FREE MARKET FOUNDATION
SUBMISSION TO THE
CONSTITUTIONAL REVIEW COMMITTEE
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PREAMBLE
CONSTITUTIONAL REVIEW COMMITTEE

General

This submission is divided into two parts. Part 1 makes specific recommendations for necessary changes to the Constitution. Part 2 discusses what would be considered desirable. The overall objective is to stress the importance of constitutional excellence and the profound responsibility of the Constitutional Review Committee.

It argues that what makes the difference between successful – free, peaceful and prosperous countries – and unsuccessful – unfree, conflict-ridden, and backward countries – is, primarily, the quality of its constitution. When the question is asked: why do some countries succeed and others fail, typically, the suggestion might be made that successful countries have the "right" culture, race, history, resources, geographic size, population size, international relations, work ethic, or whatever.

International research leaves no doubt that none of these supposed determinants explain success or failure, except to an inconsequential degree. They are, at most, minor contributors or facilitators. Modern empirical research provides evidence that is as conclusive as one can get in the social sciences. There is, essentially, no further basis for informed debate.[1]

There are countless examples of individual countries, which went from prosperity to poverty and the other way around in just a few years or even months. Argentina, for instance, rose to being the world's ninth richest country (in per capita GDP terms) and then declined precipitously to be an undeveloped country. Conversely, Mauritius, a resourceless African island in the Indian Ocean went from being one of the world's poorer countries characterised by poverty and internal conflict, to being Africa's first economic miracle, with full employment, housing for all, strong currency, etc.

Perhaps the most significant example in world history is Switzerland. At the stroke of the constitutional pen, Switzerland changed almost miraculously from being one of the world's most conflict-ridden and one of Europe's most backward countries to having the world's highest living standards and being the world's archetypal example of democracy, peace and stability.

Then there are countries that remain unchanged seemingly indefinitely. They appear to be relatively prosperous at all times, like the United Kingdom (since the dark ages) and countries that have been relatively impoverished for literally thousands of years. Sadly, there are many examples of the latter. Perhaps the best (or is it worst?) example is Ethiopia, the world's oldest independent country not having been occupied or governed by foreign forces, except fleetingly, for over 4,000 years. Some countries or nations were once successful (China, ancient Zimbabwe, the Incas, ancient Egypt, ancient Greece, ancient Rome) and then declined into decades or centuries of poverty and conflict or even vanished completely.

Ancient history is, perhaps, not as important for present constitutional purposes as modern history. In modern history the inescapable conclusions from an analysis of the evidence are the following: freedom and stability are achieved by having a truly democratic constitution (see below); prosperity is achieved by having free or relatively free markets.

Whilst none of the other determinants produce a statistically significant correlation between success and failure, countries that satisfy these two conditions (democratic constitutions and free markets) will succeed or fail (in the areas concerned) regardless of whether they are big or small, were colonised or not, have one race or another, have the so-called 'work ethic', have any particular

[1] The definitive empirical studies on what correlates with "success", such as personal and democratic freedoms, prosperity, stability, peace, and other components of social and economic development – loosely referred to by philosophers as "the good society" – include studies undertaken by, inter alia, International Freedom Network, Freedom House, WSJ/Heritage, World Economic Forum, World Bank, and such individuals as Gerald Scully, Ronald Lawson, and Frank Vorhies.

religion, have a large or small area, have many or few people, have rich agricultural land or mineral resources, and so on.

Whether a country has a market economy (properly defined) is, to a large extent, a function of its constitution.

A constitution is the best guarantee of freedom, peace, stability and prosperity if it has checks and balances that effectively prevent abuses and excesses of power, and ensure that legitimate powers are enforced effectively.

Whilst the Free Market Foundation is submitting various recommendations for improvements to the constitution, it is important to stress that the constitution should not be amended frequently or frivolously. A constitution, like all law, ought to be as stable and predictable as is feasible in the real world. There needs to be a reluctance to adopt amendments that bring about fundamental departures from the principles. The constitution should not be regarded as just another law which can be amended by parliament as and when it finds it convenient to do so.

The basic difference between the constitution and other legislation is that government functions under and subject to the constitution whereas all other laws are under and subject to parliament.

Government and parliament are, as it were, wedged between the constitution above, and the laws and policies it adopts below.

In sympathy with this principle, the Foundation's recommendations are confined to those which would give effect to the existing objectives of the constitution and add to the constitution so as to render the country more democratic. The proposed recommendations are in sympathy and in line with the constitution rather than recommendations that have in mind fundamental departures from the principles that inform it.

The mere existence of a constitutional review committee is dangerous. The committee should not feel obligated to show how productive it is by the extent to which it recommends amendments. The terminology chosen is important. What have been called for are recommendations for "improvements" to the constitution. We understand by this that recommendations should improve the constitution so as to enhance its present essence rather than to change it in any fundamental way.

PART 1

CHAPTER 2
BILL OF RIGHTS – FIRST AND SECOND GENERATION RIGHTS

For understandable reasons, both in terms of South Africa's history and international trends, our Bill of Rights contains both first and second-generation rights. At the time of drafting, negotiators and drafters grappled with the problem of second generation rights not being justiciable in any meaningful sense. First generation rights are comparatively simple. They require mere omission. They *pro*scribe what the state may do. In contrast, second generation rights *pre*scribe what the State *must* do. In order to fulfil its second-generation right obligations government has to adopt and implement far-reaching and costly policies.

Whilst it is possible for government to uphold first generation rights absolutely, it is not possible, even under extremely favourable conditions, for it to fulfil second generation right obligations. It was therefore necessary to limit the state's obligations to the availability of resources. That would not *ipso facto* have been problematic. Insurmountable problems arise when second generation rights are equated with first generation rights by rendering them justiciable. Justiciability means that ultimate control over a wide range of government policies is transferred, presumably unintentionally, from elected and accountable legislators to judges and magistrates. This is clearly both undemocratic and inappropriate.

Notwithstanding this anomaly, political imperatives at the time meant that they were, nonetheless, included as "fundamental" rights.

This is unfortunate for various reasons. A "fundamental" right ought to be one that is essentially non-contentious; one that all people of goodwill ought readily to agree is both absolute and can be upheld in the real world. This basically describes first generation rights. The issue is not so much whether second generation rights ought to be regarded, along with first generation rights, as being so fundamental and universal as to be non-voteable, but whether they can realistically, like first generation rights, be justiciable.

For the state to uphold first generation rights, all it needs to do is nothing. No budget for action is required. With first generation rights, the state is called on not to violate them. Government, must, for instance, *not* curtail press freedom, *not* interfere with freedom of movement or association, *not* impose a state religion, *not* discriminate unfairly, *not* detain people without trial, and so on.

Such first generation rights can be upheld, subject to legitimate exceptions, unambiguously and relatively easily.

Second generation rights, however, require the state to *do* something. In order to satisfy them, it must have resources, personnel, political will and more. Typically, the resources required to satisfy second generation rights, such as housing, education, welfare, and a clean or safe environment, are so substantial as to be beyond the means or any government except, perhaps, in the wealthiest countries.

Mindful of these anomalies and the profound difference between first and second generation rights the constitution drafters resorted to what appeared at the time to be the most feasible compromise, namely, to provide that second generation rights will be upheld subject to available resources. It turns out that this results in serious unintended consequences, which it is unlikely anyone wants. It shifts ultimate responsibility for decision-making regarding crucial functions of government - arguably its most important functions – from democratically elected politicians to the courts.

It is instructive to note that the targeted benefits of second-generation rights in the constitution are those that are usually the principal issues of contention between political parties in the policies they offer the electorate. They are and should be confined to the subject matter of the democratic

process where political parties and their supporters make conscious choices regarding policy priorities and trade-offs.

The current case before the courts in which people are demanding the constitutional right to housing is an inevitable consequence of second generation rights purporting to be "fundamental", justiciable and real. Unless the wording in the constitution is corrected (see below) this anomalous state of affairs will spiral out of control. There is a self-evident need and urgency to address the matter.

As the above case illustrates, the courts, with justiciable second generation rights in their current form, are unavoidably burdened. They are charged with determining how the government should budget its funds: how much it must spend on housing, education, the environment, and so on.

Since government's "resources" include its power to tax, the courts will also, ultimately, have to dictate taxation policy to government. If sufficient resources, in the judgements of the courts, cannot be diverted from other democratically preferred priorities, the courts will be left with no choice but to require the government to impose additional taxes. Government will, in effect, lose control over key policies, including budgetary and fiscal policy.

Even monetary policy will become subject to court discretion. An obvious way for government to finance second generation rights, if it does not have sufficient resources and cannot raise enough through taxes, is by increasing the money supply. Second generation rights necessarily, therefore, conflict with and are irreconcilable with the concept of an independent central bank. The second-generation rights in their present form are therefore also in conflict with the Reserve Bank clause in the constitution.

Not only do the courts become ultimately responsible for prescribing government budgetary priorities, and fiscal and monetary policy, but also they become responsible for and obliged to determine what is meant by such terms as "housing" or "environment". Is a right to a house fulfilled if the government provides homeless people with large cardboard boxes? Or does a "house" constitute a strong and insulated structure with toilets, electricity, telephones, running hot and cold water, a garden, social and physical infrastructure, and so on? As the constitution stands, the courts have to do something for which they are wholly unsuited, and which was presumably never intended: to determine the *minutiae* of housing and other policies.

The courts also have to decide, for instance, what constitutes a safe environment. Does it include a safe *natural* environment? If so, would people harmed by a natural disaster (so-called "act of God") have the right to sue the government for damages, on account of its failure to provide a safe environment? Do the residents of Alexandra township have a damages action against the government for its failure to protect them from flooding of the Jukskei river? What steps must government take to protect people from earthquakes, tornadoes or lightning?

If the courts conclude that a safe environment refers only to one which governments regulate effectively, then the courts become obligated to determine health and safety policy. Is the government obliged to require electric wiring in conduit piping? Must it ban smoking in public places? Should it put governors on all vehicles to prevent them exceeding 40 kilometres per hour? Such normal policy decisions that are contested in democracies in the political market place and are the substance of policies offered to electorates by political parties become the responsibility of the courts.

Problematic as these matters are, the most serious unintended consequence of justiciable second generation rights being supposedly on a par with first generation rights is the extent to which first generation rights become compromised and even negated. If the courts are given discretion over what constitutes a house, and how much government must spend on housing, and for whom, under first and second generation rights with equal status, they also become empowered and obliged to dictate government policy on first generation rights. The courts in deciding whether the government has sufficient resources for housing could likewise consider themselves obliged to decide whether government has sufficient resources to respect the first generation right of no

detention without trial. They could, for instance, rule legitimately that detention without trial is permitted so long as government does not have sufficient resources to conduct trials for all detainees.

Freedom of speech, the press, and political organisation might also be permitted only subject to the availability of government resources to cope with such factors as the extent to which these freedoms require the state to protect these rights. In other words, if resources are considered lacking, and the police cannot protect somebody exercising their freedom of speech the courts could rule that the right to freedom of speech is suspended.

It is clearly inappropriate, and ultimately untenable, to treat first and second generation rights on a par.

This is not to say that second generation rights should be removed from the Constitution. On the contrary, they should be retained and strengthened for all the reasons that led to their inclusion.

Recommendation

The recommended improvement to the constitution in this submission is that second generation rights be reformulated so as to render them truly justiciable and truly on a par with first generation rights. This can be achieved by rendering it unconstitutional for the government to do things that inhibit or prevent the enjoyment of second generation rights. Stated differently, the constitution could require that the government must not harm the enjoyment of second generation rights. It must not, for instance, create a dangerous environment. It must not adopt measures that prevent people from acquiring housing. Under such truly fundamental and justiciable second generation rights citizens would have the right to challenge as unconstitutional a law that prevented homeless people from acquiring housing, such as the laws that characterised apartheid. Under apartheid all private provision of low cost housing was essentially banned. This was achieved by way of laws, some of which still exist, and should be subject to constitutional challenge from homeless people, such as slum clearance laws, property development laws, building standards, and zoning. Such laws and policies will, under effectively justiciable second-generation rights, be constitutional to the extent that they do not interfere with the fundamental right to *acquire* housing, education, or whatever.

If second generation rights are retained in the constitution and recast so as to be comparable with first generation rights and therefore truly justiciable, the sanctity of both first and second generation rights will be enhanced and the objectives of all parties to the constitution will be achieved in the real world. The first generation rights will not be undermined by unattainable second-generation rights. The courts will not be expected to perform functions for which they are manifestly unintended and unsuited. The principle of separation of powers will be retained, whereby the legislature is responsible for legislation and government policy, the executive for executing and implementing laws and policies, and the judiciary for adjudicating disputes.

The acid test for whether second generation rights are correctly formulated ought to be whether the courts can uphold them by way of an interdict or injunction against a law, policy or action which would violate the right concerned. This relatively small drafting improvement to the Constitution would give existing second-generation rights real meaning and efficacy. It would require the state to stop violating both first and second-generation rights, if it were to do so. In jurisprudential terms a reformulation of the existing second generation rights clauses would mean that the courts are empowered to issue *interdicts* (injunctions) against the state when it violates rights rather than a *mandamus* calling on the state to implement policies according to the wishes of the courts, thereby usurping the functions of democratic government.

CHAPTER 11
SECURITY SERVICES – POLICE

This proposal argues for devolution of power over the police service to ensure efficient and accountable governance. It further argues that if powers are devolved the combating of crime will be more effective.

The constitution provides for provincial governments to oversee, monitor and assess the operations of the police services in the provinces. Provinces are entitled in terms of section 206(c)(3) to "*liaise with the Cabinet member responsible for policing with respect to crime and policing in the province*" which means to liaise with national/central government. The provinces consequently have no effective control over the operations of the South African Police Services (SAPS) within provincial boundaries. Section 205(1) states that "*the national police service must be structured to function in the national, provincial and where appropriate, local spheres of government*" whilst section 206(7) provides that "*National legislation must provide a framework for the establishment, powers, functions and control of municipal police services*". Although these sections may appear to indicate devolution of power, including "where appropriate" to the local government level, real devolution is not obligatory and does not happen in practice.

The Interim Constitution differed from the final Constitution in that section 214(1) stated that the police service "*shall be structured at both national and provincial levels and **shall function under the direction of the national government as well as the various provincial governments***." (emphasis added). There is a great deal of difference between "*shall function … in the sphere of*" and "*shall function under the direction of*". The reduction in the policing powers of the provinces, effected in the final Constitution, is lamentable and should be redressed.

Devolution of policing powers

It is therefore proposed that the constitution be amended to allow for the **devolution of effective policing powers to provincial, metropolitan and local government levels**.

These powers should include:

- the power to deploy and redeploy SAPS members within the boundaries of the province.
- the power to determine the size and shape of the police force within the province in consultation with central government. Where the national/central budget allocation does not allow for the effective discharge of duties by provincial governments, they should be empowered to recruit and train additional police, using money/revenue raised from the private sector or obtained from other provincial and local government revenue sources.
- the power to promote staff.

These powers should be exercised subject to consultation with metropolitan and municipal structures and community police forums.

Motivation for the proposal

Developments in efficient management methods

In the private sector there is a worldwide movement towards establishing smaller units and devolving real decision-making power to such units. The phenomenon is known as downsizing or unbundling. The purpose is to achieve greater efficiency by allowing personnel at all levels to use their knowledge and initiative to solve problems and make and implement decisions. The efficiency increases have been substantial. The same principles should be applied to all government services and especially to policing.

Greater responsiveness

The devolution of policing powers to provincial and local government levels would allow for greater responsiveness to rapidly changing local circumstances, necessitating quick responses. The causes of crime and the activities of criminals are multiple and varied. Effective policing requires intimate knowledge of local conditions/circumstances as well as liaison at national and international levels. Provincial governments are in constant contact with local and regional structures and can be expected to be more responsive than national government that by its nature is remote. Devolution of decision-making would therefore result in a more efficient use of police resources.

Enhancement of morale and commitment within SAPS

Devolution of effective powers would enhance morale, motivation and commitment within the SAPS because the various units would be more cohesive. It would intensify the interaction and strengthen the bonds between police command structures and the communities they serve. This would lead to greater mutual understanding as well as increased efficiency. There would be greater personal contact between police officers and civilian leaders. Successes would be rewarded with direct expressions of appreciation and failures could be addressed rapidly and in concrete and practical ways. This should do much to dispel the current culture of complaint and recrimination that surrounds policing in South Africa.

Efficiency

Officials operating at national level do not have the necessary knowledge of local conditions to provide efficient local government services because knowledge is dispersed among the millions of people that comprise society, and local knowledge cannot be effectively transmitted to a central planning board. In the absence of horizontal competition between provinces there is no real incentive on the part of officials to operate optimally and their jobs do not depend on keeping costs down. They can employ too many officers, create delay and misallocate resources and taxpayers are forced to foot the bill. Furthermore, centralisation results in competing and overlapping spheres of jurisdiction, bottlenecks in the flow of information, and a more costly police force.

The demonstration effect

When power is devolved to the various levels of government it is easy to compare the relative effectiveness, as well as the consequences of different policies. It will be on the basis of how the power is employed to have the greatest impact on crime that provincial, metropolitan and local jurisdictions will compete. The provincial, metropolitan or local jurisdiction that proves most effective in combating crime will attract the more productive citizens together with their intellectual and capital assets. Others will emulate the jurisdictions that demonstrate the ability to deal most effectively with crime. The overall effect will be to improve the containment of crime and ensure a safe South Africa. Provinces and local authorities, like shopkeepers, are forced to compete with each other for citizens as investors, ratepayers and workers. Competition on the basis of good services, in other words good value for money, ensures that good policies drive out bad policies.

The *demonstration effect* occurs in all countries where regional and local jurisdictions have real powers.

Innovation and flexibility

In lower levels of government policing departments are small and adaptable and allow for experimentation. They understand 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 – they are not national disasters.*

Attempts at uniformity, centralised planning and control are in sharp contrast to variety and lead to different consequences. Civil servants at national level prefer the former because it is the easier option and everyone is made to comply. Variety on the other hand causes complexity that

breeds uncertainty and leads to anxiety. Civil servants prefer to minimise anxiety by reducing variety – but *variety is the very essence of democracy.*

A small bureaucracy

It is often assumed that numerous second- and third-tier structures 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**.

Changing the Constitution

Several sections of the Constitution would have to be changed to devolve policing power to the provinces and to local authorities. Provision could be made for devolution of power to occur at the request of lower tiers of government in order to avoid imposing obligations on those that do not have the capacity to handle the proper management of the police in their jurisdictions. However, provincial governments, in particular, that wish to take over a substantially greater part of the management of the police in their provinces, should be allowed to assume those powers as soon as possible. Devolution of the policing powers could go a long way towards improving the efficiency and accountability of policing and reducing the crime rate in South Africa.

CHAPTER 12
TRADITIONAL COMMUNITIES:
CONSTITUTIONAL ENTRENCHMENT OF THEIR RIGHTS

The problem

Chapter 12 of the Constitution did not clearly define the rights of traditional communities. This lack of clarity is leading to increasing confusion regarding the roles and duties of the various forms of government in the country. The differences that have arisen over the demarcation of local authority boundaries and the relationship between traditional authorities and local authorities are a symptom of the incompleteness of the existing Constitution.

Chapter 12 of the Constitution deals with Traditional Leaders as if they function as entities separate from their communities whereas the legitimacy and relevance of the Traditional Leaders flows from the respect and standing accorded them by their communities. This fact does not reduce but enhances the importance of the Traditional Leaders.

Although the traditional authorities are the institutions most capable of bringing about the rapid economic, social and cultural development of their communities, the Constitution does not allocate to them the necessary authority, or financial and administrative capacity to perform these functions.

South Africa should set an example to the rest of the continent on how the languages, traditions, and cultures of its traditional African communities should be nurtured and allowed to flourish. Adopting a Western-style democracy for purposes of administering the "greater society" does not mean that the traditional communities should be subject to the same system. Consensus decision-making is a fundamental and desirable feature of African society, a feature that historically was integral to most small communities worldwide.

Analysis and discussion of the problem

The importance of finding a solution

South Africans are overwhelmingly in favour of the sentiments expressed by President Mbeki when he speaks of our country as being the most favourable catalyst for an African Renaissance. However, in order to achieve this desirable objective we have to create an enabling environment, similar to the environment that led to the Renaissance in Europe. A rebirth of African languages, traditions and culture will occur if traditional communities are given the necessary freedom to develop without having Western-style mechanisms imposed on them.

This African rebirth of languages and cultures, this unity in diversity, is as critical for the African Renaissance as the rebirth of European languages and cultures was critical for the European Renaissance. To illustrate the significance of this point a word about the Italian Renaissance is in order:

Italian Renaissance

The Italy of the Renaissance – from the birth of Petrarch in 1304 to the death of Titian in 1576 – was a rounded picture of all phases of human life. The designation "renaissance" placed undue stress on the revival of classic letters; it encompassed the ripening of the economy and culture into its own characteristic forms.

Politically there was no Italy; there were only city-states. This fragmentation favoured the renaissance. The commercial competition and rivalry of the Italian city-states completed the work of the Crusades in developing the economy and wealth of the region. The variety of political centres multiplied inter-urban activities and strife, but these modest conflicts and competitions merely influenced the multiplicities of economic activities.

There was a noble rivalry of the cities (city-states or principalities) in cultural patronage, in their zeal to excel in architecture, sculpture, painting, scholarship, and poetry.

The great growth and zest of Italian trade, industry and commerce gathered the wealth that financed the renaissance movement. The passage from rural peace and stoicism to urban vitality and stimulus brought about the mood that nourished the renaissance. The political basis of the renaissance had been prepared in the freedom and rivalry of the cities, in the rise of educated princes and a productive middle class. The literary basis had been prepared in the improvement of the vernacular languages and in the zeal for recovering and studying the traditions and classics.

Freedom, political decentralisation, individuality, enterprise and commercial culture, together with artistic creativity and the liberty of spirit, all became elements of the Renaissance.

The African Renaissance cannot come into being without these elements playing a role. The traditional communities of South Africa therefore have a vital part to play, not only in the rebirth of South Africa, but in the rebirth of the continent.

Constitutional recognition

The constitutional debates in respect of both the interim and final constitutions concentrated heavily on the issues upon which the Tripartite Alliance and the National Party sought to reach an accommodation. There was no space in this process to deal adequately with tribal lands and traditional authorities. The traditional authorities did not press the issue at the time because the common enemy had been vanquished and a majority government was taking over the reins of power. "Their" government was in control, so there was no pressing urgency to resolve outstanding issues relating to the administration of the tribal territories.

The confusion created by the drive to establish new local authorities and the related demarcation process has highlighted the fact that the constitutional and legal rights of the tribes and their traditional authorities have not been properly spelled out in the constitution, legislation and administrative arrangements of the country. An unnecessary confrontation can be avoided if all parties act in good faith and determine that they will negotiate a settlement of the fundamental issues through an all-encompassing negotiation process intended to reach a consensus settlement that is acceptable to everyone involved. The constitutional and legal rights and obligations of the tribes and their traditional authorities must be established and clear administrative systems must be agreed for co-operation between the central government and the tribal authorities in the development and management of the tribal areas.

Once the fundamental issues have been resolved the rights of the tribes in regard to the tribal land must be enshrined in the Constitution and in whatever legislation is necessary to support it.

Democracy and traditional authorities

Tribal land is private property and should therefore not be subject to ordinary political management. Yet critics may argue that due to the size of the areas that fall within the "jurisdiction" of traditional authorities, the constitution and other democratic rules should apply to ensure that citizens living on tribal land have a conventional vote to determine who should administer their territories.

In considering this issue the inherently democratic nature of traditional African rule has to be taken into account. Traditional authorities rule by consensus and place matters before their people on an issue by issue basis. Chiefs and their councils are fully accountable to the people and every member of the tribe has a right to voice a view on whatever matter is being considered. Chiefs do not acquire dictatorial powers by reason of birth as tradition determines an array of constraints upon the powers that they may exercise and also determines the manner in which issues affecting the tribe must be dealt with. Councils are very representative and cover all communities within a chief's jurisdiction. The Western style of democracy is certainly not superior to African traditional rule at the local government level. However, in respect of national and international affairs there is a strong case to be made for adopting the political mechanisms developed by the West. There is no reason why South Africa should not develop a harmonious blend of traditional African rule at the local (rural) level and Western-style democratic rule in the rest of the country.

Tribal land and development

Successive governments have retarded or prevented the proper development of the tribal areas. People have been shunted from one place to another and have been denied the permanence that accompanies secure property rights. It is wrong to accuse traditional authorities of a lack of interest in development. In many areas there are schools, clinics, dams, water supplies, roads and other services that were built and provided by the traditional authorities. Traditional authorities need decision-making power and budgets in order to bring about development of infrastructure in their areas. Wherever they have had the necessary power and budgets, traditional authorities have set about transforming their areas. A good example is the Royal Bafokeng administration, which assumed extra powers to develop areas under its putative control.

Once the traditional authorities have a proper and permanent constitutional and legislative structure within which to operate, they will be able to accelerate the process of development. An important requirement for that development will be the power to grant property rights to the members of the tribe. The property rights could be tribe-specific to overcome the concern that outsiders may buy up the land and eventually dispossess the tribe of its heritage. This would mean maintaining details of title in a tribal land registry with transfer limited to members of the tribe. Limited transfer rights would mean lower values for property but would confer far greater security than currently exists. The value of such limited rights to the people would be very significant as it would allow them to mortgage and sell their properties, something they are now precluded from doing.

A further development factor that could be introduced is the conferring of economic development area (EDA) status on all the tribal areas. This status could include the granting of exemption from taxes and other special dispensations that could allow the people to lift themselves out of poverty.

Tribal courts and tribal law

Recognition for tribal law and tribal courts should form part of the negotiations for a proper dispensation for traditional land and the people living on such land. The power to make binding decisions regarding land rights should form an essential part of such decision-making powers.

Hierarchical structure of traditional authorities

It would be inappropriate and demeaning to subordinate traditional authorities to low level elected politicians and their administrations. The traditional authorities at the local level should therefore function under the direction of the Provincial Houses of Traditional Leaders, who in turn should be subject to a House of Traditional Leaders at the national level.

The Constitution

Chapter 12 of the Constitution

Chapter 12 of the Constitution on Traditional Leaders is incomplete. Whereas all the other institutions of government of the Republic of South Africa are carefully described in the Constitution, the Chapter on traditional leaders does not set out the powers, functions or duties of these ancient institutions. It leaves the traditional communities "hanging in the air".

Recognition (Section 211)

Subsection 1

The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

The nature of what is being recognised in this subsection is not described. Traditional leaders are consequently justified in asking: What institution? What status? What role? What customary law? is recognised. This recognition is then "subject to the Constitution". The drafters of the Constitution

surely did not intend that traditional leadership, as an institution should be "subject to" all the other institutions of government that are carefully defined and described.

Subsection 2

A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of that legislation or those customs.

This subsection allows a traditional authority to function according to a system of customary law "subject to any applicable legislation and customs". The "customs" to which customary law is to be subject are not defined. The subsection then refers to the "repeal of ... customs". Customs cannot be repealed; the most a government could do would be to prohibit the observance of a particular custom. The subsection needs clarification and revision.

Subsection 3

The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

This subsection gives no indication as to when customary law will be applicable, and in what manner it may be superseded by other sections of the Constitution or by legislation. Greater clarity regarding this subsection needs to be negotiated.

Role of traditional leaders (Section 212)

Subsection 1

National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

The required legislation should follow only after detailed negotiations on this issue between the government and traditional leaders and should include the revisiting of the Constitution to properly define the manner in which traditional authorities will govern their communities. The Discussion Paper on Traditional Leadership and Institutions forms a basis for discussion but it is not sufficiently comprehensive, as it does not cover all the issues that have to be dealt with.

Subsection 2

To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law -

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) *national legislation may establish a council of traditional leaders.*

Although section 212 purports to deal with the role of traditional leaders it does not do so. It merely states that "legislation may provide for the establishment of houses of traditional leaders" without defining their role.

Whilst Chapter 7 of the Constitution describes the status, objects, developmental duties and powers and functions of municipalities and local government, Chapter 12 does not do the same for traditional authorities.

Some of the sections missing from Chapter 12 of the Constitution

Sections similar to those appearing in Chapter 7 of the Constitution dealing with status, objects, development duties and powers (adapted for Chapter 12) could have read:

Status of traditional authorities

(A) (1) The local sphere of government, in the case of traditional communities, consists of traditional authorities and municipalities in their jurisdictions.

(2) The executive and legislative authority of a traditional community is vested in its traditional leaders.

(3) A traditional authority has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.
(4) The national or a provincial government may not compromise or impede a traditional authority's ability or right to exercise its powers or perform its functions.

Objects of traditional local government

(B) (1) The objects of traditional local government are
(a) to provide traditional and accountable government for local communities;
(b) to ensure the provision of services to communities in a sustainable manner;
(c) to promote social and economic development;
(d) to promote a safe and healthy environment;
(e) to maintain the involvement of the communities and community organisations in the matters of traditional local government.
(2) A traditional authority must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

Development duties of traditional authorities

(C) A traditional authority must
(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
(b) participate in national and provincial development programmes.

Powers and functions of traditional authorities

(D) A traditional authority has executive authority in respect of, and has the right to administer
(1) (a) the local government matters listed in Schedule 4A; and
(b) any other matter assigned to it by national or provincial legislation.
(2) A traditional authority may make and administer by-laws for the effective administration of the matters that it has the right to administer.
(3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.
(4) The national government and provincial governments must assign to a traditional authority by agreement and subject to any conditions, the administration of a matter listed in Schedule 4A which necessarily relates to traditional local government if
(a) that matter would most effectively be administered locally, and
(b) the traditional authority has the capacity to administer it.
(5) A traditional authority has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

An addition to Schedule 4 of the Constitution

In the foregoing proposed sections reference is made to Schedule 4A. It is suggested that a new Schedule 4A be added to specify functional areas of traditional authority competence.

Other necessary changes

Sections of Chapter 7, such as Section 151(1), would have to be altered to recognise the rights of traditional communities to administer their own areas.

PART 2

ACCOUNTABLE GOVERNMENT

Further mechanisms, outlined below, to ensure accountable government – at all levels, and in all forms – should be included in the constitution (or in suitable alternative legislation).

Performance audit

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

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 imposed on others. 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.

Retrospective law

One of the principles of the rule of law and a core democratic value is that people must know their rights. It is generally agreed, especially in a country like South Africa with unsophisticated people, that laws should be as certain, accessible, and clear as possible. In a democracy, people should not be subjected to arbitrary and discretionary power and should not find that what they have been doing lawfully is subsequently declared unlawful. The reason why retrospectivity should be unconstitutional is obvious. It can be illustrated by simple example. If somebody were to go to a lawyer and say they want to conduct their affairs in a completely lawful manner as law abiding citizens and want whatever it is they do checked over in order to ensure this, the lawyer is obligated, where retrospectivity is constitutional, to say that it is not possible since whatever is done lawfully today might be declared to have been unlawful retrospectively tomorrow. With retrospectivity it is not possible for anyone to know whether what they do is lawful.

It is recommended that a retrospectivity clause be introduced into the constitution, subject to whatever strictly limited qualification may be considered essential. The clause would provide that laws and administrative decisions may not be made with retrospective effect except in exceptional circumstances. Quite what the circumstances would be would have to be prescribed and proscribed skilfully and carefully by constitutional experts. Government might want to retain the ability to take retrospective actions where, for instance, it is clear that all reasonable people would agree that it is appropriate, such as correcting a loophole in a law against rape or murder. Retrospective amendments would normally be confined to correcting faulty language. It might, for instance, be necessary, to introduce such amendments to the constitution itself, where there is consensus as to what was intended but that consensus is not captured by drafting.

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). We propose that the Constitution (Bill of Rights – Freedom and security of the person) should state:

Everyone has the right to freedom and security of the person, which includes the right

– ***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 from performing its most important function.

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

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 his/her job *ipso facto* if inflation rises above a specified level. Needless to say, inflation is stable in New Zealand.

In addition, for instance, parliamentarians' 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***.

Apart from the much-needed protection of basic rights that 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. 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.

CHAPTER 2
BILL OF RIGHTS – DIRECT DEMOCRACY – SUMMARY

The preamble to the Constitution of the Republic of South Africa states that "We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to…[L]ay the foundations for **a democratic and open society in which government is based on the will of the people**…" (emphasis added).

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 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 (Founding Provisions) should state: ***The Republic of South Africa is one democratic state in which the people are sovereign. It is founded on the following values…***

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. The three most important checks and balances that characterise a democratic state are a bill of rights, devolution of power and **direct 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 specified number of people sign a petition and a majority vote in favour of the recall.

To this end the Constitution (Bill of Rights – Political rights) should state: ***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 advantages of direct democracy

- Direct democracy ensures that elected representatives remain accountable, reflects public opinion accurately, and diminishes the importance of party politics, thereby reducing polarisation and conflict.
- 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.
- Direct democracy acts as a barometer of controversy, and in times of crisis referendums 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.

DIRECT DEMOCRACY – DETAIL

Direct democracy – the key to accountable government

The world's first democracies were the city-states of ancient Greece, in which adult male citizens were eligible to vote 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, a transition from direct democracy to representative democracy, in which a small number of people are elected to act on behalf of others.

But representative democracy has organically developed many shortcomings. For one, 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 for instance, 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 that 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 provided in Addendum 1.

Common objections to direct democracy

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 all official parties opposed the initiative, 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.

Ordinary 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 idea of democracy. But there is little agreement between, for example, members of the ANC, the IFP, 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 that 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 empowers the uneducated

The chief objection to direct democracy is that it transfers power from the educated to the uneducated. Both the left and the right raise this objection.

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 that 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 a 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.

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 that 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.

ADDENDUM 1

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 that 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 that 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 that 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.

Minority groups usually launch popular initiatives. 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 that 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, the voters accept more measures, 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 statewide 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 bussing, 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, the courts challenged initiatives 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 that 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 that 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 a 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.

CHAPTER 2
BILL OF RIGHTS – PROPERTY RIGHTS

For most of this country's modern history property has been stolen, misused and mismanaged.
Cyril Ramaphosa.

The property rights section (25) should be amended so as to guarantee the right to *acquire* property at least as effectively as it secures the right to *hold* property already acquired. That it does not do so may be an unintended anomaly in that the right to hold property (subject to due process and compensation) protects the interests of "haves" (mostly whites) who already own property of all kinds, whilst not securing the right of "have-nots" (mostly black victims of apartheid) to have access to or acquire property.

Many artificial barriers to occupation or acquisition exist, mostly inherited from the apartheid era (see below). The purpose of the Bill of Rights is also to protect people from the introduction of measures that might violate rights in future.

Most of the measures (below) inherited from the past that curtail access to land by poor (mostly black) people, are elitist, originally adopted in the context of a white middle class government with middle-income people in mind, without regard for low-income people. These measures set inappropriate "first world" standards for such issues as property development, housing, infrastructure and zoning. Colonial measures restricting full title to land in tribal areas also fall within this category.

"Property" in the Property Rights clause does not refer only to land, but includes all forms of property (25)(3)(b)). There are countless other measures that frustrate access by disadvantaged people to property of all kinds. Examples are measures that relate to access to finance (Usury Act), investments (financial institution laws), business opportunities (restrictive licensing), and a great deal more.

An amendment to the Property Rights clause to the effect that any law or policy that prevents or inhibits access to or acquisition of property unreasonably would be unconstitutional. It should be every citizen's right, especially poor and disadvantaged people, to challenge measures that prevent or frustrate access or acquisition by them to property, unreasonably.

The proposed amendment would be the flipside of the existing property rights clause that protects people against measures that would deprive them of property already acquired.

It makes no sense, especially in the context of South Africa's apartheid history, to have a property rights clause that protects ownership but does not guarantee access according to just laws.

The property rights section (25(5)) does require the state to take measures to facilitate access to land but not other forms of property. What is proposed is an amendment to the effect that any legislative or other measures that frustrate this objective could be challenged constitutionally. In other words, to shift from or supplement the notion of an obligation on the state to take *positive* action, to a formulation that prohibits it from maintaining or implementing *negative* legislation or other measures.

DISCRETIONARY POWERS AND THE RULE OF LAW

There is a long history of philosophers, judges, and scholars warning against the granting of discretionary powers to executive arms of government. Increasingly, in South Africa, law and regulation is being determined by civil servants and not by Parliament. The Constitution should prevent Parliament from abdicating its powers and Members of Parliament should be required to maintain vigilant supervision over all laws and regulations that are promulgated. The following excerpts give an indication of the historical roots of this controversy:

- In 1624 Sir Edward Coke warned the English Parliament in his *Institutes of the Laws of England*" to leave all causes to be measured by the golden and straight mete-wand of the law, and not to the uncertain and crooked cord of discretion."
- Though the two meanings of "arbitrary" were long confused, it came to be recognised, as Parliament began to act as arbitrarily as the king, that whether or not an action was arbitrary depended not on the source of the authority but on whether it was in conformity with pre-existing general principles of law. The points most frequently emphasised were that there be no punishment without a previously existing law providing for it, that all statutes should have prospective and not retrospective operation, and that the discretion of all magistrates should be strictly circumscribed by law.
- The philosopher John Locke, in his *Second Treatise on Civil Government*, was concerned with the practical problem of how power, whoever exercises it, can be prevented from becoming arbitrary: "Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where that rule prescribes not: and not to be subject to the inconstant, uncertain, arbitrary will of another man."
- Sir William Blackstone, in *Commentaries on the Laws of England* described the importance of the separation of powers: "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the Crown, consists one main preservative of public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be regulated only by their own opinions, and not by any fundamental principles of law; which, though legislatures may depart from them, yet judges are bound to observe."

The rule of law requires that government should enact only such laws as are general in nature, are applicable to everyone including itself, and which do not attempt to bring about particular outcomes. The rule of law was described by Nobel Laureate Friedrich Hayek in his book The Constitution of Liberty:

> *The conception of freedom under the law ... rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free. It is because the lawgiver does not know the particular cases to which the rule will apply, and it is because the judge who will apply them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule. Because the rule is laid down in ignorance of the particular case and no man's will decides the coercion used to enforce it, the law is not arbitrary. This, however, is true only if by "law" we mean the general rules that apply equally to everybody.*

Total power became so much a part of previous administrations that the elements of despotism are not recognised by most South Africans, not even by those who suffered most as a result of the bias and discretionary powers contained in legislation. In order to create the free society for which the majority of South Africans have been yearning for so long, it will require a conscious effort on the part of government to root out all provisions of a despotic nature contained in existing legislation. It will also be essential to ensure that no new despotic legislation is added to the statute book.

The infamous apartheid period was only possible because the rule of law was ignored and extensive arbitrary powers were given to the civil service to follow differing rules in dealing with different citizens of the country. The greater part of those arbitrary powers continue to exist and there is clear evidence that the civil service is asking for even greater powers. Citizens need protection against this trend. Two possible methods of affording that protection are:

1. That the Members of Parliament resolutely refuse to approve any legislation that is not in accordance with the rule of law as described above, and particularly, that they refuse to approve provisions in legislation that grant arbitrary discretionary powers to the civil service.
2. That the Constitution give courts the task of reviewing and controlling the acts of the administrative branch of government, especially to ensure that they do not exceed the powers that Parliament intends to grant when approving legislation.

CHAPTERS 6 AND 7
PROVINCES AND LOCAL GOVERNMENT
ALLOCATION OF POWERS

Summary
It is crucial that the Constitution of South Africa takes into account the mistakes of our past and the experience of the world, and provides the framework for this country to join the worldwide 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 **changes, improvements and experimentations**. 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 the people in greatest need and find innovative ways of **helping** them, without undermining their dignity, self-esteem or ability to help themselves.
- ***Building a democratic, caring culture***: South Africans will learn the value of democracy most rapidly if they 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 world 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. In South Africa even Cosatu demands "participatory democracy" rather than a "five-year ballot democracy" as it stated recently at NEDLAC.

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 in recent years introduced reforms to further increase regional and local powers.

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. In Somalia devolution has come by unfortunate means: War. There is now no central or national government. Peaceful devolution of power there would have been the right approach.

Our Constitution should take account of this trend.

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 truer 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.

The *demonstration effect* occurs in all countries where local governments have real powers. It also operates internationally, as in the worldwide movement of socialist countries away from central planning towards imitating the market driven economies that demonstrated their superiority.

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 – they are 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. Civil service 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 twenty-four years from 1975 to 1998 the total number of government employees (including those in state corporations) rose by 35% compared to a decrease of 6% 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 wellbeing. 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 over-billed 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 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. The concept contained in the ANC's *Freedom Charter* is that "the people shall govern" and there can be no better example of this than the people governing at the local, community level.

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 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 government, traditional authorities 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, traditional and local governments, with provincial governments focusing on matters of regional concern, and traditional and local governments attending to matters of local interest.

Provincial legislative and executive authority: 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.

Local governments: Local governments should have a degree of autonomy that is consistent with the wishes of the local community and the responsibility they are prepared to carry. The by-laws of local governments should be based on 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 and administration, for example on education and health.
4. In many areas the provinces should have exclusive powers, for example regarding schooling.
5. The enforcement of many central laws should be left to the provinces, as in Germany and Switzerland.

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

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 South Africa's 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, traditional and local governments, with provincial governments focusing on matters of regional concern, and traditional authorities 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 and traditional authorities, 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. In the South African context, the accommodation of the traditional communities is of particular importance.

Provincial powers under the Constitution

Schedule 5 of the Constitution states that a provincial legislature has exclusive legislative competence over a limited number of matters such as abattoirs, ambulance services, liquor licences, provincial roads and traffic and veterinary services (excluding regulation of the profession). This means that provincial legislative powers are not much wider than under the constitutions of 1910 and 1961.

Provincial legislative powers are so limited that there is no federalism. Sections 146, 147 and 148 provide that in most instances national legislation will prevail over provincial legislation. The bottom line is that the provincial system under the Constitution is much the same as under the old unitary system created by the past constitutions.

Taxing powers

Section 214 states that provinces receive an equitable share of revenue raised nationally. Section 228 places severe limitations on the taxation powers of provinces and makes those powers entirely subject to approval 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**. Regional governments have an incentive to be spendthrift under such circumstances and to encourage central government to tax maximally.

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

If South Africa's provinces had taxing powers the provinces with less to offer investors would reduce their tax rates to attract investment. These provinces would do so by reducing the cost of their administrations. This phenomenon can be seen functioning in the States of the USA and the Cantons of Switzerland. In the absence of such powers the less attractive provinces, from an investment point of view, such as the Free State, Northern Cape and Northern Province have no way of creating comparative advantages that will induce investors to invest in them rather than in Gauteng or the Western Cape.

Provincial legislative and executive authorities

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

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, the signatures of an agreed percentage of community citizens entitled to vote should be necessary to call a referendum or launch an initiative.

Conclusion

Distribution of central and provincial powers

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

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

LOCAL GOVERNMENT; FINANCIAL AND FISCAL RELATIONS

Summary

Under apartheid local governments were primarily administrative bodies whose main purpose was 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* that enable citizens to vote on the alteration of 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 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* that enable local units to raise revenues and 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* that make it possible for a newly formed municipality or neighbourhood to transfer functions from existing units to itself.
- *Home rule charters* that allow the people forming a new local government to decide on their own arrangements regarding service provision, taxes, voting and so on.

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 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 were primarily administrative bodies whose main purpose was 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 the last 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.

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 those 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 varied 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 that 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 due to 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.

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 to vote to alter the boundaries of existing units. A room full of planners sitting around a map and drawing up boundaries should not define local governments. 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* that 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* that make it possible for a newly formed municipality or neighbourhood to transfer functions from existing units to itself.

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

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 centralised levels of government finance communities, 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 higher levels of government collect revenues and pass them 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[23] 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.

[2] 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.

SEPARATION OF POWERS

One of the most undemocratic and tenacious legacies of apartheid is not only the failure of South African laws inherited from the past to be informed by the separation of government powers, but the general lack of appreciation in South Africa for the concept.

The interim constitution did provide for the separation of powers and for reasons which were not apparent from media coverage, this fell away in the final constitution. Whilst we do not know why, our speculation is that it might have been realised that a separation of powers is not always feasible. The solution ought not to have been to abandon the section, but to qualify it appropriately.

Having a separation of powers section in the constitution is as important in the South African context as all other provisions intended to take cognisance of the realties of our apartheid past. One of the most damaging ways in which the apartheid regime violated the rule of law and democratic values was by conflating the three basic functions of government into an omnipotent executive. Statute after statute would delegate law-making functions to ministers, boards, commissions, and officials. Systematically the legislature was stripped of its proper legislative function.

Not being satisfied that the courts would make politically desired rulings, judicial functions were also transferred systematically to the executive branch of government, especially by way of the creation of numerous quasi-judicial bodies.

As part of transformation and a true African renaissance, this legacy needs to be corrected.

There are important reasons why a separation of powers is a precondition for democratic governance. Because of South Africa's past, these are not always appreciated.

One of the most extreme examples of the conflation of powers is the Harmful Business Practices Act adopted as a typically draconian measure by the apartheid regime reflecting a consummate disrespect for almost all principles of good law. The jurisprudential aberrations of the Harmful Business Practices Act have been incorporated in Provincial Consumer Affairs Acts.

Whilst this is cited as illustrative of the problem, it should be appreciated that it is one of many examples. Under that legislation the executive has, on the face of it, more power than parliament itself. If parliament wants to declare something unlawful, it needs to follow demanding and sophisticated democratic procedures prescribed by the constitution. Policy papers are published and debated; policies and, eventually bills, are submitted to the Cabinet for its approval; approved bills are published, amended, and ultimately submitted to parliament; bills once tabled are subjected to Portfolio Committee proceedings; there are first, second and third readings in parliament; proposed laws and policies are debated in both houses of parliament; ultimately legislation must be assented to by the State President or referred back to parliament, or the Constitutional Court, for review (as was done in respect of the Liquor, Tobacco and Broadcasting Bills last year).

In contrast, a single government department, under the Business Practices and Consumer Affairs legislation, may declare virtually anything it wishes unlawful arbitrarily. The executive branch of government can ban any business practice or business. It may, virtually without checks and balances, place any business under curatorship and even liquidate it regardless of whether it is insolvent and with total disregard for company and insolvency law. The executive may make law almost without limit, and execute the law. It may also adjudicate disputes. At the provincial level there are tribunals that are even called "courts", notwithstanding the constitutional provision that only national government may create "courts".

These extraordinary and manifestly undemocratic powers do not only permit the executive to declare whatever it wishes unlawful virtually without limit, but it may do so retrospectively. It is, on the face of it, possible for government officials to announce that something that has been done lawfully for over a century was nonetheless, at the time, unlawful. It can invalidate transactions and even require the payment of penalties restrospectively without limit.

Brief reflection will make it clear why such a state of affairs is inappropriate and should be unconstitutional. Such legislation usurps the appropriate functions of accountable and

democratically elected legislatures and politicians operating in sophisticated and transparent ways. It usurps the functions of an independent judiciary that follows time-honoured procedures to ensure that justice is not only done but that it is seen to be done. The judiciary is also staffed by experienced, qualified and especially chosen lawyers. Unlike officials in the business practices committee or the quasi-provincial courts, magistrates and judges have tenure. Officials in these non-judiciary courts are politically appointed for short terms of office.

Under the proposed amendments to the constitution the executive will be confined to legitimate executive functions. Regulatory powers will be confined to regulations necessary to implement substantive laws made by national, provincial or local legislators. The judiciary will be restored to its proper status where it has sole responsibility for adjudication of disputes. Where adjudication of any kind remains an executive function there should be a constitutional right of appeal (on the merits) and review (in respect of irregularities) to an independent judiciary rather than with classified regulations that effectively make law.

The new government has introduced the practice of having proposed regulations submitted to the Cabinet. This is necessary only because of the extent to which a legacy of law making regulation has arisen. If regulations are confined to regulating this will no longer be necessary.

It is accordingly recommended that a separation of powers clause be restored to the constitution. If it is qualified, the qualification should be strictly worded. In view of the large quantity of laws and practices that violate the democratic principle of separated powers, there would probably need to be a sunset clause of, say, two years, to give the state time to unbundle conflated powers. During this period adjudication functions will have to be restored to the judiciary and law making functions to legislatures at national, provincial and local level.

CHAPTERS 2 AND 10
TRANSPARENCY

Despite the near universal endorsement of the concept of transparency, there are few explicit provisions in the Constitution dealing with transparency.

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.

Access to information

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 information the state possesses that relates to them.

We propose, therefore, that the Constitution (Bill of Rights – Access to information) should state:
Everyone has the right of access to –

- ***access to all information held by the state or any of its organs at any level of government in connection with that person***…
- ***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 to receive copies of documentary evidence***…
- ***any state hearing concerning that person and the right to cross-examine any other person who presents oral evidence to the state***.

Public administration

We propose that, with regard to discretionary power, the Constitution (Public Administration – Basic values and principles governing…) should include:

- ***Every interested person, as well as representatives of the media and relevant public interest organisations, has 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.***
- ***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.***