaucrats dispose. While much public attention attaches to legislation, it is not too much to say that, in the aggregate, of vastly more importance in the modern state are the regulations promulgated by various ministries. A typical piece of legislation in a parliamentary system states merely that " ... the Minister may issue those regulations which, in his best judgement, are calculated to give effect to this legislation." Now, clearly, the Minister cannot, personally, take action on all that is brought to

his attention; of necessity, he must delegate many of these functions, including the highly important function of regulating the ministry under his ostensible control. The legislation, as a practical matter, then serves to delegate the quasi-legislative functions of the parliament to those who are employed, on a permanent basis, within the ministry. And it is the bureaucrat, then, in whose hands the power to issue regulations of the State resides.

Modern public choice theory teaches us that bureaucrats, just like all the rest of us, undertake acts which will serve their own self-interest. In saying this, it must be stressed that this is not to suggest that the bureaucrats are, in any sense, corrupt (although some of them are). Rather, we merely wish to note that, in promulgating regulations within their ministry, bureaucrats cannot but be mindful of the effect which such regulations will have on their own lives. Thus, we would hardly expect them to issue a regulation or edict, over the Minister's name, which announces that, annually, employment within the Ministry shall be reduced by, say, 10 % per annum. But, to employ a perhaps less obvious example, we would not be surprised if the bureaucrats in, say, the Education Ministry came to convince themselves that it would be in the public interest to require that all schools within the nation be inspected at least twice per year. This would, of course, require a large number of school inspectors; and to the extent there is an increase in the number of school inspectors, the workload of present inspectors would be spread out over more of their fellow employees. This would mean that the 'good life', i.e. the "rents", which employees in the Education ministry enjoy would be increased.

The main point to be made is that it is foolish in the extreme to expect "public servants" to fail to pursue their own self-interest, to the extent they are able to do so within the confines of the environment which they face. That is, it would be foolish in the extreme not to expect 'bureaucrats' to "rent-seek", just as do politicians, various special interest groups, and, indeed, all of us.

(III) Implications for governmental budgets

We have seen that the various 'consumers' of governmental services - voters, special interest groups, politicians, and bureaucrats - will all attempt to seek special benefits, i.e. will all attempt to 'rent seek' from the government, i.e. from their fellow voters. Having made that observation, we now turn to the implications for governmental budgets.

The Predisposition toward "Public Goods"

None of us like to pay taxes. However, there is substantial evidence that, to the extent that taxpayers are able to observe the fruits of the taxes which are levied on them, i.e. which they determine to levy on themselves, they are less prone to oppose these taxes. Thus, consumers of government services which are paid for by "earmarked" taxes are generally less opposed to such taxation.

This observation, however, quickly leads to yet another - the obvious observation that we would all like to enjoy the benefits of governmental services without having to pay for them. Thus, even when taxes are "earmarked", those who are the major consumers of the governmental services invariably demand of their politician/brokers that the 'tax net' be broadened to include those who consume even smaller amounts of such services. This enables the 'heavy' users of such services to have their consumption effectively subsidised by those who are non- or 'light' users of such services. Highways provide a major example of this 'tax or cost' shifting behaviour from one group of taxpayers to another. Specifically, even the Department of Transportation acknowledges that the damage done to highways by ordinary passenger vehicles is negligible and that, in fact, virtually the totality of such damage is done by large trucks.

Yet, the 'road tax' element of the petroleum price is the same for all who purchase petrol - whether casual automobile drivers, or major trucking firms. This tax clearly enables the trucking firms to shift much of the real cost of highway maintenance to automobile drivers.

The general point to be made, of course, is that even where there are user taxes for government services, the heavier users will, necessarily and invariably, endeavour to have the government broaden the tax base to include in it those who use those services less extensively. That is, they will seek to obtain governmental benefits for less than the tax price they pay for those benefits, i.e. they will "rent seek." An especially effective way some taxpayers can become effectively subsidised by other taxpayers is to induce political parties/politicians to provide more, and better, "public goods."

"Public goods" may be defined as those goods for which the consumption by some persons does not diminish the potential consumption by others. An obvious, 'textbook' example is national defence. We all benefit from the defence of the nation; and my "consumption" of national defence services in no way detracts from your consumption - and vice-versa. There are a number of other government services which have 'public goods' characteristics (even though they do not strictly meet the definition we have given here). Among such goods are: public parks, schools, road systems, public health services, etc. Strictly speaking, my 'consumption' of the services/benefits from a public park may conflict with your ability to enjoy the benefits of the park - but this will occur if and only if the park becomes congested when you and I simultaneously wish to go to the park. Similarly with schools, public health facilities, etc. And, the probability of 'congestion' is relatively small at any given time. Thus, those who especially enjoy, say, public parks will endeavour to ensure that government provides rather more such parks; and similarly for those who especially benefit from, or enjoy, other 'public goods.' Accordingly, we would expect that there is a built-in tendency in a democracy to expand governmental budgets to provide rather more public goods since, by doing so, government can shift the real cost of my enjoyment of the public good to my fellow-taxpayers. There is, of course, much evidence that this is precisely what has happened in the major democracies of the world: the governmental sector not only has expanded, but has particularly expanded in the provision of "public goods" by the State. By continually expanding the provision of such goods, political parties/politicians are able to "woo" ever smaller segments of the voting public to vote for them, since they have shifted the cost of the provision of such goods to other taxpayers. Put differently, and bluntly, politicians have learned that the provision of "public goods" is an especially successful way to "buy votes".

The Financing of Expanding Government Budgets

The Predisposition to Deficit Financing

The pre-disposition of the government budget to expand in a modern democracy, as politicians endeavour to provide increasing amounts of public goods to increasingly smaller voter segments, is not without cost or limit. Should governments continually expand their budgets, and in doing so increase the tax burden on the electorate, they will, of course, alienate those who are most heavily taxed, and run the risk of losing their votes. It is not too much to say that voters will invariably vote for expanded public budgets; but they will not invariably vote for expanded and increased taxes.

This could present the politician with a dilemma: how to expand government benefits for voters without expanding the burden on the voter?

The Inherent Political Attractiveness of Deficit Financing

The Keynesian lessons of deficit financing provide the modern politician with a solution to this problem. One can expand government spending not by raising, and/or expanding , taxes, but

by borrowing. When governments borrow, the resulting burden on the taxpayer is shifted. Specifically, the taxpayer finds that, just as with hire-purchase, the totality of benefits are received instantly, but the burden is spread out over time. To the extent government is able to induce lenders to lend for a long period, the annualised burden to the taxpayer is vastly less than it would have been had the taxpayer been compelled to bear the full burden of the benefits received. Thus, for example, if a political party wishes to undertake a governmental project which will cost R1 000 - and thus have benefits for at least some persons (and, particularly and especially those who have supported the government of the day) of, presumptively, R1 000, it need not raise taxes by fully R1 000. Rather, if government is able to borrow the R1 000 for, say, 5 years at 15%, then it will have to repay only R200 + interest of R150, or a total of R350, per annum; and then it will be able to deliver current benefits to its supporters (or potential supporters) of R1 000 at a current cost of only R350. Moreover, the R350 will be derived from all taxpayers, and particularly those taxpayers on whom the real burden of taxes is greatest; and yet the benefits will be reasonably concentrated on those voters who derive the more direct benefits from the governmental programme. Thus the government deficit is a vehicle whereby one segment of the electorate is able to garner 'rents' at the expense of yet another segment.

Intra-generational Shifting of the Burden of the Debt

Not only can government, by deficit spending, shift the cost of its current activities away from the direct beneficiaries, but it is possible that, with skilful borrowing, it is able to minimise the number of voters who are alienated by the borrowing. That is, it is possible that even those on whom the current tax burden is greatest can escape much of the pain of current taxation. Specifically, to the extent government is able both to "borrow long" and to 'roll-over' and 'refund' its debt, it is able to shift much to the repayment of its debt from the current generation to a subsequent one.

Shifting the Burden of Debt by Printing Money

The major vehicle by which there is a 'shifting of the real burden of the public debt' is that, unless it curbs its expenditures to offset the debt-financed expenditures, government has necessarily added to the money supply. And this addition serves to induce inflation. Inflation is desirable, from the viewpoint of borrowers, since they are able to repay debt with relatively cheaper, i.e. more readily acquired, Rands. Moreover, the distortions in the price system which non-rapid inflation brings about are only felt over time. Thus, in any one year, the distortions do not create chaos in markets so the full effect of inflation is not felt by the average voter/consumer. This means that government, by inflating, is able to "buy goods on the cheap". This practice is reminiscent of the practice of 'coin-clipping' by kings of old, who found they could finance their expenditures by shaving down coins and, after they had accumulated sufficient shaving, could mint yet more coins than the monetary base would have otherwise merited.[4]

Needless to say, inflation - which has been correctly described as the 'cruellest tax of all' - is a very attractive short-run way for governments to finance expenditures in excess of taxation. However, just as there are no free lunches - someone, somewhere, after all must pay, if only by giving up something they might otherwise have had - so deficit spending and inflation is not a long run cornucopia of endless bounty. There are at least two very real problems which attach to deficit spending.

Crowding Out

One effect of deficit spending which has attracted much attention from economists is known as "crowding out" - the tendency of public expenditures of any given size to displace, or 'crowd

out' private expenditures. This 'crowding out' phenomena has various causes, and effects, which, taken as a whole, have adverse effects on a nation's economy.

Public expenditures, whether financed via taxation or via deficit spending (or, and what is essentially the same thing, increasing the money supply), will necessarily tend to 'crowd out' private expenditures. At any given time there are but so many goods and services in the economy; thus, in the short run, when government purchases goods and services, it does so only by bidding away those goods and services from the private sector. The prices of remaining goods and services which are then available for private purchase are necessarily higher; and, with prices higher, there will be fewer purchases by the private sector.

Moreover, higher levels of public expenditures will necessarily alter the rates of return on projects which otherwise would have been carried out by the private sector. This distortion of rates of return will mean that the private expenditure which does take place is not that which would have taken place had the 'crowding out' not occurred. Investment spending by the private sector will not be the same as it would otherwise have been. This will have 'second round', or subsequent, effects on prices of subsequently produced goods and services. Over time, the cumulative effect of the initial 'crowding out' can have dramatic effects on a nation's pattern of productive activity. The former Soviet Union provides an excellent example: the rulers determined to build a huge military complex at the expense of consumer goods. Thus the higher prices which the government offered for those inputs which 'fed' the military, eg prices of steel, inputs into the steel-making process, etc. Predictably, and as the Soviet government wanted, large quantities of military, and military-related, goods and services were produced. However, firms ignored the production of consumer goods so that, very quickly, the entire nature of the Soviet economy was altered and 'tilted' toward military-related production. It is doubtful that Soviet consumers felt themselves made better off by this distortion of the productive process.

"Crowding out" effects are particularly adverse when the public expenditures are financed via deficit financing. The reason is simple. When government runs a deficit, it issues IOU's to finance its expenditures. In order to induce lenders to take the IOU's, i.e. to finance the deficit, the government finds that it must offer repayment terms which are at least as attractive as those which lenders could get from private borrowers. The major way governments can increase the attractiveness of its IOU's is, of course, by offering higher interest payments to the borrowers. This means that it is competing for scarce funds with private borrowers. But, other things equal, lenders will be more favourably disposed to lend to a sovereign government than to a private borrower since the lenders know that the government has the power to tax and thus can, ultimately, repay its debt (although in, perhaps, inflated currency - but, knowing this, potential lenders demand a 'premium' interest payment to compensate them for expected inflation.) Thus, other things equal, governments will be able to 'crowd out' private borrowers in the money market. This means that private borrowers will invest less than they might have otherwise which, in turn, means that the rate of capital formation, and thus increases in the nation's productivity, is less than it otherwise would have been. The problem is that in the 'second round', i.e. "tomorrow", the nation state will find that it is less productive than it might otherwise have been, and thus its goods and services are more expensive than they would otherwise have been. For an 'open economy' like SA., these effects are particularly adverse since potential foreign buyers of domestic goods are less disposed to purchase goods made in SA. since they are more expensive than (a) they otherwise would have been and (b) the foreigners can purchase them elsewhere. Thus, 'crowding out' can very well serve to impair capital formation, and thus economic growth, making goods and services yet more expensive in future; and, therefore it makes the real burden on future consumers/taxpayers of the earlier indebtedness greater than it would otherwise have been. This leads to yet further and cumulative effects - all of which are likely to be adverse.[5]

The Debt Trap

In addition to 'crowding out' effects, we in South Africa are now either in, or closely approaching, a "debt trap" as a result of the refusal of previous governments to raise taxes to finance their expenditures. A 'debt trap' occurs when the government finds that it must borrow in order to repay the interest on the debt which it previously incurred. The reason it is a 'trap', of course, is that should we borrow today to repay interest, then tomorrow we must borrow yet again in order to repay the interest of yesterday's borrowings - and so on ad infinitum. Quickly, of course, the government finds that an increasing portion of its budget must be expended on the repayment of interest, with concomitantly smaller amounts of the current budget available for the 'normal' governmental expenditures. And, thus, in order to finance those 'normal' governmental expenditures, government must borrow yet more - with resultant larger interest payments in future. And so on ad infinitum so that, in a short time, government finds that, like the Red Queen in Alice in Wonderland, it must run faster and faster to stay in the same place. Thus, while earlier generations have succeeded in shifting much of the burden of the public debt to the current generation, the current generation, finding itself in the 'debt trap', will come to bear the real burden of that debt.

As the *Financial Mail* has noted, "once in the debt trap, it is difficult to escape - only a drastic restructuring of the economy and government's role in it might reduce debt, leading to gradual recovery. Mere tinkering with monetary and fiscal measures cannot reverse the trend." [6]

It may be asked why the current generation cannot, as did a previous generation, merely shift the debt burden. There are two principal reasons:

(1) First, to the extent that the earlier debt served to increase inflation, and thus distort relative prices of goods and services, and in doing so dampen the predisposition of investors to invest, the burden is already being felt by the current generation. After all, to some extent, investors have not invested in SA. since they have been unable to determine what their expected real, i.e. discounted for inflation, rates of return would be. In a world in which prices are unstable and uncertain, the expected return which will be received from any investment is also uncertain. Investors are less disposed to invest and fewer jobs are created. The current unemployed are to no small extent bearing the burden of yesterday's inflation. Similarly, had investment taken place, incomes of current workers would have presumptively been higher; and thus they too, like the unemployed, are worse off than they would have been had inflation not discouraged investment 'yesterday.' The logic extends, of course, to consumers generally since, had there been more investment 'yesterday', goods today would have been cheaper than they in fact are; thus consumers are having to pay the real burden of yesterday's inflation and deficit financing. There is, indeed, no free lunch.

(2) The second major reason today's generation will not be able to blithely shift the debt burden to future generations is that, as governmental debt increases relative to government's ability to repay the debt, potential lenders come to demand ever higher premiums, or interest payments, in order to induce them to purchase the governmental debt. This means that the absolute size of government's interest bill becomes larger; and, more importantly, becomes an increasing portion of the government's total expenditures, meaning that it has less to spend on 'other' governmental functions. This means, of course, that either governmental functions must be curtailed, or taxes raised, or that the debt trap be approached ever quicker. Further attempts by government to finance its expenditures by borrowing will be perceived by potential lenders to yet further fuel inflation; and investors will, accordingly, demand yet higher interest premiums to compensate them for the potential loss in purchasing power which such inflation would bring. This means that the interest portion of the government's budget rises yet further, creating the spiral mentioned above.

Moreover, as mentioned above, government borrowing arguably "crowds out" private investment and, in doing so, creates adverse employment, and price level, effects which are necessarily felt by the current generation. In short, once a nation is in a debt trap, nothing short of radical action is necessary to return to 'fiscal sanity.'

Balanced budget provision in the Constitution

A constitutional provision to compel government to balance its budget is fast gaining popularity worldwide. Several states in the USA, for example, have already adopted such a provision and a proposed balanced budget amendment to the US federal constitution was narrowly defeated.

To overcome the problem of government overspending the South African constitution should include a balanced budget requirement. Budget deficits in times of crisis, such as war, should only be allowed under very strict exceptions and should require a two-thirds majority vote in parliament or a national referendum.

[1] Tytler, Alexander Fraser, as quoted in Sir John Glubb, *Soldiers of Fortune* (1973), pp. 229-230. See Buchanan and Wagner, *Fiscal Responsibility in Constitutional Democracy*," Studies in Public Choice", vol 1, pp.159 (Leiden : Martinus Nijhoff, 1978.)

[2] We use the term income, here, to include both money income and wealth; and we add, most importantly, that we view income as being the right to do something. Thus, income includes the right to use one's property subject to minimal government regulation - regulation which does not decrease the value of the property. Often, all too often in the modern regulatory state, the State 'takes' property, via regulation, while not giving constitutionally mandated compensation for the property taken. We should avoid this in the new South Africa by appropriate constitutional rules or legislation. Failure to do so has important adverse consequences on the level of investment, and hence employment.

[3] Cited in Cullis and Jones, *Public Finance*, p. 377.

[4] This, incidentally, explains why many coins have serrated edges - the possessor of such coins can readily see if they have been shaved; and explains why ancient coins are less than perfectly rounded. The current practice of issuing coins with serrated is a historical holdover/curio.

[5] It has been argued that the 'crowding out' effects of public borrowing on capital formation need not be as dire as that described above. Specifically, it is argued that if the money borrowed by the public/government sector is "invested" wisely then it can lead to an increase in 'capital formation' which will yield returns as great as those which might have been had were there private capital formation. There is little evidence in support of this rather tenuous argument.

[6] *Financial Mail*, 20 May 1994, p. 22.

4. Accountable government: Direct democracy

Summary

PROPOSAL

To entrench in the constitution the right of people to amend the constitution and to propose and veto laws.

The most effective way to ensure that democratically elected representatives remain accountable to the people is by allowing the people to veto political decisions or propose their own laws through direct democracy. It is therefore proposed that in the constitution the following powers be reserved to the people:

1) The lawmaking initiative and referendum

The right of the people, initiated by a petition signed by a certain number or percentage of voters, to propose legislation which must be put to the vote by the people directly in a referendum, or by the elected legislature.

2) The vetoing initiative and referendum

The right of the people, initiated by a petition signed by a number or percentage of voters within a certain time after the passing by the legislature of a law, to propose that a measure to veto that law be put to the popular vote in a referendum.

3) The compulsory constitutional referendum

The obligation to refer every amendment to the constitution to a referendum of the people.

4) The constitutional initiative and referendum

The right of the people, initiated by a petition signed by a certain number or percentage of voters, to propose amendments to the constitution, which must be put to the popular vote in a referendum.

5) The recall initiative and referendum

The right of the people, initiated by a petition signed by a certain number or percentage of voters, to propose that a particular politician or other elected or appointed office-bearer, be dismissed, which must be put to a referendum.

Accountable government: Direct democracy

Direct democracy – the key to accountable government

The world's first democracies were the city-states of ancient Greece, in which all adult male citizens voted directly on important issues. Since it is time-consuming and cumbersome for an entire population to gather together every time a decision must be made, the step from direct democracy to representative democracy, in which a small number of people are elected to act on behalf of others, is an obvious one, and easily made.

But representative democracy has serious short-comings. For one thing, it is most unusual for a voter to find a political party that represents accurately all his or her preferences. The voter might be happy with his chosen party's position on abortion and capital punishment, but dislike its policies on education and taxation. But when he votes for a representative he cannot pick and choose the policies he prefers, he must choose one party and accept the combination of policies that party offers.

Moreover, democratically elected representatives frequently abuse or overstep their mandates. They promise one thing and then vote for another. In almost every country, the majority of people oppose many of the policies which their elected representatives implement. The reason why these interventions come about nonetheless is known as Olson's Law, in honour of the economist Mancur Olson who observed that small powerful groups invariably manipulate government in order to serve their vested interests.

The most effective and the most democratic way to ensure accountability is direct democracy, by which the people reserve the right to initiate their own laws and to vote directly on proposed legislation and proposed amendments to the constitution.

The advantages of direct democracy

There are numerous advantages to the popular vote. It ensures that elected representatives remain accountable, reflects public opinion accurately, and diminishes the importance of party politics, thereby reducing polarisation and conflict. Voters accept the electoral defeat of their party with equanimity when they know that although their party has not gained a majority in parliament, they can still make themselves heard through the popular ballot.

Direct democracy focuses attention on specific issues. When people are asked, for example, whether a certain tariff should be introduced, they consider the proposal on its merits instead of voting according to their political affiliations. Popular ballots also help to break deadlocks in parliamentary decision-making and enable wrong decisions to be reversed relatively easily.

In both Switzerland, where direct democracy is commonplace, and the USA, popular votes act as a barometer of controversy, and in times of crisis they increase in number. When people exercise their sovereignty frequently there is less public apathy, frustration and dissatisfaction with government.

Politicians, deprived of the power to impose their views on an impotent and unresisting populace, in time become fellow participants in the law-making process instead of legislative tyrants and adversaries.

Our proposals for direct democracy in South Africa are based primarily on the use of the popular vote in Switzerland and the USA. Since the concept of direct democracy is new to South Africans the way in which direct democracy works in these countries is described in some detail below.

Direct democracy in Switzerland

The Swiss principle that the people should have the final say in decision-making dates back seven centuries to the ancient *Landesgemeinden* of the forest and mountain cantons. The *Landesgemeinden* are public meetings where all the citizens of a canton gather together in the village square and decide political questions with a show of hands. (Governments in traditional African societies were based on a similar kind of participatory democracy.)

When the present Swiss constitution was adopted in 1848 the right of the citizens to vote directly on any law was extended to the country as a whole. The regional governments followed the example of the federal parliament and by the end of 19th century all 26 cantons and half-cantons had included the right to referendums and popular initiatives in their constitutions.

The referendum

The referendum is the process whereby citizens vote "yes" or "no" to a proposed law. Two types of referendum are in common use in Swiss cantons (provinces) and communities (local authorities) today. One is the *compulsory* referendum which must be called to allow citizens to vote on all proposed constitutional amendments. In some regions referendums must also be called to ratify intercantonal agreements or financial decisions, such as proposed increases in spending or taxes. In many communities compulsory referendums are held to approve all expenditures above a certain amount.

Small communities make all major political decisions in town meetings of the whole populace, but in cantons and communities that are too populous for such assemblies, the *vetoing* referendum is often available. The vetoing referendum permits new laws, and sometimes even administrative regulations, to be put to the popular vote within a certain period of time provided a number of citizens (usually between 1 000 and 5 000) sign a petition requesting the vote.

These two types of referendum prevent laws which do not enjoy the support of the majority from coming into force.

The initiative

Also built into cantonal and community constitutions is the right to launch popular *initiatives*, through which citizens can propose measures which will become law if they receive the support of the majority. The *lawmaking* initiative proposes new laws and the *constitutional* initiative proposes amendments to the constitution. The *recall* is an initiative that allows the removal from office of unpopular leaders, though this does not often happen in practice.

Any group that wishes to launch an initiative has a specified period of time in which to do so. In most cantons and communities between 1 000 and 5 000 signatures are required, and the time allowed for collecting them can be many months, depending on the size of the area involved. The signatures must be checked and authenticated by the commune in which the signatory is resident.

In a formulated initiative a legal text is drawn up and put to the vote. If the people vote "yes" a new bill appears in the statute books as formulated. In an unformulated initiative (which is very rare) the people instruct the government to frame a law to implement the principle which the popular vote has adopted. A second vote is required to approve the law, once framed.

Once an organisation has collected the requisite number of signatures, it submits them to the government concerned in a little ceremony. The government then studies the proposal and gives its opinion as to whether the people should vote for or against it. In most cantons and large communities the government produces a fairly comprehensive booklet listing the referendums and initiatives on the ballot. This includes the texts of the proposals, a description

of existing provisions, a paragraph explaining why the government agrees or disagrees with each proposal, and another setting out the arguments of the committees launching each proposition.

Occasionally the legislature concerned recommends a "moderate" counter-proposal which is put to the vote if the initiative is defeated.

If legislation on the subject of the initiative is already planned, the government will attempt to persuade the group concerned to withdraw their proposal.

Popular initiatives are usually launched by minority groups. They often concern social legislation, and only about ten percent are accepted. Nonetheless, they are very popular with the Swiss people, and they serve several important purposes. They allow opposition to be expressed in a purposeful way and at times lead to the formation of a new political party -- most Swiss parties began with initiatives. They often result in spirited public debates which provide a vehicle for education and help crystallise public opinion. Moreover, the degree of support an initiative receives influences future government policy. If a bill is stalemated in the legislature those who favour the bill sometimes launch an initiative to put pressure on the government to adopt it. If the pressure succeeds and the bill is passed, the initiative is dropped by its proposers.

The logistics of frequent voting

Voting in Switzerland usually takes place in a local venue such as a school. In most cantons and communities the people vote at least four times a year -- once per season -- on about 24 different issues each year. Voting is usually on Sundays, when the people can easily get to the polls. Issues on the ballot might include such matters as the site for a new community school, a proposed cantonal road, or the introduction of a national seat belt law. Voting papers are distinguished by different colours or some other means to indicate whether the referendum or initiative is a community, canton or federal matter.

Voter turnout averages 35%, but varies greatly depending on the degree of interest in the issue at hand. Whatever the percentage poll, the majority gets its way. Participation in important questions is high, so low turnouts on unimportant questions do not worry the Swiss, who believe that "only a minority of the population is intensely interested in the country's political life" (*How Switzerland is Governed*, 1983).

In recent years the number of issues on the ballot has been increasing. For example, between 1890 and 1979 the citizens of the cantons of St Gallen voted on 335 propositions in the first thirty years, 400 in the second thirty and 620 in the third thirty.

The local governments pay the cost of printing the ballot papers. They also provide polling stations and are responsible for the counting of votes. Once the apparatus (ranging from old-fashioned polling booths to electronic voting machines or computers) for plebiscites is in place, they are not expensive to conduct.

Direct democracy in the USA

Direct democracy was introduced to the USA by the Progressive movement in the first two decades of this century. The Progressives profoundly distrusted legislatures because they saw business and government colluding to their mutual advantage, to the detriment of the man in the street: "The citizens of every state have been seen legislature after legislature enact laws to the special advantage of a few and refuse to enact for the welfare of the many".

Strongly influenced by Switzerland and the New England town meetings, they argued that the only way to ensure political accountability was through direct democracy.

The efforts of the Progressives resulted in a dramatic expansion of citizen participation in American politics. Not only did various forms of popular vote become commonplace, but the franchise was extended to women, and senators were directly elected for the first time.

In 1898 South Dakota became the first American state to introduce the referendum. Others followed during the next 20 years, but for the most part direct democracy remained limited to a few western states until the 1970s, when it began to expand eastward. Now 26 states and thousands of local jurisdictions have widespread direct democracy.

Direct democracy is consistently and strongly supported by a high percentage of the US electorate, both liberal and conservative. Over 77% of Americans favour the more widespread use of referendums and initiatives. This doesn't necessarily mean that people will participate in votes or have strong views on most issues, but they believe that the public should have the right to participate.

The initiative and referendum in the USA

All the states expect Delaware have compulsory referendums to amend their constitutions and in 21 states bond issues and debt authorisation are subject to compulsory referendums too. Many states also submit certain laws to the popular vote voluntarily to ensure their legitimacy.

Twenty-five states also allow voters to reject newly enacted laws, provided they submit a petition with a required number of signatures within a specified time. However, access to the process is generally not as broadbased as in Switzerland, and only in Arkansas, Idaho and Nevada are there no restrictions on the laws that can be challenged.

As of 1980, 23 states had authorised initiatives to introduce constitutional amendments or new laws. These can be set in motion by 8% of the public on average, and once on the ballot a proposal that receives a majority in favour becomes law. In some states initiatives are restricted to certain issues – for example, some do not allow initiatives concerning the judiciary.

Direct initiatives formulate and enact a constitutional amendment or new law. Indirect initiatives propose a measure to be submitted to the legislature for formulation and enactment. If the legislature doesn't approve the proposal within a specified time, or if it formulates it in a way not acceptable to the proposing committee or group, more signatures are collected and the issue is put to the voters. As in Switzerland the government sometimes provides an alternative proposal.

By 1986 the recall initiative had been authorised in 14 states. As in Switzerland this measure is seldom used – to date fewer than 15 officials have been recalled from office – but when it is used it has a powerful effect. For example, in 1982 circuit judge William Reinecke of Lancaster, Wisconsin, said that a five-year-old victim of sexual assault was "unusually promiscuous". A recall petition was immediately circulated, but the judge retained his position by the narrow majority of 0,85%. In November 1983 state senator Phillip O Mastin was removed from office through the recall because in 1982 he had supported an increase of 38% in state income tax.

Some states also have a variation of the recall whereby certain appointed officials such as judges require periodic popular reconfirmation.

How the public initiate a measure in the USA

The wording for an initiative is drafted by a group of people who have a proposal (or *proposition*) that they would like to become law. For example, in the state of Oregon in 1990 a committee of concerned parents called "Oregonians for Educational Choice" drafted an initiative entitled *School Choice System: Tax Credit for Education Outside Public Schools*. To publicise the idea an A3-sized leaflet was posted to all households explaining what the implications of the law would be, how it would work, and who it would affect. It also listed well-known individuals who supported the idea, and gave the official wording of the proposed law.

Some groups use a special campaign consultant to help them draft their proposition. Usually the proponents of an initiative are required to file the wording with the secretary of state or attorney general, who checks that the title of the proposition is not misleading and ensures that it is not changed once it has been filed.

Number of signatures required for a popular initiative in the USA

A certain number of signatures are required on a petition before a proposition can be put to the vote. This is not a fixed number as in Switzerland but is based on a percentage of voters, which varies from one state to another. For example, in North Dakota the signatures of 2% of the population of voting age (including people who are not registered as voters) are required to bring an initiative to the vote. In Wyoming the number of signatures must equal 15% of the number of votes cast in the preceding election. The average requirement is 8% of votes in the most recent election.

Half the states require signatures to be geographically distributed: in Massachusetts, for example, no more than 25% of the signatures may come from any one county.

Fewer than 20% of all initiatives filed gain enough signatures to require the government concerned to put the issue to the vote. Not surprisingly, states with the lowest signature thresholds have the highest number of initiatives.

In states where the signature requirement is 8% and under, about one in three initiatives put to the vote are adopted (35%). In states with the thresholds of 10%, around half are adopted (47%). In other words, when it is more difficult to get a proposition on the ballot, more measures are accepted by the voters, presumably because less acceptable issues have already been weeded out.

In most states direct democracy is a grass-roots-oriented low-cost affair. In counties and municipalities few signatures are required on petitions, and it is easy to validate the signatures. However, at the state level, especially in large states, the process of validating signatures becomes very expensive: about 29c per signature in California. It is now done by means of random sampling to keep the cost down.

Signatures are collected at shopping centres and supermarkets and in cinema lines. Most people approached will sign since signing allows the matter to be put to the vote but doesn't necessarily mean they are in favour of the issue. In small areas, volunteers collect the signatures, sometimes with paid helpers at the rate of say, 25c per signature. However, in California and Ohio where signature requirements are high, a professional signature-gathering firm is sometimes employed towards the end of a campaign to complete the requisite number. These firms charge around $1,00 per signature, of which 30c goes to the individual petition circulator.

Direct mail signature solicitation is expensive – about double the price of in-person collection – but since it can be combined with fund-raising it is becoming increasingly popular for issues to which the public is likely to respond with financial assistance.

Understanding the issues in the USA

Some propositions are long and complicated and written in difficult legal terms. Furthermore, some issues are by nature confusing, and in some cases the wording attempts to disguise what the measure will mean in practice.

To ensure that the public is reasonably informed, in nine states a handbook containing an official description of each proposition, with arguments for and against, is mailed to all registered voters three to four weeks before an election (as in Switzerland). Some states require petitioners to publish the text of their propositions 30 days before the election. Many states inform voters how much is being spent by the proponents and opponents of each issue.

Problems resulting from size

As long as decision-making is largely decentralised, most initiatives and referendums occur at the local level where people are involved in the issues at hand and can easily enter the debate. In these circumstances direct democracy is an inexpensive, participatory grass-roots affair.

However, in a state like California, with a population of around 30 million and great power centralised in the state government, many propositions have to be dealt with on the state ballot. To keep costs down, propositions are voted on at the same time as elections for officials. This means voting is far less frequent than in Switzerland (where in a large canton like Zurich people vote up to 20 times a year) and numerous propositions appear on the ballot at the same time. In a general or state election California residents might vote for ten public officials and 15 or more popular initiatives. Consequently, few voters are interested in all the issues.

Moreover, it is expensive to get a proposition on the ballot because many hundreds of thousands of signatures are required. This makes access of poorer groups to the process difficult. It also means that bad decisions are difficult to reverse. In Switzerland, where most decisions are local and signature requirements are low, if the voters make an error they can quickly and easily reverse their decision. For example, in 1973 the canton of Basel-Land voted in favour of a tax increase of up to 140% on high-income earners. The result was a loss of 50 high income earners from the canton and a reduction of 8% in overall revenue. In 1974 the voters agreed in another referendum to replace the tax with one that was less punitive. In California it is so expensive and time-consuming to get a proposition on the ballot that it is seldom worth the effort to reverse an ill-advised decision.

A comparison between the process of direct legislation in Switzerland and the USA, and between various states within the USA, leads inescapably to the conclusion that the more power is devolved to the local level, the more the advantages of direct democracy are evident.

This does not mean that there should be no direct democracy in large states. Even when millions of people are involved initiatives excite great public interest, and the famous California Proposition 13 (discussed later) attracted over 350 000 more voters than the simultaneous vote for governor. Moreover, even on such a vast scale referendums and initiatives increase civic responsibility and encourage political accountability.

New voting methods in the USA

Until recently, voting in referendums or for initiatives has always been done in the same way as for elections, and, as mentioned earlier, usually at the same time. Nowadays, however, mail ballots are increasingly used. For example, in San Diego a mail ballot was used to vote on the building of a $225 million convention centre. Ballots were posted to 430 211 city residents, and returned by 261 433. Not only was the return rate double the turnout for a normal poll, the mail ballots were 20% cheaper than traditional voting, and also faster.

Information technology can also be used to facilitate direct legislation. In the USA, Gabel L Campbell has introduced a computer system called a Consensor into his church to obtain the reaction of the congregation to his sermons. Each person in the church is given a mini-terminal

small enough to fit in the palm of the hand, and simply presses a button to indicate whether or not he or she approves of the sermon. A central computer takes a few seconds to compute the vote. The consensor would lend itself ideally to decision-making at large public meetings where a secret ballot is required. Instead of walking to the front of a hall and dropping his ballot into a box, each individual could press a "yes" or "no" button and cast his secret ballot immediately.

In the USA a simple majority is usually sufficient to pass a proposition. There are exceptions. In Idaho propositions require a majority of the number of votes cast for governor, and in Wyoming "yes" votes must total 50% of the votes cast in the most recent election. Also, in some cases a two-thirds or other special majority may be required to for example, amend a municipal charter or to borrow money above a certain amount.

Issues of popular concern

Since the inception of direct democracy in 1898 there have been 17 000 state-wide propositions and many more at the city and county level in the USA. In the state of Ohio there were 1 846 popular ballots at all levels during 1968 alone.

Generally speaking, there are more ballots in the west (where the history of direct democracy is longer) than in the east, with California and Oregon leading in the number of lawmaking initiatives, and Arizona and North Dakota holding the most vetoing referendums. In the midwest and west, initiatives have increased dramatically since the early sixties. In 1982 Americans voted on more initiatives than at any time since the Great Depression, reflecting growing public frustration with the unresponsiveness of the legislatures.

On average, 60% of referendums proposed by legislatures (to test popular opinion) are approved, whereas only 38% of ordinary propositions and 34% of constitutional amendments proposed by popular petition are adopted. Petitioners generally prefer constitutional initiatives to legislative ones because once won they are harder to overturn.

Almost every issue imaginable has been the subject of a popular initiative in the USA, including civil rights, racial integration, environmental and consumer protection, nuclear energy, women's rights, school busing, housing, transport regulations, gambling, state lotteries, the drinking age, abortion, the right to work, obscenity, beverage container deposits, land-use planning, the death penalty, milk prices, and the hunting of mourning doves.

Issues of concern change over time. During the depression social issues, welfare and alcohol control were voted on most often, and in the 1970s many propositions related to drug control. In the eighties the emphasis fell increasingly on environmental questions.

Surveys show that voters find questions regarding tax and the organisation of government the most interesting, followed by education. Taxation and spending are the most frequent subjects of propositions at state level and at local level school funding is the most common issue put to the vote.

An analysis of initiatives prior to 1976 showed that 26% concerned government and the political process, 21% revenue and taxation, 14% dealt with business and labour.

The most famous of all initiatives in the USA was Proposition 13, which proposed a constitutional amendment in the state of California in 1978 to slash property taxes by 57% and to limit them in future to 5% of market value with no more than a 2% increase annually. The amendment was approved by a 5% majority of voters, with strong majorities in every class of the population. It reduced California's annual state revenues from property taxes from $12 billion to $5 billion. The day after the proposition was adopted, Governor Brown imposed an immediate freeze on the hiring of state employees, telling a joint session of the state legislature: "Over four million of our citizens have sent a message to city hall, Sacramento and to all of us. The message is that property tax must be sharply curtailed and that government spending, wherever it is, must be held in check." Voter turnout is not usually affected by the propositions

on the ballot, but in the case of Proposition 13 the poll was unusually high and the effects of the vote resounded around the nation, precipitating tax- or spending-limit movements in 22 states.

Citizens generally vote to keep taxes lower, so tax and spending limits are often approved. Yet drastic tax slashes like the one contained in California's Proposition 13 are very seldom passed, and it is not unusual for tax increases to be approved. For example, in 1990 Californians approved the expenditure of $30 million on habitat for wildlife, as well as an increase in the petrol tax to finance road construction.

The process of direct democracy is ideologically neutral. Social democrats tend to focus on environmentalism and welfare, and conservatives on tax cuts and cleaning up government. Of the statewide initiatives conducted between 1974 and 1984, 51% were sponsored by the left and 49% by the right. Of these, 44% of the left-wing issues were approved and 45% of the right-leaning measures. Out of 46 non-classifiable propositions, half were adopted.

The role of the courts in the USA

In Switzerland the people are sovereign in the true meaning of the phrase: their decisions in popular ballots may not be overruled in the courts. In the USA, however, it is possible to declare any legislation, whether proposed by the people or by elected legislators, illegal in terms of the constitution of the USA or the state concerned.

Formerly, initiatives were challenged by the courts only once they had been adopted, in the same way as laws made by representative bodies. But since 1983 there has been a substantial increase in the judicial overruling of propositions *before* they are put to the vote, even though they have achieved the requisite number of signatures. In the case of fraudulent signatures or other serious abuses these interventions appear fully justified. However, on a number of occasions properly qualified initiatives have been stripped from the ballot before the voters have had a chance to have their say.

In other words, the courts are now deciding what issues may be put to the vote, and offering weak reasons to support their decisions. It is clear that they are being used to support political lobbies. For example, in 1983 the Massachusetts Supreme Court struck down an initiative to reduce the arbitrary power of the state legislature. In Florida two propositions were struck down in 1984, one concerning tax reductions and limitation, and the other limiting malpractice liability. All of these were overruled on the grounds that they violated the "single subject" restriction imposed by the state laws on initiatives by dealing with more than one topic in one proposition. But in previous cases the courts had interpreted this same restriction broadly, allowing several issues on one proposition provided all were relevant to the main purpose.

During the same year the California Supreme Court struck down an initiative requiring the state legislators to join the call of other states for a constitutional convention on a proposed balanced budget amendment to the US constitution. The court maintained that only the "legislature" can issue the call for constitutional conventions, and that the initiative provision to withhold legislative pay and benefits to force compliance would prevent the representatives from voting "in their best judgement". In essence the Court decided that the people do not have the right to instruct their representatives to call for a constitutional convention; they can only try to persuade them to do so.

In 1984 the Montana High Court struck a US-balanced-budget amendment from the ballot on the same grounds as the California Court, and the Nebraska Supreme Court ruled against an initiative calling for a nuclear weapons freeze.

Also in 1984 the Arkansas Supreme Court overruled the Unborn Child Amendment, an initiative which would have forbidden tax funding for abortions and made it state policy to promote the "health, safety and welfare of every unborn child from conception to birth". The court ruled that use of the term "unborn child" in the title of the measure "constitutes a partisan

colouring of the ballot ... which gives the voters only the impression the proponents of the amendment want them to have." This was done even though the state's initiative provisions specifically allow initiative proponents to title their own propositions, and many courts and legal writers, including the Supreme Court of the USA, frequently use the term "unborn child".

Most of the initiatives that have been overruled by the courts enjoyed high popularity and were expected to win majority support. To avoid experiencing defeat at the polls, their opponents used the courts to nullify the proposals. Because of these successes, almost every initiative is now challenged in court by its opponents, leading to lengthy, expensive court battles.

As mentioned earlier, the Swiss courts do not have the right to overrule popular decisions. Arguably because of this, the Swiss people enjoy more rights and freedoms than any other developed nation in the world.

In South Africa we are following the example of the USA and allowing an independent judiciary to rule on the constitutionality of legislation introduced at any level of government. But we should ensure that our constitutional and other legislative arrangements on direct democracy should be broadly framed and not restrict the right of people to launch an initiative on any matter. This will prevent opponents of a proposal from seeking to strike it down through the courts before it is put to the vote.

The only grounds for striking down an initiative before it is voted on should be the same grounds that apply to a bill of Parliament or a provincial legislature before it has become law: ie the measure violates the bill of rights or is beyond the powers of the legislature concerned.

National referendums and initiatives

Switzerland is the only nation that allows vetoing referendums and initiatives at the national level, although several countries require national referendums to change their constitutions. From the time of the French Revolution to 1980 there were 550 votes worldwide at national level (including elections and referendums). Of these, around 300 occurred in Switzerland.

Amending the federal constitution in Switzerland

Federal referendums are common in Switzerland. This is because the constitution sets very explicit limits on federal power, so that any federal law on a new matter requires a constitutional amendment. Amendments can be proposed by either of the two houses or by popular initiative. If an amendment is proposed by parliament it must be adopted by a majority in each house, as well as a majority of the canton governments and the people in a referendum. If proposed by the people it must be adopted by a majority of the people and the cantons. Parliament sometimes offers a more moderate counter-formulation to a popular initiative, which is also put to the national vote.

Between 1874 and 1985, there have been referendums on 216 proposed constitutional amendments. Of these, 111 have been accepted and 105 rejected, including a proposed total revision of the constitution to restructure the federal government along more authoritarian lines. Sometimes a rejected amendment is re-submitted with slight alterations some years later and is accepted. Occasionally an amendment accepted by a majority of voters is rejected in a majority of cantons. Of the 111 amendments which have been accepted, only eight were popular initiatives, while 14 were counter-proposals to initiatives. The number of federal referendums per annum has been steadily increasing since World War II. This trend has been even more pronounced since 1970: between 1980 and 1987 the Swiss voted on 54 federal issues. (The electors go to the polls about four times a year and vote on up to six federal issues each time.)

Most amendments have granted central government more power to legislate on various economic, environmental and social welfare measures.

National compulsory referendums in Switzerland

Examples of legislation which required a constitutional amendment and therefore an compulsory referendum are: the introduction of voting rights for women (rejected in 1959, approved in 1971); protection of the environment (approved); protection of tenants/lessees (approved); introduction of value-added tax (defeated); tax increases for the rich and relief for the poor (approved); promotion of scientific research (approved); control over air pollution caused by motor vehicles (defeated); safety belts and crash helmets (approved); creation of the Canton of Jura (approved).

National vetoing referendums in Switzerland

In Switzerland 50 000 citizens or eight cantons can demand a national referendum on any federal law not later than six months after it has been passed. Not many laws are rejected. Up till 1976 only 78 out of a total 1 141 federal laws were called to referendum, and of those only 48 were rejected.

The reason the figures are so low is that the cabinet goes to considerable lengths to avoid a referendum, even if the law under consideration is not rejected. The Council tries to obtain the consensus of all the interest groups with sufficient support and resources to endanger the legislation, before introducing any new bill. This means that civil society pressure groups play a pivotal role in Swiss political life. The two most important pressure groups are the Trade Union Association and the Confederation of Swiss Industry. The Peasants' Union (which represents the traditionalists, small business, farmers and ecologists) the churches and numerous business organisations also exert considerable influence.

Unlike the political parties, interest groups are tightly organised and have specific objectives. While their members act collectively to promote those shared objectives, they are divided in their political allegiance, although the trade unions tend to support the Social Democrats, and the business organisations the Radicals and Christian Democrats.

Because of the importance of interest groups, a major part of the process of federal law-making in Switzerland includes submissions to interest groups. When a federal department drafts new legislation it always submits its proposals to a "committee of experts" which includes representatives of the principal interest groups likely to be affected by the law. The cabinet consults regularly, not only with labour, consumers, business organisations and small traders, but also with language groups, religious and regional interests and political parties.

If the cabinet does not secure widespread support for proposed legislation it may be faced with a referendum which is unwelcome because it greatly prolongs, and may halt, the legislative process. Thus Swiss politicians expend more time and effort in advance of any legislation than politicians in any other country, consulting, persuading, redrafting, conceding, communicating and accommodating as many people as possible.

The contrast between this process and the reverse lobbying that occurs in the USA (there are 23 000 registered lobbyists in Washington DC), Britain and South Africa, where interest groups lobby the government, is a clear indication of the location of power. In most countries the government is in a position to hand out favours, in the form of laws to benefit certain interest groups, in return for their political support. The state and these interest groups both grow ever larger and more powerful as they feed off each other. But in Switzerland the government is not able to hand out benefits to interest groups. It is accountable to the people, which means that any attempt to introduce legislation that benefits one group at the expense of another will be blocked by the people's veto in a referendum. This relieves the government of

the difficult task of refusing requests. The Swiss cabinet can answer applications for special laws by saying, in essence, "We would be happy to help you but it is for the people to decide".

National initiatives in Switzerland

Also built into the national constitution is the procedure through which the people can propose amendments to the constitution. Anyone who can raise 100 000 signatures can have a proposed constitutional amendment put to the vote, and if it receives the support of the majority the constitution will stand amended.

Once an organisation has collected the requisite 100 000 signatures, it submits them ceremoniously to the federal government. The process then follows as described for the cantons and communities.

Examples of past national initiatives are: introduction of a 44-hour week (defeated); protection of renters (approved); democracy in construction of national highways (defeated); against over-foreignisation (defeated); for a future without more nuclear energy plants (heavily defeated); for active protection of motherhood (defeated).

On rare occasions an initiative is so well received that the authorities agree to adopt it, and the petitioners withdraw. This happened at the central level with an initiative which proposed that equal rights for men and women be written into the national constitution. Because a constitutional amendment was involved, the people still voted on it in an compulsory referendum.

National initiatives and referendums in the USA

In the USA in 1977 a proposal was made for a constitutional amendment allowing national initiatives and referendums. Not surprisingly it was blocked in Congress. However, in 1978 and 1981 Gallup polls showed that support for national initiatives is consistently twice as strong as opposition. Furthermore support is growing as the feeling increases that Congress is run for the benefit of powerful interests.

Towards the end of 1982, partly as the result of a national campaign and partly through the efforts of spontaneous citizens' groups, 11 states and 32 local governments in the USA ran propositions in favour of a nuclear weapons freeze. Most passed comfortably, and the effect was a powerful country-wide message to President Reagan and Congress that people were deeply concerned about nuclear armaments. The president and Congress ignored the message, but they would have been forced to respond to it if the American people had the right to propose initiatives at the national level as do the Swiss.

Common objections to direct democracy

Direct democracy empowers the uneducated

The chief objection to direct democracy is that it transfers power from the educated to the uneducated. This objection is raised by both the left and the right.

Those who believe that direct democracy empowers the ignorant argue that voters have no real knowledge of the issues at hand, will not study the propositions properly, and are simply influenced by whim, advertising, or newspaper advice. However, studies show that although newspapers certainly play a role in influencing public debate, they can't guarantee the success of a proposition. People are careful whose opinions they rely on – the endorsement of educated elites such as scientists is the most important influence on their thinking, and politicians play a minor role in shaping their perceptions. Controversial issues often lose at the polls, especially if experts appear divided. The general attitude of the public is "when in doubt vote no".

Critics of direct democracy also argue that the process replaces due deliberation, orderly procedure and legislative judgement with ill-informed and intolerant public opinion which cannot absorb technical information. Popular votes focus on the short term and prevent debate, compromise and negotiation, whereas representatives take a longer view, and are able to assess the question at hand with knowledge and expertise.

In truth, however, elected representatives are no better than the general public at understanding technical issues. They rely on experts to investigate and advise them, just as the people do during the run-up to an referendum. Politicians are notorious for oversimplification, misleading claims, and promises they can't keep. Prior to an election it is easy for them to offer an array of benefits without revealing their costs, but this cannot be done in the run-up to a popular vote. When the people vote for new roads, a convention centre or a social benefit, they demand to know what it will cost them.

The results of referendums are almost invariably restrained. They hardly ever favour dramatic shifts in public policy. It seems to be universally true that people elected to political office are more radical than those who elect them. The man in the street tends to be more restrained and moderate in his judgement than elected representatives.

Black South Africans lack the knowledge and experience to participate

In South Africa the argument that ordinary people are too ignorant to be allowed to vote in referendums is used mainly with reference to blacks, who are often seen by non-blacks as a homogeneous block that would vote *en masse* for any cause advocated by radical leaders. Ironically, these same people also argue that blacks constantly fight among themselves and are incapable of agreeing on anything.

Virtually all black South Africans support the RDP. But there is little agreement between, for example, members of the ANC, the Inkatha Freedom Party, Azapo, the Black Management Forum, NAFCOC, the PAC, the SACP and the various trade unions and civic associations as to the degree of power that should be vested in the provinces, or the best way forward regarding redistribution of land. These issues are as hotly debated among blacks as they are among whites.

The majority of South Africans of all races are moderate, as are the majority of people in every country of the world, and there is every reason to believe that they will vote along common-sense lines.

Those who argue that the common man should not be allowed to vote on issues because of his ignorance must consider whether schooling or lack of schooling is indeed an accurate measure of a person's ability to decide what is in his best interest. And even if it is, should his lack of education rob him of the right to decide on his own behalf?

To consider the first question, there is no evidence that people with education and experience govern well. There is in fact no positive correlation between complex, educated societies and good government. The Chinese have a sophisticated civilisation which dates from thousands of years before Christ. The oldest known printed book was produced in China in 868 AD. The Chinese cast iron centuries before any European civilisation, and had the highest living standards in the world during the 16th century. But when intellectuals gained power and influence during the Ming Dynasty and increased bureaucratic controls over businesses, China began to decline. Under Mao Zedong and the Communist Party it became one of the poorest nations, with one of the worst human rights records, in the world. In 1980 China's male literacy-rate was only 25%; it was rated 148th out of 171 countries in terms of GNP per capita, and ninth of 134 countries in terms of civil disorder (South Africa was 22nd).

Rulers of nations are often highly educated and drawn from the most privileged class of their societies, and they base their judgements on the theories of intellectuals. Yet they frequently make disastrous economic decisions, and have scant respect for human rights.

This is not to suggest that all educated leaders make bad decisions, but that education and sophistication *per se* are no guarantee of good government.

The rural Swiss of the middle ages who ran their communities by voting with a show of hands in the village square were rough and illiterate. They were less educated and less sophisticated, in any sense of those words, than South African blacks today. But they were better able to resolve religious conflicts than the aristocracies and guilds that governed the city-states. The peasants knew that they themselves would pay the costs of any decision to force either Protestantism or Catholicism on all, so they decided that each community should make its own choice.

Switzerland today is an extremely sophisticated and wealthy society. But this society is not the creation of brilliant economists or far-sighted central planners. Its real architects are ordinary people, most of whom know very little about economic theory, but a great deal about their own lives and whether they should be subjected to new laws.

The same is true of South Africans, regardless of the colour of their skin or the level of their education. An illiterate hawker in Johannesburg understands perfectly well that bylaws requiring (a) special facilities for him to wash his hands; (b) a lavatory within 100 metres of his selling point; and (c) a storeroom for his goods not less than 2 metres wide and 2,7 metres high, with a floor space of at least 6,5 square metres, all mean that when he sells mealies by the side of the road he runs the risk of incurring a crippling fine.

There is perhaps no stronger argument than this in defence of direct democracy. As soon as power moves beyond the reach of the common man, and those who control it cease to answer to him for their actions, they are able to disregard his welfare and institute measures from which they benefit at his cost. Good government is achieved when rulers are made accountable – and accountability is assured when ordinary citizens can participate in decisions, repeal unpopular laws and remove elected representatives who abuse their mandate. If those who make decisions have to bear both their negative and positive consequences, they will soon learn to ensure that those decisions best serve the common good.

Direct democracy favours elites

The opposite argument is also heard: plebiscites are not really democratic because only well-informed, affluent, educated and politicised members of the public vote. Rich groups, it is said, are able to use their money and the media to sway the vote in their favour. Extremists and special interests adopt the process to achieve their ends, and usually get their way because the voters are often apathetic.

It is true that in all countries, generally speaking, a larger percentage of people with higher education and incomes vote than those with less; this is the case in the USA and Switzerland for

both elections and propositions. But it is also true that highly educated, affluent people are a very small percentage of the whole and never constitute sufficient numbers to achieve a majority in a popular vote.

With regard to the influence of big money on voting patterns, various studies conclude that extra spending does *not* help an initiative to succeed; under-financed underdogs often get their way. One example of this is when a handful of activists in San Francisco called upon the city to take a firm position in favour of the deregulation of the selling and availability of hypodermic syringes to help prevent the spread of AIDS. The city of San Francisco itself does not have the power to do this, so the purpose of the initiative was to instruct the city to call upon the state legislature to "deregulate the manufacture, possession, sale and distribution of hypodermic syringes". The organisers had to collect only 10 000 signatures in under six months to get the initiative onto the city ballot. They collected 15 000 to make allowance for invalid signatures, and most of the $1,000 spent during the campaign was paid to professional petitioners who helped complete the signature requirements. Although the initiative was opposed by all official parties, it attracted public support easily and received a 54% vote in favour.

The proponents of a measure are always at a disadvantage because they have to convince the voters to change the status quo, and this is usually resisted. Even if proponents outspend their opponents two-to-one they are more likely to fail than to succeed. If opponents outspend proponents, a proposition is almost sure to be defeated. Money does not help to bring new laws onto the statute books, but it does help to keep them off.

As to the argument that special interests use direct legislation to achieve their ends, it is certainly true that as long as governments are in a position to hand out benefits there will be plenty who will use any available means to feed from the public trough.

However, it is much easier to bribe a powerful official, or to seduce a committee with promises of financial support and votes, than it is to persuade an entire electorate to introduce a law in your favour. It also requires far less time and effort for special vested interest groups to persuade the electorate once every four years to support the political party most likely to advance their interests, than it does to convince them to act in their favour in numerous ballots.

Direct democracy is too expensive

As mentioned above, direct democracy at the regional and local level is generally a grass-roots-oriented low-cost affair. In counties and municipalities few signatures are required on petitions, and it is easy to validate them. Clearly the ideal situation is one in which most decisions are made locally and people get involved in initiatives and referendums primarily at the local level.

But this does not mean to say that there should be no national votes in South Africa. On the contrary, the numerous advantages which result from direct democracy fully justify the costs incurred. Also, compulsory and vetoing referendums at the national level would introduce the referendum threat that would encourage politicians to pay more attention to public opinion and spend money more cautiously. This would probably save more money than the ballots would cost. Because our citizens are less wealthy than those of the USA, interest groups would have to rely on voluntary signature collectors for petition drives, which would mean that fewer matters would come to the national vote than accrue to the state ballot in California.

Political parties will use the recall to abuse one another

In their objections to direct democracy South African politicians sometimes argue that if the recall was introduced it would be used by one political party to remove from office the members of a competing party. This says more about the fears of the politicians than the likely consequences of introducing the recall.

Although many thousands of initiatives have been launched in the USA, Switzerland, Germany, Italy and elsewhere, only a handful have been for the purposes of recalling elected representatives, and no recall petition has ever been used by one party to remove a political rival. Popular initiatives require a huge amount of work and effort by a great many people. Those involved invariably feel extremely strongly about the issue concerned. For this reason the recall is only used under conditions of public outrage. To imagine that voters would support the removal of a politician who had done nothing other than to displease some members of a competing party is to grossly underestimate the good sense and the political apathy of the average citizen.

PROPOSAL

To entrench in the constitution the right of people to amend the constitution and to propose and veto laws.

The most effective way to ensure that democratically elected representatives remain accountable to the people is by allowing the people to veto political decisions or propose their own laws through direct democracy. It is therefore proposed that in the constitution the following powers be reserved to the people:

1) The lawmaking initiative and referendum

The right of the people, initiated by a petition signed by a certain number or percentage of voters, to propose legislation which must be put to the vote by the people directly in a referendum, or by the elected legislature.

2) The vetoing initiative and referendum

The right of the people, initiated by a petition signed by a number or percentage of voters within a certain time after the passing by the legislature of a law, to propose that a measure to veto that law be put to the popular vote in a referendum.

3) The compulsory constitutional referendum

The obligation to refer every amendment to the constitution to a referendum of the people.

4) The constitutional initiative and referendum

The right of the people, initiated by a petition signed by a certain number or percentage of voters, to propose amendments to the constitution, which must be put to the popular vote in a referendum.

5) The recall initiative and referendum

The right of the people, initiated by a petition signed by a certain number or percentage of voters, to propose that a particular politician or other elected or appointed office-bearer, be dismissed, which must be put to a referendum.

5. Accountable government: Checks and balances

Whilst a giant leap towards accountable government has clearly been achieved by the introduction of universal franchise multi-party democracy, with a bill of rights, independent courts and the like, the process is by no means complete. In terms of Constitutional Principle VI, the new constitution has to include "appropriate checks and balances to ensure accountability, responsiveness and openness".

Important accountability provisions are not yet in either the constitution or in *ad hoc* legislation. Additional mechanisms to ensure accountable government - at all levels, and in all forms - should therefore be included in the constitution (or in suitable alternative legislation).

As the world's experience has shown, often under tragic conditions, elections *per se* are no guarantee of accountable (or transparent) government.

Mechanisms for ensuring accountable government can clearly not be applied "horizontally" to private individuals and organisations. The issue of accountability makes the inappropriateness of horizontal application particularly clear.

Most of the provisions recommended below are taken from and were recommended by the Professional Economic Panel (PEP) in its final Report, Appendix I, (obtainable from Robin H Lee Associates, tel: (011) 486-2143, or from Nedcor and Old Mutual, who sponsored the exercise). Members of the panel included leading experts from across the political spectrum.

In the interests of completing the process of introducing accountable government to the new South African democracy, we recommend that provisions to the following effect be included in the constitution (or in suitable alternative legislation):

Direct democracy

All citizens shall, on obtaining the requisite number of signatures to a petition, have the right to require the state, at all levels and in all its manifestations, to hold referendums on any law or decisions, save for those specifically excluded for purposes of national security and economic stability.

The most unambiguous, effective and increasingly popular method of ensuring accountable government is direct democracy. Arguably, direct democracy is the only form of true democracy, in that it is the only way of giving the electorate the final say, which is the original objective and essential purpose of democracy. The word itself has its etymology in the Greek words *demos* and *kratos*, meaning that the *people* should have *power* over themselves.

The right to referenda could be exercised and entrenched in a number of ways. A separate submission on this is attached.

Depending on the scope of issues that will be subject to automatic or discretionary referenda, how referenda are to be called, there are many possible permutations of how suitable direct democracy clauses would have to be drafted. Direct democracy being the most unambiguous form of democracy, it should be subjected to an absolute minimum of dilutions.

Right of appeal and review

The exercise of all administrative discretion shall be subject to an automatic right of appeal on the merits, in addition to the right to an automatic right of review (as are proceedings in courts of first instance), to and by either the courts, or, in exceptional cases, a higher organ of the state, whose members must be substantially different.

Performance audit

A Performance Audit office should be established to monitor and ensure the effectiveness of policies and programmes.

Civil service *Code of Conduct*

A civil service code of conduct, binding all organs of the state at all levels should be mandated, readily available, in accessible language and enforced by, *inter alia*, the Public Protector. This was recommended and motivated by the Professional Economic Panel (Par 4, Appendix I).

The principle of equivalence

One of the most effective mechanisms to promote accountability and equity is to ensure that government is not above the law and cannot exempt itself from ordinary laws of the land it imposes on others (recommended by Professional Economic Panel, par 7).

Accordingly the constitution should have an equivalence clause so that government will have to comply with and be subject to its own laws. This would minimise the adoption of unduly restrictive and oppressive laws, and minimise countless causes of inefficiency and anomalies. One of the more serious examples is the history of government exempting itself from business codes, township laws, slum laws and the like, thereby effectively prohibiting the private provision of low cost housing. Consequently there has been a monumental unnecessary and artificial shortage, and urban black populations have been forced to live in four-roomed "township" housing, which, if privately built, would have been condemned.

Retrospective law

Retrospective legislation which has the effect of diminishing rights acquired or imposing obligations which were not imposed under earlier legislation should be unconstitutional. The practice of the earlier regime of arbitrarily legislating retrospectively, has manifestly unjust consequences, has often ruined many people financially, and violated basic principles of equity.

In exceptional circumstances retrospective legislation to correct *bona fide* errors, as opposed to bringing about substantive changes in law, could be permitted subject to entrenchment (eg the requirement of a two-thirds majority of both houses)

The right to protection and security of persons and property

The function for which the state should, arguably, be most unambiguously accountable, is its role in protecting people from internal and external aggression (crimes and delicts).

This is, perhaps, the only 'second generation right' on which there is near universal consensus. The matter is so fundamental that the State's role as protector against aggression is its essential *raison d'être*. It is in this that we find the most basic rationale for the very creation of states and governments. Yet, in all the discourse about 'fundamental' generation rights, the State's most fundamental responsibility is seldom mentioned..

The closest the interim Constitution comes to recognising this right is in section 11. (1) of the Bill of Rights. The context does not, however, suggest that citizens have a basic right to protection by the state, and that the state is correspondingly accountable to them. The matter is so important that it should be placed beyond doubt. A clause to the following effect is suggested: *Every person shall be entitled to the protection of person and property by the State, by means of effective policing and related services.*

One of the most crucial aspects of this proposal is that the constitution goes further than any state of affairs in our history, and further than the constitutions of most countries, to protect the rights of wrongdoers. And so it should. However, victims need and deserve even more protection. Protection of and respect for the legitimate rights of criminals should not be traded off against the rights of their victims. There should be a countervailing emphasis on the provision of commensurate security for the innocent. The crime wave is an inevitable result of an unbalanced approach. Both sides of the equation need attention. The alternative is that the State's hands are tied. It is effectively precluded form performing its most important function. It cannot be expected to do so on the same budget (in real or relative terms), with the same ratio of police, prisons and courts *per capita*, as it did before appropriate respect for the rights of criminals.

Politicians and civil servants to be responsible for the consequences of their actions

In addition to the constitutional clauses recommended above, ways that coincide with what people in the private sector experience should be explored to hold politicians and officials accountable for their actions. It is not entirely clear that this can be done in the Constitution, although that would be ideal for obvious reasons.

One of the best examples of the kind of measure that should be included is that applicable to the Governor of the New Zealand Reserve Bank. He/she loses their job *ipso facto* if inflation rises above the specified level (presently 2%). Needless to say, he saw to it that the rate fell below that level immediately, and it has remained there ever since. Many proposals have been made, for instance, parliamentarian's salaries could be linked directly to the growth rate, so that (a) they cannot increase their incomes in excess of the welfare levels in the country as a whole, and (b) they are penalised for implementing or allowing their colleagues to implement self-serving policies that undermine the nation's prosperity.

Security of information held by the state

The Bill of Rights should include a provision to the following effect: No person representing the state shall have the right of access to information gathered by the state for any purpose other than the explicit purpose or purposes for which that information was obtained .

For obvious reasons this section would have to be subject to Section 23 of the interim Constitution (or its counterpart in the new constitution).

Apart from the much needed protection of basic rights which such a section would afford, it would have formidable practical benefits. It would, for instance, encourage people to provide accurate information to the state for research, record keeping, fiscal and other purposes. It would prevent the kind of abuse of information that occurred when President PW Botha read in Parliament from the Home Affairs departure forms signed by delegates to the Dakar meeting with the ANC when they left the country. Countless other abuses resulting from departmental sharing would be curtailed. If citizens can be satisfied as to the confidentiality of official returns, we might get meaningful census data, for instance, and people would be more inclined to pay tax on income they have earned from sources (legal or otherwise) that they want to conceal for whatever legitimate or illegitimate reason.

Expropriation

Far-reaching expropriation clauses undermine the principle of accountability. There is no reason for the State to have expropriation powers where the property being expropriated is not for locality-bound purposes, such as a harbour, pipe line, railway or trunk road. For such purposes as post offices, schools, police stations, land for redistribution, housing schemes and the like, the state ought to purchase the land – in a visibly accountable manner – like anyone else, in the market place.

Correspondingly, the state should have no right to expropriate for locality-bound purposes that the private sector does not enjoy, as might be the case in the construction of a private harbour or pipe line. It is unjust for the state's property to be acquired in ways that, if done by anyone else, would be unjust. What is privately wrong cannot be politically correct.

Even the need for locality-bound expropriations tends to be too lightly assumed, and the Constitution should place the onus of proof on the state.

In the interests of brevity, accountability provisions already adequately dealt with in the interim Constitution are not covered here, save to say that we urge the Constitutional Assembly to retain them in an undiluted form.

If more specific proposals are needed on how to make officials responsible for their actions, we will gladly provide them forthwith.

6. Accountable government: Transparency

Despite the near universal endorsement of the concept of transparency, there are no explicit provisions in the interim constitution on, and there is no Theme Committee dealing explicitly with transparency. There are also no statutes, and no proposals for legislation, on transparency. The only aspect of transparency that has received serious attention is the question of access to information, and transparency could be read into certain provisions of the constitution. However, the matter is vague and ambiguous and should therefore be remedied urgently.

Transparency and accountability, whilst having similar objectives, are distinctive issues and should be dealt with accordingly. Transparency promotes accountability – it is a necessary but not sufficient condition for it.

In most advanced democracies there is *ad hoc* legislation on this matter. Sometimes transparency is provided for in a specific context, the best known being the rules of civil and criminal procedure. The tendency is for transparency to be constitutionalised and universalised. Whilst South Africa drafts the world's newest democratic constitution, it has an opportunity to have the world's best transparency guarantees.

Most of the provisions recommended below are taken from and were recommended by the Professional Economic Panel (PEP) in its final Report, Appendix I, (obtainable from Robin H Lee Associates, tel: (011) 486-2143). Members of the panel included leading experts from across the political spectrum.

We propose that provisions to the following effect be included in the constitution or, less satisfactorily, in *ad hoc* legislation:

Every person shall have the right of access to all information held by the state or any of its organs at any level of government in connection with that person.

(Section 23 of the interim Constitution guarantees the right of access to *all* information "in so far as such information is required for the exercise or protection of any of his/her rights". The right of access to information on oneself, as opposed to information in general – for the exercise of rights – should be an unqualified right as it is, for instance, in the USA. So as to prevent the state gathering and acting on clandestine information, false charges, information obtained by illegal means and the like, people should be entitled to know what the state has on themselves.

We have commissioned research by a post graduate at North West University, Phenyo Rakate, whose informal notes on the position in Sweden, Canada, USA and India can be made available on request.)

Every person has the right of access, ... to all evidence or submissions presented to the state, ... in any matter or proceeding in respect of which that person is an interested party. To this end, the person concerned has the right to be present when oral evidence is presented, and the right to receive copies of documentary evidence.

Every person has the right to cross-examine any other person who presents oral evidence to the state, ...

Every interested person, as well as representatives of the media and relevant public interest organisations, have the right to be present as observers to witness all formal deliberations by organs of the state, engaged in the exercise of discretionary power.

All interested persons and representatives of the media have the right to written reasons for all administrative decisions directly affecting those persons.

In the absence of provisions to the contrary all organs of the state shall, in the exercise of discretionary power, observe recognised rules of just procedure and conduct.

Every person shall have the right of access to all laws in language accessible to ordinary people, in one of the official languages.

Appropriate principles and procedure shall be applied in all relevant cases so as to ensure transparency in the election or appointment of all people authorised by the state to exercise discretionary power. These shall include publicising posts to be filled and conducting hearings in public. Applicants, candidates and the media shall be entitled to written reasons for appointments.

It is probably inappropriate to subject the exercise of specified discretionary powers to these rules of transparency. Exemptions should be curtailed to a bare minimum, but there ought probably to be a few. This should be considered in the light of specially requested inputs from government departments.

It may be appropriate, for instance, for reasons of economic stability, to delay access to evidence considered by the Reserve Bank, and written reasons for its decisions, in certain contexts. However, policies should be heavily biased in favour of transparency and great care should be taken *not* to avoid transparency (and accountability) on account of the likelihood of there being significant harm on rare occasions.

There are no free lunches – all benefits have costs – and transparency is no exception. The benefits of transparency are likely to outweigh its disadvantages, and we should therefore be willing to put up with the disadvantages. An attempt to avoid the disadvantages would have the effect of negating the essential purpose of transparency. Reality does not permit us to have one without the other.

7. Separation of powers; Structure of government

Summary

The success of constitutional democracies depends on the existence of effective ***checks and balances*** which discourage democratically elected representatives from abusing or overstepping their mandates.

An important method of preventing abuse is by **distributing power between several centres**, so that each centre provides a check and counter-balance to the others.

In all advanced democracies there is a significant degree of separation of powers, especially of the **judiciary** from other government organs.

Our constitution should ensure an unambiguous separation of judicial, legislative, executive and administrative functions.

The judiciary must be free from any influence or pressure by the government or any other lobby. True independence means **the judiciary must be equal to the government** and, like it, **subject only to the constitution.** The judiciary should have the power to override any unlawful or unconstitutional action by government.

We propose that **the Senate and the National Assembly have equal status** and that their **jurisdiction be limited** to areas allotted to parliament by the constitution. We submit that the **approval of both houses, sitting separately, should be required for the adoption of *all* bills.** This would ensure that regional differences reflected in the Senate provide a balance for the populist views which predominate in the National Assembly. The additional requirements in the interim constitution for the adoption of bills affecting the provinces should remain for the protection of the provinces.

All central government legislation should be subject to a waiting period of six months during which an **optional referendum** could be called by any individual or group able to obtain 300 000 signatures to a petition. If the proposed legislation is rejected by a simple majority of those voting in a national referendum, it should fall away.

The **parliamentary executive** should be restricted to the **implementation of legislation** and not have any delegated authority to make laws. Also, laws should be designed so that **administrative officials have no discretionary powers.**

The **executive** of the central government should consist of Ministers drawn from either house and elected from the main political parties for a five-year term. This should be done in a joint sitting of both houses according to the **proportional representation** formula described in the interim constitution. Each minister should be the chief administrator of one central government department. These departments should be specified in the constitution and should include Foreign Affairs, National Defence, National Finance, National Infrastructure and national courts.

Each year one of the ministers should be elected in a joint sitting of both houses as **chairman of the Cabinet.** During his year as chairman **he would also be President** and represent the country in matters of protocol. At the end of the year he could be re-elected or be succeeded by one of the other Ministers.

The national President should enjoy no powers above those of the other Ministers.

Separation of powers; Structure of government

The success of constitutional democracies depends on the existence of effective *checks and balances* which discourage democratically elected representatives from abusing or overstepping their mandates.

An important method of preventing abuse is by distributing power between several centres, so that each centre provides a check and counter-balance to the others. In this way constraints are imposed on the potential of one centre of power to tyrannise the people.

The American political system is based on an equilibrium between three separate and great powers: the president, the legislature (Congress and the Senate) and the Supreme Court. A further check is provided by the existence of fifty states with their own Governors, legislatures, and courts. The states possess the capability to veto proposed constitutional amendments and to challenge the federal government in the Supreme Court if it tries to overstep its powers.

In Britain the parliamentary executive (cabinet) in the House of Commons is the seat of power, checked by the presence of a strong competing party, an Upper House, press and public opinion.

In Switzerland central government is based on consensus between the major parties, with a counterweight provided by the people through referenda.

In all advanced democracies there is a significant degree of separation of powers, especially of the judiciary from other government organs.

Separation of powers in South Africa

Our constitution should ensure an unambiguous separation of judicial, legislative, executive and administrative functions.

The parliamentary executive should be restricted to the implementation of legislation and not have any delegated authority to make laws. Also, laws should be designed so that administrative officials have no discretionary powers.

The importance of an independent judiciary

If a constitution and bill of rights are to be effective, they must have the protection of an independent judiciary. In other words, the judiciary must be free from any influence or pressure by the government or any other lobby. True independence means the judiciary must be equal to the government and, like it, subject only to the constitution. The judiciary should have the power to override any unlawful or unconstitutional action by government.

Since the judiciary is a branch of the government, true independence is problematic. In the case of our present constitutional court those involved in the nominations and appointments include the President, the Cabinet, the Chief Justice of the Supreme Court and the Judicial Service Commission. The Chief Justice is appointed by the President in consultation with the Cabinet. The majority of the members of the Judicial Services Commission are political appointees -- appointed by the President, or the President and the Cabinet, or the Senate. The Judicial Service Commission also includes the Minister of Justice and, when appointments to provincial court divisions are considered, the Premier of the province concerned. Thus there are numerous political influences on the selection process and, as it stands, the constitutional court's members will have to be acceptable to ruling political parties.

Supreme court judges are appointed by the President on the advice of the Judicial Services Commission.

To depoliticize the choice of judges, judicial officers should be elected by the citizens as is the case with many judges, attorneys-general and police chiefs in the USA. If there is to be a judicial commission it should be a genuinely independent panel with a majority of apolitical public figures such as were appointed to the Independent Electoral Commission. Some or other combination of these methods would have a better chance than the current system of ensuring an independent judiciary.

Parliament

We propose that the Senate and the National Assembly have equal status and that their jurisdiction be limited to areas allotted to parliament by the constitution.

In the interim constitution ordinary bills are required to be adopted by each house, and failing that by a majority in a joint sitting of both houses. Since the National Assembly has 400 members and the Senate only 90 the National Assembly can easily override the Senate. Money bills are introduced and passed by the National Assembly alone.

We submit that the approval of both houses, sitting separately, should be required for the adoption of *all* bills. This would ensure that regional differences reflected in the Senate provide a balance for the populist views which predominate in the National Assembly.

The additional requirements in the interim constitution for the adoption of bills affecting the provinces should remain for the protection of the provinces.

The People's Veto

All central government legislation should be subject to a waiting period of six months during which an optional referendum could be called by any individual or group able to obtain 300 000 signatures to a petition. If the proposed legislation is rejected by a simple majority of those voting in a national referendum, it should fall away.

The Executive

The executive is the branch of government which carries out the decisions of the legislators. Generally speaking, two types of central executives are found in democracies.

A Parliamentary executive

Usually called the cabinet or council, a parliamentary executive is chosen from members of the legislative body. It is appointed by and can be dismissed by, the legislature, and may not come into conflict with it.

The United Kingdom has a parliamentary executive which reflects the wishes of the ruling party. If the cabinet loses the support of the majority in the House of Commons it must dissolve parliament and call an election. Prior to the interim constitution, South Africa also had an British-style parliamentary executive.

A non-parliamentary executive

In a non-parliamentary executive the president or monarch and his ministers, or cabinet, are not appointed by the legislature but exercise distinct and important powers.

This is the case in the USA, where the president is elected by the people independently of Congress and has the right to retain his post even if his opponents constitute a majority in both houses. The members of the cabinet are chosen by him, and are responsible to him. He takes a leading role in proposing legislation and formulating policy. The president can veto legislation passed by Congress, but Congress can then override his veto with a two-thirds majority.

Because the president does not always enjoy the support of a majority in Congress, deadlocks between the executive and Congress can and do happen frequently in the US.

The unique Swiss executive

AV Dicey observed that the Swiss cabinet "forms as good an Executive as is possessed by any country in the world. It would appear...to combine in a rare degree the advantages of a Parliamentary and of a non-Parliamentary government" (*The Law of the Constitution*).

At the beginning of each new sitting of parliament the cabinet is elected by the legislature for a four-year term of office. By custom, the seven members of the cabinet must represent the four main political parties and three main language groups, and each must come from a different canton (province).

It is traditional to re-elect the cabinet ministers who wish to continue in office, so some of them hold office for as long as 15 or 16 years. Consequently there is a sense of continuity in the Swiss executive that is unknown in other parliamentary cabinets. Since no more than one or two seats fall vacant at any one time, elections for these seats create a lot of public interest.

The chairman of the cabinet is also the president of the country and he holds office for one year only. Although nominally elected by parliament, the offices of president and vice-president are customarily filled by a system of rotation within the cabinet. Newly elected ministers are placed at the bottom of the list of seven, as is the retiring president.

The president has limited emergency powers, a general supervisory power, and represents Switzerland in a formal capacity. Because of his restricted authority and short term of office, few people in the world – indeed, few Swiss – even know the name of the president.

The cabinet manages the affairs of the country in accordance with the articles of the constitution and in deference to the wishes of parliament, carrying out parliament's instructions much as a business manager carries out the orders of his employer. Dicey compares the position of the cabinet vis-à-vis the people to that of the Board of a large joint stock company. The Board is free to act in the best interests of the shareholders, and as long as it does a good job they don't interfere. But it is answerable to them, and they can reverse the Board's decisions.

The cabinet ministers cannot be dismissed (except for gross malfeasance), so they enjoy a degree of independence entirely unknown in other parliamentary executives. On the other hand, they must agree with one another in order to make decisions, and since they represent four different political parties the process of reaching consensus is inevitably one of compromise. The conflict which often arises between non-parliamentary executives and the legislature (as in the USA, between the president and Congress) is missing in Switzerland. If their proposals are rejected by the legislature or the people (in a referendum), the ministers simply withdraw them and remain in office.

The advantages for South Africa of an executive similar to that in Switzerland are obvious. Two features are particularly attractive: the continuity and consensus that are built into the system, and the fact that the president changes every year, thus allowing leaders of different major groups to rise to the fore.

South Africans have been most fortunate in that Nelson Mandela has earned respect and support amongst all of the different political groups. However, South Africa should like Switzerland, allow for the possibility of leaders from different parties to emerge and for the presidency to rotate.

Applying the Swiss model to the South African cabinet

The executive of the central government should consist of Ministers drawn from either house and elected from the main political parties for a five-year term. This should be done in a joint sitting of both houses according to the proportional representation formula described in the interim constitution. Each minister should be the chief administrator of one central government department. These departments should be specified in the constitution and should include Foreign Affairs, National Defence, National Finance, National Infrastructure and national courts.

Each year one of the ministers should be elected in a joint sitting of both houses as chairman of the Cabinet. During his year as chairman he would also be President and represent the country in matters of protocol. At the end of the year he could be re-elected or be succeeded by one of the other Ministers.

The national President should enjoy no powers above those of the other Ministers.

8. Amendments to constitution

Should a constitution be difficult to amend?

Since a constitution is, in essence, a list of *don'ts* for government, those who draft constitutions usually try to make them very difficult to amend. But societies constantly change and evolve. Perceptions of the role of the state also change over time, and rigid constitutions are often either cast aside or interpreted in expedient ways.

France, for example, in 130 years, had 12 rigid constitutions which purported to embody immutable laws. They all proved ineffective. The French courts have historically been unwilling to declare any law unconstitutional no matter how flagrant the violation.

The men who drafted the American constitution in 1787 were also determined to prevent it from being easily changed. Consequently, an amendment must be proposed by two-thirds of the members in both the Congress and the Senate, or by two-thirds of the states. Then a constitutional convention must be called and the proposed change ratified by three-quarters of the state legislatures. Accordingly amendments to the written document are very rare. As a result, the interpretation of the constitution has changed greatly in the last two centuries.

Who should have the final say on the constitution?

In the USA the people are theoretically sovereign and entitled to amend the constitution, but the process is so difficult that it seldom occurs. In reality Congress and the Supreme Court have the final say.

Switzerland is the only country in which the people are genuinely sovereign. They approve or veto constitutional amendments proposed by the legislature, and make their own proposals to amend the constitution. This has ensured that the Swiss people have more participation in the development of their constitution than any other nation on earth.

Of the 216 amendments to the Swiss constitution proposed between 1874 and 1985, 111 were accepted by the voters and 105 were rejected. Of the 111 which were approved, eight were popular initiatives and 14 were counter-projects (moderate variations on popular initiatives put together by parliament). The remaining 89 amendments were proposed by the national legislature. In this way the Swiss have developed a constitution which suits their special needs and enjoys popular support.

The consequences of empowering the people to decide on amendments to the constitution are, first, that there have been many amendments (one a year on average); secondly, that the constitution has evolved to reflect changes which occur in society over time; and, thirdly, that the Swiss federal government's jurisdiction has increased gradually over the years, but not dramatically nor without the approval of the people, as has happened elsewhere.

Who should have the power to amend the South African constitution and how?

We propose that the right of the people to vote directly on amendments to the constitution, and to make popular proposals for amendments, should be entrenched in our bill of rights.

Should parliament wish to pass a law concerning a matter outside its jurisdiction as defined in the constitution, or to change the constitution in any other way, a constitutional amendment would be required.

Attempts to amend the constitution would probably be fairly common. An amendment could be proposed by the National Assembly, the Senate, the Cabinet, or the public. (Popular initiatives for constitutional changes would require an initial petition with a minimum number of signatures – say 200 000).

Amendments of specially entrenched clauses, such as those protecting basic human rights, would require a two-thirds majority nationally and unanimous approval by the provinces, in other words, any one province would have the right of veto. The amendment of an ordinary constitutional provision would be subject to approval by a simple majority of the people in a national referendum, in addition to approval by a majority of the provincial legislatures.

This would mean that any proposed extension of the state's authority would be subject to the scrutiny, debate and approval of the people.

9. The nature of the provincial system and local government; Allocation of powers

Summary

It is crucial that those involved in negotiating the course of this country's future take proper notice of the mistakes of our past and the experience of the world, and join the world-wide trend back to **local participation and decision-making.** Local governments should be small, genuinely autonomous and have the power to raise taxes and make decisions regarding all aspects of everyday life.

There are numerous **benefits** in keeping government close to the people.
Accountability: When governments are small it is easier for people to **monitor the activities of their representatives,** and to speak out against corruption and unjust laws.
Efficiency : When power is devolved to many units of government it is easy to compare the relative effectiveness, as well as the consequences, of different policies. This is the *demonstration effect.* Local governments, like shopkeepers, are forced to compete with each other for citizens as taxpayers, investors and workers. Good polices drive out bad, and the ultimate result is **better government for all.**
Innovation and flexibility: Small local governments are **adaptable** and allow for **experimentation.** They **reflect and cater for local needs** and encourage a rich variety of possible solutions to be tried for different problems. They learn from one another's successes and failures and when mistakes are made, damage is limited.
Devolution means a small bureaucracy: It is often assumed that numerous second- and third-tier governments will also result in a proliferation of officials. The opposite is true. Switzerland, with 26 regional and 3 022 community governments **has the smallest civil service per capita in Europe.**
Reducing conflict: In centralised states, whichever party gains power is in a position to dominate others. A country like South Africa cannot afford winners and losers in this way. We need a system that encourages **co-operation** between potentially hostile populations, and allows the emergence of cultural groupings where desired. When issues are mediated at the regional or community level, with full involvement of the people in referenda and initiatives, they prove much easier to solve than at the national level.
Social equity: The centralised provision of welfare creates institutional and legal barriers to self-help and discourages voluntary work and charitable donations. When communities take care of their own welfare, with **no-strings-attached financial assistance** from other levels of government where necessary, money is more likely to be put to good use. Local people identify those whose need is greatest and find innovative ways of **helping** them, without undermining their dignity, self-esteem or ability to help themselves.
Building a democratic, caring culture: The best way for South Africans to learn the value of democracy is for them to have the **maximum degree of direct control** over the issues that affect their individual and community lives.

The nature of the provincial system and local government; Allocation of powers

Until about 150 years ago most people lived in small communities. An individual's life was rooted in his community, and this gave him a sense of belonging.

During the nineteenth and twentieth centuries, however, community life has been radically transformed and in some cases completely destroyed. Small states merged or were absorbed by large states. Governments became powerful tools of domination that controlled every aspect of people's lives.

After the second World War the idea that the state should be responsible for the welfare of citizens became increasingly popular. Where previously individuals and communities had relied on their own resources, now their responsibilities were taken over by governments. Many lost their independence, energy and creativity.

As welfare budgets grew so did financial deficits, inflation, inefficiency and bureaucracy that characterise many governments throughout the world today.

Now the political pendulum is beginning to swing away from centralised control toward local decision-making and active participation by the people. Eastern Europeans rose up against their governments to gain control of their lives. In Western Europe, North and South America, Southeast Asia and Africa people demand more participation in economic and political decision-making, and their demands are being heard.

Popular participation is being achieved by the devolution of power from central to regional governments, and from metropolitan to local levels.

Austria, Belgium, France, Italy and the Scandinavian countries are all devolving welfare and economic decisions to regional, metropolitan and local governments. Even Switzerland, which has the most devolved political system of any developed country, has introduced reforms to increase regional and local powers further in recent years.

All Eastern European countries are working to curb national power and develop strong municipal government. Ghana, Senegal, Nigeria, Uganda and Sudan are experimenting with devolution of power, and in India communities are being empowered to bring an end to food-shortages and take responsibility for the environment.

It is crucial that those involved in negotiating the course of this country's future take proper notice of the mistakes of our past and the experience of the world, and join the world-wide trend back to local participation and decision-making.

The advantages of localised power

There are numerous benefits in keeping government close to the people. But these benefits will accrue only if regional and local governments are genuinely autonomous: they must have the power to raise taxes, to draw up budgets and to make decisions concerning all aspects of everyday life.

Furthermore, they should be small. Large local and regional structures have the same failings as central governments, albeit to a lesser degree. This is even more true when they lack meaningful autonomy.

Accountability

When decision-making is kept close to the people, their leaders live among them and are known to them instead of being far away and remote. When power is centralised, elected politicians form distant elites who believe the people must be told how to live. This authoritarianism is justified on the grounds that only *experts* can make decisions correctly.

When governments are small it is easier for people to monitor the activities of their representatives, and to speak out against corruption and unjust laws. But when legislation concerns hundreds of thousands or millions of people, it is impossible to be informed about all the items on the government's agenda -- even major issues are so complex that reasonable knowledge of them is difficult to obtain.

In large governments not even the politicians themselves can keep up with proposed laws: they depend on unelected officials to keep them informed. Bureaucrats are in an excellent position to cater to special interests. They can apply legislation so as to lead to particular results, push through favoured laws and delay measures they dislike.

The more centralised the state, the easier it is for politicians and officials to enrich themselves with taxpayers' money and to grant favours, shielded from discovery by their remoteness and voluminous documents. Before long they become their own interest group, with an incentive to hold on to power and influence.

In small communities local inhabitants keep an eye on government budgets, and notice quickly if a village or district councillor gives jobs to relatives and friends, makes luxurious additions to his home or buys an expensive car.

Efficiency

Officials who work for centralised governments do not have the necessary knowledge of local conditions to provide efficient government services because this knowledge is dispersed among the millions of people who comprise society, and cannot be transmitted to a central planning board.

Moreover, government officials have no competitors and their jobs do not depend on keeping costs down. They can employ surplus officers, create delay and misallocate resources and then the taxpayers are forced to foot the bill.

Furthermore, the sheer volume of work created by centralisation results in competing and overlapping spheres of jurisdiction and bottlenecks in the flow of information. The overall result is *planned chaos*.

By contrast, when power is devolved to many units of government it is easy to compare the relative effectiveness, as well as the consequences, of different policies. This is the *demonstration effect*. Local governments, like shopkeepers, are forced to compete with each other for citizens as ratepayers, investors and workers. Good polices drive out bad, and the ultimate result is better government for all.

An example of the *demonstration effect* is now occurring in Germany. A few of the German *laender* (provinces) introduced Ministries for Women's Affairs. Now it has become apparent that these Ministries are being used to side-line issues of importance to women. Consequently, the *laender* without such Ministries are seeking other ways to bring women's issues onto their agendas, and those with the Ministries for Women's Affairs are scrapping them.

The *demonstration effect* occurs in all countries where local governments have real powers. It also operates internationally, as in the world-wide movement of socialist countries away from central planning towards imitating the market driven economies, which were demonstrated to be superior.

Innovation and flexibility

Small local governments are adaptable and allow for experimentation. They reflect and cater for local needs and encourage a rich variety of possible solutions to be tried for different problems. They learn from one another's successes and failures, and when mistakes are made damage is limited. In other words, failures are localised - not national disasters.

Big governments by contrast prefer uniformity, planning and control to messy variety. Variety causes complexity, complexity breeds uncertainty, and uncertainty leads to anxiety. Bureaucratic administrations want to minimise anxiety by reducing variety – but democracy cannot exist without variety.

Devolution means a small bureaucracy

It is often assumed that numerous second- and third-tier governments will also result in a proliferation of officials. But experience shows that the opposite is true.

In Switzerland, which has 26 regional and 3 022 community governments (with an average of less than 3 000 people per community), most decisions are made locally, and both central and local decisions are implemented locally. Local voters keep an eye on budgets and ensure that their tax money is not wasted. As a consequence **Switzerland has the smallest civil service per capita in Europe.**

In South Africa ordinary people have no say over the number of people employed by government. In the fifteen years from 1973 to 1988 the total of government employees (including those in state corporations) rose by 61% compared to an increase of 17% in the formal, private, non-agricultural sector. By comparison, the number of people employed in the Swiss public sector, including its two state corporations, has decreased since World War II.

Reducing conflict

In centralised states, whichever party gains power is in a position to dominate others. A country like South Africa cannot afford winners and losers in this way. We need a system that encourages co-operation between potentially hostile populations, and allows the emergence of cultural groupings where desired.

Switzerland has proved more successful in accommodating the differences between its diverse cultural, religious and language groups (Italians, French, German and Romansch, Catholic and Protestant) than any other country in the world. During the course of their history the Swiss have developed a tradition of settling conflict by allowing local areas greater autonomy. When the Catholics and the Protestants couldn't agree, they resolved their differences by allowing each community religious freedom or by forming new local governments. Similar measures were used to defuse friction between city and rural areas; usually it was sufficient to grant more local rights, but in some cases an entire region would be divided in half.

This method was used as recently as 1978. Several communities in the Jura area of the canton of Berne were in constant conflict with the rest of the canton, largely as a result of language and religion differences. Following a series of local referenda, Jura became a new canton.

When issues are mediated at the regional or community level, with full involvement of the people in referenda and initiatives, they prove much easier to solve than at the national level. This was also the case in the USA prior to World War I when most decisions were still made by the state legislatures. Jeanne Kirkpatrick observed in an interview with *Policy Review*, "...one of the secrets of stability in our constitutional order was that many of the deepest moral controversies were removed from national politics and left to be settled in communities of shared values."

Social equity

Centralised decision-making is often defended on the grounds that there is no other way to ensure that all people enjoy a minimum level of physical well-being. But experience shows that big bureaucracies fail dismally in this task.

They fail partly as a consequence of inefficiency, but also because in the eyes of officialdom citizens are not individuals, but numbers. Numerous studies show that in countries where welfare is controlled by the central state, if a person cannot read or fill in forms he has little hope of assistance. Middle class people, who can cope with forms and officials, are the ones who gain access to benefits instead of the poor. In New York in the 1970s an estimated 10% of welfare recipients were ineligible for any payment whatsoever and an additional 23% were overpaid. In 1976, nearly $1 billion (1/6 of welfare-related costs) was "dissipated through recipient and vendor fraud, administrative error and overbilled services" according to the then welfare inspector general.

The centralised provision of welfare creates institutional and legal barriers to self-help and discourages voluntary work and charitable donations. People who might otherwise contribute to charity believe instead that large government departments are taking care of the needy with their taxes. They no longer have an incentive to make voluntary contributions to the communities in which they live.

If the central government will insist on raising taxes itself and giving money to provincial or local governments to spend, then the central government should not impose conditions or directions on how the provincial or local governments should spend this money. When communities take care of their own welfare, with no-strings-attached financial assistance from other levels of government where necessary, money is more likely to be put to good use. Local people identify those whose need is greatest and find innovative ways of helping them, without undermining their dignity, self-esteem or ability to help themselves.

Building a democratic, caring culture

When communities are responsible for their own services, families from different backgrounds and people of all ages make decisions and work together, and feelings of local pride, identification and connectedness grow and flourish. Local energies are harnessed as community members experience the results of their joint efforts and are encouraged to contribute again in the future.

This country has been dominated by a racial oligarchy for so many years that its people have to learn anew how a participatory democracy works. Most black South Africans (and many whites as well) think of government in terms of control, discrimination and suppression. Ordinary citizens have had almost no opportunity to make decisions, so if they are granted local independence in the future they will certainly make mistakes, especially at first. But participation, even if lacking in expertise, is important in itself because it creates opportunities for real learning. Indeed, there can be no better way of discovering what democracy entails than through active participation in community policies.

The great French political philosopher Alexis de Tocqueville observed that "Town meetings are to liberty what elementary schools are to science; they bring it within the people's reach, they teach men to use and how to enjoy it." The best way for South Africans to learn the value of democracy is for them to have the maximum degree of direct control over the issues that affect their individual and community lives.

10. Allocation of powers; Legislative competence; Provincial legislative and executive authorities

Summary

Allocation of powers and legislative competence: Almost every country **divides powers** and responsibilities between central, provincial and local governments, but the nature and extent of the rights and duties of provincial and local governments vary greatly from one place to another.

In countries where the people speak the same language and share the same values, a considerable degree of centralisation can be tolerated. But the attempt to impose one set of policies on people with diverse traditions and values is perhaps the most **serious source of conflict** in plural societies. For this reason South Africa's future constitution should specify clearly the division of power between central and local levels, and, furthermore, it should **devolve most powers to provincial and local governments**.

The Constitution should **allocate specific functions to the centre** and leave **all others** to provincial and local government. Regional powers should be protected by the constitution and should not be changed without the agreement of the regional governments themselves.

The central state should deal only with issues of concern to the whole country. All other decision-making should rest with provincial and local governments, with provincial governments focusing on matters of regional concern, and local governments attending to matters of local interest.

Provincial legislative and executive authority: Each province should have not only its own parliament but also its **own constitution** drawn up by the province. In addition to an elected house of representatives with an executive branch, provincial legislatures might also have a second house or senate in which every local area in that legislature's jurisdiction would be equally represented. To protect the rights of local areas any such second house should have the same powers to approve or reject every law as the other house of the legislature.

Provincial voters should be entitled by the central constitution to call for a **referendum** on any provincial law, to propose provincial bills or constitutional amendments, and to **recall** unpopular elected representatives.

Provincial governments should be responsible for all areas other than those reserved for the central government by the national constitution. Provinces would be prohibited, however, from passing laws in conflict with the bill of rights.

Local governments: The degree of autonomy enjoyed by local governments would depend on provincial policy. Community laws should also be constitutionally subject to the referendum and popular initiative.

Distribution of central and provincial powers

1. In some areas the central government should have exclusive authority, for example regarding national defence.
2. There may be shared authority between the central government and the provinces. That is, the provinces can legislate as long as the central government doesn't use its authority, for example regarding nuclear power.
3. In some areas the central government should have restricted authority: it may issue guidelines, but the provinces would be responsible for specific regulations, for example on education and health.
4. In many areas the provinces should have exclusive powers, for example regarding primary school education.
5. The enforcement of many central laws should be left to the provinces, as in Germany and Switzerland.

Allocation of powers; Legislative competence

Almost every country divides powers and responsibilities between central, provincial and local governments, but the nature and extent of the rights and duties of provincial and local governments vary greatly from one place to another. Regional and local functions may be purely administrative, or they may include numerous legislative powers.

In federal systems – for example, Switzerland and the USA – provincial powers are protected by the constitution and can be changed only with provincial government agreement, whereas in unitary systems the degree of regional decision-making is controlled entirely by central government, as in England, Sweden, France and South Africa. In both federal and unitary systems the amount of power enjoyed by provincial and local governments varies from great to little.

Britain is a unitary state, but local governments have considerable power, including power over health, police, planning and education policy. This power is respected because local people are fiercely loyal to local customs, habits and traditions. Scotland has a completely separate legal and educational system as well as regional administration. Wales and Northern Ireland also enjoy regional administration with increasingly strong powers for local governments. In Sweden and France there is much less devolution of power.

Considerable power is assigned to regional and local governments in the Swiss and American constitutions, while in Germany much less power is constitutionally devolved.

In countries where the people speak the same language and share the same values, a considerable degree of centralisation can be tolerated. But the attempt to impose one set of policies on people with diverse traditions and values is perhaps the most serious source of conflict in plural societies. Diversity is accommodated best where regional and local governments enjoy considerable autonomy. For this reason we believe that South Africa's future constitution should specify clearly the division of power between central and local levels, and, furthermore, that it should devolve most powers to provincial and local governments as in Switzerland and the USA.

Provincial and local governments by definition should have the power to raise money and enjoy some degree of autonomy. Otherwise, they are not authentic governments but merely administrative arms of the central state.

Constitutional protection for sub-central government

The Constitution should allocate specific functions to the centre and leave all others to provincial and local government. Regional powers should be protected by the constitution and should not be changed without the agreement of the regional governments themselves as in Australia, the USA, Switzerland, West Germany and Canada.

If we are to avoid repeating the mistakes of the past in post-apartheid South Africa, the rights of regional governments should be entrenched in the central constitution, and local rights should form part of provincial constitutions.

Devolution to local levels

The central state should deal only with issues of concern to the whole country, for example national defence, national finance, the provision of a central court of appeal, national infrastructure, foreign affairs and a degree of redistribution of revenues from richer to poorer areas. All other decision-making should rest with provincial and local governments, with provincial governments focusing on matters of regional concern, and local governments attending to matters of local interest.

All powers and functions other than those conferred on central government should be vested in provincial governments which should devolve powers further to local

communities. This would create a great diversity of political and economic systems, so that people could see for themselves which work best. Local governments that introduced bad policies would risk losing their citizens to more attractive areas, and thus all governments would have to adopt the best policies to attract voters, investors and taxpayers.

The greater the ideological and cultural differences that exist in one country, the greater the need for localised decision-making. The greater the number of second-, third- and even fourth-tier governments, the greater the degree to which diversity is accommodated and conflict reduced.

Provincial powers under the interim constitution

The interim constitution states that a provincial legislature may make laws on a limited number of matters such as local government, schools, roads and traffic, consumer protection, planning and the environment. This means that provincial legislative powers are not much wider than under the constitutions of 1910 and 1961

The interim constitution states that parliament can also make laws on these matters. This means that the central parliament can make laws on every single subject on which a province can legislate. Provinces have no exclusive powers, and there is therefore no federalism.

As a rule, a national law and a provincial law dealing with the same matter must be construed as being consistent with each other. This means that the national law and the provincial law will both apply at the same time. This is also the same as under the previous constitutions, and will lead to a proliferation of overlapping legislation.

In addition, under the interim constitution, parliament has the right to set national standards or to "maintain economic unity", which means provincial legislation can be overruled.

The bottom line is that the provincial system under the interim constitution is much the same as under the old unitary system created by the past constitutions.

Taxing powers

The interim constitution states that provinces get a share of the revenue collected under national laws. It also states that a province may raise taxes if it is authorised to do so by parliament. In other words, provinces have no independent taxing power.

If the provinces do not have control over their own purse strings, then they are at the mercy of the central government to provide funding. When the authority that spends taxes is different from the authority that raises them, direct accountability to taxpayers is lost. The incentive for regional governments is to be spendthrift and to encourage central government to tax maximally. This was also the situation with the homelands.

Also, without fiscal control, provinces cannot tailor their economic plans to attract investors and residents.

Provincial legislative and executive authorities

Each province should have not only its own parliament but also its own constitution drawn up by the province. The structure of government would probably vary from one province to another. In addition to an elected house of representatives with an executive branch, provincial legislatures might also have a second house or senate in which every local area in that legislature's jurisdiction would be equally represented. To protect the rights of local areas any such second house should have the same powers to approve or reject every law as the other house of the legislature.

Provincial voters should be entitled by the central constitution to call for a referendum on any provincial law, to propose provincial bills or constitutional amendments, and to recall unpopular elected representatives. These popular referenda and initiatives would require a petition signed by an agreed percentage of the citizens entitled to vote. The number of signatures required to launch a popular initiative could be lowered -- but not raised -- by provincial governments.

Provincial governments should be responsible for all areas other than those reserved for the central government by the national constitution. Thus each province would determine its own economic, labour, transport, education, tax and welfare policies. However, provinces would be prohibited from passing laws in conflict with the bill of rights.

Local governments

The degree of autonomy enjoyed by local governments would depend on provincial policy. In Switzerland each community has its own legislative and executive councils responsible for numerous local matters, such as education, welfare, parks and recreation, police, shop hours, street lighting, water, electricity and refuse removal.

Community laws should also be constitutionally subject to the referendum and popular initiative. As in provinces, in communities the signatures of an agreed percentage of citizens entitled to vote should be necessary to call a referendum or launch an initiative.

Distribution of central and provincial powers

1. In some areas the central government should have exclusive authority, for example regarding national defence.

2. There may be shared authority between the central government and the provinces. That is, the provinces can legislate as long as the central government doesn't use its authority, for example regarding nuclear power.

3. In some areas the central government should have restricted authority: it may issue guidelines, but the provinces would be responsible for specific regulations, for example on education and health.

4. In many areas the provinces should have exclusive powers, for example regarding primary school education.

5. The enforcement of many central laws should be left to the provinces, as in Germany and Switzerland.

11. Local government; Financial and fiscal relations

Summary

Under apartheid local governments have been **primarily administrative bodies** whose main purpose has been to carry out national plans and to provide local services subject to central controls. The biggest problem facing the new South Africa is that of meeting the **developmental needs** of a fast growing, poverty-stricken urban and rural population. The world's experience shows that the best way to achieve rapid development is through a **market economy** combined with **government structures that are meaningful and close to the people.**

Enabling legislation
Regional laws regarding local governments should **enable** rather than **enforce.** Enabling rules for local government in South Africa might include:
Rules of association whereby local citizens can petition or vote to create (incorporate) their own neighbourhood government or municipality, or join up with a neighbouring community.
Boundary adjustment rules which enable citizens or officials to alter the boundaries of existing units. There should be no rigid rules about minimum populations and minimum land areas, and each community should be able to determine its own optimum size. Flexible boundaries will also encourage political competition between various jurisdictions to provide the best services at the most affordable prices.
Voting rules to ensure legitimacy and accountability.
Fiscal rules which enable local units to raise revenues and to receive intergovernmental transfers and grants.
Contracting rules whereby local governments may enter into agreements with one another or with private firms. The greater the number of units involved in providing services, the more likely it is that citizens' demands and preferences will be met.
Rules for transferring functions which make it possible for a newly formed municipality or neighbourhood to transfer functions from existing units to itself.
Home rule charters which allow the people forming a new local government to decide on their own arrangements regarding service provision, taxes, voting and so on.

Taxation in South Africa: Every tax runs the risk of unintended and usually undesirable outcomes, but some of these can be anticipated and avoided. The key to predicting the consequences of taxation and government spending is to recognise that if you subsidise something you get more of it, while if you tax it you get less.

Redistribution: *Horizontal redistribution* between regions should be decided and agreed upon by regional governments, and administered by the central government. Each regional government should make its own arrangements for *vertical redistribution* to local communities and neighbourhoods.

The Canadians have developed a way of calculating intergovernmental transfers that minimises the ill-effects of redistribution. It is called the *Representative Tax System (RTS)* and if introduced in South Africa would go a long way towards meeting the oft-repeated demands for government to close the gap between rich and poor.

Financing local and provincial governments: When taxes are raised and spent locally, people can see for themselves the relationship between what they *pay* and what they *get*, and they are less likely to tolerate waste and corruption. Healthy competition between local authorities also fosters accountability and financial responsibility.

Local government

Under apartheid South Africa has developed one of the most highly centralised political systems in the western world. Both white and black (but especially black) local governments have had almost no powers of their own. They have been primarily administrative bodies whose main purpose has been to carry out national plans and to provide local services subject to central controls.

There has been an exclusively top-down relationship between the various levels of government. Parliament decided on the powers of the provincial councils, and provincial ordinances created local authorities and defined their rights and powers. Furthermore, the doctrine of *ultra vires* applied, which is to say that local authorities could make laws only if they were specifically authorised to do so by a higher tier of government.

The history of government in this century has been one of increasing centralisation. In 1908 it was agreed that South Africa would have a unitary constitution with the final say on all legislation vesting in the central government. At the time a number of powers were given to the provinces. However, since these powers were not protected, most were eventually drawn back to the central government.

Like the provinces, local governments had no constitutional safeguards, and what few powers they enjoyed in the early days were soon eroded. Verwoerd regarded local governments as "the agents of the [central] state"; as such, they were expected to implement apartheid at the local level.

Until very recently, provincial control over local authorities was extreme. For example, the Cape administrator approved all municipal by-laws, set a fixed monthly allowance for councillors, approved all loans above a minimum amount, and controlled the ability to lend money or allocate grants. He also had the power to establish, dissolve or combine local authorities.

Empowering local communities

The biggest problem facing South Africa is that of meeting the developmental needs of a fast growing, poverty-stricken urban and rural population.

The world's experience shows that the best way to achieve rapid development is through a market economy combined with government structures that are meaningful and close to the people. The closer local authorities are to the people, (in other words the smaller they are) the more likely they are to meet local needs and to reflect local preferences.

The reason for this is that when a government represents millions (rather than thousands) of people it also controls big budgets and employs thousands of employees. Wherever there is a large pool of money available for public expenditure, interest groups gather around the politicians and lobby for spending that favours their own constituencies. The most effective lobbies are the ones that are powerful in terms of numbers (trade unions) or money (big business).

Ordinary people, especially those who are unemployed and living in informal settlements, are unorganised and unrepresented and are often overlooked when spending is budgeted. And even when spending programmes are directed at the poor they prove unsuccessful because they reflect the rigid visions of social planners rather than the complex and various needs of diverse communities. Also, since ordinary people are not involved in planning and deciding the programmes they feel no sense of ownership concerning them, nor do they have any understanding of what they cost.

Big governments build big bureaucracies in which it is easy for corruption to flourish unobserved; and big bureaucracies breed quantities of red tape which slows to a snail's pace the delivery of housing, schools and services.

In the USA big cities have the highest service costs and the greatest numbers of officials per 10 000 people of any local governments. A study prepared by the US bureau of the Census for the period 1877 to 1982 showed that cities of over one million people spend more than three times the amount per capita on the same range of services as cities with fewer than 50 000 people. (*Local Government in the USA*, p72.)

Participative communities

The reason why the same tax base goes three times further in a small government structure is that in small governments tax moneys are not wasted by inefficiency, corruption and fraud.

One reason for this is that smaller budgets are less attractive to powerful lobbies, so they direct their energies elsewhere. In local communities corruption is easier to spot, so elected representatives are forced to be more accountable. When the people participate directly in development planning for their own areas they can make sure that spending reflects their most important priorities. Because they are involved they become motivated to work in their spare time to help build their homes, schools, libraries and recreation centres. They are prepared to contribute to the cost of services because they understand where the money is coming from and going to.

A sense of belonging develops. Regardless of political affiliation, rich and poor and old and young work together. The youth learn the values of independence and responsibility, how democracy works in practice and how to make sensible long-term decisions.

Nepal is presently rebuilding its new multi-party democracy very successfully with a community-based system of this nature. Nepal is relevant to us because it is also a third world country emerging from a history of elitist, authoritarian rule, and it faces even worse problems of poverty than we do.

South Africa has been dominated by a racial oligarchy for so many years that its people have to learn from scratch how a participatory democracy works. The great French political philosopher Alexis de Tocqueville observed that "Town meetings are to liberty what elementary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it."

To revitalise community life, discover the value of democracy and encourage local responsibility for RDP programmes, residential areas should have their own political, economic, cultural and social units. These should include councils, schools, churches, police and fire stations, shopping districts, community centres, and charitable and volunteer organisations. People must be able to relate to the scale of their neighbourhoods and exercise leadership there.

Enabling local development

Regional laws regarding local governments should enable rather than enforce. In 1972 the American state of Montana approved a new constitution which required "each local government unit or combination of units to review its structure and submit an alternative form of government to the qualified electors of the next general or special election." Enabling legislation was passed offering the state's 184 counties and municipalities:

- six constitutional options as well as the option to write their own charters;
- means whereby municipalities could merge, consolidate, transfer services or separate; and
- processes allowing local governments to adopt self-governing powers if so desired.

The entire process took five years and proved very successful. Subsequent legislation authorised any county or municipality to make further changes at any time it wished to do so.

Enabling rules for local government in South Africa might include:

Rules of association whereby local citizens can petition or vote to create (incorporate) their own neighbourhood government or municipality, or join up with a neighbouring community. Citizens affected by incorporation or annexation should be allowed to vote for or against. Usually incorporation requires a special majority vote (for example, a two-thirds majority). If two or more units are considering a merger, this should require a majority vote in favour in each of the areas concerned.

Boundary adjustment rules which enable citizens or officials to alter the boundaries of existing units. Local governments should not be defined by a room full of planners sitting around a map and drawing up boundaries. Instead they should be allowed to emerge through a process of choice and negotiation. There should be no rigid rules about minimum populations and minimum land areas, and each community should be able to determine its own optimum size. A combination of large and small governments, some with few functions and some with many, would reflect public preferences and allow opportunities for initiative, creativity and co-operation.

Boundaries should coincide with a community of interests and be an appropriate size for the goods and services involved. If citizens are allowed to choose their own boundaries, local government will reflect changing citizen preferences, population growth or loss and developing technology. Flexible boundaries will also encourage political competition between various jurisdictions to provide the best services at the most affordable prices.

Voting rules to ensure legitimacy and accountability. Governments should be elected regularly, and citizens should also have the right to draw up petitions, launch popular initiatives, vote on fiscal matters or local government changes, challenge unpopular laws and recall unpopular officials.

Fiscal rules which enable local units to raise revenues and to receive intergovernmental transfers and grants.

Contracting rules whereby local governments may enter into agreements with one another or with private firms. The greater the number of units involved in providing services, the more likely it is that citizens' demands and preferences will be met.

Rules for transferring functions which make it possible for a newly formed municipality or neighbourhood to transfer functions from existing units to itself.

Home rule charters which allow the people forming a new local government to decide on their own arrangements regarding service provision, taxes, voting and so on.

Conclusion

The reason the RDP emphasises the importance of participation in welfare and development, and the necessity for community empowerment, is because development experts know that imposed programmes fail, but people driven-programmes succeed. It is not enough to window-dress centralised decisions with community consultation, as is happening all around South Africa today. The communities must be genuinely empowered through local councils to take full responsibility for all of the decisions that effect their daily lives.

Financial and fiscal relations

Taxation in South Africa

The pros and cons of various kinds of taxes are hotly debated. Different taxes find favour with different individuals depending on whether their aim is to ensure that people can't escape paying, that the rich support the poor, or that unintended consequences are minimised.

Every tax runs the risk of unintended and usually undesirable outcomes, but some of these can be anticipated and avoided. The key to predicting the consequences of taxation and government spending is to recognise that if you subsidise something you get more of it, while if you tax it you get less. For example:

- if bread is subsidised people eat more of it than they otherwise would;
- if property taxes are based on improvements (as well as site value) they discourage property development;
- when taxes are hidden in service rates, they discourage consumption of the taxed services, be they water, electricity or waste disposal;
- if the rich shoulder most of the tax burden – for example if taxes are limited to property owners, businesses, and high income earners – governments become accountable to the rich instead of the poor because they rely on wealthy taxpayers for their revenue;
- many business taxes, including property taxes, licence fees and electricity surcharges, are passed on to consumers in the form of higher prices, and workers in the form of lower wages;
- taxes levied on employers' wage bills encourage businesses to retrench workers and invest in labour-saving machinery, which increases unemployment;
- and when income taxes and company taxes become too high, tax avoidance and evasion increases, and some businesses move into the unrecorded or informal sector.

Because of this potential for unintended consequences, taxes at the central level should as far as possible be neutral, broad-based and general to lessen misallocation of resources on a countrywide scale. Narrowly targeted taxes of the kind described above that cause economic distortions should be restricted to the local level, where competition disciplines their use.

Redistribution

Ideally each level of government should assume fiscal responsibility for the cost generated by its decisions.

However, in South Africa there is a massive gap between the services and basic infrastructure supplied to different race groups. The primary purpose of redistributing revenues between governments is to partially equalise the provision of services in different areas.

Horizontal redistribution between regions should be decided and agreed upon by regional governments, and administered by the central government. Each regional government should make its own arrangements for *vertical redistribution* to local communities and neighbourhoods.

Problems with redistribution

The more that governments rely on their own sources of revenue, the greater the incentive which they have to make sensible fiscal decisions, balance budgets and strive for efficiency. When they have access to grants, their incentives change from seeking how to improve local economies, to finding ways to maximise the amount of their subsidies. For example, if the subsidies are based on local government costs, as they often are, the incentive is to maximise costs. And if grants are based on poverty, the interest of authorities is served by maximising local poverty.

Another problem caused by subsidies is that recipients tend to develop a dependency mentality instead of striving for self-sufficiency. This problem is compounded if subsidies are conditional on meeting certain criteria.

And when local governments are told how their money should be used, they cannot remain accountable to their constituents.

Intergovernmental grants that aim to remove all inequality between communities protect bad governments from the consequences of their actions, and interfere with the useful demonstration of the relative strengths and weaknesses of policies and programmes which results from local control.

How to minimise the problems of redistribution

Intergovernmental grants are sometimes linked to particular programmes. Alternatively, they may be unconditional and distributed by formula.

The second alternative is far preferable to the first. Studies in the USA show that when poor areas receive transfers over which they have control, they make better spending decisions than when a big jurisdiction dictates the use of subsidies to them. The fact that they are unable to raise sufficient revenues locally should not be used as an excuse to deprive poorer areas of the political right to determine their own needs. They should receive grants according to a formula, with no provisos, so that they can spend the money according to local priorities.

The Canadian system of financial-equalisation entitlements

The Canadians have developed a way of calculating intergovernmental transfers that minimises the ill-effects of redistribution. This system has been in effect since 1957.

The federal government works out a *Representative Tax System (RTS)* based on a weighted average of provincial taxes including 39 separate types of taxes, rents and user fees. This is arrived at by dividing the total revenues from each tax by the total tax base. For example, the total property tax receipts divided by the total property tax base of the country come to 1,65%. To determine the RTS the same calculation (revenues divided by tax base) is applied to every tax on an annual basis.

The RTS is a fictional system and none of the provinces use it, but if it were applied to the tax bases of all ten provinces it would yield the same total as that which they collect with their own diverse systems.

The government's accountants average the amount that the five middle provinces would raise per capita if they charged taxes at RTS rates. They then apply the RTS to each province's taxable resources and make up the difference between the potential RTS revenues of an average province and the potential RTS revenues of any province that falls short of the average, with a single, no-string-attached, annual grant.

Federal equalisation grants are not related to the way in which the provinces raise their own taxes, and provinces which receive grants are not told how to spend them. But the system does ensure that each province could, if it wanted, raise sufficient resources to meet public needs at a level which is average for the entire country by applying the RTS and adding the grant to the provincially raised sources. Even though four of the ten provinces (Ontario, Alberta, Saskatchewan and British Columbia) don't receive any RTS payments, the system is well accepted in Canada (*The Vermont Papers*, p 165).

This kind of system can be applied between first- and second-tier, and between second- and third-tier, levels of government. In other words, national governments can provide equalisation grants to poorer provinces based on RTS assessments, whilst provinces can use a similar system for redistribution among local communities. At the provincial level equalisation grants should be paid annually, but within provinces subsidies might be paid bi-annually or quarterly.

If such a system were introduced in South Africa, Gauteng and the western Cape would probably receive nothing, whereas KwaZulu-Natal and the Eastern Cape would be in line for equalisation grants. Within Johannesburg the northern areas and CBD would not be entitled to subsidies from the metropolitan government, whereas community governments in Soweto and Alexandra would.

A system of this nature does not avoid all the negative consequences of wealth redistribution, but it escapes the worst of them, and in South Africa it would go a long way towards meeting the oft-repeated demands for government to close the gap between rich and poor.

Financing local and provincial governments

Most South Africans agree that the artificial rifts that divide our towns and cities according to race should be eradicated. But it would be a mistake to confuse the fragmentation caused by apartheid with the richness that results from community diversity and empowerment – reunification doesn't necessarily mean fiscal centralisation or uniformity.

When redistribution occurs between richer and poorer local areas it need not and should not prevent communities from levying their own taxes in any way they choose, on property, sales, incomes or profits. At the very least, a portion of area-wide taxes collected within local communities should be returned to them to spend as they prefer.

There are many reasons that financial decision-making should be brought as close to the people as possible.

When taxes are raised and spent locally, people can see for themselves the relationship between what they *pay* and what they *get*, and they are less likely to tolerate waste and corruption. Healthy competition between local authorities also fosters accountability and financial responsibility. The prospect of losing taxpayers and businesses to competing localities encourages governments to provide the best possible services at the lowest possible rates, and discourages them from imposing inordinately high individual and corporate taxes.

When communities decide for themselves what rates and taxes to pay, and how revenues should be spent, they become more practical in their demands. Unrealistically high expectations are lowered. Furthermore, if they feel they are getting a fair deal they are unlikely to refuse to pay their rates.

When communities are financed by centralised levels of government, whether national, regional or metropolitan, local leaders establish rapport with the politicians who hold the purse-strings and end up losing touch with the people in the neighbourhood. For example, when the former black local authorities encouraged regional services council projects costing millions of rands, the new RSC-funded infrastructure soon deteriorated because the local people felt neither involved nor responsible. If financial decisions were made locally they would reflect real local needs, rather than the values and priorities of central planners.

Furthermore, when revenues are collected by higher levels of government and passed down to communities, they are almost always accompanied by costly and burdensome rules, regulations, inspections and audits.

South Africans are so accustomed to centralised decision-making that the idea of real local empowerment often seems to be an unrealisable fantasy. However, it is important to realise that the degree of political centralisation that exists here is the exception, not the rule, and that in some highly successful countries local communities regard financial self-governance as a fundamental and inalienable right.

Local and regional taxes in Switzerland and the USA

In both Switzerland and the USA there is considerable devolution of taxing and spending powers, and on average tax levels are very much lower than in South Africa.

In Switzerland 40% of taxes are raised by the cantons (provinces), 30% by the communities and 30% by the central government.

The central government raises most of its revenue from a general tax, sales taxes and customs duties. More than half of federal taxes are indirect; the remainder are levied on income and property. Most canton and community revenues come from a combination of income tax, company tax and property tax (not levied in all cantons). Income tax is paid at the individual's place of residence, and all taxes are collected in canton offices.

Disciplined by the competition between them, the cantons and communities live well within their means, whereas the federal government, like central governments everywhere, spends more than it raises.

In the USA state governments raise 23,8% of total revenues, and local governments only 18,9%. However, after intergovernmental transfers the local share increases to 32,3% and the state share drops slightly to 20,3%.

The federal government depends largely on income and corporate taxes, whereas the states and local governments rely primarily on property taxes, sales taxes and increasingly on income taxes. Taxes tend to be less progressive[1] at the state and local level, because governments are disciplined by competition. In the USA tax collection is co-ordinated between different areas so that each area benefits from a business with activities in different regions. In some cases an individual living in one area and working in another divides his income tax between the two.

Most state constitutions require local governments to balance their budgets, and the great majority are financially sound.

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1. Progressive taxes are linked to income or expenditure in such a way that the more an individual earns or spends, the higher the percentage he or she pays in taxes.

12. Affirmative action

Preamble

Calls for affirmative action in the new South Africa abound as do calls for equality. This submission argues that the two are mutually exclusive.

If affirmative action could in fact redress past wrongs and result in peace and prosperity for all it would be worthy of support despite the anomaly.

Unfortunately the worlds' experience shows that no matter what the *intentions* of affirmative action policies, the *unintended consequences* are negative.

For this reason **the bill of rights should clearly and without limitations guarantee equality at law** and should not attempt to guarantee equality of results.

Affirmative action

There are two reasons why South Africans should reject affirmative action policies out of hand: Firstly, they do not achieve their intended goals, and secondly they are undemocratic and racist.

Affirmative action policies or *preferential policies* are those policies *designed and enforced by government* to benefit one group in preference to another. They are an experiment in social engineering that has been tried throughout the world for different reasons and in respect of diverse groups. But no matter what the reason or who the intended beneficiary, the same negative results can be observed in country after country.

The Malay Experience

In Malaysia, for example, 58% of the population is Malay, 23% Chinese and 10% Indian. Preferential policies for Malays were first introduced by the British who did not, for example, allow the Chinese to own land and did not provide them with the same educational facilities they provided to Malays. Despite this, by independence in 1957 the Chinese dominated both the economy and academia, owning 4/5 of all retail outlets and received 80% of all degrees from the University of Malaya.

The Malays, who dominated the post-colonial political process, then tried to achieve through the ballot-box what they had been unable to attain through the market-place -- by introducing yet more preferential policies in their favour, mainly in the form of job quotas within the government.

Twelve years later the Chinese continued to dominate the economy. Violence erupted as a result of the unfulfilled expectations of the Malays and 248 people lost their lives in the race riots of 1969.

The government responded by extending its preferential policies for the majority. It intended, through its *New Economic Plan*, to tip the economic balance in favour of Malays through loans, subsidies, preferential licensing and employment and education quotas.

Preferential licensing

Under the new plan, for example, the Malay government contracted out the building of a road from Singapore to the Thai border. They did not employ the most experienced and efficient road-builders for the job, but instead granted the contract to a Malay firm that had never built a road before. The additional cost to the taxpayer in lost time, collapsed road surfaces and inefficiency was astronomical.

Education quotas

The major educational institutions of Malaysia must by law reserve 55% of their places for Malays. The MARA Institute of Technology grants only 5% of its 20 000 degrees per annum to non-Malays while 80% of all education scholarships go to Malays. In addition, to ensure that university quotas are filled, Malays are graded more leniently than non-Malays. (In theory, grading is done without reference to race, but in practice papers are submitted to an evaluation board consisting largely of Malays. Grades are unilaterally raised for purposes of "ethnic balance".)

Academic standards have dropped substantially as a result of the education quota system and each year several thousand non-Malay students leave the country to obtain an education abroad that they are denied in the country of their birth.

Successful?

In Malaysia 5% more Malays now sit on company boards than in 1969. The incomes of the top 10% of Malays have increased by 11%, but this 11% comes from the total income of the Malays not from some other group. In addition, more Malays now live below the official poverty line than in 1969.

According to Dr Mahatir bin Mohamed (then-president and a strong proponent of Malaysia's affirmative action policies): "These few Malays, for they are still only very few, have waxed rich not because of themselves, but because of the policy of a government supported by a huge majority of poor Malays. It would seem that the efforts of the poor Malays have gone to enrich a select few of their own people. The poor Malays themselves have not gained one iota." He goes on to defend the policy by saying : "From the point of view of racial ego, and this ego is still strong, the unseemly existence of Malay tycoons is essential."

The experience of the USA

In the USA, preferential policies were originally introduced not for a majority as in Malaysia, but for a minority. The rationale behind the preferential policies of the USA was compensation for the past. (The federal government's preferential policies no longer apply only to the descendants of slaves (11% of the population), but today include all other minorities and all women – thus covering an estimated 70% of the population.)

Despite the 14th amendment in the American constitution that guarantees the equal treatment of all citizens, preferential policies have been introduced in greater and greater numbers, mainly through judicial rulings, since 1965 when Lyndon B Johnson amended the Civil Rights Act of 1964 to include affirmative action for black Americans.

The civil rights revolution of the 50s and 60s had culminated in the drafting and passing of the *Civil Rights Act*. The act entrenched equality at law and was expressly against preferential treatment. Its aim was a non-racial, colour-blind America.

Thirteen days after the act was passed, race riots erupted in Harlem and throughout the US. As a result, militant activists and guilt-ridden whites began to scorn the idea of *equal opportunity* for blacks – saying that was not enough to redress past wrongs. They demanded instead *equal results* and insisted it was government's role to ensure these equal results. Thereafter the federal government began to involve itself actively in the upliftment of blacks, concentrating on crime prevention and welfare benefits, and eventually introducing employment and education quotas.

Academic standards drop

Education prior to the 1950s was the jealously-guarded preserve of local government. In the late-50s, however, the federal government began to subsidise state education – initially in response to the launching of Sputnik, but later the purpose of federal aid was to provide compensatory education for low-income groups. As a result, black enrolment in schools increased and by 1977 the percentage of blacks attending college equaled that of whites.

Academic standards in the United States, however, dropped dramatically in the 70s. In the 50s and early-60s if pupils did not achieve certain results they were held back, if they disrupted class they were suspended or expelled. In the late-60s, subsequent to the civil rights revolution, when black pupils failed to immediately achieve the same results as white pupils, the federal government set out to change education policy throughout the USA – using the threat of removing federal aid to bring all schools into line with its new thinking.

Basically the government said that it was unfair to treat previously disadvantaged pupils in the same way that pupils had been treated in the past, in effect, that to achieve equal results, the rules had to be changed. In addition, the courts ruled that to expel a student a school had to take the student to court. As a result students became more and more unruly, good pupils

found it impossible to learn and teachers found it impossible to teach. In many schools, particularly urban schools, teachers were threatened with violence and in time in urban schools students were no longer pushed to achieve – they were passed into the next standard regardless of their results.

The lowered standards in schools has in effect made it impossible for black students to meet the entrance requirements of colleges and universities – many of which demand an admission test score of 1 200 points. In 1983, only 600 blacks throughout the country scored 1 200 SAT points. The pool of qualified blacks was too small to fill the quotas of any of the universities. Thus each year the top colleges involved themselves in a wild and unseemly scramble for these few eligible students in order to fill quotas. But because the pool is too small standards have had to be lowered to fill quotas. Those admitted regardless of their ability find it impossible to make the grades needed to pass. At the University of California, for example, more than 70% of black students fail to graduate. In addition, for those who do pass, lowered standards in colleges mean ultimately lesser degrees, lesser careers and lower salaries for black college-leavers.

Economic empowerment?

This reverberates into the economy where black Americans have yet to achieve parity in incomes with white Americans – despite some positive signs to the contrary prior to the civil rights revolution when, despite discrimination in the south, the incomes of black males had begun to rise substantially compared to that of their white male counterparts. In 1940 black incomes were 42% of that of whites. By 1950 they were between 57% and 62% of those earned by white males.

Then came the civil rights act and equality at law. And then the preferential policies of Lyndon B Johnson. While the upward trend in black incomes of middle-aged blacks continued to some extent, not only did the upward trend in incomes slow substantially for black youths, but unemployment in this group increased dramatically (44% - 59%) – and this at a time when blacks were moving out of the low-income South and into the high-income north and the federal government was spending billions of dollars per annum on job creation.

The preferential policies of the federal government also urged employment quotas – initially within government, then for government contractors and all recipients of government funds and later for all businesses employing 15 or more people. Through a variety of judicial rulings these initial *guidelines* grew more and more pervasive especially after the 1971 court decision in the case Griggs vs Duke Power. The court found for Power saying that an employer did not have the right to demand a minimum requirement – such as a school leavers' certificate – as a prerequisite for employment. And Griggs was forced to employ Power – not because he was qualified for the job, but because he was black.

Since then employing "too few" minorities has come in the USA to mean racial discrimination *per se*. For fear of being labelled racist and for fear of losing federal support, less and less organisations and individuals have argued against the new race policies of the USA.

Unintended consequences

The Harvard Law School has a magazine in which the best students traditionally have articles published. These students are sought out by the best law firms and anyone looking for a good lawyer knows where to go to find one. In other words, the magazine was a good barometer of success.

Then the administration at Harvard decided that "not enough" women or blacks were being published in the magazine – and they set publication quotas. The results? It has become impossible to tell whether blacks and women are published on merit or under affirmative action policies – thus undermining the real achievements of blacks and women. Blacks and

women are *less* upwardly-mobile now than they were before the introduction of the publication quotas, and racial tension has increased as those who merit publication are turned away for lack of space taken by those who (possibly) don't.

If white employees prove incompetent in the USA, they are expendable. If blacks, other minorities or women prove incompetent they are potential court cases. Well-educated or elite people from the "preferred" group are employed, therefore, to fill quotas while **unemployment has increased substantially among poor blacks.**

And why is it that poor blacks have been unable to climb the socio-economic ladder despite the billions of dollars spent annually on their upliftment? Because the incentives to achieve have been removed; the rules of the game have been changed.

Since the federal government involved itself in crime prevention programmes – concentrating particularly on a less punitive approach to delinquency (mainly black youths) – there has been a tremendous **upsurge in juvenile crime.** The reason is a simple one – crime does pay. By 1970 in Cook county, for example, the average number of arrests of a youth before he was committed to a reform school was 13.6.

Successful?

By the late-60s Americans wanted proof that affirmative action was not encouraging people to reduce their work ethic, get married less often, or divorced more quickly. A huge social-science experiment was undertaken called the *Negative Income Tax* experiment (NIT). It began in 1968, lasted 10 years and included 8 700 people. It cost the taxpayers millions. Two test groups were selected in a variety of areas – a control group and an experiment group. The experiment group was guaranteed a minimum income, the other was given no such aid. Ten years later the American people were horrified at the results. In the experiment group 9% of husbands left their jobs, 20% of wives chose not to work any longer (it is usually through the introduction of a second income into the family that poor families become upwardly mobile) and over 43% of young men chose not to enter the labour market.

Not surprisingly one finds clear links between changes in sanctions for crime and criminal behaviour, between changes in school rules and learning, between changes in welfare policy and work effort.

Apartheid and affirmative action

South Africa's history too is paved with preferential policies – for whites in general and Afrikaners in particular. It all began in the gold industry where the price of gold was fixed. Therefore it did not matter where it was produced or by whom, any additional running or labour costs could not be passed on to consumer, but had to be carried by the company itself.

While companies therefore approved of legislation that kept labour cheap, for example, the Land Act of 1913 that forced blacks to seek work in the cities, they opposed laws that forced them to employ more expensive unionised white labour such as the *colour bar* regulations that reserved certain jobs for whites.

In the earlier part of this century poor Afrikaners, for a variety of reasons, began to flood into the cities in search of work on the mines. They found that they had to compete there for jobs with blacks who had been gaining skills on the mines over a number of years.

It was not only Afrikaners who were unwilling to compete with blacks, but the British mineworkers also resented the fact that company owners preferred to hire cheaper black labour. Because gold played a particularly important role in the economy of the time, the conflict that arose between black and white miners was of great concern both to the mine owners and to the government. Especially when it resulted in militant white unionism.

The Rand Rebellion

Fear of lost revenue through violence and unrest on the mines caused the Smuts government to submit to pressure from the unions and pass the first colour-bar regulations in the *Mines and Works Act* of 1911. The act stated that *certificates of competency* were required for certain jobs and barred blacks from holding such certificates. The act in this way reserved many jobs for whites only.

To a large extent the gold mining companies ignored the new regulations. In addition, with the advent of World War I, many British miners enlisted. Unskilled Afrikaners were hired in their stead – by the end of the war making up 75% of the workforce – while experienced blacks were used to replace skilled British workers – often in positions of authority over whites. This led to yet more conflict and regular strikes on the mines.

Then in 1921 the price of gold dropped substantially. To avoid closing marginal mines and despite the colour-bar laws, white workers were immediately fired in preference for cheaper black labour – leading to one of the bloodiest labour disputes in the history of South Africa – the Rand Rebellion. Over 20 000 white miners went on the rampage. They rallied to the cry "Workers of the world unite and fight for a white South Africa". They marched through the streets of Johannesburg – looting, burning and attacking blacks. More than 7 000 government troops were sent in and in the open warfare that resulted over 200 people were killed and hundreds more wounded.

In the political backlash that followed the Rand Rebellion the miners withdrew their support from the Smuts government and in the general election of 1924 voted the National and Labour Parties into power. The new government immediately introduced more preferential policies in favour of its voters. They first passed the *Industrial Conciliation Act* of 1924 which made provision for the settlement of disputes between employees, but excluded blacks from this collective bargaining process.

The 1925 Wage Act

This was not enough for the workers who insisted that more racially discriminatory laws be entrenched. At the same time the unions began to call for "equal-pay-for-equal-work" legislation regardless of race. On the surface this seems like a contradiction, but union members, who had no intention of improving the lot of blacks, understood that a minimum wage would prevent blacks from undercutting white labour. The Mine Workers Union of the time said "...when that minimum wage is introduced we believe that most of the difficulties in regard to the colour question will automatically drop out".

The subsequent *Wage Act* of 1925 did not discriminate overtly on the basis of race, but in application was clearly racist. It was only enforced in industries where blacks competed for white jobs. Its effect was immediate and devastating – on the railways alone black employment dropped from 75% to 49%.

Because private companies on the whole continued to contravene the law, specific job reservation was entrenched through a 1956 amendment to the Industrial Conciliation Act. The Minister of Labour was given the power to enforce job quotas in the industries of his choice. The clothing industry was the first of 26 initial industries to be investigated in this regard. The minister decreed that four clothing work categories be reserved for whites. These jobs were held at the time by 3 500 whites and 35 000 blacks. The chronic shortage of white labour made it impossible for companies to replace the black workers with whites. So the government agreed to grant exemptions upon application for a permit to employ blacks. And so the amendment to the Industrial Conciliation Act in the end did more than simply discriminate against blacks – it gave the minister tremendous power over business: the power to grant or withhold exemptions permits or, in other words, the power to force business to toe the government line.

The government tried everything in its power to enforce its preferential policies. It fined businessmen who did not fill the quotas and introduced tariff protection for those companies that "employed a reasonable proportion of civilised labour".

Because of the shortage of white labour, however, business was in effect forced to contravene the law. Even the government had trouble filling the quotas it had set – so that on the railways by 1970 over 15 000 "white jobs" were in fact held by blacks. To overcome white objections, the government simply changed the job names. So white *ticket collectors* were replaced by black *ticket takers*, white *shunters* by black *marshallers*.

Successful SA?

The preferential policies of the South African government did succeed in raising the living standards of many Afrikaners. But it is important to examine our unique situation a little more closely. Afrikaners are indeed better off than they were at the turn of the century, but they are by no means rich. It has taken decades to raise them from absolute poverty to lower-middle or middle level incomes. Despite the preferential treatment the per capita income of Afrikaners is lower than that of white English-speaking South Africans and than that of South African Indians. In addition, the Afrikaners are a tiny percentage of the total population. The benefits that have accrued to them have occurred at a devastating and unacceptable cost to the majority.

These important questions need to be answered before we bring in the verdict on just how beneficial these policies have been. 1) Were the policies moral? 2) Would Afrikaners be better off today if they had poured their energies into education and work instead of political hand-outs – in other words: is it possible that they are still relatively poor because of preferential policies? 3) Is it possible to uplift a majority of the population by implementing preferential policies?

Patterns

Certain patterns that hold true for all countries of the world emerge when one studies preferential policies.

1) Preferential policies inevitably increase intergroup hostility.

The race riots of 1969 in Malaysia, the increased racial tension in the USA (where support for the Klu Klux Klan and the Neo-Nazis is increasing), and the horrors of apartheid – are all symptoms of the same disease.

2) Preferential policies are *never* limited in time or scope.

Malaysia's New Economic Plan of 1969 had a 15 year cut-off date. It has since not only been extended, but entrenched in the constitution. In addition it is a federal offence today to publicly criticise Malaysia's racial policies.

In the USA the federal government's preferential policies no longer apply only to the descendants of slaves (11% of the population), but today include all other minorities and all women – thus covering an estimated 70% of the population.

In South Africa every step the governments of the day took since the turn of the century were designed to ensure preferential treatment for whites or, in other words, white supremacy.

3) Preferential policies are always more "successful" within government than within the private sector.

If private companies refuse to serve a particular group, or are forced to employ under-qualified people, or have to pay higher wages to a preferred group, they must carry the cost. Within government the taxpayers bear this burden.

4) There is a net loss to society as a whole.
When qualified students and capital flee the country, when real achievements are undermined, when contracts are granted not on the basis of merit but preference, the man in the street must shoulder the additional economic burden.

5) Preferential policies DO benefit people, but only an elite few within the preferred group -- at the expense of the disadvantaged within that group – in whose name the policies are originally invoked.
In Malaysia 5% more Malays now sit on company boards than in 1969. The incomes of the top 10% of Malays have increased by 11%, but this 11% comes from the total income of the Malays not from some other group. More Malays now live below the official poverty line than in 1969.

The same is true in the USA, where well-educated or elite people from the "preferred" group are employed to fill quotas while unemployment has increased substantially among poor blacks.

The new South Africa

The worlds' experience shows that no matter what the intentions of preferential policies, the results are negative.

We should concentrate instead on economic growth, education and the implementation of a genuinely non-racial constitution.

The great merit of true democracy and the rule of law are that they enable everyone to improve their economic circumstances more rapidly than any programme designed to do so on their behalf.

13. Constitutional principle

Summary

In England the ordinary law respects individual liberty and upholds freedom of religion, speech, association and so on. In many other countries a bill of rights is entrenched in the constitution in an attempt to safeguard these rights.

In a traditional bill of rights, such as that of the USA or the French Declaration of the Rights of Man, common law freedoms are listed which can be enjoyed by all people simultaneously. These are genuine liberties or freedoms (or *first-generation rights*).

Some South Africans argue that these rights are not sufficient for this country because they don't provide people with the wherewithal to exercise them, nor do they reverse the damage done by apartheid. Therefore there should be a second category of rights ensuring that all people have a house, job, education and so on, so that they can take advantage of basic freedoms. These are entitlements or privileges (or *second-generation rights*). They purport to impose on the government an obligation to confer benefits on some groups at the expense of others. In other words, they can only be granted by invading the liberties or freedoms of other persons, usually by raising taxes to provide the privileges concerned to the classes benefiting.

We propose that a bill of rights be restricted to genuinely enforceable or justiciable common-law freedoms and liberties. Second-generation rights such as the right to a house or a job cannot be enforced against the government through the courts in the same way.

Inserting unenforceable second-generation rights in the bill of rights will have the undesirable result of undermining the enforceability of first-generation rights, such as the right not to be detained without trial.

For this reason the task of reversing past wrongs should be undertaken in the political sphere.

Constitutional principle

Protecting human rights

Bills or declarations of rights are drawn up and entrenched in constitutions in an effort to protect individuals by ensuring that the state will not abuse the people.

The question of which rights should be included in a bill of rights has become a contentious one amongst South Africans for the following reasons:

The common law does not envisage a certain type of society and draw up a body of laws intended to bring it about, as governments often do. Rather it assumes, and aims to protect from government violation, inherent common-law or fundamental freedoms which can be enjoyed by all people simultaneously.

For example, it is possible for any individual, regardless of race, gender or other distinguishing factors, to enter contracts; to earn income; to buy movable and immovable property from a willing seller and do whatever he wishes with it; to move freely through the public domain; to speak or write on any matter as long as he does not commit libel or slander; to be tried in an impartial court if accused of a wrong-doing; and to vote for the political representative of his choice – without impinging on the right of any other person to the same freedoms.

These are the freedoms which we believe should form the basis of a South African bill of rights.

But some legal theoreticians and political commentators see a bill of rights very differently. They make the following observation: the fact that all people are guaranteed the right to move anywhere, live anywhere, enter employment and own property does not ensure that they will have the money or the skills necessary to exercise these rights. Therefore, they believe, the task of a bill of rights should be not only to protect an individual's freedom to clothe, feed, house and educate himself and his family, but also to ensure, through the intervention of the state, that he is able to exercise these freedoms.

Thus their bill of rights would incorporate, over and above the common law rights already mentioned, a second class of rights. These would include the right to a job, a house and an education, and further yet, the right to a four-day week, a paid annual holiday, maternity benefits for women, and indeed to a generally peaceful, clean, pleasant and civilised standard of living.

Those who advance this argument call common-law freedoms *first generation rights*, and this second class of rights *second* and *third generation rights*. (Second generation rights include such things as food, housing and health care, while third generation rights include peace, a clean environment, leisure and so on.)

In South Africa, it is argued, the entire weight of apartheid legislation has violated the common law rights of the majority of people on the basis of skin colour. This has indirectly conferred privileges on the white minority by leaving them free to accumulate wealth and skills, while restricting the freedom of blacks to do the same. Most blacks have been condemned by the system to extreme poverty, and actively precluded from acquiring skills.

As a result, the argument continues, first generation rights are no longer enough in South Africa. To say that all people should be free to live as they choose, when one section of the population has all the means to take advantage of this freedom, and the other has none, is a bad joke. Indeed, first generation rights on their own would entrench the present inequalities, as whites would use their wealth and education to hold on to the privileges they currently enjoy, while blacks would have no means of achieving equality. Therefore something must be done to redress past injustices and to set the record to rights.

One proponent of this view argues that the "true potential" of a bill of rights is "as a major instrument of ensuring a rapid, orderly and irreversible elimination of the great inequalities

and injustices left behind by apartheid." (*Towards a Bill of Rights in a Democratic South Africa*, draft discussion paper, March, 1988.) On these grounds he argues that:

> The fundamental constitutional problem, however, is not to set one generation of rights against another, but to harmonise [them]... The web of rights is unbroken in fabric, simultaneous in operation and all-extensive in character... [what we want in South Africa] is the progressive, rapid and simultaneous achievement of all the rights as formulated in the three generations.

At first glance this seems an attractive idea; in truth, however, it is impossible to achieve because first generation rights are inherently irreconcilable with second and third generation rights. That the writer is aware of this is clear from his following observation:

> ...if certain major social goals are set out in the document [i.e. the bill of rights], and public and private entities are placed under a legal duty to work towards their realisation... [then] the Second Generation of rights lend themselves more to treatment of this kind than the justiciable First Generation kind.

He proposes that a bill of rights achieve equality in South Africa through a programme of "massive affirmative action" by which the state will ensure that blacks, as the victims of apartheid, have housing, work, education, health and leisure, "to mention but a few".

This commentator seems to believe that these second-generation rights should not be enforceable by private citizens against the government, ie should not be justiciable in the ordinary way through the courts. He states that the interpretation of such a bill should not be the task of "...a body of highly trained and elderly judges, applying traditional legal wisdom in what is considered a neutral and objective manner [since]...it is unthinkable that the power to control the process of affirmative action should be left to those who are basically hostile to it." Instead he proposes that a number of government commissions monitor the implementation of the bill:

> A carefully chosen Public Service commission with a wide brief, high technical competence and general answerability to Parliament...[should] supervise affirmative action in the public service itself. Similarly, a Social and Economic rights commission could supervise the application of affirmative action to areas of social and economic life.

Inequality before the law

Under a bill of universal rights all people, regardless of gender, race, or other distinguishing factors, would be equal in the eyes of the law. The theoretician quoted above does not subscribe to this principle:

> ...if the law in its majesty were to give equal protection to a family of ten occupying a two-roomed shanty and a family of two living in a ten-roomed mansion, it would not be enlarging the area of human freedom in South Africa... from a general juridical and citizenship point of view the whites as whites will disappear from South Africa, as will the blacks. As far as the law is concerned (*outside the special area of corrective action already dealt with*), there will no longer be whites or blacks, only South Africans. [Our emphasis.]

Group rights

There are other more easily identified groups which the writer believes should also benefit from affirmative action. They are:

> ...children, the aged, handicapped persons and victims of apartheid persecution [presumably non-black victims since blacks are included in the previous general group] ...as well as workers, women and so on...In none of these cases would the question of race or ethnicity enter. Group rights will exist, but they will be the rights of workers, women and so on, not of racial groups.

Group rights as defined here are rights conferred on *some* by the *state*, as distinct from rights conferred on *all* by the *common law*. State-provided group rights should not be confused with justiciable rights which are protected as a natural consequence of individual rights.

For example, if the law guarantees freedom of religion, movement and association and the right to own property to *individuals*, then groups of Christians or Buddhists can gather together and worship in their own way, and Muslims and Jews can run private schools for their children. These are group rights in the sense that they flow from the exercise by numbers of individuals of the common law right of all individuals to association. Thus the constitutional entrenchment of group rights that are corollaries of individual rights is an unnecessary duplication of rights which are already protected.

However, to *require* that the state provide Afrikaans schools for Afrikaners, or recreation facilities for workers, is to demand that certain groups of people, on the grounds of race, language, gender, religion, job description or other identifying features, be entitled to certain benefits not allowed to others, but provided at the expense of others.

Once this concept of group rights is accepted (and it is common to many of the world's political systems), the question boils down to which groups should benefit and which not. And the answer to that question is usually that the group on which the ruling party depends for the maintenance of its power is the one that gets the group rights.

A bill of state duties

The theoretician referred to above correctly observes that the US Bill of Rights and the French Declaration of the Rights of Man were intended to be "a fetter on the State in relation to the citizen". The US Declaration of Independence states:

> We hold these Truths to be self-evident, that all Men were created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness -- That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or abolish it...

The purpose of the kind of bill of rights which this theoretician proposes is not to limit the state, but to list activities that the state *must* undertake. In doing so it becomes a *bill of state duties*.

Reversing past wrongs

All fair-minded South Africans agree that the inequalities and injustices which have resulted from apartheid should be eliminated as quickly as possible. The question is not *whether* they should be eradicated but how this might best be achieved.

There is no developed society in which people are entirely free from intervention by the state, because government, by its nature, wields coercive powers not allowed to any other

group. Without them government would be no more than a voluntary association. But the extent of freedom and prosperity experienced by the population in any country depends directly on the degree of respect for first generation rights. Where common law rights are upheld, societies are rich and free.

We propose that a bill of rights be restricted to genuinely enforceable or justiciable common-law freedoms and liberties. Second-generation rights such as the right to a house or a job cannot be enforced against the government through the courts in the same way.

In countries with second-generation rights in their constitutions, those rights are not enforced where it is impracticable to do so. The consequence is that the same criteria of impracticability is also applied to first-generation rights with the result that the courts are prepared to uphold government violations of first-generation rights on the ground that protecting those rights would be impracticable.

Inserting unenforceable second-generation rights in the bill of rights has the undesirable result of undermining the enforceability of first-generation rights, such as the right not to be detained without trial.

For this reason the task of reversing past wrongs should be undertaken in the political sphere and the bill of rights restricted to upholding genuine liberties and freedoms.

14. Bill of rights

Summary

The clauses in Chapter 3 on **Fundamental Rights** in the interim constitution nearly all commence "Every person shall have the right to" equality, life, and so forth.

This implies that the rights in the chapter have been **conferred** by the constitution and by the politicians who negotiated it.

This is misleading and incorrect. The rights mentioned in the constitution, and other individual rights and freedoms, have always been enjoyed in terms of **common law**.

The problem is not that people do not have these fundamental freedoms, but that legislation and governments restrict and destroy these freedoms.

The wording of the clauses should all therefore be changed accordingly, so as to read, for example: "The right to freedom of (conscience, religion, thought and belief etc.) shall not be abridged", and "No person shall be deprived of the right to life", and so on.

Equality: In the interim constitution 8.(1) and 8.(2) prohibit the state from making distinctions between people on any basis including race, gender and belief. Logically this prohibits statutory affirmative action. We submit that 8.(3)(a) should be omitted, therefore, and its intention that the state promote equality should be included in a general statement of "National Goals" which should be included as a preamble, preface or postscript to the constitution.

Limitation: This section states that entrenched rights "may be limited by law" provided such limitation is reasonable and justifiable in an open and democratic society based on freedom and equality, and does not negate the essential content of the right in question.

No matter how well-intentioned this may be, it means that government at all levels has the power to violate fundamental rights, and this power is vaguely defined and open to differing interpretations. Legislative violations of all the listed rights, from the right to life to the right to vote, will be measured against this limitation clause.

If there must be a limit on the extent to which any particular right is protected, the precise limit should be written into the section that entrenches that right.

No special privileges for state or governments: The bill of rights should include a clause which prevents legislatures from conferring on the State special privileges which are denied to private citizens.

In particular, the State should be forbidden from conducting any enterprise or business activity while prohibiting others from also carrying on the same activity.

Secondly, the State should be forbidden from exempting itself from the effects of laws imposed on other persons.

Ensuring accountability: The most effective way to ensure that democratically elected representatives remain accountable to the people is by allowing the people to veto political decisions or propose their own laws through direct democracy. We therefore propose that the following rights be included in the bill of rights:

1) The lawmaking initiative and referendum
2) The vetoing initiative and referendum
3) The compulsory constitutional referendum
4) The constitutional initiative and referendum
5) The recall initiative and referendum

Bill of Rights

Fundamental rights are inherent, not conferred

The clauses in Chapter 3 on Fundamental Rights in the interim constitution nearly all commence "Every person shall have the right to" equality, life, and so forth.

This implies that the rights in the chapter have been conferred by the constitution and by the politicians who negotiated it.

This is misleading and incorrect. The rights mentioned in the constitution, and other individual rights and freedoms, have always been enjoyed in terms of common law. This has been constantly recognised in South African courts.

A few examples will suffice to illustrate this. Thus it has been held (*S v Evans* 1982 4 SA 346 C 351C):

> "It is a truism that freedom of expression is a fundamental requirement of an open and civilised society. The right to give free expression to one's sentiments and beliefs is one which should and must, be jealously guarded and protected and one which the Courts should be quick to preserve."

> And also (*UDF (Western Cape Regions) v Van Der Westhuizen* 1987 4 SA 296 C 929A-B):
> "Indeed, so fundamental is this right to freedom of assembly that a Court, facing with the challenge as to the lawfulness of any limitation thereon, is bound to scrutinise carefully the action of the authority imposing such limitation to ascertain whether or not there has been exact and precise compliance with the enabling legislation before concluding that the particular limitation upon the unfettered exercise of this fundamental right has been lawfully imposed".

> And (*Castel v Metal and Allied Workers Union* 1987 4 SA 795 A 807J-808A):
> "This very freedom of assembly was the basis on which applicant's counsel addressed us. It is, as he pointed out, one of the primordial rights which every citizen in a democratic society has. (S v Turrel and Others 1973 1 SA 248 C at 256G-H). Another such right is embodied in the freedom to trade. As a result of statutory interference neither of these has remained intact ..."

Surprising as it may seem, these are just a few examples of a regular and constant acknowledgement in South African law that fundamental freedoms are enjoyed by individuals in common law and should be protected.

The problem is not that people do not have these fundamental freedoms, but that legislation and governments restrict and destroy these freedoms.

The clauses in the bill of rights should accordingly recognise that individuals already enjoy fundamental rights, and that these rights should not be violated by the government.

The wording of the clauses should all therefore be changed accordingly, so as to read, for example: "The right to freedom of (conscience, religion, thought and belief etc.) shall not be abridged", and "No person shall be deprived of the right to life", and so on.

The following items should be amended to this effect:
2. Equality; 3. Human dignity; 4. Privacy; 5. Freedom and Security of the Person; 6. Life; 7. Religion, Belief and Opinion; 8. Freedom of Expression; 8. Freedom of association; 10. Freedom of movement; 11. Assembly, Demonstration and Petition; 12. Citizen's Rights; 13. Political Rights; 14. Language and Culture; 15. Residence; 17. Servitude and Labour; 19. Property; 20. Labour Relations; 23. Access to Courts; 24. Legal Representation.

Chapter Three could also perhaps begin with a statement to the effect that all people have certain inalienable rights which may not be violated by the state, worded along the following lines:

> All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed (adapted from the Constitution of the State of Nebraska, USA).

Section Two -- Equality

In the interim constitution 8.(1) and 8.(2) prohibit the state from making distinctions between people on any basis including race, gender and belief. Logically this prohibits statutory affirmative action which requires that the government classify people by race and gender and treat them differently depending on their classification. However, 8.(3)(a) states that "this section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination...".

At least eighty percent of South Africans have been disadvantaged by unfair discrimination. Statutory measures designed to discriminate in favour of the vast majority of the population defined by race and gender make nonsense of sections 8.(1) and 8.(2).

We submit that 8.(3)(a) should be omitted and its intention that the state promote equality should be included in a general statement of "National Goals" which should be included as a preamble, preface or postscript to the constitution.

Section twenty-six -- Economic Activity

26.(2) contradicts 26.(1) and as such should be omitted. In its place we propose a statement to the effect that: The state shall make no law that inhibits the right of the people to improve their quality of life, material welfare and personal development.

Section twenty-nine -- Environment

This section states that every person *shall have the right* to an environment which is not detrimental to his or her health or well-being. This cannot be regarded as a natural or fundamental right since without any human intervention, famines, floods, earthquakes, fires and plagues occur in nature and threaten the health and well-being of people. Nor is it a right that can be conferred by the state which does not have the power to prevent natural disasters.

The inclusion of rights that are not enforceable nor achievable by the state undermines those rights which are enforceable in practice. The clause should therefore be omitted from the chapter on rights and included in "National Goals" in a statement to the effect that the state shall aim to promote a healthy environment for the people.

Section thirty -- Children

30.(b)(c)(d) and (e) (parental care; security, nutrition, health and social services; not to be subject to neglect or abuse; not to be subject to exploitative labour practices) are not natural rights nor can they be guaranteed by the state, they should therefore be deleted from the bill of rights and included under "National Goals".

Section thirty-three -- Limitation

This section states that entrenched rights "may be limited by law" provided such limitation is reasonable and justifiable in an open and democratic society based on freedom and equality, and does not negate the essential content of the right in question.

No matter how well-intentioned this may be, it means that government at all levels has the power to violate fundamental rights, and this power is vaguely defined and open to differing interpretations. Legislative violations of all the listed rights, from the right to life to the right to vote, will be measured against this limitation clause.

For example, the constitution says every person shall have the right to life. But current legislation countenances capital punishment, which is, arguably, an invasion of one's right to life. Does Clause 33 mean that the death sentence is an "unreasonable" and "unjustifiable limitation" that negates the essential content of the right to Life? Or will Clause 33 be interpreted to mean that capital punishment is a "reasonable" and "justifiable limitation" that does not negate the essential content of the right to life, since it is found in "open and democratic societies"? The answer to this question is not certain, and the application of the limitation clause allows for opposing interpretations and for unpredictability about which interpretation will prevail, which is undesirable.

Another shortcoming of the limitation clause is that it regards some rights as more important than others: some can only be overridden when "necessary". So a law cannot encroach on the right to dignity unless this is "necessary", but curiously the same protection is not extended to the right to life, for example.

The limitation clause has been defended on the grounds that it is similar to that found in the Canadian Charter. It is claimed that the Canadian legislature is faced with "a formidable onus" if it wants to limit citizen's rights. On the contrary, it has proved easy to override rights in many Canadian cases. Initially Canadian courts said a law could violate basic rights only "as little as possible", but later they decided a law could violate rights "as little as reasonably possible" and that courts should be slow to second guess "the wisdom of policy choices made by our legislatures".

If there must be a limit on the extent to which any particular right is protected, the precise limit should be written into the section that entrenches that right. In the German basic Law, for example, the home is considered inviolable, but this right is limited to allow violations in order to combat an epidemic or to protect juveniles. In other words there are precise limits as far as possible which are specific to the particular right.

If further limits of rights are felt to be necessary, the bill of rights should be amended to allow this, only with the agreement of, say, 75% of the people in a referendum. This puts the people in control, not the politicians and constitutional courts.

No special privileges for state or governments

The bill of rights should include a clause which prevents legislatures from conferring on the State special privileges which are denied to private citizens.

In particular, the State should be forbidden from conducting any enterprise or business activity while prohibiting others from also carrying on the same activity.

Secondly, the State should be forbidden from exempting itself from the effects of laws imposed on other persons.

The following wording is proposed:

"An organ of state at any level of government shall not be accorded special privileges which are not also available to other persons and in particular, but without derogating from the generality of this provision, shall not -

(a) carry on any enterprise or economic activity to the exclusion of other persons;
(b) be exempt from the operation of laws to which others persons are subject."

The right of people to amend the constitution and to propose and veto laws

The most effective way to ensure that democratically elected representatives remain accountable to the people is by allowing the people to veto political decisions or propose their own laws through direct democracy. We therefore propose that the following rights be included in the bill of rights:

1) The lawmaking initiative and referendum

The right of the people, initiated by a petition signed by a certain number or percentage of voters, to propose legislation which must be put to the vote of the people directly in a referendum, or of the elected legislature.

2) The vetoing initiative and referendum

The right of the people, initiated by a petition signed by a number or percentage of voters within a certain time after the passing by the legislature of a law, to propose that a measure to veto that law be put to the popular vote in a referendum.

3) The compulsory constitutional referendum

The right of the people to vote in a referendum on every proposed amendment to the constitution.

4) The constitutional initiative and referendum

The right of the people, initiated by a petition signed by a certain number or percentage of voters, to propose amendments to the constitution, which must be put to the popular vote in a referendum.

5) The recall initiative and referendum

The right of the people, initiated by a petition signed by a certain number or percentage of voters, to propose that a particular politician or other elected or appointed office-bearer, be dismissed, which must be put to a referendum.

15. The relationship between different levels of the court; Single or split judiciary; Constitutional court

Summary

We propose a judicial system for South Africa based on our present system combined with aspects of the United States and Swiss judiciaries.

The powers of the American federal judiciary are granted to it by the constitution and cannot be removed by Congress or the President. Its task, and that of judges throughout the land, is to interpret and uphold the constitution, and they are bound to treat as void any legislative act that is inconsistent with the constitution.

The role of the Swiss judiciary is different from that of the United States. The people are the sovereign power in Switzerland and have the final say on laws through referendums. Thus, although the constitutionality of cantonal laws is decided by the Federal Tribunal (the highest court in the land), this Tribunal does not decide on the constitutionality of federal statutes. However, federal laws can be repealed by the people's veto in a plebiscite. The framers of the Swiss Constitution wanted to prevent judicial decisions from overriding the decisions of the people's representatives in parliament. They also did not want the courts to have the power to invalidate the people's decisions in referendums.

Far less judicial centralisation has occurred under the Swiss system, where the people have the final say on federal legislation, than in the US, where the courts have the final say.

For South Africa we propose a judicial system in which the provinces have complete control over first and second tier courts, while the national government takes responsibility for a central Appeal Court.

Access to the constitutional court established by the interim constitution is difficult, time consuming and far too costly for any but the very rich, or those few poor who are fortunate enough to merit legal aid. Furthermore, most of the members of the present constitutional court are, directly or indirectly, political appointees and therefore subject to political influence.

The constitutional court should be scrapped and instead the regular courts should protect constitutional rights, as in Canada, the US and Namibia.

The Provincial Courts
The provincial courts should constitute the courts of the first and second instance which uphold the national and provincial constitutions and apply national and provincial statutes at the provincial level.

The Appeal Court
The Appeal Court, with members elected by parliament, should be the court of the final instance and have the power to decide appeals from the provincial courts. We propose that Appeal Court decisions regarding constitutional issues be binding on every court throughout the country to ensure that individual rights are protected.

The People's Veto and Initiative
The people should be entitled to call for a vote challenging legislation they consider to be unconstitutional at any level of government. This form of direct democracy (the challenge to proposed legislation) should require a petition signed by a specified percentage of voters.

We propose a judicial system for South Africa based on our present system combined with aspects of the United States and Swiss judiciaries.

The US judicial system

The powers of the American federal judiciary are granted to it by the constitution and cannot be removed by Congress or the President. Its task, and that of judges throughout the land, is to interpret and uphold the constitution, and they are bound to treat as void any legislative act that is inconsistent with the constitution.

The Supreme Court is the highest court in the land and one of the triumvirate of power which includes the President and Congress. It is the final court of appeal regarding the constitutionality of federal and state laws, and comprises nine justices, including a Chief Justice, who are appointed for life by the President subject to ratification by the Senate.

Because the Supreme Court is the final court of appeal, it has become not only the *guardian* of the constitution but also its *master*. It is the task of the Bench to determine the limits of the legislature, and in the course of time it has placed these limits far beyond anything envisaged by the Founding Fathers of the constitution. The constitution states that the courts must protect individual citizens' rights, but it also contains a catch-all phrase to the effect that Congress should uphold "the public interest", and the Supreme Court has frequently ruled against individual rights on the basis of serving the public interest. For example, it has ruled that Congress may levy or collect taxes without restraint subject only to the principle of uniformity.

Prior to the 1930s the Supreme Court was independent of political pressure and interpreted legislation, for the most part, within the spirit of the constitution. But during that decade, President Roosevelt paved the way for politically-inspired appointments to the Bench by deliberately and openly threatening to pack the Court with judges who supported the New Deal policies of his administration. Succeeding presidents have appointed judges who are likely to agree with them. As a result, the Court has often been criticised for its decisions, which some authorities believe have been at variance with the views of many or even most Americans.

The problem is that this new and pliable approach to the constitution has led to its interpretation being a matter of value judgment and personal opinion. Judges should be impartial, but their rulings are invariably coloured by their subjective political leanings and convictions. Moreover, the numbers of the Supreme Court can be increased by Congress, so it is able to add jurists who share its convictions. Supreme Court judges may be impeached for misconduct, but the only other constraint on them is public opinion.

The role of the Swiss judiciary

The role of the Swiss judiciary is different from that of the United States. The people are the sovereign power in Switzerland and have the final say on laws through referendums. Thus, although the constitutionality of cantonal laws is decided by the Federal Tribunal (the highest court in the land) this Tribunal does not decide on the constitutionality of federal statutes. However, federal laws can be repealed by the people's veto in a plebiscite. The framers of the Swiss Constitution wanted to prevent judicial decisions from overriding the decisions of the people's representatives in parliament. They also did not want the courts to have the power to invalidate the people's decisions in referendums.

The Swiss Federal Tribunal is an independent court located in Lausanne which consists of 26 to 30 full members and 12 to 15 substitute judges. The members are elected by parliament for six years, and though any Swiss citizen is eligible for election, members are usually cantonal judges, law professors or federal parliamentarians. The Tribunal's composition reflects the country's main languages, regions, religions and major political parties.

The Tribunal stands at the apex of a pyramidal system of courts. The canton courts apply federal and cantonal statutes at the cantonal level and are courts of the first and second instance. The Federal Tribunal is the court of last instance and has the power to decide appeals from the cantonal courts. It deals with civil and criminal law violations, the interpretation of public and administrative law, debts and bankruptcies, and social security questions.

Although the Tribunal does not decide the constitutionality of *federal* statutes, it may hear an "administrative complaint" against the cabinet regarding ordinances, orders or decrees which violate constitutional rights, or other federal laws. As a rule, however, federal ordinances which are based on federal statutes cannot be invalidated by the Tribunal.

The Federal Tribunal is, however, empowered to rule on "constitutional complaints" against cantonal and community governments. Any citizen can present a complaint against his canton for the violation of his fundamental rights, which include property rights, freedom of commerce and industry, voting rights, rights to referendum and initiative, and equality at law. In a series of decisions the Federal Tribunal has ruled that any application of cantonal law which is "arbitrary" or "capricious" amounts to inequality before the law. Through this interpretation of "equality" it has approved violations of rights and freedoms guaranteed in the federal and cantonal constitutions, just as the US Supreme Court has done in its interpretation of the "public interest", though to a lesser extent.

The Tribunal also decides conflicts of competence between federal and cantonal authorities or between two or more cantons. In this case it sits as a court of first instance. It does not have the power to decide on disputes between the cabinet and parliament.

Swiss Cantonal Courts

The organisational structure, proceedings and execution of sentences of all courts other than the Federal Tribunal are purely cantonal matters and vary from one canton to another.

There are several types of cantonal courts including civil courts, criminal courts and administrative tribunals. (The tribunals are based on European administrative law, a coherent system of rules and procedures not found in the same form in the UK, USA or South Africa.) About half the cantons also have labour or industrial courts to decide disputes between employers and employees, and commercial courts.

In most cantons there are two levels of courts: community-based courts in which civil and criminal cases are tried by a single judge or lawyer president or by lay members who are usually elected by the people; and cantonal or superior courts, which can hear appeals from the community courts, and may refuse to enforce canton statutes which violate federal laws. These usually consist of a professional tribunal elected by the people or the canton parliament. Only two cantons, Zurich and Geneva, have jury trials.

The administrative tribunals deal with controversies regarding canton law. They can declare a canton statute invalid if it violates the canton constitution.

A comparison of the American and Swiss systems

It is interesting that far less judicial centralisation has occurred under the Swiss system, where the people have the final say on federal legislation, than in the US, where the courts have the final say.

In theory, the US Congress cannot restrict the power of the states; in practice, however, if Congress enacts a statute, the President signs it, and the Supreme Court finds it constitutional, the states are powerless to oppose it. Article VI of the constitution declares that all statutes enacted by Congress shall constitute the supreme law, laws in the states to the contrary notwithstanding. While the Supreme Court can rule a federal law unconstitutional on the grounds that it goes beyond federal lawmaking competence, it doesn't often do so. The

Supreme Court is itself a federal institution, and during the past half-century its decisions have resulted in an ever-expanding conception of federal power.

In Switzerland, where the cantons and the people have the final say, they often block laws which aim to centralise power at the expense of local interests. Moreover the cabinet has to lobby the cantons and other interest groups such as trade unions and consumer groups to gain their support for legislation, since without their approval it runs the risk that a referendum will be called to reject the proposed measure. In the United States the opposite is true. Interest groups set up foundations and organisations in Washington whose full-time task it is to lobby Congress to pass laws in their favour.

The true seat of power in the two countries is clearly demonstrated by this difference. In constitutional terms the Swiss legislature is more powerful than the US legislature, but in reality the Swiss legislature is much more answerable to the people.

The relationship between different levels of the court; Single or split judiciary; Constitutional court

For South Africa we propose a judicial system in which the provinces have complete control over first and second tier courts, while the national government takes responsibility for a central Appeal Court.

Access to the constitutional court established by the interim constitution is difficult, time consuming and far too costly for any but the very rich, or those few poor who are fortunate enough to merit legal aid. Furthermore, most of the members of the present constitutional court are, directly or indirectly, political appointees and therefore subject to political influence.

The constitutional court should be scrapped and instead the regular courts should protect constitutional rights, as in Canada, the US and Namibia.

The Provincial Courts

The provincial courts should constitute the courts of the first and second instance which uphold the national and provincial constitutions and apply national and provincial statutes at the provincial level.

Each province has established magistrate's courts and supreme courts within its area of authority. The existing infrastructure could be retained virtually as is, with an option to devolve the control of magistrates courts to local government.

Over time provincial and local structures could vary a good deal from one another in accordance with innovative developments, customary law and local administrative systems.

The Appeal Court

The Appeal Court, with members elected by parliament, should be the court of the final instance and have the power to decide appeals from the provincial courts.

An independent court of appeal helps to avoid the possibility of local ethnic or cultural domination or miscarriage of justice. The Appeal Court would apply the law of the province in which the case originates, as happens now.

If all the provinces are to have confidence in the central government judiciary, special care must be taken to ensure its independence and impartiality. To achieve this there might be a rule that there may not be more than three judges from any one province and that a certain number of provinces may veto the appointment of a judge.

Certain conventions would probably evolve, as they have done in the USA and Switzerland, to take account of ethnicity and socio-economic factors.

All courts should decide the constitutionality of any legislation, as in the USA, Canada and Namibia.

The People's Veto and Initiative

The people should be entitled to call for a vote challenging legislation they consider to be unconstitutional at any level of government. This form of direct democracy (the challenge to proposed legislation) should require a petition signed by a specified percentage of voters.

Conflict of laws

Clearly, if laws differ from one province to the next, some of them will conflict. This is not a new problem. It occurs in Switzerland and the USA and all systems in which different constituent units have different laws. It has always been the case between provincial court jurisdictions in this country.

We do not need to re-invent the wheel; an entire body of law has been built up over time to settle disputes which result from conflicting laws. In cases regarding contracts, for instance, the law of the place in which a contract was concluded is usually invoked.

Legal precedent

The system of judicial precedent applies currently in South Africa. In other words, when there is a legal dispute the court settles the point by referring to previous judgments on similar cases. If a higher court has made a decision regarding a point of law, its decision is binding on all lower courts.

We propose that Appeal Court decisions regarding constitutional issues be binding on every court throughout the country to ensure that individual rights are protected. However, as at present, different provincial courts should be free to follow or reject decisions made in other provincial divisions.

Other court structures

Cheap and accessible courts for South Africa

It is very important that South Africa have courts which are accessible to ordinary people. At present our courts are accessible only to the wealthy, or to those poor enough to qualify for legal aid.

By devolving the control of local courts to provincial and local levels we would expect a variety of options to emerge which would be cheaper and more accessible than our current magistrate's courts and small claims courts. For example, there would probably be community or people's courts in which cases would be tried by locally elected lay people, or lay magistrates (that is, people without formal judicial qualifications who are respected community members, such as school principals, members of the clergy, business people or academics) as in Britain, Switzerland and the USA. Lay magistrates evaluate the evidence and determine the court's ruling with the aid of advice from the clerk of the court on questions of law. These courts could dispense with documentation, legal representatives and costly procedures and allow summary hearings. There are interesting similarities between lay magistrates and the traditional courts of black chiefs and headmen in South Africa.

Provinces need not limit the jurisdiction of small claims courts to minor litigation by individuals as is currently the case in South Africa. These courts could (and should) also be accessible to organisations such as small businesses or trade unions.

One of the greatest problems with enforcing rights in our current court system is that law is inaccessible to ordinary people. With a variety of systems and with small claims courts, arbitration and customary courts, access to law would become quicker and cheaper.

Also, under conditions of judicial devolution we would expect different methods of administering the law and appointing officials to be used in various forms and combinations. Competition between different systems in different localities would help to bring about the best judicial system overall.

16. Specialised structures

Introduction

The parties representing the South African people have agreed that, in the transition to freedom and democracy, various specialised structures should be established. Many of the interim commissions which have been established (such as the *Commission on Gender Equality* and the *Commission on the Restitution of Land Rights*) will become increasingly unnecessary as the injustices of the past are addressed.

South Africa has a long tradition of establishing commissions of inquiry as a means of fact-finding or resolving disputes which cannot be resolved under normal governmental structures. While commissions and other specialised structures of government are often necessary to come to agreement over certain issues, they can also have detrimental effects.

The establishment of commissions can be a device used by politicians to avoid making difficult or unpopular decisions. In democracies, the government should decide upon a policy, seek to carry out the policy, and allow itself to be judged by the electorate on the success or failure of the policy. A government which decides to let some other body formulate the policy abdicates its responsibility to govern and its accountability to the electorate. It is therefore vital that a clear distinction is made between commissions, which have powers of investigation and recommendation, and politicians, who wield direct power.

Accountability to politicians and people is lacking in many of South Africa's commissions and governmental organisations. Commissions are also expensive to maintain. Members who are paid to sit on a commission may have little interest in the swift and efficient reporting of policy advice and recommendations. The length of time which they sit should therefore be strictly limited.

A Constitution is not supposed to set down policies and political priorities of a Government. Rather, it is supposed to describe the formal relationship between the government and the people. It would be better for issues such as gender and land rights to be addressed by a Transitional Affairs Act passed by Parliament instead of establishing Commissions within the Constitution. If such Commissions are established formally within the constitution, then it would be sensible to place a limit of say, five years on the time that they are able to sit.

Public administration

Bureaucratic behaviour

Good government depends to a large extent on quality of administration and on quality of policy advice. Public service officials involved purely in administration should be non-partisan so that they can serve all members of the public in an unbiased and impartial manner. The case for a non-partisan public service rendering policy advice is more difficult to defend, for bureaucrats will often be guided not by the public interest or even by the ruling party's policy but by their own interests.

Democracies throughout the world have suffered from bureaucracies seeking to extend the scope and number of functions which they undertake in their own self-interest. This phenomenon has become the subject of a particular branch of economics: public choice analysis. Policy advice rendered by bureaucrats rarely consists in returning power from officialdom back to politicians and people themselves. Career-orientated elites responsible for public administration also tend to insulate themselves from what is happening in the real world. The maintenance of democratic government consists to a large degree in curtailing the tendency of the bureaucrat to maximise their own power, status, budget and scope of responsibility.

An open public service

The solution is to have a public service which is not career-orientated. Posts should be advertised as openly as possible. The more applicants who compete for the position, the higher the quality of the successful applicant will be. People who have experience of the private sector may be attracted to the service, bringing with them all the expertise and new techniques which the private sector generates. The result would be far greater efficiency in the administration of government. It is widely accepted that people who work in the private sector understand far more about how wealth is created than those who work in the public sector whose job is merely to redistribute it. The public service would benefit from having some members with that broader appreciation and perspective upon the nation's affairs.

The interim constitution guarantees the pensions of public service employees. Public service employees should not have their pensions guaranteed under the constitution any more than business people, plumbers, gardeners or shopkeepers. All of these people play their part in society. It is manifestly unjust, and ought to be unconstitutional, that one group's pensions should be protected by the state when another's is not. Public service employees should like anyone else have the right to a private pension scheme, so that the question of whether the state will ever be able to afford the payment of their pensions does not arise.

The Constitution should prohibit discrimination by the state in favour of a defined group of people. All citizens should be equal before the law.

The Public Service Commission

The interim Constitution also provides for a *Public Service Commission*, appointed by the President and vested with the power to give directions with regard to the machinery of government. The only person able to reject a recommendation or direction of the Commission is the President, yet the commission is supposed also to be accountable to Parliament. This is a recipe for confusion. If the previous system which led to the use of patronage and private appointments is not to be perpetuated, the mechanism for public appointments should be as transparent as possible.

The Commission will make numerous recommendations for appointment to public service. Although it is unreasonable for Parliament to be expected to duplicate all of the Commission's work by examining each and every personnel recommendation made, *Parliament should set*

down the criteria for civil service appointments, pay and conditions in a Public Service Act. Persons appointed to senior, unelected positions should have to enjoy the approval of the Commission, the relevant departmental minister and Parliament. Appointments for those positions for which Parliament should have the right of veto - which might include senior departmental civil servants or the head of police - should therefore be listed in an Act of Parliament. *Appointments to the lower levels of the public service should be made by the relevant departmental minister after the appropriate candidate has been recommended by the Public Service Commission.*

The Commission's other principal function should be to give directions to promote efficiency and effectiveness in departments and the public service. This would ensure that practices which are wasteful of public funds could be prevented. The provision in the interim constitution that the commission has no right to make recommendations or directions which involves expenditure of public funds without the approval of the Treasury for such expenditure is also welcome. *With regard to its task of keeping a check on the work of the executive branch of government, the Public Service Commission should be accountable to Parliament only.* Parliament should appoint its members, receive its reports, and have the right to veto its recommendations.

The Public Service Commission should only be able to investigate, recommend and direct matters of public administration at a national level. At provincial level, these duties should be performed by a provincial service commission, separately responsible to a provincial legislature.

Financial institutions and public enterprise

Fiscal Policy

Public revenues should as far as possible be raised and spent by the same organ of government

The creation of a people-centred society entails giving people greater control over all aspects of their own lives. That includes giving them greater control over the money which they earn and how that money is spent. Low taxation is the best way of leaving money in people's own pockets so they can decide for themselves how their money should be allocated. Where people do pay tax, there should be maximum transparency and openness, so that people can see for themselves how their money is being spent. The current situation, whereby national government can recycle funds to those areas which it regards as most in need of them is wasteful, inefficient and likely to cause resentment.

When taxes are raised and spent locally, people do not tolerate wastefulness and corruption. The relationship between the money they spend and the services which they receive is far more visible at the local level. In addition, when governments rely on their own sources of revenue, the greater is their incentive to make sensible fiscal decisions, balance budgets and strive for efficiency. Recipients of subsidies tend to develop a dependent mentality instead of striving for self-sufficiency.

If the national government does nonetheless make intergovernmental grants, it should not design expenditure programmes. When poor areas receive transfers over which they have control, they make better spending decisions than when a large jurisdiction dictates the use of subsidies to them. The fact that they are unable to raise sufficient revenues locally should not be used as an excuse to deprive poorer areas of the right to determine their own needs. They should receive grants according to a formula established by an Act of the national Parliament, with no provisos, so that they can spend the money according to local priorities.

If each level of government was responsible for its own revenue and expenditure, the electorate could see clearly how much was being taken from them and how much was being spent. They could then make more informed judgements on whether their local, provincial or national government is using their money efficiently and effectively.

The Fiscal and Financial Commission

The Fiscal and Financial Commission is a central body appointed at national level with the responsibility of making recommendations on fiscal and financial policy matters to the relevant legislative authorities at all levels. Specifically, the Commission must recommend on 'equitable financial and fiscal allocations to the national, provincial and local governments from revenue collected at national level'. This detracts from the responsibility of provincial legislatures to run independent fiscal and financial policies. Further, it could be used as a device by the national government to exert pressure on provincial legislatures.

The Commission is supposed to perform its duties fairly, impartially and independently in deciding how revenue should be allocated. Yet it will also have to take into consideration `the different fiscal performances of the provinces, efficiency of utilisation of revenue and the needs and economic disparities within and between provinces'. People will inevitably disagree over whether the Commission's recommendations subsequently turn out to be fair and impartial. Indeed, it could be argued that redistribution of revenue is by its very nature unfair.

There is no need for the Fiscal and Financial Commission to be making policy recommendations on redistribution of wealth. The national government should be perfectly

capable of deciding how much revenue should be distributed from one province to another in order to remove disparities. The Minister of Finance should bring forward recommendations to Parliament as to how funds are to be raised and distributed annually. Public debate should take place about the Minister's proposals and the legislature should then decide on whether it accepts the proposals by passing an annual Finance Act, setting out in detail how state funds are to be raised and spent. *While it may be reasonable for the Fiscal and Financial Commission to advise on the efficacy of redistributive mechanisms, the degree of wealth redistribution is an issue which should be decided in a political arena - by the Cabinet and Parliament.*

A balanced budget requirement

All democratic governments are subjected to pressure by special interest groups to increase their spending. Yet they also realise that spending increases always have to be paid for in some way. Forcing a government to run a balanced annual budget prevents it from using the politically expedient, but economically irresponsible, tactic of letting people think they are getting benefits without commensurate costs.

Without a balanced budget, the price of increased spending is high inflation and high interest rates, leading to sluggish or no economic growth. Responsible governments seek to balance their budget to make sure that their country's economy is not overburdened with debt. Debt always has debilitating effects on the economy and has to be paid off at some stage. If spending is greater than revenue, government debt can be reduced in two ways only: increasing taxation, or inflating the debt away by reducing the purchasing power of the currency (thus making every citizen poorer).

It is for this reason that mature democracies are seeking to curtail severely or eradicate budget deficits. For example, the Maastricht Treaty of the European Union requires all member states to have budget deficits of no more than 2.5 per cent of gross domestic product by 1997. In the United States of America, more and more individual states are incorporating balanced budget requirements in their constitutions. The United States Congress is currently considering a proposal to amend the Constitution to ensure that balanced budgets become mandatory.

A stable fiscal and financial environment is necessary if foreign companies are to have sufficient confidence to invest large quantities of money in the South African economy. A requirement in the Constitution for the Government to run a balanced annual budget would go a long way towards providing such an environment.

There is one major practical obstacle which all countries face when seeking to balance their budgets. It is notoriously difficult to predict how much future revenue certain tax measures will deliver.

The requirement in the Constitution should therefore be that the Government should aim to run a balanced budget. If the year's accounts subsequently prove that a budget deficit has been run, the Government should be constitutionally required to run a corresponding surplus in the subsequent year. If a deficit is then recorded for a second year running, then the Reserve Bank should be constitutionally bound in the third year not to issue any more debt on behalf of the government, thus forcing the government to seek non-inflationary forms of borrowing or to cut its spending.

Special pensions

The interim constitution guarantees special pensions paid by the taxpayer to those persons `who have made sacrifices or who have served the public interest in the establishment of a democratic constitutional order, including members of any armed or military force not established by or under any law and which is under the authority and control of, or associated with and promoted the objectives of, a political organisation.' Special pensions will also be paid to dependants of such persons.

Although an Act of Parliament will set down further conditions of entitlement to a special pension, the whole idea of special pensions is a misnomer.

Pensions should not be determined according to what anyone has done or achieved. Just as no company should pay pensions to its former employees according to how productive their work was, so no democratic state should pay pensions according to the actions of their work in bringing about democracy. Entitlement to pensions should result from a lifetime's contributions to a fund, which can be used on retirement to purchase an annuity (giving the pensioner an annual pension income). This is the practice in the private sector, and so it should be in the government sector.

The reason that money should be paid to people who have served the democratic interest by engaging in the struggle is that they should be rewarded at least no less than those who fought on the other side of the struggle against the democratic interest. The parallel is with the South African Defence Force. Where a former member of the SADF is entitled to a pension for length of service, so too should a member of the resistance movement be entitled to a pension for equivalent length of service.

It would be wrong and an abuse of taxpayers' money to pay out funds in an arbitrary fashion. The terms and conditions of payments should be set out in an Act of Parliament so that it is abundantly clear who is entitled to how much money according to their work. Payments to people who have not been adequately compensated for past services rendered are a matter for political judgement. They should not be set out in a Constitution, which is supposed to describe the legal and institutional relationship between the government and the people. Payments should not be made in instalments; they should be one-off payments for past services.

If people want to give further money to those who have helped establish a constitutional democratic order through their sacrifices and efforts, then they should be free to contribute voluntarily to a charitable fund. People would then have the freedom to choose who should receive their money as a reward for services to the state by enabling them to make donations outside of state structures.

The constitutional provision for special pensions should be dropped, although the constitution should not proscribe any future Act of Parliament which provides for payments to people who have contributed to the creation of a democratic order.

Public Enterprise and Procurement Administration

Service Provision

It is extremely tempting for politicians, when they perceive demand within society for a particular service, to attempt to provide it directly. If politicians satisfy people's demands, the theory goes, then they will become more popular. Yet in practice, politicians rarely succeed in satisfying such demands, precisely because it is they and their bureaucrats who seek to do so.

There is another course which politicians can follow. That is, when they perceive a demand within society for a particular service, they should ask themselves why that service is not being provided already. Usually, they would discover that it is because regulatory barriers to the provision of the service have been imposed. They then simply have to remove the barriers and allow businessmen to sell the service to those individuals in need of it.

Such an approach to public policy is beneficial to politicians. It enables them to take the credit for taking the initiative in the provision of services to the public, while allowing them not to have to bear the burden of responsibility of providing the services directly. It is also beneficial to business, who can seek to make profits from providing people with services; and to people themselves, who can choose for themselves whether they need a particular service and choose an appropriate combination of price and quality.

Private provision of public services

The fact has been proven the world over that the public sector supply of goods and services is far more inefficient, inflexible, pedestrian and inept than those provided by the private sector. The words `public' and `enterprise' do not stand comfortably alongside one another. Indeed, enterprise within the public sector can only be found in the ingenuity of public sector interest groups to ensure the continuation, and even expansion, of the public programmes over which they preside. Public programmes cost taxpayers money. Yet the political forces within the public sector who demand more money for public services are often too strong for government to oppose successfully.

Restructuring of state assets and enterprises within the public sector does not in itself restrain costs to the taxpayer. Only by moving state operations into the private sector can taxpayers' money be saved. The actual transfer to the private sector can take a service out of the political world and into the purely economic world. It can expose the service to the perpetual effects of competition and cost controls. It can give consumers choice and input. It can leave decisions about capital spending and prices free to be determined by straightforward economic logic, instead of by an anticipation of what the public might be prepared to tolerate.

The most attractive aspect of privatisation is its permanence. Once the service is outside the direct area of government responsibility, its costs no longer have a direct impact on taxation; and its level of service is determined by demand. In short, the government is no longer blamed for its performance.

The government of South Africa currently presides over many state-owned industries. It would be unrealistic to frame the Constitution in such a way that prohibits the government from owning industries. Privatisation will proceed regardless of a constitutional requirement for the state to divest itself of shares.

Instead, the constitution should require the state not to stand in the way of private companies who wish to offer a service being provided by the state, should not allow the state to provide a service directly where one is already being provided by the private sector, and should prohibit the state, state enterprises and statutory bodies from exempting themselves from laws to which private individuals, businesses and institutions are subject. Such constitutional provisions would give companies providing services alongside the state the opportunity to prove that they can deliver services far more efficiently and flexibly. It would also give those companies providing services which are not provided by the state the confidence to invest in the knowledge that their assets will not be expropriated and that the state will not seek to compete unfairly with them.

The procurement of public services

Relinquishing the ownership of shares in companies providing public services does not mean that politicians necessarily relinquish control over what services people are and are not entitled to receive. In education, for example, parents could be presented with a tuition credit, redeemable in cash from the state by the school to which they send their child. The school itself need not be owned by the state, but the education service which the school provides in respect of each child could be funded by the state.

Contracting out a service to private business means that while the finance can be kept in the public sector, production can be moved over to the private economy. Even where it is difficult to have firms in competition doing certain tasks, it might be possible to have them compete to be allowed to do the tasks in the first place. They should bid against each other for the right to operate the monopoly service for a limited period. Where the period for which this monopoly privilege is granted is sufficiently short, firms will need to keep costs down and efficiency high, or they will lose the privilege, when next it is awarded, to a newcomer who will beat their

price. Thus consumers can gain many of the advantages of competition, even where actual competition on the job cannot be secured.

Competitive tendering of services has proven in many countries to be most effective at local government level. In the United Kingdom, for example, local councils put out to tender the services which they intend to fund. These include refuse collection, road building, house building and maintenance, street building and maintenance, street lighting and leisure facilities. The constitutions of the provinces should set down the requirement for private tendering of provincial and local services.

A section in the new national Constitution should read:

Service Provision

Parliament shall be prohibited from introducing laws which block entry by private sector companies into service provision activities which are also provided by the government. Private companies which provide services already provided by the government body shall be entitled to the same treatment and benefits as the government body.

The government shall be prohibited from providing a new service to members of the public unless it first determines whether the proposed service is already made available by a private sector company and has removed all regulatory barriers to the provision of that service by a private sector company.

Where the national government has the approval of Parliament to spend public funds on the provision of a service to members of the public, private companies must be asked to submit public bids to provide the service. The company asked to operate the service will be that which meets the criteria set down in advance by an Act of Parliament and which saves the largest amount of public funds.

The South African Reserve Bank

The objective and powers of a central bank

The interim constitution assigns a number of objectives to the Central Bank. Clause 196 (1) says that the primary objective of the Reserve Bank is to protect the value of the currency `in the interest of balanced and sustainable economic growth'. This means effectively that the Reserve Bank is mandated to manipulate monetary policy in pursuit of growth. The clear danger is that in the pursuit of growth, the money supply will be inflated, leading to excessive price increases.

The major defect of the constitutional demands placed on the Reserve Bank is that its attention is not concentrated exclusively on the pursuit of price stability. In addition to providing a sound currency, too often it presently sees its role as that of lord of the economy. In trying to manage aggregate demand and the level of imports as a means to economic growth, the Bank simply increases money supply growth - which inevitably fuels price inflation.

Only when the increase in the quantity of money reflects the increase in the quantity of goods and services will prices remain stable. Controlling the supply of money is therefore the key to controlling prices. Any functions which the Reserve Bank undertakes without reference to the effect on the money supply will have an adverse impact on the price level.

Most tasks which the Reserve Bank currently undertakes are merely reactions to its failure to control the money supply in the first instance. For example, the Central Bank often intervenes to fix the price of the Rand at an artificial level by dealing in foreign currency purchases and sales. In addition, controls on the quantity of currency which may be exchanged means that the market is much less efficient than it would otherwise be.

If the Reserve Bank did not increase the supply of money in the first instance, then there would be no need to try to fix the value of the Rand. It would find its own level according to the supply of and demand for Rand at any given moment. If the internal value of the Rand was preserved, the Rand would over time appreciate against inflationary currencies and depreciate against those currencies with even lower inflation rates.

The task of the Reserve Bank should therefore be to focus narrowly and effectively on the control of the money supply. Other interventions detract from this task.

From time to time, a Reserve Bank may need to engage in open market operations: the purchase and sale of government securities and of foreign and domestic currency. The Reserve Bank is the government's banker. As such, it may need to issue bonds or securities on behalf of the government if the government needs to borrow funds.

But just as a businessman is not able to borrow increasing amounts of money from his banker year after year to cover losses, so too a government should not be able to borrow from its banker in perpetuity to cover deficits. Government borrowing drives up interest rates, because the Bank has to offer a higher interest rate or yield on government securities in order to borrow more from the private sector. Since government borrowing can have profound effects on the money supply by changing the interest rate, the price of money, it is preferable to keep borrowing to a minimum. That is why, as the government's banker, the Reserve Bank should refuse to issue credit to a government which runs a deficit for two years' running until the government has put its finances back in order.

As the monopoly issuer of domestic currency, the Reserve Bank directly affects the level of inflation. If the Government borrowed funds from agencies other than the Reserve Bank, the effect would not be inflationary, since no more money would have been supplied by the Reserve Bank. The clause limiting the borrowing of the Government from the Reserve Bank should not therefore preclude the government borrowing from private tenders. These private sources may, of course, choose not to lend money to the Government. The Government's capacity to borrow will be limited by the confidence which its creditors have in the Government's ability to pay back the money. If genuinely unavoidable budget deficits arise, then the Reserve Bank should be allowed to issue credit to the government as long as this has the consent of the Bank, the President and a two-thirds majority in both Houses of Parliament.

The provisions regarding the South African Reserve Bank in the interim constitution should be deleted.

The section on the objective and powers of the Reserve Bank in the new Constitution should read:

Objective

There is hereby established a South African Reserve Bank whose objective shall be the maintenance of the internal value of the currency.

Powers and Functions

The Central Bank shall have sole responsibility for monetary policy. Accordingly, it shall possess the right to engage in open market purchases and sales of South African Government securities and of foreign exchange; the right to issue or not to issue currency denominated in notes and coins; the right to hold reserves; and the right to alter the reserve percentages which the commercial banks are required to deposit with the Reserve Bank in respect of their deposit liabilities.

Four times annually, the Bank shall produce an inflation report which will be made available to the public. This will explain what measures the Bank is taking in pursuit of its objective of maintenance of the internal value of the currency.

If the Government has run a budget deficit for two years in succession, then the Reserve Bank shall not issue any more debt on behalf of the Government in the third year or any subsequent year until the Government has repaid the outstanding debt by running budget surpluses of equivalent value. This provision can be overturned with the agreement of the Bank, the President and a two thirds majority in both Houses of Parliament.

Entrenching independence

It is clear that there is general consensus that the Reserve Bank should be independent. Where there is not consensus is how best to entrench independence.

The interim constitution does not provide for a truly independent central bank. Clause 195 states that the Reserve Bank established `and regulated by an Act of Parliament' shall be the central bank; clause 196 (2) states that the Reserve Bank shall exercise its powers independently `subject only to an act of Parliament'; and clause 197 states that the powers of the Reserve Bank shall be those customarily exercised by central banks and `shall be determined by an Act of Parliament' and be exercised `subject to such conditions as may be prescribed by or under such Act'.

Although the interim constitution states that the Reserve Bank shall function `independently', the bank will be subject to control by parliament and the government. In contrast the interim constitution entrenches the independence and impartiality of the Public Protector (ombudsman) and the Auditor-General unambiguously (in clauses 111 and 192). To remove the Reserve Bank from government control, the independence and powers of the Reserve Bank should be entrenched in the constitution rather than defined by Act of Parliament.

The new Constitution should therefore read:

Independence and Impartiality

The Reserve Bank shall be independent and impartial and shall exercise and perform its powers and functions subject only to this Constitution.

No organ of state and no member or employee of an organ of state nor any other person shall interfere with the Reserve Bank in the exercise or performance of its powers and functions.

Accountability of the Reserve Bank

Independence and impartiality is a necessary, but not a sufficient condition to ensure that monetary policy is carried out responsibly. When the Governor of the Reserve Bank has one overriding objective or target (zero inflation), it is easy to assess his performance. In New Zealand the Governor is not appointed for a further term of office if he fails to meet his objective. This ensures that he is personally accountable for the monetary policy of the bank and his terms of employment depend on the effectiveness of the monetary policy which he runs.

Since the system came into force in New Zealand on 1 February 1990, the policy pursued by the Reserve Bank has been highly successful. The rate of inflation fell from 7.2 per cent at the end of 1989 to 4.9 per cent at the end of 1990, and to 1.0 per cent at the end of 1991. In 1993, it also stood at 1.0 per cent.

Adopting a system of accountability along the lines of the New Zealand model would help to ensure that the South African Reserve Bank keeps inflation under control. This could be best achieved through sanctions set out in the constitution.

Reasonably, however, sanctions should be imposed only if those affected are really responsible for the undesirable developments. There are some situations which lead to an increase in prices that may be beyond the control of a Reserve Bank Governor. These might include: where there have been strong short-term fluctuations in the terms of trade owing to changed import or export prices; where there has been an increase or reduction in indirect taxes or public levies; and where natural disasters or comparable events have had a direct impact on prices. In such situations it may be felt unreasonable for the Governor to be held directly responsible for an increase in inflation. A mechanism should therefore be inserted in the constitution to provide for inflationary situations which are unavoidable. This might involve

Parliament and the President excusing the Governor for responsibility for unavoidable high rates of inflation.

Further, detailed sanctions and regulations governing the internal functioning of the Reserve Bank should be set out in a Reserve Bank Act. In order to preserve the Bank's independence and integrity, Parliament should not be able to introduce any law which supersedes the provisions of the constitution.

The constitution should read:

The Governor

The Reserve Bank shall be administered by a Governor who shall be appointed by the President with the approval of a two thirds majority of both Houses of Parliament.

The Governor shall be a South African citizen and a fit and proper person to hold such office and shall be appointed with due regard to his or her specialised knowledge and experience of banking and economics.

The Governor shall be appointed for a term of five years. He shall thereafter be eligible for re-appointment for one further term of five years on condition that the annual inflation rate as measured by the Consumer Price Index stands at below 1 per cent after three years of his taking office.

If the annual inflation rate as measured by the Consumer Price Index stands at 5 per cent or more for any twelve month period during which the Governor has held office, then the Governor must submit his resignation to the President. The President may only refuse to accept the Governor's resignation where both Houses of Parliament have approved by a two thirds majority a report prepared by the Bank providing evidence that the inflation rate was due to factors outside the control of the Bank.

The Governor may at any other time for any other reason resign by lodging his or her resignation in writing with the President.

The Governor shall not hold office in any political party or political organisation.

On appointment the remuneration of the Governor shall be the same as that of the Auditor-General.

The Governor shall not perform remunerative work outside his or her official duties.

Consumer Price Index

The Consumer Price Index shall be measured in the same way as it is measured when this Constitution comes into force. Changes to the way in which the Consumer Price Index is measured require the approval of the Reserve Bank Governor, the President and a two-thirds majority in both Houses of Parliament.

Transformation and monitoring

Commission on Gender Equality

The interim constitution provides for a *Commission on Gender Equality* of which the composition, powers, functions and functioning will be determined by an Act of Parliament.

The new Constitution should place a time limit of three years on the commission's duration.

Equality before the law should be a fundamental democratic right of all citizens. Laws which discriminate between particular categories of citizen, like apartheid laws, are by their nature fundamentally unjust. Regardless of the Commission's desired goal, it should not create legal inequalities to achieve it. It is social engineering to discriminate in favour or against certain groups in order to achieve a political end.

The Commission should seek to promote equality of treatment of men and women before the law. This will involve a three year project of identifying and eliminating all laws which discriminate between men and women. Removal of legal obstacles will provide men and women with equality before the law.

A provision in the Constitution should read:

The function of the Commission on Gender Equality shall be to identify laws which discriminate on grounds of gender and to recommend to Parliament that they be amended.

The Commission shall sit for three years. After this period, any law which directly discriminates on grounds of gender shall be prohibited.

The Public Protector

Every democracy needs an institution to investigate maladministration and corruption within state bodies. The interim constitution provides for a Public Protector to fulfil this role. Yet the status of the Public Protector is not as secure as it should be.

To be most effective the Public Protector should be as independent of other state bodies as possible. Instead of its powers merely being to bring matters to the notice of the relevant authority charged with prosecutions, it should itself be able to bring prosecutions against politicians and state officials. This would prevent collusion between the state prosecuting authorities and state officials or politicians to stop cases of fraud, corruption or maladministration going to court.

The President currently has the power to remove the Public Protector from office where he deems the Protector no longer fit for the job on the grounds of misbehaviour, incapacity or incompetence. This means that a ruthless President could remove the Public Protector to protect friends from investigations by the Public Protector. A further safeguard should be added. If the President wishes to remove the Public Protector, then he should only be removed if both Houses of Parliament vote for his removal by a 75 per cent majority.

Human Rights Commission

The constitutions of many developed democracies contain a Bill of Rights without the need for a commission to help enforce those rights. The United States of America is a notable example. While South Africa is in a phase of transition between a regime which had little respect for human rights and a democratic government which observes all human rights, the theory behind the existence of a Human Rights Commission is that it may serve to reassure people that their government is making every effort on their behalf to preserve their rights. This is ironic, since the largest threat to human rights in most countries is the government itself.

Constitutions evolved for the express purpose of protecting citizens from arbitrary government and of ensuring that governments remain the servants of the people. Bills of rights were added to specify the nature of the laws that governments could not enact in abrogation of the freedoms possessed by citizens as of right.

When a Bill of Rights is enshrined as a permanent feature of the new Constitution, the need for an arm of government (the commission) to oversee human rights will be redundant. All issues relating to infringements of human rights will be settled in independent courts.

After the new Constitution has been put in place and become widely accepted, the continued existence of a human rights commission would do more harm than good. In order to justify its continued existence, the Commission, like any bureaucracy, would look for work to do. It might decide that various amendments are needed to the Bill of Rights; perhaps one new right should be inserted; perhaps another should be removed. Such actions would certainly undermine public confidence in the Bill of Rights. It is vital that the rights in the Bill of Rights are regarded as fundamental and sacrosanct: rights which no government should have the power to abuse. South Africans born with certain fundamental human rights should keep those same fundamental human rights throughout their lives.

The commission on human rights currently has the power to investigate alleged breaches of human rights and to bring them to court. Although this idea appears initially attractive, in practice the commission's power may work to the advantage of some citizens but to the detriment of others. If a citizen's rights have been breached but the commission does not think his case is strong enough to bring to court, then that citizen will have no recourse to justice. In effect, the commission would be acting as judge and jury of first resort.

More effective would be a more people-centred mechanism of redress. In criminal cases, any person who cannot afford to pay for legal representation has the right to legal representation paid from state funds. Legal aid should be extended to human rights cases. This would put the citizen - rather than a commission - in charge of securing redress for infringements of his rights. As soon as such a system of legal aid is established, the need for a commission is removed. The courts system is the proper independent vehicle for adjudicating upon these cases.

Restitution of land rights

The need to restore land expropriated from their rightful owners is clear. The interim Constitution provides for a Commission for the Restitution of Land Rights to achieve this task, although a Land Restitution Act could be at least as effective. Since the land rights provisions of the interim Constitution have been agreed in some detail between the parties representing the people of South Africa, it would be sensible for Articles 121-123 of the interim Constitution to form part of the new Constitution. Any further detailed legislation could be set out in an Act of Parliament as long as it is compatible with the provisions of the Constitution. There is a strong case for the addition of one further Article - dealing with the right to own, let and dispose of land.

This might read:

- *Any person should have the right to own property, provided that the property was purchased with the consent of both the buyer and vendor.*
- *Any South African citizen should have the right to purchase, at market value, any state land on which he has a dwelling.*

17. Property

1. Situation analysis

The fact that many black South Africans have been (a) dispossessed of their land and (b) prevented from acquiring land is well known and well documented.

Land dispossession has occurred under successive "land acts" and adopted by successive governments since the 1870's - at times with the encouragement of organised industry.

The denial of adequate access to land, the inadequacy of title regarding land to which blacks did have access, and the severe controls over that land has handicapped blacks severely. It has, *inter alia*, denied many blacks access to one of the most effective forms of capital acquisition and security.

The land question is, therefore, one of great symbolic, emotional and economic importance.

Depending on how it is dealt with, it can be conflict provoking or conflict reducing. Correctly handled, it presents an opportunity for meaningful and rapid empowerment for many disadvantaged people in ways that are relatively cost-free and conflict reducing.

2. Proposals

We suggest three primary and far-reaching proposals, and the various subsidiary proposals that flow from them.

Empowerment of the disadvantaged

State-owned "black" residential (urban and rural) land, and non-residential land held under some form of registered title, should immediately be converted to ownwership (freehold) and transferred to the existing lawful holders thereof at little or no cost.

Blacks who can prove that they had been ordinarily, but unlawfully - by virtue of not having "section 10" rights - resident in urban areas for at least 10 years, should be provided with a free plot of land as soon as reasonably possible.

As soon as representative structures can be established to supervise the process, and not before, a policy of making much of the vast tracts of land held by the state available to disadvantaged people should be formulated and implemented.

Land Tribunal

A Land Tribunal or Court should be established with the mission and power to restore land acquired coercively for apartheid purposes to original owners and/or to require the state to provide adequate compensation to people whose land it is impracticable to restore, or who have since become *bona fide* owners and from whom land must now be taken for restoration purposes.

Liberalisation

Diverse restrictions and charges in respect of land use and transactions should be scrapped or relaxed.

3. Analysis

These objectives could be achieved by way of the following 10 point plan:

a) The **transfer** by decree of such ownership - free of significant costs and formalities - to existing lawful occupiers.

b) The establishment of a **land court/tribunal** for the restoration of land to or the compensation of people dispossessed of land for apartheid purposes.

c) The removal of unnecessary restrictions on land use.

d) The relaxation in respect of land registration formalities.

e) The suspension of costs and taxes in connection with land transactions.

f) The democratisation of tribal land administration and disposal.

g) The transfer to disadvantaged people of extensive land in the hands of the state.

h) The repeal or relaxation of restrictions on sub-division of agricultural land.

I) The suspension or relaxation of the requirement of land survey as a pre-requisite for land ownership.

4. Summary of a 10-point plan for land reform

a) Conversion to freehold

There are numerous forms of "apartheid" title: quitrents, deeds of grant, permissions to occupy, various forms of lease (monthly, annual, 30 year, 99 year) etc. These should all be summarily converted to ownership (freehold title) by decree. This should not be dependent upon prior land survey and deeds registration (see (e) and (j) below)

b) Transfer to existing occupiers

All this converted residential and urban land, and all non-residential non-"communal" rural land held under some form of individual title, should become owned by the existing lawful holder/s either automatically, or, should further investigation reveal that this would be impracticable, according to some alternative maximally expeditious and cost-effective method.

c) Land Tribunal

The Land Tribunal or Court should be established with the power (subject to appeal) to restore land to any person dispossessed thereof for apartheid purposes against the return or refund of whatever compensation they might have received plus interest. If the land has since been transferred to a *bona fide* private owner the land tribunal should have the power to order the state to compensate either the present owner/s if it orders land to be restored or the former owner/s if not.

d) Removal of restrictions

Most "apartheid" titles have severe and patronising conditions of title in addition to South Africa's generally applied prescriptive land use controls (see **Land** and **Town Planning**). These conditions of title and controls should be scrapped or relaxed. In particular, people should be free to own land jointly, to divest or encumber it freely, to be absentee owners, to use it for all reasonable purposes.

e) Deeds registration

Conversion (a) and transfer (b) should not require prior deeds registration. This would cause untenable delays and costs. Existing methods of record-keeping should be improved and regarded as adequate provisionally. In due course these records can be transferred to the formal deeds registries, after the system itself has been liberalised and modernised. Meanwhile, transfers and mortgages should take place in much the same way as eg vehicles and shares are transferred or pledged, or as land registers already operate in most areas. Importantly, there should be no obligatory use of conveyancers.

f) Suspension of costs and taxes

There are many costs attached to land transactions (conveyancing, stamp duties, transfer duties, survey). These should be scrapped *in toto* for the first transfer which, if by decree, would be relatively cost-free, only thereafter. Land transactions should not, in any event, be a source of general revenue.

g) Democratisation of "tribal" land

Democratic methods, eg, by community referenda, should be adopted to determine whether all non-residential land in tribal areas should continue to be "communally" held or whether all or some of it should be converted to ownership, and, if so, how. For instance, should tribal authorities be empowered to sell or let farms, or convert pasturage (grazing rights) into co-operative farms.

h) Transfer of state land

The state owns vast tracts of land through the Defence Force, former homeland governments, forestry, wilderness areas, the former SADT, provincial and local governments, railways and more. Much or most of this land which is reasonably disposable should be transferred to disadvantaged people by acceptable methods, such as bidding or tendering.

I) Subdivision of agricultural land

In order to make the land available in affordable sizes, and to more people, and promote small-scale farming, the restrictions on the subdivision of agricultural land should be scrapped or relaxed.

j) Land survey

The present requirement that land must be surveyed to the highest standards before it can be owned, is of debatable value especially regarding land that has a low market value per square metre. "Black" land has been satisfactory held and transferred in large numbers for many generations. The costs and delays involved in surveying all **existing** black plots and allotments are excessive. Accordingly, the application of the Land Survey Act to land to be converted and transferred in terms of (a) and (b), should be suspended. This would mean that survey would be optional on the part of owners and mortgagees. More importantly, it would mean that conversion and transfer could proceed immediately.

Comments

There are a number of problems, anomalies, and potential injustices, (or so it might seem), entailed in these proposals.

There will be situations where people have purchased land in "black" townships. They may have occupied this land for many years. Their neighbours may be tenants who moved in last week. This proposal would grant the neighbour full ownership free of cost, which to the

original buyer would seem unjust. This is the extreme case. Typically, a purchaser is still paying the purchase price by way of instalments, and non-purchasers have been occupiers for longer periods. The proposed solution is (a), to cancel all future instalments; and (b), to persuade the public to accept these anomalies as an unavoidable part of such a dramatic and historic fact of empowerment.

There are many black people who have lived unlawfully in "white" areas, (without Section 10 rights), and who did not therefore qualify for township housing. A special proposal is that people who can produce evidence that they have been normally resident in urban areas for at least ten years, should qualify for a free plot.

Since the land tribunal will, according to this proposal, assess restitution claims non-racially, both blacks and whites would have equal rights to restitution, including whites whose farms, or homes, were dispossessed for inclusion in homelands or townships. This proposal has an automatic way of insuring that justice is done, in that restitution will occur against a return to the state of whatever compensation a dispossessed person received. There is a view that many whites were over-compensated, and many blacks were under-compensated. This question will automatically resolve itself, in that, people who were over-compensated will obviously not claim restitution.

It may be necessary to establish a Land Commissioner's Office (LCO), to create the necessary institutions, such as the land tribunal, and to administer the process by, for instance, seeing to the improvement of land registers in rural areas.

Agricultural land use

Analysis

There are various agricultural land-use controls. These fall into three broad categories: conservation, mining, and commerce/industry. Although there may be a need to re-evaluate mineral- and conservation-related controls (soil erosion, water utilisation, weeds, etc), this proposal confines itself to controls that inhibit the non-farming commercial and industrial use of land. This includes a whole gamut of activities, from guest farms, hotels, sports, entertainment and camp sites to informal settlements, farm stalls, shops, craft centres, agricultural produce processing, factories, game reserves and hunting.

Increasingly, craft industries are being encouraged on farms. Though these are technically unlawful for many reasons (factory or labour laws, land-use laws etc), they are obviously a healthy development whereby, typically, the spouses of farmworkers are assisted by the farmers' wives to do weaving, knitting, sewing, carving, etc. Such craftwork on farms should be decriminalised and the marketing of such crafts along public roads should likewise be allowed.

The main sources of these controls are: legislation (various acts, regulations and schemes - see "Agriculture" section of *Butterworths Statutes*), conditions of title (esp. deeds of grant, quitrents) and state ownership (eg tribal land, permissions to occupy). These may provide, for instance, that the land must be personally farmed and managed by the designated person and may not be used for mortgage or economic purposes other than agriculture without official permission. These conditions are archaic and patronising.

If, as is hoped, many SME farmers emerge, it will be necessary to broaden agricultural land use so as to take optimal advantage of this important resource. There is nothing sacred about pristine farming and no reason why there should not be multiple land use in rural areas in sympathy with urban trends.

Normally the best person to decide upon the optimal usages to which to put rural land is the lawful proprietor. Where there are agricultural support programmes and land tenure systems that keep bad farmers on the land - such as we have in South Africa - there is a danger

that the land will be abused (erosion, over-grazing, neglect). Removal of legislative controls will replace negative land-use incentives with positive incentives, with automatic penalties for bad farming. It will be in the self-interest of bad farmers to transfer land to better farmers. This proposed de-control does not refer to environmentally motivated controls, only to restrictions on multiple-use, title, and rights of disposal.

Recommendation 1 - The legislation should be amended so as to allow farmers relative freedom to benefit from additional land-use opportunities. This should be inhibited by no more than a general requirement that the land and related resources such as water not be used in such a way as to cause undue disturbance (the common law relating to neighbourhoods and nuisance) or to harm the land or the environment unduly.
Recommendation 2 (conditions of title) - Agricultural smallholdings, and the various forms of "apartheid title" such as deeds of grants, quitrents, 99-year leases, 30-year leases and permissions to occupy, contain extremely restrictive and authoritarian conditions. These archaic and paternalistic conditions of title should be scrapped.

Implications

A considerable empowerment of agricultural communities would occur, with a concomitant enhancement of their responsibility. Farmers, especially emerging black farmers, would be able to make better demand-driven use of their land, which in most parts of South Africa is not very suitable for farming. Most land values should rise, making access to loan finance easier to secure.

Enormous resistance can be expected from bureaucrats who believe strongly in the need for controls to prevent "chaos". Officialdom would lose a significant amount of power and influence. Officials should be re-oriented towards serving as advisors/consultants - like extension officers - rather than controllers. A simultaneous public education programme on the enhancement of the opportunities for and responsibilities of farmers would be desirable.

Agricultural land subdivision

Analysis

Agricultural land may not be subdivided without the consent of the Minister of Agriculture, in terms of the Subdivision of Agricultural Land Act (70/1970). During the late 1960s the conventional wisdom was that for land to be viably farmed, it had to be above a certain size. The modern conventional wisdom is that small-scale farming can be more productive and that there is no ideal size below which land should not go. Be that as it may, if there is freedom to trade in land and land-users are not protected by the government from the consequences of bad farming, the land will automatically be consolidated or subdivided - over time - to the closest we can get to "optimal" sizes, given all the circumstances of the users.

Also, it is commonplace for farmers, especially those with smaller farms, to let their farms. Many farmers are not farm owners. On the other hand, many farm owners do not farm. This is a spontaneous method of consolidation of smaller units. It will be in the self-interest of any farmer to let a farm to a more efficient user, who may or may not be taking advantage of economies of scale.

For farmers to let a part of their farm to tenant farmers for more than ten years without the consent of the Minister is also unlawful under the Subdivision of Agricultural Land Act.

As South Africa moves towards a more market-related agriculture policy, regarding which much progress has already been made, the need for the restriction on subdivision should

fall away. More importantly, the prohibition on subdivision is precisely the opposite of what is required to make land accessible in affordable sizes to South Africa's emergent farming community. In particular, those who have been denied the right to be commercial farmers in most of South Africa, would in most cases be best advised to start small-scale farming and not try to become large-scale farmers immediately. Modern farming is very sophisticated and cannot be done by someone with only peasant farming experience.

Incidentally, it is often alleged that farming has become increasingly monopolised. There is said to be some sort of "market failure". Indeed, it is the restriction on subdivision that ensures the continual process towards land agglomeration. The market, when it was free, was leading in precisely the opposite direction. It is this natural market trend that led to the law in the first place.

Recommendation - The Subdivision of Agricultural Land Act should be repealed *in toto* to restore the position prior to the 1970s.

Implications

There would be resistance from agriculturalists who still believe that the government should ensure that farms are big enough to be "viable".

Conveyancers

Analysis

A completely separate issue from whether title to land should be registered under the existing system in the deeds registry (see **Title deed registration**) is whether the use of conveyancers should be obligatory. The current system of conveyancing was developed at a time when deeds had to be handwritten and very carefully checked. To perpetuate this system in a world of modern technology is absurd. Technology can provide better protection than conveyancers. The only merit of the present system is that it protects conveyancers.

There has been a relaxation, in that a conveyancer is not required for the first transfer to an individual of an erf in a township situated in an area that was formerly set apart for black residence, in terms of the Upgrading of Land Tenure Rights Act (112/1991). And a conveyancer is also not required for the first transfer to an individual of an erf in a new less formal settlement or for land newly acquired by a tribe for settlement, in terms of the Less Formal Township Establishment Act (113/1991), though this exemption does not extend to all new townships established under the less formal procedure prescribed under that Act.

Recommendation - A system of registration by computer should be introduced as soon as possible. All that is required is to establish beyond doubt the identity of the parties and their intention to enter into the land transfer, lease or mortgage. A computer programme can reflect whether there are conditions of title that would require the sophistication of a conveyancer or notary. In simple transfers, mortgages and registered leases, the requirement of conveyancing should be scrapped.

Implications

As in all such situations, there are obviously strong vested interests against this reform. In the interests of empowering the disadvantaged, these vested interests should be given no quarter. In earlier discussions with the South African government on this matter, those involved were told that though it was realised the system is archaic, the conveyancers' lobby in Parliament

was far too powerful to tackle. The minister who allegedly made this comment was Chris Heunis, himself formerly a partner of a law firm largely dependent on conveyancing.

Land

Analysis

This is a complex and emotional issue. There is a whole range of laws that inhibit optimum access to land for newcomers. These are dealt with separately under the following headings: **Agricultural land subdivision, Conveyancers, Land rights conversion to ownership, Land survey, Land taxes and rates, Stamp duty, Title deed registration,** and **Transfer duty.**

Land rights conversion to ownership

Analysis

There are various forms of "apartheid" title, ranging from short-term leases in government housing and permissions to occupy (PTOs) in tribal areas to deed of grant rights and 99-year leases in urban areas.

There has been some reform of these statutory "apartheid titles". Holders of site permits and certificates of occupation who bought their houses from the local government or administration board believed incorrectly that they had rights to the land. In fact, their houses belonged in law to the local government, and the householders could not freely transfer or mortgage their property. In 1988 provision was made to give to the existing *de facto* holders of site permits and certificates of occupation the superior 99-year leasehold, which gives rights to the land and to transfer and mortgage the property, in terms of the Conversion of Certain Rights to Leasehold Act (81/1988).

However, this reform does not affect occupants of council housing who pay a monthly rent to the local authority. These householders, to whom residential permits were issued in the past, remain mere monthly tenants.

In 1991 there was another reform affecting the holders of 99-year leasehold and deed of grant rights in urban areas, in terms of the Conversion of Land Tenure Rights Act (112/1991). If the erven in a particular township are fully surveyed and shown on an approved survey general plan (see **Land survey**), and if a separate title deed of the township area has been registered in the deeds registry (see **Title deed registration**) and a township register opened in the deeds registry, then 99-year leasehold and deed of grant rights over erven in the township are automatically converted to ownership. Quitrent rights to surveyed farmland are also automatically converted to ownership.

But if the township has not been surveyed properly, and if no township register has been opened, the reform is inapplicable. Nor does the conversion affect any rented property, even in a surveyed township for which a township register has been opened. And the reform does not affect people in rural areas who occupy land by virtue of a permission to occupy (PTO) or according to tribal custom.

The system is still complex, confusing and unnecessary.

Recommendation - All forms of black title to land should be automatically converted to ownership.

Implications

There are a number of serious implications to this proposal.

The present legal formalities for ownership (freehold title) require complex and sophisticated survey and deed registration as a prerequisite (see **Land survey** and **Title deed registration**). Various land surveyors, registrars of deeds and conveyancers present impassioned arguments that this is necessary. However, many of these properties have existed and been transferred perfectly satisfactorily from one person to another for centuries without survey or registration in the deeds registry. Properties are presently defined by physical features on the ground, or by diagrams. In many cases they are registered in magistrate's courts or elsewhere. There is absolutely no reason why the existing system should not continue until the land has been surveyed and registered in deeds registries with the title being ownership rather than the existing apartheid title. Indeed, there is no reason why formal survey and transfer to a deeds registry should not be left as an owner-option indefinitely. The fact is that there is absolutely no legal advantage to be gained by requiring land survey and deed registration as a prerequisite for conversion to freehold.

It will be said that mortgage lenders will not grant mortgages unless land is surveyed and registered. There is no way of knowing in advance. At present, the law requires this. Mortgage grantors, whether institutions or private individuals, should be allowed to decide for themselves. They do not need land surveyors or conveyancers to speak for them. Some mortgage lenders have indicated that they will lend on any readily identifiable security. Except in the case of mutual building societies, most banks and other moneylenders can lend without any security at all. There is no reason why there should be a restriction on the mortgage of land unless it is surveyed and registered.

Obviously land surveyors, registrars and conveyancers constitute an enormous and powerful vested interest. Their narrow self-serving interests should not be allowed to prevail at the expense of black empowerment, especially regarding land.

A decision has to be made regarding the duration of occupancy required for an occupier to qualify for free transfer of ownership. Should people who have occupied a property for only a few days get it at no cost?

There are two possible approaches here, either of which would ensure a rapid transfer of ownership to and empowerment of hundreds of thousands of black South Africans. Firstly, the view could be taken that people have to have been in lawful occupation for a specified minimum period in order to qualify. One sensible formula that has been suggested is that anyone who has occupied a property for ten years or more would get it free of purchase price or transfer costs. Anyone who has just moved in to a property would be required to pay its market value less, say, one-third. Those who have occupied properties between zero and ten years would pay according to a sliding scale on a straight-line basis between one-third and zero.

The second approach is to say that something drastic must be done and that in such a bold restructuring of South Africa's land ownership patterns, there should be no attempt at fine-tuning. Whoever the lawful occupier is, even if he or she moved in only yesterday, should get the land free and immediately. This would create, overnight, around four million landowners.

The biggest problem relates to tribal areas. Some communities may prefer maintaining the present tribal tenure system. The democratic solution to this problem would be to allow each community to vote by referendum on whether they want summary conversion to freehold, or whether they want to retain the present system. Even if tribal allocation is maintained, tribal authorities, with the consent of the community, could allow the tribes to transfer land into individual ownership by sale or to lease the land commercially, either to members of the tribe or to outsiders, by choice.

Land survey

Analysis

South Africa has the world's most sophisticated land survey system, the cadastral system. The cadastral system plots the co-ordinates of surveyed land to within millimetres in the galaxy! A land surveyor in another solar system, given the co-ordinates, would be able to tell precisely where the land is. That we have such a system is a source of great pride to the South African land survey and deeds registry fraternity.

However, as with our deeds registration system (see **Title deed registration**), it is the most costly and inappropriate system for the majority of South Africans. It is proposed above (see **Land rights conversion to ownership**) that land that has already been laid out (but not surveyed) should be transferred into ownership prior to survey. It would take hundreds of millions of rands and over ten years to survey all the existing unsurveyed properties. Clearly, black South Africans cannot be asked to wait this long for meaningful land reform.

If survey costs, conveyancing costs, transfer duties, stamp duties and mortgage registration costs are added together, compliance with unnecessary legal formalities may amount to five, ten or even fifteen times the value of the land. In response to this obvious problem, there is a heated debate within survey circles over whether survey standards should be lowered, whether aerial surveys should be regarded as adequate. There are many complex aspects to this debate. **It is not necessary for these to be resolved** to call for the exemption from the requirement of survey - by whatever standard or method - and for the transfer into ownership of existing properties.

A distinction must be drawn between **existing** properties and those that will exist in **future**. Where defined land already exists and is held in some form of unregistered title, a land survey is legally pointless. Where land is to be subdivided for future transfer, then land survey can serve the purpose of **defining** the boundaries in law. The precise boundaries of existing land subsequently surveyed are not necessarily those in a survey diagram. If there is a boundary dispute, the diagram will not be evidence. The evidence of the precise boundaries is that of witnesses and physical features. Only if a diagram **creates** the boundary does it define the boundary regardless of other evidence. This is an important yet subtle distinction - obvious though it might seem - that has escaped attention in the debate.

In respect of existing properties, land survey can follow as and when it can be afforded, when adequate surveyors are available, and when the debate regarding standards has been resolved.

To expedite the registration of new properties for the lower socio-economic groups, the boundaries should be defined by description and layout plan. Description has served many societies, including South African blacks, perfectly well for centuries, and there is no reason why it should not be adequate for the time being in South Africa as part of the urgent process of empowerment through land ownership and occupation.

Recommendation 1 - The survey and formal deeds registry requirements and the use of conveyancers in respect of *existing* land should be immediately suspended.
Recommendation 2 - The formula for the suspension or relaxation of these provisions in regard to properties still to be created for lower socio-economic groups should be investigated.

Implications

Surveyors would earn hundreds of millions of rands if all properties have to be surveyed before transfer. Obviously, it is in their self-interest to mount an energetic lobby for the retention of the survey requirement. Since the survey of existing plots is of no real value, this lobby should be resisted.

Land taxes and rates

Analysis

In most urban areas there is a system of rates and taxes on land, and a land tax policy has been recommended for South Africa by various commentators. It would be economically and politically unfortunate to impose such a burden on blacks just as many become land-land-owners for the first time.

Recommendation - Various possibilities should be investigated. For instance, land below a certain value could be exempted from rates and taxes. Alternatively, the first ten years of land ownership could be tax-free. An affirmative action solution would be to exempt the victims of "apartheid" from land rates and taxes for a fixed period.

The economics of a land tax or rates is such that the market value of the land is simply reduced in proportion to the tax/rates. Thus a land tax would have the effect of making land more affordable to blacks; however, the other side of the coin is that the land they already have - hopefully to be converted to ownership without cost - would be of less value, and their ability to acquire wealth through land ownership - a route to wealth for many whites in the past - would be undermined. This seems unfair. The new South Africa should afford blacks at least the opportunities whites had historically.

Title deed registration

Analysis

The deeds registry system in South Africa is probably the most sophisticated, and thus most costly, in the world. As such it is probably also the least suitable for the majority of South Africans. Many first-world countries such as Britain and America do not have compulsory deeds registration or survey. The argument by vested interests in South Africa is that the disadvantages of this approach outweigh the advantage of lower costs. However, there are two simple solutions to the problem of greater insecurity of title that may arise when deeds registration is not compulsory: either the state can guarantee title, or property owners can take out title insurance.

There is a myth that the deeds registry system in South Africa provides "security of title". This is not so. Title may be challenged on various grounds. Also, land may be acquired without registration, for example, by various forms of servitude. A sophisticated land registration system seems justified where the value of the land or the importance of the boundaries warrants it. In South Africa, the land for which conversion to ownership is recommended is, overwhelmingly, below a market value that would justify such an expensive system.

The other question of whether existing standards and methods of registration, including the use of conveyancers, should be retained for properties of low value, is a separate issue. It should be remembered that people routinely transfer assets way in excess of the average plot value in South Africa, without the compulsory use of intermediaries or costly forms of registration. Two obvious examples are motor vehicles and shares. Most motor vehicles cost more than the average plot of land, and purchasers of motor vehicles face a more complex and multifarious range of options than most home-buyers. If there is a case for the compulsory use of conveyancers and complex forms of registration, it would be more justified in respect of motor vehicles.

It will be suggested that vehicle registration does not guarantee ownership. As pointed out, land registration also does not guarantee ownership in all cases, especially if there has been

fraud, theft or prescription. More importantly, though, it would be a simple matter to require a stricter method of ensuring the identity and intention of the transferor, which is all that is relevant.

The amounts involved in most share transactions are also greater than the value of most plots. Yet it is possible to transfer shares with a mere handwritten power of attorney. Even the transfer of shares in public companies is simple and cheap, and does not require the services of a stockbroker.

It should be pointed out that, increasingly, land is registered in the name of a property-owning company. The shares in this company, and thus ownership of the land, may be transferred many times without any requirement of registration or conveyancing.

Recommendation - Registration of property titles, when land becomes owned or subdivided for the first time after an operative date and is certified by a valuer to be below a certain value, should be optional.

A system should be introduced whereby land, especially below a prescribed value, can be transferred as quickly, easily, and cheaply as shares and motor vehicles. All that is required with motor vehicles is to fill in a form, lodge it with the licensing department, and pay a nominal fee to cover administration costs.

Town planning

Analysis

Town planning schemes reduce the availability of land that may be used for dwellings or for business purposes. Residential occupation is prohibited in areas zoned for non-residential purposes. Home businesses (spazas, cottage industries, backyard operations) are prohibited in residential zones.

No ordinary person regards the violation of zoning laws as wrong. What is wrong is the disturbance of neighbours, or activities that harm the character of the neighbourhood and thus the enjoyment and property values in the neighbourhood.

The deficiency of zoning laws is that they are not an effective way of preventing this. The common law of nuisance and neighbourhood law would be both more effective and perfectly adequate. The main problem is not the inadequacy of land-use control laws but the inaccessibility of the courts to ordinary people. This is because the courts are overregulated (see **Land Tribunal**).

In some countries land-use control takes the form of restrictive covenants, or conditions of title. This essentially amounts to a contract established by developers as between neighbours. The present zoning law allows bureaucratic discretion to overrule such conditions without the right of compensation for those who are harmed. Thus the law is bad both ways: it prevents people from using their property reasonably, and allows people to use their property at the expense of their neighbours in violation of explicit or implicit contracts with them.

Restrictive covenants and conditions of title are adequate methods of establishing land or townships as special residential (single-family dwelling), general residential (high-density residence), commercial, light or heavy industrial, etc. The classic example of the efficacy of an unzoned city is America's sixth biggest city, Houston, Texas, about which various books have been written, such as Bernard Siegan's *Land Use Without Zoning*.

Recommendation - Zoning laws should be suspended by community agreement, perhaps by referendum.

In the absence of zoning, the common law on nuisance should apply. This simply provides that people may use their property for any purpose provided that they do not disturb neighbours unduly.

If people in a particular area wish to create more restrictions among themselves, they could voluntarily agree to incorporate an enforceable restrictive covenant in their title deeds, which would bind their successors in title as well, promising that their property shall be used or developed only in a particular way.

Township establishment

Analysis

Township development laws have recently been relaxed with the introduction of the Less Formal Township Establishment Act (113/91). The Less Formal Township Establishment procedure is a most welcome reform. However, it applies only in respect of "less formal forms of residential settlement". Corresponding relaxation of controls should apply in respect of all township establishment. Until the 1970s, township establishment was a quick, easy and relatively inexpensive procedure that might take as little as three months. It is now a costly, bureaucratic procedure that can take a decade. All of this was supposed to protect the public from unscrupulous developers. The law has conspicuously failed to achieve this. Instead, the cost has been increased unduly at the expense of the public.

The potential use of agricultural land for *less* formal settlements is already catered for. However, the conversion of agricultural land to *more* formal settlements is not yet adequately liberalised. Nor is the subdivision of urban or township land. This remains a costly and cumbersome procedure. Some welcome relaxation has been introduced by most local governments.

Recommendation 1 - Township establishment laws should be critically re-examined with a view to substantial streamlining and relaxation along the lines of the Less Formal Township Establishment Act.

Recommendation 2 - The authorities should be able to accept a certificate by the engineer, land surveyor, town planner or other person who submitted the plans or other information on behalf of the landowner, that the township will comply with the requirements laid down. This solution should not, however, create a new category of reserved work for a narrowly defined group of professional people.

Implications

As with the Less Formal Township Establishment Act, some vested interests in the town and regional planning profession could be expected to raise strenuous objections.

18. Reserve Bank independence

We understand that it is accepted that the independence of the central bank is a prerequisite for sound monetary policy. We welcome this important step.

Press reports have created the impression that no major changes are to be made to the clauses dealing with the Reserve Bank as they stand in the Interim Constitution. It is apparently believed that the existing interim constitution clause secures the independence of the Reserve Bank from control by the government of the day.

This view is mistaken. The interim constitution's clause places the Reserve Bank under the control of whatever laws Parliament may choose to pass from time to time.

The interim constitution states that the Reserve Bank, established and "regulated by an Act of Parliament", shall be the central bank (section 195). The Reserve Bank shall exercise its powers independently, "subject only to an Act of Parliament" (section 196(2)). The powers of the Reserve Bank shall be those customarily exercised by central banks and "shall be determined by an Act of Parliament" and be exercised "subject to such conditions as may be prescribed by or under such Act".

Although the interim constitution suggests that the Reserve Bank shall function "independently", it is clear that the Bank is subject to control by Parliament, and hence by the government of the day.

In contrast, the interim constitution guarantees the independence of the Public Protector and Auditor-General from parliamentary control. The constitution entrenches unambiguously the independence and impartiality of the Public Protector and Auditor-General (in sections 111 and 192). These provisions do **not** state that the Public Protector and Auditor-General shall be subject to Acts of Parliament. On the contrary, they state that no organ of state shall interfere with the Public Protector and Auditor-General in the exercise of their powers.

To establish the independence of the Bank, the Reserve Bank clauses of the interim constitution must be altered to bring them into line with the clauses dealing with the Public Protector and Auditor-General, as follows:

(1) *The Reserve Bank shall be independent and shall exercise and perform its powers and functions subject only to this Constitution.*

(2) *No organ of state shall interfere with the Reserve Bank in the exercise of its powers.*