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uligurcliy inevitably favours the privileged minority to the detriment and disadvantage of the unenfranchised majority.

The South Africa Act also introduced the Westminster model of government coupled with a system of regional as opposed to proportional representation and a loading and unloading of urban and rural constituencies respectively, which favoured the predominantly rural Dutch (Afrikaans) section of the white population. This resulted in an extreme form of the winner-takes-all and an alternating monopoly of power system. This model of Westminster government necessitates that the Government must have the support of the elective house, which has led, as elsewhere in the Commonwealth, to a rigid and despotic party system and the de facto exercise of the legislative function by the Cabinet.<sup>6</sup> This type of constitution proved to be singularly unsuitable for the Government of a heterogeneous people among whom language and race were strong dividing factors.

In the decades that were to follow the advent of the Union of South Africa, the constitutional structure of South Africa became increasingly more oligarchical as a result of the progressive dilution, diminution and ultimately the total eclipse of the black (non-white) franchise.

In 1930 the vote was given without any qualifications to white adult males throughout the erstwhile Union.<sup>7</sup> This was resented by the white males in the Cape and Natal, to whom the pre-Union income and property test still applied. Consequently in 1931, as a result of the Franchise Laws Amendment Act,<sup>8</sup> all qualifications for white men were removed, but remained for black (non-white) males in the Cape and Natal. This resulted in an inevitable and significant decrease in the voting power of blacks.<sup>9</sup>

In 1936, as a result of the historic and precedent-setting Representation of Natives Act, the Cape African (native) voters were taken off common roll and placed on a communal roll in order to elect three white representatives in three divisions. This legislation also created a further precedent by establishing a Native Representative Council, partly nominated and partly elected, but only with purely advisory functions. Native representation was subsequently completely abolished as a result of the Promotion of Bantu Authorities Act<sup>10</sup> in 1959.

The same tragic pattern of disenfranchisement was repeated in regard to the Coloured voters of the Cape Province, who after an acrimonious and protracted constitutional struggle, were removed from the common role and placed on a separate roll to elect four white representatives in four constituencies in 1956.<sup>11</sup> The oligarchical nature of our constitution reached its apogee in 1970 when as a result of Separate Representation of Voters Amendment Act,<sup>12</sup> representation of the Cape Coloured voters in Parliament came to an end with the advent of the Coloured Persons Representative Council.<sup>13</sup> It is axiomatic that the more oligarchical a system of government the more unjust it will be.

The Asiatic Land Tenure and Indian Representation Act<sup>14</sup> enfranchised Indians in Natal and the Transvaal on a separate roll by three white representatives. The Indians boycotted this legislation which was speedily repealed after the National Party emerged victorious after the 1948 general election. The political and psychological motivation for the disenfranchisement of black South Africans was undoubtedly a profound fear on the part of the

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white electorate and the Afrikaners in particular that they would be increasingly pressurised and ultimately politically overwhelmed by growing numbers of enfranchised African and Coloured voters. The Westminster model constitution, based on the winner-takes-all principle and an alternating monopoly of power, aggravated and compounded this fear.

It has become fashionable to attribute the existing political and constitutional maladies in our society to the slavish following of the Westminster model. However, South Africa has, particularly in the post Second World War years, departed from both the spirit and letter of the Westminster system. The evolution of the Westminster system was characterised by the progressive enfranchisement of the British population. The Reform Act of 1832 initiated a process of enfranchisement which culminated in universal franchise for both men and women in 1928.<sup>15</sup> South Africa in its constitutional development moved in the opposite direction of progressive disenfranchisement. The Reform Act of 1832 was of great symbolic importance and was the beginning of a long process that was, through constitutional change, to extend the franchise from a privileged oligarchy to the entire nation thereby ensuring a more equitable political order. Nineteenth century Great Britain was par excellence an age that produced statesmen of great moral and political courage. It was the conduct of great statesmen like Gladstone,

Disraeli and Earl Grey<sup>16</sup> that made the process possible.

The enactment of the famous Statute of Westminster in 1931 emancipated the erstwhile Union of South Africa from colonial tutelage and brought into being a sovereign Parliament. Ironically it was this peculiarly British concept of legislative supremacy,<sup>17</sup> that in the hands of successive Afrikaner governments was used to eliminate the potential threat from increasing numbers of Cape Africans and Coloureds by a process of disenfranchisement which is anathema to both the spirit and constitutional evolution of the Westminster system. These African and Coloured voters had also increasingly supported the racially more liberal political parties for which most English-speaking South Africans voted. Afrikaners feared that the English-speaking South Africans would gang up against them. The elimination of the franchise rights of blacks (African, Coloured and Asian) ensured the continual hegemony of the National Party and contributed to the decline and demise of its once powerful rival the United Party and the consequent emasculation of English-speaking South Africans as a political force. ' \_ \_

The hegemony of the governing National Party, the decline and emasculation of parliamentary opposition and the erosion of rule of law has permitted the National Party Government to uninhibitedly implement its controversial policy of apartheid with increasing vigour and consistency in spite of very considerable opposition and sporadic unrest.

The policy of separate development increasingly institutionalised racial discrimination and replaced the former policy of largely defacto segregation. The South Africa Act and its successor the Republic of South Africa Constitution Actm established a sovereign legislature in regard to which there were no legal limitations, thus permitting acts of disenfranchisement, violations of the rule of law and the enactment of institutionalised racial discrimination. The entrenchment of voting rights in terms of section 152 of the South Africa Act had ultimately proved to be ineffective.

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The nature of the South African constitution had greatly facilitated the implementation and perpetuation of the policy of separate development. Had South Africa obtained a federal constitution with an effectively entrenched bill of rights, similar to that of the USA. the political and constitutional history of South Africa would conceivably have been different and a more just political order could have emerged. Prof L M Thompson in his erudite and monumental work the *Umfz'catz'on* of South Africa reaches this conclusion;19 "The founders of the Union believed that a Sovereign Parliament would be the best constitutional instrument for the handling of these difficult problems. They had buttressed this belief with many arguments, of which some were dubious interpretations of history, others were false prophecies, and none was conclusive. In following the British example, they had ignored the fact that in so far as the flexible character of the British Constitution met the needs of the British people, that was because they had become a comparatively homogeneous people, and their respect for constitutional conventions, for political compromise, and for personal liberty was strong enough to form an effective barrier against arbitrary action by the Government of the day; whereas the essence of the problem confronting South Africa was that her peoples were extremely heterogeneous, and the colour consciousness of most of the whites and the national exclusiveness of most of the Afrikaners were potent enough to override any feelings they may have had for conventions, for compromise, and for the liberties of others. Since a flexible Constitution provides no legal safeguards against arbitrary government, it was the very worst prescription for such a country. So long as Afrikaners remained in a political majority they would have the opportunity, and therefore the temptation, to stand together, to obtain control of Parliament, and to impose their will on the other inhabitants. A division of powers, territorially between the centre and the regions, and within the centre between the Legislature. the Executive, and the Judiciary, would have provided the only sound basis for concord in South Africa. The Constitution of the United States of America would have been a better model than the British Constitution."

The federal constitution of the USA with its entrenched bill of rights has been instrumental in securing greater justice for the black minority in America. The United States had had statesmen like Lincoln who possessed great moral and political courage and were instrumental in securing a free and more just society. Although the constitution was indispensable in securing fundamental changes and reforms other factors made a very significant contribution. American history produced a great tradition for liberty and justice which was harnessed in the cause of a politically and economically disadvantaged community. In addition the Supreme Court produced judges of great moral strength and integrity whose judgments in recent times initiated civil rights campaigns. In this regard the famous case of *Brown v Board of Edztcatz'orzgo* constituted a great milestone in the process of securing a more just society, in the USA. -

The above examination of the constitutional dispensation created by the South Africa Act indicates the limitations and defects of alconstitution devised for a heterogeneous country which was to be governed by a white oligarchy. The constitutional nature of the South Africa Act was such that it was 2? POLITIKON Vol. 9 No. 1 June 1982 junic

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highly improbable that it could have evolved into a more democratic constitution and consequently brought about a more just political order.

The positive aspects of the policy of separate development have evolved, - since 1959.2' into a form of partition in regard to tribal and rural Africans. This has involved a constitutional process, ostensibly based on tribal tradition, which has culminated in some cases in the granting of sovereign independence to the fragmented erstwhile native reserves (Transkei, Bophuthatswana. Venda and Ciskei.) The other non-independent homelands (National States) have a high degree of self-government. Yet millions of westernised African people continue to reside permanently in the urban areas. The vast majority of these people have no, or at most very tenuous, affiliations with the traditional homeland areas.

The present constitutional dispensation is acutely unjust in regard to urban Africans.22 With the exception of Bophuthatswana the selfgoverning and independent states are economically impoverished, giving rise to the influx into the urban metropolitan areas of South Africa of large numbers of rural Africans, despite stringent influx control regulations, the application of which makes the life of these unfortunate people tragic and precarious and

blights the image of South Africa abroad.

Although after many years the National Party Government has belatedly and reluctantly recognised the permanences of the urban Africans, the political problems relating to this group remain perplexingly unresolved and are potentially explosive. At most the Government is prepared to allow them local government rights alongside their franchise rights' in the independent or self-governing national states.

The Coloured and Indian people have been subjected to severe institutionalised racial discrimination in terms of the policy of separate development. Constitutional experiments with partly elected and partly representative councils have proved to be unmitigated failures, and have compounded the frustration of these groups.

This was particularly so in regard to the defunct and little lamented Coloured Persons Representative Council. The functioning of such councils i.e. the defunct Native and Coloured Representative Councils and the extant South African Indian Council involved a form of representative government devoid of any real responsibility and led inevitably to intense frustration and dissatisfaction. Lord Durham in his influential report in regard to Canadian colonial problems<sup>4</sup> indicated that; uIt is difficult to understand how any English statesman could have imagined that representative and irresponsible government could be successfully combined. the colonial demagogue bids high for popularity without the fear of future exposure. Hopelessly excluded from power he expresses the wildest opinions and appeals to the most mischievous passions of the people without any apprehensions of having his Sincerity or prudence hereafter tested by being placed into a position to carry his views into effect." .

The frustrating experience of members of the Coloured Representative Council (CRC) was not dissimilar to that of the erstwhile Canadian 'colonial demagogue'.

The boycott and consequent low percentage poll in the recent South African Indian Council (SAIC) election manifests a rejection by the Indian  
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community of a separate development form of representative and irresponsible community government. Any future constitutional plan for South Africa based on separate legislative assemblies for different racial groups must inevitably, in practice, involve representative, but irresponsible government. 'for all groups other than the white group, who will in practice retain political sovereignty. This will not solve our political and constitutional problems but exacerbate existing political frustration among blacks.

One of the greatest weaknesses of the policy of separate development was that it was unilaterally devised by a ruling oligarchy and then imposed on all the other unenfranchised groups regardless of their consent. Government by consent is an essential prerequisite for a just political order.

It is generally accepted by both the Government and the opposition parties that the pure Westminster system is singularly inappropriate for the government of an exceptionally heterogeneous country like South Africa. Unanimity on this constitutional issue creates a certain potential for constitutional reform and a more just political order.

#### CONSTITUTIONAL OPTIONS AND THEIR POTENTIAL FOR EFFECTING A MORE JUST POLITICAL ORDER IN SOUTH AFRICA

The *modus operandi* for devising a new constitution for South Africa is a matter of considerable dispute. The Government and different opposition parties are irreconcilably divided on this issue. It is submitted that the most direct and effective way of doing this would be by a national convention involving acknowledged and credible leaders of all the different groups.

Even if such leaders were willing to convene a national convention the process of negotiation would be protracted, complicated and inordinately difficult. A national convention would not be a panacea solution. The process would of necessity have to be accompanied by an incremental, but resolute programme of legislative reform which would be conducive for an atmosphere of reconciliation and good faith.

Progress would require great moral and political courage from all the leaders involved. The process and concept of a national convention would have to be supported by the government representing the vast majority of the white electorate and also by credible and recognised black leaders. However desirable a national convention may be it is unequivocally rejected by the National Party Government. The potential of other less effective ways of devising a new constitution which could initiate a more just political order must therefore be investigated.

The merit of the different options will depend on the potential they have for effecting genuine participation at any level of government by those groups who are at present excluded from the prevailing oligarchy. Genuine participation by formerly excluded groups will bring about a more just society. In this regard Robert Schrire comments as follows; "While a national convention is one possibility, it by no means preempts the field. Alternatives could include inter-government negotiations, non-racial legal commissions and ratification by plebiscite." 3-5 In theory the Schlebusch Commission and the Government have accepted this?6

The purpose behind a National Convention is to secure the co-operation

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of the acknowledged leaders of all groups for a constitution that must inevitably be the product of negotiation and compromise, thereby ensuring government by consent and a just political order. The way in which a constitution is devised or evolves through incremental change is just as important as the nature and provisions of the final product in securing justice for the society.

In regard to the advisability of a National Convention at the present time Dugard has expressed the following opinion; "In any event, there is a school of thought with which I have some sympathy. that maintains that South Africa is not adequately prepared for a National Convention on the ground that there has been insufficient preliminary discussions that would arise at such a Convention."27

There is at present greater political fluidity in our politics than there has been for more than three decades. There is a potential for constitutional reform at a local, regional, national and "international" level in South Africa. However; the process of constitution-making is as important as the final constitution in determining political stability or its absence; The Presidents Council is the Government's alternative to a National Convention. The exclusion of Africans from the Council has rendered it a very contentious institution and has severely inhibited its credibility among blacks. However, it is submitted that in spite of these limitations the Presidents Council does have a certain potential for initiating constitutional reform. There is also the very real danger that the Council may prove to be

disastrously counter productive. Should the Government reject the constitutional proposals of the Council relating to local, regional and national government, since they may involve a departure from orthodox separate development, the result would be to discredit the Council, and facilitate its disintegration and total eclipse. The Government's rejection of the recommendations of the President's Council in regard to Pageview and District Six have already discredited the Council. The acceptance of these recommendations would have constituted a symbolic act of reconciliation and facilitated mutual good faith and trust which is manifestly absent between the Government and the two groups concerned. The inability to accommodate expectations created by the institution of the President's Council could dangerously increase racial polarisation.

There is a very real possibility that the rejection of the recommendations of the President's Council could lead to a deadlock in regard to constitutional reform at a national level. However, new initiatives and options may be created at a regional level by the publication and implications of the report of the Buthelezi Commission in regard to the future of Natal and KwaZulu.<sup>29</sup> Chief Buthelezi has categorically rejected independence for KwaZulu. Furthermore, meaningful consolidation for KwaZulu is virtually impossible. A quasi-federal relationship between Natal and KwaZulu is likely to be recommended together with power-sharing and the implementation of consociational principles of government. The orthodox principles of grand apartheid cannot be applied successfully in Natal and KwaZulu. Compromise in this regard could set a precedent for other self-governing black states that do not wish to accept independence. Deadlock in regard to the future of KwaZulu and the consequent political alienation of Chief Buthelezi would have serious

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implications for the future of South Africa. The failure to secure co-operation from Chief Buthe and the Zulu people in regard to peaceful change could seriously destabilise the whole of South Africa.

New options and constitutional development may also occur at an international level in South Africa. The Government has committed itself to a confederal constitutional arrangement of states. History has shown that confederations are not enduring constitutional phenomena. "It is for this reason that the three important unions of confederated states of modern times - namely, the United States of America, the German and the Swiss Confederations - turned into unions of federal States."<sup>3</sup>

The emergence of a form of federal government or a government involving both federal and confederal principles is a distinct possibility. For political reasons, Government spokesmen must use the rhetoric and language of confederation.<sup>32</sup> In practice, a strong federal element may indeed emerge in regard to the confederation of states and, in particular, from the economic relationships between the states. Furthermore, the Government has, in recent years, increasingly in both theory and practice, abandoned the ideologically inspired Verwoerdian policy of economic fragmentation. The decentralisation plans and initiatives announced by the Prime Minister at the Good Hope Conference are the most manifest example of this. These plans indicate clearly that for the purpose of effective decentralisation, the national states, the independent states and the common area of the Republic are to be treated as a composite integrated economic unit. The constitutional and political significance of this is that very often economic unification is a forerunner and catalyst for ultimate political union in the form of a federation.

The advent of the proposed Development Bank of Southern Africa will greatly facilitate the process of economic integration. Economic integration has political implications. In the words of Jan Lombard, special adviser to the Reserve Bank; "The Government would have to find a solution to the problem of reconciling the functional integration of blacks in the production process of South Africa and their geographic differentiation in the country's political processes." <sup>35</sup>

In the important field of labour, trade unionism and manpower the implementation of the Wiehahn Report's recommendations is resulting in an increasingly unified and uniform labour dispensation.

At the local, regional, national and international levels, new options and initiatives could manifest themselves. The Government's response to these options and initiatives will be of cardinal importance. The old orthodox separate development policies are singularly inadequate. Statesmanship of the highest calibre is required for the Government to depart from these policies. Without a clear and unequivocal display of moral and political courage and leadership by our statesmen, and in particular the Prime Minister and his Cabinet, the future of South Africa appears to be terrifyingly bleak. Reform is incompatible with the policies of orthodox separate development. The greater the reforms, the greater the departure from the policy of separate development. This is the dilemma that the Government finds itself in; i.e. that it cannot have both reform and separate development. Consistent and significant departures from the policy of orthodox separate development will greatly enhance the potential for constitutional and political reform. Ad

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Implementation of orthodox policies in response to internal and external pressures and violence are, however, likely to heighten, rather than reduce, racial tensions, and possibly even encourage further and greater racial conflict. It is therefore, unfortunate that so many changes at present are ad hoc, inconsistent and anomalous.

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THE CONSTITUTIONAL REQUIREMENTS FOR A JUST  
POLITICAL ORDER IN SOUTH AFRICA

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The kind of constitution that would produce a more just political order would necessarily have to provide for effective participation of all groups in government at all levels. Furthermore, such a constitution would have to ensure the

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guarantees; they cannot be altered except by the special process of constitutional amendment."H

In order for minorities to be effectively protected the constitution would have to provide for a system of executive power-sharing, as opposed to the Westminster system of winner-takes-all, and an alternating monopoly of power between political parties. Indeed, the system must be so structured that power-sharing is institutionalised

The constitution will have to provide for the protection against the exploitation of economically and culturally impoverished groups. This could be done by the institution of an ombudsman or control commissioner as this office is referred to in Bophuthatswana<sup>15</sup> Such an official would have to enjoy the same kind of independence as a judge of the Supreme Court in order to fulfil his tasks effectively and impartially. His functions would encompass the investigation of inter alia:

- (a) economic exploitation and the recommending of remedies; and
- (b) executive and administrative abuse of powers to the detriment of the individual.

Finally, the constitution would have to provide impetus and mechanisms for the economic, cultural and social rehabilitation of impoverished groups. A careful balance will have to be maintained between the free enterprise system and a form of social democracy. The reason for this is that "... constitutional change, unaccompanied by socioeconomic reform, may even heighten rather than reduce intergroup tensions."<sup>36</sup>

It is submitted that the principles of federal government are an appropriate form of government to accommodate communities of different cultures who wish to form a common nationality but simultaneously wish to preserve their cultural identity.

South Africa is a unique combination between the first and third worlds. The kind of constitution required to effect a more just society in South Africa must take into account the realities of such a community. A constitution of its own accord cannot, however theoretically suitable and perfect, ensure a just society. Other ingredients are also essential. A tradition and respect for freedom and justice together with statesmen and moral and political courage are essential.

In this regard our historical experience has proved highly ambivalent.

Afrikaners have displayed great courage and tenacity in securing their liberty and political independence, but their treatment of blacks has been motivated by a deep fear that has led to highly oppressive measures. The struggle in South Africa is for the hearts and minds of men. The great challenge facing South Africa requires that the sterling qualities of courage and perseverance, which history has demonstrated the Afrikaner people have, should be harnessed to produce a constitution that will secure justice, liberty and well being for all South Africans.

We live in turbulent and unpredictable times. The words of Thomas Paine ring true today as they did nearly two hundred years ago during the age of the French Revolution; "It is not for the benefit of those who exercise the powers of government, that constitutions, and governments issuing from

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them, are established. In all those matters, the right of judging and acting are in those who pay, and not those who receive. A constitution is the property of a nation, and not of those who exercise government."<sup>37</sup>

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