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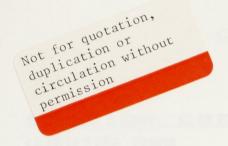
A CITIZENS GUIDE TO CONSTITUTION-MAKING AND DEMOCRATIC POLITICS IN SOUTH AFRICA

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PLEASE NOTE:

This document is not necessarily in its final form. It may change further as a result of conversations we are having with key political actors. It is our intention to have it commercially published in its final form.

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South African - The National Party's Five Year Plan;

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- ANC/OAU Statement on Negotiated Change;

- ANC's Revised Constitutional Guidelines;

- The Freedom Charter (adopted at the Congress
  of the People at Kliptown, Johannesburg, on
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- SACP's Programme Adopted at the 7th
  Congress, 1989, entitled "The Path to
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- The South African Law Commission's Draft
  Bill of Rights;

- The FCI's Business Charter of Social,
  Economic and Political Rights.

International - Federalist Paper - No. 10: Madison,
November 22, 1787;
- Karl Renner and Otto Bauer ?

INTRODUCTION

The purpose of this essay is to help equip South African
citizens to participate actively and effectively in shaping
their society's future. If good government requires the
consent of the governed, then successful constitution-making
and democratic politics requires the informed participation
of citizens. This essay seeks to facilitate such
participation by:

-   clarifying some key terms of the political debate;
-   surveying some of the options in respect of a new
    constitution; and
-   discussing steps in a constitution-making process.

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SECTION ONE
CLARIFYING TERMS

"South Africa shall become a united, democratic and non-racial state;

All its people shall enjoy common and equal citizenship and nationality, regardless of race, colour, sex or creed;

All its people shall have the right to participate in the government and administration of the country on the basis of a universal suffrage, exercised through one person one vote, under a common voters' role;"

Organisation of African
Unity, August 1989.

"(A) South Africa shall be an independent, unitary, democratic and non-racial state.

(B) Sovereignty shall belong to the people as a whole and shall be exercised through one central legislature, executive, judiciary and administration."

African National
Congress, Revised
Constitutional
Guidelines, 1988.

"South Africa is one undivided state with one
citizenship for all. Every South African has the right
to participate in political decision making on all
levels of government which affect his interests,
subject to the principle of no domination."

National Party, Five Year
Action Plan, September
1989.

Many political actors are using similar words to describe
the future they seek. Yet often they intend quite different
meanings. In this section we examine some key terms of
debate and describe different possible meanings.

COUNTRY, STATE AND NATION

"Nothing against the State, Nothing without the State,
Nothing outside the State."

Mussolini.

A country is both a group of people and a piece of territory
with a common political authority. It has a set of common
symbols: a flag, most often its own currency, its own armed
forces, and its citizens carry its passports when they
travel outside the country.

The word state is used in two different ways. Firstly, it refers to a country. Alternatively it refers to the government of the country. These usages are often confused, often with dangerous consequences.

Nation is often used to describe a country with a distinctive and homogeneous culture, language, religion and ethnic character. This usage became prominent in both the nineteenth and twentieth centuries. In this form the term nation-state is both misleading and dangerous. It is misleading because very few of the world's 150 countries are culturally, linguistically, religiously, ethnically or racially homogeneous. Diversity is the character of most countries. For example, this is true of the United States, Canada, Britain, Switzerland, Yugoslavia, Czechoslovakia, the Soviet Union, China, India, Malaysia, Indonesia, Australia, almost all of Africa and most of South America. Mono-cultural societies are exceptional.

The term nation-state is dangerous as it has been used time and again for majority (and minority) domination. Conceiving countries as having common cultures has also allowed politicians to avoid both the accommodation of differences and the design of structures to resolve inter-group conflict.

PEOPLE, GOVERNMENT AND SOCIETY

Lincoln's definition of democracy was government of, by and for the people. This is easier said than achieved. The second half of this century has produced many Peoples' Democratic Republics, few of which would conform to Abraham Lincoln's concept of democracy. Politicians absolutise concepts, often as a way of entrenching their own power: so patriotism equates criticism with treason, and the repression of dissent and the denial of individual freedom are explained as defending the People or the Nation. The idea of the national, general or people's will has been used time and again to legitimize tyranny. Indeed a good general rule for ordinary people is to beware of politicians who make use of words with capital letters: State, Nation, Volk, People, Blacks, Whites, the Masses.

Government is the word applied to those formally and effectively controlling a country. Government takes many forms: priestly rule, tribal or traditional rule, monarchies, dictatorships and a wide variety of representative forms of government which claim, at least, to govern by consent. Governments operate armies, police forces and courts to enforce their will - and demand a monopoly in this regard.

Society describes the total of human action. Workers, bosses, children, parents, politicians, voters, jailers, prisoners - at work and at play. Government (and in that sense the state) are clearly part of society, but are only a part. Even in the most totalitarian regime, the government cannot control, direct or determine all human action (and still less all human thought). Most often politicians act as if they control far more than they do in reality. For example, politicians in many different systems of government often speak of "the private individual" or "the private sector" as if these were residual categories representing a small part of reality. In fact, most people live most of their lives beyond the control of their political masters.

The powers that politicians demand for themselves define the degrees of freedom enjoyed by the people whom they govern. In turn peoples' expectations of their government also shape these lines between government and society. A government can assume protective powers (e.g. policing), regulatory powers (e.g. conflict-resolving as in courts), extractive powers (as in tax-raising) and re-distributive powers (as in welfare related). Political scientists have used the metaphors of the night watchman government (with minimal powers and functions), the welfare state government (with wide powers of intervention), the umpire or referee

government (as the arbiter between rival groups and
interests). A common, though by no means necessarily
successful, image of government in recently de-colonized
societies is that of the agency of development, the
eradicator of poverty, the establisher of social and
economic equality and of government as a nation-builder. In
this last role - that of the nation-builder - a distinction
must be made in culturally diverse societies of two kinds of
nation-building. In the first common character is achieved
through the elimination, or at least the suppression of
differences (a common nationalist tendency). In the second,
national reconciliation is achieved through the
accommodation of different groups within the society.

While it is important to decide what it is that we expect of
the government, we must not fall into the mistake of
supposing that a government can do anything which is
required of it. Some things are simply not possible. To
take an extreme but illustrative example, no government can
make its citizens immortal no matter how strong its mandate
nor intense the will of the people.

Many things are possible, but whatever is done, whether by a
government or by a private individual, exacts a price. If
we use our resources for one purpose they are not available

to pursue another. This is illustrated by the old slogan "guns or butter". The more money a country spends on armaments the less it has to spend on welfare. Not even the wealthiest country has the resources to satisfy all its needs at once.

This is still not the end of the question. It is not simply a matter of having so much money which we can spend on one thing or another. Attempts to change society in any direction have side effects and different policies may be incompatible with each other. It frequently happens in life that there are two things, both of which we want but the more we have of the one, the less we can have of the other. This is called "a trade off".

So, for example, in motoring there is a trade off between the advantages of speed and safety. If we want to get where we are going as quickly as possible we will have to run a high risk of accidents; if we want to run no risk of accidents we will not be able to move at all. This is the most common kind of trade off where the obvious solution is a compromise. We pursue both objectives up to a point and neither to extremes. There are also some trade offs where we have a stark choice of one thing or another and no middle ground is possible. There are also cases where an apparent trade off does not work in practice, so, for example, it superficially appears that there is a trade off between

individual liberty and efficiency but if in the pursuit of
efficiency we create a situation of intense conflict we may
end up with less efficiency than we would have had with more
liberty.

An interesting case of such complexity lies in the area of
equality. There is a good deal of evidence that there is a
trade off between the pursuit of economic growth and the
pursuit of equality. If equality is an end in itself, the
trade off is a simple one but if the object of pursuing
equality is to improve the lot of the poor, it is far less
simple. In a country which grows rapidly richer but remains
unequal the absolute position of the poor may improve faster
than in a country which grows slowly or not at all but
renders the distribution of income more equal.

In the debate now started, it is vital that South Africans
express themselves as to what they expect from their
government: coach, policeman, manager, equalizer, judge?
Equally we must specify the objectives against which a
future government's success or failure will be judged:
peace, justice, national conciliation, economic growth, or
the attainment of social and/or economic equality. And we
must realize that objectives must be selected, or at least
priorities allocated. If the citizenry does not articulate

its own goals - albeit in great diversity - government will judge itself by its own standards, and often merely by its ability to hold onto power.

BILLS OF RIGHTS, THE JUDICIARY AND THE LIMITS OF GOVERNMENT

We have tried to distinguish between state and country, society and government. Politics presents ever shifting lines of authority and influence in this regard. Three related political constructs are of particular importance in this regard. These are the judicial concepts of natural justice and due process, and the constitutional concept of a bill of fundamental or human rights.

In British judicial tradition the concept of natural justice embraces a set of basic principles of substantive and procedural fairness by which the justice of both state and individual actions are judged. These principles are not codified but are available to the courts as a basis of reviewing the actions of executive and legislative bodies. In governments with a tradition of the sovereignty of parliament, the legislature can exclude the courts from reviewing their actions in specific cases. In all residual cases these principles of natural justice stand as a fundamental test of good and competent government.

In the United States this residual test of fairness is more commonly described as <u>due process</u>, though this is a more narrow test.

Both concepts have been used by South African courts to protect, and extend areas of freedom, as well as to obstruct intrusions of government authority in unfair or unreasonable ways, notwithstanding the primacy of the South African parliament in making law.

Fundamental to this is the principle of judicial independence. Notions of natural justice, due process or the rule of law are meaningless in a society where the courts are viewed as an agency of the executure power whose function is merely to take retribution against those already condemned as enemies of the state. There are many examples in modern history of the excesses which result, when in the name of people's justice or some other overriding national cause, citizens are denied the right to a fair trial and to bring suit against the state in an open court before an impartial judge.

A related constitutional concept is that of a Bill of Rights. This is a code of rights, freedoms and entitlements which most often guarantees individual citizens freedom to

act in specified ways without interference or constraint of government. Commonly, freedom of speech, assembly, movement, religion, and freedom from the arbitrary arrest or detention are guaranteed in such documents.

Such documents have played an important role in defining, expanding and protecting the realm of individual freedom in relation to the powers of government.

In South Africa, where historically government power has not been dependent on black South African consent or participation, the concept of a Bill of Rights, and the allied concepts of natural justice and due process, have a vital role to play in changing the political culture and creating the 'space' necessary for democratic politics.

Several proposals in this regard, are on the table. The South African Law Commission has produced a draft Bill of Rights for discussion purposes. The KwaZulu Natal Indaba included a Bill of Rights in its constitutional proposals. The 1955 Freedom Charter, which has been the key policy document of the ANC, is suggestive of fundamental rights, and the ANC's revised constitutional guidelines, released for discussion in 1988, makes reference to a Bill of Rights in clauses (H) to (M). The business organization, the South African Federated Chamber of Industries (FCI), has also produced a Charter of Social, Economic and Political Rights.

These documents are important – and indeed perhaps a Bill of
Rights is the first document different parties in South
Africa should seek to negotiate and agree upon. This
document after all defines the zones of competence of
government and the zones of freedom of action for the
citizenry. This is a good place to start in
constitution-making.

DEMOCRATIC POLITICS

The word <u>democracy</u> is widely used and widely abused. It is
difficult in the modern world to find a political leader or
a political party who is not in favour of democracy. It is
often as difficult to understand what politicians <u>mean</u> when
they invoke democracy. At least six levels of meaning can
be identified:

1.   **Popular Participation**

     Aristotle used a compound word to describe a form of
     government meaning literally rule by the many and/or
     rule by the poor, or perhaps more clearly rule by the
     common people. It is this tradition which defines the
     first meaning given to the word by the Oxford
     Dictionary:

"government by the people ... in which the
sovereign power resides in the people as a whole,
and is exercised either directly by them ... or by
officers elected by them."

2. Jean-Jacques Rousseau And The General Will

In more modern times two different conceptions have
developed of "government by the people", both of which
are present in contemporary debate.

The first of these is the notion of the General Will.
Here government by a privileged elite is contrasted to
the sovereignty of the General Will. In the thoughts
of French philosopher Rousseau, the People are
conceived as mystical collective actor. Their
collective will is knowable, and it is this General
Will that constitutes the only source of legitimate
authority.

The People are a single actor whose will requires
strong agencies of articulation and implementation. In
the French Revolution (1789 - 1795), this mystical
General Will, in the Rousseauian tradition, swept away
the institutions, barriers and privileges of the Ancien
Regime. The old order was destroyed in a process which

began as a demand for constitutional monarchy (as expressed by the Tennis Court Oath), but was overtaken by the forces of popular democracy and culminated in the execution of the monarch and the Reign of Terror. In this way, the people obtained both articulators of their will, and ruthless implementers of it, through that small group of modern politicians, the Jacobins. Two key characteristics are important in Jacobin politics. Firstly, such politicians act not in the name or service of a tradition, estate, class or group - but in the name of the General Will. The Jacobin creed was most clearly articulated by their leader Maximilien Robespierre when he insisted "Our will is the General Will". Secondly because they act - as they see it - in the name of "The People" as a whole, resistance to their ideas or actions is seen as an attack on "The People", or treason. The distinctive political instrument of the Jacobins is that of the guillotine. Where "The People" rule, heads have a tendency to roll.

Jacobin forms of democratic politics have had two more recent manifestations. Socialist conceptions of democracy in the first half of this century have often led to the denial of individual freedom in the name of the General Will. In the construction of a new

socialist order diversity has often been equated with dissidence, and even treason. The gulag of Stalinist rule is the result. This is what French philosopher Albert Camus described as Napoleonic socialism. Its practical consequence, as he has noted, is to demand "justice" now and to promise freedom later.

The second modern manifestation of Rousseauian and Jacobin concepts of democracy is that which has occurred in newly de-colonized nations in the second half of the century. Here many new states were created by the act of colonial withdrawal. These new states, existing more on paper than in popular consciousness, had to be built in the nation-building conception of Lenin. A new social reality had to be extracted from an Ancien Regime. Difference and dissent were often seen as a fundamental threat to the new nation, whose rulers constantly stressed unity, often invoking at mass rallies the essentially Rousseauian notion "One X, one nation". The practical consequence of this stress on national unity, and a single national will, was that heads had to roll. Harmony meant conformity rather than the accommodation of difference.

Perhaps this Rousseauian democratic tradition is more important for what it destroyed. In France in 1789 it

swept away an old order as both effete and despotic.
The same can be said of Russia in 1917. In Africa and
Asia the politics of the General Will has often
replaced a colonial order. The track record of this
democratic tradition in terms of good government is,
however, hardly encouraging.

3. **James Madison And Representative Government**

A third tradition can be identified amongst Anglo Saxon
philosophers, revolutionaries and politicians on both
sides of the Atlantic Ocean. Many individuals
contributed to a new concept of government: John
Locke, David Hume, Edmund Burke in Britain; the
founding fathers, and in particular James Madison,
Thomas Jefferson and Alexander Hamilton in the United
States. Madison is selected here as the symbol of this
tradition. The Americans were concerned not only to
end what was for them a distant tyranny (British rule)
but also to establish what Lincoln came later to
describe as government of, by and for the people.

Outside of the (small) village in traditional society
direct democracy is difficult, or is at best possible
on only selected issues, as in Swiss plebiscites.
(The Swiss practice of referring key decisions to the

voters as a whole is a direct and meaningful exercise of democracy certainly capable and worthy of being practiced elsewhere.) Institutions must be designed through which popular participation can be channelled. In the Madison tradition these are the institutions of representative government. As the general will is complex and variable over time these institutions must provide for diversity. And as the inclination to tyranny is not restricted to kings or aristocrats, the institutions of government must operate within a system of constitutional constraints to prevent the abuse of power by rulers, present or future.

The problems and dilemmas experienced by the early architects of American democracy are vividly captured in the Federalist Papers. One attempt to prevent the abuse of power found expression in the doctrine of the separation of powers. The legislative arm of government was to make law; the executive arm to implement it; the judicial to interpret it, and also to ensure that laws made were consistent with both the constitution and Bill of Rights. Forms of popular participation were built into all three arms of government with the election of legislators, state governors and a federal president. Elaborate provision for shared decision-making between these arms was also

designed. For example only Congress may pass
legislation, but the President has a limited right to
veto law. Interpretation of law, and its conformity to
the constitution, is a role for the courts, and
ultimately for the Federal Supreme Court, the members
of which are nominated by the President and confirmed
by the Senate.

To Americans, governments were instituted to secure
certain "unalienable rights", among which were "life,
liberty and the pursuit of happiness". Because of
their concern for liberty, and fear of tyranny, they
tended to see democratic government as a means to these
ends, rather than as an end in itself. It was proper,
indeed necessary, therefore, to delegate governmental
powers carefully and limit government, even if
democratic, within certain clearly defined bounds. As
Thomas Jefferson stated in his first inaugural address:

> "All, too, will bear in mind this sacred
> principle, that though the will of the majority is
> in all cases to prevail, that will to be rightful
> must be reasonable; that the minority possesses
> their equal rights, which equal law must protect,
> and to violate would be oppression."

4.   Accountable Government: Government By Consent

A fourth strand of meaning of democratic politics is
that of the accountability of governments, to their
citizens, and the dependence of politicians on the
consent of the governed.

Almost all countries claiming to be democratic make
formal provision for this accountability.   In many
however, elections are essentially a sham and a fraud.

The test is a simple one: can consent, once given be
withdrawn?   Can the electors change their mind?   Have
voters the opportunity not only to install or hire
government, but also to fire them?   And can today's
majority become tomorrow's minority?

In turn, the answer to this question is provided by
whether governments change over time and how they
change.   An important link exists here between
governments, political parties, elections and the
extent and nature of choice available to the voter.

Though many theoretical claims have been made for
one-party democracy the evidence suggests that unless
voters can choose between parties at the polls the

ballot box is an impotent instrument. Political parties play the vital role of enabling individual citizens to act together with like-minded citizens to pursue their political interests. Political parties are the engine house of a democracy. The almost universal tendency of one-party systems is to equate country, government and party. The party is synonymous with the assumed popular view. Rival political groups are therefore viewed as "enemies of The People", or a threat to national unity. The return of Eastern European societies to multi-party forms of democracy provides eloquent evidence for this.

If government is to be accountable to the governed it is important not only that there should be more than one political party, but also that the plurality of parties should have a certain character. Firstly they should enjoy a reasonable prospect of attaining power or at least of participating in government. Secondly they should be internally democratic: that is the leaders of the party should be accountable to their members. The test of this accountability is the same as that of governments: are leaders voted out of office. A feature of one party systems is not only (and obviously) that one party rules, but also that the

leadership of that one party is remarkably durable. In
such Parties (normally describing themselves with the
definite article, and in upper case i.e. the Party)
leaders either die in office (like Lenin, Stalin and
Brezhnev) or are purged (like Khrushchev).

Only the competition between democratically constituted
parties can create democratic politics. The twentieth
century provides examples of vibrant multi-party
democracies on every continent: U.S.A., France, Japan,
Botswana and Brazil.

5.   **Egalitarianism**

A fifth strand of meaning often intended in the use of
the word democratic is that of _equality_. This was one
of the three cries of the French revolution, together
with liberty and fraternity.

In contemporary times egalitarianism can take two
forms:

-    equality of opportunity or access:
-    equality of outcome or entitlement.

Equality before the law, in the sense that all
citizens, whatever their rank or station, are equal in

the eyes of the law and enjoy the same civic or legal
rights is an example of equality of opportunity.
Another example is the action of governments to remove
discriminatory access to public services and public
institutions. The desegregation of buses, schools,
universities and the polling booths in the United
States in the 1960's are examples of this.

Progressive income tax, welfare and some affirmative
action programmes are all examples of government
actions which seek to establish an equality of outcome
or entitlements.

Most governments today strive to achieve both forms of
equality. However neither politicians, nor the public,
should confuse these two forms of equality. The
evidence of recent decades suggests that ensuring equal
opportunity is easier to attain than ensuring equal
outcomes. Programmes which espouse an equality of
entitlements are very expensive, and can exhaust the
resources of governments, even in the richest of
societies. Recent critiques of welfare programmes have
also noted their dependency creating character. "The
greater the need, the greater the entitlement" formula
can also perpetuate rather than alleviate deprivation,
both by rewarding deprivation and by expanding
bureaucracy.

Perhaps the most significant difference in the two
types of equality is the radically different role they
demand from government. Equality of opportunity
requires certain clearly limited and attainable roles
for government: quality education available without
discrimination, a stable currency, adequate defence and
police protection. Each citizen is then free to make
the most of his God given talents. Equality of
outcomes requires the active involvement of government
in the most intimate details of individual lives in
order to undo the unequal outcomes of differences in
talents and application. The range of social
programmes that can be justified to achieve equality of
result is nearly infinite. This ever elusive goal has
contributed as much as any theory to augment the power
and reach of government in the twentieth century.

6. **Accommodating Differences**

If the people spoke in a single voice and wanted the
same things democratic politics would be a simple
matter. However the universal experience of popular
participation in government is that of competing
conceptions of the good, or conflicting assertions of
rights, interests and entitlements. It is this

experience that has led an English political scientist
Bernard Crick, to make the following observation:

"Politics ... can be simply defined as the
activity by which differing interests within a
given unit of rule are conciliated."

In Defence of Politics,
1966: 21.

An essential precondition in this concept of democratic
politics is the recognition of diversity. If the
expression of dissent is seen as an act of disloyalty,
or a threat to national unity, then politics cannot
accommodate such differences. A multi-party system
seems necessary for accommodative politics as does the
independence and autonomy of key social institutions
such as the courts, the media, the universities,
businesses and trade unions. It is through these
institutions that dissenting notions of the common good
can be legitimately articulated. It is the task of the
institutions of representative government to resolve,
or at least accommodate, these differences.

CONSTITUTIONS AND POLITICS

Much (though not all) of the discussion in the second
section of this essay has to do with constitutions.

Constitutions are a set of rules regulating government. In some cases the rules are written down (as in the United States and Federal Republic of Germany), in others they are contained in a set of conventions or customs (as in Britain).

A constitution must always be viewed in the context of the political culture and patterns of political behaviour which has produced it. Where the words and deeds of politicians diverge their deeds are almost always more important than their words.

This is also true of South Africa. The country needs a new political culture as much as it needs a new constitution. Without this the finest constituent in the world is likely to have little impact on the lives of ordinary South Africans.

WAYS OF SEEING SOUTH AFRICA:
THE GROUP VERSUS THE INDIVIDUAL

We have another issue to clarify before turning to survey constitutional and political options. It is both important and complex. In many ways this issue, or this debate, lies at the heart of present day conflict.

How are we to understand South African society? Is it a country of some 37 million individuals? Or is it a piece of territory which eight or nine groups, peoples or nations uneasily co-habit?

Firstly, we must raise our eyes beyond our borders and seek to understand the role which groups have played in other societies. A particular South Africa psychosis is to always assert our uniqueness. The South African experience of groups has been a deeply divisive one. Group identity has been defined and imposed by a politically powerful minority, and resisted by a protesting majority. For many this experience has emptied the concept of any legitimate meaning. Its every appearance is viewed as minority domination in disguise.

This does not represent the universal role of the group concept. The group has played, and still plays, a prominent role in many plural and democratic societies.

At the outset of discussing this role some distinctions must be drawn.

The first of these is the nature of group formation. Groups may be formally defined by some external authority (for example, the courts, the government or the law) or they may be self-defining. Groups may form (either way) along lines

of culture, language, religion, ethnicity or race. Groups may be (and indeed most commonly are) ideologically defined. A political party in a multi-party state is most commonly a self-defined, ideologically coherent group.

Secondly, groups may be defined for the purpose of political representation or to ensure the attainment of group rights. In the first case the purpose is normally to facilitate effective inter-group accommodation through political participation. In the second the purpose is to equalize government provided or mediated benefits across groups.

Thirdly, though group representation and group rights have been used (as in South Africa) to secure and maintain minority domination, more commonly their purpose is quite the reverse. Other societies have used the group concept either to protect minority rights or prevent discrimination; or to accommodate and meliorate inter-group conflict. Some examples will serve to illustrate this point.

In the United States group concepts have been used to detect discrimination or deprivation between individual American citizens who belong to different groups. The American population has been divided into groups as reflected in the census. These divisions have changed over time. Sometimes newly created groups have had an arbitrary quality, as was at least initially the case with the categories Hispanic and

Asian. These categories have been used, mainly by the
courts, but also by the executive agencies of government and
many private institutions in the United States, to increase
minority-group access to public benefits. Those purposes
have included representation (in for example the
re-delimiting of electoral districts along group/ethnic
lines), the allocation of benefits (in respect of
scholarships), to protect interests (in respect of language
rights) to express preferences (in respect of ethnic
composition as defined by affirmative action programmes i.e.
programmes to allocate jobs or benefits with reference to
language or caste) and to secure rights (in respect of
government benefit programmes).

In India in the 1950's (but continuing today) the courts
have used the group concept for a similar range of purposes.
Groups have not been defined in either religious or ethnic
terms (except in regard to personal law) but they have been
defined in terms of language and caste. A residual category
has also emerged - "other backward castes" (OBC's). These
groups have been used to reserve representation, rights and
benefits - always with the view of achieving inter-group
equality. Inevitability such reservation has influenced the
pattern of political patronage - to the point in one Indian
state that parties argued that some 85% of political

positions were group reserved, and the court held that this had to be reduced to no more than 50%. This problem illustrates two dangers in all affirmative action programmes:

- firstly, it is difficult to know when to stop;

- secondly it is possible to create a circumstance which rewards, and so maintains, backwardness and deprivation.

Similar examples could be given of the use of the group concept in Switzerland, Lebanon and many other countries.

The above uses of the group concept are consistent with democratic politics. Such uses enhance rather than diminish the individual rights of citizens. Their purpose is inclusive, and not exclusive. For example in India parents who among them have 40 or more children in a school may insist on mother tongue instruction. This does not entitle parents or educational providers to exclude any child wishing instruction in this language from joining the class.

A final point about the use of groups in society is to note that majority and minority groupings use and react to group differentiation differently. It is common for ethnic,

racial, cultural, religious or linguistic majorities to deny
group differences; even to the point of ruthlessness. It
is as common for ethnic, racial, cultural, religious and
linguistic minorities to insist on both the existence and
accommodation of group diversity.

It is against this background that we must view the group
and the individual in South African society.

ECONOMIC SYSTEMS AND POLITICAL SYSTEMS

It is widely believed that there are essentially two
economic systems in the world, the one called socialism and
the other called capitalism. Reality is a great deal more
complicated than that.

As a matter of formal definition, socialism is defined as a
system where the "means of production" are owned by the
state or, as it is sometimes said, by the people. The
"means of production" means all material things which are
used in the process of making other things or of producing
wealth in any form. The houses in which people live, the
clothes that they wear and the food that they eat are not
means of production, but all kinds of machines and tools

down to typewriters and a carpenter's hammer are means of
production. Although houses are not a means of production
it is usually assumed that under socialism, houses, flats,
etc., are also owned by the state and rented out to
individuals.

The main point to be noted about this system is that the
word "ownership" does not have a clear and unambiguous
meaning and it can often happen that somebody or some
institution is said to own something whereas the actual
decision about how it should be used and the benefits of
using it accrue to somebody else. This is important because
"the people" can be said to own things but they cannot
effectively control them except through other agencies which
are capable of making actual decisions.

So, while under socialism it may be said that "the people"
own the means of production, the government inevitably has
real control over them. It is therefore of the utmost
importance in considering the significance of a socialist
system to ask who controls the government because those who
actually control the government actually control the means
of production, which means in effect that they are the only
employer and that they are free to decide who to employ and
who not to employ, and to set all wages and prices to suit
themselves. If the government is effectively under the

control of the people it can be assumed that it will at least make a genuine effort to make these decisions in the interests of the people in general or at least of the majority of them. If it is not under the effective control of the people it is much more likely that it will make these decisions in the interests of those who actually control the government. The assumption widely made, therefore, that socialism leads to equality is not in itself true. Socialism under an undemocratic government could well lead to great inequality.

Capitalism is a system whereby the means of production are owned privately and can be bought and sold. To a greater or lesser extent the owners of capital and the workers compete with each other for jobs, for workers and for customers, and prices, wages and patterns of employment are the result of the consequences of this competition.

In the real world, however, governments inevitably interfere with the freedom of competition in various ways, of which some of the most common are fixing maximum prices, rents or interest rates, limiting or controlling the occupations which people can undertake and, in some occupations, regulating the way in which the business is run in some detail.

The first thing to be noticed is that the great majority of countries in the real world represent a mixture of the two systems. There is not a single country in the world where the government undertakes no activities of a business nature although there are a few where it does extremely little. There are no countries in the world where the principle of the state ownership of the means of production is actually taken to its extreme logical extent so that it is not possible to own a typewriter or a hammer. Attempts were made to apply this extreme view in the Soviet Union and in China immediately after their respective revolutions but these were abandoned.

In the majority of countries in the world which call themselves socialist, there is in fact a good deal of private property and a considerable proportion of the economy is conducted on a basis of private ownership and markets although there are usually restrictions as to how big individual undertakings can become and prices are often controlled. However, in countries like Poland the contribution of private activity based on private property to the total wealth of the country has at all times been substantial.

In countries which call themselves capitalist it is not infrequent for the government to own and operate a very substantial proportion of the economy, with the proportion

owned by the government varying very much from country to country. Japan has always had one of the lowest proportions, which has been further reduced in recent years by privatisation, while South Africa has always had a relatively high proportion of state ownership.

There is another aspect of state activity which is sometimes called socialist but which has nothing to do with the ownership of the means of production and which is quite distinct in principle. This is so-called transfer payments, in terms of which the state pays to some people money which has been collected by means of taxes from others. These are found in all countries but to considerably varying extents. There are direct transfer payments in the form of money; old age pensions and unemployment insurance, are transfer payments to the extent that they do not reflect the repayment of money which has been previously paid in the form of insurance premiums by the person receiving. Free services or services supplied at below cost by the state such as free education or free or subsidized health care also constitute transfer payments. There is no necessary connection between the scale of transfer payments and either socialism or capitalism. The most extensive transfer payments in the world are made in Sweden where the State's share of the economy is very small. The scale and

generosity of these payments tends rather to correlate with
the wealth of the country. Neither India (which calls
itself socialist) nor China (which calls itself communist)
is in a position to make, or does make, any substantial
provision for the unfortunate.

The connection between economic systems and political
systems goes two ways. On the one hand, the significance of
the economic system depends on the political system in the
way which we have already seen. The economic system confers
greater or lesser power on the government. The political
system decides how that power will be exercised and in whose
interests, so the actual effect on the people of government
ownership of the economy will be quite different depending
on whether the government is under the effective control of
the people or not.

On the other hand, there also appears to be an influence in
the opposite direction that; it is not possible to
reconcile certain political systems with certain economic
systems. It is a fact that there does not exist in the
world, and never has existed in the world, a society where
most of the economy is owned by the government and where the
government can be changed by means of free elections. There
are two possible reasons for this, both of which turn on the
fact that the ownership of the economy places gigantic power

in the hands of the government since the government is the
sole decider of who shall be employed and in what positions;
what shall be paid in wages; what the difference should be
between the payments to different people; what should be
produced and at what prices it should be sold.

Under such a system it is difficult to see how a democracy
could operate since there is no space in which opposition
groups can organize. The government is the only publisher,
not only of newspapers but of all printed material of any
kind. The government owns all venues in which meetings can
be held and so, without any formal ban on meetings, can
prevent any meeting from taking place. In the same way,
without any formal censorship, the government decides what
shall be published.

The other consideration is that the power conferred on the
government is so great that no group of people possessing
such power are prepared to contemplate parting with it.
Whatever the explanation may be, the fact remains.

There is no regular link between capitalism and any
particular form of government. While all the democratic
countries in the world are capitalist to a significant
extent, the level of government involvement varies very
much, from very high in India to very low in Japan. There

are also undemocratic governments presiding over
predominantly capitalist economies, including military
dictatorships, one-party states, and, in one case, a Crown
Colony. This is Hong Kong, which probably has the closest
approximation in the world to a purely capitalist economy
and is governed in a totally undemocratic manner as a
British colony. Other countries with predominantly
capitalist economies which have either undemocratic or
imperfect democratic governments include Taiwan, South
Korea, Kenya and the Ivory Coast (and, until recently)
Brazil.

The amount of government control over the economy also
varies very much and does not appear to depend on the
political system. The degree of government control is much
greater in some democratic states than in others and also in
undemocratic countries. There is, for example, much more
government control of the economy in Holland than in
Belgium, and more in Singapore than in Taiwan, and more in
Taiwan than in Hong Kong.

The system which used to be called fascism, which no country
in the world will admit to operating today, was
characterized by totalitarian government, a mixture of

capitalism and state ownership and a very high degree of
state control, to such an extent that the actual control of
the economy was more in the hands of the government than in
the hands of the nominal owners.

SECTION TWO

CONSTITUTIONAL AND POLITICAL OPTIONS

What are the constitutional and political alternatives available to the people of South Africa? In this section we set out some of the major choices; describe where they have operated, and sketch some of their advantages and disadvantages.

ONE COUNTRY OR MANY?

The first critical question which faces South Africa is are we, and do we want to be, one country or many? In times past South Africa comprised four distinct areas: two colonies and two republics. Partition (and secession) have occurred in other countries, and often as a device to resolve or diminish inter-communal conflict. It is an option for South Africa.

Often partition has been imposed by a third party rather than negotiated between rival groups within the united territory. Thus were created new states in central Europe after the First World War. This too is the character of partition in Ireland and Cyprus, and (more complexly) Palestine. In the case of India separation into India and

Pakistan was agreed, but under the shadow of Britain's
impatient and imminent withdrawal. The separation of Norway
from Sweden and of Iceland from Denmark are instances of
amicable, negotiated partition without third party
involvement. This is also the case of Belgium's separation
from Holland.

Has partition resolved inter-group conflict? The evidence
is mixed, and judgements are entirely dependent on the sense
of alternatives.

Some characteristics would seem to influence the costs of
partition as well as its chances of resolving communal
conflict.

<u>Firstly</u> the stronger the link between group and territory
the easier (or less costly) the separation. If a country
has its northern regions populated by one group and the
south by another, the creation of a frontier may be
relatively painless. Where this is not the case not only
does territorial dispersion perpetuate inter-group conflict
within the newly separated countries, it also increases
group conflict around resources, administration, and
government.

Secondly physical barriers promote easy and uncontested separation. An example here is Singapore's expulsion from the Malaysian federation, as is the separation of Iceland from Denmark.

Thirdly where partition is the product of negotiation it can be relatively painlessly achieved. It can also result in good relations between the newly separated countries, as is the case in the examples of negotiated partition cited above.

Fourthly, however, the desirability of partition must always be measured against realistically available alternatives. If a long civil war is the alternative even disruptive and costly partition may be preferable.

In the case of South Africa partition has often been advocated as a means of producing one or more ethnically homogenous states: ethnic partition if you like. This is not the only alternative. Were one region of South Africa to reach an inter-group accommodation unacceptable to other regions and the country as a whole it might seek to secede. Non-ethnic partition is also possible.

There are other costs, created by partition. The cost of government could be increased, and, in the absence of a free trade zone, economic efficiency could be reduced. More

importantly, as James Madison explained in his Federalist
Paper Number 10, an extended republic enhances, rather than
diminishes, protection for individual liberties.

> "In smaller homogeneous societies it is easier for a
> majority to oppress a minority than in a large country
> with many different interests that must be accommodated
> through compromises."

The costs of partition should not be assumed lightly. It is
estimated that the partition of India and Pakistan resulted
in the loss of between 500 000 and 1 000 000 lives, and that
up to 12 000 000 people moved from the one country to the
other. And since partition India and Pakistan have fought
three wars over disputed territory.

The alternative to partition is a united (but not
necessarily unitary) state. This brings us to our next set
of alternatives.

FEDERALISM OR CENTRALIZATION

State powers may be centralized in national institutions or
dispersed in regional bodies.

In the centralized state, administrative and legislative powers and functions are concentrated in national institutions. Though subordinate administrative units may be created on a regional basis, policy is determined nationally, and is uniform. The regional structures derive both authority and resources from the centre. This pattern of government is often described as unitary. Britain, France and Japan are centralized, unitary states, as is South Africa.

In federal states, political power is shared between a central administration, with competence in some issues, and federal units, with competence in others. Federal units, normally called states or provinces, have their own administrations, often their own legislature, and in some cases unique legal systems. The United States, Switzerland, Canada, Australia, the Federal Republic of Germany and the Soviet Union are all federal states.

Federation does not necessarily resolve group conflict. It does however offer opportunities to accommodate group diversity not available in the centralized state. This firstly because different groups may participate and exercise power in different federal units. Also because devolved decision-making allows for different patterns of government as well as the competitive pursuit of rival policies.

The second point is well illustrated by the competition between federal units in respect of taxation. Where taxes are too high in one federal unit both producers and consumers are likely to vote with their feet and move to another. Federalism can also promote popular participation in government. It generally provides greater scope for local decision-making, and therefore for local politics than is the case in the unitary state. This enables many more people to participate directly in political decision-making.

As already noted federalism does not necessarily resolve group conflict. However in this regard the experience of Nigeria's three encounters with federal constitutions (the third of which is about to come into effect) illustrate some of the advantages of dividing a heterogeneous state into many units of roughly equal size (and ideally similar levels of resource). In Nigeria's first federation the country was divided into four regions of which the northern province was dominant. The second federation expanded to 19 states of roughly equal size; and the third proposes 21 states, also of similar size.

A last word is that federal experience has been chiefly that of devolving authority to territorially defined units. Examples of non-territorial federalism exist. In Moravia in 1905 a federal arrangement was created in which Czech and

German citizens could elect to be governed by a set of Czech
or German institutions, irrespective of where they lived.
This was described as personal federalism. In Estonia
government by language group existed for some years. In
contemporary Belgium and the Quebec Province of Canada
certain communal affairs - including schooling - are
determined by group-defined structures which operate
independently of territory. In the Ottoman Empire the same
was true in respect of issues relating to personal law, as
well as education.

In addition to the above, non-territorial federalism has
been the subject of serious debate, for example by Adolph
Fischoff in 1869 and Karl Renner in 1918 and Otto Bauer in
1923 and 1924 in respect of the Austro-Hungarian Empire.

In South Africa federalist thinking has a long tradition.
Federation was advocated by colonial administrators Grey
(1840's) and Carnarvon (1870's). Federation was also
debated, before being rejected, in the 1909 National
Convention that drafted the first constitution for a united
South Africa. It has been advocated by many politically
significant groups over time. It is central to the present
KwaNatal Indaba proposals. Federal style devolution is
advocated in Kendall and Louw's book South Africa: The
Solution. This book follows the Swiss Cantonal and
municipal model of devolved authority.

Federal or centralized forms of state power? These
constitute a key constitutional alternative for South
Africa.

THE AGENDA OF GOVERNMENT:
WHO DECIDES WHAT?

Politicians often talk of political power as if it were a
single, simple entity: something that can be possessed by
only one person or group at one time. Political power is
the capacity to determine how government shapes the lives of
its citizens. It actually is many facetted, and resides at
any moment in time in the hands of many people, groups and
institutions. Thus it is useful to spell out some of the
different aspects or agendas at work in "government". At
least three levels of authority or decision-making can be
delineated.

'Personal law', or as it is more commonly known in South
Africa the law of persons regulates vital issues such as
marriage, divorce, parental authority, estates. As noted
above in the Ottoman Empire diversity, especially religious,
was accommodated in personal law. The same choice is
available to black South Africans, who can marry, for
example, under customary law.

A second level of authority and decision-making relates to underline community affairs, especially, though not exclusively, schooling.

Third (fourth and fifth) levels relates to political decision-making in bigger units: the city, the federal state, national politics.

Considerable flexibility exists as to which issues are determined at community, or higher, levels. Considerable control can be located at community level over schooling for example: from the choice of language of instruction, to the establishment and control of schools and examination bodies. This can be done whilst retaining high levels of tax payer funding for schools.

Furthermore this communal level of politics can be group rather than territory based, as is the case in Belgium and Quebec.

For most parents the nature, quality and character of the education of their children is a central political concern. To remove decisions about schooling to a community level (whether territorially or group based) not only allows for direct popular decision-making, but also accommodates both diversity and choice. When national or even regional

education authorities determine education they choose sides between both parents and competing concepts of education. Where these decisions are devolved to the neighbourhood or community these divisive, emotion-charged, choices are avoided. Various mechanisms for the state funding of schools, without state control, exist, of which one prominent method is the voucher system, where funding is provided to the parent rather than the school system.

ELECTORAL SYSTEMS
FIRST-PAST-THE-POST VERSUS PROPORTIONAL REPRESENTATION

As noted above, if democracy means government by the people then democratic politics requires institutions of representative government through which the people elect politicians to government on their behalf. A wide range of alternative electoral systems exist. Though much of the debate about these alternative systems is technical, the choices described here reflect (and determine) different purposes for representative government. Two broad alternative purposes can be defined, and most electoral systems involve trade-offs between these.

Firstly electoral systems and processes can be designed to provide for competition between rival proposals, parties or people, in a way in which one proposal, party or person will emerge as the clear winner, and all others as losers.

An example of this "winner-takes-all" outcome is that of the U.S. presidency. When this electoral technique is used to elect a parliament, or representative assembly, it is usually through single representative constituencies, in which the candidate polling the highest number of votes (but not necessarily a majority) joins the parliament, and the other candidates are excluded.

A consequence of this electoral system is that a party can gain control of the legislative or representative assembly without winning an outright majority of the popular vote. Indeed this often occurs. For example in the 13 governments which have ruled Britain since 1945 none has enjoyed a majority of the popular vote. The comfortable majority of seats achieved by Margaret Thatcher in her three victories at the polls have all been achieved with 45% or less of the popular vote.

The discrepancy between votes and seats, which is the unintended consequence of winner-takes-all electoral systems, can produce an outcome in which the party which wins most seats is not the same party winning most votes. This was the case in South Africa in 1948 when the National Party with 41% of votes won 53% of seats in contrast to the

United Party's 51% of votes and 47% of seats. The parties
obtaining most votes also failed to win most seats in Canada
in 1979, and in New Zealand in 1978 and 1981.

A positive feature of "winner-takes-all" is the incentive it
gives to parties to create the broadest possible coalitions
within their own ranks. It encourages two-party systems and
gives each party an incentive to moderate its position and
appeal to "the centre". In this manner it promotes
ideological compromises before the election rather than
between ideological factions afterwards.

An alternative electoral technique exists for relating seats
won to votes cast. This is proportional representation.
Though a number of alternative forms of proportional
representation exist the key characteristic of the system is
that a party is allocated seats in the representative body
in proportion to its share of popular votes cast.

The major consequence of this electoral technique is to
promote broader participation of political parties in
representative institutions and governments. In practice
the role of the biggest party is reduced, and that of small
parties is enhanced. The clearest example of this is to
compare the political fortunes of the liberal parties of
Britain (winner-takes-all) with that of West Germany
(proportional representation).

Generally the British Liberal Party has won more votes than
its German counterpart. Yet since the war British Liberals
have consistently had fewer seats in parliament than their
share of votes and have not participated in government in 45
years, or 13 administrations. German Liberals have enjoyed
full representations and have constituted a powerful role in
national government in 13 out of 15 governments since 1949.

Proportional representation systems, by offering smaller
parties a more meaningful role, often result in coalition
government. (This would not result, of course, if one party
consistently won 50% of the vote.) It is often argued that
coalition governments are weak and unstable. The experience
of continental Europe (whose electoral systems are
universally based on proportional representation principles)
refutes this. As Finer has noted the coalition governments
of post-war Europe have reflected greater policy stability
than the oscillating Conservative/Labour Party governments
of post-war Britain.

Broad based political participation can also produce
political stability, even when governments change often.
Italy provides a dramatic example of this. Since 1945 Italy
has experienced no less than 52 changes of government. Yet
all those governments involved coalitions between
centre-left or centre-right parties. Policies and people

..

remained constant over time. Prime Ministers changed
frequently. Italian democracy has not been undermined by
this "musical chairs" process. And in recent times Italy's
economy has grown impressively.

Two further points can be made about alternative electoral
systems. Firstly the choice of system has an impact on the
role of the individual representative and his party in the
political process. In single representative constituency
systems the individual representative develops a
relationship with a particular constituency or district. He
is "the local MP". His relationship with his electorate can
be a close and important one. He can be accessible to his
constituents, and act for them - including those who did not
vote for him. He can pursue local issues and resolve local
problems. This can, it should be noted, develop into a
system of patronage - what Americans describe as pork barrel
politics, where the representative can be more concerned
with the benefits he can obtain (normally through traded
support) for his district, than with national or even
regional good government.

The national list form of proportional representation
completely breaks the link between voter and individual
representative. The voter elects a party and not a person.
The party's central authority allocates the seats it wins to
a list of its chosen representatives.

Other forms of proportional representation - such as the
West German system - allocates half the seats to area bound
representatives, and the other to party list
representatives.

The second point is that electoral systems can be designed
not only to promote broad-based participation but also to
require inter-party (and often therefore inter-group)
accommodation. For example the second Nigerian federal
constitution required the successful candidate for president
not only to win a plurality of votes (i.e. more votes than
anyone else) but also to achieve a broad-based distribution
of votes as between federal states. Many variants of this
example exist. When such provisions are combined with a
diversity of representative bodies (discussed in the next
section) and a power-sharing pattern in the executive they
can provide powerful incentives for both inter-party and
inter-group accommodation. They do this both by requiring
political parties seeking power to recruit support across
regions and groups as well as rewarding multi-party
alliances.

REPRESENTING WHAT?
ONE CHAMBER OR TWO?

Representative institutions of government in the democratic
tradition have as their purpose to define and represent the

general will. As was noted in the first section however the
general will is seldom a single or unequivocal thing. Many
countries have chosen therefore to give voice to government
by consent in more than one way. Two chamber parliaments
are constituted to this end.

Again there is a wide range of alternatives. In the United
States, seats in the lower house - the House of
Representatives - are allocated on the basis of population,
and in the Senate equally for each state. In Britain, the
lower house - The Commons - comprises one person one vote
directly elected representatives, whilst the Lords represent
a combination of hereditary privilege and appointed members.
Two Chamber parliaments exist in India, Pakistan, Malayisa,
the Philippines, Japan, the Argentina, Bolivia, Brazil,
Columbia, Peru, Uruaguay, Venezuela, Switzerland, France and
Italy.

Two questions are important here for South Africa. Does
South Africa want to create representative institutions
which reflect interests other than those of individuals?
Put differently does it want to count interest groups as
well as heads? A parliament without one chamber which
reflects the political aspirations of the country as

expressed through universal individual franchise is difficult to reconcile with the characteristics of democracy. However many countries have chosen to combine such a chamber with another form of representation.

Many options exist for additional representation. The U.S. experience points to some pattern of territorial representation. In a huge and geographically diverse country such as the U.S. the effective representation of all regions, even the most distant and most sparsely populated, promotes national geographic integration, and prevents regional domination. In other cases different political interests are represented in a second chamber. Specific expertise and interests can be given representation in such a second chamber.

In South Africa an option often discussed is the representation of group interests in such a second chamber. This idea was contained in the original constitutional proposals of the Progressive Party (set out in the report of the Molteno Commission). More recently it constitutes the basis of the KwaZulu Natal Indaba proposals for a regional second chamber. These proposals make provision for self-defined groups as well as a 'South African' group. A

Soviet academic, Starushenko, made a proposal along these lines a few years ago. Group interests (racially defined) were represented, though in impotent minority form, in the South African Senate from 1936 until the late 1960's.

A second important question should a second chamber be considered, is the relationship between these chambers? Here the options range from the largely co-terminal, or equal, powers of the U.S. Senate and House of Representatives; to the review/delay powers of the British House of Lords; to the purely advisory role of second chambers elsewhere.

THE PRESIDENTIAL VERSUS THE PARLIAMENTARY EXECUTIVE

A further issue to be considered is the relationship of executive power to the legislature or parliament. The range of options here extend from the American separation of powers where the president is elected separately from Congress, to the British system where parliament elects the executive. The French model of a directly elected President who acts together with a Prime Minister dependent on parliamentary support represents a middle position.

South Africa's current dispensation is similar to France. Though the President is elected by parliament, thereafter his power and role is substantially independent of parliament.

Each system has its advantages. Parliamentary executives concentrate power in the legislature. A presidential executive has direct popular legitimacy and can check and balance the powers of parliament.

Perhaps a relevant issue for South Africa is that the more dispersed and numerous the forms of state power there are the easier it will be to accommodate divergent and rival groups within the institutions of government.

EXECUTIVE GOVERNMENT:
MAJORITARIANISM OR POWER SHARING

If we turn from parliament or the National Assembly to the executive or administrative arm of government some important options can be defined.

The first, and most crucial, of these revolves around the desired character of executive authority. Should the president or prime minister, and his cabinet, be drawn exclusively from the largest party? Or, should the executive accommodate more than the majority party?

This question is answered more frequently by the political process and culture of a country rather than by its formal constitutional provisions or conventions.

In countries such as Britain, Canada, the United States and Australia the party winning most seats becomes the executive. In countries with a plurality of parties, none of which enjoys an outright majority, shared executives are more common. In some countries with strong lines of communal division a pattern of inter-group and inter-party cooperation in executive government has emerged over time. In Switzerland seats of the executive Federal Council are allocated by informal agreement according to language and party. Austria was governed for some two decades by a "Grand Coalition". In Holland, as a consequence of the wide spectrum of voter support, all post World War II governments have been some form of ideological/religious coalition. In Lebanon a pattern has persisted over time where the President is drawn from one religious community and the prime minister from another.

Many terms have been applied to this practice of shared executive power: concordance democracy, coalescent politics, consensus politics and consociation. The common character is a will and ability of different parties and

groups to cooperate in the exercise of executive government authority. The motive has often been a sober one: to end or prevent civil war.

Conflict itself, rather than deals struck in smoke filled rooms, or complex constitutional formula's, may drive the sharing of power. As Hanf has argued:

> "... consociation may be the product of a conflict in which there are no winners and losers rather than the product of elite intentions and actions - it is essentially a civilized form of cease fire." (Hanf: 1981).

SECTION THREE
TOWARDS RESPONSIBLE
TRANSITION

NO INEVITABLE PROGRESS

A lesson of our century is that there are few human
situations which cannot get worse; change does not
necessarily mean progress. Economic growth does not
necessarily produce political freedom or social progress.
The end of colonial rule does not necessarily end, or even
reduce, poverty. Democracy does not necessarily bring
peace.

Equally the citizens of the twentieth century should be
cautious about utopian designs. It seems both more
difficult, but also more important, to decide how to move
forward in a society, rather than to design an impeccable
vision of the intended final destination.

Almost all South Africans are united by some broad goals:
they seek <u>peace</u>, in the sense of an end to inter-group
conflict; they seek <u>justice</u>, in the sense of democratic
rights and democratic freedoms; they seek increasing
<u>prosperity</u>, in the sense of enhanced housing, health,

education and employment opportunities. The debate which
rages, and must rage, is about what specific steps we can
take now to move in that direction.

With respect to constitutional and political change this
suggests that we should be as concerned with how we initiate
change in this area, as with what changes are effected. The
process is as important as the product.

CONSTITUTION-MAKING

Constitutions can be made in many different ways. A common
characteristic is that the constitution is only as effective
as the process that produced it. Put differently, unless
the constitution is a product of broad political
participation; unless it is the creation of the inter-play
of the real political forces at work in the society, it is
unlikely to be successful in regulating those forces.

How can broad-based participation be achieved in the process
of making a new South African constitution?

At least three stages can be identified in the
constitution-making process:

1. **Drafting proposals**

    The start of the process can be the production of a
    draft. The draft can draw on many sources. Certainly
    it must reflect the political culture of the society it
    seeks to shape. It can also however draw on the
    experience of others. Ideas and principles of good
    government have proved eminently exportable as the
    experience of the United States, India, Germany,
    Botswana and Japan illustrate.

    The authorship of the draft must reflect all the key
    parties to political conflict. The drafters must seek
    to rise above sectional interests.

    Many options exist. Firstly, South African society is
    now rich in proposals for constitutional change. Three
    sets of proposals originating from the National Party,
    the KwaZulu Natal Indaba and the ANC already suggest
    some important areas of agreement:

    -   a united (though not necessarily unitary) country;
    -   equal political participation for all;
    -   multi-party democracy;
    -   the independence of the judiciary;
    -   a Bill of Rights.

An expert individual or group could chart areas of agreement as well as a set of alternatives. Foreign expertise could be enlisted to examine what South Africa could learn from other societies. In this regard many comparisons are better than a few, and differences are as instructive as similarities. We must look for countries of comparable levels of economic development, industrialization and urbanization. Brazil, Mexico, Portugal, Greece, India may all have something to offer in this regard.

2.   **Debating proposals**

A second stage is that of the debate of alternative proposals. Clearly to be meaningful a number of important conditions attach:

-    the debate must include all groups with significant political power, from the Conservative Party to the African National and Pan Africanist Congresses;

-    secondly, to have any chance to reach agreement these groups must enter the debate ready to compromise on at least some important issues;

- thirdly the process of debate must allow for reference by political leaders of deadlock and/or concession issues to their supporters. Constitutions agreed by leaders without the step-by-step knowledge and support of their followers are unlikely to be effective.

3. **Adopting proposals**

A third stage is the ratification and adoption of agreed compromises by the broadest and most inclusive process of popular participation possible. Often , but not necessarily, this is by means of plebiscite. In divided societies, however, constitutions need not only the support of numerical majorities but also those politically organized minorities on whose cooperation the constitution depends.

A BILL OF RIGHTS AND A TRANSITIONAL GOVERNMENT

When the above three stages are considered in the light of South African realities the problems are legion.

Firstly, which individual or group enjoys sufficient confidence across groups to be entrusted with the drafting of proposals for a new constitution?

-    academics?

-    the Chief Justice?

-    a group collectively constructed to create confidence
     across the lines of political conflict?

Secondly, how can the type of debate envisaged above be
initiated in contemporary South Africa?

Thirdly, what form of popular but inclusive endorsement
would indicate really broad-based support?

In this regard both the African National Congress and Mass
Democratic Movement have proposed a transitional government
to enable free political activity. However the prospects of
the present power holders agreeing to surrender power until
an acceptable new political process has been created seem
remote.

However the concept of a Bill of Rights has been accepted by
most major players. The purpose of a Bill of Rights is to
ensure the necessary degrees of freedom for all citizens to
join or form political parties, articulate and debate
political aspirations, and engage in peaceful political
activity. At the same time this concept is designed to
protect public order against political violence. Surely
this instrument - if supported by a political culture which

makes it more than a piece of paper - holds the promise of reconciling freedom and order in a way that will make a debate about future constitutions both possible and constructive.

Perhaps the first debate should be about the Bill of Rights.

TIMESCALES

Constitutional change in South Africa is both urgent and important. It cannot be delayed. However neither can it be attempted with a haste which will undermine its possible success.

South Africans, and those outside of South Africa with passionate interests here, are impatient. They speak of time in terms of weeks and months. Yet the obstacles to democratic politics in South Africa have been created over decades, and indeed centuries.

We must at least allow the process a reasonable time to take root, be nurtured and grow.

A CONCLUDING THOUGHT

Democracy is not South Africa's inevitable or automatic destiny. In history government by consent has been the exception rather than the rule. As De Tocqueville has noted:

"Nothing is harder than freedom's apprenticeship ... liberty is generally born in stormy weather, growing with difficulty amid civil discords, and only when it is already old does one see the blessings it has bought."

Yet there are grounds to believe that democratic politics is possible in South Africa.

Popular cultures, both indigenous and imported, which cherish liberty; key democratic institutions such as the courts, the press and universities, economic interdependence; and - perhaps crucially - a set of alternatives, all of which seem much less attractive; all suggest the possibilities for a meaningful, inclusive democracy here. Much will depend on the expectations South Africa's citizens express and the accountability they demand of their political leaders.

SECTION FOUR
A GLOSSARY OF KEY
CONSTITUTIONAL AND
POLITICAL TERMS

G L O S S A R Y

BILL OF RIGHTS

This is a charter which seeks to define and protect fundamental rights and liberties which may be incorporated into or associated with a country's constitution. As a basic document, a Bill of Rights normally enjoys constitutional status. The power of review by an independent judiciary provides the best means of enforcing a Bill of Rights against the state.

See also JUDICIAL REVIEW

CENTRALISED/DECENTRALISED GOVERNMENT

In a centralised system of government, power is concentrated in a few national institutions which may either have a geographic expression (eg Westminster) or an organisational one (the Communist Party of the Soviet Union). Some functions of government may be delegated to other bodies, but the authority of the central institutions remains supreme and subject to very few restraints.

In a decentralised system of government, power is divided and devolved to a range of regional or local institutions which exercise full or partial authority over their respective areas. In this way, they act as a check on one another.

See also FEDERALISM and UNITARY GOVERNMENT

CHECKS AND BALANCES

Checks and balances are constitutional devices designed to prevent any power of state becoming absolute because it is checked by or balanced against other powers and institutions. These may include the separation of powers, judicial review, the devolution of power and a bicameral legislature.

See also JUDICIAL REVIEW and SEPARATION OF POWERS

CONSOCIATIONALISM

This is a term used by the political scientist Arend Lijphart to describe a particular form of powersharing of which Belgium serves as the prototype. In Lijphart's definition, consociationalism is a means of conflict resolution in divided societies whereby procedures are agreed for the representatives of the different regions, groups or parties to participate directly in government. Characteristic features include executive powersharing, proportional representation, minority

veto and administrative autonomy. Consociationalism appears to
work best when it has evolved as a traditional political
convention.

See also PLURALISM and POWER-SHARING

CONSTITUTION

A constitution is a set of rules or procedures which sets out a
framework for government and defines the institutions and
conventions of all forms of political power - executive,
legislative and judicial. Although a constitution is usually
given expression in a fundamental legal document this need not be
the case. The United Kingdom has no formal written constitution
of this kind, but political behaviour is governed by powerful
conventions which evolved over centuries. These together with
some important laws (such as the Act of Succession and the Act of
Union with Scotland) create clearly defined and regulated roles
for all institutions of government.

CONSTITUTIONAL GOVERNMENT

Under a system of constitutional government, political power is
exercised as an expression of the will of the governed rather
than the might of the government. It is a system in which
authority is regulated by publicly known rules enjoying the
consent of the electorate and their representatives. Citizens
have the power to act against those in government who transgress
the limits of their legitimate authority or ignore the procedures
set for the exercise of that authority. The fact that a country
may have a formal constitution is no guarantee for the existence
of constitutional government.

See also LIMITED GOVERNMENT

CONSTITUTIONALISM

A philosophy and approach to political power which embraces an
agreed system of effective restraints upon authorised government
of attending to common affairs in an orderly and law-regulated
manner.

See also CONSTITUTIONAL GOVERNMENT, DUE PROCESS and NATURAL
JUSTICE

DEMOCRACY

Democracy is both an ideal and a political system. Derived from
the Greek words "people" and "power", democracy has come to mean
government representative of and accountable to its citizens. It

is normally thought to entail free elections in which individuals
participate on the basis of equality (universal franchise), a
competitive party system and limited government.

In political debate, democracy is a term which has developed
different meanings and is used to describe political systems or
forms of government which may differ markedly from one another.
Some of the more common references include the following:

- direct or participative democracy provides for direct
  popular participation in government

- representative democracy means that the people select
  their own representatives to form the government

- majority democracy provides for governments to be
  formed and political decisions taken on the basis of
  majority vote

- plural democracy or consociational democracy enables
  representatives of different sections of the electorate
  to form the government

- one party democracy restricts political participation
  to the representatives of a single party which provides
  the only avenue for the expression of political
  interests

- people's democracy provides government in the interests
  of the people through the mechanism of a vanguard party
  which may not enjoy popular support or seek popular
  membership but which claims to represent the popular
  will

- bourgeois democracy is the term used by Marxists to
  describe representative democracies such as exist in
  the United States or Europe which are thought to
  represent only the interests of the middle class or
  bourgeoisie.

Democracies may find expression in many forms of government -
federal or unitary, presidential or parliamentary.

DIVISION OF POWERS

A principle advocated by the seventeenth century philosopher John
Locke that the powers of the legislature should be divided
between different institutions which can provide a check upon one
another. This finds contemporary expression in many countries in
bicameral legislatures or under a federal system.

See also CHECKS AND BALANCES and SEPARATION OF POWERS

DUE PROCESS

This is a legal doctrine in the United States which requires that the conduct of legal and political affairs be subject to established principles and procedures as specified in the Constitution and its amendments. In particular, due process requires that no one be deprived of life, liberty or property except by a legal procedure that meets societal norms of fairness.

See also CONSTITUTIONALISM and NATURAL JUSTICE

ELECTORAL SYSTEM

This is the mechanism whereby the support given a particular party in an election is translated into seats in the legislature. The electoral system may be based on the principle of "first past the post" (as in the United Kingdom), proportional representation (Holland) or some combination of the two (West Germany).

See also PROPORTIONAL REPRESENTATION and REPRESENTATIVE GOVERNMENT

EQUITY AND EQUALITY

Equity is a legal notion fashioned by Roman lawyers to describe the process whereby a judge is able to modify the harsh rigidity of the law in order to conform to natural justice. It requires that individuals receive equal treatment which is fair and just.

Equality is a political ideal dating from at least the French Revolution which grants all citizens equal political rights and status. It is normally associated with equality before the law in terms of which no class or distinction is drawn between people in their standing under the law and all enjoy equal legal rights.

Equality is also a social goal pursued by many. Some seek equality of opportunity so that all may have an equal chance to compete for the material and other benefits society offers. Others seek equality of outcome so that all in society are made to enjoy the same level of material and psychic benefits.

See also NATURAL JUSTICE

FEDERALISM

Federalism is a constitutional arrangement for distributing power between national and regional governments which exercise independent legislative and executive authority with respect to defined functions or areas. Thus the national or federal government normally bears responsibility for foreign policy,

national defence and the like while the individual state
governments are autonomous in managing their own affairs.

Most federations take a geographic form in which the powers of
state are divided between the central authority and provincial or
state governments. An alternative form is corporate federalism,
in which the component authorities are not regionally based, but
have jurisdiction over all the members of defined groups of
people, regardless of local boundaries.

The precise distribution and balance of power between the federal
and state authorities varies from federation to federation.
This differs from Confederation which is an association of
sovereign states in which the individual members retain full
independence and the central authority has only very limited
powers to perform defined common functions.

See also CENTRALISED/DECENTRALISED GOVERNMENT and UNITARY STATE

GOVERNMENT

A government is simply the institution which exercises power over
society through law and coercion, whether legitimate or
otherwise. Government may be constitutional or unconstitutional,
limited or absolute, representative or unrepresentative, unitary
or federal, presidential or parliamentary, despotic or
democratic, monarchical or republican.

JACOBINS

The original Jacobins were members of a political club which
included deputies from the National Assembly during the French
revolution. They were led by Maximilien Robespierre who governed
France between 1793 and 1794 and instituted the Reign of Terror.
Acting in the belief that they represented the General Will, the
Jacobins were ruthless in their defence of the revolution. The
name has subsequently been given to (or adopted by) other radical
groups which seek to impose their will on society in the name of
liberty.

JUDICIAL INDEPENDENCE

The principle of judicial independence, derived from the doctrine
of the separation of powers, holds that despotism may result
unless the agency which applies the law in society is independent
from those which make and administer it. Justice is better
served when citizens are able to defend themselves and to
challenge the actions of government in an open court which
sharply distinguishes the roles of judge and state prosecutor.

See also CHECKS AND BALANCES and SEPARATION OF POWERS

JUDICIAL REVIEW

A doctrine of constitutionalism found in countries such as the
United States, India and West Germany, according to which
legislative and executive action is tested by the judiciary for
its conformity to the principles and provisions of the
constitution (including the Bill of Rights). Governmental action
that is found to violate the constitution is held to be invalid.

See also BILL OF RIGHTS

LIMITED GOVERNMENT

A system of limited government is one in which there are
effective restraints which prevent the concentration and
unrestrained use of political power. These restraints normally
take the form of constitutional checks and balances including the
separation of powers, judicial independence, the rule of law and
due process.

See also CONSTITUTIONAL GOVERNMENT

MAJORITARIANISM

This is a principle of political decision-making that the
minority should not over-ride or check the decisions of the
majority, however narrowly it may be defined. This principle is
rarely applied unconditionally and in modern constitutional
democracies the potential for "majority tyranny" is tempered
somewhat by the protection granted individual rights and other
mechanisms which seek to prevent numerical preponderance alone
over-riding considerations of equality, morality and justice.

See also POWER-SHARING

NATION

A nation is the collection of people in a specific territory who
feel bound together by common heritage, values and political
aspirations. The term is also used a synonym for country
although strictly speaking a country may contain more than one
nation (eg Great Britain), while a nation may be divided between
different countries (eg the Germans).

NATURAL JUSTICE

Natural justice consists of the basic principles and procedures
which must be observed if justice is to be done and to be seen to
be done.

See also DUE PROCESS and EQUITY

PARLIAMENTARY SYSTEM

In a parliamentary system, the executive arm of government
derives from and is accountable to the legislative arm or
popularly elected assembly (parliament). Executive authority is
vested in the cabinet whose members are drawn from the party or
coalition of parties which enjoys the confidence of the
legislature. The government remains in office as long as it
continues to command majority support in parliament, subject to
the wishes of the electorate as determined by regular elections.
Every act of government is carried out by a duly appointed
official whose authority derives ultimately from parliament. The
legislature may comprise one or more representative assemblies
whose powers, duties, membership and basis for election are laid
down in the constitution.

See also PRESIDENTIAL SYSTEM

PARTIES

A party is a group of individuals united for a common political
cause. In a representative democracy, parties are based on
voluntary association and they compete for political power by
putting forward candidates for election to political office. In
one party states, the party represents the only mechanism for the
political expression of the people. It enjoys a monopoly of
office which extends to social and economic institutions in
society and permits no formal opposition.

PARTITION

Partition is the division of what was a single country into a
number of new countries each with their own governments.
Partition may be agreed by domestic political parties, imposed by
external agents or result from civil war. Partition may take
place because the differences in religious, ethnic, regional or
political sentiment are judged to be so great as to be
incompatible with the maintenance of a single national entity.

THE PEOPLE

This is a collective noun used to describe all those who are
subject to a particular government. It is also used as the
personification of the national political will or purpose and
hence as a rhetorical device to lend legitimacy, or suppress
opposition, to a particular political programme or movement.

See also NATION

PLURALISM

Pluralism is a political philosophy which regards society as
being composed of a variety of political, ethnic, religious,
cultural and economic associations to which individuals may be
affiliated in a network of cross-cutting loyalties. Pluralism
finds organisational expression in a constitutional system based
on consensus, which seeks to accommodate the various elements via
the distribution of political power.

See also CONSOCIATIONALISM and POWERSHARING

POLITICAL CULTURE

A country's political culture is the set of traditions and
beliefs which facilitate (or, in some cases, hinder) the
political process and provide the basic foundations upon which
the political system is based.

PRESIDENTIAL SYSTEM

Under a presidential system of government, executive authority is
vested in a leader who is elected, directly or indirectly, by the
people. The legislature exists independent of the executive and
derives its authority in a separate mandate from the electorate.

See also PARLIAMENTARY SYSTEM and SEPARATION OF POWERS

POWERSHARING

Powersharing may be contrasted with majoritarianism as a
mechanism which seeks to involve the representatives of all
significant elements or views in society in the process of
political decision-making. Powersharing may take various forms.

See also MAJORITARIANISM

PROPORTIONAL REPRESENTATION

Proportional representation is an electoral system designed so
that the different opinions of the voters participating in the
election contest are represented in the legislature in proportion
to the number of votes received. There are many different forms
of PR.

REPRESENTATIVE GOVERNMENT

A representative government is one which represents the interests
of the people it governs through regular, free elections

according to the principles of accountability and government by consent. Various electoral systems exist which seek to improve the level of popular representation of government. No system is perfect and each gives priority to improving the representation of certain people which can only occur at the expense of certain other people. In representative democracies, political parties which are organised to contest elections provide a further means for representation.

See also ELECTORAL SYSTEM

RULE OF LAW

This is a constitutional practice which requires that the exercise of political power be restrained by the observation of the principles and procedures of the law and of natural justice. Limited government, the democratic process and an independent judiciary provide the best hope for the maintenance of the rule of law.

See also DUE PROCESS, JUDICIAL INDEPENDENCE and LIMITED GOVERNMENT

SEPARATION OF POWERS

In terms of this constitutional doctrine, tyranny is avoided if the executive, legislative and judicial powers and functions of government are exercised by separate institutions or persons. Each branch of government is thus a counterweight to the others, preventing a single branch or governmental officer accumulating all the powers of the state. The principle of judicial independence is based upon the separation of powers.

See also CHECKS AND BALANCES, JUDICIAL INDEPENDENCE and DIVISION OF POWERS

STATE

The term state may refer to a sovereign territory or government. It may also refer to the legal order in a country as in international law, the state is a juristic person. When used as a synonym for government, it is usually associated with the mechanisms of power and coercion in society. Thus in Marxist terminology, the state is the instrument of whatever class is dominant at that particular stage of development. In contemporary South Africa, the term is sometimes understood to mean the apartheid system and its associated apparatus of power.

See also GOVERNMENT

TOTALITARIANISM

A totalitarian regime is one which extends permanent government control over all institutions and organisations in society and the state enjoys a monopoly over all forms of control and influence in the country.

UNITARY STATE

In a unitary state, all political power is vested in a single set of institutions which enjoy nationwide jurisdiction. Authority may be delegated to other echelons of government, but power inheres in the central structures.

See also CENTRALISED/DECENTRALISED GOVERNMENT and FEDERALISM

UNIVERSAL FRANCHISE

This involves the grant of voting rights to all adult citizens enabling them to participate in the election of their political representatives on an equal basis - more commonly known as "one man, one vote". This right is only meaningful if it can be exercised in regular, fair and free elections in which the voter is given a real choice of candidates to support.

See also ELECTORAL SYSTEM and REPRESENTATIVE GOVERNMENT