SOUTH AFRICA AND THE CONSOCIATIONAL OPTION - A CONSTITUTIONAL ANALYSIS

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SOUTH AFRICA AND THE CONSOCIATIONAL OPTION

A CONSTITUTIONAL ANALYSIS

by

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LONG TITLE

A CRITICAL AND COMPARATIVE ANALYSIS OF THE HISTORICAL AND CONTEMPORARY POLITICAL CONSTITUTION OF SOUTH AFRICA FROM A JURIDICIAL PERSPECTIVE, WITH PARTICULAR REFERENCE TO THE PRINCIPLES OF CONSOCIATIONAL DEMOCRACY.

PREFACE

In this work attention is given to constitutional developments which have taken place up to the end of 1981.

A work on South Africa's constitutional politics must necessarily refer to the statutorily-defined ethnic and racial groups in the country, although official designations have at times tended to cause offence. In accordance with prevailing practice reference is made to 'whites', 'coloureds', 'Indians' (although some legislation refers to 'Asiatics'), and blacks (here used in the narrow sense, and not as to include all those who are not white). Occasionally it is convenient to use the terms 'non-white' and 'non-black', although neither is intended to have a negative connotation; likewise dated terminology is sometimes appropriate for historic institutions (eg the Native Representatives' Council) and the national states (homelands). No concession to modernity is made in the use of pronouns and other gender-words, but lawyers have the benefit of the 'male embraces female' principle to justify exclusively male terms.

As with all research this study draws heavily on the work of others involved in the same field, and this is acknowledged in the bibliography and footnotes. On a more personal level I have received assistance of varying kinds from Marinus Wiechers, Arend Lijphart, Raphael de Kadt, Lawrie Baxter, Rob Lambert, Nic Olivier, Lawrie Schlemmer and my supervisor Tony Mathews, and to them I record my grateful thanks.

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In terms of the applicable regulations it is hereby declared that this thesis is the candidate's own original work.

L.J. BOULLE

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Amalgamated Society of Railway Servants v Osborne 1910 AC 87.

Attorney-General v Jonathan Cope Ltd (1975) 3 AER 484.

Attorney-General v Times Newspapers Ltd (1973) 3 AER 54 (HL).

Attorney-General (NSW) v Trethowan (1931) 44 CLR 394.

Baker v Carr 369 US 186 (1962).

Bell v Van Rensburg NO 1971 (3) SA 693 (C).

Bestuursraad van Sebokeng v Thelima 1968 (1) SA 680 (AD).

Beukes v Administrateur-Generaal Suidwes-Afrika 1980 (2) SA 664 (SWA).

Bhendeli v Attorney-General Transvaal 1961 (3) SA 232 (T).

Blackburn v Attorney-General (1971) 2 AER 1380 (CA).

Bribery Commissioner v Ranasinghe 1965 AC 172.

British Coal Corporation v R 1935 AC 500.

Brown v Board of Education 347 US 483 (1954).

Brown v Cape Divisional Council 1979 (1) SA 589 (AD).

Brown v Lloyds (1897) 4 Off Rep 17.

Chikerema and others v UANC and another 1979 (4) SA 258 (ZR AD).

Colegrove v Green 328 US 549 (1946).

Collins v Minister of the Interior 1957 (1) SA 552 (AD).

Conway v Rimmer (1968) 1 AER 874.

Cormack v Cope (1974) 3 ALR 419.

Cowburn v Nasopie (Edms) Bpk en andere 1980 (2) SA 547 (NC).

Deary NO v Acting President, Rhodesia and others 1979 (4) SA 43 (R).

Delaware v New York 385 US 895 (1966).

Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd (1975) 1 AER 41 (QB).

Dred Scott v Sandford 19 How 393 (1857).

Dube, In re 1979 (3) SA 820 (N).

Du Plessis v Administrateur-Generaal vir die Gebied van Suidwes-Afrika en andere 1980 (2) SA 35 (SWA).

Du Plessis NO v Skrywer NO en andere 1980 (2) SA 52 (SWA).

Du Plessis NO v Skrywer NO en andere 1980 (3) SA 863 (AD).

Duport Steels Ltd v Sirs (1980) 1 WLR 142.

Edinburgh and Dalkeith Railway v Wauchope (1842) 8 CL & F 710 (HL).

Ellen Street Estates Ltd v Minister of Health (1934) 1 KB 590 (CA).

Everett v Minister of the Interior 1981 (2) SA 453 (C).

Freeman v Union Government 1926 TPD 638.

Geldenhuys v Pretorius 1971 (2) SA 227 (O).

Harris v Minister of the Interior 1952 (2) SA 428 (AD).

Hoshe and others v Cape Town Municipality and others 1927 AD 380.

Hind v The Queen 1977 AC 195.

Honey and another v Minister of Police 1980 (3) SA 800 (TSC).

Huyser v Louw 1955 (2) SA 321 (T).

Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111.

Kahn v Times Inc 1956 (2) SA 580 (W).

Komani v Bantu Affairs Administration Board 1979 (1) SA 508 (C).

Komani v Bantu Affairs Administration Board 1980 (4) SA 448 (AD).

Leon v Sanders 1972 (4) SA 637 (C).

Loxton v Kenhardt Liquor Licensing Board 1942 AD 275.

Macarthys Ltd v Smith (1979) ICR 174.

Madzimbamuto v Lardner-Burke NO 1968 (2) SA 284 (RAD).

Madzimbamuto v Lardner-Burke NO 1968 (2) SA 457 (RAD).

Madzimbamuto v Lardner-Burke NO 1969 (1) AC 645 (PC).

Maluleke v Minister of Internal Affairs 1981 (1) SA 707 (BSC).

Mandirwhe v Minister of State 1981 (1) SA 759 (ZAD).

Marbury v Madison (1803) 1 Cranch 137.

Masai v Jansen 1936 CPD 361.

McCarthy v Mustheights (Pty) Ltd and others 1974 (4) SA 328 (C).

McCarthy v Mustheights (Pty) Ltd and others 1974 (4) SA 627 (C).

Middelburg Municipality v Gertzen 1914 AD 544.

Minister of Posts and Telegraphs v Rasool 1934 AD 167.

Minister of the Interior v Harris 1952 (4) SA 769 (AD).

Minister van Justisie v Alexander 1975 (4) SA 530 (AD).

Moeca v Addisionele Kommissaris, Bloemfontein 1981 (2) SA 357 (O).

Moleko v Minister of Plural Relations and Development 1979 (1) SA 125 (T).

Moseneke, Ex parte 1979 (4) SA 884 (T).

Motaung v Mothiba NO 1975 (1) SA 618 (O).

Mpangele and another v Botha and others Case No M 1189/81 (17 July 1981) CPD.

Narainsammy v Principal Immigration Officer 1923 AD 673.

Nasopie (Edms) Bpk en andere v Minister van Justisie en andere 1979 (3) SA 1228 (NC).

Nasopie en andere v Minister van Justisie en andere (2) 1979 (4) SA 438 (NC).

Ndlwana v Hofmeyr 1937 AD 229.

Pan American World Airways Incorporated v SA Fire and Accident Insurance Co 1965 (3) SA 150 (AD).

Pennington Health Committee, In re 1980 (4) SA 243 (N).

Plessy v Ferguson 163 US 537 (1896).

Pretoria North Town Council v A.J. Ice Cream Factory 1953 (3) SA 1 (AD).

R v Abdurahman 1950 (3) SA 136 (AD).

R v Drybones (1970) 9 DLR (3d) 473.

R v Lusu 1953 (2) SA 484 (AD).

R v Maharaj 1950 (3) 187 (AD).

R v McChiery 1912 AD 199.

R v Ndhlovu 1968 (4) SA 515 (RAD).

R v Ndobe 1930 AD 484.

Regents of the University of California v Bakke 438 US 265 (1978).

Reynolds v Sims 377 US 533 (1964).

Rikhoto v East Rand Administration Board and another Case No 9290/81, 22 September 1981 (WLD).

Roberts v Chairman, Local Road Transportation Board and others (2) 1980 SA 480 (C) at 496 (C).

Rosenburg v South African Pharmacy Board 1981 (1) SA 22 (AD)

S v Beyleveld 1964 (1) SA 269 (T).

S v Dalindyebo 1980 (3) SA 1049 (TK).

S v Heavyside 1976 (1) SA 584 (AD).

S v Hotel and Liquor Traders' Association of the Transvaal and others 1978 (1) SA 1006 (W).

S v Kunene 1979 (2) SA 1153 (N).

S v Machebele 1978 (1) SA 569 (T).

S v Mangena 1978 (4) SA 585 (T).

S v Marwane 1981 (3) SA 588 (BSC).

S v Matsana 1978 (3) SA 817 (T).

S v Memke 1976 (4) SA 817 (ECD).

S v Moloto 1980 (3) SA 1081 (BSC).

S v Ncokazi 1980 (3) SA 789 (TSC).

S v Nkabinde 1967 (2) SA 157 (T).

S v Sambe 1981 (3) SA 757 (T).

S v Tekere and others 1981 (1) SA 878 (ZAD).

S v Tuhadeleni 1969 (1) SA 153 (AD).

S v Van Niekerk 1972 (3) SA 711 (AD).

S v Zitudeza 1970 (2) SA 773 (EC).

S.A. Associated Newspapers Ltd v Estate Pelser 1975 (4) SA 797 (AD).

S.A. Defence and Aid Fund v Minister of Justice 1967 (1) SA 263 (AD).

Schmidt v The Home Secretary (1969) 1 AER 904.

Scott and others v Hanekom and others 1981 (3) SA 1182 (C).

Spoorbond and another v South African Railways and Harbours 1946 AD 999

Steyn v Estate Agents Board 1980 (2) SA 334 (T).

Theron v Hylton-Smith 1978 (2) SA 294 (N).

Tickley and others v Johannes NO and others 1963 (2) SA 588 (T).

Union Government v Fakir 1923 AD 466.

Van der Linde v Calitz 1967 (2) SA 239 (AD).

Vauxhall Estates Ltd v Liverpool Corporation (1932) 1 KB 733.

Weber v Kaiser Aluminium and Chemical Corporation 563 F 2d 216 (1979).

Winter v Administrator-in-Executive-Committee 1973 (1) SA 873 (AD).

TABLE OF PRINCIPAL STATUTES

Aliens Act No 1 of 1937.
Affected Organisations Act No 31 of 1974.
Asiatic Land Tenure and Representation Act No 28 of 1946.

Blacks (Abolition of Passes and Co-ordination of Documents) Act No 67 of 1952.
Black Administration Act No 38 of 1927.
Black Affairs Administration Act No 45 of 1971.
Black Authorities Act No 68 of 1951.
Black (Urban Areas) Consolidation Act No 25 of 1945.
Borders of Particular States Extension Act No 2 of 1980.

Colonial Laws Validity Act (28 and 29 Victo c 63).
Coloured Persons Representative Council Act No 49 of 1964.
Community Councils Act No 125 of 1977.
Criminal Procedure Act No 51 of 1977.

Defence Act No 44 of 1957.
Designated Neighbouring Countries Act No 41 of 1978.

Electoral Act No 45 of 1979.
Electoral Act for Indians No 122 of 1977.

Gatherings and Demonstrations Act No 52 of 1973.
Group Areas Act No 36 of 1966.

Immorality Act No 23 of 1957.
Indians Education Act No 61 of 1965.
Industrial Conciliation Act No 28 of 1956.
Information Services of South Africa Special Account Act No 108 of 1979.
Internal Security Act No 44 of 1950.
Interpretation Act No 33 of 1957.

National Key Points Act No 102 of 1980.
National States Citizenship Act No 26 of 1970.
National States Constitution Act No 21 of 1971.
Native Administration Act No 38 of 1927.
Natives Land Act No 27 of 1913.
Native Trust and Land Act No 18 of 1936.

Official Secrets Act No 16 of 1956.

Parliament Act (1 and 2 Geo 5, c.13).
Parliament Act (12, 13 and 14 Geo 6, c.103).
Parliamentary Internal Security Commission Act No 67 of 1976.
Police Act No 7 of 1958.
Population Registration Act No 30 of 1950.
Powers and Privileges of Parliament Act No 91 of 1963.
Powers and Privileges of the President's Council Act No 103 of 1981.
Prisons Act No 8 of 1959.
Prohibition of Mixed Marriages Act No 55 of 1949.
Prohibition of Political Interference Act No 51 of 1968.
Promotion of Bantu Self-Government Act No 46 of 1959.
Public Service Act No 54 of 1957.
Publications Control Act No 42 of 1974.

RSA Constitution Act No 32 of 1961.
Representation of Natives Act No 12 of 1936.
Reservation of Separate Amenities Act No 49 of 1953.
Riotous Assemblies Act No 17 of 1956.

Secret Services Account Act No 56 of 1978.
Senate Act No 53 of 1955.
Separate Representation of Voters Act No 46 of 1951.
South Africa Act (9 Edw7, c 9).
South Africa Act Amendment No 9 of 1956.
South African Citizenship Act No 44 of 1949.
South African Coloured Persons Council Act No 24 of 1980.
South African Indian Council Act No 31 of 1968.
South West Africa Constitution Act No 39 of 1968.
Status of Bophuthatswana Act No 89 of 1977.
Status of Ciskei Act No 110 of 1981.
Status of Transkei Act No 100 of 1976.
Status of Venda Act No 107 of 1979.
Status of the Union Act No 69 of 1934.
Statute of Westminster of 1931 (22 Geo 5, c.4).
Supreme Court Act No 59 of 1959.

Terrorism Act No 83 of 1967.
Transkei Constitution Act No 48 of 1963.

Unlawful Organisations Act No 34 of 1960.
Urban Bantu Councils Act No 79 of 1961.

Women's Enfranchisement Act No 18 of 1930.

GENERAL INTRODUCTION

AND

OUTLINE

LEGITIMACY CRISIS AND CONSTITUTIONAL RESPONSE

This work deals with aspects of constitutional development in South Africa, in an historical and comparative context. More specifically, it examines the political constitution of the country from the perspective of consociational democracy.

That the South African state system is going through a period of crisis is beyond any doubt, although it is by no means the only system to be experiencing this fate.[1] The crisis tendencies are observable in the economic, social and political spheres of society.[2] Recent evidence of the socio-economic crisis is found in the increasing industrial strikes, economic boycotts, housing shortages and squatter removals, power supply cuts, staffing shortages in hospitals, salary discontent from teachers and other public servants, school and university boycotts, and high unemployment and inflation. Evidence of the political systems crisis is found in the emergence of political groups in exile, attacks on strategic installations within the country and the growing militarisation of the state, loss of confidence in government leaders and increased support for the Herstigte Nasionale Party in the 1981 general elections, low voter turnouts in the community council and the South African Indian Council elections, and the seeming inability of the system to generate any significant reform. Again, similar phenomena are discernible in many other systems and the South African state has responded to them with a not a-typical combination of coercive and co-optive measures.[3]

But in addition to the above crises there is also a crisis of legitimacy in the South African state, and the focus of this

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1. See eg K. Middlemas Politics in Industrial Society (1979) 430-463; J.O. Freedman Crisis and Legitimacy (1978) - in relation to the enduring crisis in the American administrative process. In class theory crisis is seen as a permanent condition of capitalist societies because of the fundamental conflict built into their structure, although socialist systems are not immune to crises in all spheres of society.

2. See Raphael de Kadt The South African State System in Crisis (unpublished paper, University of Natal, 1981) 1-6; J. Habermas Legitimation Crisis (1976) 45-50.

3. H. Adam and H. Giliomee The Rise and Crisis of Afrikaner Power (1979)

work is on the government's constitutional response to this development. A legitimacy crisis manifests itself at the level of 'symbolic interaction' or 'superstructure' at which the authority (as distinct from the power) of a regime is maintained.[1] For Lipset,[2]

> 'Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society.'

There will be a crisis of legitimacy, for Lipset, during a transition to a new social structure when all the groups in society do not have access to the political system. For Friedrich,[3]

> '... legitimacy can be achieved only where there exists a prevalent belief as to what provides a rightful title to rule. If the community is basically divided on this matter, then no legitimacy is possible.'

For Habermas,[4] legitimacy denotes 'a political order's worthiness to be recognised', and it is a 'contestable validity claim' in that there can be a dispute among different groups as to the legitimacy of a given political order; at this point a legitimation problem arises. What is common to these three approaches to legitimacy is the factor of subjectivity, that is the perceptions of those affected by a political system, and possibly of others external to it as well. At this level constitutions have a focal relevance, regardless of how unrealistic they might be in the sense of non-descriptive of who actually exercises power.[5] It is not an uncommon contemporary phenomenon for the appropriateness of constitutional systems to be challenged, and problems of legitimacy, of greatly varying degrees, are discernible in many modern states.[6]

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1. De Kadt op cit 1-4.
2. S.M. Lipset Political Man (1959) 77ff.
3. C.J. Friedrich Limited Government - A Comparison (1974) 111.
4. J. Habermas 'Legitimation Problems in the Modern State' in Habermas Communication and the Evolution of Society (1979) 178.
5. C.J. Friedrich Constitutional Government and Democracy (4 ed, 1968) 583.
6. See J.H. Schaar's excellent first essay in Schaar Legitimacy in the Modern State (1981) 15-52.

In South Africa the contemporary crisis of legitimacy is particularly acute, and is primarily due to the fact that those with political demands continue to be excluded from the political system. Evidence of the growing rejection of the state's authority is found in many of the factors mentioned above (the crisis tendencies are all closely interrelated), as well as more symbolic activities such as the anti-Republic festival and flag-burning incidents in 1981, and also in the state's increasing tendency to resort to coercive measures such as removals, deportations, detentions and censorship. To accentuate the problem the state is unable to sustain the degree of economic performance-based legitimacy it has acquired during times of economic prosperity.[1]

Following Weber[2] it is usually asserted that legitimacy can be derived from traditional authority (a monarch or a chief), or charismatic authority (faith in a leader arising from his prestige or charisma) or rational-legal authority (where those subject to authority accept the appropriateness of the laws under which the system operates).[3] But the Weberian categories of legitimacy have been criticised subsequently, as has the notion of an historic progression from charismatic to traditional to rational-legal authority;[4] even rational-legal authority, which is seen as the most progressive and suitable for modern systems of government, is currently being undermined in many countries. Nevertheless the concept of rational-legal authority serves a useful analytical purpose as far as South Africa is concerned, in view of the almost universal agreement in this country on the inappropriateness of the existing laws regulating the political system - that is the constitutional order. Whereas in the first two categories of legitimacy authority is vested in specific persons, in the third type it is vested in 'impersonal rules and the offices created under them'.[5] Rational legitimacy is thus

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1. Cf Lipset op cit 77-82.
2. M. Weber The Theory of Social and Economic Organisation (by T. Parsons (ed) 1947) 130ff.
3. Eg S.M. Lipset in N.J. Smelser Sociology: An Introduction (1967) 442-448.
4. Habermas op cit 183ff; Schaar op cit 16-17.
5. S.E. Finer Comparative Government (1970) 31f.

closely related to legality,[1] and the notion of constitutionalism.[2] But although legitimacy in its modern form presupposes legality, the two concepts must be distinguished; while actions in accordance with the positive law will be legal, they will not necessarily be legitimate. Thus the constitution not only legitimises modern government, but itself stands in need of legitimacy,[3] and this requires general acceptance of the 'rules of the game', as laid down in the constitution, by those subject to them. There is thus a close relationship between rational-legal legitimacy and the constitution's method of adoption;[4] here the focus turns to the constituent power from which the constitution derives its authority and which transcends the constitutional order, and constitutionalists emphasise that the legitimacy of a constitution will be assured when it is accepted by a referendum or by a constituent assembly comprising popularly elected representatives.[5] On the other hand, as Friedrich points out,[6] if legitimacy can only be achieved where there exists a prevalent communal belief as to rightful rule, there may be conditions under which it is not possible at all.

The government's contemporary emphasis on constitutional politics and the need for a new constitutional dispensation is an expression of its own search for some kind of democratic legitimacy,[7] which, in the absence of an appropriate tradition and charismatic

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1. In fact the term 'legitimacy' derives from classical Latin legitimus, meaning in accordance with the law, although now it denotes justification in the eyes of the ruled. See P. Rosen 'Legitimacy, Domination and Ego Displacement' in A. Vidich and M. Glassman (eds) Conflict and Control - Challenge to Legitimacy of Modern Governments (1979) 75.

2. On legitimacy and legality see A.P. d'Entrèves The Notion of the State - An Introduction to Political Theory (1967) 141-150; and on legitimacy and constitutionalism see C.J. Friedrich Limited Government - A Comparison (1974) 110-118. Friedrich rejects Weber's classification and distinguishes between religious, juristic (philosophical), traditional and procedural types of legitimacy - op cit 114.

3. Friedrich op cit 113.

4. See K.C. Wheare Modern Constitutions (2 ed, 1966) 62-66; B.O. Nwabueze Constitutionalism in the Emergent States (1973) 24-28.

5. Friedrich op cit 112.

6. Op cit 116.

7. Cf C.J. Friedrich Constitutional Government and Democracy (4 ed, 1968) 583. As Weber observed, most forms of power strive for legitimation - see Rosen ibid.

leadership, could only have a rational-legal basis.[1] In its response to the crisis of legitimacy the government has embarked on an extensive programme of deliberate constitutional activity during the last two decades, and particularly the last three years. During the former period the Coloured Persons Representative Council was established, only to be subsequently discontinued, the South African Indian Council was created and later made predominantly elective, the national states have been taken through various stages of self-government and four of them to constitutional independence, four new 'nationalities' have been created in the sub-continent, subordinate local authorities have been established for blacks in the 'common area' of South Africa, the government has formulated a new constitution and incorporated it in a draft constitution bill, and the Senate has been abolished and the president's council created. These matters are all dealt with in the body of the work. Besides these activities of high constitutional salience there have been numerous other developments of constitutional relevance. The Constitution Act[2] has been formally amended by forty-two statutes between 1961 and 1981, the amendments ranging from the purely symbolic (the 'flag-burning' provision[3]) to those making a functional contribution to the political process;[4] in addition, provisions of the constitution have been repealed by implication,[5] and other enactments have affected important aspects of the broad constitutional system.[6] The last few years have also seen the appointment of numerous commissions of enquiry bearing on the constitution and related matters: those appointed by the govern-

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1. The consociational model's dependence on leadership élites suggests the possibility of a degree of charismatic authority as occurred in the 'new nations', but it would have to be buttressed by a greater degree of rational-legal authority than exists at present.

2. Act No 32 of 1961.

3. S 5A of the Constitution Act introduced by Act No 101 of 1981 which criminalises the destruction or discrediting of the national flag.

4. Eg the amended ss 20(3), 20A and 40(1)(b) and (c) which further the centralisation of power in South Africa and contribute to the managerial style of government which characterises the Botha administration.

5. Most notably by the Status Acts Nos 100 of 1976, 89 of 1977, 100 of 1979 and 110 of 1981, which impliedly repealed s 114(a) of the Constitution for the purposes of those acts. On juridical aspects of this matter see below, 448-449.

6. Eg the Prohibition of Political Interference Act No 51 of 1968 (which proscribed racially-mixed political parties) and the Electoral Act No 45 of 1979 (which provided for the registration of parties for the first time and affected other aspects of the electoral system).

ment, such as the Theron, Schlebusch and Niewoudt commissions, and those appointed by other bodies such as the Quail (Ciskei), Lombard and Buthelezi commissions.[1] Various other commissions have investigated matters such as industrial relations, group areas, regional development, security legislation, the media, black urban rights, education, and the courts, all of which have broad implications for constitutional development. And finally the government has also recently shown formal deference to the importance of the process of constitutional change and the significance of this factor for legitimacy,[2] although it has yet to give significant effect to this acknowledgement.

These frenetic constitutional activities have clearly been inadequate thus far in that they have not resolved the legitimation crisis and are perceived even by the government as only the precursors of more substantial constitutional changes; in addition some developments have been of only temporary duration and others have been mutually inconsistent with one another. To the extent that they are inadequate and inconsistent and have created additional, but as yet unfulfilled, political expectations, it might even be said that some of these developments have contributed to the legitimation crisis.[3] A further problem is that the juridical ease with which the government can, and does, effect constitutional changes,[4] highlights the situational nature of constitutional rules and structures[5] and gives a quality of impermanence and vulnerability to institutional innovations. But despite these factors of fluctuation and uncertainty, it is

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1. The reports of these commissions are dealt with in the text, where appropriate, and cumulatively in chapter 5, below.

2. Eg in its acceptance of the Schlebusch report's recommendation that in the process of constitutional change there should be 'the widest possible consultation and deliberation ...' (Interim Report of the Commission of Inquiry on the Constitution (R.P 68/1980) § 8(b)), and in the creation of the president's council as a vehicle of constitutional change, despite that institution's many shortcomings - see below, 326-333.

3. Not only among non-whites but also among whites, for whom the changes in existing conservative institutions are perceived as a threat. Cf S.M. Lipset Political Man (1959) 78.

4. S 118 of the Constitution Act. In recent years the select committee procedure has tended to be avoided even for important constitutional innovations, eg the enlargement of the House of Assembly to accommodate nominated and indirectly members in a way not even recommended by the Schlebusch commission. See below, 321-326.

5. In terms of the doctrine of parliamentary supremacy the government was able to amend s 114 of the constitution in 1981 with retrospective effect to 1961. See s 7 of Act No 101 of 1981.

possible to identify two consistent lines of constitutional development during the past few years: the creation of separate political institutions in the national states into which all black political activity is intended to be channelled, and the creation of separate and joint institutions in the 'common area' through which coloureds and Indians will be gradually incorporated into the 'white' political system. The government has sought to legitimise the former process in terms of the principle of self-determination; for this purpose use is made of the concepts of international law and the process is depicted as one of 'internal decolonisation'. The latter process has also been legitimised in terms of self-determination, but more recently the government has come to use consociationalism as a legitimising ideology, albeit often implicitly.

Consociational theory was devised as an alternative to the two traditional theories of western constitutionalism, those of parliamentary and presidential government respectively. In essence consociationalism differs from traditional liberal-constitutionalism in that it replaces its majoritarian and adversarial aspects with a system of proportionality and power-sharing; it also posits a crucial role for leadership élites in the political process, at the cost of extensive popular participation in government. Consociational democracy is both an empirical and a normative model - it provides a description of the political system in certain divided plural societies, and a prescriptive arrangement for other divided plural societies. It is intimately associated with theories of pluralism and the plural society and must therefore be evaluated in the light of these theories, and their relevance. But consociationalism does not provide an analytical constitutional-juridical model for plural societies, and its principles can be applied in a variety of constitutional frameworks - in fact the main contributors in the consociational

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1. Save for that exercised through the community councils. See below, 179-182.

2. See the references in T. Hanf, H. Weiland and G. Vierdag South Africa: The Prospects of Peaceful Change (1981) 412-413; see also House of Assembly Debates vol 16 cols 8115-8119 (4 June 1980); vol 6 col 3438 (10 September 1981).

3. On these systems see chapter 1, below.

4. The characteristics of consociationalism are described in chapter 3, below.

5. On whether consociationalism constitutes a 'model' in social science terms see A.J. Venter 'n Kritiese Ontleding van die Konsosiasiemodel van Arend Lijphart, unpublished M.A. thesis, Unisa (1980) 101-102.

school are political sociologists who approach the subject from a behavioural-attitudinal and not a legal-institutional perspective. Nevertheless it is possible to identify the principles of consociationalism with well-known constitutional features and mechanisms and to indicate which constitutional frameworks would be most conducive to the emergence of a consociational system of government.

In this work consociational democracy is not applied prescriptively to South Africa for reason of the absence here of many of the crucial preconditions for its successful operation. South Africa's political culture has never shown much affinity with the coalescent nature of consociational government, and its constitutional tradition shows little convergence with the optimal institutional arrangement for a consociational system. The analysis[1] shows, on the contrary, the South African constitution's historical adherence to the Westminster system of government, as far as the composition and functions of the main institutions and the conventions of the constitution are concerned. The major constitutional deviations from the Westminster model are found in the restricted franchise and the more limited operation of the rule of law in South Africa. In response to demands that these deficiencies be rectified, most pertinently through the extension of the franchise, the government has on the one hand created separate Westminster-modelled systems in the national states,[2] but on the other purported to move away from the Westminster system in the common area. The seeming paradox is, however, readily explicable: by rejecting the Westminster system as a normative model for South Africa, the government is also able to avoid its features of a universal franchise and majority rule, which would inevitably threaten its own position; in fact, particularly since 1976[3] the government has emphasised the need to move away from the Westminster paradigm in the development of a new constitutional order for South Africa. Clearly a movement away from a system which has never properly existed is somewhat illusory, but the 'Westminster system' continues to be used as a point of departure in the quest for an alternative constitution. Other

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1. See chapter 4, below.

2. This statement must be somewhat qualified, since not all the national states have copied Transkei in accepting the Westminster paradigm. See chapter 5, below.

3. The year of the Theron Commission report. See chapter 5, below.

parties have joined in the investigation of new constitutional models[1] and have tended to combine with the government in adopting the terminology of consociationalism, but like the latter in an eclectic and often inaccurate way. But the more recent constitutional developments in pursuance of the so-called movement away from Westminster do show some affinity with the principles of consociationalism - this applies particularly to the government's 1977 constitution,[2] and to a lesser extent some aspects of the homelands policy, including the proposed 'constellation' arrangement. In essence what have emerged are formal and informal structures in which appointed and nominated leaders of racially and ethnically defined groups hold consultations, based on a political agenda prepared by the government. As yet this process is not accompanied by popular political participation in joint institutions and it falls demonstrably short of a system of consociational democracy; it has, nevertheless, been referred to as a form of 'sham consociationalism'.[3] In social science terms, the government continues to regulate conflict unilaterally,[4] whereas genuine consociationalism assumes a system of democratic conflict regulation through multilateral negotiations. But despite the use which is now made of consociational concepts, the ruling ideology remains opposed to power-sharing,[5] which is a central tenet of consociationalism.

As far as future constitutional developments are concerned this work is restricted mainly to what is loosely referred to as 'a period of government-controlled change'. There is clearly no sense in which the government could be regarded as an autonomous actor during such a period, since constitutional changes would invariably be made in response to economic and political tensions, and other internal and external pressures. But from a legal-institutional point of view there is a sense in which it can be

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1. Chapter 5, below

2. This is analysed in chapter 6, below.

3. See Hanf, Weiland and Vierdag op cit 410-415. But the very notion of 'sham consociationalism' is a matter of dispute; see the discussion in F. van Zyl Slabbert and J. Opland (eds) South Africa: Dilemmas of Evolutionary Change (1980) at 32-33.

4. Hanf, Weiland and Vierdag op cit 18.

5. Ibid 379.

said that the government will, for a certain period, be able to initiate and implement constitutional changes without losing formal control of the process of change. If one were to pinpoint the termination of the corresponding period in the Zimbabwe constitutional transition it would probably be the internal agreement of March 1978, which made provision for a transitional government;[1] at this point the white government lost the formal initiative over constitutional change, despite the fact that the white parliament remained in existence as the sole legislative authority. There is no indication of any comparable transition in South Africa within the intermediate term, although some attention is given to the relevance of consociationalism if a 'no-win' situation is reached in South Africa.[2] But no attempt is made to construct an ideal constitutional blueprint for the country, whether consociationally-influenced or otherwise.

It has been said that,

> 'political change in South Africa is most likely to take a "consociational form" in the initial stages of power-sharing.'[3]

While the ruling ideology is at present opposed to power-sharing, this observation highlights the process of consociational engineering which can be anticipated in the future.[4] Past constitutional developments, the existing momentum of institutional change, and the expressed government intentions,[5] indicate what the state's priorities will be during a period of government-controlled constitutional change, and it clearly has the legal and logistic means to give effect to its intentions in a substantially unilateral way. What can be anticipated is the furtherance of the 'internal decolonisation' process until all, or

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1. The transitional government remained in office until the Zimbabwe-Rhodesia constitution came into effect on 1 June 1979; see below, 239-240.

2. See chapter 10, below.

3. See L. Schlemmer South African Society in the 1980's: An Exercise in Hazardous but Concerned Speculation (CASS, University of Natal, 1979) 3.

4. See chapter 7, below.

5. There have been numerous such expressions, some of them conflicting; one of the more important is the 'twelve-point plan' which, although vague and subject to various interpretations, indicates a future continuity of past constitutional trends. The plan was first expounded at the Natal congress of the National party in 1979; see 1980 Annual Survey of Race Relations 10. See also the references in chapter 7, below.

most, of the national states are constitutionally independent and their members have been denationalised, and the gradual incorporation of whites, coloureds and Indians into a common political system. In both these processes aspects of consociationalism will be apparent: any resurrection of the government's 1977 constitution will probably retain the general principles of the original, including its quasi-consociational features, and both the pre-independence and post-independence relationships between the national states and the republic are likely to have some affinity with the normative consociational model. But again this would fall well short of a system of consociational democracy which would require, inter alia, constitutional changes of a fundamental nature,[1] and these by definition would not be accepted during a period of government-controlled change. What is predicted is a complex form of quasi-consociationalism with its foundations embedded in the constitutional past, but a transition from this situation to genuine consociationalism is unlikely to be achieved through a process of piecemeal constitutional adjustments.

Whether these constitutional developments could resolve the economic and political crises of the future falls outside the scope of this work, but what can be anticipated is that they will not resolve the legitimation problem if the constitutional system continues to be based on concepts of colour and ethnicity and the changes are unilaterally implemented by the government through its control of the political agenda and virtual monopoly of bargaining power.[2] There remains to be investigated the relevance of consociationalism should these crises not be resolved, and what several commentators refer to as a 'no-win' situation is reached in South Africa.[3] From the government's point of view this would occur when it perceived the costs of maintaining the system to be greater than those of entering open-ended negotiations for its replacement. The corresponding moment for the internal Zimbabwe government would be when it accepted the principle of the Lancaster House constitutional conference. If

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1. See chapter 8, below.

2. It will be shown that, while the government adopts the terminology and some of the structures of consociationalism, the procedure whereby it effects constitutional changes is far from being fully consociational.

3. See F. van Zyl Slabbert and D. Welsh South Africa's Options - Strategies for Sharing Power (1979) 121.

this point were reached in South Africa, previous patterns of constitutional development and prevailing perceptions of power and privilege are likely to result in the main issue for negotiation being seen as the constitutional accommodation of blacks and whites (or alternatively blacks and non-blacks) in a common political system. And if a negotiated constitution were to emerge from such deliberations it would be likely to incorporate features such as proportional electoral systems, legislative veto-rights, joint executive authorities, justiciable fundamental rights, a decentralisation of authority, and an inflexible amending procedure - in short the constitutional devices for protecting minorities and promoting power-sharing which are associated with consociationalism. At this stage the emphasis on institutional and symbolic matters is likely to result in a form of rational-legal authority and largely resolve the legitimation crisis, regardless of the system's real potential for resolving socio-economic problems.[1] If a democratic system emerges through a process of intermittent constitutional evolution, culminating in a negotiated constitutional settlement, it is likely to be a form of constitutional democracy (as opposed for example to participatory democracy), which shows at least some features of a consociational system. As Lijphart has said of South Africa,

> 'the outlook for democracy of any kind is poor, but if there is to be democracy at all it will almost certainly have to be of the consociational type.'[2]

The subject-matter of this work is approached primarily from a constitutional-juridical perspective. It is concerned predominantly with the constitutional allocation and limitation of authority and judicial interpretations thereof, and not with the far more complex feature of social systems, namely power. It therefore suffers from the same limitations as other institutional analyses. At the same time sight is not lost of the fact that, for the most part, our constitutional theory was devised for a simple version of the plural society and that in many respects

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1. Chapter 10, below.

2. A. Lijphart Democracy in Plural Societies (1977) 236.

it needs updating in the light of modern socio-economic and political realities.[1] The emergence of the bureaucratic-administrative state, the rise of corporatism, the long-standing centralisation of power, the recent moves towards a managerial form of government, and the use of some of the structures of consociationalism, have all contributed to a growing divergence between theory and reality in South Africa. Against this background a re-evaluation is made of some constitutional doctrines closely affected by current and anticipated constitutional developments.[2]

Finally reference should be made to the comparative scope of this work. Although consociationalism was conceived as an alternative to the parliamentary and presidential systems, it nevertheless remains within the ambit of western liberal-constitutionalism. Most of the comparative material relates to countries falling within this tradition, and in particular the original presidential and parliamentary systems in the United States and Britain respectively, and also to the main empirical consociational systems; more eclectic references are made to other countries with Westminster-derived constitutions, and semi-presidential and quasi-consociational systems. No comparative references are made to the constitutional systems in the socialist countries, and only a few to those in third world countries. African constitutionalism does not provide much comparative scope because constitutional democracy has not generally been a success in Africa and there has been a trend towards authoritarianism and military regimes in the post-colonial era;[3] however, the African one-party systems and various principles of traditional African public law show an affinity with some aspects of consociationalism. Of the more recent instances of constitutional transformation in the African sub-continent, Zimbabwe and its constitutional experience have obvious relevance for South Africa, and reference is also made to pre-independence constitutional developments in Namibia; but for the reasons already mentioned the Mocambiquean and Angolan constitutions are not referred to.

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1. See L. Baxter's valuable paper 'Constitutionalism, Bureaucracy and Corporatism' in L.J. Boulle and L.G. Baxter (eds) Natal and KwaZulu: Constitutional and Political Options (1981) 75-108.

2. Chapter 9, below.

3. See B.O. Nwabueze Constitutionalism in the Emergent States (1973) 139-172.

PART ONE

CONSTITUTIONALISM PLURALISM AND CONSOCIATIONALISM

CHAPTER 1

LIBERAL-DEMOCRATIC CONSTITUTIONALISM

1. Introduction

The story of modern constitutionalism has been depicted[1] as a great debate between British and American constitutional principles which, it has traditionally been asserted, were responsible for the two historic versions of stable democracy, the British parliamentary and the American presidential systems. But despite the historical and institutional differences between these two systems they are both based on the principle that the essence of democracy is majority rule. Lijphart has suggested[2] that within a typology of democratic political systems the British and American versions can, on the basis of this common feature, be contrasted with the system of consociational democracy, which challenges the notion that democracy should be equated with majority rule. The political competition which takes place in an adversarial context and according to predominantly majoritarian rules in the traditional liberal democracies, is replaced in consociational theory by elite co-operation and consensual decision-making according to what may loosely be called the 'power-sharing' principle. The distinction between majoritarian rule in an adversarial context and power-sharing in a co-operative context is a central theme of this work.

Although the identification of democracy with majority rule is a wide-spread contemporary phenomenon within the liberal democracies there was an earlier principle in many societies according to which decisions had to be reached unanimously.[3] The majority principle came to be recognised gradually throughout Europe but

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1. C.J. Friedrich The Impact of American Constitutionalism Abroad (1966) 12; cf G. Almond and G. Powell Comparative Politics (1966) 5.

2. Arend Lijphart 'Consociational Democracy' 21 (1968-9) World Politics 267, 'Majority Rule Versus Democracy in Deeply Divided Societies' 4 (1977) Politikon 113.

3. See D.V. Cowen The Foundations of Freedom (1961) 104ff.

was, and continues to be, justified in widely differing terms. Thus it has been said, in different times and contexts, to be based on the superior force of the majority,[1] on various theories of natural law,[2] on the theory of the social contract,[3] on a variety of legal fictions,[4] on its utilitarian function,[5] and on its 'certain naturalness'.[6] But its contemporary justification tends to have a more pragmatic basis - if it is not possible to achieve a unanimity of opinion, the optimal situation, then convenience and practical necessity require that the will of the majority should prevail, if only as a last resort. The normative principle that modern government rests on the consent of all the governed, must be balanced against the need in practice for effective government - and in certain cases this means quick and decisive decision-making, provided it carries the minimum support of a bare majority. The only alternative to majority rule, it is felt, is 'minority rule', for which there can be no theoretical or practical justification.[7]

But liberal-constitutionalists have always experienced a tension between the principles of majoritarian democracy, based on the rights of popular majorities, and constitutionalism, founded on

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1. Cf Sir James Stephen's well known comment, 'We count heads instead of breaking them' (quoted in Cowen op cit 105).

2. Grotius De Jure Belli ac Pacis 2.5.17; see Huber Heedendaagse Rechtsgeleertheyt 4.3.1-20 and cf Puffendorf Droit de la Nature et des Gens 7.2.15.

3. John Locke Two Treaties of Government Bk II ch 8 (Everyman's Library ed, 1977, 165-6); J.J. Rousseau The Social Contract Bk IV ch 2 (Everyman's Library ed, 1913, 88).

4. D.V. Cowen op cit 106.

5. A. de Tocqueville Democracy in America (1835) ch 14 (World's Classics ed, 1946, 183). For De Tocqueville 'the very essence of democratic government consists in the absolute sovereignty of the majority'.

6. John Rawls A Theory of Justice (1972) 356.

7. The term 'minority-rule' is clearly misleading since a minority can have no more than a negative power to restrain the majority; this does not allow it to rule, but could give it some share in the exercise of power. Nevertheless the term 'minority rule' serves to emphasise a minority's ability, under certain constitutional circumstances, to preserve the status quo.

the fear of an abuse of power. If majority rule was the essence of democracy did this entail unlimited power for a bare majority? Conversely, if constitutionalism involved limitations on the exercise of power could it also limit the popular will? The constitutionalists, by definition, tended to answer the latter question in the affirmative and were able to draw on a long, if somewhat erratic, intellectual tradition in support of the view that popular majorities should be constitutionally restrained. Locke's belief in government by consent and rule by the majority accommodated a concern for minority rights, and he regarded rulers as liable to be replaced if they acted tyranically.[1] Rousseau, who espoused a more radical majoritarian viewpoint, differentiated between the majorities necessary for 'grave and important' matters (near unanimity) and matters requiring 'an instant decision' (a majority of one vote).[2] Madison had a constitutional rather than a populist notion of democracy,[3] Burke[4] regarded majority rule as 'a most violent fiction of law', and both De Tocqueville[5] and Mill[6] regarded the 'tyranny of the majority' as an evil against which society should be on its guard. And in the twentieth century, writers from Hayek[7] to Finer[8] to Rawls[9] have perceived the need to restrict majority rule through

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1. John Locke op cit 224ff.

2. J.J. Rousseau The Social Contract (1762) Bk 4 ch 2 (Everyman's Library ed, 1973, 251).

3. J. Madison The Federalist Papers (1788) No. 10 (Mentor Books ed, 1961, 77-83).

4. E. Burke An Appeal from the New to the Old Whigs in B.W. Hill (ed) Burke on Government, Politics and Society (Fontana ed, 1975) 373.

5. A. de Tocqueville Democracy in America (1835) ch 14 (The World's Classics ed, 1946, 182-198).

6. J.S. Mill On Liberty (1859) ch 1 (Dent & Sons ed, 1972, 68f).

7. F.A. Hayek The Constitution of Liberty (1960) 103-117.

8. S.E. Finer Comparative Government (1970) 62-66.

9. Rawls op cit 129.

various constitutional devices in order, respectively, to limit the scope of governments' activities, to allow minorities the means to become a majority, and to acquire a more just body of legislation. Dahl sought to resolve the contradiction between populist and constitutionalist democracy by developing the hybrid notion of polyarchal democracy.[1]

Friedrich's views on constitutionalism and democracy can be regarded as representative of modern liberal constitutionalists.[2] By constitutionalism Friedrich understands a system of government in which authority is constitutionally divided among various bodies and its exercise is subject to legal restraints and controls.[3] He points out that constitutionalism was at the outset not democratic, but rather aristocratic;[4] democracy only spread gradually through the nineteenth and twentieth centuries with the extension of the franchise and the elimination of public discrimination, until popular majorities came to be recognised as the only basis of legitimate government.[5] But it is unrealistic and contrary to fact to assert that a 'bare majority' has unlimited power in a democracy - there is a need for flexibility in determining what should constitute a majority for different purposes. A good constitution should demark clearly what are grave and more important decisions, and require qualified majorities in these instances; provided the constitutional limits are accepted by the majority of the people there need be no conflict between democracy

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1. R.A. Dahl A Preface to Democratic Theory (1956) ch 3; see also Dahl's Polyarchy: Participation and Opposition (1971).

2. C.J. Friedrich Limited Government: A Comparison (1974) 34-49.

3. And, by implication, the political responsibility of the government to be governed. Cf C.H. McIlwain Constitutionalism: Ancient and Modern (rev. ed, 1947) 146.

4. Cf Walter Bagehot's aversion to the ultra-democratic theory The English Constitution (2 ed, 1872) (World's Classics ed, 1974, 129ff). Dicey's notion of parliamentary sovereignty assumes an unrestricted franchise although he did not canvass this issue; he did, however, accept the majority rule viewpoint: A.V. Dicey An Introduction to the Study of the Law of the Constitution (10 ed, 1959) 83. See also C.B. Macpherson The Real World of Democracy (1965) 1-11.

5. Cf S.E. Finer op cit 35.

and constitutionalism. And should the limitations on popular majorities entrench the position of minorities then, according to Friedrich following Locke, the majority of the community retains a residuary power to alter the constitution by revolutionary means. Thus for Friedrich majority rule remains the quintessence of democrary provided it is not taken to mean 'majority-of-one'. Among the traditional devices used by constitutionalism to restrain majorities have been bicameralism, the separation of powers, the federal division of powers, proportional electoral systems, the use of qualified majorities in deliberative bodies, checks and balances, constitutional rigidity, bills of rights and judicial review; these devices are designed to limit the scope of majority rule, the kinds of matters on which majorities have final authority, and the speed with which the aims of majorities can be put into effect.[1]

The main weakness of these theories of constitutionalism concerns their limited view of where power actually lies in a political system; they are concerned only with the formal distribution of constitutional authority and the legal restraints thereon, and with the question of whose views should prevail in a democratic system rather than with whose views actually do prevail. But as this work is concerned predominantly with the constitutional allocation of competence in political systems it is unnecessary to develop this type of critique of liberal-constitutionalism. What is relevant for present purposes are the factors in a constitutional system which determine whether the will of the majority can prevail on matters requiring authoritative decisions, or whether it is formally restrained by the constitution. These include:

(i) The electoral system - whether this operates on the plurality principle in single-member constituencies to the advantage of the major parties, or on a proportional basis in multi-member constituencies to the advantage of minority parties;

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1. See J. Rawls op cit 224. For Rawls there is an inverse relationship between the degree to which a constitution is majoritarian and the extent of 'equal political liberty'. See also S.A. de Smith The New Commonwealth and its Constitutions (1964) 107-109.

(ii) The legislative process - whether this allows bare majorities to enact their policies, or whether legislation requires qualified majorities or approval by a review chamber or the electorate;

(iii) The executive - whether it is composed exclusively of members of the majority parliamentary party and is thereby enabled to dominate the legislature, or whether it comprises members of all legislative parties or has a separate popular mandate;

(iv) The allocation of competence - whether competence is allocated exclusively to a few authorities, or is widely dispersed among many on a functional and territorial basis;

(v) The constitutional amending procedure - whether this is rigid or flexible;

(vi) The sites of political competition - whether there is only one decisive site, as in a unitary parliamentary system, or numerous sites established by a separation and division of powers;

(vii) A bill of rights - whether or not this is constitutionally entrenched and legally enforceable;

(viii) Referenda - on what issues a referendum is constitutionally prescribed and whether there is a right of popular initiative.

The above factors will determine the extent to which a constitutional system is formally responsive to politically organised majorities although the extent to which actual effect can be given to their wishes depends on a range of additional extra-constitutional factors. Conversely, they determine the extent to which the rights of political minorities are constitutionally safeguarded and they are enabled to work towards creating a new majority, although the actuality of these aspects likewise depends on extra-constitutional factors. In the following two sections specific attention is given to these factors in an investigation of the relationship between majoritarianism and constitutionalism in Britain and the United States. It is possible

at this stage, however, to state that the liberal democracies are 'qualified democracies' in that they display some or most of the above features which restrain majorities.[1] The notion of 'qualified democracies' also indicates that the term majority can become a multifaceted concept in the context of a constitutional system. While definitionally 'majority' denotes the greater number in or part of a certain group,[2] the term can be understood in a number of different ways, as can be illustrated in relation to the electoral system. Thus by 'overall majority' is understood at least fifty per cent plus one of those who have voted in an election, a total which need not be attained where there are more than two candidates; 'absolute majority' has the same meaning, save that the percentage is usually calculated in terms of those who were entitled to vote, as opposed to those who actually voted. These two terms can be distinguished from 'relative majority' which denotes a plurality of votes - where there are more than two candidates a relative majority could constitute an overall minority. A further distinction can be drawn between a 'simple majority', namely fifty per cent plus one, and a 'qualified majority', which is larger than the former, for example a two-thirds or three-quarters majority, and which could involve concurrent majorities within specified subgroups, or even unanimity. Thus while majority rule is usually understood in terms of simple or overall majorities, many of the constitutional devices used by the liberal democracies involve one or more forms of qualified majoritarianism, and the electoral system usually operates according to the relative majority principle.

Consociationalism shares with liberal democracy a deep sense of constitutionalism but differs from it in that it seeks to replace the majority principle with the principle of proportionality; while the terms majoritarian and proportional are usually

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1. S.E. Finer Comparative Government (1970) 74; C.J. Friedrich Constitutional Government and Democracy (4 ed, 1968) 18; G. Carter and J. Herz Government and Politics in the Twentieth Century (3 ed, 1973) 269.

2. Vol VI Oxford English Dictionary 59.

used in connection with electoral law, consociationalism applies the proportionality principle to the decision-making process as a whole.[1] This is based on the assumption that in divided plural societies there are likely to be permanent electoral majorities and permanent minorities, with the latter being unable to convert to majority status and therefore being excluded indefinitely from power.[2] The effect of this arrangement, runs the consociational argument, is to violate the primary rule of democracy which is that those affected by political decisions should have a chance to participate, either directly or through representatives, in their making. But when there is a zero-sum approach to politics, and minorities are excluded from participation in decision-making (eg in Westminster-type cabinets), then effect is only given to the secondary rule of democracy, namely that the will of the majority should prevail.[3] The proportionality of the normative consociational model leads to a system of power-sharing, in which all groups are represented in decision-making processes and are enabled to influence decisions according to their proportional strength. The constitutional basis for power-sharing includes most of the institutional devices for restraining majorities associated with liberal democracy, but consociationalism requires additional institutional and extra-constitutional factors to be successful.[4]

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1. J. Steiner 'The Principles of Majority and Proportionality' 1971 British Journal of Political Science 63.

2. See chapter 2, below.

3. W.A. Lewis Politics in West Africa (1965) 64ff; A. Lijphart 'Majority Rule Versus Democracy in Deeply Divided Societies' 4 (1977) Politikon 113 at 115.

4. See chapter 3, below.

2. The British Parliamentary System

(a) General constitutional principles

Descriptions of the British constitution usually emphasise that it is a product of a gradual evolutionary development originating in medieval times, and that even in its modern form it remains largely uncodified and regulated more by the rules of political conduct known as constitutional conventions than by legal rules.[1] Its main institutions are said to be a constitutional monarchy, a bicameral parliament, a parliamentary executive, an independent judiciary and an impartial public service; while there do exist sub-national institutions, the constitution is unequivocally unitary and the system of government highly centralised. The most important rule of the constitutional system is the supremacy of parliament which finds its justification in terms of that institution's representative composition; the House of Commons is elected on the basis of a universal franchise through an electoral process which gives rise to a predominantly two-party system and an adversarial style of politics. Although there are no constitutional guarantees of human rights or judicial safeguards against an abuse of power, the Rule of Law is said to qualify the supremacy of parliament and to provide some protection for the individual. Constitutional lawyers usually refer to these as the main features of the British constitutional model, or as it is sometimes known, the 'Westminster system' of government.[2]

But the term 'Westminster system' is also used in a narrower sense to refer to only certain features of the British constitution; in this sense it means,

> 'A constitutional system in which the head of state is not the effective head of government; in which

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1. See e.g. S.A. de Smith Constitutional and Administrative Law (2 ed, 1973) 35ff; E.C.S. Wade and G. Phillips Constitutional and Administrative Law (9 ed by A.W. Bradley, 1979) 32ff; O. Hood Phillips and P. Jackson Constitutional and Administrative Law (6 ed, 1978) 19ff.

2. The term 'Westminster system' has no precise constitutional or political meaning and has been particularly misused in the South African context. (See chapter 4, below). See S.A. de Smith The New Commonwealth and its Constitutions (1964) 77; L.J. Boulle 'The Second Republic: It's Constitution Lineage' 1980 CILSA 1ff; D.H. van Wyk 'Westminsterstelsel - requiescat in pace? of: kan 'n luiperd sy kolle verander?' 1981 THR-HR 105ff.

> the effective head of government is a Prime Minister presiding over a Cabinet composed of Ministers over whose appointment and removal he has at least a substantial measure of control; in which the effective branch of government is parliamentary inasmuch as ministers must be members of the legislature; and in which ministers are collectively and individually responsible to a freely elected and representative legislature.'[1]

In this definition attention is focussed on the executive branch of government and its formal relationship with the legislature which gives rise to the particularly British form of parliamentary government, although there are other species of parliamentarianism. The main feature of this system evolved out of two distinct historical processes:[2] the differentiation of the functions of government which led to the limitation of the monarch's powers, and the subsequent practice of the monarch of selecting as ministers persons who had the confidence and support of the majority in the Commons. The close institutional relationship between the legislature and executive is traditionally regarded as the essence of the Westminster system and its most distinctive feature. Bagehot[3] attributed the 'efficient secret'[4] of the constitution to this feature, which, as he understood it, involved 'the close union, the nearly complete fusion,

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1. S.A. de Smith The New Commonwealth and its Constitutions 77-78. This definition is usually used in relation to the Westminster export models and in a comparative context.

2. See G. Carter and J. Herz Government and Politics in the Twentieth Century (3 ed, 1973) 35-36; the second process overtook the first and made it superfluous.

3. W. Bagehot The English Constitution 9. J.A.G. Griffith aptly describes Bagehot's oft-cited work as 'unhappily misleading'. ('The Political Constitution' 42 (1979) Modern Law Review 1 at 2).

4. By the 'efficient' part of the constitution Bagehot understood those parts by which in fact it worked, and he contrasted these with the 'dignified' parts which brought it into force and attracted its motive power.

of the executive and legislative powers'. Bagehot's purpose was to expose the 'fallacies' of Montesquieu and Blackstone who ascribed the stability of the English system to the separation of powers doctrine,[1] but subsequent critics have pointed out that the close relationship between the executive and legislature does not exclude the importance of the constitutional distinction between the two : English constitutionalism has always recognised the need for a partial separation of government functions and a partial separation of personnel.[2] Bagehot's concept of fusion also obscured the notion of balance between cabinet and parliament which was central to the theory of British parliamentary government and was effected through the mechanisms of dissolution and ministerial responsibility.[3] However, the notion of balance has in turn been outdated in terms of the contemporary dominance of parliament by the cabinet,[4] and dissolution and ministerial responsibility no longer play the role attributed to them during the classical period of parliamentary government.[5] But although the relationship between the cabinet and parliament distinguishes the Westminster system from the

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1. Cf C.F. Strong Modern Political Constitutions (8 ed by M.G. Clarke, 1972) 211f - this is one of the many works which eulogises Bagehot's contributions.

2. See Wade and Phillips op cit 48; M.C. Vile Constitutionalism and the Separation of Powers (1967) 226f; C.J. Friedrich Limited Government 18f. in recent English decisions the separation of powers doctrine has been invoked to prevent the judiciary from intruding in the legislative field (Hind v The Queen /1977/ AC 195, Duport Steels Ltd. v Sirs /1980/ 1 WLR 142) although there is evidence of the doctrine's continued vitality in other fields: C. Munro 'The Separation of Powers: Not Such a Myth' 1981 Public Law 19-24.

3. Vile (op cit 226ff) convincingly exposes Bagehot's limited insight into English constitutional history, during which the two theories of mixed government and separation of powers had been combined into the single theory of the balanced constitution which was based not on the fusion of all power in one set of hands but a partial separation of powers. Bagehot did no more than 'expose' the long since discredited, extreme theory of separation of powers which he assumed to underly the English constitution; he overlooked the more subtle division of power between, and interdependence of, the executive and legislature.

4. Cf H. Laski Parliamentary Government in England (1938) 171ff.

5. Vile op cit 228.

non-parliamentary executive of the presidential system as well as other systems of parliamentary government,[1] constitutional theorists still differ on the exact nature of this relationship and the implications of the 'weak separation of powers' which it involves.

As De Smith's definition[2] indicates, cabinet members in the Westminster system must be members of parliament on appointment, or become so within a stipulated period of grace.[3] Executive authority vests predominantly in the cabinet and its members are collectively and individually responsible to parliament for the exercise of this authority. The theoretical diffusion of executive authority results in residual powers remaining with the head of state, but these tend to be of a ceremonial or nominal nature and are exercised on the advice of the cabinet. The most important function of the head of state is the appointment of the prime minister who, by convention, must be the leader of the majority party in the House of Commons; the prime minister effectively appoints and dismisses other members of the cabinet, although ministers remain nominally servants of the Crown. Although the cabinet is dependent for its continuance in office on

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1. The parliamentary systems of Western Europe are also characterised by the inter-locking of the executive and legislature but differ from the Westminster system in various ways, each of which places the executive in a weaker position than its British counterpart: in some cases the executive has no power of dissolution, in others the President is vested with real executive powers, and in others the multi-party systems lead to frequent votes of no-confidence and cabinet resignations. As parliamentary government generally depends for its stability on the two-party system these governments tend to be unstable. Strong op cit 220ff; Carter and Herz op cit 40.

2. See above, 24-25.

3. This arrangement is followed faithfully in all Westminster's export models. The older Commonwealth countries (New Zealand, Australia Canada, South Africa) all developed from representative to responsible government, at which stage the responsibility of the executive to the locally elected legislature was ensured by law or convention; the relationship between the executive and legislature in these countries still conforms to the Westminster model, with local variations in style and practice. In many of the newly independent Commonwealth countries the executive branch of government was also parliamentary, either through force of statute or through the incorporation by reference of the relevant British conventions. S.A. de Smith The New Commonwealth and its Constitutions 82ff; Carter and Herz 37ff.

the support of parliament, the two-party system tends to ensure its stability for the full term of a parliament's life.[1] Ultimate political control remains in the hands of the electorate and is exercised in periodic elections.

This, in brief and somewhat eclectic overview, is the traditional constitutional theory underlying the Westminster system of government, although it provides at best a very limited insight into the actual operation of the British or other Westminster-based political systems. However it does provide a general background against which the majoritarian aspects of the Westminster system can be examined.

(b) Majoritarian Features

As far as its institutional arrangements and constitutional allocation of competence are concerned, the Westminster system can be described as thoroughly majoritarian in the following respects:[2]

(i) The electoral system operates through single-member constituencies and according to the plurality principle.[3] This entails the election in each constituency of the candidate with a relative majority of votes, which in contests between more than two candidates could constitute an overall minority of the votes cast. The system favours major parties because votes cast for losing candidates have no post-electoral effect and smaller parties are unable to translate their electoral support into

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1. See S.E. Finer Comparative Government (1970) 158f.

2. See A. Lijphart 'Majority rule versus democracy in deeply divided societies' 4 (1977) Politikon 113 at 115; M. Wiechers 'Possible Structural Divisions of Power in South Africa' in J. Benyon (ed) Constitutional Change in South Africa (1978) 107 at 111.

3. On the British electoral system see Hand, Georgel and Sasse (eds) European Electoral Systems Handbook (1979) 217-233; Halsbury's Laws of England (1977) vol 15, 205ff.

parliamentary seats unless it is strategically concentrated in certain constituencies. This can result in inadequate representation for minorities, to the point of their being effectively disenfranchised. The system tends to throw up two major parties with broad national support and of almost equal strength, but since there is no direct arithmetical relationship between the number of seats won by a party and its overall electoral support the party with minority popular support may achieve a legislative majority. Hence Wade's remark that it is a 'crude majority system'.[1] Further distortions can arise through the unequal delimitation of constituencies; although the principle of equality in the voter strengths of constituencies has been accepted for some time[2] it is still not applied in practice[3] and is further aggravated be the fact that Scotland and Wales are more generously represented in parliament than England.[4]

The British electoral system is traditionally said to have the advantages of presenting a clear choice to the electorate and of fulfilling clearly the competing rolls of government and opposition; it produces both a legislature and a government, and the government-opposition dichotomy in the Commons establishes clear lines of responsibility. By virtue of its parliamentary majority

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1. H.W.R. Wade Constitutional Fundamentals (1980) 9.

2. Wade and Phillips Constitutional and Administrative Law (9 ed, 1977) 146.

3. After the last redistribution the average size of the English constituencies was 64,134 electors, but this ranged from 25,023 to 96,830, an extraordinary maldistribution (see A.H. Birch The British System of Government (4 ed, 1980) 69-71). The standard constitutional law texts mention, but tend to gloss over, this phenomenon.

4. For a tabulation of these distortions, which includes the 1979 general election, see H.M. Drucker (ed) Multi-Party Britain (1979) 13; see also E. Lakeman How Democracies Vote (1970) 39ff.

and the convention of joint responsibility[1] the government is able to provide strong and effective leadership and to give effect to its policies. But almost without exception contemporary commentators on the electoral system call for its drastic reform. While the suggestions for reform are wide-ranging, and include such matters as the constitutional regulation of political parties, they generally call for a fairer apportionment of seats and fairer electoral outcomes[2] - in short, a movement away from majoritarian elections to a more proportional system.

(ii) Parliament in its legislative capacity functions on a majoritarian basis which empowers the government, acting through the dominant party, to enact legislation even against the objections of a large minority. Because enactments require only a simple parliamentary majority and because that majority may reflect only a narrow electoral majority, or even minority, a statute may rest in a very narrow basis of popular consent. The same legislative procedure is followed, in the Westminster system, for all legislation, and even constitutional amendments are subject to no formal suspensory or absolute veto exerciseable by a sizeable minority. Nor does the system of standing legislative committees modify this process in any significant way, as is the case in other countries.[3] The majority party dominance extends to parliament's other traditional elective, control and financial functions.

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1. Carter and Herz op cit 106.

2. H.W.R. Wade Constitutional Fundamentals (1980) 20. See also S.E. Finer (ed) Adversary Politics and Electoral Reform (1975); N. Johnson In Search of the Constitution (1977) 217-219; Lord Hailsham The Dilemma of Democracy (1978) 183-189.

3. See S.A. Walkland 'Committees in the British House of Commons' in J. Lees and M. Shaw Committees in Legislatures - A Comparative Analysis (1979) 242 at 249; but select committees 'compensate in limited fields for the deficiencies of the party confrontation in the Commons' (262).

(iii) The cabinet is composed solely of members of the majority party which results in the exclusion of all legislative or electoral minorities from power. As the executive is the main instrument of modern systems of government, majoritarianism at this level, though intrinsic to the Westminster system,[1] has far-reaching consequences. The homogeneously composed cabinet can utilise its parliamentary majority to ensure its continuance in office[2] and to secure the enactment of its legislative proposals.[3]

(iv) The majority party not only forms a single-party cabinet but it captures the 'spoils' of government on a winner-takes-all basis. As far as the allocation of resources, the provision of public services, the extraction of means from various sources and the making of public and quasi-public appointments are concerned, the cabinet is in a pre-eminent position and is subject to no constitutional restraints. Through its control of the bureaucracy the majority leaders have a virtual monopoly on access to information, which can be further used to benefit supporters of the majority. At the apex of the system is the prime minister with extensive personal powers of patronage in relation to members of his cabinet, parliamentary caucus and party, and this has led to the suggestion that cabinet government has been replaced recently with a system of prime

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1. Dissolution is the means whereby a deadlock deriving from a legislative majority hostile to the executive can be broken. A fresh appeal is made to the electorate so that the legislative majority and the executive will once again be of the same mind - this is the only basis on which parliamentary government can operate. See S.E. Finer (ed) Five Constitutions (1979) 55f.

2. The system requires relatively centralised and disciplined political parties to ensure the majority parliamentary support on which the cabinet continuously depends.

3. As numerous commentators have pointed out the Commons has become no more than an extension of the executive and is not a 'legislature' in the true sense of the word. Nevertheless the true extent of the cabinet's power is difficult to define. See J.P. Mackintosh The British Cabinet (3 ed, 1977) 5ff.

ministerial government.[1]

(v) The principle of legislative supremacy entails that there are no geographical or functional areas from which parliamentary authority is barred and therefore within which the parliamentary majority is precluded from intervening. As contemporary constitutional reformers[2] point out, fundamental human rights, the status of minorities, the long standing principles of the constitutional system, all are theoretically at the mercy of the supreme parliament in the context of a flexible constitution. While sub-national law-making authorities do exist these have no constitutional tenure and could be abolished at the discretion of parliament. The corollary of legislative supremacy is the fact that the courts have no testing right over legislation, duly enacted, and no supervisory constitutional role.

(vi) The centralisation of authority in the Westminster system is a majoritarian feature which emanates from two other constitutional features, but deserves separate mention. The first feature is the supremacy of parliament which renders the constitution unitary and allows no legislative rivals to this central institution; the second is the doctrine of ministerial responsibility which, regardless of its political efficacy, has resulted in more and more powers being granted to the ministers as the only persons who could be identified as responsible within the parliamentary structure of government.[3] In a highly centralised

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1. R. Crossman (ed) Walter Bagehot: The English Constitution (Fontana, 1963) 54; but cf J.P. Mackintosh op cit 428-458 and 628-631; S.E. Finer Comparative Government (1970) 169-174; R. Blake The Office of Prime Minister (1975) 45-68.

2. Those points are made mainly in relation to the introduction of a British bill of rights, some aspects of which are dealt with at 436 to 445, below.

3. See the perceptive analysis of N. Johnson In Search of the Constitution (1977) 81ff.

> system of government there will be relatively few important sites of political competition and therefore relatively few opportunities for the majority party's dominance to be contested. The thrust of the Westminster constitutional system is to concentrate political power, and not to divide it between different institutions and levels of government.

As far as its institutional arrangements and constitutional allocation of competence are concerned, the Westminster system is consistently majoritarian and involves a winner-takes-all competition at one decisive site, namely the constituency elections.[1] The development of competitive two-party politics makes success in this decisive (and highly centralised) site of political competition of crucial importance. The party that gains a simple overall majority in the election controls parliament, and the party that controls parliament controls the executive. The principle of parliamentary supremacy limits the independent status of the judiciary; when a conflict of interests arises its subordinacy becomes apparent.[2] This has led to descriptions of the system of government as an 'elective dictatorship'[3] and concern has been expressed over the trend towards a system of 'prime ministerial' government.[4] But while there is a growing clamour for the modification of many of these constitutional principles, so as to impose more effective curbs on the power of government, the majoritarianism in the British constitutional system has in reality always been mitigated by a number of factors.

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1. Cf A. du Toit Federalism and Political Change in South Africa (1974) 21.
2. Ibid; and see N. Johnson op cit 85.
3. By Lord Hailsham. See The Dilemma of Democracy (1978) 125-132.
4. See fn 1 at 32 , above.

(c) Limits on Majoritarianism

Despite the existence of many nominally majoritarian features in the Westminster constitutional model, the British system of government is not highly majoritarian in practice. The same may not be true as far as the Westminster export models are concerned because most of the factors mitigating majoritarianism in Britain derive from its peculiar constitutional history and political culture, factors which are clearly not for export. But constitutional lawyers have always asserted that the British system is characterised by a strong sense of constitutionalism, or limited government - that British democracy is 'qualified democracy' because of the formal and informal restraints on the majority's power.[1] Among the features usually referred to as qualifying the apparently unlimited majoritarianism are the following:

(i) The first restraint on the majority is the certainty of a general election every five years, and often more frequently. This tends to result in a regular alternation in office between the two major parties - as Laski remarked, the success of the system lies in the opposition's 'proximity to office'.[2] The alternation in office derives from the dual balance of power between two relatively even-sized parties, which requires only small fluctuations in voter allegiance to turn the opposition into the majority party, and vice versa.[3] Lijphart[4] goes so far as to say that this alternation in government is the

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1. Eg S.A. de Smith Constitutional and Administrative Law (2 ed, 1973) 37; C.J. Friedrich Limited Government (1974) 46; Wade and Phillips Constitutional and Administrative Law (9 ed, 1977) 30; O. Hood Phillips and P. Jackson Constitutional and Administrative Law (6 ed, 1978) 27.

2. H. Laski Parliamentary Government in England (1938) 176; Bagehot's observation was, 'Two can play at that fun'. The English Constitution (World's Classics ed) 206.

3. See the classic account of the two-party system in Britain in I. Jennings The British Constitution (4 ed, 1952) 63f ('... opposing the Cabinet will be another party accepting the principle of majority rule, but expecting sooner or later to replace the party in office and form a Cabinet in turn ...').

4. A. Lijphart 'Majority Rule Versus Democracy in Divided Societies' 4 (1977) Politikon 113 at 115.

'vital condition' of democracy, for without it the primary rule of democracy (that citizens are entitled to participate in decision-making), is violated by the secondary rule (that the will of the majority should prevail), in that the minority is effectively excluded from power for an extended period.[1] Alternation in power prevents majority rule from becoming exclusive rule, in the sense of indefinite rule by one group. It also prevents majority rule from becoming unqualified rule in so far as the real possibility that the government will shortly be in opposition acts as a powerful restraint on the exercise of its theoretically extensive powers. The winners do not in fact take all and the losers do not lose all; the losers will accept their minority status because of its limited duration and, more importantly, will accept the general rules of the game.[2] The alternation in office, while it persists, prevents real hardships for the minority, even in the absence of legal restraints on government and justiciable fundamental rights.

(ii) The Rule of Law has an important influence on the operation of the Westminster system in that the constitution has gradually grown up out of a recognition of it.[3] In the first place the Rule of Law qualifies the principle of legislative supremacy in practice,[4] in so far as the legal values inherent in the Rule act as a restraint on the otherwise unlimited scope of parliament's powers, thereby fulfilling a similar function to that of a justiciable bill of rights.[5] The restraint which the doctrine

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1. See above, 23.

2. In a sense this begs the question since an underlying consensus is a sine qua non for the functioning of this system.

3. Cf C.F. Strong Modern Political Constitutions (8 ed, 1972) 251.

4. See J. Dugard Human Rights and the South African Legal Order (1978) 37ff.

5. O. Hood Phillips and P. Jackson (Constitutional and Administrative Law (6 ed, 1976) 39) describe the concept as involving 'the existence in the English Constitution of certain principles almost amounting to fundamental laws.'

exercises on parliament is both political and moral[1] and it provides a partial substitute for legal safeguards. This clearly implies an understanding of the Rule in terms of the preservation of basic procedural and substantive liberties and not simply as the principle of legality, in which form it is more easily reconcileable with, and does not effectively qualify, parliamentary supremacy.[2] The Rule of Law also affects the exercise of executive power in two ways:[3] firstly it requires that the executive's powers are authorised by statute and the common law and they can therefore be partially controlled by the judiciary, and secondly it implies that the executive's power should not be so extensive as to permit inroads on basic rights except in cases of emergency. The judicial control over legislation can be directly or indirectly curtailed by statute, and extensive discretionary powers can be granted in wide enabling legislation, but the Rule of Law does provide some check on legislative and executive power, thereby mitigating the majoritarianism in the Westminster system.

(iii) While checks and balances are not a prominent feature of the Westminster constitutional system, they deserve some attention in relation to the restraints on political majorities. The weak separation of powers gives rise to two main reciprocal controls between parliament and cabinet,

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1. J. Dugard op cit 39; Dicey, the 'father' of the Rule of Law recognised the implications of the concept for his notion of parliamentary sovereignty. (An Introduction to the Study of the Law of the Constitution (10 ed, 1959) 406-414); and see D.H. van Wyk 'Westminsterstelsel - requiescat in pace? of: kan 'n luiperd sy kolle verander?' 1981 THR-HR 105 at 111.

2. For the wide meaning of the term see A.S. Mathews Law, Order and Liberty in South Africa (1971) 31-33.

3. Mathews op cit 26; cf I. Jennings The Law and the Constitution (5 ed, 1959) 46ff.

namely dissolution and ministerial responsibility, but these no longer perform their traditional functions.[1] Legislative power is distributed among the component parts of parliament,[2] each of which must function in order to give rise to a valid enactment. The House of Lords retains a suspensory veto which has in the past, albeit very seldomly, been used to restrain the legislative activities of the Commons; the royal veto power remains a more remote restraint, but further ensures that the principle of legislative supremacy cannot be exploited by a single institution.[3] Similarly the diffusion of executive power between the Crown and cabinet leaves the former with residual prerogative powers which could be used in exceptional circumstances.[4] The judiciary in turn has some control over the executive in relation to the latter's powers and the way it exercises them, but generally the checks and balances in the Westminster system provide only a limited qualification on majoritarian rule.

(iv) While single-party cabinets based on clear parliamentary majorities are regarded as the normal pattern of Westminster government, the reality is somewhat different: as Butler points out coalitions or quasi-coalitions have been in power in Britain for about one third of the twentieth century.[5] This phenomenon is attributed to the

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1. See above, 25-27.

2. Or more pedantically the 'Queen-in-Parliament', in whom legislative competence vests.

3. Cf M. Vile Constitutionalism and the Separation of Powers (1967) 305.

4. It should be remembered that in English constitutional law the Crown's prerogatives can never be completely replaced by conventions.

5. D. Butler (ed) Coalitions in British Politics (1978). The clear and explicit coalition governments were the two war-time coalitions (1915-1945) and the national government of 1931, but there have been six other periods of 'minority rule', where the government has depended on the votes or abstention of at least one opposition party.

weakening of the forces which have traditionally given the country single-party governments[1] - there has been a breakdown in the national homogeneity and voter discipline which fitted the nation into the stable two-party mould; and the majoritarian electoral system is now producing indeterminate results which make coalitions necessary and a more permanent feature of political life.[2] In the British context this process is seen to have the disadvantageous effect of blurring lines of responsibility and obscuring the clear-cut choices which a two-party system provides,[3] but it has the advantage, in the context of this analysis of majoritarianism, of reducing the costs of adverse politics; a genuine coalition is a form of power-sharing by specified groups.

(v) During the last decade the possibility of devolution in Britain has become stronger, and an effective devolutionary process would involve significant limitations on majoritarianism. Although the concept of devolution[4] refers to a delegation of central government powers without the relinquishment of parliamentary supremacy,[5] it does involve

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1. Butler op cit 113.

2. Cf H.M. Drucker (ed) Multi-party Britain (1979): 'Britain no longer has a simple two-party political system. The old concept must be replaced' (at 1). Since Drucker's book the Social Democratic Party has been formed from among former members of both major parties; in an electoral alliance with the Liberals it scored two by-election successes in 1981 and seemed capable of breaking the Labour/Conservative domination of parliament. Some constitutional commentators (eg Wade and Phillips Constitutional and Administrative Law (9 ed, 1977) 31) have suggested that the constitutional structure of Britain does not necessarily rest on the two-party system, but it seems clear that any permanent departure from this system would bring significant changes to the political process. See also N. Johnson In Search of the Constitution (1977) 63ff.

3. Butler op cit 118; and see also Johnson op cit 68. Other traditional arguments against coalitions are that they do not render the electorate sovereign, they make for unresponsive government, and they involve weak government.

4. On devolution in Britain see V. Bogdanor Devolution (1979), and for a more comparative view H. Calvert (ed) Devolution (1975).

5. This was the definition provided in the Report of the Royal Commission on the Constitution (Kilbrandon) Cmnd 5460 (1973) para 543. The report distinguished further between administrative, executive, and legislative devolution. See Wade and Phillips op cit 372-378.

the exercise of powers by political authorities who are not directly answerable to the central government[1] and can thus be seen as a limitation on majoritarianism. The phenomenon of devolution is not new in the United Kingdom in that Northern Ireland had a devolved parliament and executive from 1922 to 1972, although it has since been governed directly from Westminster; it can also be seen as a continuation of the administrative decentralisation to Wales through the Welsh Office, and, on a more substantial basis, to Scotland through the Scottish Office.[2] But whereas decentralisation refers to the regional exercise of central government powers by officials of the central government[3], the two devolution bills considered in 1978 made provision for locally elected assemblies for each of Scotland and Wales.[4] The Scottish Assembly was to have legislative and executive powers on devolved matters, while the Welsh Assembly was empowered to administer certain laws of Westminster in so far as they pertained to Wales. Neither Assembly would have independent sources of finance but would be dependent on block grants allocated by the Westminster parliament. It is thus clear that control and residual constitutional authority remained with the central government, but that as long as the scheme of devolution continued there would be a territorial division of power. Both bills received the royal assent but failed to receive sufficient support in separate Scottish and Welsh referendums to be brought into operation. The prospects of devolution are at present uncertain, but it is clear that if federalism is understood as process,[5] the process of federalising a

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1. O. Hood Phillips and P. Jackson Constitutional and Administrative Law (6 ed, 1978) 714.

2. The decentralisation of certain government functions also extends to the regions of England. Hood Phillips and Jackson op cit 714-715.

3. Ibid.

4. The Scotland Bill and the Wales Bill.

5. See C.J. Friedrich Constitutional Government and Democracy (4 ed, 1968) 193f.

political community and transforming a unitary state into a federally organised whole, then devolution can be seen as an important part of the federal process which would have a significant effect on the majoritarianism of the British constitutional system.[1]

(vi) Finally commentators from Bagehot[2] to Friedrich[3] to Finer[4] have emphasised that parties in Britain do not push their principles to their logical conclusion and that the British political traditions ensure that the majority does not impose its will continually on the minority. This is not only a consequence of the alternation-of-power phenomenon, but also of the nature of the political culture. Thus the recognition of the opposition is a long-standing political and parliamentary practice, and on important issues the leader of the opposition tends to be consulted by the government. The government's sensitivity to public reaction is also sometimes apparent, as on the contentious issue of Britain joining the European Economic Community where the government resorted to a form of 'direct democracy' by holding a referendum; it clearly felt that such a major policy decision required more than the approval of the bare majority in both houses of parliament and sought wider support. Britain is a prime example, it is said, of a liberal-democracy and in a liberal democracy government is, by definition, qualified; the government is sensitive to minorities, and majority rule is in practice qualified majority rule.

If the evaluation in the previous paragraph is accurate, it would indicate that in Britain constitutional democracy tends to prevail over populist democracy and that the 'thorough majoritarianism' of the Westminster model is mitigated in practice, at least

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1. The federal process would clearly require other institutional changes, such as the reform of the House of Lords and a federal role for the judiciary. See V. Bogdanor 'Devolution and the Constitution' 1978 Parliamentary Affairs 252.

2. W. Bagehot The English Constitution 130.

3. C.J. Friedrich Limited Government (1974) 46.

4. S.E. Finer Comparative Government (1970) 1266

in its original setting. And the two contemporary phenomena of modern industrial societies, bureaucratic power and corporatism, have served further to distort the principles of constitutionalism. Sedgemore has said of the former phenomenon,

> 'One cannot understand how power is exercised in Britain unless one can appreciate the interaction of Prime Ministerial power and civil service power'.[1]

And corporatism has been said to threaten parliamentary democracy directly by by-passing ministers, by-passing parliament and by-passing the people.[2] These factors have severely qualified the majoritarian and competitive aspects of the Westminster constitutional system.

3. The American Presidential System

(a) General constitutional principles

Presidentialism may be institutionally distinguished from the Westminster system chiefly on the basis that the head of executive government is popularly elected, serves for a fixed term and is not dependent on legislative support for his continuance in office, and is not constitutionally accountable to the legislature in the exercise of his executive powers. Whereas the essence of the Westminster system is parliamentary government,

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1. B. Sedgemore The Secret Constitution (1980) 33.

2. Sedgemore op cit 36. Commentators have been reluctant to define corporatism and to stipulate the extent to which Britain has moved from pluralism to corporatism. Schmitter has characterised it as 'a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports'. P. Schmitter Corporatism and Public Policy in Authoritarian Portugal (1975) 9. See also Sedgemore op cit 34; J.K. Galbraith The New Industrial State (2 ed, 1972) 297ff; K. Middlemas Politics in Industrial Society (1979) 371-388; J. Richardson and A. Jordan Governing Under Pressure (1979) 161-163; J. Harrison Pluralism and Corporatism (1980). On corporatism and consociationalism see at 114, below.

the essence of presidentialism is the separation of powers. The principle of the non-parliamentary executive has found its clearest application in the constitutional system of the United States, and American presidentialism has in turn served as a model for other presidential regimes.

As with the Westminster system, so with American presidentialism does the constitutional allocation of public power provide a limited, and at times deceptive, picture of the American system of government despite the more tangible presence of the United States constitution; if anything there has been a far greater legalism associated with the United States constitution because of its codified nature and the authoritative function of the Supreme Court, and there has been a tendency to study 'constitutional law' and not the constitution. However, as this work is concerned primarily with the constitutional framework of government attention will be given mainly to the formal institutions in the United States, and particularly to those at the national level of government. In this context it can be said that there are three outstanding features of the United States constitutional system, namely the separation of powers, the checks and balances, and the federal division of power.

The separation of powers has traditionally been regarded as the fundamental principle of the United States constitution;[1] in so far as there is an almost complete separation of the personnel of the legislative and executive branches of government it differs from the weak or partial separation of powers of the British parliamentary system. The prominence of this principle was clearly apparent in the format of the 1787 constitution. Provision was made first, and by implication foremost, for the legislative power, which was vested in Congress[2] consisting of the popularly elected House of Representatives and a Senate which was formally designed to reflect state interests. Executive power was vested in the President,[3] to be elected for a four year period by an electoral college, thus giving him a different constituency to the legislature; it is to the old theory of the

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1. See eg G. Caney 'The Separation of Powers' in G. Graham and S. Graham Founding Principles of American Government (1977) 98.
2. Art I.
3. Art II.

separation of powers that the democratic value of the non-parliamentary executive is traceable - a president popularly elected to perform executive functions should not be subject to limitation in his executive capacity by a body elected for another purpose.[1] The members of his cabinet would be appointed by the President and remain accountable to him and not to the legislature, in whose proceedings neither cabinet members nor the President might participate; he also had the power to appoint and remove public office-holders, thus making him the effective administrative head of government as well.[2] Finally the judicial power was vested in the Supreme Court and other inferior courts which Congress might establish.[3] Members of the Supreme Court would be appointed by the President[4] and it would have both original and appellate jurisdiction. This basic structure has remained fundamentally unaltered since its inception,[5] although from the earliest operation of the constitution all three organs of government came to exercise powers beyond those allocated to them, in contravention of any strict notion of separation of powers.

In reality the separation of powers was qualified by the second prominent feature of the United States constitution, the well-known checks and balances, which were designed to subject each branch of government to some influence and control from the other branches.[6] The most important of the internal checks and balances is the bicameral structure of the federal legislature; the Senate and House of Representatives have virtually identical

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1. C.F. Strong Modern Political Constitutions (8 ed, 1972) 232.

2. B. Schwartz Constitutional Law (1972) 143.

3. Art III.

4. Art I s 2.2.

5. The main formal changes to this structure have been the XII and XXIII amendments (dealing with the election of the President and Vice-President - see below, 50-51) and the XVIV amendment (providing for the popular election of senators).

6. As M. Vile Constitutionalism and the Separation of Powers (1967) 18 observes, the amalgam of the doctrine of separation of powers with the theory of checks and balances formed the basis of the United States constitution; this single, essentially American, doctrine replaced the pure doctrine of separation of powers which had been espoused in revolutionary America.

powers in respect of legislation and finance and neither can override the other.[1] Of more significance to the separation of powers doctrine are the checks and balances which operate externally to each branch of government, so that none can act without the approval and support of another branch, notwithstanding that the legislature and executive each have a direct popular mandate.[2] Thus acting as restraints on Congress's legislative power are the President's ability both to initiate legislation and to veto acts passed by Congress;[3] the veto, however, can be overridden by a two-thirds majority in Congress[4] and does not exist in relation to constitutional amendments. Another substantial check on the legislative function of Congress is the courts' power, not expressly provided for but first asserted early in the history of the constitution,[5] to review the constitutionality of federal laws. As far as the President and other members of the executive are concerned, they are subject to removal by Congress through the process of impeachment, and their actions can be invalidated by the court in the latter's capacity as arbiter between government and nation, and between the branches of government. The President also requires senatorial approval for appointments to the Supreme Court and other key positions, and ratification by the Senate of treaties negotiated by him;[6] and although he can appoint federal officials,

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1. See S.E. Finer Comparative Government (1970) 224. The 'filibuster' practice in the Senate can be regarded as another internal check.

2. Cf J. Lees The Political System of the United States (1969) 36.

3. A far more remote check is the Vice-President's role as president of the Senate, in which he has a casting vote in the event of an equality in deliberative votes.

4. The so-called 'pocket veto' prevents Congress from overriding a presidential veto of measures passed at the end of a Congressional session.

5. Marbury v Madison (1803) 1 Cranch 137. Some support for the courts' review powers is to be found in Arts III and IV of the constitution, but it is also an inevitable consequence of constitutionalism. Cf Lees op cit 43; E.L. Barrett Constitutional Law (5 ed, 1977) 17-39.

6. The appointments require the Senate's 'advice and consent' and by convention this check has been considerably expanded; treaties require approval by a two-thirds majority in the Senate but the President can bypass this requirement through the device of 'executive agreements'.

the power to create public offices vests in Congress.[1] The Supreme Court in turn has its members appointed by the President (with senatorial approval) and they remain liable to impeachment by Congress; the Courts' structure and jurisdiction is subject to the authority of Congress, and they are also dependent on the administration to give effect to their decisions.[2]

While the separation of powers in the United States constitution ensured that the main exercise of each power would be entrusted to one person or institution, the checks and balances introduced a minor participation for other persons and institutions.[3] Thus Congress acquires a quasi-judicial function in relation to impeachments[4] and the Senate an executive function in relation to the treaty-making and appointment processes. The President has an important legislative role in relation to initiation, and the veto power (which may be exercised for any reason) allows him to particpate directly in the law making process.[5] The Court, through its review powers, can act as a 'council of revision' or 'superlegislature' and final policy-maker for the nation. While the extent of these modifications to the separation of powers was not always precisely envisaged by the founding fathers, they are integral features of the contemporary political process in the United States.

The third outstanding feature of the United States constitution is the federal division of power between the national and state authorities, with each set of institutions having its own sphere of competence and having a direct impact on citizens within its

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1. B. Schwartz Constitutional Law (1972) 140.

2. Cf J. Lees op cit 253.

3. C.J. Friedrich Constitutional Government and Democracy (4 ed, 1968) 184.

4. That is the House of Representatives acts as 'prosecutor' and the Senate as a 'court'. Cf C.H. Pritchett The American Constitution (2 ed, 1968) 203-5.

5. B. Schwartz op cit 137. The President has been referred to as the 'chief legislator' - R.G. Tugwell The Emerging Constitution (1974) 398.

jurisdiction.[1] It was sought to safeguard the distribution of competence and the status of each level of government through the rigid constitutional amending procedure and the supremacy of the constitution, and the authority of the judiciary came to be exercised to enforce the constitution's supremacy and to resolve conflicts between the levels of government. Partly because of the rigid amending procedure most changes relating to the federal aspects of the constitution were made through judicial interpretation, and this was to modify the original federal principles significantly. The general trend has been for the federal jurisdiction to be enlarged at the expense of the states' jurisdiction, and the division of power has not prevented the national authorities from exercising power on any substantive area of government; 'co-ordinate' federalism has given way to 'co-operative' and 'organic' federalism in turn,[2] and resulted in a system which is decidedly less federal. But the federal principle is still said to be a reality in the United States, particularly in relation to political parties and the electoral system,[3] and there is evidence of a greater concern from the Burger court for the rights of states in the federal system.[4]

(b) The United States constitution and majoritarianism

The American system of government has always been regarded as a constitutional democracy, based on a distrust in government and faith in the division, diffusion, limitation and sharing of authority.[5] Each of the constitution's three main features,

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1. Cf G. Sawer Modern Federalism (2ed, 1976) 1f.

2. G. Sawer op cit 98-108.

3. J. Lees op cit 66; S.E. Finer Comparative Government (1970) 215ff; R.G. Tugwell op cit 536-541.

4. See eg L.H. Tribe 'Unravelling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services' 90 (1977) Harvard Law Review 1065-1104; R.Y. Funston Constitutional Counter-Revolution? The Warren Court and the Burger Court (1977) 345ff; and the collection of articles on this theme in 86 (1977) Yale Law Journal 1018-1296.

5. See C.J. Friedrich Limited Government (1974) 34-49.

the separation of powers, the checks and balances, and the federal arrangement, can be regarded as qualifications of the political system's basic premise of majority rule. The three basic elements of federalism, the territorial distribution of competence, the supremacy of the constitution, and the authority of the federal judiciary, have an anti-majoritarian effect at the national level; furthermore the territorial distribution of competence allocates to the individual states, each of which is a minority in the national context, authority on matters of state (or minority) interest.[1] The division of competence, together with the functional separation of powers, combines to prevent a concentration of power in a single institution, thus avoiding the possibility of any 'sovereign' authority.[2] The checks and balances involve a further qualification of majoritarianism by establishing an elaborate interdependence between the various authorities, which requires the co-operation of more than one authority to exercise a given power. Bicameralism serves as a restraint on the popular majority in the House of Representatives, and the Senate has a liberum veto in respect of presidential appointments;[3] the president in turn, through his legislative veto power, can require laws to achieve a two-thirds rather than a simple majority in Congress.[4] The courts have a 'counter-majoritarian' effect in relation to their two main constitutional functions - upholding the supremacy of the constitution and enforcing the Bill of Rights.[5] Finally, drastically qualified majorities are required to effect

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1. This assumes a form of 'dual federalism' which no longer exists, but the point still has a qualified relevance.

2. Although the constitution divides sovereignty one could say in a legalistic sense that the United States has a sovereign power equivalent to the Queen-in-Parliament, namely two-thirds of both houses of Congress together with three-quarters of all the states, but the difficulty in mobilising the constituent parts makes the comparison unrealistic. See M. Vile Constitutionalism and the Separation of Powers (1967) 205.

3. C.J. Friedrich Limited Government (1974) 57.

4. Cf R.E. Tugwell op cit 139.

5. The rights listed in the American constitution are basically liberal in nature and designed to protect the individual against invasion by public authorities.

formal amendments of the constitution, a factor not unconnected with the relatively few such amendments since its inception. Thus it cannot be said of the American presidential system, as is true of the Westminster system, that authority is constitutionally allocated on the basis of a 'winner-takes-all' competition at a single decisive site; there is in fact a multiplicity of sites, both functional and territorial, of political competition, and from a comparative point of view one would expect the system to operate more slowly than its British counterpart in giving effect to majority views.[1]

Further insight into the question of majoritarianism in the United States constitutional system can be gained by looking at specific aspects of the three main institutions. It then becomes apparent that the principle of majority rule underlies both Congress and the presidency, whereas the Supreme Court's powers are premised partly on the need for minority protection.

As far as Congress is concerned, both the electoral system and legislative process are formally majoritarian. Elections for the House of Representatives are based on single-member constituencies and the plurality principle, with the same electoral consequences as in the Westminster model. This system is again accommodative of two broadly aggregative parties which dominate the House, and there is no assured representation for minority parties. The discrepancies between votes polled by the major parties and the seats won by them are not, however, as great as in Britain. This may be attributed to two principal factors - the reapportionment decisions of the 1960's, which introduced what has been referred to as 'the doctrine of quantitative majoritarianism'[2] in terms of which electoral constituencies came to be equally delimited to ensure that all

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1. Cf G. Carter and J. Herz Government and Politics in the Twentieth Century (3 ed, 1973) 53.

2. M. Uhlmann 'The Supreme Court and Political Representation' in L. Theberge (ed) The Judiciary in a Democratic Society (1979) 91 at 92; and see L.H. Tribe American Constitutional Law (1977) 737ff.

votes would be of equal weight,[1] and the existence of solid blocks of constituencies which, at least until recently, did not change their party representation.[2] Senators are also elected on a majoritarian basis in district or state-wide elections, with the same political consequences for minority parties; however, in the case of the Senate all states have equal representation, which entails over-representation for the smaller states and has an anti-majoritarian influence on the final composition of the Senate. The legislative process is also majoritarian in that enactments require simply majority votes in the Senate and House of Representatives, with the exception of decisions relating to constitutional amendments or the reversal of the presidential veto, which both require qualified majorities; conversely it can be said that a congressional minority[3] (and in the case of constitutional amendments a minority of states in addition[4]) can prevent the majority in Congress from functioning. Another significant deviation from the Westminster pattern of legislating is the more fully developed committee system in the United States Congress; in many of these committees, which take most of the important legislative decisions, there are norms of bargaining and compromise which deviate from the adversarial pattern of decision-

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1. This occurred through judicial interpretation of the 'equal protection' clause of the Fourteenth Amendment as requiring equality of access for citizens to the political process through equal representations in legislative bodies, but can also be seen as a logical outcome of the majoritarian principle. In Baker v Carr (1962) 369 US 186 the rule that apportionment laws were beyond judicial cognisance (Colegrove v Green (1946) 328 US 549) was rejected, and the court in Reynolds v Sim(1964) 377 US 533 gave constitutional effect to the principle that all votes should be of equal weight. However, the reapportionment decisions of the Warren Court have been greatly criticised; see eg R. Berger Government by Judiciary(1977) 69-98; M. Uhlmann op cit 91-109.

2. See E. Lakeman How Democracies Vote (3 ed, 1970) 34.

3. That is one third of the members of either house.

4. That is one quarter of the states.

making.[1] However, it can be said that majoritarianism is the general constitutional rule concerning the composition and functioning of Congress, and the qualifications to the rule tend to be exceptional.

The second area in which majoritarian elements are evident in the United States constitutional system is the executive; this can be seen in relation to the election of the President and the modern phenomenon of a concentration of power in the executive. The presidential electoral system is predominantly majoritarian and weighs strongly in favour of the two major parties and heavily against minor parties. Within the electoral college the winner must acquire an absolute, and not a relative, majority of votes. But it is difficult for the non-major parties to be represented and have any influence in the electoral college because of the 'unit rule', in terms of which all the electoral college votes of a particular state are earmarked for the candidate with the relative majority of popular votes in that state; votes cast for losing candidates in each state have no impact on the electoral result.[2] All that remains of the electoral college is a mode of electing the President by majorities in the states, rather than a majority of the electorate as a whole.[3] Numerous proposals have been made for

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1. See J. Lees 'Committees in the United States Congress' in J. Lees and M. Shaw (eds) Committees in Legislatures (1979) 11-60. Because of the federal nature of the political process and the absence of a parliamentary executive the national parties in the United States are relatively weak and have less internal discipline than in Britain. Thus even in Congress there is no consistent adversarial contest.

2. C.H. Pritchett The American Constitution (2 ed, 1968) 313. In 1966 the state of Delaware unsuccessfully challenged the rule on this basis, and because it favoured the large states, and created the possibility of minority presidents. Delaware v New York 385 US 895 (1966).

3. C.J. Friedrich Constitutional Government and Democracy (4 ed, 1968) 399. This arrangement also means that a candidate could be elected with only minority overall support, but this has happened on only one occasion.

the reform of this system[1] but, apart from the fact that there has been no consensus on an alternative, it is difficult to avoid a majoritarian election where only one person is to be elected for a single term of office. The presidential electoral system, therefore, constitutes a zero-sum competition at an important site in the political system.

The other salient feature of the executive is its steady accumulation of power in modern times. Authority is vested initially in the President, the head of the executive, and he is able to appoint his own cabinet, which is not a collective body and has less influence over him than a parliamentary cabinet has over a prime minister. He also has extensive patronage in the form of the 'spoils' of government: a new President is entitled to make substantial changes of administrative personnel outside the competitive civil service.[2] Apart from assuming the role of 'chief legislator'[3] the President has accumulated extensive powers, particularly in relation to foreign and military affairs; he has been assisted in this process by his powers of patronage and his ability to appeal to the electorate for popular support, and has not been significantly impeded by the constitutional checks and balances. The failure of the checks and balances is exemplified by the past inability of Congress to scrutinise and control the executive,[4] in particular the President and his White House staff, a development which has led to the phenomenon of the 'imperial presidency'.[5] The crisis of Watergate has been described as

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1. See eg C.H. Pritchett op cit 315-321.

2. By contrast no civil service positions change hands if there is a change of government in Britain.

3. See above, 45 fn 5.

4. P.B. Kurland Watergate and the Constitution (1978) 28.

5. See A. Schlesinger's work The Imperial Presidency (1974). Schlesinger suggests that Nixon concluded that the separation of powers had so frustrated government on behalf of the majority that the constitutional system had become intolerable (252); one of his attempted solutions was to transform the presidency of the constitution into a plebiscitory presidency (377).

the result of a long build-up in the concentration of presidential power, and the failure to adhere to the limitations on authority explicitly and implicitly contained in the constitution.[1] While the scope and extent of presidential power has probably diminished since the Watergate era,[2] the intervention of the bureaucracy in all fields of government continues to undermine the premises of the separation of powers doctrine and the notion of checks and balances.[3] Majoritarianism and the concentration of power are therefore important features of the executive, with implications for the constitutional system as a whole.

Finally, reference should be made to the Supreme Court's 'counter-majoritarian' function within the United States constitutional system. Hamilton[4] was of the view that the court would be the 'least dangerous' branch of government because it would have 'neither force nor will, but merely judgment'. When the Court first asserted its power of judicial review it purported to restrict itself to legal issues so that it could not be accused of usurping the majoritarian powers of Congress and the President. It has been suggested that this led to the development of a constitutional myth to reconcile the conflicting demands for majoritarianism and the preservation of minority rights: according to the myth Congress and the President were to decide 'political' issues by majority rule, while the Supreme Court would protect the 'legal rights of minorities as set out in the constitution'.[5] But the myth could not account for an increasing number

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1. Kurland op cit 4. Kurland (at 172) attributes the executive's dominance to judicial constructions of the constitution which allowed it to exercise the national power over foreign affairs, to occupy the entire field of government and regulation, and to acquire extensive powers through delegation. The separation of powers doctrine became ineffective in restraining the exercise of these powers and was further blurred by party allegiance.

2. See, eg T.E. Cronin 'A Resurgent Congress and the Imperial Presidency' 95 (1980) Political Science Quarterly 209-237.

3. P. Kurland op cit 35ff; cf M. Vile Constitutionalism and the Separation of Powers (1967) 321-2.

4. A. Hamilton The Federalist No 78 (Mentor Books ed, 1961, 465); cf A. Bickel's well-known work The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1963).

5. See C. Abernathy 'America's Supreme Court and the Balance of Justice' (Byliner series, Oct 1979).

of judgments during the era of the Warren Court[1] in which the Court gave decisions on clearly political issues; it became a more active political organ of government and moved from a constructionist position to one where it began balancing competing societal interests. This led to accusations of judicial usurpations,[2] and terms such as 'super-legislator'[3] and 'imperial judiciary'[4] came to be used in relation to the Supreme Court. And from the earlier notion that the Supreme Court was 'counter-majoritarian', developed the notions of 'minority rule by nine old men'[5] and 'the tyrrany of the minority'.[6] An important element in these accusations were the facts that the justices of the Supreme Court are not elected, constitute a relatively isolated elite, and, apart from the remote threat of impeachment, enjoy tenure for life. There have, however, been numerous rejoinders to these attacks and it has been suggested that the notion of 'government by judiciary' is a gross overstatement of the case.[7] It is pointed out that the judiciary is no less representative than other institutions such as the presidency and bureaucracy,[8] that the judicial majority usually reflects the majority in the larger political system,[9] that the court can be overriden as a last

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1. 1954-1969. The court's most notable decisions were in the fields of legislative reapportionment, race relations and criminal accuseds' rights.

2. Eg A. Bickel The Supreme Court and the Idea of Progress (1978) 3.

3. R. Berger Government by Judiciary (1977) 2-3.

4. P. Kurland in L. Theberge (ed) The Judiciary in a Democratic Society (1979) 21-22.

5. See C.J. Friedrich Limited Government (1974) 46.

6. P. Kurland in L. Theberge op cit 23.

7. R. Funston Constitutional Counter-Revolution? The Warren Court and the Burger Court (1977) 12.

8. D. Horowitz The Courts and Social Policy (1977) 18.

9. G. Schubert Judicial Policy Making (rev ed, 1976) 209. Other writers, however, suggest that to speak of 'counter-majoritarianism' is to misconstrue the true basis of majority rule. For further views on this matter see below, chapter 9.

resort through constitutional amendment.[1] While there has been some change in the extent of judicial activism in the transformation from the Warren to the Burger Court,[2] the whole question of the proper role for the judiciary within the American constitutional system remains a controversial one.[3]

Thus only a complex overall picture can be provided of majoritarianism in the United States constitutional system. This can be attributed partly to the long-standing dualism in American political thought: a desire for limited government on the one hand, and for democratically responsible government on the other.[4] The separation of powers, checks and balances, federal division of power and judicial review are linked with the former, and the populist and majoritarian aspects with the latter. The result is 'an imperfectly antidemocratic judicial process and an imperfectly democratic political process'.[5] It is, however, possible to agree with the assertion that whereas the parliamentary system is designed to translate majority wishes swiftly into legislation, the presidential system is designed to restrain popular pressures, and protects vested groups and interests.[6]

4. Conclusion

In the preceding overview of liberal-democratic constitutionalism emphasis has been given to the majoritarian features of the two historic versions of liberal-democracy, British parliamentarianism

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1. On four occasions the amendment procedure has been used to overrule Supreme Court decisions: the tenth, fourteenth, sixteenth and twenty-sixth amendments. See L.H. Tribe American Constitutional Law (1977) 50-51; A.P. Grimes Democracy and the Amendments to the Constitution (1978).
2. R. Funston op cit 327-373.
3. See L.H. Tribe op cit 47-52.
4. Cf See R. Funston op cit 11-12.
5. L. Tribe op cit 51.
6. G. Carter and J. Herz (3 ed, 1973) Government and Politics in the Twentieth Century (1973) 53, and see 145; as M. Vile (Constitutionalism and the Separation of Powers (1967) 335) observes, the emphasis in the former system is on coordination and in the latter on control.

and American presidentialism. It has been shown that both systems are premised on the principle of majority rule with its concomitant adversarial pattern of politics, but that in practice various constitutional and political factors combine to prevent majority rule involving unlimited rule by a bare majority. The British system tends to place greater reliance on political factors and the American system on constitutional factors in this process, but both systems display the basic principles of constitutionalism, and are regarded as constitutional democracies, in the traditional sense of that term.

South Africa's constitutional system has never conformed to either of the historic versions of democratic constitutionalism, and has at the most constituted an attenuated version of Westminster parliamentarianism.[1] The liberal tradition in South Africa has generally drawn comparatively on the empirical constitutional models of Britain and the United States in advocating a programme of constitutional reform for the country.[2] Thus it has been suggested that South Africa's version of the Westminster constitution should be adapted to conform more closely to the original model, in a series of gradual reforms involving, inter alia, the extension of the franchise (often on the basis of educational or property qualifications), the restoration on the Rule of Law, the removal of references to race and ethnicity in the constitution (and the statute book generally), and the reformation of the Senate. Alternative suggestions have been made with reference to American constitutionalism, and have involved a separation of legislative, executive and judicial powers, a territorial-federal devolution of power, a justiciable bill of rights, and other checks and balances designed to fragment power and preserve liberty. These proposals

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1. See below, chapter 4.

2. See for example D. Molteno The Molteno Report for the Progressive Party (1960), K. Heard Political Systems in Multi-Racial Societies (1961), D.V. Cowen Constitution-Making for a Democracy (1960) and The Foundations of Freedom (1961). For a critique of liberal-constitutionalism with specific reference to South Africa see the Sprocas report South Africa's Political Alternatives (1973) 128-143.

have not been uncritical of the majoritarian aspects of liberal-democratic constitutionalism[1] and have suggested that they need to be constitutionally qualified to accommodate the 'multi-racial' conditions of South African society, but their constitutional recommendations have generally been based on the principle of majority rule in an adversarial political context.[2]

Consociationalism, on the other hand, challenges the notion that democracy should be equated with majority rule, and seeks to avoid this principle at every level of government. Although consociationalism does not provide an analytical constitutional model[3] its principles have a close affinity with those constitutional features of the liberal-democracies which are designed to qualify majoritarianism and safeguard minority interests.[4] It is further possible to indicate an optimal constitutional framework for the operation of a consociational system,[5] although its successful working will inevitably depend as well on a range of extra-constitutional factors. But consociationalism's particular relevance is in relation to the plural society, in respect of which it is said to provide a normative model, and whereas the classical liberal tradition tended to be based on an individualistic model of politics and society,[6] consociationalism is more closely associated with the pluralist tradition. It is therefore necessary to give attention to the theories of pluralism and the plural society.

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1. Cf K. Heard op cit 3ff; D. Cowen op cit 104-11.

2. There has also been a tendency in this tradition to emphasise constitutional measures without attending to the social and political preconditions for their operation; clearly constitutional engineering alone cannot create the conditions for a stable democracy. (See the Sprocas report op cit 127ff). Some attention is given to these matters in chapter 8, below.

3. See below, 96-108.

4. See eg the nine 'safeguards against the abuse of majority power' referred to by S.A. de Smith The New Commonwealth and its Constitutions (1964) 107-10.

5. See below, 400-405.

6. See the Sprocas report op cit 127; C.B. Macpherson The Real World of Democracy (1966) 1-11.

CHAPTER 2

PLURALISM AND THE PLURAL SOCIETY

1. Introduction

Consociationalism challenges not only the identification of democracy with majority rule,[1] but also the notion that democracy is not a viable form of government for divided plural societies.[2] In the refutation of this second notion, consociationalism is presented as an explanatory theory for the viability and stability of certain empirical democracies with plural societies, but its proponents also advance it as a normative model for other plural societies.[3] Consociationalism is therefore closely related to theories of pluralism and should be analysed in that context.

Concepts of pluralism have been used extensively in the study of comparative politics and nearly all countries in the world have at times been described as pluralistic. The South African society is far from unique in that it consists of two or more culturally different and socially distinct segments, nor in the fact that it is politically dominated by one such segment. In the current constitutional debate much emphasis is given to these features of cultural and social difference, frequently through the loose and ill-defined use of the concepts of 'pluralism' or 'plural society'.[4] Both supporters and opponents of the South African government describe situations of ethnic dominance as intrinsic problems of 'plural societies',[5] and various

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1. See above, 56.

2. A. Lijphart 'Majority Rule Versus Democracy in Deeply Divided Societies' 4 (1977) Politikon 113; see also Lijphart's chapter on Pluralism and Democracy in The Politics of Accommodation (2 ed, 1975) 1 - 15.

3. A. Lijphart Democracy in Plural Societies (1977) 1 - 3.

4. Perhaps the highpoint in terminological abuse was the designation 'Department of Plural Relations' for the former Department of Co-Operation and Development.

5. H. Adam and H. Giliomee The Rise and Crisis of Afrikaner Power (1979) 42 - 43; and see L. Schlemmer 'Theories of the Plural Society and Change in South Africa' 3 (1977) Social Dynamics 3 - 16, and W.B. Vosloo 'Pluralisme as teoretiese perspektief vir veelvolkige naasbestaan in Suid-Afrika' 1 (1977) Politikon 4 - 14.

constitutional models have been justified in terms of South Africa's 'plural population'.[1] It is therefore necessary to give attention to the different theories of pluralism, their association with consociationalism, and their significance for South Africa.

Three principal uses of the term pluralism as used by social and political theorists may be distinguished.[2] The most important, as far as the present work is concerned, is in relation to the 'theory of the plural society', which has been developed by anthropologists and sociologists but has implications for the study of comparative politics. The other two uses derive from the work of the English political pluralists and their American counterparts. In spite of the widely different senses in which the concept of pluralism is understood by these three groups,[3] each is concerned with the same basic issue, namely the relationship between unity and diversity in society. It is convenient to deal with these three traditions in their rough chronological sequence.

2. Political Pluralism

Whereas the theories of the sociological pluralists are concerned with the relationship between social conditions and political behaviour and stability, political pluralist theory focusses on the distribution of political power in society.[4] The sense in which the term pluralism is used in political thought has only a tenuous

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1. Cf W. Thomas Plural Democracy (1977).
2. D. Nicholls Three Varieties of Pluralism (1974) 38ff.
3. L. Kuper ('Plural Societies: Perspectives and Problems' in L. Kuper and M. Smith (eds) Pluralism in Africa (1971) 7) refers to the 'quite antithetical' traditions which may be discerned in regard to the nature of societies characterised by pluralism. He is referring to the 'equilibrium model' of pluralism of the American school of political pluralists which associates democracy with pluralism, and the 'conflict model' of pluralism of the 'plural society' theories.
4. See A. Lijphart The Politics of Accommodation (2 ed, 1975) 2.

connection with its meaning in the theory of the plural society, although, as has already been mentioned, the relationship between unity and diversity is a theme common to both traditions. There are two distinct traditions of political pluralism, the first emanating from the English political theorists and the second from their American counterparts; while each tradition has its distinct features there are also large areas of convergence.

(a) English political pluralism

English political pluralism emerged in the early decades of the present century and was promoted by writers such as J.N. Figgis,[1] Harold Laski,[2] and G.D. Cole.[3] The theory rested on three basic principles:[4]

(i) The first was that liberty is the most important political value and is best preserved by the dispersal of power in society. The fear of concentrated power was a pervasive feature of pluralist thought and placed pluralists in the tradition of such writers as De Tocqueville and Proudhon.[5]

(ii) The second principle was that groups should not be depicted merely as collections of individuals but as having

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1. J.N. Figgis Churches in the Modern State (1913).
2. H.J. Laski Authority in the Modern State (1919).
3. G.D. Cole Guild Socialism Re-stated (1920).
4. See D. Nicholls Three Varieties of Pluralism (1974) 5 - 12.
5. R. Presthus ('The Pluralist Framework' in H.S. Kariel(ed) Frontiers of Democratic Theory (1970) 274 at 282-5) suggests that the origins of the pluralist rationale probably lie far back in history - the ancient fear of impersonal and arbitrary government and the realisation that 'power corrupts in geometric proportion as it grows'. But whereas this rationale for pluralism existed in England, with its sovereign parliament, it was not so necessary in America where the constitution had always been seen as limiting the power of government. See also K.D. McRae 'The Plural Society and the Western Political Thought' 12 (1979) Canadian Journal of Political Science 675ff.

a real personality. The English pluralists argued that groups could not adequately be understood simply in terms of the lives of their individual members, and that both political and legal theory should take more seriously their substantive personality and consequent rights.[1] Frederic Maitland was one of the first pluralist writers to assert that groups were real entities in society, and he drew in turn on the work of Otto van Gierke who, although writing on German nationalism and not himself a pluralist thinker, emphasised the significance of groups and their claim to have rights and privileges recognised by law.[2]

(iii) The third principle involved a denial of the theory that in every state there must be a sovereign. As far as legal sovereignty was concerned, pluralism took issue with the view that law is simply the will of the sovereign, irrespective of its content or character. This involved a rejection of both Bentham's sovereign legislator and Austin's positive law, as well as the model of the state as a legal order in which a determinate authority acts as the ultimate source of power.[3] In its political form sovereignty may be understood as the view that in every society there is a power that can resolve disputes by saying a last word that will be obeyed, and this attitude was criticised by pluralism as being of doubtful factual correctness, and as having dangerous moral consequences.[4] Consistently with the above two standpoints

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1. This approach had important implications in the field of law and challenged legal practice to replace the fiction theory of group personality, as advanced by Von Savigny and having extensive application in regard to corporate persons, with the recognition that behind legal personality was a real social entity which could develop and change its original purpose. See Nicholls op cit 8-9.

2. H.S. Kariel 'Pluralism' in International Encyclopaedia of Social Sciences 164-168.

3. H. Laski A Grammar of Politics (1925) 50f.

4. Ibid 44. According to Laski the monistic notion of the state as a 'hierarchical structure in which power is, for ultimate purposes, collected at a single centre' was both 'administratively incomplete and ethically inadequate'. The remedy lay, inter alia, in decentralisation and corporate representation. Laski 'The Pluralistic State' in The Foundations of Sovereignty (1921) 24 and 66.

> the notion of moral sovereignty was also rejected by the English pluralists.[1]

In developing their doctrine[2] the English pluralists were reacting against nineteenth century liberalism and utilitarianism, which had placed the individual in a social vacuum and focussed exclusively on the relationship between the individual citizen and the sovereign state; by drawing on the empirical political evidence of man's interest in, and loyalty to, a plurality of groups, they came to emphasise the group nature of politics. The view that the individual's relationship with the state was mediated by groups and associations exhibited a basic aversion to the classical liberal tradition, which was based on an individualistic or atomistic model of politics and society, and viewed politics in terms of a basic opposition between the individual and the state.[3] In the pluralist view the groups and associations in society were characterised by voluntary (and hence at times overlapping) memberships, were equal in status with one another, and possessed autonomy in so far as they themselves decided on their rules of behaviour.

The function of the state,[4] according to this tradition of pluralism, was to provide and maintain the framework within which

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1. As H.S. Kariel (op cit 167) expresses it, 'They /the pluralist thinkers/ found sovereignty divisible and allegiance to the state contingent and qualified. They argued what American statesmanship - insisting on bills of rights, on a separation of powers, and on the institution of federalism - had concluded more than a century before'.

2. Reliance is placed in this section on J. Degenaar's valuable chapter 'Pluralism and the Plural Society' in A. de Crespigny and R. Schrire (eds) The Government and Politics of South Africa (1978) 223-244, and his essay 'n Model van Pluralisme' in Degenaar Moraliteit en Politiek (1976) 92-110.

3. See the Sprocas report South Africa's Political Alternatives (1973) 127-130, and references cited there. The report goes on to observe that despite its departure from the methodological individualism of the liberal tradition, political pluralism may itself be derived from that tradition, or more particularly its constitutional features. American pluralism, on the other hand, tends to be justified more in terms of a social-psychological insight into the group basis of personality and society.

4. For Laski the state was just one of many groups in society, but Figgis regarded it rather as a group composed of groups: Nicholls op cit 12-14.

groups interacted and pursued their substantive purposes, and to guarantee the continued existence of the groups. The power of the state was limited by other powers in society, exercised by different non-state organisations, with whose autonomy the state should not interfere. Political action was perceived not as the exercise of sovereign power, but as the interplay of a variety of plural associations resulting at times in a conflict of wills arising from the complex network of group relationships. Freedom was formulated not negatively, in terms of the limitations on governmental powers, but positively, as the equal opportunity for self-realisation by the individual in his groups or social structures. By spreading power according to the diversity of functions it had to perform, the state could maximise the opportunities for freedom and development. In this view of politics the participatory role of the citizen became crucial[1] - he had firstly a duty to become involved not only in the state, but in the society as a whole, in which, as has been shown, he participated through his membership in a plurality of groups. Secondly, as the state created areas of freedom in which groups could operate, the groups themselves, and hence their members, shared a co-responsibility for the conditions in the society - pluralism of responsibility became a feature of the pluralist model.[2] Finally, insofar as the citizen was faced with a choice between conflicting loyalties, to the state and organisations in competition to the state, he might on a specific issue be compelled to give his loyalty to a group other than the state, and thus resort to civil disobedience.

The English pluralist view necessitated a search for more complex institutional arrangements than the direct democracy desired by Rousseau, or the simple representative mechanisms described by Locke.[3] Nicholls[4] makes reference to various institutional

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1. It will be shown in the following chapter that a critical participatory role for citizens is not a feature of the normative consociational model.

2. Degenaar 'Pluralism and the Plural Society' 232.

3. See R.P. Wolff 'Tolerance' in The Poverty of Liberalism (1968) 122 at 125; this essay first appeared as 'Beyond Tolerance' in A Critique of Pure Tolerance by Wolff and Marcuse (1965). All references are to the later work.

4. Nicholls op cit 54-56.

embodiments of pluralism, such as the guilds envisaged by the guild socialists, as well as to various forms of corporativism and functionalism (in the sense of functional representation[1]) advocated by the pluralists. The pluralist model could even be described as essentially 'federal' in so far as it implied a functional division of power among corporate groups.[2] Laski[3] went so far as to observe that for a proper understanding of any society it should be regarded as essentially 'federal'[4] in its nature. By this he meant that general activities which interested all members of society belonged to the state, while activities which were primarily specific in their incidence should be administered by those most directly affected by them - these latter activities interested the state only in so far as they affected the rest of the community, in which event the state might exercise its ultimate reserve power. The criterion for the functional devolution of power was social utility.

English political pluralism began to grow irrelevant even before the emergence of its American counterpart. It had tended to be more normative than empirical, and among the most frequent criticisms levelled at it were that it ignored the complex reality of group life and the possibility of the groups becoming oligarchical and unscrupulous, that it presupposed on the part of the individual an interest and rationality in politics, and that it tended to overlook the dangers of deadlock and stalemate in the political system.[5] Even proponents[6] of pluralism began to see

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1. Both W. Churchill (Parliamentary Government and the Economic Problem (1930)) and L. Amery (Thoughts on the Constitution (1947)) advocated a functionally based chamber, as do some contemporary proponents of a reconstituted House of Lords.

2. It can be said that this model necessitated a framework of legal institutions to resolve inter-group conflicts which would include such constitutional features as judicial review and bills of rights.

3. Laski op cit 59.

4. The italics are the writers. Throughout this work the term federal is used to denote a system of territorial, and not functional, decentralisation.

5. See Kariel 'Pluralism' 166-167, and Degenaar 'Pluralism and the Plural Society' 240-1.

6. While Laski was initially a forceful advocate of pluralism, he later adopted a basically Marxian standpoint.

the need for something beyond a vigorous group life, such as national leadership and a more purposeful role for the state. The tradition's opposition to state absolutism, and its emphasis on the dispersal of power and the group nature of politics, constituted its main contributions to political theory.

(b) American political pluralism

Pluralism has been the dominant tradition within American political sociology for several decades. During this time American political pluralism has purported to be an explanation of, and justification for, the United States' political system, although at times this system has been viewed, as critics have frequently suggested, in a rather romantic light. The tradition[1] may be traced back to De Tocqueville, with his reflections on self-governing 'intermediate bodies' capable of countervailing both an atomistic society and a totalitarian state,[2] and Arthur Bentley, who portrayed the political arena as being composed of a large number of groups each attempting to forward some particular interest.[3] The themes of Bentley were developed by subsequent American theorists who came to associate democracy with pluralism; far from viewing differences in social and political positions as being incompatible with democratic ideals for a plural society, the theory saw in their balanced adjustment the

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1. See D. Nicholls Three Varieties of Pluralism (1974) 28ff.

2. A. de Tocqueville Democracy in America (OUP ed, 1946) 126-133; R. Presthus ('The Pluralist Framework' in H.S. Kariel (ed) Frontiers of Democratic Theory (1970) 274 at 283) traces the origins of the pluralist rationale further back in history to the Greek city-states and Aristotle, and the ancient fear of government and impersonal arbitrary rule.

3. A.F. Bentley The Process of Government: A Study of Social Pressures (1908). Bentley has been described as the 'father' of American pluralism, De Tocqueville as the 'spiritual father'.

essential conditions for democracy. Thus in pluralist theory policy outcomes were perceived as the result of group processes, and not individual rational choices as envisaged by classical democratic theory.

In the nineteen-fifties American pluralist theory began to take on the role of an 'ideology' and to be applied in a descriptive and prescriptive manner.[1] A free society was said to be characterised by the existence of semi-autonomous groups whose leaders compete for political power, while the state enforces the rules of the game. The multiplicity of groups are characterised by cross-cutting cleavages, and the multiple affiliations[2] of individual members prevent the emergence of exclusive loyalties which would exacerbate conflict.[3] The presence of multiple affiliations, together with a commitment to common values and a competitive balance of power, leads to the integration and stability of such a society.[4] The political structure of this type of society is itself plural, in that equal political rights are exercised by its citizens in a constitutional system[5] characterised by a separation of legislative, executive and judicial powers, a justiciable bill of rights, and a federal or quasi-federal division of power.[6] Not only is political power fragmented among the branches of government, but it is shared between

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1. D. Nicholls op cit 25. Among its better-known proponents was D. Truman The Governmental Process (1951).

2 On the importance of multiple affiliations see W. Kornhauser The Politics of Mass Society (1960) 81f; cf S.M. Lipset Political Man (1959) 87-90.

3. As Kuper (Kuper and Smith op cit 9) points out, this extends the concept of pluralism to the level of individual pluralism.

4. E.A. Shiels The Torment of Secrecy (1956) 155f; Kornhauser (op cit 104) does not postulate the inevitability of common values in the equilibrium model of pluralism, and refers to its fluidity and diversity of value-standards.

5. On the 'constitutional basis' of political pluralism see H.S. Kariel The Decline of American Pluralism (1961) 7-13.

6. Acceptance of the legitimacy of existing constitutional and political structures is a further feature of this model. Cf P. van den Berghe South Africa - A Study in Conflict (1965) 270-271.

the state and a number of private groups and individuals.[1] The relationship between the groups and government is, however, subject to some dispute, and Wolff[2] distinguishes between two pluralist theories according to their treatment of this relationship: the 'vector-sum' theory, in which the different groups are seen to exert pressures on government agencies which formulate a compromise, and the 'referee' version, in which the state is perceived as a passive co-ordinating authority which upholds the rules for competition and conflict resolution.[3] In the latter theory groups achieve their goals directly, and in the former indirectly through organisation as influential pressure groups. Both theories nevertheless emphasise the value of a plurality of interest groups in society and the resultant decentralisation of public power.[4]

In opposition to the pluralist writers of the fifties other theorists began to assert the elitist nature of the American polity,[5] and while this opposition was to stimulate a vigorous defence of the orthodox pluralist position it led ultimately to a redefinition of the concept - whereas historically pluralism had demanded active citizen participation in group and public affairs (and a reasonable equality of bargaining power among interested groups), it began to mean competition among elites and organised groups, irrespective of whether decision-making within the groups was dominated by the few.[6] American pluralism's

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1. Cf R. Presthus 'The Pluralist Framework' 280-281.
2. R. Wolff The Poverty of Liberalism (1968) 129.
3. See also D. Nicholls op cit 23.
4. On the decentralisation of the United States system see the contribution of R. Dahl A Preface to Democratic Theory (1956). This feature highlights the antithesis of pluralism to monism, by which is understood the acceptance of the state as the highest sovereign power to which all other associations are legally subordinate. See R. Presthus op cit 280. See also Madison's anticipation of the pluralist standpoint in The Federalist Papers, No. 10.
5. D. Nicholls op cit 26f. This approach is exemplified by C. Wright Mills The Power Elite (1959).
6. R. Presthus op cit 301; and cf R. Dahl Who Governs? Democracy and Power in an American City (1961). The first formulation of this model has been attributed to Joseph Schumpter Capitalism, Socialism and Democracy (1942).

emphasis on group behaviour led, ironically, to the decline of individualism[1] and to elitist theories of democracy.[2]

It is beyond the scope of this work to provide a detailed criticism of the pluralist political model. One of the most persistent criticisms is that, while purporting to be empirical it ignores the realities of the American political process, which has been blatantly undemocratic vis-á-vis groups which have shown the greatest degree of cultural or social pluralism. Wolff[3] provides a threefold criticism of pluralist theory: the first is that existing groups are in practice always favoured over groups in the process of formation, thereby inhibiting social change;[4] the second is that in the case of inter-group conflicts the system systematically favours the stronger over the weaker party, and legitimate interests which are unorganised will find their disadvantaged position perpetuated.[5] These two criticisms are based on the empirical evidence of the American system.[6] The third is based on an alternative philosophy of society, which rejects the pluralist notion that there is no such thing as the public interest or the common good in the modern state; while the pluralist emphasis on public competition among

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1. H.S. Kariel The Decline of American Pluralism 180ff.

2. See C.B. MacPherson The Life and Times of Liberal Democracy (1977) 77-91 and references cited there. MacPherson suggests use of the term 'pluralist elitist equilibrium model'.

3. Op cit 150.

4. This criticism relates to the vector-sum theory of pluralism which requires state recognition of emergent groups, while the following criticism relates to the 'referee version' in which the state is held to play a more passive role.

5. A criticism first articulated by H.S. Kariel The Decline of American Pluralism 140. On the question of the bias of pluralism see S. Lukes Power - A Radical View (1974). Lukes suggests that pluralism provides a 'one dimensional view' of power.

6. R. Wolff (op cit 126ff) points to three specifically American factors which contributed to the theory of pluralism - its federal structure, the American penchant for dealing with problems by means of voluntary associations, and the presence of 'ethnic politics' in America. Presthus (op cit 285) accurately observes that the rationale for pluralism in England, where the supreme state was an actuality, did not exist in America. See also Kariel op cit 146ff.

groups may be appropriate for solving problems of distributive justice, it is inadequate for solving problems relating to the common good, or for reorganising society on a large scale. This requires the broader vision of 'community', which Wolff attempts to formulate as an alternative to the pluralist model.[1] From a different perspective Szymanski[2] advances two primary criticisms of pluralism. The first concerns its assumption that American society is composed of a diversity of equally powerful groups reflecting the interests of most people, when in fact only half the population belongs to voluntary associations, most of which have only a peripheral interest in politics. The second concerns the function of the state in the pluralist model, which is regarded as reconciling the various group influences and converting them into state policies; it does not recognise the limited number of policies which the state can follow without causing socio-economic disruption of the society, nor that the state's main purpose might be to defend the predominance of a particular class.[3] But despite these criticisms the pluralist view of society as outlined in this section continues to predominate in the United States, and in western countries generally.

3. Theories of the Plural Society

The most recent tradition of pluralism finds expression in the theory of the plural society. Whereas 'pluralism' for the American political pluralists is a condition of democracy, for the plural society theorists it is a threat to the democratic viability of societies. In this context a 'plural society' is understood as one which contains two or more communities which are distinct in a number of ways - culture, race, caste, class, language and

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1. In his essay 'Community' in Wolff op cit 162-195. Nicholls (op cit 31) describes the suggestions of Wolff as a statement of the 'new Rousseauism'.

2. A. Szymanski The Capitalist State and the Politics of Class (1978) 4-6.

3. Cf R. Milliband The State in Capitalist Society (1969) 4f. The most important alternative to the pluralist view is that of Marxism. The most notable attempt to integrate Marxist ideas into a pluralist framework was by S.M. Lipset Political Man (1959); see Szymanski op cit 16-18 and the references cited there.

religion; these lines of differentiation, or 'cleavages', tend to be deep and mutually reinforcing, and there is a relative absence of cross-cutting cleavages and multiple group affiliations.[1] Furthermore, political divisions also follow closely the lines of social cleavage, leading to sharp conflicts between the politically organised groups, or 'segments' - hence the notion of 'conflict pluralism' as opposed to the earlier 'equilibrium pluralism'.[2] While the relationships between the different segments are invariably characterised by inequality, there is some difference of opinion as to whether the concept of the plural society should be restricted to systems which are dominated by one such segment.[3] Nevertheless it is generally agreed that pluralism has multiple dimensions, the most important of which are cultural and social, and that there is a prevalence of political dissensus and conflict in plural societies which frequently results in the non-democratic regulation of the society and minority political domination.

This model of the plural society was first developed by Furnivall, and was based on his study of tropical colonies in which he was concerned with the impact of western capitalism on Asian pre-capitalist societies.[4] He defined a plural society as one 'comprising two or more elements or social orders which live side by

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1. This is to paraphrase Eckstein's definition of pluralism (H.Eckstein Division and Cohesion in Democracy (1966) 34) which was adopted by the leading consociational theorist, A. Lijphart Democracy in Plural Societies (1977) 3-4.

2. See L. Kuper 'Plural Societies: Perspectives and Problems' in L. Kuper and M. Smith (eds) Pluralism in Africa (1971) 7; Kuper and Smith's work remains the most authoritative statement on the theory of the plural society. See also M. Fortes The Plural Society in Africa (SAIRR, 1970).

3. See P. van den Berghe 'Integration and Conflict in Multi-National States' 1 (1975) Social Dynamics 3.

4. J.S. Furnivall Netherlands India - A Study of Plural Economy (1944) and Colonial Policy and Practice - A Comparative Study of Burma and Netherlands India (1948). J.H. Boeke Economics and Economic Policies of Dual Societies (1953) also contributed to the early formulation of the theory.

by side, yet without mingling, in one political unit'.[1] Each section of the community lived separately and held by its own language, religion and culture, meeting only with members of other groups in the market-place in buying and selling. The plural society was created largely by economic forces, and was the distinctive character of modern tropical economy with its division of labour along racial lines and differential incorporation of ethnic groups, which created distinct 'economic castes'.[2] This type of society was characterised by the absence of a 'social will', which made democracy impossible;[3] the society was held together by the colonial power and a common economic system, and its basic political problem was one of integration. Furnivall advocated federalism as a possible method of reintegrating such societies, and in fact likened the plural society in its political aspect to a confederation of states which united for certain common ends but otherwise remained separate;[4] the plural society, however, lacked the traditional confederal features of a voluntary union, territorially segregated sections, and the possibility of secession. It should be emphasised that in Furnivall's theory the conflict in a plural society did not arise from racial or cultural divisons per se, but because economic exploitation and boundaries co-incided with racial or cultural differences.[5]

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1. Furnivall Netherlands India 446. 'Society' is thus understood in political and administrative, and not sociological, terms. While Furnivall initially included South Africa, Canada and the United States as plural societies, he later limited his definition and described these as societies with plural features, and distinguished them from the tropical plural societies. As his distinguishing feature was 'a common tradition of western culture' he would seem to have been referring only to 'white' South Africa.

2. Furnivall gave close attention to the question of how far the principles of orthodox economics were applicable to a plural society.

3. In this sense it provided a diametrically opposed perspective to consensus functionalism.

4. This approach draws attention to the concept of corporate federalism which is analysed in chapter 3, below.

5. See eg M. Cross 'On Conflict, Race Relations and the Theory of the Plural Society' 12 (1971) Race 479.

Since Furnivall the conflict theory of pluralism has been further developed by writers such as Kuper, Smith, van den Berghe and Schlemmer, and it has been extended beyond the tropical scene to all heterogeneous, that is culturally and socially stratified, societies. But Smith, its main proponent, reacts against this extended usage.[1] He distinguishes between heterogeneous societies, which may exhibit varying degrees of pluralism, and plural societies proper;[2] the former are characterised by a common system of basic institutions shared by the majority of their members, who are differentiated at the secondary level of institutional and organisational specialisation, while the latter are characterised by incompatible institutions (the sole institutional framework that incorporates the aggregate is government),[3] and dominated by one of the cultural groups, usually a minority. For Smith, then, political domination by a cultural minority is part of the definition of the plural society. Smith's other major contribution concerns the mode of incorporation of the various groups into the public domain, which determines their access to political power. In the plural society the groups are differentially incorporated, which results in unequal access to government, and minority domination, whereas if incorporation occurs on a consociational basis there is equal access to government: federation can be seen as a constitutional equivalent of the latter mode of incorporation.[4] The maintenance of the plural society, for Smith, is a function of its common economic system, and the non-democratic regulation and coercion of the dominant minority which subordinates the political institutions of other groups. The heterogeneous society, on

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1. M.G. Smith began employing the concept in his studies of the Caribbean. M.G. Smith The Plural Society in the British West Indies (1965); see also 'Social and Cultural Pluralism' 83 (1960) Annals of the New York Academy of Sciences 763-785; 'Institutional and Political Conditions of Pluralism' in Kuper and Smith op cit 27-61.

2. Smith builds on Despres' distinction between homogeneous, heterogeneous and plural societies; the latter's refinement of the plural model depends on a distinction between local and national institutions. L. Despres Cultural Pluralism and National Politics in British Guiana (1967) 21ff; and see D. Nicholls Three Varieties of Pluralism (1974) 42f.

3. Smith in Kuper and Smith op cit 36.

4. Cf S. Bekker 'The Pluralist Approach of Pierre van den Berghe' 1 (1975) Social Dynamics 12.

the other hand, has social cohesion as the basis of its stability and does not develop a rigid and hierarchical ordering of relations between the different sections. Smith's model thus extends Furnivall's perceptions within a general theoretical framework.[1]

Van den Berghe[2] broadens the scope of the pluralist approach considerably, in his attempt to explain the development of the majority of multi-national societies in terms other than those of consensus functionalism or Marxism. Unlike Furnivall or Smith, he conceives pluralism as a variable, rather than an all-or-none phenomenon; plural societies are not regarded as sui generis.[3] A society is pluralistic, for Van den Berghe, to the extent that it is structurally segmented and culturally diverse, and exhibits a relative lack of value consensus, relative rigidity and clarity of group definition, and the relative presence of conflict and lack of integration; pluralism is a matter of degree, and societies may range from the relatively homogeneous to the extremely pluralistic. A basic distinction is made between cultural and social pluralism in society: the former refers to the existence of ethnic groups themselves, and hence cultural diversity, while the latter refers to distinct social sections, each with analogous, and hence duplicated, sets of institutions.[4] While cultural pluralism in a society inevitably involves a degree of social pluralism, the converse is not necessarily true, and groups which share the same culture may nevertheless be relegated to inferior positions on the basis of race, class or caste membership. Van den Berghe refers to this feature as secondary pluralism, a useful reference in discussing the nature of South Africa's pluralism.[5]

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1. See L. Kuper 'Plural Societies: Perspectives and Problems' in Kuper and Smith op cit 14; also D. Nicholls op cit 41-47.

2. See P. van den Berghe Race and Racism (1967); South Africa - A Study in Conflict (1965); 'Pluralism and the Polity: A Theoretical Exploration' in Kuper and Smith op cit 67-90; Race and Ethnicity (1970); 'Integration and Conflict in Multi-National States' 1 (1975) Social Dynamics 3-10.

3. S. Bekker op cit 13.

4. See S. Bekker op cit 13ff, D. Nicholls op cit 48f.

5. See below, 83-89.

Van den Berghe is expressly concerned with the question of stability in society, and how it may be maintained in multi-national societies in such a way that structural inequalities based on ethnicity are minimised.[1] These societies are all held together by relations of power and relations of production, but the crucial variable in multi-national states is what he calls the 'degree of symmetry'[2] in the relationship between ethnic groups, that is the extent to which the groups are in a hierarchy, and there is political domination and economic exploitation. Most multi-national societies begin with a dominant group, whose policy towards subordinate groups can range from genocide, to enslavement, to indirect rule through the co-option of subordinate group elites,[3] to democratic pluralism which involves well-defined constitutional arrangements, proportional ethnic representation, entrenchment of minority rights, and local autonomy. This last type of multi-national state is the most infrequent,[4] and its constitutional arrangements are clearly consociational in nature. The persistence of this type of state as an entity is said to depend on neither coercion nor consensus, but on the realisation that economic and political interests are best advanced by staying together in a sensibly arranged political union. For Van den Berghe minority government is not directly relevant to the question of social and cultural pluralism, although it is associated with the first three types of multi-national state.

In his study of patterns of conflict in divided societies Dahrendorf[5] makes the distinction between group affiliations which are dissociated and those which are super-imposed. He places the nature of group affiliations on a continuum, with complete dissociation, giving rise to cross-cutting affiliations,

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1. See S. Bekker op cit 14.

2. Van den Berghe 'Integration and Conflict in Multi-National States' 6.

3. This policy has been extensively pursued in South Africa's version of the plural society. See generally chapters 6 and 7, below.

4. Switzerland, one of the empirical consociations, provides the most clear-cut case.

5. R. Dahrendorf Class and Class Conflict in Industrial Society (1959) 173; and see Nicholls op cit 49.

on the one end, and complete superimposition, or reinforcement of affiliations, on the other. For Dahrendorf it is the structural phenomenon of superimposition of affiliations, causing a convergence of lines of group conflict, which has adverse political consequences. But Dahrendorf uses the term pluralism in relation to countries with dissociated affiliations, which is the opposite sense to that in which it is used by the plural society theorists, and more akin to that of the American political theorists referred to in the previous section.

Finally, in his contribution to the theory of the plural society Schlemmer[1] attempts to explain the variation in the degree of conflict among different plural societies. Schlemmer builds on the earlier pluralist theorists in identifying the constituent dimensions of pluralism - inter alia, cultural distinctiveness, power disparities, socio-economic differentials, 'consciousness' of class, group or culture, and perceptions of relative deprivation. For Schlemmer the essential basis of conflict in plural societies is not cultural incompatibility, but the nature of the 'social formation'. The distribution of power and privilege in a plural society is regulated within social institutions which are associated with corporate group organisations. These corporate groups are formed through the elite mobilisation of people, which is inherent in the nature of a plural society, but in turn corporate groups involve a degree of popular involvement in the system - that is popular insistence on the satisfaction of needs and interests articulated through the group. For Schlemmer it is the degree of mass popular participation in the interaction between corporate groups which is the essential feature of plural societies, because this creates various forces and needs in the political economy - the defence of popular material interests, the defence of status interests, the fervour of mass ideologies (eg 'nationalism'), the maintenance of group integrity. Schlemmer refers to this basic dynamic of plural societies as 'popular social communalism', a process in which class, identity and power are combined and articulated to serve the interests of the corporate groups, and which determines the degree of conflict.

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1. L. Schlemmer 'Theories of the Plural Society and Change in South Africa' 3 (1977) Social Dynamics 3-16.

It is apparent from this overview that there is a wide divergence of views among the conflict pluralists as to the defining characteristics of a plural society, and the essential sources of conflict. What is clear is that while all societies exhibit pluralism, in the sense of a divergence of groups which sustain social relationships with one another,[1] only societies with certain kinds of pluralism qualify as 'plural societies'.

> 'The extreme case of a plural society is a society of total identities, of self-contained cultural systems or exclusive racial groups';[2]

but such a society will be infrequently identified in practice, and would fit Mitchell's description of 'a contradiction in terms'.[3] The identification of less extreme examples will depend upon which of the above theories of the plural society is applied.

For the purposes of this work Bekker's definition of a plural society is the most appropriate, namely,

> 'a political unit which manifests cultural differences, structural units with boundaries coinciding with the differences, and a mode of differential incorporation'.[4]

These defining characteristics are clearly distinguishable from the assumed characteristics of the equilibrium pluralist society, and the aspect of 'differential incorporation' implies political domination by one group. Consociationalism is claimed to avoid such political domination in a divided plural society by ensuring a mode of uniform incorporation for all groups.

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1. L. Kuper 'Ethnic and Racial Pluralism: Some Aspects of Polarization and Depluralization' in Kuper and Smith op cit 459-487 at 465.

2. A.A. Mazrui 'Pluralism and National Integration' in Kuper and Smith op cit 333-349 at 347.

3. J.C. Mitchell Tribalism and the Plural Society (1960) 25f: 'The term "plural society" itself is a contradiction since the idea of "society" in terms of usual sociological definition implies "unity" - the antithesis of plurality. The problem of plural societies, then, lies in this contradiction - in what way can these societies be both "plural" and "societies" ...' This problem is avoided in the present work by using the term society to refer to a political unit.

4. S. Bekker op cit 12.

As a sociological theory conflict pluralism has been criticised from both the consensus functionalist and Marxian perspectives, and particularly from the latter.[1] Thus it is said that it denies the fundamental importance of the economic base and the class structure of social conflict,[2] that it reifies cultural differences as if they were immutable,[3] that it disregards the existence of 'third column' institutions which are generated by the interaction between groups,[4] that some of its proponents emphasise political domination to the exclusion of economic interdependence,[5] and that it fails to explain the origins, development and directions of change in plural societies.[6] Other critics of the 'plural society' concept assert that there must be something other than force and economic interest which holds plural societies together - something in the way of a common set of values.[7] But whether or not pluralist theory actually provides a better account of what takes place in society than class theory or structural functionalism, it is perceived as a meaningful theory in the South African context, and is used by the government as a type of legitimating ideology for its policies.[8] It also partially accounts for the official movement towards consociational strategies, in that consociationalism is intimately linked with notions of pluralism. South Africa's constitutional development can be better understood, therefore, against the background of pluralist theory.

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1. Cf D. McK Irvine 'Plural Societies and Constitution-making' in J.A. Benyon (ed) Constitutional Change in South Africa (1978) 94.
2. Ibid; cf H. Adam in Adam & Giliomee The Rise and Crisis of Afrikaner Power (1979) 45.
3. Ibid.
4. J. Rex Race Relations in Sociological Theory (1970) 11.
5. Cf H. Lever South African Society (1978) 99.
6. S. Bekker op cit 11; as S. Greenberg (Race and State in Capitalist Development (1980) 18) observes, the theory does not explain why a cultural minority whose position has been built on 'differential incorporation' begins 'incorporating' other groups.
7. D. Nicholls Three Varieties of Pluralism (1974) 45; see also M.G. Smith 'Some Developments in the Analytic Framework of Pluralism' in Kuper and Smith op cit 415 at 421, for a summary of the four most general objections to the theory.
8. H. Adam op cit 45.

4. Synthesis

While the three pluralist traditions which have been referred to are all concerned with the relationship between unity and diversity in society, each provides a different emphasis:[1] the British tradition of political pluralism emphasises the importance of individual liberty and group life and the need to limit the activity of the state, American political pluralism emphasises the value of a plurality of groups with cross-cutting memberships in society, and the sharing of power between these groups and government agencies, and the plural society tradition focusses on the cultural diversity in society and its negative implications for the political process and the stability of the system. Because of the basic antithesis between the two latter models, it is appropriate to give some definitional clarity to the term 'plural', to distinguish between two different situations. Thus it is convenient, if not necessarily scientific, to draw the following distinction:[2]

(i) The term 'plural society' refers to highly segmented and conflict-prone societies;
(ii) The term 'pluralistic society' refers to societies in which there are many politically significant groups with cross-cutting memberships and interests.

The political form of the plural society is sectional domination, and of the pluralistic society liberal democracy.[3]

It would be difficult to incorporate the various trends in the pluralist perspectives into a single system, in particular the 'equilibrium' model of American political pluralism and the 'conflict' model of the plural society, which imply two basic types of society. Kuper also suggests that because of the difference in their social structure the transition from a divided

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1. Cf J. Degenaar 'Pluralism and the Plural Society' in A. de Crespigny and R. Schrire (eds) The Government and Politics of South Africa (1978) 223.
2. Cf L. Kuper 'Plural Societies: Perspectives and Problems' in Kuper and Smith op cit 7 at 22.
3. Ibid 14.

plural society to an open pluralistic society is liable to be extemely difficult.[1] Nevertheless Degenaar attempts to frame a pluralist model in which insights from all three traditions are incorporated.[2] This model displays the following characteristics, inter alia, of the state and society:

1. The state loses its assumed character of sovereignty and can therefore not claim any absolute nature;
2. The state is viewed as only one of the groups through which a society operates;
3. Society is seen as the co-existence and interrelatedness of individuals and groups within a geographic unit acting according to systems of rules;
4. Each group is seen as a group of individuals acting within the same system of rules and cultivating common values through continual contact with one another;
5. The relation between citizen and state is not only direct and immediate, but also indirect and mediated; the citizen belongs to a variety of groups which the state must take into account in its dealings with individuals;
6. By means of spreading power over the whole of society, in such a way that a continual structuring and restructuring of power takes place, the concentration of power in the state can be effectively opposed;
7. It is possible for a plurality of loyalties to co-exist in society, and the state must compete with this plurality of claims to the loyalty of the citizen;
8. The autonomy of groups, residing in the fact that groups decide themselves on the rules that govern their behaviour, should not be viewed in an encapsulating way, but rather as a voluntary basis for being open to one another as regards contact, tension, criticism, influence and co-responsibility.

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1. L. Kuper op cit 16-22; Kuper concedes, however, that a theoretical synthesis of the two models might be possible. See also the Sprocas report South Africa's Political Alternatives (1973) 84.
2. J. Degenaar op cit 230-233. For the purposes of this enterprise Degenaar defines pluralism as 'a political philosophy in which man is described as acting in society not as an isolated and sovereign individual but within a plurality of groups'. See also J. Degenaar Moraliteit en Politiek (1976) 92-93.

The emphasis in this model is on organisational pluralism and, as Degenaar shows, a number of its characteristics are not evident in the South African system. But Degenaar goes on to introduce the dimension of cultural diversity, which allows him to frame three further analytical models which are of direct relevance to the subject of this work.[1] The first is the conflict pluralist model, which emphasises the fact that cultural and ethnic diversity inevitably leads to the undemocratic domination by one group over others; this clearly leads back to Smith's version of the plural society outlined above.[2] The second is the consensus or open pluralist model, in which the effects of cultural diversity are mitigated by cross-cutting group affiliations, which tend to diminish the probability of conflict by building up mutual trust and an integrated society; this leads back to the American tradition of democratic pluralism.[3] The third is the consociational pluralist model, which recognises cultural diversity as a decisive factor but maintains stability and avoids conflict through negotiation and co-operation at the elite level, despite the absence of voluntary associations and cross-cutting affiliations. Relating these models to South Africa Degenaar suggests that,

> 'the present situation can be described in terms of conflict pluralism with a possible development in the direction of consociational pluralism which could be the stage of transition towards a fully-fledged consensus pluralism ...'[4]

Degenaar further suggests that consociational democracy should take priority over majoritarian democracy as being better suited to the nature of South Africa's divided plural society, and this view is shared by others who apply the theory of the plural society to this country. Thus although consociationalism is not applied prescriptively in this work, it is necessary to refer briefly to the reasons why majoritarian democracy is said to be unsuited for divided plural societies such as South Africa.

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1. J. Degenaar op cit 238-239; also Moraliteit en Politiek 109; Degenaar has more recently restated these views - see Sunday Times 18 October 1981.
2. At 71-71.
3. See above, 64-68.
4. Degenaar loc cit.

5. Pluralism and Liberal-Democratic Constitutionalism

It has been shown[1] that majority rule is a basic principle of liberal-democratic constitutionalism, although this principle is mitigated in practice by constitutional and political factors. One of these factors is said to be the homogeneous political culture encountered in the British and American systems, itself a product of their pluralistic societies which consist of numerous interest-groups with cross-cutting memberships.[2] The supposed homogeneous political culture[3] of the Anglo-Saxon democracies can be contrasted with the fragmented political culture of the continental European systems; this is a product of their divided plural societies, which embody predominantly reinforcing, and not cross-cutting, politically relevant cleavages. The fragmented political culture in these societies, runs the argument, gives rise to political conflicts between clearly defined segments, which makes viable and stable democratic government difficult. Thus it has been a general belief in comparative politics[4] that a movement away from a fragmented political culture towards a homogeneous political culture would reduce the likelihood of instability and conflict, and improve the prospects of strong and stable democracy. Without such a transition, it is felt, the prospects for stable democracy are not good, even in the established first world countries.

The theory of the plural society adds to the 'democratic pessimism' as far as the third world countries are concerned. As has been shown these countries also lack the cross-cutting, politically relevant, affiliations which give rise to a homogeneous political culture, and for at least some pluralist writers the undemocratic regulation of conflict is a defining feature of the plural society encountered in these countries.[5]

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1. See above, 16.

2. See the up-to-date discussion of this topic in T. Hanf, H. Weiland and G. Vierdag South Africa: The Prospects of Peaceful Change (1981) 3-10, and the references cited there.

3. The qualification relates to the fact that it is generally agreed that the homogeneity of western societies has been greatly overstressed, particularly in relation to the economic base of the political system.

4. See D. Nicholls Three Varieties of Pluralism (1974) 56; A. Lijphart The Politics of Accommodation (2 ed, 1975) 3.

5. M.G. Smith 'Institutional and Political Conditions of Pluralism' in Kuper and Smith op cit 27-65

In addition numerous commentators[1] have drawn attention to the accentuation of ethnic and linguistic conflict in recent times, arising from a reassertion of communal attachments in plural societies; this phenomenon has challenged the assumptions of the 'political modernisation' theorists that the political significance of cultural, ethnic and religious ties would diminish with economic development, and that the process of national integration would lead to the eradication of communal attachments and their replacement with a national loyalty. As Smock and Smock observe,[2]

> 'The politicisation of plural subgroups and the significance of its political implications have caught many social scientists unprepared ... communal attachments do not quietly wither away with exposure to modernizing influences. Quite the contrary, modernization often creates the very conditions necessary for the incubation of strong communal identities and sets the stage for communal competition.'

In the light of this evidence the 'democratic pessimists'[3] have concluded that it is not possible to depluralise such societies through a process of modernisation and nation-building, nor is it possible to manage and regulate their conflicting forces democratically.[4]

Consociationalism provides a challenge to the 'democratic pessimists', by indicating for divided plural societies alternative

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1. See on this theme S.P. Huntington in the foreword to E. Nordlinger Conflict Regulation in Divided Societies (1972); N. Glazer 'The Universalisation of Ethnicity' 44 (1975) Encounter 8ff; A. Rabushka and K. Shepsle Politics in Plural Societies (1972); D. and A. Smock The Politics of Pluralism (1975); N. Kasfir The Shrinking Political Arena (1976); M. Essman 'The Management of Communal Conflict' 21 (1973) Public Policy 49; Crawford Young The Politics of Cultural Pluralism (1976); A. Lijphart 'Religious vs Linguistic vs Class Voting: The "Crucial Experiment" of Comparing Belgium, Canada, South Africa and Switzerland' 73 (1979) The American Political Science Review 442-458.

2. Op cit 3-4 and references cited there; for these writers communalism involves 'the overriding attachment to groups sharing inherited bonds based on religion, ethnic descent, language, race or regional origin'.

3. The term is Lijphart's: Democracy in Plural Societies (1977) 2-3; cf also T. Hanf et al op cit 4-6.

4. See in particular Rabushka and Shepsle op cit 212ff; but cf Crawford Young op cit 125.

political processes to those adopted in the stable liberal-democracies. It is pointed out that the majoritarian features of the British and American constitutional systems, and the resulting government-versus-opposition dichotomy, are particularly unsuited to plural societies because they assume flexible voting patterns and changes in voter allegiance, which by definition are absent in these systems. Because political preferences consistently coincide with lines of cleavage, the majoritarian principle is likely to result in practice in permanent political majorities and permanent minorities. As Smock and Smock observe,[1]

> 'The winner-takes-all ethos that characterizes the Westminster model does not suit many plural societies because it almost assuredly means that some communal groups will be in power at the expense of others.'

The logic of the situation precludes rotation in office and an alternating monopoly of power,[2] upon which both the Westminster and presidential systems depend for their democratic functioning. And if there is no alternation in office the exclusion implicit in the government-versus-opposition dichotomy can have drastic consequences for those excluded indefinitely from office, who would furthermore have no incentive to abide by the rules of the game. This pattern involves a violation of what Lewis calls the primary rule of democracy, namely that all citizens should have the opportunity to participate in decision-making, if only through elected representatives.[3] Rabushka and Shepsle suggest that 'majoritarianism is the cause of the dominant community',[4] and their paradigm of politics in plural societies involves the sectional domination of decision processes, a decline in democratic competition, electoral machinations and political violence, resulting in the destabilising of the whole polity.

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1. Op cit 331.
2. See H. Adam 'The Failure of Political Liberalism' in Adam and Giliomee op cit 258 at 273.
3. W.A. Lewis Politics in West Africa (1965) 64-66. And see above, 23.
4. Op cit 90; 'white' politics in South Africa shows some affinity to their paradigm. See also E. Nordlinger Conflict Regulation in Divided Societies (1972) 36 for the view that majoritarianism contributes to the conflict's exacerbation.

While consociationalism is not over-sanguine as to the prospects of democracy in divided plural societies, its proponents can be regarded as the 'democratic optimists' in relation to such societies.[1] Operating on the assumption that it is not possible to depluralise a plural society through assimilation or partition, the consociationalists assert that conflict in such societies can be democratically regulated, provided it is not done on the basis of the majoritarian principle. The basic principles of consociationalism point to alternative constitutional features to the majoritarian features of the traditional liberal-democratic constitutional systems.

6. South Africa and Pluralism

(a) The plural society

The theory of the plural society has been applied to South Africa by numerous writers, and South Africa has been described as a prime example of a plural society.[2] This may be partially attributable to the difficulty of explaining the existence and maintenance of South African society in terms of consensus functionalism. The definition provided by Bekker[3] is one which could be applied to South Africa in all its essential elements, but generally the writers do not elevate pluralism to a general theory of society, but regard it instead as a useful variant theory.[4] The government, on the other hand, tends to use notions

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1. Cf Hanf, Weiland and Vierdag op cit 7-8.
2. See eg J. Rex 'The Plural Society: The South African Case' 12 (1971) Race 401-413; L. Kuper Race, Class and Power (1974); P. van den Berghe South Africa - A Study in Conflict (1965); L. Schlemmer 'Theories of the Plural Society and Change in South Africa' 3 (1977) Social Dynamics 3-16. See also the surveys of the literature in H. Adam and H. Giliomee The Rise and Crisis of Afrikaner Power (1979) 42-50; V.V. Razis Swords or Ploughshares? (1980) 91-129; Hanf, Weiland and Vierdag op cit 10-15.
3. See above, 75.
4. Eg L. Schlemmer op cit 5.

of the plural society in the absence of a legitimising ideology of minority domination.[1] The perception of government policy as a cynical manipulation of race and ethnicity to further a divide and rule strategy has led, in turn, to an extensive discrediting of notions of pluralism. The most persistent criticism of pluralist theory in relation to South Africa comes from the class perspective, which holds that racial and cultural pluralism are not in themselves relevant, or have only peripheral relevance, to the fundamentally class conflict in society. This has given rise to an extensive debate on the true nature of the conflict in South Africa, and the relevance of race and ethnicity to future constitutional developments.

The pluralist approach emphasises the extensive cultural heterogeneity of South Africa, which derives from the cultures of three continents.[2] Western European culture was introduced in two main variants, English and Dutch, and through the process of acculturation is at present the dominant culture, being shared by all whites, most coloureds, and increasing numbers of blacks and Indians. The other imported culture is that of the Indians, and there is the indigenous culture of the Bantu-speaking people, both of which have survived the process of acculturation in varying degrees. The lines of cultural cleavage in South Africa do not, however, coincide completely with 'racial' divisions (as the term 'race' is used in the South African context[3]), since the whites and coloureds are regarded as different 'races' without there being separate cultures; coloured persons share two identifying characteristics, language and religion, with the Afrikaans sub-culture. This feature is described by Van den Berghe as secondary pluralism.[4] The criterion of 'race' further complicates the pattern of

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1. See Adam and Giliomee op cit 45.

2. See P. van den Berghe South Africa - A Study in Conflict (1965) 38-72; H. Lever South African Society (1978) 1-36.

3. As Lever (op cit 5) points out, racial differentiation in South Africa has a social rather than a scientific basis; one might more accurately suggest a social-legal basis.

4. See above, 72. While coloureds share the dominant culture they are relegated to an inferior position because of their 'racial' membership.

social stratification and segmentation in South Africa since it results in imposed, and not voluntarily assumed, group identities.[1] Membership of the statutorily-defined 'race' groups is ascribed at birth, and mobility between the groups is difficult;[2] the single criterion of 'race' entails important political, social and economic consequences for an individual in terms of the existing social and legal dispensation. Internally each 'racial' group is further sub-divided according to different criteria and with differing degrees of rigidity: the white group is stratified on the basis of language, religion and class, the coloured group on the basis of class and physical traits, Indians on the basis of religion, language, class and caste, and blacks on the basis of ethnicity and tribal loyalty, class and degree of urbanisation. Thus the stratifications in South Africa are characterised as being based on race, language, religion, culture, class, colour, tribalism and urbanisation, and as being maintained partly by custom and partly by law. The fundamental cleavages in South African society are not generally muted by cross-cutting memberships in associations, which for legal and traditional reasons have tended to be 'homogeneous' in composition; the main exceptions are found in respect of religious denomination, the process of acculturation, and the continuing industrialisation of the country,[3] but these do not shift the society significantly towards the dissociation end of the spectrum.[4] If pluralism is a matter of degree, then South Africa is seen as highly pluralist with a large convergence in its lines of cleavage; in addition it features the sectional domination associated with plural societies, in that the white group is at the apex of a hierarchical system controlling political and economic power and enjoying

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1. The most important statute dealing with 'race' classification is the Population Registration Act No 30 of 1950, but some other acts contain their own particular definitions. It is clear from the first-mentioned act that coloured persons constitute a residual category (s 1).

2. On race classification generally see M. Wiechers Staatsreg (3 ed, 1981) 151ff. Edogamy is enforced by the Prohibition of Mixed Marriages Act No 55 of 1949.

3. L. Kuper 'Political Change in White Settler Societies' in Kuper and Smith op cit 180; Sprocas South Africa's Political Alternatives (1973) 84-85.

4. See above, 73-74.

the attendant privileges,[1] and beneath them are coloureds, Indians, and finally blacks. In this context the theory of the plural society would seem to have some relevance.

Van den Berghe[2] has described South Africa as an example par excellence of a plural society, in the sense in which he uses the term. He perceives a proliferation of separate societies with different institutions and facilities, different goals and opportunities, and differing values and points of view. In the absence of value consensus, coercive measures are required to ensure stability and enforce laws, and the inherent conflict could lead to the breakdown of the system. But together with others who apply the plural society concept to South Africa,[3] Van den Berghe does not emphasise cultural factors to the exclusion of economic factors. In their study Slabbert and Welsh[4] define the nature of the conflict in South Africa as 'structural inequality of wealth, status and power'. Because the inequalities are institutionalised on the basis of statutorily-defined concepts of 'race' and 'ethnicity', these concepts acquire an important political salience and the conflict tends to be articulated in racial/ethnic terms. While they do not deny the importance of the class conflict (and the authors concede the large degree of overlap between colour and class), they point out that in the political arena the conflict is seldom articulated in economic terms, or in terms of the interests of a particular economic class; and they suggest that where class and ethnic solidarities compete, ethnicity will invariably prevail. Even by those operating within the broad pluralist tradition, therefore, the theory of the plural society is seen to have a limited explanatory value in South Africa; what is sought is a recognition, but not an absolutising, of ethnic and cultural diversity.

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1. See H. Lever op cit 7.
2. P. van den Berghe Race and Racism (1967) 64.
3. Eg L. Schlemmer 'Theories of the Plural Society and Change in South Africa' 3 (1977) Social Dynamics 3-16.
4. F. van Zyl Slabbert and D. Welsh South Africa's Options : Strategies for Sharing Power (1978) 23.
5. Ibid 14.

The main criticism of the pluralist approach from the class perspective is that it overlooks the real dimensions of the class struggle in South Africa.[1] In reality, conflict is attributable to the cleavages between classes having opposed economic interests, and the concepts of ethnicity, language and religion used by the pluralists serve only to conceal the real nature of this conflict. The 'racial' conflict in South Africa is attributed to the fact that 'race' can be equated with class, and the phenomenon of ethnic mobilisation is attributed to 'false consciousness' on behalf of the working class. It is also said that the political and economic systems in South Africa are not operating in opposition to each other, and that racial domination flows from the needs of the capitalist mode of production; from this follows the view that economic development will not necessarily lead to political liberalisation, and that there is no possibility of fundamental political change under the present capitalist mode of production.[2] The Marxist and neo-Marxist analyses of conflict in South Africa have been criticised in turn for their tendency to overlook subjective reality and their pre-occupation with economic factors; it is said that racial discrimination in South Africa cannot be explained solely as a product of the system of production. This has led to attempts to combine some aspects of pluralist theory with Marxist theory. In his article on black labour in South Africa John Rex[3] concludes that the analysis justifies neither wholly pluralist nor wholly Marxist conclusions:

> '... What is evident is certainly not the pluralism of cultural segments which either Furnivall's analysis ... or Smith's ... suggests. If there is division, the divisions can be seen to be functionally interrelated within an overall pattern of political conflict generated by the capitalist development ... a

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1. See L. Kuper Race, Class and Power (1974); F.A. Johnstone Class, Race and Gold: a Study of Class Relations and Racial Discrimination in South Africa (1976); M. Legassik 'South Africa: Capital Accumulation and Violence' 3 (1974) Economy and Society 253-291; see further the references in Adam and Giliomee op cit 46-50, V.V. Razis op cit 91-111, Hanf, Weiland and Vierdag op cit 10-11.

2. This is too perfunctory a treatment of class theory to be of great value, but a constitutional study must, by definition, attend to 'superstructure' and not the economic base.

3. 'The Plural Society: The South African Case' 12 (1971) Race 401-413.

> specific kind of class struggle there undoubtedly is, namely one in which the classes are groups of varying histories and ethnic origins who enter the modern society with varying rights and degrees of rightlessness ... all the groups and segments in this society are held locked together, albeit in a bitter conflict, not solely by the institution of government, but by a rapidly expanding economy ...'[1]

The race/class debate remains, however, fundamentally unresolved.

In a recent major study of conflict and its regulation in South Africa Hanf, Weiland and Vierdag[2] distinguish between three principal dimensions of conflict, namely economic, socio-cultural and political, and suggest that it is implausible to stipulate in principle that one dimension will be primary. The relative importance of the dimensions of conflict, and the relationship between them, should be treated not as matters of definition, but as empirical questions which should be answered in the light not only of potential sources of conflict resulting from objective differences between groups, but also perceptions of conflict, which they regard as a central factor in conflict regulation.[3] Whereas all three types of conflict are unilaterally regulated at present by the dominant white group, they suggest, in the light of their surveys, that the economic conflicts could in principle be resolved by negotiated regulation in the future; on the other hand the conflicts over socio-cultural identity and power raise considerable difficulties, inter alia, because of the subjective perceptions of the combatants. The study concludes, on this aspect, that some form of consociational solution need not be completely excluded for the future.[4]

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1. Op cit 412.
2. South Africa : The Prospects of Peaceful Change (1981).
3. Ibid 12.
4. Ibid 381.

While the three forms of conflict identified in the Hanf study are closely related to one another, it is the conflict over political power with which the present work is primarily concerned. While political formation on the basis of perceived differences between cultural groups is a feature of most plural societies,[1] in South Africa the formation of political groups, and therefore the expression of the political conflict, takes place in a context of statutory group definitions. At present the political conflict is a product of the differential incorporation of these groups into the political system, and the fundamental political issue relates to full political rights for those presently excluded from voting and standing for public office.[2] And regardless of the complexity of the overall patterns of conflict, the political relations between blacks and whites is the priority issue in South Africa at present. This is also the conflict with which constitutionalism is most closely related, and the need is usually expressed by political reformists in South Africa to create constitutional structures which will terminate white political domination and allow for universal political participation, without at the same time allowing for any other sectional domination. It is thus inevitable that in the constitutional debate existing concepts of 'race' and 'ethnicity' should be used, regardless of the extent to which the statutory groups coincide with objective or perceived group interests.

(b) Political pluralism

It is clear from the preceding analysis that South Africa does not have the 'open pluralistic society' and homogeneous political culture associated with the British and American liberal-democracies. Insofar as the traditions of political pluralism emphasise the need for limitations on the power of the state, and the need for institutional arrangements to distribute and share power, it can also be said that South Africa lacks the other ingredients of political pluralism.[3]

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1. Ibid 15.

2. Cf. L. Schlemmer 'Conflict and Conflict Regulation in South Africa' in De Crespigny and Schrire op cit 160-161.

3. Cf Degenaar's integrated pluralist model at 78 . above.

The pluralist aversion to a concentration of power is not apparent in the South African system of government which has shown a general tendency to concentrate power in the central authorities, more particularly the cabinet and bureaucracy. This tendency may be partially attributed to specific constitutional features, such as the unitary nature of the constitution which has facilitated the growth of the central legislature's powers at the expense of provincial and local authorities.[1] The flexibility of the constitution and the doctrine of sovereignty, in both its legal and political forms, have also been conducive to a concentration of power, and, in combination with the system of parliamentary government, have enabled the white executive to dominate all other branches of government and control the whole political system. The absence of a judicial testing-right or justiciable bill of rights has given further strength to the arm of the central government. While separate development can be said to have given rise to a 'plural' devolution of power along territorial and functional lines, this has not threatened the sovereignty of the central legislature, nor has it proved to be a substantial check on the process of centralisation. It is rather true to say that there is a position of state sovereignty, without any plural division of power 'based on a division of functions according to social utility'.[2]

As far as group formation and activity are concerned, there is also considerable deviation in South Africa from pluralist theory. The most severe deviations have been caused by state intervention, in the form of direct and indirect statutory restrictions on the composition and membership of groups and associations; even political parties are restricted in their composition,[3] which has led to a disjunction between 'official' and 'actual' groups in South Africa.[4] The absence of voluntary group identities and cross-cutting group memberships has affected the groups' other

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1. These matters are analysed in more detail in chapter 4, below.
2. J. Degenaar 'Pluralism and the Plural Society' in De Crespigny and Schrire op cit 223 at 228.
3. Mainly by the Prohibition of Political Interference Act No 51 of 1968.
4. F. van Zyl Slabbert and D. Welsh South Africa's Options (1979) 11.

functions in society: they tend not to be open to one another, and their sporadic contacts are inclined to be inhibited and unsuccessful.[1]

Besides playing an important role in defining group boundaries, and in creating divisions within such groups, the state in South Africa also polices intergroup boundaries and unilaterally confers legitimacy on, or withdraws it from, existing or emerging groups. The government also tends to restrict the activities of non-state groups such as universities, schools, churches and trade unions; Degenaar cites specific instances of the government acting in a non-pluralist manner, such as when it warns these organisations not to interfere in politics.[2] While the state's role in pluralist theory is to ensure the co-existence of groups so that the greatest freedom is granted to individuals and groups, the tendency in South Africa is for the state to deny political participation on a pluralist basis to groups other than itself. When the state assumes its character of sovereignty, groups tend to become subordinated and absorbed by it.[3]

Thus while the 'white' political system may be described in terms of competing interest groups,[4] the pattern does not spread through society as a whole. The inequalities in power and resources of non-white groups precludes any notion of an overall competitive balance of power. As has been indicated,[5] one has to do here with a system of conflict pluralism and not consensus pluralism, and this work investigates the extent to which it might develop in the direction of consociational pluralism.

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1. See M. Savage's analysis of group and personal interaction in 'Major Patterns of Group Interaction in South African Society' in L. Thompson and J. Butler (eds) Change in Contemporary South Africa (1975) 280-302; see also Peter Harris 'Interest Groups in the South African Political Process' in D. Worrall (ed) South Africa: Government and Politics (2 ed, 1975) 253-284.

2. J. Degenaar 'Pluralism and the Plural Society' 233; see also J. van der Vyver 'The Function of Legislation as an Instrument for Social Reform' 93 (1976) SALJ 56-67.

3. Ibid. See also M. Wiechers Staatsreg (3 ed, 1981) 189.

4. See H. Adam 'Interests Behind Afrikaner Power' in Adam and Giliomee op cit 177-195; Adam singles out two groups as having pronounced political power and influence in decision-making: English and Afrikaner big business, and sections of the state bureaucracy. Corporatist tendencies are clearly evident here.

5. See 79 , above.

7. Conclusion

This excursus on pluralism and the plural society is designed to serve three purposes. The first is to provide some understanding of, and definitional clarity to, concepts which are extensively and often inappropriately used in the current constitutional debate. The second is to situate consociationalism within the different traditions in political science and political sociology; here its close association with theories of pluralism has been established. The third is to highlight the forms of conflict which the pluralist traditions regard as important, and their essential nature. At the political level the main perceived conflict is between whites with political rights and non-whites without, and it is to a constitutional resolution of this conflict that the principles of consociationalism might be called in aid, as an alternative to partition and other forms of political separation on the one hand, and unitarianism and majoritarianism on the other.

CHAPTER 3

THE CONSOCIATIONAL ALTERNATIVE

1. Introduction

Consociationalism[1] challenges the pluralist proposition that viable and stable democracy is not possible in divided plural societies because they lack the 'essential' characteristics of cross-cutting cleavages and multiple group affiliations.[2] It also challenges the tendency to equate democracy with majority rule, and provides an alternative pattern of decision-making to that associated with the Westminster and presidential systems of government to suit the circumstances of plural societies. It thus indicates the necessity for modifications to both pluralist theory, and to accepted notions of democratic government.

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1. The word 'consociate' dervies from the Latin consociare (to associate together, join in fellowship) and 'consociation' has been used in respect of a union in fellowship, a close association, and a political alliance or confederation. The principle of confederating churches has been referred to as consociationism (S.O.D. vol I 376) /Cf Hasnet (1603), 'When a Lyon a Fox and an Asse were met together in Pilgrimage it was much wondered at ... what the Consociation meant.'/ The term was used by Johannes Althusius (1563-1638) in his work Politica Methodice Digesta (1603). The first modern writer to use the term was David Apter (The Political Kingdom in Uganda: A Study in Bureaucratic Nationalism (1961) who (at 24f) defined consociation as a 'Joining together of constituent units which do not lose their identity when merging in some form of union'. He described it further as essentially a system of compromise and accommodation but subject to immobilism because of the need to find agreement on common action. The first writer to use and apply the term systematically was Arend Lijphart beginning with his articles 'Typologies of Democratic Systems' 21 (1968) Comparative Political Studies 3-44, and 'Consociational Democracy' 21 (1969) World Politics 207-225. G. Lehmbruch (Proporzdemokratie: Politische System und politische Kultur in der Schweiz und in Oesterreich (1967) developed the concept independently of Lijphart. Other terms used for the same concept are accommodation, contractarianism, amicable agreement and konkordanzdemokratie. In this work use is made of both 'consociationalism' and 'consociation', as with 'federalism' and 'federation'.

2. See A. Lijphart The Politics of Accommodation: Pluralism and Democracy in the Netherlands (2 ed, 1975) 1ff.

The literature suggests that consociationalism can be approached from three different, though related, standpoints.[1] These are: firstly, as a pattern of social structure which emphasises the degree of religious, ideological, cultural or linguistic segmentation in a society;[2] secondly, as a pattern of elite behaviour, emphasising the process of decision-making and conflict regulation;[3] and thirdly, and more elusively, as an underlying characteristic of the political culture arising from historical circumstances.[4] In this chapter consociationalism is depicted in terms of the second approach, though its close relationship with the third will become apparent.

As espoused in the second approach, consociationalism refers in essence to a political system in which there is close co-operation between the leadership élites of all significant groups in a divided society who make a conscious effort to transcend the cultural and social fragmentation at the mass level.[5] In consociational theory overarching élite co-operation is a substitute for cross-cutting cleavages and multiple group affiliations, and the immobilising and destabilising effects of cultural fragmentation are counteracted by the deliberate political efforts of pragmatically oriented élites. The corollary of élite accommodation in a consociational system is relative self-containment and mutual isolation for the different subcultural segments; consociationalism not only ex-

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1. K. McRae (ed) Consociational Democracy: Political Accomodation in Segmented Societies (1974) 5-13.
2. As exemplified by V. Lorwin 'Segmented Pluralism - Ideological Cleavages and Political Cohesion in the Smaller European Democracies' 3 (1971) Comparative Politics 141-175, and included in McRae op cit 33-69.
3. As exemplified, inter alia, by Lijphart in his works referred to below.
4. The approach emphasised by H. Daalder; the Daalder-Lijphart debate is referred to at 121-123, below.
5. The idea that negotiation should continue until a solution acceptable to all participants is found corresponds in some way to the method of palaver traditionally used by some African tribes. See J. Steiner Amicable Agreement Versus Majority Rule - Conflict Resolution in Switzerland (1974) 5. Cf B.O. Nwabueze Constitutionalism in the Emergent States (1973) 168f; W.D. Hammond-Tooke Command or Consensus (1975) 4-75.

pressly recognises these segments, but makes provision for their cultural and political autonomy. For empirical models of consociationalism its proponents have pointed to relevant periods in the history of the European democracies of Austria, Switzerland, Belgium and Netherlands, and to less striking examples outside Europe, but they suggest that it can also serve as a prescriptive model for other divided plural societies. Whereas traditional typologies of political systems had not accounted successfully for the smaller European democracies, which tended to be stable despite lacking a homogeneous political culture, the consociational writers argue that these systems fit into pluralist theory as amended by the consociational phenomenon of élite accommodation.

Consociational democracy differs in essence from the Anglo-American constitutional tradition in that it avoids majoritarianism at all stages of the decision-making and distributive processes of government, without resorting to minority rule or other non-democratic devices. It should be emphasised, however, that consociationalism does not provide an analytical constitutional model, and its principles may be encountered in a wide variety of institutional arrangements; as some constitutional features are more favourable than others for the application of the consociational principles, it has become natural to associate these with consociationalism, and even to refer to them as consociational institutions or devices - for example a proportional electoral system. It is thus useful to draw a distinction between the consociational system, in which all the relevant principles are applied, and consociational devices, which can be encountered in non-consociational systems as well - in fact many political systems have a combination of co-operative consociational features and competitive majoritarian features. And while the emphasis in the second approach to consociationalism is on behavioural - attitudinal factors, it will be shown that the system's success is enhanced by those constitutional features and devices which encourage a co-operative style of government by departing from the majoritarian and adversarial aspects of the Westminster and presidential systems. The effect of these institutions is

to replace majoritarian government with joint consensual rule; the government-versus-opposition dichotomy and the alternation in power phenomenon are replaced by a system in which power-sharing among all significant groups becomes a prominent feature of the political system, if not an institutional requirement.

The writers in the consociational school differ among themselves as to the essential characteristics of a consociational system, the efficacy of the various consociational techniques, the favourable conditions for successful consociationalism, and the classification of various systems as consociational or semi-consociational. In what follows an analysis will be given of the principles which are generally accepted as being characteristic of the consociational model, the conceptual links between consociationalism and federalism will be described, a brief survey will be given of the main empirical examples of consociationalism, an indication will be given of the factors conducive to the system's success or failure, and reference will be made to some of the drawbacks in consociational theory and in a consociational system of government. Finally, attention will be given to consociationalism in the South African context.

2. General Characteristics of Consociationalism

The most significant contribution to consociational theory has been made by Arend Lijphart, who defines consociationalism in terms of four fundamental characteristics which will be taken

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1. Among the main sources which have been used in this work are A. Lijphart The Politics of Accommodation (above) and Democracy in Plural Societies - A Comparative Exploration (1977); K. McRae (ed) Consociational Democracy (above) which includes contributions by many of the major writers in this school; and E. Nordlinger Conflict Regulation in Divided Societies (1972). Other proponents and critics of the consociational theme are referred to below. Among the most important reviews of the literature are those by H. Daalder 26 (1974) World Politics 604-621, B. Barry 5 (1975) British Journal of Political Science 477-505, G. Powell 73 (1979) American Journal of Political Science 296, and J. Steiner 1981 Comparative Politics 339-354.

as the basis of the analysis that follows. Each of these characteristics can be compared and contrasted with a corresponding majoritarian feature of the Westminster and presidential constitutional systems, and cumulatively they give rise to a system which shares, diffuses, separates, divides, decentralises and limits power.[1] The consociational model stands in particularly sharp contrast to the Westminster model, with its tendency to concentrate political power in the hands of the electoral majority, and it is with this model that it can be most appropriately compared in the South African context. The two basic elements of consociationalism are power-sharing at the national level of government, and group autonomy at the sub-national level, but in fact all four of the consociational characteristics can be identified at the sub-national level in certain systems.[2]

(a) Grand coalition[3]

The most important feature of a consociational system is the grand coalition in which the leaders of all significant groups in the society are represented.[4] It is at this level that leadership élites are able to transcend the subcultural cleavages at the mass level and lend stability to the political system; the grand coalition is also the forum where bargains are struck by group leaders without requiring direct popular ratification. It is a cartel of pragmatically oriented élites.

The composition and functioning of the grand coalition shows a clear deviation from the assumptions of majority rule and the

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1. A. Lijphart 'Consociation: The Model and its Applications in Divided Societies' 3, paper presented at the Study Conference on Models of Political Co-operation', Queen's University, Belfast, 25-28 March 1981.

2. See, for example E.A. Aunger's work In Search of Political Stability: A Comparative Study of New Brunswick and Northern Ireland (1981) in which he identifies the consociational characteristics in the Canadian province of New Brunswick.

3. On this characteristic see A. Lijphart Democracy in Plural Societies 25-36; E. Nordlinger op cit 21f.

4. But cf B. Barry 'The Consociational Model and its Dangers' 3 (1975) European Journal of Political Research 393 at 405f, who argues that the grand coalition is only an epiphenomenon and that the political willingness to maintain stability is the more important factor.

government-versus-opposition pattern[1] in which an elected majority enjoys extensive constitutional power for the duration of its majority status. The competitive majoritarian model embodies a principle of exclusion in relation to both the composition of the cabinet and its decision-making patterns, which denies minorities access to power for the duration of their minority status;[2] the principle becomes less exclusive if the minority can achieve majority status and there is an alternation in office, but becomes highly exclusive where minority status is of indefinite duration, as is the tendency in divided plural societies. The basis of the grand coalition's composition, by contrast, is the principle of inclusion, which ensures participation for all minorities in the coalition on a proportional basis, regardless of whether their status is permanent or not,[3] and this reduces the need for an 'alternation in office'. Their presence and participation in the grand coalition are made meaningful by the other consociational devices, which allow minorities to induce a consensual type of decision-making that is not institutionally supported by the homogeneous composition of conventional Westminster or presidential cabinets.[4] Consensus and a coalescent style of leadership in the grand coalition become the characteristics of a consociational political system.

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1. This is something of an idealised concept since R. Dahl (Political Oppositions in Western Democracies (1965) 332) has shown that 'government-versus-opposition' systems are the deviant cases in Western democracies, which show no single prevailing pattern of opposition.

2. But cf E. Aunger (op cit) to the effect that the Westminster system's one-party majority cabinets are not incompatible with a grand coalition, provided the segments are represented in both major parties.

3. The grand coalition principle contradicts the theory that in zero-sum conditions coalitions tend toward the minimal winning size. See W. Riker The Theory of Political Coalitions (1962) 28-32.

4. A. Lewis Politics in West Africa (1965) 68 and referred to at 23, above, advocated coalition government by all major parties in preference to the one party systems which emerged in the early years of African independence; in addition he favoured proportional representation in all branches of government, and federalism or a provincial devolution of power.

Grand coalitions can be found in many institutional forms but the prototype is the grand coalition cabinet, as exemplified by the Swiss national executive, the federal council. This body consists of seven members, each of whom is chosen by the main political parties in proportion to their electoral strength, and the presidency rotates among the members of the council on an annual basis.[1] Many of the Swiss cantons also have power-sharing executives which are composed and function along similar lines. During Austria's consociational experience the coalition principle was applied within the national cabinet in which the two major political parties were equally represented, and in an extra-constitutional coalition committee in which there was also equal representation. Another variety of grand coalition is found in the case of economic or cultural councils, which might have only informal and advisory powers but nevertheless play a decisive role in the political process.[2] There are also cases where cabinets are formed not on the grand coalition basis but with a broader political base than is required by a majoritarian system; this tendency is even discernible in Britain, with its thoroughly majoritarian parliamentary system, when exceptional circumstances have required the promotion of national policies.[3] A distinction should be made, however, between coalitions formed prior to elections with the avowed aim of conflict regulation, and common government coalitions which may merely represent post-electoral marriages of political convenience.[4] In the latter case, if one or more major conflict organisation is not included in the coalition the arrangement will not have a consociational outcome, and could even

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1. This so-called 'magic formula' results in two socialists, two Catholics, two liberal-radicals, and one peasants' party representative being elected, by convention, to the federal executive. These numbers have fluctuated according to the respective strengths of the parties and the present quota is of comparatively recent origin. In addition the linguistic segments are also catered for within this formula. See C. Hughes The Federal Constitution of Switzerland (1954) 108f, and The Parliament of Switzerland (1962) 69-83.

2. A. Lijphart refers to empirical examples in Belgium, the Netherlands, Austria and Czechoslavakia, but they are also encountered in non-consociational systems such as France.

3. See D. Butler (ed) Coalitions in British Politics (1978) 113, and above, 37-38.

4. E. Nordlinger op cit 21-22.

lead to the divisive 'outbidding' phenomenon from those omitted from the coalition.[1]

As far as constitutional arrangements are concerned, it is clear that the majoritarian Westminster system with its one-party executive, two competitive parties, and concentration of the opposition, is not favourable for the application of the coalition principle;[2] however a parliamentary system does have the advantage of allowing all parties in parliament to be represented on the executive, provided it is not homogeneously composed. The presidential system also does not provide a favourable institutional basis because it vests executive authority predominantly in a single individual with a separate popular mandate; nevertheless a type of coalition could exist between the president and other top office-holders,[3] and the separation of powers principle inherent in presidentialism can be conducive to co-operation and compromise in an executive which is not directly responsible to the legislature.[4] The most favourable constitutional setting is provided by the semi-parliamentary Swiss system in which the federal executive is elected on a proportional basis by the national legislature, is relatively independent of the legislature during its term of office, and is a collegial body in that all its members are of equal formal status and importance.[5] The efficacy of the grand coalition, however, is also intrinsically dependent on the other consociational characteristics.

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1. See A. Rabushka and K. Shepsle Politics in Plural Socieites (1972) 83: ' ... ambitious politicians not included in the multi-ethnic coalition have incentives to generate demand for communal rather than national issues ... /they/ seek to increase the salience of communal issues and then to outbid the ambiguous multiethnic coalition'.
2. Cf R. Dahl op cit 349-352.
3. A. Lijphart cites the example of Lebanon for such an arrangement.
4. A. Lijphart Democracy in Plural Societies 34. The same can be said of the semi-separation of powers in the Netherlands.
5. A more detailed analysis of the optimal constitutional framework for consociationalism is provided in chapter 8, below.

(b) Mutual veto[1]

While the grand coalition enables all groups to participate in the decision-making process, the availability of the mutual veto at this level ensures that all participating groups, including minorities, will be able to influence that process materially. The veto can be viewed from two closely-related perspectives - as a device to ensure that there is unanimity among those present on all decisions, or as a device to enable minorities to prevent the taking of decisions which might adversely affect their essential interests. It is natural for the focus to fall on the second aspect since a minority veto, with its connotation of negative minority rule, is perceived as a contentious deviation from the majoritarian principle which gives minorities disproportionate power and leverage.[2] In the consociational model, however, it is seen as necessary to afford minorities both voices and vetoes, primarily within the grand coalition, but also in theory in other branches of government such as the legislature and judiciary. The concept is reminiscent of Calhoun's doctrine of the 'concurrent majority', which required that each interest or combination of interests in society should consent to the making and execution of laws in order to safeguard minorities against the will of 'democratic majorities'.[3] Calhoun found manifestations of his doctrine in the separation of powers, checks and balances, and amending process of the United States constitution, and most codified constitutions embody the principle in relation to a rigid amending procedure.

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1. A. Lijphart Democracy in Plural Societies 36-38; E. Nordlinger op cit 24-26; R. Dahl op cit 358.

2. See D. Rae 'The Limits of Consensual Decision-Making' 69 (1975) American Political Science Review 1270-1294. Rae argues forcefully that consensus should not even be a normative criterion, despite its deep roots in liberal thought (cf the reference to John Locke at 17, above).

3. J. Calhoun A Disquisition on Government (The American Heritage Series edited by C. Gordon Post (1953) 20-31). Calhoun contrasted the numerical or absolute majority with a concurrent or constitutional majority. Writing before the American Civil War he had some support from J. Madison The Federalist Papers No. 10. See further D.M. Potter The South and the Concurrent Majority (1972) for ways in which the South was able to maintain a position of power in the national government through this device, and to prevent, inter alia, the advancement of civil rights.

Numerous variations are possible in relation to the availability and effect of the veto right. Thus it could be available in respect of all decisions, or only those relating to constitutional amendments, or only those which affect certain vital interests,[1] and variations could also exist in relation to the minimum size (if any) of the group which might exercise the veto. It could operate at the national or subnational levels of government, in different branches of government, and its effect could be absolute or merely suspensive. Different combinations of these variations are found in practice.[2] Practical variations are also found in relation to the veto's constitutional status - that is whether it is incorporated into the constitution itself, is formally agreed upon by the respective parties but lacks constitutional force, or is informally practised and dependent on usage and convention. In the Netherlands and Switzerland the veto principle has been applied informally, in Austria it was the product of a formal agreement, in Belgium the former informal understanding was incorporated into the constitution in 1970 and now requires a concurrent majority on cultural and linguistic matters, and in Lebanon the Christians and Muslims have for some time had a legislative veto as a constitutional right. There are clear attractions in the formal availability of the mutual veto in a system which has no strong tradition of political compromise and consensus, whereas a legacy of élite cooperation renders this less necessary.

In the light of the earlier discussion on majoritarianism[3] it is clear that the mutual veto involves a radical departure from majority rule, and even from the less extreme forms of qualified majoritarianism. Its purpose is to effect a form of joint consensual rule, or power-sharing, by preventing decisions being taken unless they are acceptable to all relevant

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1. Cf the reference to J.S. Mill at 18 , above.
2. For further discussion of these possible variations, see below, 421-425.
3. At 16 to 23, above.

parties. The manifest danger of the veto is the immobilisation of government, or at least a radical deceleration of the governing process;[1] and if political choices do not have outcomes then the resultant inaction or delay inevitably favours the status quo and vested interests.[2] Whatever the normative appeal of consensual decision-making there appears a need for a non-consensual path for at least some outcomes.[3] The consociational writers, however, attempt to put these disadvantages in perspective by emphasising the mutuality (or double edge) of the veto, the security it gives to minorities who might otherwise favour a violent alternative, and the institutional necessity it creates for compromise where governmental activity is essential. Over a long term, they argue, and with the growth of mutual trust and the benefit of experience, it can be a feasible principle of government. Of all the consociational characteristics, however, it is the most potentially disruptive and requires the greatest sense of responsibility from leadership élites.

(c) Proportionality[4]

The term 'proportionality' is usually used in relation to electoral systems which do not operate on a majoritarian or plurality basis,[5] but in the consociational model it is used in relation to the decision-making process as a whole.[6] Here the function of proportionality is to ensure that all groups influence decisions and actions in proportion to their numerical

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1. The failure of the Cypriot consociational constitution has been attributed in part to the over use of the veto, which was available as a constitutional right.

2. As D. Rae (op cit 1280) points out, a majoritarian decision minimises the maximum number of voters who can be dissatisfied with such an outcome.

3. Ibid.

4. See A. Lijphart Democracy in Plural Societies 38-41; E. Nordlinger op cit 22-24; J. Steiner 'The Principles of Majority and Proportionality' 1 (1971) British Journal of Political Science 63-70 (and reprinted in McRae op cit 98-106); R. Dahl op cit 358. The arguments of G. Lehmbruch in Proporzdemokratie (1967) are summarised and developed in 'A Non-Competitive Pattern of Conflict Management in Liberal Democracies: The Case of Switzerland, Austria and Lebanon' in McRae op cit 90-97.

5. See above, 22.

6. J. Steiner op cit 63.

strength, in contrast to the winner-takes-all outcomes in majoritarian systems. The principle again applies primarily in respect of the grand coalition which is composed in proportion to the electoral strengths of the various parties; here it constitutes an essential complement to the coalition and veto principles. But proportionality also operates at numerous other levels in the normative consociational model.

The principle is first encountered at the electoral level, where it ensures representation for all groups in joint authorities in proportion to their electoral support;[1] proportional representation involves proportional influence in decision-making if the mutual veto is also available in these authorities. Likewise indirect elections, such as those for a coalition cabinet, are conducted on a proportional basis. The second area of application is at the appointment level, where the principle ensures that all non-elective government positions are proportionately allocated among the various groups; this would apply particularly to the bureaucracy, but the principle could be extended to public corporations, advisory boards and administrative tribunals. The third area of application is at the allocation level, where the principle ensures that there is an equitable distribution of public funds and the other 'spoils' of government. At all levels the principle is designed to minimise conflict by reducing the degree of competition for governmental power, administrative positions, and scarce resources.[2] Two variations of proportionality are the deliberate overrepresentation of minorities, and parity of representation for all groups;[3] each of these arrangements results in exaggerated influence for minorities, as opposed to the majorities who are favoured in majoritarian systems.

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1. Greater attention is given to comparative electoral regimes in chapter 8, below.

2. E. Nordlinger op cit 23. This is facilitated by the fact that the proportional model postpones decisions to the highest level of government where it is easier to effect compromises, though this obviously incurs costs in respect of the concentration of power and administrative secrecy.

3. Eg there is parity of representation in the Belgian cabinet for members of the French- and Dutch-speaking groups, although the latter constitute an overall majority of the population.

The principle of proportionality is hardly alien to modern constitutionalism and is encountered in various forms in numerous constitutional systems. It is consistently applied in federal constitutions in such matters as the equal state representation in the federal chamber,[1] and proportionality as a basis of representation or a method of making public appointments or allocating resources is to be found in the constitutional provisions and practices of numerous other non-consociational systems. But in many of these cases it tends to be applied eclectively and at times inconsistently, and has a limited impact on the 'majoritarian bias' of the constitutional system as a whole. In the normative consociational model, on the other hand, proportionality has more extensive and consistent application and it effectively negates the possibility of majoritarian rule; it 'abolishes the sharp distinction between winners and losers: both majorities and minorities can be "winners" ...'.[2] Although the proportionality principle is seldom encountered in its pure form,[3] it has been widely practised in the empirical consociations of the Netherlands, Switzerland, Austria, Belgium and Lebanon,[4] where it has had an important accommodationist role.

While the problems relating to the mutual veto are partly normative, those relating to the proportionality principle are predominantly practical. Policy decisions are difficult to take along proportional lines,[5] as are decisions of a basically dichotomous nature; an example of the former category would be the conduct of foreign affairs, and of the latter a clear-cut decision on defence matters, such as the declaration of war. The consociationalists point out that these problems can be

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1. For example the United States and Australian Senates.

2. A. Lijphart 'Consociation: The Model and its Applications in Divided Societies' (1981) 4.

3. J. Steiner op cit 64.

4. There are numerous examples of proportionality in practice at different levels of government, some of which are referred to subsequently in this work. To cite a single example: in Belgium political decisions on matters such as industrial development, education and public works projects are taken on a 'proportional' basis. See E. Nordlinger op cit 24.

5. J. Steiner op cit 63.

partially resolved through the practice of reciprocal concessions and package deals over time, so that a group disadvantaged on one occasion will be preferred on another.[1] Difficulties also pertain to the filling of a single important vacancy, where the only possibility is to provide for the frequent rotation of office (that is proportionality in the temporal dimension[2]), as occurs with the Swiss presidency. But even where there is more than one position to be filled the proportionality principle tends to emphasise the quantitative, rather than the qualitative, dimension, and fails to take account of the fact that some offices may be considerably more important than others; the latter consideration should therefore be seen as an integral feature of effective proportional patronage in public office. Finally, as a basis for making public appointments proportionality tends to prefer the equal treatment of groups to the respective merits of individual appointees, which can involve costs in terms of ability and efficiency; here it displays some of the problems encountered in 'affirmative action' programmes, with which it shares a common function.[3] These problems, however, are an inevitable consequence of the consociational approach and, so it is argued, should be compared with the manifest problems of a majoritarian approach in a divided plural society. They have, however, led to various attempts to refine consociational theory. For example, Steiner[4] suggests a form of decision-making by 'interpretation', which involves taking account not only of the numerical strength of various groups, but also their political status; while this approach raises problems of its own, it does allow intensities of preference to be considered in the process of interpreting the sense of a meeting or hearing, and it might benefit from further development.

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1. Ibid; A. Lijphart Democracy in Plural Societies 39.

2. J. Steiner op cit 63.

3. 'Affirmative action' as a consociational device is discussed briefly at 418-419, below.

4. See J. Steiner 'The Consociational Theory and Beyond' 13 (1981) Comparative Politics 339-354; see Lijphart's response to these suggestions in the same volume at 355-360.

(d) Segmental autonomy[1]

The function of the first three features of consociationalism is to establish a system of joint decision-making by leadership élites on matters of national concern, and thereby effect at the highest level of government a power-sharing arrangement among the various segments in a plural society. The fourth feature completes the overall pattern by requiring the delegation of as much authority as possible to the respective segments, with the intention of allowing autonomous rule-making and rule-application by each segment, without interference from the other segments or the joint authorities.[2] The application of the principle of segmental autonomy has lead, in practice, to the creation of exclusive segmental organisations which have a form of 'personal jurisdiction' over the members of an individual segment on matters such as education, the media and industrial relations. Segmental autonomy not only involves a recognition of segmental cleavages in society, but also a reinforcement of them through this type of organisational pluralism. It also involves a significant deviation from majoritarianism in that areas of decision-making are removed from the potential influence of national majorities, and each (minority) segment is enabled to take decisions on matters of exclusive concern to it.

One of the earliest forms of group autonomy on the basis of the personality principle was devised by Karl Renner for the Austro-Hungarian empire.[3] Contemporary examples are found in the Netherlands, Belgium and Lebanon in relation to religious

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1. A. Lijphart Democracy in Plural Societies 41-44; R. Dahl op cit 358. E. Nordlinger does not refer to segmental autonomy as a conflict-regulating device, and specifically excludes federalism, with which it is closely related (op cit 31-33).

2. This characteristic has been interpreted as 'a kind of dissolution of the modern territorial state into a quasi-feudal system'. See G. Lehmbruch 'Consociational Democracy in the International System' 3 (1975) European Journal of Political Research 377 at 379.

3. See the references to Renner's work in T. Hanf, H. Weiland and G. Vierdag South Africa : The Prospects of Peaceful Change (1981) 385.

and linguistic communities. But segmental autonomy also has a measure of de facto application in countries such as Switzerland where the segments are territorially concentrated. In these circumstances it is possible to avoid applying the principle on the problematic basis of the personality principle, because segmental autonomy can be effectively institutionalised through a geographic federation, itself a consociational method.[1] As segmental and territorial autonomy are closely related matters, special attention needs to be given to the conceptual and empirical links between consociation and federation.

3. Consociation and Federation[2]

It has been pointed out in the previous section that in countries such as Switzerland the principle of segmental autonomy is applied through a conventional federal arrangement. Switzerland is thus both an empirical federation and an empirical consociation, although the correlation need not always be so great, as the following analysis indicates.

As federation is a greatly over-defined term, no attempt will be made to provide even a working definition thereof;[3] the modern

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1. The territorial concentration of segments could be conducive to partition or secession which are theoretical solutions to divided societies but are, by their nature, alternatives to consociationalism.

2. See on this section two valuable papers given by Arend Lijphart: 'Federal, Confederal and Consociational Alternatives for the South African Plural Society: Theoretical and Comparative Aspects' at the Conference of the World Peace Foundation and S.A. Institute of International Affairs, Rustenburg, 26-29 July 1978, and 'Consociation and Federation: Conceptual and Empirical Links' at the IPSO Conference on Intergroup Co-operation in Southern Africa, New York, 23-25 October 1978. These papers have been included in amended form in, respectively, R. Rotberg and J. Barrett (eds) Conflict and Compromise in South Africa (1980) 51-75, and 12 (1979) Canadian Journal of Political Science 499-515. All reference to Lijphart in this section are to these two papers, the second being an elaboration of the first. Some of Lijphart's views have been developed and applied to South Africa in L.J. Boulle 'Federation and Consociation - Conceptual Links and Current Constitutional Models' 1981 THR-HR 236-254.

3. See on this aspect Boulle op cit 241.

tendency is to describe federalism as a process, or in terms of the various reactions to a federal situation, and as a function not of constitutions but of societies.[1] Nevertheless, from a constitutional-juridical point of view, a federal system's most salient feature can be concisely stated[2] - political authority is territorially divided between two formally autonomous sets of institutions, one national and the other regional, and the various institutions have some guarantee of continued existence as institutions and as holders of power. The secondary characteristics of federalism all bear some relation to the first: the constitution is necessarily codified, the legislature is bicameral,[3] and all constituent regions are entitled to be involved in the process of constitutional amendment - these are the invariable features of the empirical federations. The other secondary characteristics are more varied in nature, namely the overrepresentation of small states in the federal chamber, and the degree of decentralised government resulting from the first federal principle.[4] Finally, it is a federal characteristic that the judiciary resolves conflicts between governmental authorities and generally upholds the supremacy of the constitution, which in some cases includes a bill of rights.

In the context of this work it is appropriate to refer briefly to some aspects of federalism which pertain particularly to heterogeneous or plural societies. There exists a basic disagreement here on the optimal relationship between the boundaries of the federal units and the boundaries dividing the different segments in such societies. Lipset,[5] on the one hand,

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1. See eg U. Hicks Federalism: Failure and Success - A Comparative Study (1978) 3-19.

2. See I. Duchacek Comparative Federalism: The Territorial Dimension of Politics (1970) 192; G. Sawer Modern Federalism (1976) 1.

3. The few exceptions to bicameralism (eg in Pakistan) go to prove the rule.

4. D. Elazar ('Federalism' in Greenstein and Polsky Handbook of Political Science vol 5, 101) finds it more appropriate to describe this feature as one of 'non-centralisation'; in practice, however, federalism and decentralisation tend to go together.

5. S.M. Lipset Political Man (1959) 61. Lipset's argument is that federalism increases the opportunity for multiple sources of cleavage by adding regional interests to the others which crosscut the social structure; this additional source of crosscutting cleavages is lost when federalism divides a country along the lines of its basic cleavages.

suggests that the optimal arrangement is for the two types of boundaries to be cross-cutting, so that national differences are reproduced at the unit level (a symmetrical federation), whereas Lijphart, on the other, argues that the optimal arrangement is for the boundaries to coincide, so as to translate the national heterogeneity into unit homogeneity (an asymmetrical federation). The empirical evidence points to Switzerland as the most successful asymmetrical federation, and to the United States and Austria as successful examples of symmetrical federations, though these descriptions are somewhat relative. The disagreement, however, extends to the very utility of federation in resolving problems associated with ethnic or racial diversity.[1] It can correctly be said that federation constitutes an attempt at solving territorial, and not racial or ethnic, conflicts of interest,[2] but does it follow that where communal diversities are not territorially based the federal formula has no useful purpose to serve? Lijphart suggests that where the federation is asymmetrical it can indeed contribute to solving a plural society's problems; he is in fact viewing this aspect of federalism consistently from the consociational perspective, which holds that conflict can be reduced where there are clear dividing lines between antagonistic groups, and these are reinforced by state boundaries.[3] The more traditional attitude is that where federal boundaries coincide with these lines of antagonism, a disruptive and conflict prone situation[4] will arise, and that

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1. Cf Carnell 'Political Implications of Federalism in New States' in U. Hicks (ed) Federalism and Economic Growth (1961) 23f.

2. Cf V. Lorwin 'Segmented Pluralism' 1971 Comparative Politics 141 at 151.

3. E. McWhinney (Federal Constitution-Making for a Multi-National World (1966) 41) argues that the successful examples of multi-racial societies are those where the different ethnic-cultural communities are conveniently located in territorially distinct units of the country (ie 'horizontal federalism'). He adds that where these groups are not dispersed in this way, the constitutional draftsmen must look beyond the 'classic' federal ideal-types.

4. E. Nordlinger (op cit 31) does not include federalism in his list of conflict-regulating devices, but for a different reason, viz that he regards it as a substantive outcome of the other conflict-regulating practices. See also D. Horowitz 'Quebec and the Canadian Political Crisis' 433 (1977) American Academy of Political & Social Science Annals 19.

there may in fact be advantages in a federal arrangement which reproduces national differences at the unit level where it would be easier, on a smaller scale and with local variations, to solve intergroup problems. Federalism also serves the useful purpose of avoiding a centralisation of power through its dispersement of authority - the basis of constitutionalism - which mitigates against a single ethnic or racial group dominating a whole political system through its control of the centre, and this applies as well to a symmetrical federal arrangement. Thus both groups see a useful purpose for federalism in the context of a plural society, but from fundamentally different perspectives.

Because of its affinity to consociationalism, brief reference should also be made to the concept of 'corporate federalism'. Conventionally federalism is viewed in terms of a territorial division of power, but some writers, such as Friedrich,[1] extend the concept to include a non-territorial arrangement where autonomy is extended to corporate groups, instead of geographically defined regions. Friedrich applies the term 'corporate federalism' to the short-lived Cyprus constitution of 1960, but in this work the extended definition will not be used. The immediate relevance of the extended definition, however, is that it leads on to the consociational model, because the federal 'corporate units' correspond to the consociational segments to which autonomy is correspondingly extended in the latter model.

It is clear that the consociational and federal systems coincide in many respects, and most evidently in that they both involve the sharing out of governmental power among a number of authorities in the country. Some institutions have jurisdiction over the whole country, and in the decision-making process at this level all component units are entitled to participate, while others have more limited jurisdiction, either territorial or

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1. C.J. Friedrich Trends of Federation in Theory and Practice (1962) 124. For Friedrich the main advantage of 'corporate federalism' is that it does away with the problem of 'territorial districting' - 'The Politics of Language and Corporate Federalism' in J.G. Savard and R. Vigneault (eds) Multilingual Political Systems, Problems and Solutions (1976) 233.

personal, and provide the basis for the decentralisation of authority. Both systems are formally anti-majoritarian, though in differing ways and degrees, and both require a formula for resolving disputes between the various authorities, and for amending what is usually a rigid and supreme constitution. In other respects the two models overlap, but do not converge: the federal upper chamber usually displays some characteristics of a grand coalition, and the coalition principle tends also to be applied in the formation of the federal executive, though not to the same degree as in the consociational model. Proportionality also tends to be applied to a more limited extent in the federal model, namely in the composition of the federal chamber, while it is, by definition, a pervasive feature of the consociational model. Similarly, the principle of consensuality has less application in the federal model, though constitutional rigidity usually provides a legislative veto in respect of constitutional amendments.[1] The number of component units in either model could be as low as two, but the federal model can accommodate a great many more units than the consociational model, which becomes susceptible to immobility or deadlock with a large number of units; the jurisdictional complications inherent in non-territorial units would also act as a practical limitation on their number. Finally, it can be said that the two models show clear divergences in so far as the segments in the consociational model are defined in terms of common personal characteristics or interests, while the regions in the federal model are territorially defined; jurisdiction is thus based on the personality and territorial principles respectively. A second divergence lies in the fact that the federal

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1. Sawer (op cit 15-16) observes that after the creation of the US constitution there was a 70 year dispute as to whether the system was predominantly national or confederal. Those emphasising the latter spoke of the 'concurrent majority' required in congress, which would have given each region or group of regions a veto power, and the theory of nullification envisaged a reserve power for each region to disregard major decisions affecting their interests. Since 1865 primacy has been given to the national assumptions of the system. The doctrine of the concurrent majority is most often associated with J. Calhoun A Disquisition on Government (ed Post, 1953) who is referred to by several of the consociational writers.

model need not be democratic as is the case, by definition, with consociational democracy.[1]

To summarise, then, a consociation will be a federation when the segments are geographically concentrated and the boundaries between the federal units follow segmental boundaries as far as possible, and where the other federal principles, such as bicameralism, are applied. Conversely, a federation will also be a consociation where the first three consociational principles are applied, where the federation is asymmetrical (as previously defined) and consists of an appropriate number of small component units, and where it establishes a decentralised system of government. In fact, federal theory embodies all the consociational principles in rudimentary form,[2] and the concept of 'corporate federalism' highlights the affinity between the two. There can also exist a large number of federal and consociational combinations, as illustrated by the example of Belgium.[3] Here the religious and socio-economic cleavages were resolved along consociational lines through bargaining and compromise and with each segment having its own organisational infra-structures, but a federal decentralisation was required to accommodate the French-Dutch ethno-cultural cleavage, which became increasingly salient in in the 1960's. As Heisler observes,[4]

> ' ... for some purposes Belgium could be thought of as a federal entity consisting of three units,

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1. Consociationalism, on the other hand, can also operate undemocratically, as where non-elected leaders are drawn into the process of government on a limited scale. On the democratic quality of consociationalism see below, 127-128.

2. This is not restricted to theory. Eg S. Noel 'Consociational Democracy and Canadian Federalism' 1971 Canadian Journal of Political Science 14-16 shows that in Canada élite accommodation along consociational lines takes place in the institutions which are central to the maintenance of the federal system: the federal cabinet, federal boards and councils, and inter provincial conferences.

3. See M. Heisler 'Managing Ethnic Conflict in Belgium' 1977 American Academy of Political and Social Science Annals 33 at 38.

4. Op cit 42.

> while for other purposes it is comprised of only two.'

While the consociational techniques were insufficient to manage ethnic differences, their experience facilitated the transition to a federal regime.

It is possible to introduce a third element into the discussion on federalism and consociationalism by showing the affinities between these two systems and the contemporary phenomenon of corporatism. Reference has already been made to the modern trend away from pluralism to corporatism and neo-corporatism[1], as evidenced, inter alia, by the collaboration between business and organised labour in certain areas of economic policy-making. In an illuminating article[2] McRae extends Lijphart's earlier analyses by identifying five basic similarities between corporatism, consociationalism and federalism in democratic settings. The most important of these is the fact that,

> 'the total load of government is shared, either formally or informally, between a central government and at least one other level, or arena, of interest intermediation and decision-making.'

While the three systems have this important similarity, they differ as to the kind of problem that is removed from the central political arena, and offer alternative modes of response to the problem of governmental overload. But again corporatist, consociational and federal systems all have in common,

> 'a certain minimum disposition among élites towards collaborative or co-operative, rather than authoritative or majoritarian, modes of decision-making in order for the system to function ...'

In this sense they may all be contrasted to the constitutional assumptions of the majoritarian Westminster system of government. Combinations of the three systems are also possible in

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1. See 41 , above and the references cited there.

2. K.D. McRae 'Comment: Federation, Consociation, Corporatism - An Addendum to Arend Lijphart' 12 (1979) Canadian Journal of Political Science 517-522.

a single polity, and McRae suggests that of the four 'classic' consociational democracies only Belgium is not simultaneously considered neo-corporatist. In the context of this work it is the relationship between corporatism and consociationalism which is of some significance, and it is given further attention subsequently.[1]

4. Consociationalism in Practice

Consociational democracy has thus far been presented mainly as a theoretical model, with only passing references to empirical examples where stable and democratic government has been achieved in highly divided societies. McRae[2] has identified four 'classic' cases of consociationalism, all among developed Western democracies, namely the Netherlands, Austria, Belgium and Switzerland; temporal qualifications must be added, however, to indicate the key period of consociational accommodation in each case[3] - in Austria during the period of Catholic-Socialist grand coalitions from 1945 to 1966, in Belgium since the first world war, in the Netherlands from 1917 to 1967, and in Switzerland from 1943 to the present.[4] Examples of consociational systems outside Europe have been Lebanon from 1943 to 1975, Malaysia from 1955 to 1969, Cyprus during the brief period from 1960 to 1963, Surinam from 1958 to 1973, the Netherlands Antilles since 1950, and Colombia from 1958.[5] Lijphart[6] describes two other countries as 'semi-consociational' democracies,

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1. See the analysis in chapter 8, below.
2. K. McRae Consociational Democracy (1974) 13.
3. See A. Lijphart 'Majority rule versus democracy in deeply divided societies' 4 (1977) Politikon 113 at 119.
4. A less notable European example is that of Luxembourg.
5. On Colombia see R.H. Dix 'Consociational Democracy - The Case of Colombia' 1980 Comparative Politics 303-326.
6. Op cit 119.

namely Israel since 1948 and contemporary Canada,[1] each of which has several consociational features without being fully consociational. Nigeria, which was referred to as the main example of consociationalism by the first modern writer in the school,[2] could at best be labelled semi-consociational during the period 1957-1966.[3] The latest example of a semi-consociational system is Zimbabwe, whose independence constitution embodies several consociational institutions and devices.[4] In the light of the earlier comparison of federalism and consociationalism it may be noted that of the above examples all save Lebanon, Cyprus, Israel, Surinam and Zimbabwe are also federations or semi-federations, indicating that the conceptual links between the two systems are reflected in practice.

But consociationalism remains a disputed concept, even in respect of Switzerland which is often held out as the 'prime example' of consociational democracy. As far as the nature of Swiss society is concerned, Bohn[5] argues that on the evidence it is not fragmented into isolated and competitive segments and that, particularly from the ethnic perspective, the social struture is best accounted for by the open pluralist model. Other writers also refer to the presence of cross-cutting cleavages in Switzerland and suggest that stability is a result of the 'remarkable consensus' in Swiss society, and not its consociational regulation

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1. R. Presthus (Elite Accommodation in Canadian Politics (1973)) finds that Canada meets most of the functional requisites of consociational politics and that consociationalism is a useful theory in explaining the Canadian political system; in his analysis he demonstrates how accommodation occurs not only within the formal political structure but also between government and private political élites; see also Noel op cit. On the Israel case see A. Lijphart Democracy in Plural Societies (1977) 129-134.

2. David Apter The Political Kingdom in Uganda (1961). See the reference at 93, above.

3. A. Lijphart Democracy in Plural Societies 161-164.

4. On the Zimbabwe constitution, see 244 to 247, below.

5. D.E. Bohn 'Consociational Democracy and the Case of Switzerland' 42 (1980) The Journal of Politics 165-179.

6. See, eg, B. Barry's review article of J. Steiner's Amicable Agreement versus Majority Rule: Conflict Resolution in Switzerland (1974) in 5 (1975) British Journal of Political Science 477-505.

of conflict. As far as its institutional features are concerned, it is pointed out that Switzerland has one of the most extensive systems of direct democracy at both national and subnational levels in existence, and that the referendum and popular initiative through which it is effected are decidedly non-consociational in character.[1] Because of the possibility of direct majority rule created by these institutions, it is argued that Switzerland provides no support for the theory of consociational democracy, despite the existence and important function of such consociational devices as proportionality and the grand coalition.[2]

In practice most political systems contain a mixture of co-operative and competitive strategies of conflict regulation. While the consociational systems have a preponderance of the former over the latter,[3] there are numerous non-consociational systems which contain some consociational devices. Nordlinger[4] points out that wherever conflict is successfully regulated in divided societies one or more of these devices is invariably employed, although not always the whole range. These factors have led Steiner[5] to suggest that, instead of classifying specific countries as consociational, it might be more appropriate to take, as the units of classification, decision-making for individual conflicts within those countries. This approach would lead to a more accurate and useful system of classification because distinctions could be drawn between issues resolved along co-operative and competitive lines within each country, and comparisons could be made not only between, but also within,

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1. For descriptions of direct democracy in Switzerland see J. Steiner op cit 18ff and M. Mowlam 'Popular Access to the Decision-making Process in Switzerland' 14 (1979) Government and Opposition 180-197.

2. But cf M. Mowlam (ibid) who concludes that although many groups have access to the agenda-setting phase of decision-making, élites have the power and resources to turn outcomes against them if they (the élites) so wish.

3. See G. Lehmbruch 'Consociational Democracy in the International System' 3 (1975) European Journal of Political Research 377 at 378.

4. E. Nordlinger Conflict Regulation in Divided Societies (1972) 117.

5. J. Steiner 'The Consociational Theory and Beyond' 1981 Comparative Politics 339 at 345ff.

countries. It should be pointed out, however, that where consociational devices are eclectively applied they might not have consociational outcomes, and could even increase the influence of majorities and diminish the likelihood of co-operation;[1] this necessitates an investigation beyond constitutional arrangements to concrete decision-making situations. In this work, however, the focus is on institutional arrangements, and the classification of countries and constitutional systems is made on that basis.

Apart from disputes relating to the classification of countries as consociational or semi-consociational, it is evident from the above survey that many cases of consociational democracy have been of short or limited duration, and that others have ended in failure. Are these factors attributable to the weakness of the consociational techniques and the inappropriateness of the basic principles of consociationalism? This is a complex question with no easy answer, owing partly to the fact that the total sample of empirical consociations is relatively small. Lijphart[2] has argued in respect of the Netherlands and Austria that consociationalism made itself superfluous by its very success, and that these countries were easily able to shed it in favour of stable and democratic majoritarian systems; in these cases, he urges, the termination of consociationalism should not be equated with its failure.[3] The interruption of consociationalism by the Lebanese civil war is attributed partly to the international nature of the Lebanese conflict and the intervention of external forces; the consociational experience before this interruption is regarded as having been moderately successful, despite the fact that some of the consociational devices were over-rigidly applied.[4] The consociational principles

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1. On this aspect of the government's 1977 constitutional proposals see chapter 6, below.

2. In the second edition of The Politics of Accommodation (1975) he added a further chapter (196-219) in which he adduced reasons for the retreat from consociationalism in the Netherlands and attempted to explain why Dutch politics became less stable when social cleavages began losing their sharpness and political salience.

3. For his most recent rebuttal of the arguments based on the 'failed consociations' see A. Lijphart 'Consociation: The Model and its Applications in Divided Societies' (1981) 6-8.

4. Eg the system of proportionality was not made flexible so as to accommodate demographic changes.

embodied in the 1960 Cyprus constitution were unable to prevent civil war and the eventual partition of the country, and this consociational experiment can be classified as a failure; on the other hand it could be argued that the external intervention by Greece and Turkey jeopardised the precarious political stability and that the easy availability of the mutual veto power contributed to the political breakdown.[1] A further problem in Cyprus was that consociationalism was only reluctantly agreed to by the Greek majority, which far outnumbered the Turkish minority.[2] The consociational school argues, moreover, that despite its empirical failures consociationalism remains the only feasible alternative to a majoritarian system for a divided plural society - other than political partition, or the permanent suppression of minorities. Assuming, ex hypothesi, the correctness of this proposition, it becomes necessary to examine more closely the favourable conditions for the operation of a consociational system.

5. Favourable and Unfavourable Conditions for Consociationalism

From the successes and failures of consociationalism commentators have identified those conditions which are favourable and unfavourable for its operation, although the views on this aspect tend to be widely diverging, and at times conflicting.[3] Notwithstanding the agreement which does exist, it is also invariably pointed out that the favourable conditions are neither necessary nor sufficient for successful consociationalism, and the converse applies to the unfavourable conditions. In referring to these conditions a distinction should be drawn between

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1. E. McWhinney (op cit 76-80) is complimentary of the 'professorial' Cyprus constitution and suggests that its influence in the exacerbation of communal strife was at the most peripheral.

2. As is pointed out later (at 120, below) a dual balance of power is in any case not conducive to successful consociationalism

3. See A. Lijphart Democracy in Plural Societies (1977) 53-103; E. Nordlinger Conflict Regulation in Divided Societies (1972) 42-116; K. McRae (ed) Consociational Democracy (1974) 8-10; V. Lorwin 'Segmented Pluralism' 1971 Comparative Politics 141-175; G. Lehmbruch 'Consociational Democracy in the International System' 3 (1975) European Journal of Political Research 377-391; J. Steiner Amicable Agreement Versus Majority Rule (1974) 269-273.

factors which are attitudinal, such as those relating to élite behaviour, and those which are objective, such as the social structure and physical features of a country; it is clear that the former can be changed more easily over time than the latter.

(a) Favourable conditions

As consociationalism has been described mainly from the perspective of élite behaviour[1] it is not surprising that its successful operation makes significant demands on leadership élites, and that, while all political systems require élite leadership, consociational theory posits a critically decisive role for this factor. Leaders should accept at least some basic national symbols and be committed to the maintenance of the system, they should be able to transcend the sub-cultural cleavages in society through over-arching co-operation and compromise, and above all they should be strong enough to take their followers with them, which requires at least the appearance that they are accommodating popular demands. Moreover, the leadership should be relatively stable, in that a high circulation of leaders is not conducive to the strong and effective leadership needed within the segments, and the trust and co-operation needed in respect of inter-segmental relationships. The corollary of structured élite predominance is a citizenry which accepts the position and role of élites, and which is itself relatively apolitical and acquiescent. Besides these factors relating to non-élites, there should also be at the mass level some loyalty to the system as such,[2] and at least a minimal consensus on the rules of the game.

Among the more objective favourable conditions frequently cited are a multiple balance of power among the segments in a plural society,[3] a multi-party system through which each segment is

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1. See 94 , above.

2. Nationalism has not, however, been a strong feature of the four European consociations.

3. This entails at least three segments and approximate equilibrium among them, so that no compact majority group exists and each individual segment is in an overall minority; in this situation working majorities can only be acquired through compromises. See J. Steiner Amicable Agreement Versus Majority Rule 253f.

represented by its own political party, and distinct lines of cleavage between the subcultures[1] and internal political cohesion within them. The country should be of a relatively small size in area and population since co-operation, and the governing process generally, becomes more complicated on a large scale,[2] and the existence of external threats against a small country can be conducive to internal cohesion and co-operation.[3]

The most contentious of the favourable conditions for successful consociationalism is that of a prior tradition of élite accommodation which has given rise to a protracted debate between Daalder and Lijphart;[4] this has led to two diverging approaches to consociationalism[5], each of which has different consequences for the system as a normative model. The issue in question is whether consociationalism is the product of earlier political traditions, or whether it can be created through the deliberate efforts of leadership élites. According to the former view, as espoused by Daalder, the historical tradition of compromise and co-operation is crucial for a successful consociational arrangement in the modern period; in

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1. On whether the continued existence of fundamental cleavages is an absolute condition for the persistence of the system see G. Lehmbruch op cit 94f. See also the last chapter of A. Lijphart The Politics of Accommodation.

2. But cf H. Daalder 'On Building Consociational Nations: the Cases of Netherlands and Switzerland' 23 (1971) International Social Science Journal 355.

3. This presupposes that the threats are similarly perceived by all groups. Small group research shows solidarity increases within a group under external pressure, and the same applies to states. During the external pressure of World War II Britain deviated from the majority model in setting up an all-party government.

4. See H. Daalder 'On Building Consociational Nations' (op cit), 'The Consociational Democracy Theme' 26 (1974) World Politics 604-621 and 'The Netherlands: Opposition in a Segmented Society' in R. Dahl Political Oppositions in Western Democracies (1965) 188-236, and A. Lijphart 'Cultural Diversity and Political Integration' 4 (1971) Canadian Journal of Political Science 1 and 'Majority Rule versus Democracy in Deeply Divided Societies' 4 (1977) Politikon 113 at 124.

5. That is the second and third approaches, referred to at 94 , above.

this view consociationalism is seen not as a response to the dangers of subcultural divisions, but as the reason why these never became disruptive. Lijphart by contrast, and particularly in his early writings, stresses the voluntaristic, rational and purposive aspects of élite behaviour, in establishing a consociational system: at a particular moment in history élites consciously decide to counteract the threats of political and cultural divisions through an arrangement of mutual accommodation based on power-sharing and compromise - the 'self-denying hypothesis', which stands in contradiction to the theory of the plural society.[1] The difference between the two relates to both timing and causal relationships.[2] While the debate has not been satisfactorily resolved, the viewpoints need not be regarded as irreconcilably opposed: Lijphart concedes that even in Austria, where Daalder's theory seems least applicable in view of the fact that a civil war preceded the consociational accommodation, the grand coalition was not a purely intellectual conception since the principle had been applied at the Lander level during the first Republic; nevertheless he argues that one should not shift from a voluntarist position to one of complete determinism.[3] Daalder, in turn, concedes that the consociational model may be relevant for developing nations without a history of élite accommodation, provided they have at least some earlier pluralist traditions.[4]

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1. The divergence is aptly revealed by the different approaches to the Dutch Pacificatie in 1917; Lijphart describes it as the response to the perils of subcultural divisions, while Daalder emphasises the prior accommodation arrangements and describes Pacificatie as the prelude (not response) to the development of subcultural interest organisations.

2. K. McRae op cit 12.

3. Lehmbruch (op cit 380-1) in fact suggests that if past violence is perceived as traumatic by all subcultures, it may be an inducement to more peaceful means of conflict regulation in the future.

4. Lehmbruch (op cit 379ff) distinguishes between 'genetic' and 'sustaining' conditions of consociational democracy, and suggests that having chosen a consociational strategy under specific genetic conditions, élites may internalise these strategies as norms (in terms of learning theory) thus establishing a routine pattern of conflict regulation which outlives the genetic conditions. Clearly the bargaining results will have to be perceived as satisfactory by all groups for this development to occur.

This debate has a particular relevance for South Africa in relation to the position of consociational democracy as a prescriptive model. If consociationalism presupposes the existence of a tradition of political accommodation and a special élite culture, then its implementation in societies without these features is likely to be very difficult; this would be the case in South Africa, with its stark historical absence of accommodationist politics. On the other hand if consociationalism depends rather on the intelligent choice by particular élites at a critical juncture in a divided nation's history, then it can still serve as a normative model for societies, such as South Africa, without a tradition of political accommodation. Any attempt to apply consociationalism prescriptively to South Africa must inevitably assume the latter view, rather than the one based on historical determinism.

(b) Unfavourable conditions

By necessary implication the absence of the above conditions will be unfavourable for a successful consociational arrangement. In addition a high degree of socio-economic inequalities within a country, and the presence of external threats which are not perceived in the same way by the different segments, will not be conducive to its operation. Although it has been emphasised that consociationalism can be applied in a variety of institutional frameworks, some constitutional features are less conducive to its success than others; thus unitarianism, presidentialism, and majoritarian electoral systems are less suitable than federalism, a parliamentary executive and proportional representation;[1] more generally it can be said that those constitutional features which place a relatively high total load on central institutions and centralise the sites of political competition will be less favourable than

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1. More detailed attention is given to the optimal constitutional framework for consociationalism in chapter 8, below.

those which divide and devolve power and increase the sites of competition.[1] There is more ambivalence over the question of whether the structure of the cleavages, their quality, and the degree of politicisation they give rise to, can be unfavourable for a consociational system in a divided society.[2] While consociational theory has generally not regarded the absence of cross-cutting cleavages as an unfavourable condition, the fact that there are cross-cutting cleavages in many of the working consociations, such as Switzerland, has led to the view that the success of consociationalism might be a function of this factor, together with the nature of the cleavages;[3] it has been suggested, for example, that the existence of cleavages based on ethnic identity is not auspicious for a consociational arrangement. Even Lijphart concedes that the chances for consociational democracy decrease as the degree of pluralism of plural societies increases.[4] This is, however, a matter to which insufficient attention has yet been given.

This survey of favourable and unfavourable conditions for consociationalism gives only a limited indication of its feasibility in a practical situation. Just as the absence of the political will to participate in a co-operative arrangement

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1. There may seem a contradiction between the emphasis on (conspiratorial) élite accommodation in the consociational model, and the desirability of a division and devolution of power. The aim of the latter features, however, is primarily to ensure that no single élite group attains a hegemonial position which could result in a zero-sum political process, and not necessarily to encourage non-élite political participation which might remain low even in a devolved political structure. Cf J. Steiner Amicable Agreement Versus Majority Rule (1974) 259ff.

2. See H. Daalder op cit 616ff; B. Barry 'Political Accommodation and Consociational Democracy' 5 (1975) British Journal of Political Science 478 at 488.

3. See for example E. Aunger's recent work In Search of Political Stability: A Comparative Study of New Brunswick and Northern Ireland (1981).

4. A. Lijphart 'Majority Rule Versus Democracy in Deeply-Divided Societies' 4 (1977) Politikon 114 at 120.

would be fatal to any consociational system, regardless of the presence of conditions favourable for its success, so would the existence of such will compensate in some measure for the presence of unfavourable factors. Lijphart goes so far as to suggest that consociational engineering can be attempted 'even where the conditions for it do not appear promising at all'.[1] It is nevertheless expedient to examine, in due course,[2] the existence or otherwise of the various conditions in the South African context.

6. The Shortcomings of Consociationalism[3]

While consociational theory has been authoritatively described as 'among the most influential contributions to comparative politics in the last decade',[4] it remains relatively undeveloped, and its descriptive adequacy and explanatory capacity have been seriously questioned. In the first place, therefore, consociationalism can be criticised as a theoretical model. But as a system of government consociationalism also has manifest drawbacks, particularly in relation to its democratic qualities and its efficiency.

Early critics were concerned about the type of conflict which might be regulated along consociational lines, and in his critical analysis Barry[5] concludes that it is doubtful as to whether

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1. Ibid 124.
2. See below, 130-133.
3. See generally A. Lijphart Democracy in Plural Societies (1977) 47-52; D. Rae op cit; B. Barry 'The Consociational Model and its Dangers' 3 (1975) European Journal of Political Research 393-412; and the reviews referred to at 96, above.
4. G.B. Powell 'Review of Arend Lijphart: Democracy in Plural Societies' 73 (1979) American Political Science Review 295.
5. B. Barry 'Political Accommodation and Consociational Democracy' 5 (1975) British Journal of Political Science 471-505.

consociationalism could be used to accommodate divisions based on ethnic (as opposed to linguistic or religious) identity; this limitation would considerably narrow the range of consociationalism as a prescriptive model. A more fundamental criticism has been made from a Marxist perspective, with specific reference to consociationalism in the Netherlands.[1] It is pointed out that the religious cleavages in the Netherlands were never so deep and intense as to require consociational arrangements to avert civil war, but they did serve to divide the working-class movement and contribute to the maintenance of the existing relations of production which was more important, as far as the interests of the bourgeoisie were concerned, than the formal consociational arrangements. Moreover the accommodationist arrangements in the Netherlands,

> 'were themselves determined by shifts in the balance of class forces between the bourgeoisie and the proletariat. For that very reason it is not wholly surprising that these arrangements should start breaking down with the intensification of class conflict, that is, precisely during those periods of social and political unrest when they are supposed to be most effective.'[2]

This line of argument could clearly be developed into a more generalised critique of consociational theory from a class perspective. A formal analytical assessment of Lijphart's ideas has been made by Boynton and Kwon,[3] and they suggest that his argument is incomplete because accommodation does not necessarily follow from the structure called consociational democracy. They conclude that more is required to guarantee political accommodation and democratic stability in plural societies than is advocated by consociational theory. Some attempts have been made to refine consociational theory[4] in the light of its shortcomings, but these come only a small way towards meeting the criticisms levelled at it as a theoretical model.

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1. R.A. Kieve 'Pillars of Sand: A Marxist Critique of Consociational Democracy in the Netherlands' 1981 Comparative Politics 313-337.

2. Ibid 332.

3. G.R. Boynton and W. Kwon 'An Analysis of Consociational Democracy' 3 (1978) Legislative Studies Quarterly' 11-25.

4. Eg J. Steiner 'The Consociational Theory and Beyond' 1981 Comparative Politics 339-354.

As a system of government the drawbacks of consociationalism arise from the reliance it places on leadership élites and the premium it puts on co-operation and compromise. Its unashamedly élitist character[1] has obvious implications for its democratic qualities, although the interaction between consociationalism and democracy tends to have been inadequately analysed by the consociational writers.[2] If the democratic quality of a system depends upon the strength of the structured opposition,[3] the periodical alternation in office, or the competitiveness of the electoral system, then consociationalism is democratically deficient in that there is no opposition in the traditional sense,[4] no alternation in power between government and opposition, and electoral outcomes are not crucial.[5] These criticisms, however, display a majoritarian bias, whereas the consociational pattern of decision-making discards the very assumptions of majority rule. But what does have implications for the democratic qualities of consociationalism is the feature of structured élite predominance, which results both from the system's emphasis and reliance on élite co-operation, and such manipulative constitutional features as electoral party

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1. Cf Macpherson's description of the 'pluralist élitist equilibrium model' of democracy in C.B. Macpherson The Life and Times of Liberal Democracy (1977) 77-82.

2. Cf H. Daalder 'The Consociational Democracy Theme' 1974 World Politics 604 at 617.

3. But cf R. Dahl's epilogue on the desirability of structured opposition in a democratic system: Political Oppositions in Western Democracies (1965) 387-401.

4. Cf O. Kirchheimer's early approach to this matter in 'The Waning of Opposition in Parliamentary Regimes' 24 (1957) Social Research 127-156. It should be emphasised, however, that there can still be a majority government confronted by an opposition in a consociational system, but each group would be a coalition and would not be formed along the lines of the major cleavage. E. Aunger shows that in respect of New Brunswick the grand coalition principle is compatible with one-party majority (that is Westminster) cabinets: In Search of Political Stability: A Comparative Study of New Brunswick and Northern Ireland (1981).

5. The system in fact places a premium on the non-circulation of leaders.

lists as the basis of proportional representation.[1] The important role of élites in the co-operative process[2] requires popular deference to leaders, acquiescent attitudes to authority, and patron-client relationships between leaders and followers; the danger that leaders will be regarded as apostates because of their willingness to compromise might even necessitate the suppression of popular dissent.[3] The system of 'bargaining behind closed doors' by an élite cartel involves restrictions on popular participation in government and on access to information, and the possible co-optation of all experts who might oppose élite decisions; moreover élites are in a more than usually favourable position to keep certain issues off the political agenda, so as to maintain the status quo.[4] These features have serious consequences for the democratic qualities of consociationalism as far as non-élites are concerned, and the notion of democracy as self-government becomes heavily qualified in the consociational context.

The obvious disadvantage of the anti-majoritarian features of the consociational model is that they produce slow and ineffective government. The coalition and veto principles, in particular, might lead to complete immobilism in government which would inevitably frustrate attempts to introduce social and economic reforms and tend to favour the status quo. There is an implied assumption in the system that changes of policy are more costly than the continuation of policy, an assumption which could lead to the destabilisation of the political system and the rise of private power.[5] Further loss in efficiency can be anticipated from the extensive application of the proportionality principle, particularly if important appointments are made

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1. There are other less centralised forms of proportional representation available. Electoral matters are dealt with in detail in chapter 8, below.

2. Cf E. Nordlinger's (op cit 74-78) argument for élite predominance.

3. See C. Young The Politics of Cultural Pluralism (1976) 83; I. Lustik 'Stability in Deeply Divided Societies: Consociationalism versus Control' 1979 World Politics 325 at 334.

4. Cf P. Bachrach and M. Baratz 'Power and its Two Faces Revisited' 69 (1975) American Political Science Review 901; and S. Lukes Power: A Radical View (1974) 16-20.

5. See D. Rae 'The Limits of Consensual Decision-Making' 69 (1975) American Political Science Review 1270 at 1280; also M. Heisler 'Managing Ethnic Conflict in Belgium' 1977 American Academy of Political and Social Science Annals 33 at 38.

on this basis rather than on merit. Financial inefficiency can also be expected through the above factors, and the multiplication of institutions involved in the implementation of the segmental autonomy principle.

The proponents of consociationalism are ready to concede the existence of the above drawbacks, but point out that they should not be exaggerated. The short term effectiveness of majoritarian systems, they argue, is likely to be counter-productive if it leads to instability in the long-run; conversely, the consociational model may be slow and frustrating in the short term, but more effective in the long. As far as the democratic drawbacks are concerned, they suggest that these are not so drastic when compared with the democratic prospects of a majoritarian system in a divided society, or even, with the real (as opposed to theoretical) democratic qualities of the traditional Western systems.[1] They also point to Austria and the Netherlands as evidence of the relative ease with which consociationalism can be discarded in favour of a majoritarian system.

One additional drawback of the consociational model which requires mention is its tendency to make a plural society more plural.[2] This derives from the institutionalisation of segmental differences and the organisation of politics along segmental lines, which has the tendency to increase segmental isolation and potential hostility, despite the 'good fences and good neighbours' hypothesis of consociational theory. Furthermore the assumption that the cleavages in society are static can become a self-fulfilling prophecy. Barry[3] has argued that for these reasons the model should not be used outside its original areas since it might lead to increased polarisation and

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1. Lijphart gives specific attention to the quality of Dutch democracy during the period of accommodation in The Politics of Accommodation (2 ed, 1975) 177-180; cf C.B. Macpherson The Life and Times of Liberal Democracy (1977) 82-92.

2. Cf V. Lorwin 'Segmented Pluralism' 1971 Comparative Politics 141 at 158.

3. B. Barry 'The Consociational Model and its Dangers' 3 (1975) European Journal of Political Research 393.

instability; he suggests that in the particular situations of Canada and Northern Ireland consociational practices might make matters considerably worse. In short consociationalism should be treated cautiously as a prescriptive model.

7. South Africa and Consociationalism

The remainder of this work is devoted to aspects of consociational government in the South African context. The notion of a consociational option in South Africa was first mooted in 1973 in the Sprocas commission report on political alternatives.[1] Since then numerous political 'scenarios' have, either expressly or implicitly, included forms of consociationalism, and consociationalism has been presented as a prescriptive model for the reconciliation of what are perceived as the two polarised political demands in South Africa - from whites, political separation and continued white domination in the 'common area', and from blacks, an extension of political rights to all citizens in a unitary system of government. The government itself has made use of some of the consociational cant in an attempt to construct a new legitimising ideology for its political programme. But recent political developments have, at the most, given rise to a form of 'sham consociation', or 'consociational authoritarianism', in which the crucial consociational principle of 'power-sharing' is manifestly absent.[2]

However, most of the commentators who have analysed the practical feasibility of the consociational option in South Africa have concluded negatively, because many of the important conditions for its successful operation do not exist in this

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1. Sprocas Report No. 10 South Africa's Political Alternatives (1973) 163-166.

2. See in particular the analysis in chapter 6, below.

country - or at least there are serious obstacles to its implementation here.[1] Thus it is pointed out that there is no voluntary group membership in South Africa, there is no multiple balance of power among existing groups nor would there necessarily be one among future groups, there are few overlapping memberships among groups, there is no strong tradition of political moderation and co-operation in South Africa, the country is fairly large in size, it has a high international profile, and the external threats against it are not uniformly perceived by all inhabitants, and finally there is a very high degree of socio-economic inequalities within the country. But perhaps the most serious drawbacks to consociationalism in South Africa relate to leadership élites and the restrictions imposed on them;[2] this has led to the existence of leadership vacuums, non-representative leaders, and externally-based élites, none of which factors has existed to the same degree in the empirical consociations. And even in respect of the leadership élites who are participating in the political process, there does not exist a common commitment to maintaining the integrity of the system and to observing the rules of the consociational game - in short consociationalism is not accepted as a fundamental norm.

The most authoritative work on this matter[3], however, concludes slightly less negatively, albeit somewhat ambiguously, on the prospects of consociationalism for South Africa. The study of Hanf, Weiland and Vierdag examines the objective and perceived factors of conflict in South Africa, in the light of which

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1. See L. Schlemmer 'The Devolution of Power in South Africa: Problems and Prospects', paper presented at the conference on Intergroup Accommodation in Plural Societies, Cape Town, 1977, and 'Social Implications of Constitutional Alternatives in South Africa' in J.A. Benyon (ed) Constitutional Change in South Africa (1978) 266; H. Adam and H. Giliomee The Rise and Crisis of Afrikaner Power (1979) 288ff; Royal Institute of International Affairs A Survey of Proposals for the Constitutional Development of South Africa (1980).

2. For a more detailed analysis of these matters see chapter 8, below.

3. T. Hanf, H. Weiland and G. Vierdag South Africa : The Prospects of Peaceful Change (1981) - this is the English translation of Südafrika, friedlicher Wandel?

they conclude that there is no possibility of peacefully creating a unitary state in which there is a full democratic franchise. But as an alternative to unitarianism, on the one hand, and partition, on the other, they find that 'some form of consociational democracy need not be completely excluded'[1] for the resolution of the conflicts in South Africa. As far as the conditions for successful consociationalism are concerned, this study is also more optimistic, though at times, in the present writer's view, unduly so.[2] Thus on the basic structural conditions of consociationalism they conclude,[3]

> '... we may say that the basic conditions of the group structure in South Africa and the country's international profile are not unfavourable to the emergency of a consociational democracy. While the existing political culture clearly militates against it, the possibility exists that change may occur because serious conflict is recognised to be imminent.'

Of the conditions pertaining to political leadership, they find that the most important are fulfilled, namely the existence of strong and representative leaders, but they refer to the prevailing attitude of the white power-élite as the destructive factor at this level.[4] And as far as the conditions pertaining to the population as a whole are concerned, they conclude that these are in part favourable and in part unfavourable, but that the latter could be overcome through incisive changes in economic relations.[5] In short, it is primarily a change in attitude by white leaders within the short or medium term which would be

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1. At 381.

2. Eg at 389 the authors suggest that 'if South Africa were to adopt an acceptable form of conflict regulation it would achieve a low profile in international politics.' It is not clear, however, that consociationalism would be regarded internationally as an acceptable arrangement, and it would probably not be if it excluded external black leaders; in other words the work seems to underestimate the degree to which political issues in South Africa have become internationalised.

3. At 391.

4. At 393.

5. At 394.

needed to ensure the emergence of a system of consociational democracy. But because of the absence of a real threat to white political power during this period, the authors are of the view that the present system of 'unilateral conflict regulation' is as possible, for the foreseeable future, as peaceful change:

> 'Our conjecture about the immediate future is therefore that the white power-élite will not opt for consociation, but for a sham consociation; that is, for a perpetuation of unilateral conflict regulation in forms which only resemble those of a consociational democracy.'[1]

They also suggest that a transition from sham consociation to genuine consociation is possible, but not likely under prevailing circumstances. For these reasons, inter alia, the system of consociational democracy is not applied prescriptively in this work; consociationalism is rather used as a basis of analysis for an examination of South Africa's political constitution.

8. Conclusion

In this chapter consociationalism has been referred to mainly as a system of government in which leadership élites play a decisive role. In the chapters which follow the focus will be turned to constitutional arrangements in South Africa, and the extent to which these sustain or inhibit a consociational form of government. Thus the institutional basis of the present system of sham consociation will be analysed, and there will be a description of the constitutional adaptations required to constitute the minimal institutional conditions for consociational democracy. But, as the tenor of this chapter has shown, consociationalism cannot be completely reduced to constitutional factors, and the analysis should be seen in this perspective.

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1. At 412.

PART TWO

THE HISTORICAL
AND
COMPARATIVE BACKGROUND

CHAPTER 4

SOUTH AFRICA'S CONSTITUTIONAL BACKGROUND

1. Introduction

In this chapter a brief historical overview is given of the main constitutional developments which have taken place in South Africa during the seven decades since Union.[1] The survey does not refer, other than in passing, to those constitutional developments which form part of the 'government's new constitution' which was first publicised in 1977 and which has been implemented since then in certain respects; these latter developments are dealt with subsequently.[2] The purpose of the survey is rather to describe, in an historical perspective, the constitution as it existed immediately prior to these changes, and thus to provide the background against which the current constitutional debate is taking place.

Two broad themes can be identified within the period of constitutional development referred to above: the first is the evolution in South Africa's status from a position of colonial and dominion subordinacy to one of republican independence, a transition which is of only oblique relevance to this work.[3] The second theme relates to the 'internal' changes in constitutional structures and processes; within this area there are, despite some fluctuations and conflicting trends, various clearly discernible constitutional consistencies, and in many respects the government's constitutional proposals constitute their continuation and, in a purely institutional sense, their culmination.

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1. This chapter updates and develops the analysis in L.J. Boulle 'The Second Republic: its Constitutional Lineage' 1980 CILSA 1-34.

2. See chapter 6, below.

3. See on this theme H. May The South African Constitution (3 ed, 1955) 30-43; H. Hahlo and E. Kahn South Africa: The Development of its Laws and Constitution (1960) 128-175; and M. Wiechers Staatsreg (3 ed, 1981) 192-217.

This latter aspect of South Africa's constitutional development has been comprehensively documented and is generally well-known.[1] To serve the purposes of this work it is proposed to describe these developments in terms of their affinity or otherwise with the Westminster constitutional system. In the first place this makes it possible to show the extent of the normative influence of the majoritarian principle, which is closely associated with the Westminster model, in South Africa's constitutional system; to the extent that this system has incorporated majoritarian Westminster institutions it is at variance with the principles of consociationalism, although it does not necessarily follow that the non-Westminster institutions in South Africa are consociational in nature. In the second place this approach gives a sense of perspective to at least one aspect of the current constitutional debate. It has become fashionable in the last few years to depict recent constitutional changes in terms of a movement away from the Westminster system towards a constitutional arrangement better suited to South Africa's plural society.[2] This tendency may be traced back to the Theron report,[3] which first focussed on the supposed 'Westminster nature' of the South African constitution

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1. The definitive text on the South African constitution, and South African constitutional law, is Marinus Wiechers Staatsreg (3 ed, 1981) - a perceptive and up to date authority. Of more historical importance are H. May The South African Constitution (2 ed, 1949 and 3 ed, 1955), Hahlo and Kahn op cit, Verloren van Themaat Staatsreg (2 ed, 1967). More recent, but synoptic, contributions are found in Hosten, Edwards, Nathan, Bosman An Introduction to South African Law and Legal Theory (1977) 588-634, and R. Goldblatt 'Constitutional Law' in vol 5 The Law of South Africa 3-48. On the constitutional politics of South Africa see D. Worrall (ed) South Africa: Government and Politics (2 ed, 1975), A. de Crespigny and R. Schrire (eds) The Government and Politics of South Africa (1978), C. Niewoudt, G. Olivier, M. Hough (eds) Die Politieke Stelsel van Suid-Afrika (1979).

2. See Boulle op cit 2; D. van Wyk 'Westminster-stelsel - Requiescat in Pace? of: kan 'n luiperd sy kolle verander?' 44 (1981) THR-HR 105-119.

3. Report of the Commission of Inquiry into Matters Relating to the Coloured Population Group (RP 38/1976) 178. See below, 263-265.

and suggested that the existing 'Westminster-founded constitution' might have to be amended to accommodate South Africa's particular conditions. Those who have taken up this argument have invariably used concepts of consociationalism in promoting a particular constitutional alternative to South Africa's 'Westminster system'. But the analysis which follows shows that the point of departure in these arguments is somewhat tenuous, in that the South African import version of the Westminster constitutional model deviates in several fundamental respects from the original. Furthermore, what is so far known about the supposed movement away from Westminster would in fact perpetuate many of the Westminster and the non-Westminster constitutional features of the past, including the non-consociational majoritarian aspects. An examination of South Africa's past and present constitutional system also reveals very little in the way of consociational institutions and practices. Thus from a constitutional point of view any transition to an authentic consociational arrangement would involve fundamental changes with the past.

2. Westminster Features of the South African Constitution

The main constitutional features of the Westminster system of government have already been described,[1] together with their affinity or otherwise with the principle of majority rule. The three most important Westminster features which have been incorporated into the South African constitutional system are the supremacy of parliament, the parliamentary executive and the plurality electoral system;[2] of less significance are the bicameral legislature and the constitutional conventions.

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1. See above, 24-28.

2. See Boulle op cit 2-8; Van Wyk op cit 106-112; A. Cilliers 'Die Westminster-sisteem en Suid-Afrika se Konsepgrondwet' 1979 Obiter 86-92; D. du Toit 'Geskiedkundige oorsig van Suid-Afrikaanse konstitusionele modelle met besondere verwysing na die Westminster-staatsmodel' in S. Jacobs (ed) 'n Nuwe Grondwetlike Bedeling vir Suid-Afrika - Enkele Regsaspekte (1981) 8-24.

(a) Parliamentary supremacy

While the drafters of the Union constitution had several constitutional traditions upon which to draw, they opted for the doctrine of parliamentary supremacy of which the Cape, Natal and the Transvaal had had experience, and thereby discarded the Orange Free State precedent of a rigid constitution with guaranteed rights and judicial review.[1] This was to be the most important principle of the South African constitution and it had far-reaching political consequences.[2]

Until the passing of the Statute of Westminster in 1931[3] the legislative capacity of the Union parliament was qualified by the subordinate constitutional status of the country. Thus the British parliament retained legislative supremacy over the Union, including the right to amend its constitution unilaterally, the Colonial Laws Validity Act of 1865[4] was still in force and precluded the Union legislature from legislating repugnantly to an act of the British parliament extending to the country, and there was also a territorial limitation on the Union parliament's powers, though its extent was not clear.[5] The Union's position of subordinacy also involved other derogations of sovereignty - the Governor-General, a British government nominee, could reserve bills for the King's consideration, and the King retained the power of disallowance.[6]

The Union's constitutional subordinacy was not, however, reflected in political practice and the prevailing conventions

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1. In Brown v ~~Lloyds~~ Leyds, NO (1897) 4 Off Rep 17 Kotze CJ held that the Grondwet of the Free State republic constituted fundamental law with which the Volksraad had to conform; in asserting a judicial testing right he referred to the celebrated Marbury v Madison 1 Cranch 137 (1803) as authority.

2. See John Dugard Human Rights and the South African Legal Order (1978) 25ff.

3. 22 Geo V, c 4.

4. 28 and 29 Vict, c 47.

5. May (3 ed) 24.

6. Ss 66 and 65 of the South Africa Act (9 Edw 7, c 9), respectively.

regulating British-dominion relationships led to a gradual increase in the independence of the dominions. It was nevertheless considered necessary to remove the three legal limitations on the dominions' legislative powers, and this was effected by the Statute of Westminster whose main significance was that it gave juridical force to prevailing practice. The statute (i) provided that no British law should apply to a dominion unless requested by the latter;[1] (ii) repealed the Colonial Laws Validity Act, provided that no future legislation of a dominion would be void for its repugnance to the law of England or any existing or future British act, and empowered the dominions to repeal or amend British statutes;[2] and (iii) empowered the dominions thenceforth to legislate with extra-territorial effect.[3] To avoid constitutional problems which might be created by the possible, though unlikely, repeal of this British statute, the Union parliament incorporated its relevant provisions into South African municipal law in the Status of the Union Act,[4] which enactment described the Union parliament for the first time as having 'sovereign legislative power in and over the Union'.[5] This statute also ended the legislative limitations implicit in reservation and disallowance.[6]

The only remaining limitation on the Union parliament's legislative competence was the procedural one contained in the entrenched sections,[7] although the majority opinion before the constitutional crisis of the 1950's was that the entrenching

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1. S 4. The British courts did not, however, regard this as a curtailment of the Westminster parliament's powers. See further on this matter pages 436 to 445, below.

2. S 2. The doctrine of repugnancy was thus unequivocally terminated, but it was also necessary to make the position clearer than had been the case before 1865.

3. S 3.

4. Act No 69 of 1934.

5. S 2.

6. Except in respect of the matters referred to in s 10 of the Status Act.

7. Ss 35, 137 and 152 of the South Africa Act. The writers who denied that entrenchment rendered the Union parliament non-sovereign are referred to in Hahlo and Kahn op cit 101-164.

procedure was ineffective.[1] The crisis itself was to have an ironic outcome: it confirmed the juridical efficacy of the entrenched procedure,[2] but showed how easily it could be circumvented by the principle of parliamentary supremacy, and that principle was further emphasised in the wake of the crisis through the introduction of the fore-runner to s 59(2) of the Republic Constitution Act:

> 'No court of law shall be competent to enquire into or pronounce upon the validity of any law passed by Parliament other than a law which alters or repeals or purports to alter or repeal the provisions of s 137 or s 152 of the South Africa Act, 1909.'[3]

In so far as parliamentary supremacy denotes the absence of legislative rivals to parliament and a judicial testing-right over legislation, it is clear that the Union parliament enjoyed such supremacy subsequent to the Statute of Westminster and the constitutional crisis.[4] From a juridical point of view it could be said, however, that legal sovereignty was divided between parliament as constituted under s 63 and under the proviso to s 152 of the South Africa Act;[5] thus in terms of the 'new view' of parliamentary supremacy the legislature had, in order to render its enactments effective, to comply with the provisions of the constitution which for the time being regulated its own composition.[6]

When the Union became a Republic with the enactment of the Republic of South Africa Constitution Act[7] '... a legislature

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1. See Stratford J in Ndlwana v Hofmeyer NO 1937 AD 229, 'Parliament ... can adopt any procedure it thinks fit; the procedure express or implied in the South Africa Act is ... at the mercy of Parliament like anything else ...'; see May (2 ed, 1949) 33 (where he refers to the two-thirds majority rule as being 'legally as dead as the proverbial dodo'); and Hahlo and Kahn op cit 154, and Dugard op cit 29.

2. The second Harris decision (Minister of the Interior v Harris 1952 (4) SA 769 (AD)) remains the authoritative curial pronouncement on the entrenchments.

3. S 2 of the South Africa Amendment Act, No 9 of 1956.

4. It seems that at common law the courts did have a legislative testing right. See M. Wiechers Staatsreg (3 ed, 1981) 334-339.

5. Centlivres CJ in Harris v Minister of the Interior 1952 (2) SA 428 (AD).

6. A detailed and critical analysis of the 'new view' of sovereignty appears at 441 to 444, below.

7. Act No 32 of 1961.

... sovereign in the traditional sense in all respects save that it was bound by entrenchment, made an irrevocable transfer of its powers to a new legislature, differently composed ...'.[1] The new legislature was the republican parliament which was again described as having 'sovereign legislative authority' in and over the republic,[2] and the provision first adopted in 1956 was retained[3] to emphasise that the courts could only review legislation relating to the entrenched clauses.[4] It remains necessary for the constituent parts of parliament to function as constitutionally prescribed to render enactments effective.[5]

The principle of parliamentary supremacy entails in South Africa, as it does in the Westminster system, that there are no geographical or functional areas from which parliamentary authority is barred and, because parliament operates on a majoritarian basis, within which the parliamentary majority is precluded from intervening. As applied in South Africa the principle has three important constitutional corollaries. The first is the legal dependence of the judiciary on the legislature, and the absence of any significant legislative testing rights for the courts.[6] The second is the unitary, as opposed

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1. E. Kahn 'The New Constitution' 78 (1961) SALJ 244 at 272.
2. Constitution Act, s 59(1).
3. Constitution Act, s 59(2).
4. Ss 108 and 118 of the Constitution, s 118 as amended by s 1 of Act No 74 of 1980. Despite changes to the various quorums of the appellate division effected by Act No 46 of 1980, the quorum of 11 judges has been retained for appeals in which the validity of an act of parliament is in question (s 12(1)(b) of the Supreme Court Act, No 59 of 1959). See S v Tuhadeleni 1969 (1) SA 153 (AD).
5. That is according to s 24, or s 118 (and before the abolition of the Senate s 63) of the Constitution Act; see Boshoff AJP in S v Hotel and Liquor Traders' Association of the Transvaal and others 1978 (1) SA 1006 (W). Whether s 114 regulates the composition of parliament is more problematic - this matter is dealt with in greater detail at 448 to 449, below.
6. S v Tuhadeleni 1969 (1) SA 153 (AD). In Cowburn v Nasopie (Edms) Bpk en andere 1980 (2) SA 547 (NC) Van der Heever J suggested (obiter) that s 59(2) imposed only a limited limitation on the courts review powers. This was said in relation to the possible invalidity of the Status of Bophuthatswana Act, No 89 of 1977, for non-compliance with the provisions of s 114 of the constitution. See further pages 447 to 450, below.

to federal, nature of the constitutional system, despite the 'federal characteristics' which commentators have been wont to identify in the Union and Republican constitutions;[1] the 'federal' division of competence inherent in the provincial system[2] was in fact always constitutionally susceptible to unilateral transformation by the central parliament and never gave rise to a federal system of government in practice.[3] Thirdly, the constitution is highly flexible, save for the remaining entrenched clauses.[4] These three features also testify to the relative absence of institutional restraints in the South African constitutional system on the power of political majorities.

From a constitutional point of view the principle of parliamentary supremacy has, together with the system of parliamentary government, enabled the party controlling the legislature to enact wide-ranging changes, without affecting this predominant principle of the constitution.[5] There have thus been far-reaching changes affecting the franchise, the composition of the House of Assembly and the Senate, the status and powers of the provincial governments, and the control and operation

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1. Eg the equal representation of the provinces in the former Senate, and s 114 of the Constitution (and its predecessor s 149 of the South Africa Act) - see C. Schmidt 'Section 114 of the Constitution and the Sovereignty of Parliament' 79 (1962) SALJ 315. A 'federal' interpretation of s 114 was given (obiter) in Cowburn v Nasopie (above) but the fate of s 114 was soon to be sealed (see at 449, below).

2. See H. May (3 ed, 1955) 359 on the federal/union 'compromise'.

3. The courts have acquired a type of federal testing right in respect of legislation of the non-independent national states in terms of s 19(1) of the National States Constitution Act No 21 of 1971. See S v Zitudeza 1970 (2) SA 773 (EC), S v Heavyside 1976 (1) SA 584 (AD), and J.C. Bekker 'Rewriting the Textbooks: A Re-evaluation of Some Traditional South African Constitutional Law Assumptions' 1979 CILSA 272 at 277.

4. Ss 108 and 118 of the Constitution Act, the latter as amended by Act No 74 of 1980.

5. Parliamentary procedure in South Africa is also fundamentally majoritarian, and the Westminster precedent has been followed in respect of both parliamentary standing orders and the privileges of parliament.

of political parties.[1] There have also been major institutional innovations in the form of separate, subordinate authorities for coloureds and Indians, and a system of territorial decentralisation leading to the self-government and partition of the black states. In recent times parliament has been subject to no legal restraints when it has prolonged its own life, abolished one of its component parts, amended the entrenching procedure, limited its geographical jurisdiction, and enacted a constitutional amendment having retrospective effect for a twenty year period. Finally, it has been possible to enact such pervasive features of the living constitution as the Population Registration Act[2] and the Group Areas Act,[3] which would remain indispensible features of the government's new constitution. These constitutional changes have had a profound effect on the political system and have resulted in a significant concentration of political power in South Africa, but have not affected the broad constitutional framework constituted by the twin Westminster principles of parliamentary supremacy and parliamentary government.

(b) Parliamentary government

Reference has been made[4] to the close institutional relationship between the legislature and executive which is regarded as the distinctive feature of the Westminster system and which distinguishes it from presidential government. Historically the cabinet came to be seen as a committee of parliament, accountable to that body and not to the Crown, and dependent on parliament's confidence for its continuance in office. Parliament's control over the cabinet was effected through the

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1. All the developments referred to in this paragraph are dealt with in the body of this work, below.
2. Act No 30 of 1950.
3. Act No 36 of 1966.
4. At 25, above.

fact that ministers had to be, or become, members of the legislature, and were jointly and individually responsible to that body for the performance of their duties. In time the conventions of responsibility gave way to the control and domination of parliament by the cabinet, leaving little notion of balance between the two. It is, however, the close institutional relationship between legislature and executive which remains the defining characteristic of parliamentary government.

It was not surprising that the drafters of the Union constitution, having preferred the Westminster notion of parliamentary supremacy to that of a legislature limited by the constitution, should make provision for a parliamentary executive as well. The principle of the parliamentary executive had first been transmitted to the Cape in 1872.[1] This meant in essence the application of the cabinet system in the Cape, and other colonies, where the executive function had formerly been in the hands of the imperial government;[2] effective executive power passed into the hands of the executive council which remained in office while it enjoyed the support of the locally elected lower house. The South Africa Act, however, provided only a 'fragmentary statutory basis for responsible government',[3] namely the requirement that no minister could hold office for longer than three months unless he was or became a member of either house of parliament.[4] The implications of responsible government were not spelled out in the constitution, but had to be sought in the English common law which was the main source

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1. In this context the term 'responsible government' was used to emphasise the responsibility of the colonial government to the colonists, and not the metropolitan power. Natal received responsible government through the Constitution Act of 1893.

2. Cf Strong Modern Political Constitutions (8 ed, 1972) 217.

3. Hahlo and Kahn op cit 129.

4. South Africa Act s 14(1). This was the usual arrangement in the dominions; s 14(1) follows almost exactly the wording of art 64 of the /Australian/ Commonwealth Act of 1900. The 'period of grace' derives from the British convention - S.A. De Smith The New Commonwealth and its Constitutions (1964) 101.

of South African constitutional law. Some of the English conventions were specifically enacted[1] and others came to be incorporated by reference,[2] while a third group were never specifically referred to by the Union constitution. The Governor-General's duty to act on the advice of the executive council, an essential feature of parliamentary government, was statutorily regulated,[3] to prevent difficulties which could emanate from the Westminster-derived diffusion of executive power between the head of state and head of government. The conventions of joint and individual ministerial responsibility came to be observed 'within elastic limits'[4] to give further support to the system.

The Republic Constitution Act also provided only a fragmentary basis for responsible government by requiring ministers to be, or become, members of the Senate or House of Assembly within three months of assuming office;[5] in 1980 the period of grace was extended to twelve months,[6] and with the abolition of the Senate at the end of that year ministers were compelled to be elected or nominated members of the House of Assembly only.[7] The State President's duty to act on the advice of the executive council was statutorily prescribed,[8] as were some other conventions, while the remainder were given statutory recognition without being enacted.[9] The most important among the

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1. Eg ss 22 and 56 of the South Africa Act.
2. Eg s 4(3) of the Status Act No 69 of 1934.
3. South Africa Act, s 13. Certain powers were reserved for the Governor's personal discretion.
4. Hahlo and Kahn op cit 131.
5. RSA Constitution Act s 20(3).
6. S 1 of Act No 70 of 1980. Only one such period is permitted. The act also amended s 54 of the Constitution to prevent (for the first time) such a minister from voting in parliament.
7. These matters are dealt with in detail in chapter 6, as part of the government's constitutional proposals.
8. Unless otherwise expressly stated or necessarily implied; Constitution Act s 16(2).
9. Constitution Act s 7(5).

last group is the State President's duty to appoint the leader of the majority party in the House as prime minister, and the other ministers on the prime minister's advice. The principles of joint and individual ministerial responsibility remain dependent for their enforcement on the conventions of the constitution. According to the theory of parliamentary government the executive is responsible to the people through the mediation of the legislature and the efficacy of the system depends materially on the representative nature of the legislature. As the analysis of the South African electoral system and franchise shows,[1] the legislature in South Africa is largely unrepresentative, and the convention of ministerial responsibility has undergone substantial modification in scope and significance in the light of political events of the late nineteen seventies.[2] These conventions have also been notionally weakened through the increased period of grace for cabinet ministers, and the innovation in 1981 of nominated members of parliament.[3] In the light of these institutional differences, the political responsibility of the government is significantly less in South Africa than in the Westminster system itself, and the system of parliamentary government has amounted in practice to complete domination of the legislature by the cabinet.[4]

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1. See below, 147-150.

2. Chiefly the 'information affair'. For the Erasmus Commission's observations on individual responsibility see the Report of the Commission of Inquiry into Alleged Irregularities in the Former Department of Information (RP 1131/3 1978) § 11.345 - § 11.349. For a ministerial dictum on the 'uberrima fides relationship' between ministers see House of Assembly Debates vol 1 cols 321-322 (8 February 1979).

3. See below, 321 to 326.

4. W.H.B. Dean (The Riots and the Constitution in 1976 (1976) 15) suggests that the sole contemporary function of parliament is to provide the executive with the legislation the latter requires to effect its policy and that the idea of the legislature controlling the government is obsolete.

The system of parliamentary government in South Africa, and the co-ordination of legislature and executive activities which it involves, has given rise to an efficient and decisive governing process.[1] But it has also contributed to a massive concentration of power in the cabinet which has partly contributed to the legitimacy crisis which the state system faces in the 1980's.[2] As far as the constitutional allocation of competence is concerned there is a winner-takes-all competition at one decisive site: the party which gains a majority of seats in the elections for the House of Assembly controls both parliament and the cabinet, and control of the latter leads to indirect control and influence in vast areas of the administrative state. The twin principles of parliamentary supremacy and a parliamentary executive, together with the electoral system to be described below, have made the South African constitutional system thoroughly 'majoritarian',[3] without the compensation, even within the limits of 'white politics', of the alternation of majorities which characterises the Westminster model. The rise of bureaucratic power and the emergence of corporatism[4] in South Africa has led to further distortions of the constitutional theory underlying the Westminster system. In South Africa the limited form of Westminster government tends in theory and practice towards unrestrained 'majoritarianism'.

(c) The electoral system

The South African electoral system,[5] the restricted franchise apart, has always been based on the Westminster electoral

1. For an analysis of the executive and its relationship to parliament see Olivier 'The Executive' in De Crespigny and Schrire The Government and Politics of South Africa (1978) 17-31.

2. See above, 2-4.

3. That is the constitutional system as it relates to whites, within an overall perspective the constitution clearly involves a system of minority rule.

4. See H. Adam and H. Giliomee The Rise and Crisis of Afrikaner Power (1979) 77-195; L. Baxter 'Constitutionalism, Bureaucracy and Corporatism' in Boulle and Baxter (eds) Natal and KwaZulu: Constitutional and Political Options (1981) 75 at 85ff.

5. On the South African electoral system and process see J. Faris 'Elections' in vol 8 The Law of South Africa (1979) 283-378.

arrangement of single-member constituencies operating according to the plurality principle.[1] As has been shown already,[2] this is a thoroughly majoritarian system which tends to exaggerate the representation and influence of majority parties, and there has been no exception to this tendency in South Africa.[3] The system has in the past given rise to two dominant parties within the 'white' political system, but it is doubtful whether it can be said that a two-party system prevails today, and there is certainly not the alternation-in-power phenomenon associated with Westminster political practice. However, the absence of any form of proportional representation has undoubtedly denied parliamentary representation to smaller parties, and in this sense the electoral system has had a similar effect to its British progenitor.

The existing electoral system should also be viewed in the light of the constitutional provision for the loading of urban and the unloading of rural constituencies.[4] The effect of this feature is to distort electoral outcomes further, in the sense that parties with predominantly rural support, whether

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1. South Africa Act s 32(a) and Republican Constitution Act s 40(1).

2. At 28, above.

3. See K. Heard General Elections in South Africa 1943-1970 (1974) 236f. The discrepancies in the 1981 general election can be depicted as follows (the first column indicates the seats won by the respective parties, and the second the seats they would be entitled to in a proportional system):

National Party	131	-	95
Progressive Federal Party	26	-	31/2
New Republic Party	8	-	12/3
Herstigte Nasionale Party	0	-	25

Of the 151 seats contested in this election 12 were won by candidates with only a relative majority of votes in their constituency. (Acknowledgment is made to Professor N. Olivier MP for these statistics). See also T. Hanf, H. Weiland and G. Vierdag South Africa - The Prospects of Peaceful Change (1981) 119-126.

3. S 40(3) of the South Africa Act and s 43(4) of the Republican Constitution Act.

they be minority or majority parties, can translate their electoral strength into a disproportionately high number of parliamentary seats, while the converse applies to urban-based parties. Despite manifest objections to this principle, it has endured since the time of Union.[1] Further inter-provincial distortions have been introduced with the provision made in 1980[2] that, instead of a national quota, each province should have its own electoral quota for the purposes of loading and unloading constituencies; at the same time the government refrained from amending s 40(2) of the Constitution to accommodate inter-provincial demographic fluctuations of the past.[3] The net effect of these arrangements is that a rural seat in a relatively depopulating province (eg the Cape) can have less than half the voters of an urban seat in a province with a relatively expanding population (eg the Transvaal).[4]

But despite these local variations, the South African electoral system performs the same function as its counterpart in the Westminster system, that is it produces a government-versus-opposition dichotomy and an adversarial political context. It is not designed to achieve what systems of proportional representation achieve, namely to translate electoral support into parliamentary support.[5] In this sense it is a predominantly majoritarian and anti-consociational institution.

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1. Cf § 9 of the Schlebusch Report (Interim Report of the Commission of Inquiry on the Constitution - RP 68/1980).

2. By s 1 of Act No 28 of 1980 which amended s 43(1) and (2) of the Constitution Act. As this matter is closely related to the government's new constitution it is dealt with in more detail at 318-321, below.

3. That is the number of seats allocated to each province was not amended after the general re-registration of votes in 1979-80 and the appointment of the 1980 delimitation commission.

4. The provincial quotas adopted by the 1980 delimitation commission were as follows: Cape - 12 626; Natal - 13 283; OFS - 12 863; Transvaal - 15 433. In the 1981 general election the constituency with the most voters was Bezuidenhout (Transvaal) with 17 308, and with the least, Prieska (Cape) with 8 720. See House of Assembly Questions and Replies vol 5 pp 255-259 (26 February 1981).

5. For a detailed discussion of proportional electoral systems see 411-416, below.

(d) Bicameralism

A less enduring feature of the Westminster model in South Africa was bicameralism, which came to an end with the abolition of the Senate in 1980.[1] Like the House of Lords the Senate was never popularly elected, it was designed to serve as a chamber of review,[2] and it was subordinate to the elected house.[3] Unlike the Lords, however, the Senate was always partly indirectly elected[4] (and partly nominated), and was, at various periods of its existence, designed to perform functions additional to that of reviewing legislation; among the more salient of these functions were those of representing and safeguarding provincial interests,[5] of representing groups excluded from the franchise,[6] and of safeguarding the entrenched sections.[7] While it is not intended to evaluate the performance and role of the Senate, it can be said that none of the four functions mentioned above were adequately performed by it. Its abolition can be seen as a prelude to the implementation of the government's constitutional dispensation and will be alluded to again subsequently.[8]

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1. By Act No 101 of 1980.

2. Cf the higher minimum age qualification provided in the former s 34(a) of the Constitution Act.

3. This is a corollary of responsible government which requires governmental support in the elective house. The conventional subordinacy of the House of Lords was enacted in the Parliament Acts of 1911 and 1949 (1 and 2 Geo 5, c 13 and 12, 13 and 14 Geo 6, c 103) while the South African Senate's subordinacy was implicit from the provisions of s 63 of the South Africa Act but made more explicit by s 7 of the Senate Act No 53 of 1955, which amended s 63 and was retained in identical form in the Republican constitution (s 63) until its repeal in 1980.

4. South Africa Act ss 24 and 25, Constitution Act s 28.

5. This follows from the initial parity of provincial representation in the Senate, followed by the over-representation of the minority provinces.

6. See the analysis in the second half of this chapter.

7. As provided in s 152 of the South Africa Act, and s 118 of the Constitution Act, until amended by s 1 of Act No 74 of 1980 in anticipation of the Senate's demise.

8. At 317 to 321 , below.

(e) Constitutional Conventions

The influence of the Westminster system is also apparent in relation to the main conventions of the South African constitution[1] and reference has already been made to those conventions pertaining to the system of parliamentary government.[2] The tendency in South Africa, however, has been to enact the most important conventions,[3] as has also been the case in the other export models of the Westminster system. This has resulted in the conventions proper being not so numerous in relation to the codified parts of the constitution as in Britain. Apart from this unimportant difference, the conventions in South Africa are significantly weaker than their British counterparts.[4] This may be partially attributed to the fact that they do not have the same theoretical rationale in South Africa, namely to give effect to the will of the true political sovereign, the majority of the people.[5] But it is also a function of the South African political culture and the fact that many of the conventions are seldom applied in practice, with the result that their continued status as conventions and their exact scope are no longer self-evident.[6] It can also be said that in South Africa the conventions do not materially qualify the majoritarian aspects of the constitutional system.

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1. The description of the South African conventions given by Marinus Wiechers, Staatsreg (3 ed, 1981) 172-186, is the most complete and up to date, save for some omissions relating to ministerial responsibility.

2. At 145-147, above.

3. See, eg, ss 7(3), 16(2), 20(3), 26 and 64 of the Constitution Act.

4. This is not to overlook the fact that several of the British conventions have also been weakened by recent political events, as numerous commentators have pointed out.

5. See A.V. Dicey An Introduction to the Study of the Law of the Constitution (10 ed with introduction by E.C.S. Wade, 1959) 429 - Dicey spoke of the electorate, but for him this was synonymous with the people.

6. Various examples can be found relating to ministerial responsibility, but reference can also be made to the convention that if a government is defeated in the house the State President should dissolve parliament; this was not followed in 1939 when preference was given to an alternative convention. See Wiechers op cit 182.

3. Non-Westminster Features of the South African Constitution[1]

By virtue of its origins and history the South African constitution contains two variations on the Westminster paradigm which do not have the practical significance of the other non-Westminster features to be discussed below. The first of these is that South Africa has a codified constitution, but the only significant consequence of this factor is that it has enabled the entrenchment of two constitutional provisions; for the rest the constitution is as flexible as its Westminster counterpart. The second is that the South African institutions such as the presidency and Senate have not enjoyed the same status and prestige as their Westminster counterparts;[2] in Bagehot's terms they have not attracted the same 'motive power' as the 'dignified parts of government' in the British constitution.[3] This difference is of little significance in the every-day working of the constitution, but is inclined to manifest itself at times of political or constitutional crisis.[4]

The other departures from the Westminster model are of a more substantial nature and have had an important effect on the constitutional politics of South Africa. The first, and most obvious, is the franchise, and this is the constitutional feature which has had the most decisive role in the political development of the country. The progressive retractions of the franchise have lead indirectly to the second and third features, namely communal representation in joint and subsequently separate institutions, and partition; these in turn

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1. See L.J. Boulle 'The Second Republic: Its Constitutional Lineage' 1980 CILSA 1-32, D.H. van Wyk 'Westminsterstelsel - Requiescat in Pace? of: kan 'n luiperd sy kolle verander?' 44 (1981) THR-HR 105-119.

2. See M. Wiechers 'Grondslae vir Politieke Ontwikkeling in Suid-Afrika' in J. Coetzee (ed) Gedenkbundel - H.L. Swanepoel (1976) 103.

3. W. Bagehot The English Constitution (2 ed, 1872) (World's Classics ed (1928) 3-4).

4. Examples are the manipulation of the Senate during the coloured voters' crisis (Wiechers in Coetzee op cit 106), and the position of the State President in testifying before the Erasmus Commission which had to report to him (see G. Devenish 'The protection of the dignity and reputation of the state president' 44 (1981) THR-HR 136).

comprise the constitutional basis of the government's form of sham consociationalism and the foundation for its new constitutional dispensation. The fourth variation relates to the provincial system which is of little current significance, and the fifth to a normative legal principle, the Rule of Law. The net effect of these variations has been to produce a constitutional system which, even before the amendments of 1980 and 1981, was strongly at variance with the normative Westminster model.

(a) The franchise

The retraction of the parliamentary franchise in South Africa is the obverse of what has occurred in other political systems where ruling parties have sought to broaden the base of their electoral support by enfranchsing new strata of the population;[1] in this way democracy became 'a fulfillment of the liberal state'.[2] The process can be illustrated briefly in relation to Britain where the modern history of the parliamentary franchise[3] began with the Reform Act of 1832, and within just under one hundred years of reform the franchise had become the prerogative of all resident British subjects of eligible age. It can be said in a generalised sense that the franchise was first extended on the basis of property qualifications, then on the basis of residence to all males, then on a uniform basis to men and women over twenty-one years of age, and finally to all adults over eighteen years; the final step in the process of electoral reform was the abolition of plural voting in 1948, since when each elector has had no more than a single vote. Whereas in 1800 only three out of every one hundred adults was eligible to vote, a century and a half later a universal and equal franchise was well established. The picture, then, is one of a gradual but purposive widening of the franchise, until the principle that the

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1. D. Welsh 'The Evolution of South Africa's Constitutional Structure' (unpublished paper, Cape Town, 3 February 1978) 7.

2. C.B. Macpherson The Real World of Democracy (1966) 10.

3. See Wade and Phillips Constitutional and Administrative Law (1977) 141-143, Hood Phillips and Jackson Constitutional and Administrative Law (1978) 186-189, J. Harvey and L. Bather The British Constitution (1966) 49-61.

Commons should represent 'property and intelligence' had been replaced by the principle of citizen representation. It is also clear that the main institutions of the Westminster system were well established before the system became democratic.

Since the introduction of self-government in the Cape in 1853 the parliamentary franchise in South Africa has always been qualified in one or more ways.[1] At first a property and later an educational qualification were used to limit the franchise, but these were succeeded in time and significance by the racial and colour qualifications which were used to retract the franchise and which remain its most important contemporary feature. The developments have therefore not followed the pattern of the Westminster and other systems, except in so far as the age and gender qualifications have been modified to extend voting rights to women and young adults. In so far as parliament is not democratically representative, the South African constitution lacks a crucial attribute of the Westminster system.

The original Cape franchise was not racially restricted and extended to all British subjects who owned property of a certain value or received a certain annual remuneration; the economic qualifications were amended subsequently and in 1892 an educational qualification was introduced for the first time. The effect of the qualifications in the Cape was to produce a predominantly white electorate. In Natal the franchise was also originally non-racial and based on economic qualifications, but subsequent qualifications effectively excluded black, and later Indian, voters. The franchise in the Free State Republic extended to all burghers of the state, who by definition had to be white and to possess in addition certain residential or property qualifications. The constitution of the South African Republic expressly forbade equality between whites and persons of colour, and both citizenship and

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1. On the franchise in South Africa see H. Hahlo and E. Kahn South Africa: The Development of its Laws and Constitution (1960) 53ff; J. Dugard Human Rights and the South African Legal Order (1978) 17ff; M. Wiechers Staatsreg (3 ed, 1981) 299ff.

the franchise were restricted to the former, but later even naturalised citizens were excluded from the rolls; property qualifications were relevant only to the attainment of citizenship through naturalisation, and not to the franchise directly.

One of the well-known compromises of the national convention preceding Union was the retention of the existing franchise arrangements in each colony for the purpose of electing members to the House of Assembly from each of the new provinces.[1] In fact the franchise issue was never properly resolved because the convention was unable to agree on a uniform franchise for the whole country.[2] The Union parliament itself was empowered to prescribe future franchise qualifications, subject only to the special procedure which was required should future legislation disqualify existing electors in the Cape.[3] There was also provision that no person might be removed from an existing voters' roll by reason only of factors of race or colour,[4] and this safeguard was also entrenched.[5]

Even before further racial restrictions were made to the franchise, the nature of the qualified franchise in the Cape and Natal had to be evaluated in the light of three additional factors. The first is that the qualifications relating to electors did not apply, mutatis mutandis, to members of the legislature, who were required to be 'of European descent'.[6] The second is that in establishing the quota for the delimita-

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1. South Africa Act s 36. The Cape also forewent the right of non-whites to stand for election to parliament.

2. See I. Walton Inner History of the National Convention (1912) 140ff and H. May The South African Constitution (3 ed, 1955) 10-13.

3. South Africa Act s 35(1). There was no restriction on amending the qualifications as such, and the special procedure was not required when white women were enfranchised by Act No 19 of 1930, although this step diminished the value of the coloured vote.

4. South Africa Act s 35(2).

5. South Africa Act s 152.

6. South Africa Act ss 44(a) and 26(a), for the House and Senate respectively. Non-whites were, however, entitled to sit in the Cape and Natal provincial councils - South Africa Act s 70(2).

tion of electoral divisions the white population only was taken into account,[1] which resulted in fewer seats being apportioned to the Cape (in which most coloured voters were resident), and in a reduction in the value of the Cape vote vis-à-vis that of the other provinces.[2] The third is that the Women's Enfranchisement Act of 1930[3] enfranchised white women only, and without any qualification, and this development, together with the subsequent removal of income and property qualifications for white males,[4] led to a substantial reduction in the influence of the composite coloured vote.[5]

The subsequent qualifications to the franchise were all racially based. In 1936 blacks were removed from the common parliamentary voters' rolls,[6] except for the few in Natal who remained eligible.[7] In 1946 those Indians who were registered on the general voters' rolls were removed,[8] and coloured voters were removed by the Separate Representation of Voters Act of

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1. S 24 of the South Africa Act regulated the initial allocation of seats until membership of the House of Assembly reached 150, which occurred in 1931. From then s 41 was applicable, and based the quota on the number of white adults in the Union. This was amended by s 1 of Act No 55 of 1952 which provided for the first time that the delimitation should be based on the number of registered white voters. S 34 was repealed by s 4 of Act No 30 of 1942.

2. As has been shown above (147-149), the deliberate inequality in the weight of votes is well entrenched in South African constitutional law although it conflicts with one of the implied meanings of 'one man one vote'. See I. Duchacek Rights and Liberties in the World Today - Constitutional Promise and Reality (1973) 194.

3. Act No 18 of 1930.

4. Franchise Laws Amendment Act No 41 of 1931. Before this law was enacted all males in the Cape were still subject to the property qualifications; after its enactment coloured males remained so, but white males and females did not. For the numbers of respective voters see Hahlo and Kahn op cit 165.

5. This influence was also affected, though less directly, when white voter registration became compulsory (Act No 20 of 1940) and it became necessary for coloured voters to register before a magistrate, policeman or electoral officer (Act No 50 of 1948).

6. Representation of Natives Act 12 of 1936. This necessitated an amendment to s 35 of the Constitution which was effected by s 44 of the Representation Act. See Ndlwana v Hofmeyr 1937 AD 229.

7. The Electoral Act No 46 of 1946 retained this limited franchise for blacks (and Indians), but it was abolished by Act No 46 of 1951.

8. Asiatic Land Tenure and Representation Act No 28 of 1946.

1951[1] which was validated in 1956[2] in the wake of the constitutional crisis.[3] Since then the general parliamentary franchise has been restricted exclusively to whites[4] for whom there is a system of universal, in the sense of non-qualified, franchise;[5] and the right to be elected corresponds exactly with the right to elect.[6] The only subsequent extensions of voting rights have been made in relation to the separate and subordinate political institutions referred to below, thus introducing a new type of 'qualified franchise' for coloureds, Indians and blacks.

The restrictive franchise in South Africa has clearly limited the representative nature of the central parliament and distorted the operation of such Westminster principles as parliamentary supremacy and parliamentary government, as well as all forms of constitutional responsibility. The undemocratic nature of the constitutional system has deprived it of a rational-legal legitimacy and contributed to the legitimation crisis facing the state system. The government in response has turned its back on the majoritarian Westminster system as a normative model, because that system would involve an extension of the franchise on a universal basis. Instead it has institutionalised various forms of communalism in its pursuit of a type of quasi-consociationalism.

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1. Act No 46 of 1951.
2. By Act No 9 of 1956
3. See Harris v Minister of the Interior 1952 (2) SA 428 (AD); Minister of the Interior v Harris 1952 (4) SA 769 (AD): Collins v Minister of the Interior 1957 (1) SA 552 (AD); and M. Wiechers Staatsreg (3 ed, 1981) 307-321.
4. As regulated by the Electoral Consolidation Act No 46 of 1946 until this statute was superceded by the Electoral Act No 45 of 1979. The Electoral Laws Amendment Act No 30 of 1958 first extended the franchise to whites in the age group 18 to 20 years. Registered coloured voters in Natal remained on the common rolls until their death.
5. On the other hand the old franchise qualifications remained in force for those on the separate coloured voters' rolls.
6. See s 46 of the Republican Constitution Act.

(b) Communal representation in common authorities

Since 1936 various forms of communal representation have been adopted for those excluded from the parliamentary franchise, at first in common institutions, and subsequently in separate nominated and elected authorities. The principle of communal representation is not, from a comparative constitutional point of view, without empirical precedent,[1] and is in fact consistent with the normative consociational model. In relation to the South African central parliament, however, the principle has been applied predominantly for 'compensatory' purposes, and it has operated within such limited constraints that it has had little impact on the political process. The developments are dealt with in relation to the different statutorily defined groups, although this corresponds to some extent with their chronological sequence.

(i) Blacks. Upon their removal from the common electoral rolls in 1936, blacks were placed on a communal roll to elect directly three white representatives to the House of Assembly and two white representatives to the Cape Provincial Council.[2] The existing franchise qualifications remained in force, but the representation continued only until 1959 when it was discontinued.[3] Communal representation for blacks was also instituted in the Senate in 1936[4] when provision was made for

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1. Examples of countries where it has been adopted are India, New Zealand, Indonesia, Cyprus, Lebanon and Zimbabwe. See I. Duchacek op cit 101-108; E. McWhinney Federal Constitution-making for a Multi-National World (1966) 27-31; S.A. de Smith The New Commonwealth and its Constitutions (1964) 117-121. And see further at 411 to 412 , below.

2. Representation of Natives Act No 12 of 1936. For a description of the electoral process see May (3 ed, 1955) 104-106.

3. The Promotion of Bantu Self-Government Act No 46 of 1959.

4. Representation of Natives Act. Since 1910 the Constitution had provided (s 24(ii)) that four of the eight senators nominated by the Governor-General-in-Council should be selected on the ground mainly of their thorough acquaintance with the wants and wishes of the 'coloured races'.

four white[1] senators to be indirectly elected by blacks in four electoral divisions;[2] those elected held office for five years regardless of any prior dissolution of the Senate. In 1951[3] the Governor-General was empowered to increase the number of black-elected senators to six,[4] but this power was never exercised and the system as a whole was also abolished in 1959[5] after which blacks have no longer been represented in common institutions.[6] The principle of ethnic differentiation among blacks was never applied while their representation in common authorities persisted.

(ii) Coloureds. The history of coloured persons' communal representation in the central parliament was somewhat similar to that of blacks, but extended over a different time period.[7] Upon their removal from the common electoral rolls, coloured voters in the Cape were registered on separate rolls to elect four white representatives[8] to the House of Assembly and two to the Cape Provincial Council.[9] This representation was

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1. This followed from the requirement (s 11(1)) that these senators have the same qualifications as those elected under the South Africa Act (s 26); a further qualification was residence for two years in the province within which the electoral area was situated.

2. For a description of the electoral colleges and electoral process see May (3 ed) 101-104; Verloren van Themaat Staatsreg (2 ed, 1967) 284.

3. The Bantu Authorities Act No 68 of 1951.

4. S 19 read with the Schedule; the Schedule also introduced incidental changes in the method of electing senators.

5. The Promotion of Bantu Self-Government Act No 46 of 1959, s 15.

6. Sitting members were not affected by the provisions of the 1959 Act (s 15(1)). The provision referred to in fn 4 at 158 above was retained in similar form in the republican constitution (s 19(2)(b)) but the amended wording (introduced by s 4 of Act No 53 of 1960) restricts its scope to 'coloured persons', as opposed to the previous 'non-white' persons; the provision was repealed simultaneously with the abolition of the Senate.

7. The best account of the general history of coloured political rights is to be found in chapter 16 of the Theron Report op cit.

8. This requirement derived from the qualifications of the representatives which were the same as those for members of the House of Assembly and Provincial Council respectively, save for the additional requirement of two years residence in the Cape Province (ss 10(1) and 12(1) of the Separate Representation of Voters Act No 46 of 1951).

9. Ss 8(1) and 11(1) respectively, read with s 6(2).

terminated by the Separate Representation of Voters' Amendment Act of 1968,[1] and the termination coincided with the creation of the Coloured Persons Representative Council; thenceforth there was no further communal representation for coloured persons in common authorities.[2] There had never been any separate representation of coloured voters in the Senate, although provision was made[3] for an additional white senator to be nominated by the Governor-General 'on the ground of his thorough acquaintance ... with the reasonable wants and wishes of the non-European population in the ... Cape /province/'; this provision was retained in the republican constitution,[4] but was repealed in 1968.[5] Reference has already been made[6] to the expression of legislative preference for half of the nominated senators to be acquainted with the interests of the coloured population, but juridically this provision was only directory and within the overall context of 'white politics' its political efficacy could only be minimal.

(iii) Indians. In the Cape Province Indians were on the same voters rolls as coloured persons and shared their electoral fate, but in Natal, in which the majority were resident, no Indians could register as voters after Union.[7] Thus because of their prior virtually complete exclusion from the franchise, Indians were never actively disenfranchised by the Union parliament, and there was not the same compulsion to establish 'compensatory' communal representation for them in common institutions as there was for blacks and coloureds; when legislative provision was eventually made for such representation

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1. Act No 50 of 1968. The Commission of Inquiry into Improper Political Interference and the Political Representation of the Various Population Groups (the Muller Commission, RP 72/1967) recommended the termination of this system because of the establishment of the CPRC.
2. The 1951 Act (s 13) did not affect during their lifetime those non-whites in Natal who were already on the common rolls, provided they remained resident in the province.
3. Separate Representation of Voters Act s 7.
4. S 28(1).
5. S 5 of Act No 50 of 1968.
6. See page 158 fn 4.
7. See M. Wiechers op cit 299, and page 154, above.

the arrangement was stillborn. In 1946 statutory provision[1] was made for Indians in the Transvaal and Natal to elect three white members[2] to the House of Assembly[3] and for the latter to elect two members,[4] who could be white or Indian, to the Natal Provincial Council;[5] the franchise was restricted to males and qualified in respect of education and income.[6] Provision was also made for Indian voters to elect one white member[7] to the Senate and for the Governor-General to appoint an additional white senator to represent Indians.[8] The whole arrangement, however, was boycotted by Indians,[9] and the provisions of the statute dealing with representative matters were repealed[10] after the National party came to power in 1948; no provision has subsequently been made for direct or indirect Indian representation in the central parliament.

In retrospect communal representation in the central parliament proved in all cases to be no more than a transient phenomenon in the movement towards communal representation in separate political institutions. Contemporary policy statements[11]

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1. Asiatic Land Tenure and Indian Representation Act No 28 of 1946. The first chapter of the Act (ss 1-39) placed restrictions on the acquisition and ownership of fixed property by Indians and the second chapter (ss 40-58), dealing with representation, could be seen as something of a quid pro quo.
2. S 48(1) prescribed the same qualifications for these members as existed for other members of the House.
3. S 41(b) read with s 47(1).
4. S 50(1).
5. S 41(c) read with s 49(1).
6. S 43.
7. S 46(1) prescribed the same qualifications for this Senator as existed for other Senators.
8. S 41(a) read with s 45(1).
9. See Hahlo and Kahn op cit 165.
10. By s 2 of Act No 47 of 1948.
11. See the policy statements of prime ministers D.F. Malan, J.G. Strydom and H.F. Verwoerd in M. Horrell Laws Affecting Race Relations in South Africa (1978) 9-10. The government's constitutional policy was given added impetus by such important aspects of the 'living constitution' as the Population Registration Act No 30 of 1950, the Group Areas Act No 41 of 1950, the Reservation of Separate Amenities Act No 49 of 1953 and the Industrial Conciliation Act No 28 of 1956 which introduced statutory job reservation (s 77).

tended to justify these arrangements in terms of 'baaskap', or 'apartheid' policy, in which the overt emphasis was on the exclusion of non-whites from institutional bases of power. Subsequently policy statements gave greater emphasis to the concept of 'separate development' which was to involve the creation of the separate communal institutions described below. Even from the institutional point of view, however, and aside from their overt or covert political objectives, these arrangements must be evaluated very negatively.[1] In the first place the representation afforded to non-white groups was so minimal as to afford them no prospect of materially affecting the political process; secondly, the system of representation operated on a vicarious basis in that the 'representatives' of these groups were for the most part white, and blacks and coloured leaders could not themselves be included in the nominal form of participation afforded the two groups; and thirdly the insecurity of the various statutory formulae in the face of the principle of parliamentary supremacy further diminished their constitutional and political significance. The constitutional history of communal representation in joint institutions is thus not encouraging. Nevertheless the principle was revived by the government when it instituted the president's council as part of its quasi-consociational programme,[2] and there was also a recent unsuccessful attempt to apply it at the local government level in Natal.[3]

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1. For an inside account see From Union to Apartheid (1969) 27-140 by Margaret Ballinger, herself a 'native representative' for twenty-three years. See also H. May (3 ed) 106ff.

2. On the president's council see below, 326 to 333.

3. The Local Authorities Amendment Ordinance of 1979 (29 March 1979) purported to amend the Local Authorities Ordinance, No 24 of 1974 (Natal) to provide for the 'civic enfranchisement of Indians and coloureds and their enrolment on "common" voters' lists with whites'; the arrangement would have involved a form of communal representation for whites, Indians and coloureds in certain local authorities in Natal, but the ordinance did not receive the State President's assent in terms of s 89 of the Constitution Act. See F. Martin MEC in the Supplement to L.J. Boulle and L.G. Baxter (eds) Natal and KwaZulu: Constitutional and Political Options (1981) 46.

(c) Communal representation in separate institutions

At the same time that representation in the central legislature was being restricted to whites, the institutional basis for the policy of separate development began to emerge with the creation of separate authorities, partly nominated and partly elected for coloureds and Indians. Insofar as these developments involved a devolution of authority from parliament to subordinate bodies it evidenced a deviation from the Westminster system, but this form of decentralisation took place within the department level of government and Wiechers appropriately describes it as a process of 'departmental deconcentration of activities'.[1] The government had earlier instituted along similar lines a communal assembly for blacks operating at the national level of government; and subsequently, when the process of constitutional partition had begun to take effect, it instituted authorities for blacks at the sub-national level. In all these developments ultimate control was retained by the relevant minister and parliament, and the broad constitutional framework was left intact. An indispensible feature of these developments was the system of race classification, as regulated predominantly by the Population Registration Act,[2] which became the most important determinant of the constitutional and political processes. It is again more appropriate to deal with these developments in relation to the different statutorily defined groups than in strict chronological sequence.

(i) Coloureds.[3] In 1943 the government created an advisory coloured council[4] under the wing of the Department of Social

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1. M. Wiechers in J. Coetzee op cit 107: '... behoort daar ... van departmentele dekonsentrasie van werksaamhede gepraat te word - met ander woorde 'n beperkter vorm van delegasie van regeringsmagte met die behoud van alle kontrole - bevoegdhede sonder effektiewe medewerking van die delegatus in die proses van kontrole'.

2. Act No 30 of 1950.

3. See the Theron Report op cit, chapter 16; M. Wiechers Staatsreg (3 ed, 1981) 428-433.

4. This followed a minority recommendation (§ 1159) of the Commission of Inquiry into the Cape Coloured Population of the Union (The Wilcocks Commission, UG 54 of 1937). The majority recommendation (§ 1158) was that the franchise provisions in the Cape should be extended to the other provinces. This was not the last time that a commission's recommendations would be ignored.

Welfare, which was at the time responsible for administering coloured persons' interests. The council consisted of twenty-five nominated members and had advisory, but not executive, powers; it met four times a year. After differences with the government on matters of principle the members resigned in 1950 and the council was dissolved shortly afterwards. In retrospect the council's failure can be seen as an addition to the inauspicious record in South Africa of nominated bodies with advisory powers.

A similar, but this time partly representative institution, was established by the Separate Representation of Voters Act of 1951,[1] the same statute that disenfranchised coloured voters. Provision was made for a Union Council for Coloured Affairs,[2] to consist of fifteen members nominated by the Governor-General and twelve elected by coloured voters;[3] its executive committee comprised five members of the Council. The functions of Council were to advise the government on matters affecting coloured persons, to act as an intermediary between this group and the government, and to carry out any other functions assigned to it by the Governor-General.[4] The Council was officially opened in 1959 and held regular meetings in camera under a nominated chairman. It failed, however, to have much impact on coloured affairs because of its limited powers, its widespread rejection by coloured organisations and community leaders, and partly because of the continued, albeit indirect and limited, coloured participation in 'white' politics.[5] The Council was disestablished when the first Coloured Persons Representative Council was constituted in 1968 - the Theron report describes the period of its operation as a 'transitional phase' in the constitutional development of coloured persons.[6]

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1. Act No 46 of 1951, ss 14-19, as amended by s 2 of Act No 30 of 1956.
2. S 14. The original s 14 envisaged a 'Board for Coloured Affairs' consisting of eight elected and three nominated members and with substantially the same powers as those bestowed on the Council, but with no executive committee.
3. Three from each of the four Union electoral divisions.
4. S 18(1)-(d).
5. See the Theron Report op cit ch 16 § 16.67-16.69 and Vosloo and Schrire 'Subordinate Political Institutions' in De Crespigny and Schrire op cit 88.
6. Op cit ch 16 § 16.50.

Provision was first made for a successor to the Union Council in 1964[1] in the form of a 'representative Council' of thirty elected and sixteen nominated members, but implementation of the act was delayed and it was amended[2] before it took effect. In terms of the amended act a Coloured Persons Representative Council (CPRC) could be instituted, consisting of forty members elected by coloured voters and twenty members nominated by the State President,[3] all of whom had to be coloured persons. The careful blend of 'local' representatives and central appointees ensured substantial government influence in the Council, and was to be a controversial feature for the duration of its existence. All coloured persons over the age of twenty-one who were South African citizens and not subject to any disqualification[4] were liable to register as voters to return the elected component.[5] The Council would be elected for a five year period but might be dissolved by the State President at any time.[6] It was empowered to elect from its own members a chairman and deputy chairman,[7] as well as four members to the executive of the Council which would be presided over by a chairman designated by the State President.[8]

The Coloured Persons Representative Council was brought into existence by proclamation the following year,[9] and remained in existence for a period of eleven years. Its creation in 1969 coincided with the termination of coloured representation in parliament and the Cape Provincial Council, and its abolition in 1980[10] coincided with the preliminary introduction of the government's constitutional dispensation. During its existence the Council, and its executive, had three major functions. The first was a legislative function, with the Council

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1. Coloured Persons Representative Council Act No 49 of 1964.
2. By the Coloured Persons Representative Council Amendment Act No 52 of 1968. The legislation was delayed pending the findings of the Muller Commission (op cit), the recommendations of which resulted in the Prohibition of Political Interference Act No 51 of 1968, the abolition of coloured representation in the Assembly, and the creation of the CPRC.
3. S 1.
4. S 5.
5. S 4(a).
6. S 1A.
7. S 14(1).
8. S 17(a).
9. Proc No 77 of 1969 in Gazette 2347 of 3 April 1969.
10. S 4(1) of Act 24 of 1980.

being granted law-making competence[1] in respect of finance, local government, education, community welfare and pensions, rural areas and settlements, agriculture,[2] and any other matters determined by the State President.[3] The jurisdiction of the Council was founded on the 'personality principle'[4] and was not territorially based; this could have led to serious jurisdictional complications, particularly as it was never clear whether laws of the Council would prevail over other forms of subordinate legislation.[5] The Council's legislative power over the designated matters was described as being the same as that vested in parliament,[6] although it clearly could not legislate repugnantly to existing statutes.[7] In fact the Council's subordinate constitutional status was nowhere more evident than in respect of its legislative competence, since ministerial approval had to be obtained prior to the introduction of legislation,[8] the central government, through the State President, retained a legislative veto[9] (not necessarily circumscribed by convention), and legislation would cease to be valid if it was repugnant to subsequent acts of parliament. In addition the Minister of Coloured Affairs could regulate the sessions, proceedings and all other matters relating to the Council's functioning,[10] and parliament could, by virtue of its continued legislative supremacy, withdraw powers or terminate its existence - which in fact it subsequently did. Some indication of the Council's legislative

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1. S 21(1) read with s 17(6)(a).
2. Agriculture was added by Proc R 185 of 1973 (Gazette 3989 of 3 August 1973).
3. S 17(6)(a)(vi).
4. That is powers were conferred 'in so far as they affect Coloured persons'.
5. Theron Report op cit § 17.104 - § 17.107. But see R. Goldblatt in vol 5 The Law of South Africa 41.
6. S 21(1).
7. S 25(1).
8. S 21(2). Approval could only be granted after consultation with the Minister of Finance and the provincial Administrators (in the latter case presumably to prevent conflicts with provincial ordinances).
9. S 23.
10. Ss 15 and 26. For a description of additional controls exercised by the central government see Vosloo and Schrire in De Crespigny and Schrire op cit 90.

efficacy is evident from the fact that in its eleven years of existence it passed only three pieces of legislation.

The executive function of the Council was carried out by its executive committee, which was also empowered to exercise all the functions of the Council when it was not in session, although it could not itself legislate.[1] The management of finance was statutorily assigned to the chairman of the executive,[2] but the other portfolios could be allocated among the remaining members at the chairman's discretion. The most important single task of the executive was to prepare the annual budget: the estimates of expenditure were prepared by the executive for submission to the Minister of Coloured Relations who, in consultation with the Minister of Finance, determined the amount to be submitted to parliament for appropriation; from the total funds allocated by parliament the Council could make its own appropriation by resolution.[3] While the executive committee was in political control of those functions allocated to the Council, the administration of those matters was entrusted to an Administration of Coloured Affairs which was instituted at the same time as the Council and was headed by a commissioner appointed by the central government; matters not within the executive's purview continued to be administered by the Department of Coloured Relations.[4] Although there was some basis for administrative decentralisation, the Minister of Coloured Relations, who was responsible to the central parliament, remained in overall control of the administration of coloured affairs.

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1. S 17(6)(a).
2. S 17(6)(b).
3. Ss 22(1) and (2)(a). In anticipation of appropriation by the Council the chairman could authorise the issue of moneys in circumstances of urgency.
4. In 1951 a division of coloured affairs had been instituted within the Department of the Interior; it acquired departmental status in 1959 and in 1962 its own minister. In 1969 some of its functions were taken over by the Administration of Coloured Affairs, the administrative organ of the CPRC.

The third function of the Council and its executive was to advise the central government on matters affecting the economic, social, educational and political interests of coloured persons,[1] and to make recommendations to the government regarding these matters.[2] It was also intended to serve as a link and means of contract and consultation between the government and coloured persons;[3] by mediation of the minister members of the executive had direct access to any other minister in connection with matters affecting coloured persons.[4] In a sense these provisions attempted to overcome some of the shortcomings in the powers and status of the CPRC and its executive by prescribing informal consultation and liaison as methods of influencing the government on matters affecting coloured persons; the structural deficiencies, however, were not to be easily remedied in this way and the Theron report[5] found severe inadequacies in the advisory function of the Council.

The creation of separate and subordinate political institutions for coloured persons during this phase of constitutional development was an important step in the institutionalisation of the policy of 'parallel development',[6] which involved the greatest possible constitutional and political separation between whites and other groups.[7] This policy was based on the assumption that authentic distinctions could be drawn between matters in which the interests of coloured persons are decisive, matters

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1. S 20(1)(a).
2. S 20(1)(b).
3. S 20(1)(c).
4. S 20(3).
5. Op cit § 17.109 - 17.112.
6. Theron Report op cit § 16.47 - 16.48.
7. Further effect was given to this policy through the enactment of the Prohibition of Political Interference Act in the same year that the Council was created (Act No 51 of 1968); the act prohibited members of one 'population group' from being members of, or rendering assistance to, or addressing any meeting of, a political party to which members of any other 'population group' belonged (s 2). Previously coloured teachers had been prohibited from being members of the United, National, Progressive or Liberal parties (GN 1375 of 1965).

in which the interests of whites are decisive, and matters of joint interest. The first category was to be regulated by the CPRC, through which the political rights of coloured persons would be exercised, while the second and third categories would continue to be regulated by the central and regional white institutions. Even in its early stages the CPRC was perceived as a prospective 'coloured parliament' with its executive committee as a 'coloured cabinet'.[1] The next phase of policy implementation would have involved the enhancement of the Council's constitutional status and competence, and the creation of formal consultative mechanisms with the white parliament and other institutions; the government's 1977 constitutional proposals were the first formulation of this phase. But the institutional continuity inherent in this process was broken in 1980 when the CPRC was disestablished,[2] following requests for this move from both the majority and minority parties in the Council.[3]

The failure of the CPRC to gain any significant support among coloured persons can be attributed to a number of its constitutional features which contributed to its lack of legitimacy. Among these[4] were the fact that the Council was not wholly elective,[5] the existence of restraints on its legislative powers, the inadequacy of parliamentary-type privileges in respect of its proceedings,[6] the absence of a satisfactory terri-

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1. See the Theron Report op cit § 17.1 and § 17.71.

2. By the South African Coloured Persons Council Act No 24 of 1980. In terms of s 4(1) of the act the Council was deemed to have been dissolved, but s 4(2) made provision for its possible future reconstitution.

3. Cf the preamble to Act No 24 of 1980.

4. Theron Report op cit § 17.94 - § 17.124; Vosloo and Schrire in De Crespigny and Schrire op cit 90-92.

5. After the first elections in 1969 the government nominees helped create a legislative majority out of an electoral minority.

6. There was a qualified freedom of speech (s 16 of Act No 49 of 1964) but this fell well short of the freedom conferred on parliament by the Powers and Privileges of Parliament Act No 91 of 1963 (see Kahn v Times Inc 1956 (2) SA 580 (W)), and that conferred on the provincial councils by s 75 of the Constitution Act. Cf Leon v Sanders 1972 (4) SA 637 (C).

torial jurisdiction for the Council,[1] the fiscal arrangements which entailed financial dependence on parliament, and the insecurity of tenure of the Council and its subsidiary institutions. The Council's subordinacy and limitations were further underlined when provision was made during its lifetime for additional and far-reaching ministerial intervention in its activities. To ensure the provision of revenue for the services controlled by the Council in the event of the majority Labour party rejecting the budget,[2] provision was made in 1972 for the executive committee alone to appropriate money, and failing this the Minister of Coloured Relations.[3] After the Labour party election successes in 1975[4] the minister was empowered to exercise any function[5] of the executive, its chairman, or the council, if such instance failed to exercise its powers; alternatively the minister could delegate the function to 'any other person',[6] which he subsequently did on certain occasions.[7] But these factors only aggravated the wider political issues surrounding the Council - the fact that it was unilaterally imposed by the government, that it was perceived as part of a divide and rule strategy, and that it was intimately related to the system of race classification, residential and educational segregation, and other discriminatory practices. The failure and dissolution of the CPRC was to be a prominent symptom of the legitimation crisis in South Africa.

The main political recommendation of the Theron commission[8] was that the existing pattern of constitutional development

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1. Jurisdiction was primarily personal, and territorial only in relation to land owned or occupied by coloured persons (eg in terms of the Group Areas Act).

2. M. Horrell op cit 31.

3. S 22 of the main act as amended by s 6 of the CPRC Amendment Act No 99 of 1972.

4. M. Horrell op cit 32.

5. Other than the power to legislate.

6. S 22A of the main act as inserted by s 2 of Act No 32 of 1975.

7. Eg in 1975 the minister authorised the replacement chairman of the executive to authorise the budget, and the same procedure occurred in 1976.

8. Op cit § 178. And see below, 263 to 265.

should be discontinued, and that satisfactory forms of direct coloured representation should be instituted at all levels of government. This recommendation was expressly rejected by the government at the time,[1] and was again implicitly rejected in its new constitutional proposals, which involved a continuity in and evolution of previous constitutional developments. The subsequent dissolution of the CPRC left an institutional vacuum which was to have been filled by a fully nominated body with executive and advisory powers only[2] - despite the break in constitutional continuity this would still have provided an institutional basis for the evolution of a coloured 'parliament'. But this arrangement was itself stillborn,[3] and the statutory implementation of the government's proposals began with no existing representative or nominated coloured authorities at the national level.

(ii) Indians. Separate communal authorities for Indians were slower in developing than for coloured persons and their development was never the same source of political controversy - a function partially of the historically lower salience of the Indian franchise.[4] The development, however, is similar to that of the various coloured councils, since it involved the pursuit of the same policy of political and constitutional separation; it also made the same assumptions as to the exclusivity of 'Indian interests'.[5]

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1. See the white paper entitled Provisional Comments by the Government on the Recommendations of the Commission of Inquiry into Matters Relating to the Coloured Population Group (W.P.S. - 76).

2. Act No 24 of 1980 established a council to be known as the South African Coloured Persons Council consisting of 30 members nominated by the State President who would also appoint members to its executive committee. The council and its executive would have executive and advisory powers but the legislative powers, of the CPRC would be taken over by the State President.

3. After discussions with coloured leaders in mid-1980 the government announced that it would not continue with the CPC. See M. Wiechers Staatsreg (3 ed, 1981) 432.

4. It was only in 1962 that the government accepted that the repatriation scheme for Asians could not succeed. See the Minister of Indian Affairs in Senate Debates vol 3 col 503-520 (8 February 1962). The RSA Constitution Act, No 32 of 1961, vests in the State President the 'control and administration ... of matters specifically or differentially affecting Asiatics throughout the republic ...' (s 111).

5. See at 168, above.

In 1964 a National Indian Council was established consisting of twenty-one nominated members, and presided over by the Secretary for Indian Affairs; in its early years the Council was an extra-constitutional body and it had advisory powers only. In 1965 the name of the Council was changed to the South African Indian Council,[1] and it was given statutory recognition in 1968 with the passing of the South African Indian Council Act.[2] Membership was increased to a maximum of twenty-five,[3] with all members being Indians appointed by the minister to represent the Cape province, Natal and the Transvaal.[4] The Council could appoint its own chairman[5] and elect four members to the executive committee, the fifth member and chairman of which would be appointed by the minister.[6] At this stage of its development the Council had neither legislative nor executive powers, and its main functions were to advise the government on matters affecting the economic, social, cultural, educational and political interests of the Asiatic community,[7] to make recommendations to the government on these matters,[8] and to serve as a link and means of contact between the government and this group.[9]

In terms of subsequent legislation[10] the State President was empowered to increase the size of the Council to not more than thirty members, to specify the number of appointed and elected members, and to provide for the qualifications of candidates

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1. M. Horrell op cit 34.
2. Act No 31 of 1968.
3. S 1
4. S 2. At the time of Union entry of Indians into the Free State was prohibited, and their residence there is still prohibited.
5. S 7(1).
6. S 10(1)(a).
7. S 13(1)(a).
8. S 18(1)(b).
9. S 13(1)(d). This function is similar to that of the CPRC, as described above.
10. SA Indian Council Amendment Act, No 67 of 1972, s 2 of which inserted s 1A in the main act.

and voters, and for the election and nomination procedures; this arrangement highlights the degree of administrative control which has always existed over non-white constitutional matters. In 1974[1] the size of the Council was duly increased to thirty members, with parity of strength between those nominated by the central government and the others indirectly elected by electoral colleges which comprised members of Indian local authorities, local affairs committees, management committees and consultative committees.[2] The first elections were held in the same year, and an elected member was appointed chairman of the council's executive. In 1976[3] the minister delegated[4] all powers previously vested in him in regard to education and social welfare to the executive committee,[5] which could then deal with these matters insofar as they affected Indians.[6] No provision was ever made, however, for legislative powers to be delegated to the Council, and its status was clearly inferior to that of the former CPRC.

An evaluation of the SAIC may be made along similar lines to that of the CPRC, with due regard to its greater constitutional subordinacy and functional limitations. Its unrepresentative composition and minimal powers combined to undermine its legitimacy in the perception of those for whom it was intended as a political forum, although it was difficult to gauge its communal support since it was never subject to popular control, and its elected component was only remotely responsible to the electorate. In what proved to be the first statutory step in the implementation of the government's constitutional dispensation, legislative provision was made in 1978 for significant changes in the composition (but not powers) of the Council.

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1. Proclamation R 167 of 3 September 1974 (Reg Gaz 2031).
2. The proclamation (sch §3) made separate provision for each province.
3. Gov Notice R 7 of 2 January 1976 (Gov Gaz 4945).
4. In terms of s 10A(4).
5. S 10A(4) also provided that powers might be delegated to the executive by a provincial executive committee, but this never occurred.
6. S 10A(2). This put its executive powers on the same footing as those of the CPRC.
7. SA Indian Council Amendment Act No 83 of 1978.

Among the major changes envisaged in the amending legislation were an increase in the size of the Council to forty-five members, the majority of whom would be elected,[1] an extension of the Council's term of office from three to five years,[2] the adjustment of qualifications of members to resemble those for members of the House of Assembly,[3] and a decrease in the size of the new Westminster-type executive from five to four members.[4] This statute anticipated the draft constitution bill of 1979[5] which, other than for a change in nomenclature,[6] made provision for a representative assembly and responsible cabinet along the lines already described. Constitutional and political continuity is again apparent in this transformation - it involves a transition from representative to responsible government in a process of 'internal communal decolonization'. Nevertheless for administrative and political reasons there were numerous delays in the elections for the new Council, and the terms of office of the appointed and indirectly elected members were periodically extended,[7] so that the implementation of the government's constitution was again commenced before this stage of development had been completed. Elections were eventually held in November 1981 and it was

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1. S 1 of the main act as amended by s 1 of the 1978 amending act; forty members would be elected in accordance with the Electoral Act for Indians No 122 of 1977 as amended by Act No 41 of 1979, three would be nominated in proportion to party strengths in the Council, and two would be nominated by the State President on the advice of the leader of the majority party. For further references to the 'Indian Parliament' see below, 295 to 298.

2. S 2 of the main act as amended by s 3 of the amending act.

3. S 3 of the main act as amended by s 4 of the amending act; cf ss 46 and 55 of Act No 32 of 1961.

4. S 10 of the main act as amended by s 11 of the amending act: the State President is to appoint the leader of the majority party in the council as chairman, and the other three members on the latter's advice.

5. Ss 52-53. During the second reading of the amendment bill the minister referred to the new Council as being designed to fit into the new dispensation. House of Assembly Debates vol 17 col 8186-7 (30 May 1978).

6. 'Chamber of Deputies' for 'Indian Council'.

7. By the State President (Proc R 271 in Gov Gaz 2548 of 21 Oct 1977, Proc R 288 in Gov Gaz 2685 of 3 Nov 1978, and Proc R 236/79 in Gov Gaz 6715 of 2 Nov 1979) in terms of s 5A of Act 31 of 1968, and by parliament in Act No 13 of 1980.

clear from the response of the Indian electorate[1] that the SAIC would have the same legitimacy problems as the defunct CPRC. The Council was to convene for the first time early in 1982.

(iii) Blacks. The establishment of separate communal authorities for blacks has taken place in terms of three different objectives, which require separate analysis. The first objective was to provide a substitute for the termination of black representation in common authorities; these developments are now of only historical interest. The second objective was to institutionalise black political participation in the homelands system in furtherance of the policy of separate development; in its ultimate form of constitutional independence and partition this objective has been realised in relation to Transkei, Bophuthatswana, Venda and the Ciskei. The third and more recent, objective has been to create limited black political participation in the 'common area' through the community council system; this arrangement involves a recognition of the political limitations of the homelands system, and it highlights certain structural illogicalities in the government's constitutional proposals. The first and third developments are dealt with in this section, and the second on its own in relation to partition.

When black voters were removed from the common electoral rolls in 1936, besides provision being made for their separate representation[2] in parliament, a Natives Representative Council was established as a compensatory political forum.[3] This body consisted of twenty-three members[4] - the official members, who comprised the Secretary for Native Affairs and six chief

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1. The highest turn-out in the elections was 20,5% of the registered voters (Red Hill, Natal) and the lowest 1,8% (Fordsburg, Transvaal). In Natal, where the vast majority of electors reside, the average poll was 10,15% of registered voters. See Rand Daily Mail 5 November 1981.

2. See pages 158 to 159, above.

3. Representation of Natives Act No 12 of 1936. See M. Wiechers Staatsreg (3 ed, 1981) 435ff.

4. S 20(2); there were originally twenty-two members but the number was increased by Act No 45 of 1947 (s 4).

'native commissioners',[1] four black members nominated by the Governor-General,[2] one for each of four electoral areas, and twelve black members who were indirectly elected by black authorities.[3] The Representative Council had neither legislative nor executive powers, and its functions were solely advisory. It could consider and report on proposed legislation insofar as it affected blacks, and on any other matters referred to it by the minister.[4] It could also recommend to parliament or a provincial council legislation which it considered to be in the interests of blacks.[5] Parliamentary or provincial legislation could in theory be delayed for the consideration of the Council, but only if the minister submitted a certificate stating that the enactment would specially affect black interests;[6] the minister's decision was based on his unfettered discretion, and this provision proved to be a dead letter. Even before its abolition in 1951[7] the Council itself had proved to be inadequate, ineffective and unacceptable to blacks,[8] and had, of its own volition, adjourned *sine die*. For its brief and politically unremarkable existence, however, it was the first national authority in any way representative of blacks, and in the light of subsequent developments it was significant that the principle of ethnic differentiation among blacks was not a determinant of its composition. Since its demise the Representative Council has had no com-

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1. S 20(3).
2. S 20(4).
3. Three by the general council of the Transkeian territories, two by the electoral college of each of the other electoral areas, and one by the advisory board in each of the three electoral areas other than the Transkeian territories (s 20(5)). The Secretary for Native Affairs, or the minister's nominee, presided over meetings of the Council (s 26(4)).
4. S 27(1).
5. S 27(2).
6. S 26(3).
7. By Act No 68 of 1951 (s 18).
8. For a critical evaluation of the Council see M. Ballinger *From Union to Apartheid* (1969) 141-218; see also H. May *The South African Constitution* (3 ed, 1955) 497-500.

parable successor, although the Schlebusch commission, recommended, (rather cryptically), the establishment of a black citizens council as a counterpart to the president's council,[1] and the government reacted favourably to the suggestion. Although no indication was given as to the proposed composition and powers of this body, the concept was reminiscent of the Representative Council, but it was announced in mid-1980 that the recommendation would not be implemented because of its unequivocal rejection by black leaders during discussions with the government.

Between the early 1950's and 1971 the statutory basis of the homelands policy was laid by the South African parliament, and this resulted in the process of constitutional partition from the mid 1970's onwards.[2] The government's 1977 constitutional proposals were in fact premised on the eventual attainment of constitutional independence by all the national states,[3] but the Community Councils Act of 1977[4] heralded something of a departure from the previous constitutional development for blacks, and involved a contradiction of this major premise of the new proposals.[5] In the first place it made provision for the establishment of permanent local authorities for blacks outside the homeland structures, and clearly envisaged a measure of political autonomy for these bodies; in the second place it abandoned the principle of ethnic differentiation among blacks which had been consistently applied, not only in respect of the national states, but also in respect of the Urban Black Councils which, together with the black Advisory Boards, were the predecessors of the new councils. Despite the fact that the community councils are only sub-national authorities which afford very limited political rights to blacks

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1. Schlebusch Report op cit § 10(f)(ii).
2. This development is described at 182 to 194, below.
3. See the preamble to the 1979 Draft Bill.
4. No 125 of 1977.
5. Cf the comments of S. Bekker in F. van Zyl Slabbert and J. Opland (eds) South Africa: Dilemmas of Evolutionary Change (1981) 33-34.

in the 'common area', their significance for current constitutional developments cannot be overlooked.[1]

Since 1923 provision had been made for blacks resident within the jurisdiction of white local authorities to have some participation in local government. In that year black Advisory Boards were created for locations or villages under the control of urban local authorities,[2] and the relevant provisions were retained when the legislation was consolidated in 1945.[3] These bodies usually consisted of three members elected by registered occupiers of property in the location or village concerned, and three members and a chairman appointed by the 'parent' local authority.[4] They were empowered to consider and report upon any matter specially affecting the interests of blacks in the urban area,[5] and on other matters referred to them by the minister or relevant local authority.[6] The Advisory Boards did not have legislative or executive powers and came gradually to be replaced by the Urban Black councils.[7]

Legislative provision for Urban Black Councils was made in 1961.[8] The Councils were established by urban local authorities on the

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1. Local-government institutions for Indians and coloureds are regulated by the Group Areas Act No 41 of 1950 (later consolidated as Acts Nos 77 of 1957 and 26 of 1966) and to date a small number of autonomous local authorities have come into existence; while these institutions are not unimportant for future constitutional development, particularly at the regional level, they do not have the same salience as the community councils and are not dealt with in this work.
2. Black (Urban Areas) Act No 21 of 1923, s 10.
3. Black (Urban Areas) Consolidation Act No 25 of 1945, s 21.
4. Hahlo and Kahn op cit 802.
5. S 21(2)(a)(iii).
6. S 21(2)(a)(ii).
7. The Promotion of Black Self-Government Act, No 46 of 1959, (s 4) provided that territorial or regional authorities (on which see pages 183 to 185, below) could nominate a representative in one or more urban local authority area; these representatives (s 5) could advise the local authorities on matters affecting the interests of the national unit concerned. This arrangement was later extended to self-governing black territories (Third Black Laws Amendment Act No 49 of 1970). It cannot, however, be said that they replaced the advisory boards as is stated by Hahlo and Kahn (op cit 802).
8. Urban Black Councils Act No 79 of 1961.

request of an existing Advisory Board, or on the direction of the minister after consultation with the black community in the area,[1] and they could be instituted for specified residential areas or for members of specified national units.[2] The local authority could determine the number of members of a council (though not fewer than six) and their method of election or selection.[3] The councils were empowered to exercise the same powers and perform the same functions as the Advisory Boards,[4] but provision was made for additional executive powers to be conferred on specific councils by the appropriate local authority, after consultation with the relevant provincial administrator and with the concurrence of the minister.[5] In fact few of the additional powers were ever conferred on any of the councils and they remained predominantly advisory bodies[6] with little greater significance, save for their more representative features, than the boards.

In terms of the Community Councils Act the Urban Black Councils are disestablished when a community council is instituted in the relevant area.[7] The system came into operation in July 1977 and since then numerous councils have been proclaimed throughout the country.[8] They are elected by blacks resident within their jurisdiction, and those eligible to vote and stand for office include not only black South African nationals but also nationals of the independent black states.[9] The act itself comprises broadly enabling legislation which confers extensive administrative powers on the minister in relation to the establishment[10] and dissolution[11] of councils. The minister

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1. S 2(3)(a) and (b).
2. S 2(1)(a) and (b). This second possibility is not specifically provided for in the Community Councils Act.
3. S 3. From 1970 there could no longer be selected members (Act No 49 of 1970).
4. S 4(1).
5. S 4(2).
6. M. Horrell op cit 68.
7. Act No 125 of 1977, s 10(1) read with s 14(2).
8. See M. Wiechers Staatsreg (3 ed, 1981) 391-393. Within three years nearly 250 councils had been established.
9. S 3(4) and (5).
10. After consultation with the relevant Urban Council or Advisory Board - s 2.
11. After consultation with the relevant Administration Board - s 2.

may determine the size of a council, the method of its election[1] and, after consulting the Administration Board and council concerned, make regulations relating to its tenure, committees, service conditions, the control of its financial affairs, and other matters necessary for the effective implementation of the act.[2] The conferment of substantive powers and duties on community councils is also subject to the minister's discretion, and in theory considerably greater powers can be conferred on these authorities than on their predecessors,[3] including most powers hitherto exercised by the Administration Boards.[4] The intention of the scheme as a whole was that the councils would eventually act independently of the boards, whose functions would decline as the council system expanded.[5]

The open-ended nature of many provisions of the Community Councils Act provides the basis for a measure of autonomy on matters of local concern, though subject to the overall control of the central government.[6] The extent to which the councils achieve

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1. S 3. If fewer members than are required are elected to a council, the minister may himself appoint members to it. This provision was introduced by Act No 28 of 1978 to prevent electoral boycotts from frustrating the arrangement. Council elections were the subject of litigation in Moleko v Minister of Plural Relations and Development 1979 (1) SA 125 (T), and Scott and others v Hanekom and others 1981 (3) SA 1182 (C).

2. S 11(1).

3. S 5. S 5(1)(n) provides that the minister may confer power over 'any matter, whether or not it is connected with the matters referred to in this subsection' on a council - this is an enabling provision of the broadest possible kind.

4. The Administration Boards were introduced in 1971 (Act No 45 of 1971) to take over the powers and functions of local authorities relating to black affairs in urban areas, and resorted under the then Department of Bantu Administration (now Co-operation and Development). Twenty boards were originally created, but the number was reduced to fourteen in 1979.

5. The Riekert Commission (Report of the Commission of Inquiry into Legislation Affecting the Utilization of Manpower RP 32/1979, §§ 210-211), recommended that they remain responsible for some aspects of the proposed Community Development Act and act as agents for other departments.

6. Cf M. Wiechers op cit 392, fn 15, 'In effek is die blanke parliament en minister besluitnemend, en die gemeenskapraad prinsipieel uitvoerend.'

municipal status and local autonomy is, however, largely dependent upon how the minister exercises the powers conferred upon him by the act. 'Municipal status' is itself a relative concept, and includes situations that vary from those in which local authorities have secured powers and independent sources of revenue, to those in which they have delegated powers and are dependent on central or regional authorities for their income. It is clear that the community councils do not have secured powers, since even those functions conferred upon them by ministerial delegation can be totally withdrawn and returned to the appropriate Administration Board.[1] As far as their fiscal position is concerned each council is empowered to 'impose levies for specific services or purposes on the persons residing in its area';[2] this would seem to include the power to levy rates or even impose municipal income taxes. Where powers are transferred from an Administration Board to a council, the board must contribute towards the cost of exercising such powers.[3] However, the scheme also requires loans and grants-in-aid from the central government, and the extent to which the councils achieve real powers to match their responsibilities[4] will depend on the extent to which they can become financially secure.

The future of the community council system, however, is dependent not only on its viability, but also its legitimacy. Already the legitimation crisis facing the institutions of separate development has been felt in council elections,[5] and their future political role would not seem to be promising. Nevertheless the immediate constitutional significance of the system is that it

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1. S 5(4).
2. S 5(1)(j).
3. S 8(1)(b).
4. An example of an important responsibility of a community council is the control and management of a community guard which is responsible, inter alia, for the maintenance of law and order and the prevention of crime. S 5(1)(b) read with s 8(1).
5. In the elections for the Soweto Community Council, politically the most important, there were no nominations in many of the wards. In the contested wards the percentage polls averaged 6%, and by-elections had to be held to return a full complement to the Council. See 1978 Annual Survey of Race Relations 341f.

makes permanent institutional provision for the decentralisation of competence to blacks at the local government level, and this highlights the present constitutional shortcomings at the metropolitan, regional and central levels of government.[1] Neither the homelands arrangement, nor the government's new constitutional proposals, meet these shortcomings in any material way. And whatever the deficiencies of the community councils, they are likely to be used by the government in its future programme of quasi-consociational constitutional engineering.[2]

(d) Partition[3]

The legal foundations of territorial separation, and eventual constitutional partition, can be traced back to the Natives

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1. The community councils system, together with the 99-year leasehold scheme (on which see at 501, below), implies an acceptance by the government of the permanence of blacks in the 'common area', which its constitutional strategy belies. In 1980 three bills were published, the Local Government Bill, the Laws on Co-operation and Development Bill, and the Black Community Bill (Gov Nots 774, 775 and 776 of 1980 respectively - 31 October 1980), which provided a 'new deal' for 'urban blacks'. In the wake of extensive criticism of the bills they were withdrawn and submitted to the Grosskopf commission for further investigation. The commission was reported to have completed its findings towards the end of 1981, but the report had not been released by the year-end. See also below, 269.

2. See further on this aspect chapter 7, below.

3. See M. Wiechers Staatsreg (3 ed, 1981) 435-442 and 502-524. For a comprehensive juridical account of this aspect of constitutional development see F. Venter's unpublished thesis Die Suid-Afrikaanse Bantoestaatsreg (Potchefstroom, 1978). Among the critical works on the constitutional politics of the homelands are G. Carter, T. Karis, N. Stultz South Africa's Transkei - The Politics of Domestic Colonialism (1967); P. Laurence The Transkei - South Africa's Politics of Partition (1976); J. Butler, R. Rotberg, J. Adams The Black Homelands of South Africa: The Political and Economic Development of Bophuthatswana and KwaZulu (1977), J. Dugard Independent Homelands - Failure of a Fiction (1979), N. Stultz Transkei's Half Loaf - Race Separatism in South Africa (1980); and for a more journalistic version B. Streek and R. Wicksteed Render unto Kaiser - A Transkei Dossier (1981). For the views of homeland leaders see K. Matanzima Independence My Way (1976), L. Mangope A Place for All (1978), and M. Buthelezi Power is Ours (1979).

Land Act of 1913,[1] but it was only in the 1950's that the policy of separate development came to be consistently applied in its political dimension. With the abolition of the Natives Representative Council in 1951[2] the principle of ethnic differentiation among blacks came to be first applied, and was henceforth the major determinant of black constitutional development. From a legal-institutional point of view there was a consistent evolutionary development from the early tribal authorities through to constitutional independence, although when the government's policy was first given institutional form it was not intended to culminate in partition. It is proposed here to describe only the general statutory framework within which this development took place.

The Black Authorities Act of 1951 introduced a three-tiered system of local administration for blacks.[3] At the base of the hierarchical system were 'tribal authorities' which could be established by the Governor-General in respect of an area assigned to a chief or headman, and would consist of the chief or headman and tribal councillors.[4] The chief functions of these bodies would be to administer the affairs of the tribe, give assistance to the chief or headman, advise the government and territorial and regional authorities on matters affecting the inhabitants of the area, and perform other functions assigned to them by the Governor-General.[5] Their powers were to be exercised according to traditional laws and customs.[6]

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1. Act No 27 of 1913. See W.B. Harvey and W.H.B. Dean 'The Independence of Transkei - a Largely Constitutional Enquiry' 1978 Journal of Modern African Studies 189. The 1913 Act was followed by the Native Trust and Land Act No 18 of 1936 which established a trust to purchase the land earmarked as 'native reserves', which constituted 13,7% of the country's surface area.
2. Act No 68 of 1981, s 18.
3. The act did not affect the system of local and general councils, to be referred to below.
4. Ss 2(1)(a), 2(2) and 3(1). The method of appointment of councillors was prescribed by regulation (s 3(2)). In practice most councillors were appointed by the chief and Commissioner.
5. S 4(1).
6. S 4(2)(a).

Where two or more tribal authorities had been established the Governor-General was empowered to establish a 'regional authority', consisting of a designated chairman and as many members as determined by the Governor-General;[1] the senior chief would head each authority, the heads of all tribal authorities would be ex-officio members, and other members could be appointed from among the tribal councillors. The regional authorities were to advise and make recommendations to the minister on matters affecting blacks within their jurisdiction, and, subject to ministerial direction, provide services relating, inter alia, to education, health, agriculture and other matters assigned to them.[2] These authorities were endowed with delegated legislative power in respect of the matters within their purview,[3] and could levy rates of a limited amount.[4]

At the apex of this hierarchical administrative system were the 'territorial authorities', which exercised control over two or more areas which had established regional authorities,[5] and consisted of a designated chairman and as many members as determined by the Governor-General; the chairman and members were all drawn from among the members of the relevant regional authorities. The powers and functions of these bodies were not statutorily defined, but the Governor-General was empowered to assign to them the same powers as vested in the regional authorities, and any other powers relating to the administration of black affairs.[6] These authorities were subsequently to be replaced by the legislative assemblies of the homelands, or national states.

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1. Ss 2(1)(b), 3(1) and 3(3).
2. S 5(1)(a) and (b).
3. S 5(2). Their by-laws required the Governor-General's approval.
4. S 6. The finances of each level of authority were statutorily regulated (ss 8-11); see the description in H. May The South African Constitution (3 ed, 1955) 190-1.
5. Ss 2(1)(c), 3(1) and 3(3).
6. S 7(1). This was a wide enabling provision, but far-reaching powers in respect of black affairs remained vested in the minister and Governor-General.

The implementation of the scheme contained in the 1951 legislation was not to be immediate and it was the subject of extensive opposition from blacks. While purporting to reintroduce traditional features of African public law it tended to re-establish tribalism and increase the power of chiefs at the expense of elected leaders.[1] The subordinate status of the various authorities, the restrictions on their powers, and their jurisdictional limitations, did not constitute an attractive alternative to direct participation in the central legislature.[2] Nevertheless both the Ciskeian and the Transkeian General Councils eventually accepted the system,[3] and the various authorities were subsequently instituted throughout the country; the first Territorial Authority was established in the Transkei in 1957. The scheme as a whole established the first separate communal authorities for blacks and permitted a certain measure of territorial decentralisation, the extent of which would depend upon the use made of the act's enabling provisions. The 1951 legislation must be seen as an important milestone on the road to partition.

In 1955 the Tomlinson Commission[4] called for an acceleration of the separate development programme, and although the government never responded wholeheartedly to its economic recommendations, it was soon to give further statutory effect to the policy of political separation. In what has been described as 'the decisive year in the evolution of Nationalist policy towards the African',[5] the government enacted the Promotion of Bantu Self-Government Act of 1959[6] which both terminated black repre-

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1. See W.D. Hammond-Tooke Command or Consensus - The Development of Transkeian Local Government (1975) 198-215.

2. Even by chiefs, who stood to benefit by the arrangement, it was regarded with suspicion. See Butler, Rotberg and Adams op cit 218.

3. In 1955 and 1956 respectively. M. Horrell op cit 39.

4. Report of the Commission for the Socio-Economic Development of Bantu Areas within the Union of South Africa (U.G. 61/1955). See further below, 259 to 262.

5. H. Kenney Architect of Apartheid H.F. Verwoerd - An Appraisal (1980) 160, and referred to in M. Wiechers op cit 439.

6. Act No 46 of 1959.

sentation in parliament[1] and provided the immediate statutory basis for the homelands. The act further re-emphasised the principle of ethnic differentiation in relation to black constitutional development by identifying eight 'national units',[2] each of which came to be associated in time with separate territorial areas[3] - the future homelands or national states. The powers and functions of the existing territorial authorities were statutorily augmented,[4] and in both the preamble to the act and the parliamentary debates reference was made to the goal of self-government through gradual progression - and even of ultimate independence.[5] Closer liaison with the central government and other 'common area' authorities was also envisaged through the provision for a commissioner-general[6] to represent the government in each unit,[7] and for the nomination of urban representatives by the territorial authorities.[8]

By 1970 geographical homelands had been set aside for each of the national units identified in the 1959 legislation,[9] and in each case tribal, regional and territorial authorities[10] were created. The next, and more contemporary, stage of constitutional development is that of self-government, which is regulated by the National States Constitution Act of 1970[11] for all

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1. S 15(1) repealed the 1936 Representation of Natives Act.
2. S 2(1): the North-Sotho, South-Sotho, Swazi, Tsanga, Tswana, Venda, Xhosa, and Zulu units.
3. S 7 inserted s 4 bis in the Native Trust and Land Act, No 18 of 1936, and provided that rights in respect of 'Trust land' could be vested in territorial authorities.
4. S 12 substituted a new s 7 in the main act. In particular legislative powers were conferred, as well as powers in respect of the administration of justice and the imposition of taxes.
5. House of Assembly Debates vol 16 cols 6215-7 (20 May 1959) and col 6730 (27 May 1959); see also the government's white paper (no 3 of 1959) which accompanied the bill.
6. S 2(2); some units shared a commissioner-general.
7. S 3.
8. Ss 4 and 5.
9. With the sole exception of the Swazi group. The South Ndebele national unit was recognised in 1972.
10. The dates of the establishment of territorial authorities were: Transkei 1956, Ciskei 1961, Bophuthatswana 1961, Gazankulu 1969, Lebowa 1969, Qwaqwa 1969, and KwaZulu 1970.
11. Act No 21 of 1971.

the national states other than Transkei, which was the subject of independent legislative treatment[1] and which, for historical and other reasons,[2] proceeded more quickly through the stages of self-government to independence; the Transkei's constitutional development was in fact the model for the other national states.

The stages through which the national states pass on the way to constitutional independence are not dissimilar to those through which former dependant colonies progressed on their way to independence from the colonial power;[3] the process has in fact been described as one of 'internal decolonisation',[4] though the description is not wholly appropriate. At the first stage provided for in the Constitution Act[5] the relative national state acquires, on the request of the appropriate territorial authority, its own constitution, a legislative assembly and executive,[6] and legislative and executive competence in respect of the matters specified in the schedule. At this stage central government control is retained through a repugnancy provision,[7] a legislative veto vesting in the State President,[8] and the assembly's financial dependence on parliament;[9] in addition the minister can resume executive control over any matter to ensure continued governance in the area.[10] This first phase has

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1. Transkei Constitution Act No 48 of 1963.
2. See on this aspect John Dugard Human Rights and the South African Legal Order (1978) 91.
3. See P. Laurence op cit 65.
4. Cf M. Wiechers op cit 502, and L.J. Boulle The Changing Constitution (1979) 35f.
5. Chapter 1 (ss 1-25).
6. The method of appointment of the executive is determined by the South African government, thus enabling the latter to decide such fundamental constitutional issues as whether the executive should be parliamentary or not. See W.H.B. Dean 'Whither the constitution', 39 (1976) THR-HR 266 at 268.
7. S 3(1)(b).
8. S 3(2).
9. S 8. This provision was, however, amended by s 14 of Act No 12 of 1978, to permit the relevant legislative assembly itself to appropriate money.
10. S 25.

in fact been passed by all the national states.[1] At the second stage of constitutional development, that of 'self-government' proper,[2] the presidential legislative veto is retained[3] but the legislative assembly is empowered, within its sphere of competence,[4] to legislate repugnantly to acts of parliament,[5] and central legislation on scheduled matters does not apply within the self-governing territories to the citizens thereof[6] - though this clearly does not detract from parliament's legislative supremacy. The state legislatures can also appropriate revenue through their own legislative enactments at this stage, and they acquire personal jurisdiction to make laws with extra-territorial, though intra-Republican, effect.[7] Another innovation at the self-government stage is that a high court can be instituted with the jurisdiction of a provincial or local division of the Supreme Court and from which appeals can be taken to the South African Appellate

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1. Save for KaNgwane. The homelands became self-governing on the following dates: Bophuthatswana - 1972, Ciskei - 1972, Lebowa - 1972, Venda - 1972, Gazankulu - 1973, Qwaqwa - 1974, KwaZulu - 1977.

2. Chapter 2 (ss 26-36). This stage is similar to that provided in the Transkei Constitution Act.

3. S 31. It has been suggested that in the light of the constitutional conventions operating within the former British Commonwealth the State President might come to act in terms of the respective homeland cabinet's advice when taking a decision on legislation passed by a legislative assembly. See N.J.J. Olivier 'Implications of Constitutional Development in KwaZulu/Natal for the Rest of South Africa' in L.J. Boulle and L.G. Baxter Natal and KwaZulu - Constitutional and Political Options (1981) 57 at 68; but cf the editors' rejoinder, ibid fn 8.

4. Among the matters expressly reserved from legislative competence are defence, explosives, ammunition, posts, police and the constitution act itself.

5. S 30(1)(b).

6. S 30(3). Uncertainty over this matter was resolved by the Appellate Division in S v Heavyside 1976 (1) SA 584 (AD). See also S v Memke 1976 (4) SA 817 (ECD), S v Machebele 1978 (1) SA 569 (T), S v Matsana 1978 (3) SA 817 (T), S v Kunene 1979 (2) SA 1153 (N), S v Sambe 1981 (3) SA 757 (T), and F.G. Richings 'The Applicability of South African Legislation in the Self-Governing Bantu Territories' 1976 SALJ 119.

7. S 30(1)(b); this power exists at the earlier stage, but is only exerciseable with the State President's prior approval (s 3(1)(c)).

Division.[1] For the rest there are changes of nomenclature, such as 'cabinet' and 'cabinet minister' for 'executive council' and 'executive councillor' respectively,[2] and the introduction of some of the symbols and trappings of self-government, such as flags and anthems.[3]

From the perspective of the Westminster constitutional system the 1971 Constitution Act provides the constitutional basis for an ethnic-territorial decentralisation of power, and an un-Westminster form of ethnic-regional self-government. What the system does not entail is the simultaneous participation of the self-governing regions in the central political institutions, so that any suggestion that it involves a 'federal process' would be misleading. Even the notion of regional autonomy requires drastic qualification in the light of the legal and financial controls retained by the central government over the self-governing national states. Parliamentary supremacy, and therefore, overall constitutional control, is clearly unaffected by the delegation of legislative and executive powers to the state authorities, while a more incongruous example of central constitutional control is found in the retention[4] of section 25 of the Black Administration Act of 1927,[5] which empowers the State President to legislate by proclamation for homelands on any matter not vested in their legislative assemblies.[6] The process of decentralisation established by the homelands programme, and the possibility of 'federal' regional autonomy, would, however, have been enhanced had the National States Constitution Amendment Bill of 1977[7] been enacted. This bill provided for a third stage of self-government

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1. S 34.
2. S 29.
3. Ss 27 and 28 respectively.
4. By s 30 (4) (read with s 30(3)).
5. Act No 38 of 1927. M. Wiechers (Administratiefreg (1973) 30) describes this as a 'Henry VIII' clause. See R v Maharaj 1950 (3) 187 (AD).
6. There is, however, some academic dispute over this matter. See the references in M. Wiechers Staatsreg (3 ed, 1981), 441.
7. B 91 - '77. See the government's Explanatory Memorandum WP 9 - '77.

short of independence, at which a national state would become 'internally autonomous'. In constitutional terms this would mean additional legislative competence for the assembly of the relevant state, and the ability to amend or repeal, within its sphere of competence, acts of the central parliament; only expressly reserved matters, such as foreign affairs or defence, would not be within the assembly's legislative jurisdiction.[1] The internally autonomous state would also be able to create its own administrative departments, commensurate with its legislative capacity, and provide for the election and designation of its head of government. 'Internal autonomy', however, would be something of a misnomer for this status: the State President would retain a legislative veto, and his prior approval would be necessary for the introduction of a bill which would incur expenditure which could not be defrayed out of the territory's consolidated revenue fund.[2] An 'internally autonomous' state would also not be able to change its own constitution, which would remain subject to unilateral amendment by the republican parliament.[3] But the overall significance of the bill was that it suggested a *via media* for the national states between subordinate dependence and constitutional independence, that its decentralising effect would have stood in contrast to the centralising trend affecting provincial powers,[4] and that its provision for regional autonomy is at variance with the Westminster model.[5] Despite its failure to appear on

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1. Cf s 4 of Act No 21 of 1971.

2. The South African government would also be able to demand alteration of a homeland bill 'by reason of its implications for the Republic' - a right which could be used to obstruct enactments abolishing legislation such as the Group Areas Act.

3. The arrangement would not be formally unlike that of the associated states, eg Puerto Rico and the United States, in which Puerto Rico is not a member of the U.S. federation but is subordinate to the U.S. in the sense that the powers of autonomy which have been delegated to it can be unilaterally revoked. Puerto Ricans are U.S. citizens and are subject to federal laws, but do not vote in federal elections and do not pay federal taxes. See I. Duchacek op cit 184.

4. See pages 194 to 197, below.

5. On devolution in the United Kingdom see page 38 , above. Despite the bill's devolutionary implications it could again not be seen as part of the 'federal process', insofar as it failed to provide for joint participation by the 'autonomous states' and their citizens in central authorities.

the statute book[1] its resurrection had seemed a possibility for those black states which would not accept independence,[2] but since the Ciskei took this step the possibility has become very remote.

The final statutory step towards partition consists of the Status Acts,[3] which confer constitutional independence on the national states.[4] Juridically the transition is effected by excising the relevant districts from the territory of the Republic and declaring them to be a sovereign and independent state,[5] by renouncing parliament's legislative capacity over the territory,[6] and by removing the constitutional limitations which had previously applied to the relevant legislative assembly and empowering it, from the effective date of the Status Act, to enact its own constitution[7] and to legislate without the requirement of the State President's assent.[8] In each case the legislature of the relevant national state has enacted an independence constitution on the day of independence, to take effect from the same moment as the Status Act. The constitutional transition from subordinate dependence to republican independence is characterised by legal continuity and an absence of constitutional autarchy[9] for the new states.[10]

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1. Some of its clauses were introduced in other legislation, eg s 7 in Act No 115 of 1977.

2. The Quail Report (Report of the Ciskei Commission, 1980) outlined a number of advantages for the Ciskei in 'internal autonomy' as an interim step towards independence, or some other change in constitutional status (102-102, and 126). See further, below, 274 to 277.

3. Acts No 100 of 1976 (Transkei), No 89 of 1977 (Bophuthatswana), No 107 of 1979 (Venda) and No 110 of 1981 (Ciskei).

4. In terms of the Transkein Public Security Act of 1977 it is a criminal offence to propagate a view which defies the constitutional independence of Transkei. See S v Ncokazi 1980 (3) SA 789 (TSC); S v Dalindyebo 1980 (3) SA 1048 (TSC).

5. S 1(1).

6. S 1(2). As Harvey and Dean (op cit 194) point out, the Status Acts are drafted on the premise that parliament can limit its sovereignty. Aspects of sovereignty are dealt with in more detail at 445 to 456, below.

7. S 3(1). 8. S 3(2).

9. See K.C. Wheare The Constitutional Structure of the Commonwealth (1960) 89, E. Kahn 'The New Constitution' 78 (1961) SALJ 244 at 252 ff, and L.J. Boulle 'The Turnhalle Testimony' 95 (1978) SALJ 49 at 51.

10. The courts will take judicial notice of this development - Nasopie (Edms) Bpk en andere v Minister van Justisie 1979 (3) SA 1228 (NC).

Complementing the Constitution Acts are the statutory provisions regulating the citizenship of the national states.[1] The question of citizenship remains one of the most controversial features of the homelands policy and certain aspects thereof are dealt with in greater detail subsequently.[2] In broad outline it can be said that citizenship of one or other non-independent national state is peremptory for all black South Africans,[3] but at this stage they remain South African nationals for purposes of international law.[4] When each homeland becomes constitutionally independent all its citizens are statutorily denationalised by the Status Act, regardless of their place of birth, residence or employment, and in all cases they have been granted nationality of the newly independent state in terms of its complementary statutory criteria. The transition has thus far involved few problems of statelessness or dual nationality at municipal law,[5] and will not do so unless an independent state subsequently changes its criteria for nationality; but it does raise problems of statelessness in international law.[6] The arrangement is of a self-perpetuating nature in that all future generations of blacks statutorily linked with an independent state will be regarded as nationals of that state, irrespective of their place of birth, residence or employment, and regardless of how remote the real link might be.[7] South African nationality can only be regained by denationalised blacks if they were formerly South African nationals (which excludes future post-independence generations),

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1. Transkei Constitution Act s 7-8, National States Citizenship Act No 26 of 1970, and the Status Acts (s 6 and schedule 8).

2. At 488 to 508, below. On the juridical aspects of citizenship, see C. Schmidt 'Citizenship and Nationality' vol 2 The Law of South Africa par 449-465; M. Wiechers Staatsreg (3 ed) 334-396; W.H. Olivier 'n Juridiese evaluasie van burgerskap' 1979 TSAR 212-225, and 1980 TSAR 22-31, 127-151.

3. Ss 2 and 3 of Act 26 of 1970.

4. S 2(4) of Act 26 of 1970. On the national/citizenship distinction see below, 488-490.

5. See W.H.B. Dean 'A Citizen of Transkei' 11 (1978) CILSA 57-67; W.H. Olivier 'Statelessness and Transkeian Nationality' 1 (1976) SAYIL 143-154 and 'Bophuthatswana Nationality' 3 (1977) SAYIL 108-118.

6. By reason of the non-recognition of the black states, and the international law requirement of a genuine link between a state and its national (Nottebohm case 1955 ICJ Reports 4).

7. Dean loc cit.

and on application for citizenship of a non-independent state and with ministerial approval.[1] As a consequence of these provisions the main political rights of citizenship (in particular the franchise) are exercised by South Africa's black nationals in the homeland authority to which they are statutorily allocated, and by denationalised blacks in the political institutions of a constitutionally independent state; some of the non-political rights of citizenship however, are afforded to the latter group of 'statutory aliens'[2] who are in a slightly more advantageous position than 'foreign aliens'.[3] In terms of the logic of the citizenship arrangements all blacks will eventually lose their South African nationality, and the rights pursuant thereto, and the government's constitutional proposals are premised on this eventuality.[4]

This juridical outline of the homelands programme evidences, in the light of this chapter's theme, an un-Westminster form of decentralisation which evolves towards independence and partition, although it has led, somewhat ironically, to the creation of a series of new Westminster systems in the national states themselves.[5] Ex facie the constitutional provisions,

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1. S 3 of the Black States Citizenship Act as amended by s 1 of Act No 13 of 1978.

2. Eg 'Section ten rights'. S 12 of the Black (Urban Areas) Consolidation Act No 25 of 1945 was amended by s 2 of Act No 12 of 1978 to exclude former South African 'citizens' (ie denationalised blacks) from the definition of 'alien', thus allowing them to qualify under s 10 of the act.

3. See John Dugard 'South Africa's "Independent" Homelands: An Exercise in Denationalisation' 10 (1980) Denver Journal of International Law and Policy 11-36; and pages 500 to 502, below.

4. See the preamble to the 1979 Draft Constitution Bill.

5. This is something of an overstatement since only the Transkeian constitution can be labelled a Westminster (and South African) import model. See Harvey and Dean op cit 213. On the independence constitutions see I. Rautenbach 'The Constitution of Transkei' 1977 TSAR 199; M. Wiechers and D.H. van Wyk 'The Republic of Bophuthatswana Constitution' 1977 SAYIL 85-107; G. Carpenter 'The Independence of Venda' 1979 SAYIL 40-56; and see generally M. Wiechers Staatsreg (3 ed) 502-524; also at 249 to 258, below.

it also evidences an anti-majoritarian tendency, in that each (minority) national state is given exclusive jurisdiction over matters of concern to it. But within the wider theme of this work it can be asserted that the constitutional development of the homelands has not resolved the legitimacy crisis facing the state system in South Africa. Apart from any other evidence which might support this assertion, reference can be made to the government's own proposed plans for a constellation of states and regional economic organisation, both of which involve new forms of post-independence relationships with the national states designed to resolve some of the political and economic problems which have been unaffected, or even aggravated, by constitutional independence. These new relationships all embody forms of quasi-consociationalism, and are dealt with subsequently.[1]

(e) Decentralisation: the provincial system

The provincial system which was incorporated into the Union constitution evidenced at the time a significant variation on the Westminster theme;[2] in overall terms it provided the institutional basis for a substantial decentralisation of power, and it was understandable, in the light of pre-Union history, that the constitution should defer in this way to the local interests and needs of the new provinces. In fact the British political system has not, in its modern history, been as strongly centralised as some other countries with unitary constitutions,[3] but decentralisation in South Africa was the result of indigenous, non-Westminster constitutional features. Provincial government has always comprised locally elected councils[4]

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1. See chapter 7, below.

2. On the provincial system see H. May The South African Constitution (3 ed) 359-396; M. Wiechers Staatsreg (3 ed) 397-424.

3. In Britain local government has an important political function and allows for a significant measure of decentralisation. See C.F. Strong Modern Political Constitutions (8 ed, 1972) 56-57.

4. South Africa Act ss 70-73; RSA Constitution Act ss 68-71.

and centrally appointed officials,[1] with the provincial councils, successors to the colonial legislatures, enjoying original legislative authority.[2] Decentralised executive power is exercised by the administrator, a central government representative, and the other members of the executive committee, who are elected by the provincial council for a fixed term and are not responsible to it as in a parliamentary system proper.[3] Wiechers[4] defines decentralisation as 'die verdeling van magte op 'n grondslag van oorhoofse kontrole en terselfdertyd samewerking in dié oorhoofse kontrole'; in the case of provincial decentralisation in South Africa this 'samewerking' was evident, inter alia, in the former method of electing senators, which involved provincial councillors as well as praliamentarians,[5] and in the other forms of recognition given to the provinces in the structure of the central legislature.[6]

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1. Of these the most important is the administrator who exercises legislative and executive powers, but members of provincial administrations are also centrally appointed. South Africa Act ss 68-69; RSA Constitution Act ss 66-67.

2. This was laid down in the well known case of Middelburg Municipality v Gertzen 1914 AD 541 at 551; see also Brown v Cape Divisional Council 1979 (1) SA 589 (AD), In re Pennington Health Committee 1980 (4) SA 243 (N).

3. S 76 (1) and (2) of the Constitution Act.

4. M. Wiechers 'Grondslae vir Politieke Ontwikkeling' in J. Coetzee (ed) Gedenkbundel - H.L. Swanepoel 106.

5. S 28(3) of the Constitution Act, subsequently repealed by Act No 101 of 1980.

6. The separate identity of the provinces has been recognised in varying degrees in the composition of the central legislature. They were equally represented in the Senate until the constitutional crisis in 1955, and the smaller provinces continued to be overrepresented until its demise (s 28(1)). The smaller provinces were also originally overrepresented in the House of Assembly (as is still the case with Scotland and Wales in the Westminster parliament) but this gradually gave way to a proportional inter-provincial allocation of seats (ss 40 and 42), until 1980, when the government refrained from updating this allocation according to the 1980 general re-registration of voters (cf the amendment to s 43 effected by Act No 28 of 1980) - this now results in over-representation for the relatively depopulating provinces. Electoral divisions were never permitted to straddle provincial boundaries (s 42(1)).

Although they provided a basis for decentralised government the provincial authorities were always subordinate institutions in that they exercised their powers within a framework of control, or potential control, by the central government.[1] This aspect has lead to the characterisation of the South African constitution as unitary, a characteristic it shares with the Westminster system: the essence of unitarianism, from a juridical point of view, is that sovereignty is undivided, regardless of whether government itself is centralised or localised. The recent attempts to devolve power in Britain[2] showed some similarity to the provincial system in South Africa in that it would have left the Westminster parliament's sovereignty unaffected[3] - devolution in that context denotes the delegation of central government powers without the relinquishment of central supremacy, but without those exercising power being directly answerable to the central government.[4] Several commentators[5] have described South Africa's unitarianism in qualified terms, by reason of the reputed 'federal characteristics' of the constitution, such as the 'federal' division of legislative power and the 'federal' composition of the former Senate,[6] but this qualification tends to overlook the reality of the provincial authorities' constitutional subordination.[7] Nor did the provincial system ever give rise to the

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1. Vosloo and Schrire in De Crespigny and Schrire The Government and Politics of South Africa (1978) 79; among the contemporary constitutional controls are the repugnancy provision (s 85), the presidential veto over provincial ordinances (s 89), the legislative supremacy of parliament (s 59(1)), the provinces' financial dependence (s 88(2)), the central appointment of the administrator (s 66), the restricted powers of the provincial councils (s 84(1)), and the flexibility of the constitution (s 118).

2. See Wade and Phillips Constitutional and Administrative Law (9 ed, 1977) 372-378, and above, 38-40.

3. The Scottish Bill of 1978, however, empowered the Scottish Assembly to amend or repeal acts of parliament in relation to devolved matters; cf the position of the self-governing national states (pages 187 to 189 , above). And see D. Yardley 'Devolution in the United Kingdom' in Essays in Honour of Ben Beinart vol III (1978 Acta Juridica 364).

4. Wade and Phillips ibid.

5. Eg May op cit (3 ed) 359.

6. See above, 150.

7. See K.C. Wheare Federal Government (4 ed, 1963) 30f.

'federal process' in the sense of a unitary state becoming differentiated into a federally organised whole.[1]

Although the basic structure and constitution of provincial government has not changed much between its inception and the present, modifications within this basic structure have left the provinces with greatly diminished status and powers. The trend has been towards a gradual, but unequivocal, centralisation of power, as the central government has both directly usurped powers formerly vested in the provincial councils,[2] and begun to co-ordinate policy through administrative and financial controls in areas nominally under provincial control.[3] The provinces have become 'implementors of national policy rather than formulators of specifically provincial politics'.[4] While the draft constitution bill of 1979 left the provincial system intact, the internal logic of the government's constitutional proposals suggests little future scope for elected provincial councils,[5] and there have been numerous indications that the provincial system will be radically reorganised when the implementation of these proposals begins, and this despite various pleas for 'special status' provinces or regions within the country.[6]

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1. With the early predominance of party over provincial interests in parliament the relative strengths of the provinces lost importance and the 'federal flavour' of the constitution was lost; in the constitutional crisis voting in both houses followed party lines, and there was no attempt by the Cape representatives to retain the system which their predecessors had sought to have entrenched at the time of Union.
2. Eg in respect of Black Education (Act No 47 of 1953) and Indian Education (Act No 61 of 1965).
3. Vosloo and Schrire op cit 80; L.J. Boulle The Changing Constitution (1979) 26.
4. Vosloo and Schrire loc cit.
5. See chapter 6 below.
6. See the papers in L.J. Boulle and L.G. Baxter (eds) Natal and KwaZulu: Constitutional and Political Options (1981).

(f) The Rule of Law[1]

Reference has already been made to the role of the Rule of Law in the Westminster system and the significance attributed to it in the operation of the Westminster form of government.[2] The Westminster system has grown up out of the constant recognition of the Rule of Law, and the principle has come not only to qualify the doctrine of parliamentary supremacy, but to influence as well the executive and judicial branches of government. Although there have been numerous reformulations of the Rule of Law since Dicey's first contribution,[3] the prevalent English law approach[4] is fundamentally Diceyan, and emphasises that all governmental action must be authorised by law and that the law should conform to certain minimum substantive and procedural standards of justice. In this respect the South African constitutional system has shown material deviations from the Westminster model.[5]

In the first place the Rule of Law in South Africa has not generally had a normative influence on parliament in the exercise of its legislative powers, and it has never emerged as an effective qualification on the principle of parliamentary supremacy; any conflict between the two principles has invariably been resolved in favour of the supremacy of a parliament which has not felt restrained from making legislative incursions on substantive and procedural rights.[6] Secondly, the extensive

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1. On the Rule of Law in South Africa see A.S. Mathews Law, Order and Liberty in South Africa (1971), J. van der Vyver Seven Lectures on Human Rights (1976) 106ff, J. Dugard Human Rights and the South African Legal Order (1978) 37-49, M. Wiechers Staatsreg (3 ed, 1981) 140ff.

2. At 35 to 36, above.

3. See A.V. Dicey An Introduction to the Study of the Law of the Constitution (10 ed, 1959) 183-414.

4. Cf S.A. de Smith Constitutional and Administrative Law (2 ed, 1973) 38.

5. See L.J. Boulle 'The Second Republic: Its Constitutional Lineage' 1980 CILSA 1 at 29-30; D.H. van Wyk 'Westminsterstelsel - Requiescat in pace? of: kan 'n luiperd sy kolle verander?' 1981 THR-HR 105 at 111.

6. This phenomenon is not unique to South Africa. Cf Hood Phillips and Jackson Constitutional and Administrative Law (6 ed, 1978) 37f; see also A. Rabie's note 'The Principle of Legality and Parliamentary Sovereignty: Unbridled Power Behind the Throne' 1978 THR-HR 179-183.

discretionary powers of the executive in South Africa, and the imperviousness of the executive tc judicial control in many cases, involves a violation of the Rule of Law, as arbitrary and uncontrolled power is fundamentally inimical to the doctrine.[1] Thirdly, although an independent judiciary exists in South Africa, the doctrine of parliamentary supremacy has permitted both direct and indirect incursions on judicial independence and the judiciary's powers, and the courts do not have the same role in enforcing the Rule of Law as is the case in the Westminster system.

In short the Rule of Law doctrine has shallow roots in the South African constitutional system. This is aggravated by the fact that even when the doctrine is recognised, it is often accorded the narrower meaning of 'government according to law', or the principle of legality,[2] thus stripping it of any notions of substantive justice. When seen cumulatively with the other deviations from the Westminster model, described above, this phenomenon can be said to have had its most striking impact in South African constitutional law in the areas relating to the protection of fundamental rights and liberties; the absence of a vigorous Rule of Law doctrine has gone hand in hand with the absence of a bill of rights and other constitutional guarantees of fundamental freedoms.

4. Consociationalism and the South African Constitutional System

The analysis in the preceding sections reveals a constitutional tradition which commenced with an attenuated export version of the Westminster system and which, after seven decades of amendment and modification, showed more fundamental divergences from its prototypal constitutional model. To the extent that this tradition has embraced the basic principles of the Westminster system, such as parliamentary supremacy, parliamentary government and the plurality electoral system, it has had a thoroughly

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1. See Mathews op cit 42-44.
2. See the references in J. Dugard op cit 41-45.

majoritarian and anti-consociational effect on the political process. But it is also self-evident that there is no necessary correlation between the non-Westminster features of this tradition and consociationalism; on the contrary such aspects as the restricted franchise and the absence of the Rule of Law have had a decidedly anti-consociational effect on the political process, as consociationalism assumes both a representative system of government and a deep sense of constitutionalism. Nevertheless it is possible to identify some consociational institutions and practices within this tradition, although it is at once apparent that they have existed both functionally and temporarily in isolation from one another, and they do not have the same significance and consequences as these features have in a fully consociational system. More particularly, in the South African context they have not materially mitigated the majoritarian effects of the Westminster and non-Westminster features already described, nor have they induced a system of political power-sharing. What follows is a brief description of the most salient consociational and quasi-consociational features of the constitutional and political system.

There is some institutional evidence of the grand coalition principle in South Africa but this was only of limited duration, namely the provincial executive committees until 1962.[1] These committees were elected by provincial councillors on a proportional and not a majoritarian basis, which allowed for the participation of more than one party represented in the council; in one case, though it was atypical, a committee consisted of four members from four different parties.[2] The system was in fact closely modelled on the Swiss federal executive[3] but its

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1. South Africa Act s 78 read with s 134, and the original s 77 of the RSA Constitution Act.

2. In the Transvaal in 1917. Hahlo and Kahn op cit 177.

3. Which A. Lijphart (Democracy in Plural Societies (1977) 31) describes as one of the best examples of the grand coalition in its prototypal form. For comparative observations on the two executives see H. May The South African Constitution (3 ed, 1955) 369.

efficacy as a consociational institution was reduced by the absence of the other consociational characteristics, such as the mutual veto.[1] The system was subsequently altered so as to conform to the majoritarian Westminster-type cabinet arrangement.[2] In a non-institutionalised form the grand coalition principle was evident in the political coalition of 1933[3] in which cabinet seats were equally divided between the two parties, which led subsequently, after their electoral successes, to fusion.[4] Within the limited framework of white politics this arrangement can be seen as an attempt to avoid the implications of majoritarianism and the government-opposition dichotomy and to effect a more coalescent and consociational style of government. In the absence of institutional support, however, the co-operation was of relatively short duration and in 1939 was replaced by the adversarial pattern of government. Finally, the inter-cabinet council which was established in 1976 as an extra-constitutional body displayed some features of an inchoate 'grand coalition'. The council consisted of members of the white cabinet and the statutory Indian and coloured executive councils,[5] and its main function was to provide a forum for the discussion of matters of 'mutual interest'.[6] It had, however, neither legislative nor executive authority, and its informal influence also proved to be minimal

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1. Questions in the committees were determined by majority vote, although they endeavoured to be unanimous in their decisions. The rule of collective responsibility clearly did not apply. See May op cit (3 ed) 369-370.

2. By Act No 28 of 1962.

3. See May op cit (3 ed) 135; this arrangement conformed to Nordlinger's 'stable governing coalition' in that the coalition was formed prior to elections.

4. Less striking examples of the coalition principle are the Unionist Party's 'merger' with the South African Party in 1920, the Nationalist-Labour pact which came to power in 1924, and the support of the Afrikaner Party for the National Party after the 1948 election.

5. See pages 165 and 172 respectively, above.

6. This body had been anticipated by the then prime minister in 1971. See the Theron Report op cit § 16.48.

because it met irregularly and infrequently and was not generally accepted by the leadership élites whom it purported to incorporate consociationally into the political system. The council ceased to meet after a relatively short period, and its only contemporary significance is that it was the forerunner of the council of cabinets envisaged in the government's constitutional proposals.[1]

The principle of proportionality as a basis of representation has not been wholly absent from the South African constitution,[2] but its effects have been severely attenuated by a preponderance of majoritarian elections. The national convention considered a system of proportional representation for the parliamentary elections, but preferred, and proceeded to institute, the plurality principle in single-member constituencies;[3] proportionality was, however, the basis on which the provincial executive committees were originally elected, although the principle was distorted by the fact that provincial councillors, who elected the executive, were themselves elected on the same majoritarian basis as parliamentarians - the popular electoral strength of parties was not, therefore, necessarily reflected in the composition of the executive committees. The same distortion applied in the election of senators, who were elected according to the proportionality principle[4] but by a majoritarian-constituted electoral college;[5] this system in fact favoured the majority party in each province since it was able to fill casual vacancies[6] arising in that province, whether or not the vacating senator was from that party. Finally, the original parity of provincial representation in the Union Senate,[7] and the subsequent over-representation of the smaller provinces

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1. See pages 301 to 304, below.
2. See s 134 of the South Africa Act.
3. See R.H. Brand The Union of South Africa (1909) 130.
4. Except during the period from 1955 until 1960.
5. S 30(3) of the Constitution Act until repealed by Act No 101 of 1980.
6. S 30(2) of the Constitution Act, until its repeal.
7. South Africa Act ss 24 and 25.

in the Union and Republican Senates,[1] may also be seen as variations of the principle of proportionality.[2] The principle has never, however, been used as the basis of allocating resources, public appointments and other 'spoils' of government, and where found in its attenuated form has not effected any significant deviation from the majoritarian rule principle.

The veto principle has had only very limited formal application in the South African constitutional system, namely in relation to the entrenching procedure[3] which has extended a power of veto to a minority of one third of the members of the combined House of Assembly and Senate[4] in respect of legislation affecting the entrenched sections. The veto in fact delayed the enactment of the Separate Representation of Voters Act of 1951,[5] but it was statutorily circumvented in subsequent developments, and since then its scope has been limited and it has had less practical significance. The convention of joint ministerial responsibility implies some form of consensual decision-making in the cabinet, and a type of informal veto principle,[6] though with a quite different function to that of the mutual veto in the consociational democracies. This characteristic can therefore be said to be generally absent from South Africa's constitutional tradition.

As far as segmental autonomy is concerned, the terminology of separate development tends to overlap with that of consociationalism. In South Africa the constitutional provision for separate black, Indian and coloured authorities, with each set

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1. Constitution Act s 28.
2. Cf A. Lijphart Democracy in Plural Societies (1977) 40-41.
3. South Africa Act s 152; Constitution Act s 118.
4. And since Act No 74 of 1980, to the members of the Assembly alone.
5. Act No 40 of 1951.
6. See the then prime minister's description of decision-making in the cabinet, in House of Assembly Debates vol 10 col 4552 (12 April 1978).

exercising personal jurisdiction over members of the relevant group, may be seen as an apparent concession to the principle of segmental autonomy, and it has been officially justified in terms of consociational-type concepts of 'self-determination' and 'group autonomy'. Thus it could be argued that, as in the consociational model the autonomy principle ensures that each minority group controls and regulates all matters of exclusive concern to that group, so the institutionalisation of separate development has provided the structural basis for the same type of arrangement in South Africa. At the institutional level, however, and quite apart from any evaluation of the policy of separate development itself, there are three salient shortcomings in the South African system, when compared with the normative consociational model. Firstly, it is misleading to speak of the South African segments as being 'autonomous', by reason of their constitutional subordinacy, their minimal constitutional powers, and the political and economic limitations circumscribing those powers. Secondly, the 'segments' recognised by the South African constitution are statutorily defined in terms of ethnicity and colour,[1] and are not necessarily based on actually perceived common interests; only the withdrawal of the prohibition on free political association[2] could ensure the emergence of authentic segmental identities, among which the present divisions may or may not be salient. The issue of 'segmental' identity would require resolution before any of the consociational devices could be authentically employed.[3] Thirdly, the provision for 'autonomous segmental' institutions has not been accompanied by provision for joint participation in central institutions on matters of common concern, as is provided in the grand coalition of the consociational model. In the case of the black states, moreover, 'segmental autonomy' has led to partition[4] and has internationalised the claim of

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1. Inter alia by the Population Registration Act No 30 of 1950.

2. This would require in limine the repeal of the Prohibition of Political Interference Act No 51 of 1968.

3. This point is strongly emphasised in chapter 8, below.

4. It is partially because of this possible outcome that Nordlinger (op cit 32), unlike Lijphart, does not include segmental autonomy as a conflict-regulating device.

the independent states and their citizens to a joint say on matters of common concern.[1] Thus while the premises of separate development and consociationalism may be similar in regard to this principle, their theoretical and practical outcomes are widely divergent.

It can thus be concluded that despite a predominantly anti-consociational constitutional and political tradition, it is possible to discern some consociational institutions and political practices in South Africa, but that these do not have great significance in the overall system.

5. Conclusion

In this chapter attention has been given to the main constitutional developments which have occurred in South Africa since the time of Union. Within a single overall constitutional system it has been possible to identify a set of Westminster-type institutions which serve as the basis of the exclusive 'white' political process, and in addition, a range of other institutions for blacks, coloureds and Indians, which are subordinate to the former. There has been a tendency in South Africa to regard the white political institutions as the real constitution, and to set the institutions for other groups apart for constitutional purposes;[2] this has contributed, in part, to the tendency to overlook the limitations of South Africa's 'Westminster model'. In this chapter the constitutional system has been presented as a totality, and within this context it becomes less easy to speak of a Westminster-type arrangement in South Africa. In fact the South African political system provides democracy for one category of citizens

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1. However N. Stultz (Transkei's Half Loaf - Race Separatism in South Africa (1980) 150) describes the post-independence relations between Pretoria and Umtata as more closely resembling the consociational ideal - in that they require bargaining from independent power bases - than do relations between Pretoria and other black entities. The implications of homeland independence for consociationalism are dealt with in chapter 7, below.

2. See J.C. Bekker 'Rewriting the Textbooks: a re-evaluation of some traditional South African constitutional law assumptions' 1979 CILSA 272 at 285; and see the author's review of M. Wiecher's Staatsreg (3 ed, 1981) to appear in 1982 THR-HR.

and authoritarian rule for the rest,[1] and in overall terms this amounts to a system of 'unilateral conflict regulation'.[2] The majoritarian institutional features within the white political system have contributed towards the ability of the electoral majority within the minority white group to dominate the overall majority. The legitimacy crisis has been caused primarily through the exclusion of the overall majority from the important political institutions, and the government has embarked on forms of consociational engineering in an attempt to resolve that crisis. But against the reality of the present constitutional system, as described in this chapter, any transition to a genuine consociational system would require institutional changes of a fundamental nature.

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1. See T. Hanf, H. Weiland and G. Vierdag South Africa - The Prospects of Peaceful Change (1981) 45-46.

2. Ibid.

CHAPTER 5

THE SOUTHERN AFRICAN CONSTITUTIONAL CONTEXT IN CONSOCIATIONAL PERSPECTIVE

1. Introduction

In the previous chapter a survey has been given of the main historical developments in the South African constitutional system, which in their latter stages involved the institutionalisation of the 'Verwoerdian blueprint'. In the chapter following, attention is given to the government's new constitutional proposals, which involve both a continuation, and a culmination, of the constitutional ideologies and structures of the past. Apart from the government's own proposals, numerous alternative constitutional futures have been predicted for South Africa, either descriptively or prescriptively; these range from radical forms of partition, on the one hand, to military dictatorships of various persuasions, on the other. These alternatives have been well documented in the literature[1] and it is not proposed to describe and evaluate them here; the approach of this work is essentially analytical, and not prescriptive or speculative.

Nevertheless it is appropriate to widen the constitutional perspective beyond the prevailing system, in order to provide a comparative context within which to assess the government's constitutional dispensation. In the first place, therefore, the excursus in this chapter provides comparative material from within southern Africa for those involved in a critical capacity in the current constitutional debate. But it also reveals a

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1. For the best up-to-date, if somewhat succinct survey, see D. Geldenhuys 'South Africa's Constitutional Alternatives' 11 (1981) South Africa International 190-227; see also the Sprocas Report No 10 South Africa's Political Alternatives (1973), W.H. Thomas 'South Africa Between Partition and Integration' 3 (1979) Aussenpolitiek 305, the articles in R. Rotberg and J. Barrett Conflict and Compromise in South Africa (1980), Royal Institute of International Affairs A Survey of Proposals for the Constitutional Development of South Africa (1980) and T. Hanf, H. Weiland and G. Vierdag South Africa - The Prospects of Peaceful Change (1981).

range of constitutional policies and practices within the sub-continent, some of which might have an influence on the constitutional politics of South Africa. It would be naive to suggest that the government and its political actors will be inspired by the matters dealt with here; after all constitutions, as has been said,[1] are autobiographical and correspondingly idiosyncratic - they tend, like codes, to reflect the personality and general intellectual background of their drafters - and South Africa's new constitutional dispensation is proving to be no exception. Nevertheless it would be equally misplaced to deny the potential influence on the government of the contemporary political, empirical and intellectual constitutional 'forces' in southern Africa, and, without extending the 'constitutional copycat' theorem beyond its accepted limits,[2] it is appropriate to regard these factors as having some potential relevance for the country's future constitutional developments.

The matters to be discussed in this chapter can be distinguished as to whether they are theoretical, that is the constitutional policies of internal political parties, empirical, that is constitutional systems which have been agreed upon or implemented by political actors in southern Africa, or specialist, that is the reports of commissions bearing on constitutional matters.[3] The ambit of this excursus is limited by the general scope of the work - thus no reference is made to the so-

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1. S.E. Finer Five Constitutions (1979) 21; cf E. McWhinney Federal Constitution Making for a Multi-National World (1966) 7.

2. See I.D. Duchacek Rights and Liberties in the World Today - Constitutional Promise and Reality (1973) 11-14.

3. This description should be qualified to the extent that many 'specialist' commissions of enquiry have also had a strong political complexion.

called revolutionary constitutional models,[1] nor does the investigation extend to the contiguous constitutional systems in Mocambique or Angola[2] - in short the constitutional matters discussed fall within the pluralist framework. In what follows they are all examined from a consociational perspective.

2. The Party Policies

Apart from the policies of the governing National Party, which have been institutionalised during the last three decades, there are three other political parties with clearly formulated constitutional policies - these are the Progressive Federal Party, the New Republic Party, and the Labour Party. In addition the Inkatha movement has a well-formulated political policy from which it is possible to deduce its basic attitude to constitutional matters, if not a constitutional model as such.

(a) The Progressive Federal Party

The constitutional policy of the official parliamentary opposition is based on the report and recommendations of the Van Zyl Slabbert constitutional committee, which were adopted by the

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1. On which see Thomas op cit 315-6 and Royal Institute op cit 28-9. As Thomas points out, radical opponents of the existing régime tend to have no clear constitutional and socio-political strategy for after the initial goal of liberalisation has been reached, but he distils the following principles from the relevant literature and policy statements:
   - The complete abolition of racial differentiation;
   - Introduction of a socialist economic system;
   - Initiation of a new strategy for socio-economic development;
   - Stipulation of equal franchise rights for all inhabitants irrespective of past ethnic or regional structures.

   The ANC also advocates a national convention to agree on a new constitution incorporating such principles. On the constitutional views of Dr Motlana of the 'Committee of Ten' see Rotberg and Barratt op cit 31-47.
2. See at 14 , above.

federal congress of the party in 1978.[1] This policy comprises two basic components, one of which deals with the proposed method of establishing a new constitutional structure, namely through a national convention,[2] and the other with the substantive constitutional model which the party would present to the convention.[3] The concept of a national convention (or constitutional conference) is clearly a response to the problems of legitimacy facing political institutions in South Africa.[4] The convention would be attended by all significant political groupings in the republic[5] which did not advocate violence or subversion,[6] and would negotiate on a new constitution for the country. Decisions at the convention would be taken on the basis of consensus and the proceedings would continue until an alternative constitution had been agreed upon. Existing institutions would remain intact during the constitutional deliberations and the supremacy of parliament would be unaffected; the convention would stand in an advisory relationship to parliament which would be responsible for the phased introduction of a new constitution through legislative enactment,[7] after which it would terminate its legislative supremacy[8] or any residual authority which it had. It is envisaged that, simultaneously with the convention's deliberations, the government of the day would systematically amend discriminatory laws and remove other inequalities affecting the constitution's wider socio-economic context.

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1. Report of the Constitutional Committee of the Progressive Federal Party, 1978. See also F. van Zyl Slabbert and D. Welsh South Africa's Options - Strategies for Sharing Power (1979).

2. §§ 3.1 - 3.13. 3. §§ 5.1 - 5.10.

4. See the discussion in the introduction to this work. Cf K.C. Wheare Modern Constitutions (2 ed, 1966) 52-66.

5. The convention would decide whether independent homelands, which were desirous thereof, could participate in the proceedings with a view to being incorporated in the new constitutional structure. Blacks denationalised by the South African Status Acts, but permanently domiciled in the republic, would be allowed representation at the convention.

6. A judicial commission would be entrusted with ensuring the overall representativeness of the convention. § 3.6.2.

7. The convention would appoint an advisory council to assist the government in this process.

8. On juridical aspects relating to the termination of parliament's supremacy, see 445 to 456, below.

The PFP's constitutional proposals evidence an attempt to incorporate several consociational devices into a conventional federal constitution.[1] In broad outline, provision is made for a federal division of authority between a central legislature and several state assemblies, with the former having jurisdiction over specified matters of a national character, and the latter having constitutionally-secured residual powers. The central legislature would be bicameral with each chamber having equal and co-ordinate powers,[2] though as in other non-presidential federal systems it might be anticipated that power would gravitate to the lower house.[3] The secondary federal characteristics, such as equal state representation in the federal chamber, the right of the states to change their constitutions unilaterally and to participate in the amending of the national constitution,[4] and the institutional provision for decentralised government, are also found in these proposals.[5] The judiciary, through a federal constitutional court, would adjudicate on constitutional matters and uphold the supremacy of the constitution.

The composition of the individual states in the PFP proposals merits closer attention, since discussions of federation in South Africa are largely concerned with whether the federal units should be regionally or communally defined.[6] The party's federal structure would have a regional basis, that is it would conform to the conventional territorial-federal (as opposed to

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1. See L.J. Boulle 'Federation and Consociation: Conceptual Links and Current Constitutional Models' 1981 THR-HR 236 at 248-250, and the discussion of federation and consociation at 108 to 115, above.

2. Except in respect of money bills, over which the lower house would have the final say - § 5.4.

3. The lower house would in any event elect the prime minister and its composition would determine membership of the federal executive, which would contribute to its predominance.

4. Constitutional amendments would require an affirmative vote in the Federal Assembly and Senate, as well as in two-thirds of the state legislatures.

5. The states would have jurisdiction over all matters other than those which were 'essentially national' - § 5.2.3. See also § 2.3.

6. A. du Toit Federalism and Political Change in South Africa (1974) 17f. See also L. Marquard A Federation of Southern Africa (1971) 71f, and the references cited at 108, above.

corporate-federal) model. The general non-discriminatory thrust of the proposals also indicates that the state boundaries would be drawn so as to create a symmetrical federation, and not so as to translate national heterogeneity into relative state homogeneity; nevertheless there are several indications that communal factors are regarded as being of some significance in this process.[1] In the first place, while the number of states would be finalised by the convention itself, the proposals recommend that they be small in size rather than large, and therefore, by implication, relatively numerous; given the legacy of residential segregation in South Africa this would tend to create an asymmetrical arrangement. Secondly, the state boundaries commission appointed by the convention would be required to take into account, inter alia, the 'community of interests of the population' and the 'desirability of a high degree of homogeneity'. Thirdly, the commission would be required to look specifically at existing semi-autonomous areas to see whether, with appropriate boundary adjustments, they could provide a suitable basis for federal states; in terms of existing constitutional realities, this would involve the consolidation of the non-independent national states. These factors indicate the possibility of at least a partially asymmetrical federation emerging in the short term, and this would be the furthest concession which the proposals make to the consociational principle of segmental autonomy.

The other consociational principles are applied consistently in the PFP constitutional plan. The federal executive would accommodate a grand coalition along Swiss lines, with its chairman (the prime minister) being elected by the federal assembly,[2] and its members being appointed by the chairman in proportion to party representation in the assembly (and after consultation with party leaders). Membership of the cabinet would be incompatible with continued membership of either federal chamber. The close affinity of this arrangement with the Swiss federal

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1. See § 5.6.

2. This would tend to weaken the federal element in the executive sphere since the federal chamber would have no say in his election.

executive (which Lijphart[1] describes as one of the best examples of the grand coalition in its prototypal form) is further evidence of the compatibility of consociational principles with a conventional federal constitution; in the case under discussion, however, the power-sharing aspects of the federal executive would be constitutionally prescribed. Mention should also be made of the Senate which, besides its conventional federal composition, would cater for the consociational incorporation of cultural groups through their registered cultural councils;[2] this type of functional representation would be an innovation in the South African context, although it has various precedents in the empirical consociations.[3] Finally on this aspect, a federal Finance Council would comprise representatives of the federal and state governments and non-government experts, and would constitute a type of third chamber.[4] Its main function would be to examine federal and state budgets and to determine the amounts of revenue and loan funds which each state could claim from the federal treasury; its decisions would be enforceable, unless overridden by majorities in both the federal assembly and the state government concerned. As in Canada, these proposals would introduce the grand coalition principle into the institutions which would be central to the maintenance of the federal system.[5]

The last two consociational principles are as strongly evident as the coalition principle in the PFP proposals. Proportionality as a basis of representation is envisaged for all legislative bodies, federal and regional, as well as for the federal

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1. A. Lijphart Democracy in Plural Societies (1977) 31.

2. Any 'cultural group' could establish a cultural council to promote its interests and which, on registration with the constitutional court, would be empowered to nominate one member of the Senate. § 5.4.2.

3. The best example is found in the Belgium constitution of 1971 which recognises (art 3(c)) French, Dutch and German cultural communities, and provides for French and Dutch cultural councils which can issue decrees on cultural and educational matters (art 59(2)). See also I. Duchacek Comparative Federalism (1970) 1-10.

4. § 5.8.3.

5. See S. Noel 'Consociational Democracy and Canadian Federalism' 4 (1971) Canadian Journal of Political Science 14 at 16, and at 113 , above.

executive.[1] The power of veto would vest in any minority of ten or fifteen percent in the federal assembly, on all decisions other than those relating to money bills, matters of administrative detail, and the election of the prime minister; it would also operate in the federal executive, although it is not clear on what basis.[2] The veto would avail groups of states in respect of constitutional amendments,[3] and both individual states and cultural councils in respect of legislation affecting their particular interests.[4] Finally, the veto would also operate within state institutions.[5] The overall effect is that the consociational elements inherent in federal theory are jointly and severally accentuated in the PFP constitutional policy, which gives effect to Lijphart's suggestion that consociational democracy should, if possible, be introduced in a federal form.[6] Inevitably the proposals would involve in practice the same problems that are associated with federal and consociational systems of government, but most pertinently they contain the potential for inefficiency, immobilism and maintenance of the status quo, through their emphasis on consensuality, and on constitutional, as opposed to majoritarian, democracy.[7]

Of the other general features of the PFP constitutional policy, the most salient in the South African context are its general adult franchise[8] and the avoidance of any reference to racial

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1. There would also be a proportional allocation of federal assembly seats among the states - § 5.4.1.

2. § 5.5.4. 3. § 5.10.

4. § 5.4.2.

5. While the proposals envisage the states deciding on their own individual forms of government, they stipulate the basic requirement of consensus and proportionality. § 5.6.1.

6. A. Lijphart 'Consociation and Federation: Conceptual and Empirical Links' 12 (1979) Canadian Journal of Political Science 599 at 414, and see the author's own conclusions in Boulle op cit 254.

7. Cf the discussion in chapter 1, above.

8. The party's predecessors had advocated a qualified franchise but this was rejected by the Slabbert committee.

or ethnic factors. Provision is made for a non-executive president to be elected jointly by members of the federal and state legislatures, and there is a semi-separation of powers between the legislature and executive[1] which would tend to blur, by Westminster standards, the lines of ministerial responsibility.[2] There is also provision for a judiciary, whose members would be appointed by a judicial appointments commission and who would enjoy security of tenure and salary;[3] the judicial branch would include a constitutional court with the ability to enforce the constitution and an entrenched bill of rights.[4] An ombudsman would also be appointed.[5] In general terms this amounts to a constitutional model which falls strongly within the liberal-democratic tradition, subject to the modifications inherent in its consociational elements.

(b) The New Republic Party

As opposed to the open-ended emphasis in the PFP's concept of a constitutional convention, the NRP emphasises in its constitutional proposals[6] the need to use existing institutions and arrangements as a point of departure in future constitutional developments; in fact these proposals may be regarded as an elaboration of the government's own constitutional plan.[7]

The NRP accepts the existence of 'four main groups' in South African society, namely whites, Indians, coloureds and blacks. For constitutional purposes it makes a further distinction be-

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1. In fact the proposals make repeated reference to a separation of powers - eg § 2.3 and § 4.2 - but this is somewhat misleading from a strict constitutionalist perspective.
2. Cf § 5.5.4.
3. § 5.7.
4. § 5.9.1.
5. § 5.9.2.
6. This description is taken from the party's submissions to the Schlebusch commission which were drafted by Prof D.J. Kriek; while the submissions are relatively comprehensive, they are reticent on several matters of institutional detail.
7. A. Lijphart 'Federal, Confederal and Consociational Options for the South African Plural Society' in R. Rotberg and J. Barrett Conflict and Compromise in South Africa (1980) 51 at 69.

tween 'homeland blacks' and 'non-homeland blacks',[1] and advocates the incorporation of the latter category, together with whites, Indians and coloureds, into a corporate-federal political structure. Each of the four communities would have its own institutions at the local, provincial and community (that is, national) levels of government, and there would in addition be joint consultative machinery at each level; the allocation of functions among these levels would be made subject to the 'principle of subsidiarity' - that is no function would be accorded to a higher authority if it could be carried out efficiently by a lower one. At all levels of government each group would have control over its own legislative, executive and administrative authorities, at the apex of which would be the four group parliaments. In addition there would exist various 'federal' authorities with specified powers over matters affecting all members of the corporate federation: a bicameral legislature with chambers of equal status,[2] an executive committee elected on a proportional basis by members of the legislature and with a rotating chairman (who would also be head of state),[3] a federal judiciary, and a specialised financial committee. The constitution would be highly rigid, with amendments requiring the approval of the federal legislature and support in a referendum from a majority of voters, and in addition concurrent majorities within at least three communities.

A further 'confederal' arrangement would be constructed to accommodate the 'federal republic', as just described, and all the present and former homelands.[4] This would consist of cen-

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1. The basis of this distinction is not altogether clear, but the proposals suggest that effect could be given to it through an amendment to the National States Citizenship Act No 26 of 1970. Although the system would depend on 'race' classification, compulsory classification in terms of s 5 of Act No 30 of 1950 would be discontinued, and replaced by 'a system of natural registration'.

2. The lower house would be indirectly elected, with each group parliament electing one component; the upper house would comprise an equal number of members nominated by each of the group executives.

3. This would be a collegial body, again modelled on the Swiss executive.

4. The proposals assume the attainment of constitutional independence by all the national states, but no reference is made to the terms thereof, or to such matters as consolidation.

tral decision-making bodies to deliberate on matters of common interest, but the proposals provide no organisational detail on these matters.[1] Powers would be delegated to the confederal authorities by the various member states and exact relationships would be defined in a series of treaties. The NRP describes its constitutional policy as involving a 'federal-confederal' arrangement for South Africa.

The consociational elements in the NRP constitutional proposals are self-evident and do not require detailed elaboration - suffice it to say that the proposals attempt to institute a corporate form of federalism. Because of the scheme's close affinity with the government's 1977 constitution and its constellation proposals, it can be subjected to similar criticisms[2] - in particular those relating to the jurisdictional complications and financial costs inherent in a proliferation of institutions with personal jurisdiction. In many respects the NRP proposals also fail to come to terms with the legitimacy crisis facing political institutions in South Africa - this is evident, inter alia, from the fact that they are dependent on the constitutional entrenchment of colour and ethnicity.

(c) The Labour Party

In 1978 the Labour Party executive of the Coloured Persons Representative Council appointed a commission[3] to investigate alternative constitutional proposals, the findings of which could serve as a basis for negotiation with the government. The report of the commission was tabled in the CPRC and it was unanimously accepted by the Council after the opposition had left the chamber.[4] The Labour Party was thus predominantly responsible for the initiation, drafting and endorsement of the commission's report, and it became the official constitutional policy of the party.

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1. Passing reference is made to a council of ministers and a secretariat.
2. See in general chapter 6, below.
3. The Du Preez Commission. The report of the commission is dated 14 March 1979.
4. Debates of the CRC vol 41 (3-5 April 1979).

Before outlining its own constitutional recommendations, the Du Preez report provides critical analyses of the government's constitutional proposals of 1977, the Progressive Federal Party's federal constitution, past and proposed forms of partition, theories of pluralism, and the principle of majoritarianism. Brief reference is also made to consociationalism and its relevance to future constitutional developments, but the system is rejected on the ground that the South African community is not deeply divided to the point of disintegration and therefore in need of remedial consociational treatment. The nature of the conflict in South Africa is regarded as being not ethnic or cultural, but 'horizontal', that is political, social and economic, and the conflict is seen as being susceptible to constitutional containment only through 'a process of democratisation'. A recurring theme in the report is that it has been the abuse of the Westminster system, and not the system itself, which has been at fault in the past, and the report suggests that, if properly utilised to give effect to popular political sovereignty, the Westminster system would be an ideal constitutional model for the future.[1]

In its constitutional recommendations the report favours a unitary system of government based on a general principle of non-discrimination.[2] This would involve a universal adult franchise and common electoral rolls to elect members to an enlarged House of Assembly; all members of the Senate would be indirectly elected by parliamentarians and provincial councillors, and the Senate would function as a chamber of legislative review. The executive would be parliamentary and majoritarian in composition, with traditional Westminster forms of responsibility. The State President would have ceremonial powers only and would continue to be elected at a joint session of both legislative chambers. Provincial councils would be retained and would not, by implication, enjoy any greater powers or security of tenure.

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1. There were some indications that the commission identifies the Westminster system principally with unitarianism, as opposed to federalism, although it does go on to recommend the institution of a Westminster-type cabinet.

2. This would necessitate the abolition of all race classification legislation, and the Prohibition of Political Interference Act No 51 of 1968.

Judicial independence from the other branches of government would be ensured by empowering the judiciary itself to appoint new members to its ranks. The system would thus not only incorporate basic Westminster constitutional principles, but would also involve a significant degree of institutional continuity with the past, save that the political system would become fully inclusive.[1]

Three main variations on the Westminster paradigm are evident in the Du Preez proposals, one of which is a consociational characteristic, namely the extensive use of the proportionality principle in parliamentary and provincial elections. In the case of parliament the extreme form of proportionality would be used, with the country being regarded as a single constituency and electors voting for political parties and not candidates;[2] the only qualification in the system would be the requirement of at least five percent popular support before a party could share in the distribution of seats, a threshold designed to prevent political fragmentation. This electoral arrangement is justified on three main grounds: it would prevent a minority party from gaining a majority of parliamentary seats, it would obviate the time-consuming process of redelimitating the country to accommodate the newly enfranchised voters, and it would prevent the exploitation of de facto racially exclusive constituencies, the legacy of years of residential segregation. But it is trite that the greater the proportionality of an electoral system, the greater the chance of more than two strong parties emerging, and in this factor is to be found a basic contradiction in the Du Preez proposals: while the Westminster system is presented as a normative model, the proportional electoral system would not give rise to the two-party system which is responsible for many features of that system.[3] In particular

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1. Before being implemented the constitution would require popular ratification in a referendum.

2. On proportional electoral systems see further at 411 to 415, below.

3. S.E. Finer Comparative Government (1970) 158. And see the discussion at 28 to 30, above.

the formation of a majority party cabinet would most likely be impossible, yet the proposals emphasise that executive authority would be the sole prerogative of the parliamentary majority, and that the principle of proportionality should not apply in the formation of a cabinet.

The other two Westminster variations are not inherently consociational, but again evidence internal contradictions in the Du Preez report. Firstly, the constitution would constitute supreme law and would be highly rigid, and secondly there would be an entrenched bill of rights. Both these features imply a judicial testing right, which is at odds with the notion of the political supremacy of the electorate, to which continual emphasis is given in the report. While the principles of popular democracy and Diceyan notions of sovereignty are espoused, effect is given to a system of constitutional democracy.

The Du Preez report and Labour party constitutional policy have little significance from a consociational point of view, save for the proportional electoral system which they advocate. Their main significance lies in their antithesis to the government's present and proposed constitutional policy; as the Labour party has in the past received the electoral support of a vast majority of coloured voters, this antithesis serves to emphasise the legitimacy problem which the government's constitutional programme faces.

(d) Inkatha[1]

In common with other black organisations, Inkatha has not adopted a fixed constitutional position, but has formulated a set of

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1. Inkatha Yenkululeko Ye Sizwe is the Zulu National Cultural Liberation Movement led by Chief G. Buthelezi, chief minister of KwaZulu.

constitutional principles as a basis for future negotiation.[1] In terms of existing constitutional trends, and Inkatha's own position, the most salient of these principles concerns the homelands programme: the maintenance of the geographical integrity of South Africa is regarded as a non-negotiable factor in future constitutional developments and homeland independence is seen as a violation of this principle; flowing from this are the additional demands for one nationality, one citizenship, and one economy.

As with the Progressive Federal Party, Inkatha emphasises the indispensibility of a representative national convention as the only acceptable way of deciding the constitutional future of the country. Its own constitutional proposals are presented in the most basic terms, as involving 'power sharing within one political system'; no particular form of power-sharing is proposed, nor is any organisational detail provided. But a future constitution would have to involve 'the repeal of discriminatory laws as a first step towards political normality', the repeal of the political interference act,[2] the creation of a 'truly free enterprise' economic system, and the constitutional entrenchment of minority rights. As far as the homelands are concerned, these could be consolidated and given provincial status, provided there was 'regionality without ethnicity'. There would in addition be a bill of rights based on the Inkatha 'Statement of Belief'.[3]

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1. This description is taken from the memorandum submitted by Inkatha to the Schlebusch Commission which includes the 17-point 'Statement of Belief'. The memorandum appears in W.S. Felgate 'Co-operation Between Natal and KwaZulu - An Inkatha View' in L.J. Boulle and L.G. Baxter (eds) Natal and KwaZulu - Constitutional and Political Options (1981) 154-165; see also G. Thula 'A Constitutional Alternative for South Africa (Inkatha)' in F. van Zyl Slabbert and J. Opland (eds) South Africa: Dilemmas of Evolutionary Change (1980) 36-45, and 'A Basis for the Constitutional Transformation of South Africa' in R. Rotberg and J. Barrett (eds) Conflict and Compromise in South Africa (1980) 161-169.

2. The Prohibition of Political Interference Act No 51 of 1968.

3. W.S. Felgate op cit 161-2. This would include equal rights before the law, a redistribution of wealth, the elimination of secrecy in government, due process of law, and the right to form trade unions.

Because of their generalised nature it is not possible to provide a consociational analysis of the Inkatha constitutional proposals. At times the notion of 'power sharing' would seem to be understood in terms of communal representation by blacks and whites in common institutions, but this contradicts the more general insistence on the need for avoiding references to race or ethnicity in constitutional provisions; the references to power-sharing and minority rights are not in themselves indicative of a commitment to a consociational form of government. On the whole the proposals appear to adhere more closely to traditional concepts of liberal-constitutionalism, as is the case with the Labour party constitutional proposals. The Inkatha principles are also clearly irreconcileable with the government's constitutional policy.

3. The Empirical Models

(a) The Turnhalle experience

(i) Background

Namibia's internal[1] constitutional affairs were regulated exclusively by the South African government between 1919 and 1978,[2] and this resulted in the territory acquiring an equivalent constitutional status to the South African provinces as far as the 'white' political institutions were concerned. Authority vested initially in an administrator, who had both legislative and executive powers, and subsequently in a legislative assembly, which was first partly, and later wholly, elected by the white electorate; the executive committee had the same composition and functions as its provincial counterparts. By 1968 the powers of the legislative assembly were

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1. On the wider international dimensions of political developments in Namibia see John Dugard (ed) The South West Africa/Namibia Dispute (1973), G.M. Cockram South West Africa Mandate (1976).

2. See on this development M. Wiechers Staatsreg (3 ed, 1981) 445-501. The most important statute regulating the territory's constitutional affairs was the South West African Constitution Act No 39 of 1968 which repealed the earlier constitution act.

marginally greater than those of provincial councils and legislation did not require the State President's assent,[1] so that there was a slightly greater measure of self-government for the territory, although constitutional control was retained by the republic, inter alia, through the repugnancy provision,[2] the assembly's restricted powers and inability to amend its own constitution,[3] and the continued legislative supremacy of parliament.[4]

As far as the constitutional status of other groups in the territory was concerned, the South African government's intention was to implement its policy of separate development through the creation of separate political institutions. This was particularly evident from the Development of Self-Government for Native Nations in the South West Africa Act of 1968,[5] which mapped out a plan of self-government and constitutional independence for indigenous peoples in the territory, along similar lines to the homelands programme. By the time the Turnhalle conference commenced, the first stage of self-government had been attained by four of the statutorily defined groups.[6] In addition a partially elected advisory council had been established for coloured persons, who were not catered for in the Coloured Persons Representative Council. Thus the internal constitutional pattern coincided in many respects with that of South Africa.

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1. The administrator could approve legislation himself and could reserve laws for the State President, who had a power of disallowance. Ss 37(4) and 28 of Act No 39 of 1968. Cf s 64 of the South Africa Act (before 1934).

2. S 37(4).

3. Ss 21 and 22.

4. S 37(1). These powers were vested in the State President (s 27(2)) except in regard to matters on which the assembly could not legislate; on these matters only parliament could legislate (s 37(3)).

5. Act No 54 of 1968 as amended by Acts Nos 23 of 1972 and 20 of 1973. The preamble to the 1968 Act read, 'Whereas it is desirable that the native nations in the territory of South West Africa should in the realisation of their right of self-determination develop in an orderly manner to self-governing nations and independence ...' The Turnhalle conference was to evidence a reversal of this policy.

6. The Owambos, Kavangas, Caprivians and Basters.

(ii) The Turnhalle conference[1]

The Turnhalle constitutional conference was held between September 1975 and November 1977 and was attended by eleven invited delegations, each of which represented a different 'ethnic' group;[2] for the most part delegates were drawn from institutions created by the South African government. At its first session the conference issued a 'Declaration of Intent'[3] and unanimously resolved that all decisions of the conference and its committees would be taken by consensus. The most important function of the conference was performed by its constitution committee, whose third draft constitution was accepted by the conference as a whole and was incorporated in a petition to the South African government requesting the institution of a provisional government along the lines set out in the draft constitution.[4] Appropriate legislation was prepared for the republican parliament, but international developments prevented its enactment; the Turnhalle conference was terminated and its constitution was incorporated into the policy of the Democratic Turnhalle Alliance, a grouping of political parties formed during its closing stages.

(iii) The Turnhalle constitution

The Turnhalle constitution[5] provided for three levels of government, central, 'communal' and local, and a functional distribution of authority based on the classic separation of powers doctrine. At the local level representative 'ethnic' authorities would be given powers of traditional local concern and

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1. See M. Wiechers 'n Kritiese ontleding van die Turnhalle-grondwet vir 'n tussentydse regering' 18 (1977) Codicillus 4-8; L.J. Boulle 'The Turnhalle Testimony' 95 (1978) SALJ 49-62.

2. D. Prinsloo South West Africa: The Turnhalle and Independence (1976) 11ff. The most notable absentee from the conference was the South West African Peoples Organisation, but there were also other groups absent.

3. This is available in 1976 CILSA 277-281.

4. The white electorate had first approved the constitution in a referendum held on 17 May 1977 (GN 122/77 in Official Gazette 3610 of 5 April 1977). For details of the referendum see 1977 CILSA 231.

5. See Wiechers op cit, Boulle op cit, 1977 CILSA 232-233.

provision was made for co-ordinating metropolitan bodies where necessary. At the second level of government provision was made for eleven elected legislatures (the so-called representative authorities) each of which would be representative of, and have jurisdiction over, the relevant ethnic group. These authorities could be seen as the continuation and extension of previous separate development institutions such as the homeland authorities, the council for coloured persons, and the white legislative assembly. Each representative authority would have its own executive.

The second tier authorities would periodically serve as electoral colleges, in that one of their functions would be to nominate members to the central legislature (the national assembly), a unicameral body comprising sixty seats, of which forty-four would be divided equally among the eleven groups, and the remainder would be allocated proportionately.[1] The division of powers between the national assembly and representative authorities was to be relatively flexible, and liberal provision was made for the delegation of authority in both directions, and also for its re-delegation. While authority on matters of obviously national concern was vested in the assembly,[2] the representative authorities were given original legislative competence over other, not insubstantial, matters,[3] and legislation on these matters would prevail over conflicting enactments of the assembly.[4] In exercising its powers the assembly would operate on a qualified-majority basis: all decisions would require overall majority support, and in addition majority support within each component part of the assembly (that is the ethnic delegations).[5] Should more than three groups exercise their veto

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1. The overall distribution of seats would be as follows: Owambos 12, Whites 6, Damara 5, Herero 5, Kavango 5, Coloured 5, Nama 5, Caprivu 5, Bushman 4, Baster 4, Tswana 4.

2. As the constitution was only intended to regulate the interim government, certain 'national' matters, such as defence and foreign affairs, would remain under South African control.

3. Eg education, social services, roads, forestry, agricultural credit and land use, and environmental control.

4. S 3(i)(iv) of ch III; in other cases of conflict central legislation would prevail.

5. Ch III s 3(g)(i)1. The complete absence of a particular delegation, however, would not prevent the assembly from functioning.

power the matter in issue would be quashed, but in other cases it could be referred to the relevant representative authority, or authorities, which could uphold or reverse the veto decision.[1]

Executive power at the central level would vest in a president and ministers' council,[2] with the former being nominated by the South African government for the interim period and having the predominantly ceremonial powers of a head of state.[3] Each group represented in the national assembly would be entitled to nominate one member to the ministers' council,[4] and to discharge him at its discretion.[5] The chairman of the council would be elected by, and remain responsible, to the assembly at large,[6] but his tenure would depend on his continued membership of the assembly, and thus ultimately on the confidence of the relevant representative authority and not necessarily that of the assembly. All decisions in the council would be taken by consensus unless it was agreed, also by way of consensus, that a particular decision be taken by way of an ordinary or a two-thirds or a three-quarters majority vote.[7] The consensus principle would apply in respect of all decisions, and no institutional mechanism was provided for resolving possible deadlocks.

The Turnhalle constitution vested judicial power in a Supreme Court, the members of which would be appointed by the ministers' council[8] and would have security of tenure unless dismissed by special resolution of the national assembly.[9] The Supreme Court

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1. See ch III ss 3(g)(i) 2 and 4.
2. Ch III s 2.
3. His assent would not be a requirement for the validation of assembly legislation.
4. The minister need not belong to the nominating group, but would have to be a member of the assembly.
5. Ch III s 2.
6. Ch III s 2(b)(i)(a).
7. Ch III s 2(f). The chairman of the council would have neither an ordinary nor a casting vote.
8. Ch III s 4(a)(v).
9. Ch III s 4(a).

would have traditional judicial functions, and in addition a testing right over all legislation enacted by the national assembly, representative authorities and other subordinate bodies, which might be invalidated for excess of jurisdiction.[1] Provision was made for the retention of traditional courts (such as tribal courts) and for the institution of lower courts by law. A separate constitutional court[2] was empowered to advise the various legislatures, at their request, on whether proposed legislation was compatible with the declaration of fundamental rights included in the constitution; an adverse decision by the court would have to be tabled in the appropriate legislature,[3] but would not preclude the subsequent enactment of the statute.[4] The bill of rights, which enjoyed some prominence in the constitution,[5] was based partly on the Basic Rights of the Federal Republic of Germany and was a significant constitutional innovation, even in its unenforceable form, in the southern African context. Provision was also made for a rudimentary ombudsman-figure, the government commissioner,[6] who could investigate complaints of alleged infringements of the bill of rights resulting from administrative practice or action, and mediate, if necessary, with the appropriate authority.[7]

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1. Ch III s 4(a)(iii).

2. The three members of this court would be appointed by the ministers' council - ch II s 15.1.

3. Ch II s 16.3.

4. Ch II s 18. Cf s 59(2) of the South African constitution. The second draft of the constitution made the bill of rights judicially enforceable, but the conference subsequently amended this. For empirical comparisons see Boulle op cit 59.

5. It followed the introductory provisions (ch II).

6. Appointment was by the ministers' council.

7. Ch II s 19. There is again an analogy with the German constitution (art 93(1)4a) which (since 1969) allows individuals with basic rights complaints against public authorities access to the Constitutional Court. See G. Brinkman 'The West German Federal Constitutional Court: Political Control through Judges' 1981 Public Law 83-104.

(iv) Evaluation

As a 'national convention' exercise, the Turnhalle experience has some relevance for the republic in view of the many demands for an all-inclusive convention to consider a new South African constitution.[1] What the Turnhalle has demonstrated is that a convention which does not include all the major competitors for power is a futile exercise, and that once political groups with significant support have formed in exile, an internal agreement is insufficient to resolve basic constitutional issues. In fact the Turnhalle conference, operating according to the consensus principle, had a remarkable achievement in finalising its constitutional agreement within a relatively short time period, but in the end the exercise did no more than combine the internal parties for the purposes of subsequent negotiations with SWAPO. The internal settlements in Rhodesia had the same limited significance.[2] The Namibian experience also highlighted the legitimacy problems inherent in any attempt to resolve the constitutional dispute and institute a new system of government, before the holding of free elections; legitimacy would have been more attainable through an exercise in constitutional autarchy.

As far as the Turnhalle constitution is concerned, this displays many of the characteristics of liberal constitutionalism, such as the declaration of rights, the separation and division of powers, a general adult franchise, the independent judiciary, constitutional checks and balances, and a pervasive principle of restraining the exercise of legitimate power - the essence of constitutionalism. When viewed from the Westminster perspective there are several obvious differences - the principle of group representation in the national assembly, the jurisdictional limitations on that body, the provision for a strong decentralisation of functions to the representative authorities, the avoidance of majoritarianism in the assembly and ministers' council, the heterogeneous composition of the council, the un-

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1. Cf the views of W. Thomas 'South Africa Between Partition and Integration' 3 (1979) Aussenpolitiek 305 at 316.

2. At 239 to 240 , below.

likelihood of a clear government versus opposition dichotomy emerging in the political process, the absence of an electoral mandate for the legislative majority, and the 'ethnic' basis of the constitutional system. In particular the key determinant of a Westminster system, the close inter-relationship between legislature and executive, is excluded through the provision that members of the ministers' council be appointed severally by the ethnic groups; this feature violates the concept of cabinet government and blurs traditional lines of joint and individual ministerial responsibility.[1] In short the constitution contains some of the external features of a Westminster-type parliamentary system, but in practice would involve a decidedly non-Westminster form of government.

When viewed from the federal perspective the constitution evidences a typical federal division of authority with secured powers for the unit governments, but without separate federal states with territorial jurisdiction.[2] The system could be described as a type of 'corporate federalism',[3] with the qualification that the corporate groups recognised by the constitution would be statutorily defined and based on factors of colour and ethnicity. Once the significance of this qualification has been recognised, it is possible to identify other 'federal' characteristics, such as the supremacy and rigidity of the constitution, the authority of the judiciary, and the provision for a strongly decentralised system of government. It is significant, however, that besides personal jurisdiction over members of the relevant population group, the representative authorities would also have had some territorial jurisdiction in relation to land owned by members of that group.[4] It follows

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1. With the possible exception of the chairman of the council, who would remain dependent on the assembly's confidence.

2. The unicameral national assembly could also be said to have a 'federal composition' in that one component would have equal representation of the 'units' and the other proportional representation. It should be borne in mind, however, that the assembly would be only indirectly elected.

3. On 'corporate federalism' see 111, above.

4. Ch III s 3(1) 3 (ii).

that the de iure 'corporate federation' could have been given asymmetrical territorial-federal[1] form in practice, and this was to cause a major dispute during the closing stages of the Turnhalle conference because of the wide disparities in land ownership among the ethnic groups.[2]

When viewed from the consociational perspective the Turnhalle constitution shows a consistent rejection of majoritarianism at various levels of representation and decision-making.[3] The principle of segmental autonomy, or minority rule over matters of minority concern, would have been institutionalised along separate development lines among the eleven groups through the deployment of the personality principle; in the case of the smaller and less prosperous groups, however, the eventuation of any degree of meaningful self-government would have been unlikely.[4] The grand coalition principle is strongly evident in the composition of the ministers' council, as are variants of the principle of proportionality in the form of minority over-representation in the assembly, and parity of group representation in the council. The mutual veto is available in a slightly qualified form in the assembly, but in its extreme form in the council. Save for one major qualification, namely that the 'segments' would be statutorily defined and not the product of free political association,[5] the Turnhalle constitution displays all the main features of the normative consociational model. It is mainly these features, however, which

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1. See L.J. Boulle 'Federation and Consociation - Conceptual Links and Current Constitutional Models' 44 (1981) THR-HR 236 at 239, and 109 to 111, above.

2. There was pressure from poorly endowed groups to remove matters from the second tier of government, and vest them in the central authorities, for fear that the well endowed groups would dominate the system from the second tier. See Boulle 'The Turnhalle Testimony' 54.

3. See Boulle 'Federation and Consociation ...' 250-252.

4. The system of public finance meant that each representative authority, apart from central loans, would have as its main independent source of revenue taxation on the personal income of members of the relevant group; this would have entailed in practice large discrepancies in the standards of social services.

5. Consociationalism is indeed based on the 'good fences make good neighbours' axiom but is seldom reliant on statutory fences which tend to codify separatism and prove problematic for persons of mixed origins. Free political association would allow segmental formation to occur along lines other than ethnicity or colour, and such freedom is an essential characteristic of political pluralism - see above at 78.

point to one of the main weaknesses of the Turnhalle model, namely the probability of slow, inefficient and expensive government, which would not be attractive features for a newly independent state. The pervasive limitations on the exercise of power, in particular, would probably have lead to protraction and immobility, both of which would have favoured the socio-economic status quo and lead to political frustration and instability. An oft-quoted political criticism of the Turnhalle constitution was that the system of government it envisaged would have been dominated by whites from the second tier. Justification for this viewpoint is to be found, inter alia, in the more substantial limitations imposed on central authorities than on their communal counterparts; this would have allowed effective dominance to those of the latter which were territorially and financially well endowed. In the Namibian context only the white group qualified in terms of these factors.

(v) Post-Turnhalle developments

Since the termination of the Turnhalle conference the constitutional development of the territory has been delayed, pending negotiations between South Africa and the international community. The 1968 Constitution Act[1] had been amended[2] before the termination of the conference to empower the State President, by proclamation in the gazette,[3] to legislate for the territory 'with a view to the eventual attainment of independence'; this delegated authority included the power to repeal or amend any legal provision or act of parliament (including the Constitution Act) applying to the territory. This development gave the State President wide discretionary powers to govern the territory, and through two proclamations[4] later that year he created the office of administrator-general and empowered the incumbent

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1. Act No 54 of 1968.
2. By Act No 95 of 1977 which amended s 38 of the principle act.
3. Proclamations had to be tabled in the South African parliament and the State President could not unilaterally dispense with this requirement. See J. Faris 'South Africa's Severence of Links with South West Africa' 1977 SAYIL 49-64.
4. Proclamations 180 and 181 of 19 August 1977.

to legislate for the territory by proclamation in the Official Gazette.[1] Shortly after the appointment of the first administrator-general the office of the administrator of Namibia was abolished.[2]

During 1978 unsuccessful negotiations continued between the South African government and the five western nations[3] on the holding of elections for a 'constituent assembly' to draw up an independence constitution. Towards the end of the year South Africa unilaterally organised elections for such a body;[4] these were held on a nation-wide, proportional basis[5] and resulted in the Democratic Turnhalle Alliance acquiring eighty percent of the fifty seats.[6] During 1979 the constituent assembly played a minor role in the international deliberations on the territory and, on the initiative of the DTA, passed a motion that an interim government with legislative powers be established. Pursuant to this the administrator-general converted the constituent assembly into a 'national assembly' with extensive legislative powers,[7] but it was not empowered to make laws which would alter the status of the territory and laws

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1. In terms of Act No 95 of 1977, however, laws made by the administrator-general required the State President's approval. Proclamation 202 of 31 August 1980 provided for Walvis Bay to be administered again as part of the Cape province from 1 September that year.

2. Proclamation 264 of 30 September 1977.

3. The United Kingdom, United States, Canada, Germany and France. See J. Faris 'The Western Proposals and Elections in South West Africa/Namibia: A Summary of the Events for 1978' 1978 SAYIL 90.108.

4. In terms of Proclamation AG 63/1978.

5. The DTA's votes entitled it to 41 seats, Aktur's to six, and each of three other parties acquired a single seat. SWAPO, SWAPO Democrats and the Namibia National Front did not contest the elections. The main difference between the constitutional policy of the DTA and Aktur (the Aksie-front vir die behoud van die Turnhalle-beginsels) was that the latter wished to retain the basic principles of the Turnhalle third draft constitution, while the former saw the need to create a stronger central government at the expense of the ethnic authorities. See 1977 CILSA 356.

6. It was estimated that of those eligible to register as voters between 75 and 80% actually participated in the election - 1979 CILSA 126.

7. Proclamation AG 21/1979 of 14 May 1979. The assembly's initial term of office would be one year from the effective date of the proclamation (21 May 1979) and its size could be increased to sixty-five members. In Du Plessis NO v Skrywer NO en andere 1980 (2) SA 52 (SWA) the court was faced with one of the problems endemic in a proportional electoral system, and decided that a member did not need to retain membership of the party which nominated him in order to retain his seat in the assembly. The case was a sequel to the passing of the Abolition of Racial Discrimination Act. The decision was confirmed in Du Plessis NO v Skrywer NO

would require both his signature and the South African government's approval. The validity of the proclamation instituting the assembly was challenged in legal proceedings which were somewhat inconclusive,[1] but a subsequent proclamation of the State President placed the legality of the assembly and the validity of its laws beyond doubt, by providing that the administrator-general's proclamation should be deemed to have been issued by the State President.[2] The State President had earlier provided for the establishment of a Central Revenue Fund for the territory.[3] The result of these developments was that there now existed a set of institutions which coincided to a significant extent with those envisaged in the Turnhalle constitution: a national assembly with delegated legislative powers, and various subordinate ethnic authorities with varying legislative and executive powers.[4] At first an unofficial council advised the administrator general in the exercise of his executive powers, but subsequently executive authority was conferred on a ministers' council, and it acquired the same relationship with the national assembly as that envisaged in the Turnhalle constitution. Towards the end of 1979 the assembly considered the question of the division of functions between the central and second-tier authorities, and decided to confer limited and specific powers on the latter[6] and relatively wide residual powers on the former, a decision which involved a clear variation on the Turnhalle constitution. The assembly proposed that elections be held for the second tier authorities, unless the relevant ethnic group was opposed there-

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1. Du Plessis v Administrateur-Generaal vir die Gebied van Suidwes-Afrika en andere 1980 (2) SA 35 (SWA); see also Beukes v Administrateur-Generaal, Suidwes-Afrika 1980 (2) SA 664 (SWA).

2. Proclamation 172/179 in G.G. 6618/1979 (13 August 1979) which was made retrospectively effective from 14 May. This proclamation also excepted laws of the national assembly from the requirement (s 38(2) of the constitution act) that laws would not be effective until approved by the State President.

3. Proclamation 85/1979 of 4 May 1979.

4. Since the termination of the conference additional assemblies had been constituted along separate development lines.

5. Various proclamations of the administrator-general himself have resulted in the transfer of the administration of most government departments to the A-G, and of many of the white legislative assembly's powers to the national assembly.

6. Land tenure, agriculture and agricultural credit, education (up to primary school teachers' training), health services, social welfare and pensions.

to, in which case it could transfer its powers to the central government. Elections were in fact held for most ethnic groups towards the end of 1980.[1]

During 1981 the DTA-dominated national assembly continued to legislate by proclamation and the ministers' council acted as the territory's cabinet. International attempts to secure a Namibian settlement in terms of United Nations Security Council resolution 435 of 1978 continued, but in spite of a multi-party meeting in Geneva[2] these were unsuccessful. It is improbable that the Turnhalle experience will have much influence when the independence constitution is eventually drafted, but it has provided, within the limits referred to above, the example of a semi-consociational system in operation in southern Africa. Both the Turnhalle and Zimbabwean constitutional experiences show that consociational institutions can only have limited significance if fundamental legitimation problems have not been resolved.

b. The Rhodesian-Zimbabwean constitutional transition

(i) Background

The modern constitutional history of Zimbabwe[3] can be traced back to the 1961 Constitution of Southern Rhodesia which became effective while the territory was still part of the Central African Federation.[4] This was the first of many constitutional arrangements which purported to introduce blacks into the political system, while at the same time retaining political control in white

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1. The DTA suffered various setbacks in these elections. See A. du Pisani 'SWA/Namibia: 1980 Review' 1981 Africa Institute Bulletin 25-32.

2. See A. Du Pisani 'Namibia: the Search for Alternatives' 1981 South Africa International 292-302. The 'internal parties' were lead at Geneva by the Administrator-General.

3. On the earlier constitutional developments see C. Palley's definitive work The Constitutional History and Law of Southern Rhodesia 1888-1965 (1966); see also the résume in A. Blaustein and G. Flanz Constitutions of the Countries of the World (1980) and references cited there.

4. This was brought into being by Order-in-Council under the authority of the Southern Rhodesia (Constitution) Act 1961.

hands. It provided for a legislative assembly of 65 members, of whom 50 would be elected by "A" roll and 15 by "B" roll voters; while both rolls were theoretically open to all races the "A" roll qualifications[1] were such as to make it predominantly white, and the system amounted in practice to communal representation for blacks and whites in the unicameral parliament.[2] A two-thirds legislative majority was required for constitutional amendments, a figure within the reach of the white component; some provisions required, in addition, the British government's assent or that of the country's four 'racial' groups expressed in separate referenda - the latter 'concurrent majority' requirement clearly involved a type of mutual veto, but was never used in practice. For the rest the constitution displayed all the main Westminster characteristics, save for the facts that the country had only dependent dominion status, and legislation could be delayed by a Constitutional Council for six months for non-compliance with a detailed Declaration of Rights.[3] Upon dissolution of the federation, Southern Rhodesia resumed all functions previously vested in the federal authorities and the 1961 constitution remained largely intact, save for the establishment of a local Appellate Division to replace the Federal Supreme Court.

Shortly after the unilateral declaration of independence in 1965, a new constitution was ratified by the legislative assembly,[4]

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1. A mixture of income, property and educational requirements.

2. A complicated 'cross-voting' procedure allowed voters on one roll to influence, to some extent, elections held under the other.

3. A two-thirds parliamentary majority could reverse the decision. The High Court could also grant redress to petitioners for contraventions of the Declaration.

4. The legality of the 1965 constitution was upheld by the Rhodesian courts (Madzimbamuto v Lardner-Burke NO 1968 (2) SA 284 (RAD)) on the grounds that the revolution had succeeded and an effective new order had been established (see also R v Ndhlovu 1968 (4) SA 515 (RAD)). Leave to appeal was refused in Madzimbamuto v Lardner-Burke NO 1968 (2) SA 457 (RAD) but the Judicial Committee of the Privy Council allowed the appeal and reversed the earlier decision - it upheld the legal effect of the British Act and Order in Council which reaffirmed Britain's authority in the territory. Madzimbamuto v Lardner Burke NO 1969 (1) AC 645 (PC). The Rhodesian courts did not hold themselves bound by the Privy Council decision. For views on these matters see M. Wiechers Staatsreg (3 ed, 1981) 29-30 and 33, and the numerous references cited there.

and it dispensed with all forms of external control, including those relating to the amending procedure, to accord with the government's view of the country's independent status. The constitution now stipulated that executive power was to be exercised solely on the Rhodesian minister's advice,[1] the legislature was declared to be sovereign, and appeals to the Privy Council were abolished, but as far as the internal distribution of authority was concerned the 1961 constitution was re-enacted almost exactly. After several years of unsuccessful negotiations between Rhodesia and Britain on the former's status, the Whaley commission was appointed to consider a new constitutional framework for the country; the recommendations of the commission were partly incorporated into a draft constitution which was approved in a referendum in 1969, and at the same time the electorate voted in favour of republican status for Rhodesia.

(ii) The Republican constitution

The new constitution[2] proclaimed Rhodesia to be a republic and terminated all constitutional ties with Britain, but it retained, and slightly strengthened, the Westminster features of the system of government. The President replaced the Queen as head of state and was given nominal powers only,[3] and executive power was vested in a prime minister and cabinet drawn from and responsible to the legislature, according to established Westminster rules and conventions.[4] Parliament became bicameral for the first time, with a constitutionally dominant lower house,[5] consisting of fifty white members elected directly by voters on a black roll, and eight black members elected by an electoral college comprising traditional and elected leaders.[6] The Senate

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1. The Queen remained Head of State but was now represented by an Officer Administering the Government.
2. Act No 54 of 1969, promulgated on 2 March 1970.
3. Save where otherwise provided he had to act on the cabinet's advice (ss 53, 54 and 57). Somewhat unusually for a Westminster export model, he was also appointed by the executive council. S 3(1).
4. Ss 56 and 55(5).
5. Ss 10, 11 and 42.
6. S 18(2)(a) and (b).

consisted of ten whites elected by the white members of the House, ten black chiefs (five each from Matabeleland and Mashonaland) elected by the Council of Chiefs, and three (later five)[1] senators appointed by the President.[2] The principle of communal representation in the legislature was more securely entrenched than before, because of the colour determinants of the voters rolls and colour qualifications for membership of either house.[3] Because of the electoral arithmetic, which was unilaterally imposed by the white government, black participation in the legislature was of only nominal significance, although there was provision for an increase in the number of blacks in the House, each increase being related to the level of income tax paid by blacks in proportion to that paid by whites, until there was numerical parity of representation for the two groups.[4] The Senate, in which blacks were relatively better represented, could delay legislation for a maximum period of 180 days.[5]

The Westminster influences on the constitution were clearly apparent in the majoritarian cabinet, the close institutional link between cabinet and parliament, and the legislative supremacy of parliament.[6] Deference to the last principle was shown by the fact that the Declaration of Rights[7] was retained in the republican constitution, but was made non-justiciable.[8] The Constitutional Council was disestablished, and in its place a Senate Legal Committee[9] was created and empowered to report on the compatibility of referred bills with the Declaration;[10] an

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1. Since the 1974 Constitution Amendment Act (s 2 of which amended s 13 of the Constitution).
2. S 13(2)(a) and (b).
3. The Electoral Act imposed in addition differential educational, income and property qualifications for each roll.
4. S 18(4). The additional members would be alternatively indirectly and directly elected.
5. S 42.
6. Cf s 30(1).
7. Second Schedule.
8. See Deary NO v Acting President, Rhodesia and others 1979 (4) SA 43 (R).
9. S 14(5). The Committee consisted of as many legally qualified senators as determined by the President.
10. S 43(1) and (2).

adverse finding, however, would only delay enactment of the measure if confirmed by the Senate as a whole, and only then for a temporary period.[1] There were other limitations on the constitutional protection of basic rights: the Legal Committee could not scrutinise money or constitutional bills,[2] nor could it delay the progress of a bill certified by the Prime Minister as requiring urgent enactment in the national interest;[3] furthermore differential treatment of persons was allowed, the Declaration notwithstanding, if such treatment would 'promote harmonious relations'.[4] In short, there were few legal restraints on the white-controlled political institutions.

From the consociational point of view it is clear that the feature of communal representation in parliament would be hard put to effect a consociational type of power-sharing because of the minimal representation afforded to blacks and the gross over-representation of whites - an inverse relationship to the demographic realities. Black representation was also ineffective because of the absence of any veto power; a veto only availed the black legislative minority in respect of constitutional amendments, which required an affirmative vote of at least two-thirds of the total membership of each house,[5] but even this could be circumvented if a bill which had not achieved the two-thirds majority in the Senate was re-submitted to that body and approved by a mere simple majority.[6] The two-thirds majority in each house was peremptory in respect of amendments to the 'specially entrenched provisions',[7] but these, and certain entrenched provisions in other statutes,[8] were essential for the retention of the political and economic status quo, so that constitutional rigidity in fact favoured

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1. S 44(2). Even such confirmation could be overruled by a subsequent Senate resolution that enactment was necessary in the national interest.
2. S 43(6)(a) and (b).
3. S 45. The certificate also rendered unnecessary Senate approval of a bill.
4. Eg s 19(2).
5. S 78(1)(a) and (b).
6. S 78(2).
7. See the Third Schedule.
8. Eg parts of the Electoral and Land Tenure Act.

the white minority. The overall picture was of a predominantly majoritarian Westminster-type constitution, whose variations on the Westminster paradigm, particularly those relating to the franchise and composition of parliament, served to secure white minority domination - the antithesis of consociationalism.

While the republican constitution endured, numerous unsuccessful attempts were made to achieve a constitutional settlement acceptable to the white government, black leaders, both internal and external, and Britain.[1] On 3 March 1978 an 'internal agreement' was signed in Salisbury, following talks between the government and leaders of three black political groupings within the country.[2] In terms of the agreement,[3] a transitional government was established consisting of an Executive Council, comprising the four signatories to the agreement,[4] and a Ministerial Council, comprising equal numbers of black and white ministers.[5] Effective power remained with whites as the new authorities stood in an advisory relationship to the existing parliament, although during the transitional period numerous discriminatory statutes were amended or repealed. The last function of the outgoing parliament was to enact the Zimbabwe-Rhodesian constitution,[6] based on the draft agreed to by an all-party committee, and a corresponding electoral act.[7]

The 'internal agreement' can be regarded as a type of consociational pact among internal élites, acting in terms of the self-denying hypothesis; but it was not a self-conscious 'union of

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1. For an account of these events see L. Sobel (ed) Rhodesia/Zimbabwe 1971-1977 (1978).
2. The United African National Council, the Zimbabwe African National Union, and the Zimbabwe United People's Organisation.
3. This can be seen in 1978 CILSA 223-225.
4. The prime minister Mr. I. Smith and Bishop A. Muzorewa (UANC), Rev N. Sithole (ZANU), and Senator Chief J. Chirau (ZUPO). The chairmanship rotated among the four leaders.
5. The cabinet portfolios were held jointly by black and white ministers. This arrangement necessitated the Constitution Amendment Act No 18 of 1978.
6. Act No 12 of 1979.
7. Act No 14 of 1979.

opposites' in the authentic sense, because of the absence of the Patriotic Front, one of the major parties to the conflict. This 'political deal', therefore, was imperfectly consociational. The period of transition itself witnessed the quasi-consociational incorporation of black leaders into the existing system of government, on an informal extra-constitutional basis. The pairing of ministers in the allocation of cabinet portfolios, and the rotation of the Executive Council chairmanship (that is proportionately in the temporal dimension), can be seen as attempts to ensure that black participation resulted in a sharing of power. Although this arrangement was only intended to be of temporary duration, its relative failure (as evidenced, inter alia, by the short life of the constitution which it produced) may be attributed to the unrepresentativeness of the black leaders, the gross over-representation of whites in the two new bodies, and the informal and insecure basis of the whole arrangement - in fact the 'consociational' aspects of the transitional government contributed its undemocratic and authoritarian qualities, and they had no material impact on the legitimacy crisis facing the system.

(iii) The Zimbabwe-Rhodesia constitution

The transitional government's constitution was published in January 1979[1] and came into operation on 1 June, after general elections had been held earlier in the year.[2] For the first time consociational institutions became a prominent feature of the country's constitutional dispensation - communal representation in the legislature, over-representation for the white minority, an institutionally-required coalition executive, and a significant veto power. These features in fact gave rise to a coalescent form of government, but the legitimacy problem remained unresolved - on the one hand a major conflict party was excluded from the consociational arrangement, and on the other the consociational features were perceived as devices to protect white interests against the new majority government.[3]

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1. Cmd R.R.2 - 1979.

2. On the elections see 1979 CILSA 249. The black members were elected on a proportional basis and Bishop Muzorewa's UANC won 51 of the 72 seats. All elected white seats were won by the governing Rhodesia Front.

3. Cf Blaustein and Flanz op cit 26.

As far as its main institutions were concerned the constitution was faithful to the Westminster model and the prior republican constitution. There was provision for a President with the nominal powers of a head of state,[1] a bicameral legislature with a dominant lower house,[2] a prime minister and executive council with effective executive power and responsibility to the legislature,[3] and a judiciary appointed by the President and with security of tenure. The main innovations were to be found in the composition of the legislature and executive. In the former the principle of communal representation was retained, with white and black voters directly electing twenty and seventy-two members to the House of Assembly respectively, all on a constituency basis;[5] a further eight white members would be elected by the already returned members, sitting as an electoral college, from sixteen candidates nominated by the twenty elected whites.[6] The Senate consisted of ten black and ten white senators elected by the respective components of the House, and ten chiefs elected by the Council of Chiefs. For the first time the black majority in the country acquired a majority in parliament. The composition of the executive complemented that of the legislature, in that the President was required for the first five years to apportion cabinet posts among the parties

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1. Ch II. The President would be elected by members of the House of Assembly and Senate.

2. Ch III. 3. Ch IV.

4. Ch V.

5. The first election of black members was held on a proportional (party-list) basis because of the impossibility of delimiting constituencies timeously (third schedule). The court in Chikerema and others v UANC and another 1979 (4) SA 258 (ZR AD) was faced with a similar problem to that in Du Plessis v Skrywer 1980 (2) SA 52 (SWA), and held that it had no jurisdiction to force the appellants to vacate their parliamentary seats after resigning from respondent party, which had nominated them. The court found support in the English decision Amalgamated Society of Railway Servants v Osborne 1910 AC 87. And see M. Wiechers Staatsreg (3 ed, 1981) 192.

6. For the first election the sixteen candidates were nominated by the fifty white members of the outgoing house.

represented in the House.[1] This arrangement introduced elements of a grand coalition into an otherwise Westminster cabinet,[2] and resulted in the appointment of five white ministers to the first national government.[3] But there was no constitutional provision for a veto in the cabinet, and it is a matter of speculation as to how long cabinet solidarity and a consensual type of decision-making could have been sustained without it; in the event this constitutional phase was only of short duration.

As far as the legislative process and constitutional amendments were concerned, there was provision for a significant veto power which in practice could be exercised by the white minority.[4] While the constitution stipulated only a simple majority in either house for legislative measures,[5] the provisions relating to the head of state, the executive, the legislature, the judiciary, the service commissions, finance, the Declaration of Rights, and the entrenched procedure itself, required for their amendment affirmative votes of at least two thirds of the senators and seventy-eight members of the House,[6] which gave an accessible and conclusive veto to the white parliamentarians as far as the composition and functioning of the main institutions of government were concerned. In addition, various non-constitutional statutes were also specially entrenched in this manner.[7] Other constitutional amendments required only a two-thirds majority in each house, and if the

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1. S 67 read with s 8 of the Third Schedule. Each party with five members in the House would be entitled to representation in the cabinet. In recommending the appointment of ministers from non-government parties the prime minister would act on the advice of party leaders.

2. Cf s 5.5.2 of the PFP constitutional proposals. Membership of the council would not, however, be incompatible with membership of the legislature.

3. The first cabinet posts were apportioned as follows: UANC - 11; RF - 5; ZANU - 2; UNFP - 2. The constitution prohibited the whites, for a five year period, from forming a governing coalition with any party other than the majority black party. Third Schedule, s 8(1).

4. The constitution itself was 'supreme law' and inconsistent laws would be invalid (s 3); 'black majority rule' meant an end to Westminster notions of parliamentary supremacy.

5. S 42.

6. S 157 read with the Second Schedule.

7. S 160. Among these were the Electoral Act and laws relating to school education and medical services.

Senate failed to produce this majority it could be overruled after a delay of six months. The effect of these amending procedures would have been to perpetuate the prevailing level of white representation in parliament for at least ten years,[1] after which a commission of review could recommend the abolition of separate white representation in parliament, or a reduction in the number of white seats; either step would have as a necessary consequence the curtailment of the veto power. Although such recommendations could be statutorily implemented by a simple majority vote in the assembly,[2] the composition of the review commission would strongly reflect white interests,[3] so that even these amendments would require a measure of white concurrence. Additional white control would have emanated from the various other commissions for which provision was made in the constitution.[4] The commissions would have supervisory and recommendatory functions in respect of the judiciary, the public service, the prison service, the police force and the defence forces, and the commission members, as well as the permanent heads of the various services and other functionaries such as the Attorney-General and the Auditor-General, would have to be persons who had had senior positions for minimum periods (in most cases five years) before the enactment of the constitution. Previous white predominance in the bureaucracy would have resulted in few blacks qualifying for these positions. These provisions were also specially entrenched.

The overall picture of constitutional limitations, weak government, and potential perpetuation of the socio-economic status quo, was completed by the Declaration of Rights,[5] which was now made justiciable[6] and thus a further restraint on the national government. The rights included in the Declaration may be

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1. Or after the second dissolution of parliament within the ten year period. As has been shown the equivalent period for the executive was five years.

2. The Senate's approval would not be required - s 159(6).

3. Of its five members one would be the Chief Justice and two would be elected by the white parliamentarians.

4. Ch 6.

5. Ch VIII.

6. S 134. It was in fact a substantial re-enactment of the previous non-justiciable Declaration.

broadly categorised as 'liberal' in nature with particular prominence being given, in a marathon clause,[1] to the protection of private property; expressly exempted from the Declaration for a ten year period, however, and thus immune from invalidation, were laws which were effective before the promulgation of the constitution and continued to be effective thereafter as laws of Zimbabwe-Rhodesia. The new government, therefore, would be hampered by a legacy of prior discriminatory laws until their specific repeal, and could be thwarted in any energetic programme of economic and social reform by the Declaration of Rights.[2] The international non-recognition of the new, predominantly black, government may be partially attributed to those constitutional devices which were designed to restrain and limit the power and wishes of the popular and legislative majorities. The independence constitution introduced significant modifications to these features.

(iv) The Zimbabwe constitution

The independence constitution was agreed upon by the Zimbabwe-Rhodesian government and the external black parties at the Lancaster House conference, lasting from 10 September to 15 December 1979, and held under British chairmanship.[3] After a return to legality,[4] Britain resumed direct rule over the country and both enacted the new Zimbabwe constitution through order-in-council[5] and made legislative provision for the attain-

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1. S 133(1(b).

2. S 132(1) read with ss 136 and 75. An exception was allowed for laws which made provision for the taking of action during declared 'periods of public emergency' which could not be invalidated for non-compliance with certain provisions of the Declaration, notably the right to due process, free assembly, conscience and personal liberty, and the protection from arbitrary search.

3. See the Report of the Constitutional Conference, Lancaster House, London Cmd RZR 3-1980. Apart from the British, the signatories were Bishop A. Muzorewa and Dr S. Mundawarara of the Zimbabwe-Rhodesia government, and Mr R. Mugabe and Mr J. Nkomo of the Patriotic Front. See also 1980 CILSA 240-1.

4. The Constitution of Zimbabwe Rhodesia Act (No 44 of 1979) reversed the declaration of independence and proclaimed the country to be once more a British dominion. It provided for a governor to assume all legislative and executive powers. The British parliament, in turn, enacted the Southern Rhodesia Act 1979, which made provision for the introduction of a new constitution and for the interim governance of the country.

5. The Zimbabwe Constitution Order 1979 (No 1600), made in terms of s 1 of the Southern Rhodesia Act of 1979. The new constitution was also annexed to Act No 44 of 1979 (Rhodesia).

ment of independence[1] and the termination of British responsibility. Elections were held under British supervision during February 1980[2] and the constitution became fully operative on 1 April that year.

Once again a significant degree of institutional continuity was evident in the new constitution, although there was a noticeable movement towards majoritarianism in the removal of some of the legal restraints imposed by the constitution's immediate predecessor. There was again provision for a President with only the nominal powers of a head of state,[3] a bicameral legislature with a dominant lower house,[4] a prime minister and executive council with effective executive power[5] and responsibility to the lower house,[6] and a judiciary appointed by the President and with security of tenure.[7] The main innovations again related to the composition of the legislature and executive. White representation in the house was reduced to twenty members, to be elected on a constituency basis by voters registered on the white electoral roll, with the remaining eighty members being elected by voters registered on the common roll.[8] The composition of the Senate, and the method of electing senators, was retained save that the number of non-chief black senators was

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1. Zimbabwe Act, 1979.

2. The twenty white constituency seats were won by Mr Smith's Rhodesia Front. The eighty black seats were again contested on a proportional basis in eight multi-member constituencies, with electors voting for parties, not candidates. The proportional allocation of seats was ZANU-PF (Mr Mugabe) 57, PF (Mr Nkomo) 20, UANC (Bishop Muzorewa) 3. Muzorewa's votes dropped from 64% in the internal elections to 8,1% - commentators attributed this, inter alia, to the white constitutional veto and continued white control of the forces and bureaucracy during his term of office.

3. Ch IV. The method of electing the President was left intact.

4. Ch V. The Senate's delaying power was reduced from a period of 180 days to 80 days (s 51 read with s 3 of Schedule 4).

5. Ch VI. The President's duty to act on the cabinet's advise was expressly stipulated.

6. This convention, the basis of the Westminster system, also found statutory expression (s 69(1)).

7. Ch VIII.

8. S 38(1).

increased from ten to fourteen, and provision was made for an additional six senators to be appointed by the President on the prime minister's recommendation.[1] The new executive, however, could now be formed along majoritarian Westminster lines and the coalition features of the Zimbabwe-Rhodesia cabinet were omitted from the constitution;[2] nevertheless the coalition principle was strongly evident in the first Zimbabwean cabinet.[3]

While the more limited white participation in the legislature and executive would reduce the ability of the white minority to influence decision-making in these institutions, constitutional rigidity again provided some security. The constitution itself is the 'supreme law of Zimbabwe', and other laws inconsistent with its provisions will be void to the extent of that inconsistency.[4] The ordinary legislative process, which operates on a simple majority basis,[5] and constitutional amendments, which require the support of seventy members in the house and two-thirds of the Senate[6] subject to Senate disapproval being overruled by the House,[7] cannot be curbed by whites; the requirement of unanimity in the House for the amendment of the specially entrenched constitutional provisions, however, affords the white legislative minority an absolute veto power; this power will endure for ten years in respect of amendments affecting the content and enforcement of the Declaration of Rights,[8] and for seven years in respect of the composition and functions of the legislature,[9] and after these periods the normal amending

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1. S 33. The ten senatorships for Chiefs were again divided equally between Mashonaland and Matabeleland, despite the numerical preponderance of the Shona tribe in Zimbabwe.

2. S 69(1). The creation of a coalition between the white members of the lower house and any minority black party for the purposes of forming a government was statutorily prohibited - s 69(2).

3. The 'cabinet of national unity' consisted of 23 members, of whom 4 were from Nkomo's PF and two from Smith's RP. This development contradicted the theory that in zero-sum conditions coalitions tend toward the minimal winning side. W. Riker The Theory of Political Coalitions (1962) 28-32.

4. S 3. Cf S v Tekere and others 1981 (1) SA 878 (ZAD).

5. S 56.

6. S 52(3)(a) and (b)(ii).

7. S 52(6).

8. S 52(4).

9. S 52(5).

procedure will apply. The content of the Declaration of Rights,[1] and its method of enforcement,[2] has not been changed significantly in the new constitution, but an additional provision[3] introduces a broad judicial discretion to overrule official reliance on the savings clauses contained in many provisions[4] of the Declaration; a law, or action taken under authority thereof, can be declared to be in contravention of the Declaration if reliance on the savings proviso could not be 'reasonably justifiable in a democratic society'. This innovation can be seen as imposing additional, though slightly vague, restraints on the government.[5] Finally, white influence in the bureaucracy has again been ensured, though in less pronounced form, through the requirements relating to the composition of the commissions controlling various branches of the administration, as well as the qualifications of other influential officials.[6]

In institutional terms the constitutional transition from Rhodesia to Zimbabwe was characterised by a remarkable degree of continuity as the political system became progressively more inclusive. The main changes related to the franchise, the racial composition of parliament, the availability and effect of the veto power, and the status of the bill of rights, but these occurred within the same broad constitutional framework. During the transition black attention tended to be focussed on parliament, while white attention tended to shift towards the bureaucracy and armed forces; there was a corresponding tension between the notions of majoritarian and constitutional democracy. This tension is still apparent in the Zimbabwean constitution, but its provisions have been adhered to during the first two years of independence.

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1. It is now given greater prominence in ch III (ss 11-26) of the constitution.
2. S 24. Petitioners may approach the Appellate Division for redress, but the court will not adjudicate on academic matters - see Mandirwhe v Minister of State 1981 (1) SA 759 (ZAD).
3. S 24(5).
4. Ie ss 16(7), 19(5), 20(2) and (4), 21(3), and 22(3)(a) to (e).
5. Existing laws would be immune from invalidation for non-compliance with the Declaration for a period of five years - ss 25(2) and (3).
6. Ch VII.

(v) Evaluation[1]

The virtual exclusion of blacks from the main political institutions in Rhodesia meant that the main constitutional issue during the period under discussion was perceived from all sides as being black participation, and its extent, in these institutions. In the constitutional debates blacks and whites were regarded as cohesive groups - in a consociational perspective, they were regarded as the communal segments. But this, apart from any other factors, mitigated against the chances of a fully consociational arrangement, because instead of a favourable multiple balance of power, there was an unfavourable imbalance between two groups only.[2] Furthermore the 'consociational' accommodation reached in the 'internal agreement', and the consociational devices adopted during the transitional period and in the Zimbabwe-Rhodesia constitution, were not successful because the crisis of legitimacy had not been resolved; if anything the consociational devices may have exacerbated the conflict during this unrepresentative phase of government. But once the accommodation of legitimacy had been reached at Lancaster House the position changed significantly. This agreement was itself a consociational accommodation, a self-conscious 'union of opposites', in which accepted leaders reached a constitutional compromise which was more acceptable to all parties than a continuation of the political and military conflict. It was still not possible to make the constitution fully consociational, because in relation to the black and white 'segments' there was still a massive demographic imbalance. Nevertheless it was possible to include in the independence constitution several consociational devices, such as the over-representation of whites in parliament and the legislative veto, and although these have created serious tensions they have been politically successful, at least in the short term, because the basic legitimation problem had already been overcome. For the same reason it was possible to form a coalition cabinet without any institutional inducement,

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1. See L.J. Boulle 'Federation and Consociation - Conceptual Links and Current Constitutional Models' 1981 THR-HR 236 at 252.

2. Blacks outnumbered whites by approximately twenty-five to one.

although this must also be attributable to the remarkable degree of statesmanship and moderation displayed by the prime minister. The only characteristic of consociationalism which was not in evidence was segmental autonomy, but this was an inevitable exclusion in view of the sparsity of whites in a large territory, and the need for a strong national government. Without going so far as to draw constitutional lessons for South Africa from the Zimbabwean experience, it is relevant to observe that the consociational institutions in that country only became effective after the legitimacy crisis had been resolved;[1] this point alone is of comparative relevance for constitutional developments in South Africa.

(c) The National States

A new source of comparative constitutionalism in southern Africa has been provided by the conferment of constitutional independence on the national states since 1976, which has resulted in the enactment of an independence constitution in each case. The first example was not promising from a comparative point of view, as the relevant model for Transkei was clearly the South African constitution; moreover it has been said of the Transkeian constitution that,

> '... it is impossible to detect any feature adopted or adapted from the numerous constitutional experiences elsewhere in the new nations of sub-Saharan Africa or Asia.'[2]

The Bophuthatswana and Venda constitutions proved to be slightly more exotic, although they have little direct significance from the consociational perspective. Nevertheless, without providing a detailed description of the various constitutional systems,

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1. Cf M. Hirsch 'Lessons from Rhodesia for Constitutional Change in South Africa' in F. van Zyl Slabbert and J. Opland (eds) South Africa: Dilemmas of Evolutionary Change (1980) 54-70.

2. W.B. Harvey and W.H.B. Dean 'The Independence of Transkei - A Largely Constitutional Inquiry' 16 (1978) Journal of Modern African Studies 189 at 213.

it is proposed to refer to three matters of indirect relevance to this work.[1]

(i) Parliamentarianism and presidentialism combined

While the Transkei constitution provided for the traditional Westminster diffusion of executive power between the head of state and head of government, and relied on Westminster constitutional theory and practice to resolve possible conflicts between the two, the Bophuthatswana constitution combined aspects of parliamentarianism and presidentialism within a single system;[2] with a few unimportant exceptions this arrangement was followed in the Venda constitution as well. The Bophuthatswana President is elected for a five year period by an electoral college consisting of the members of the national assembly,[3] and he must himself be a member of the assembly.[4] He is subject to dismissal during his term of office on impeachment by the assembly,[5] and is eligible for re-election unless the assembly resolves to the contrary.[6] The President is both head of state and head of the executive government.[7] In exercising the latter functions he must consult the members of his executive council,[8] who are appointed by him from the ranks of the legislature.[9] No constitutional provision is made for a prime minister, and the speaker of the assembly serves as acting President when the office is vacant or the executive council considers the incumbent to be unable to perform his duties.[10]

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1. See generally M. Wiechers Staatsreg (3 ed, 1981) 502-524. A perceptive article on the Transkei constitution is I. Rautenbach 'The Constitution of Transkei' 1977 TSAR 199; see also Harvey and Dean op cit, Booysen, Wiechers, Van Wyk & Breytenbach 'Comments on the Independence and Constitution of Transkei' 1976 SAYIL 1. On Bophuthatswana see M. Wiechers and D.H. van Wyk 'The Republic of Bophuthatswana Constitution' 1977 SAYIL 85, and on Venda, G. Carpenter 'The Independence of Venda' 1979 SAYIL 40. The Ciskei acquired constitutional independence in December 1981 and it had not been possible to obtain a copy of the constitution by the cut-off date of this work.

2. See Wiechers and van Wyk op cit 94ff.

3. Except for the three members whom he can appoint personally to the assembly. Bophuthatswana Constitution Act s 39(1).

4. S 21(4).

5. S 25.

6. S 23(2).

7. Ss 19 and 20(1).

8. S 31.

9. S 35.

10. S 26. It has been suggested (Wiechers and Van Wyk op cit 96) that because of the President's dual status the conventional position of a senior or prime minister, who would preside over cabinet sessions, could arise, but this could not lead to the full Westminster cabinet system of government.

The relevance of this arrangement from a consociational point of view is that the semi-separation of powers which it introduces is a favourable institutional feature for a consociational system.[1] The system is not fully presidential, in that the President has no mandate separate to that of the legislature and he is constitutionally limited in the choice of his cabinet, but in relation to the grand coalition principle it combines the advantages of both presidentialism and parliamentarianism. Thus the fact that the President is elected for a five year term, and that he and his cabinet are not dependent on the continued support of the legislature, provides the institutional leeway for a coalition cabinet to act as a 'conspiratorial élite cartel' and to effect compromises for which they will not be directly accountable in parliament. And the fact that the cabinet has to be chosen from members of the legislature facilitates the formation of a grand coalition, in that all parties represented in parliament could be drawn into the cabinet. On the other hand the major disadvantage of this arrangement is the predominant institutional position of the President: unlike the Swiss system, with which it has several similarities, there is no rotation of the presidency, and this would prevent the emergence of a collegial cabinet.[2] In practice the Bophuthatswana President dominates the political process and the system of government is unconsociational. Nevertheless the comparative value of these features remains.

(ii) Traditional and modern combined

The Transkei, Bophuthatswana and Venda constitutions all afford significant recognition to traditional leaders in the legislature and purport to balance their authority and power with that of the representative leaders.[3] In all cases the arrangements correspond to some degree with those in force before indepen-

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1. The optimal constitutional framework for consociationalism is described at 400 to 405, below.

2. The position is exacerbated somewhat by the fact that, with certain exceptions, the dignity and reputation of the President is protected - s 28 (cf s 13 of Act No 32 of 1961 and S v Beyleveld 1964 (1) SA 269 (T)); this provision could be abused in relation to his political functions. In Transkei the anomaly does not apply - cf S v Dalindyebo 1980 (3) SA 1049 (TK).

3. See Rautenbach op cit 206f.

dence,[1] which have in turn often had a crucial bearing on the pre-independence power structure and the very decision to accept independence;[2] there has also been a consistent avoidance of bicameralism, with its potential for institutionalising the potential opposition between traditional and modern rulers.

The Transkeian independence constitution makes provision for parity of representation between chiefs and elected members in the unicameral legislature.[3] All paramount chiefs are automatically entitled to seats, and the remaining chiefs are appointed according to a procedure provided in the constitution;[4] the former category may also be represented by nominees in the proceedings of the assembly.[5] The status of chiefs is thus constitutionally secured in this arrangement, but they become ordinary members of the legislature and, where appropriate, the executive. The Bophuthatswana constitution also provides for the equal representation of chiefs and elected members in the legislature, although in this case the latter are in an overall minority because there is provision for three additional members to be nominated by the President.[6] The chiefs are appointed by the twelve regional authorities in the country,[7] and although they become ordinary members of the unicameral legislature they can exercise a veto power vis-à-vis the elected component. This can be effected if thirty members[8] of the assembly petition the speaker for any decision (save in respect of an appropriation bill) to be decided separately by

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1. These in turn built upon the 'Bantu Authorities' system described in chapter 4 (above) in which the election principle had been superceded by one of ascription.

2. See P. Laurence The Transkei - South Africa's Politics of Partition (1976) 63-78; L.J. Boulle The Changing Constitution (1979) 38.

3. Transkei Constitution Act, s 22 read with s 29(1).

4. S 29(2). 5. S 28(1).

6. S 38(1). The nominated members do not have voting rights. A similar position prevails in Venda where the elected members constitute an overall minority in parliament (cf ss 24 to 41 of the Venda Constitution Act).

7. S 38(2).

8. There are altogether forty-eight elected and forty-eight ex officio members.

the elected and ex officio components of the house, in which case a concurrent majority in each component is required for the matter to be approved.[1] This consociational institution provides the chiefs with a strong source of influence in the legislative process; on the one hand it could be used to secure legislative compromises, but on the other to obstruct progressive legislation which might threaten their aristocratic position. A second device is provided to promote 'obligatory conciliation'[2] between the traditional and modern elements, namely the requirement that they must jointly and severally approve a motion calling for the removal of the President.[3] This ensures, in the eventuality of political polarisation, a mutual veto for the two groups[4] in relation to the tenure of the most important political figure. Thus apart from the vantage arising from their numerical strength, the Bophuthatswana chiefs are given additional sources of potential influence through a consociational veto device.

The formal status of traditional elements in African independence constitutions has shown great variation from country to country, and has at times been an issue of contention.[5] It can be said that in most jurisdictions the political power of traditional rulers has been eclipsed in the immediate post-colonial period; in some cases they have been left with the forms of authority but deprived of effective power, and in only a few cases have they retained the forms of authority and been allocated a power-sharing role.[6] Even the ideal of bestowing on such rulers powers commensurate with those they possessed before independence[7] is somewhat illusory, because of the distortions

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1. S 49(3). The veto is only effective for one year. In theory it also avails the elected members, though their need for it seems more remote.

2. Wiechers and Van Wyk op cit 94.

3. S 24(2)(c).

4. It also entails that the President is protected from removal if he enjoys only majority support of either group, but this could prejudice his re-election for which approval by a majority of all assembly members is required.

5. For an overview of some of these countries see S.A. de Smith The New Commonwealth and its Constitutions (1964) 155-166.

6. Ibid.

7. Cf Rautenbach op cit 206.

which may have occurred in the status of the chiefs, and in traditional concepts of public law, during the colonial period. In the comparative African context, however, the position of the chiefs in the homeland states, as measured by their potential influence in the legislature, is strikingly unique. In those African states which uncharacteristically opted for bicameralism there was even an avoidance of placing chiefs in a weak upper house, in spite of the initial attraction to this arrangement.[1] In the case of the more preponderant unicameral systems there was also little express provision for traditional leaders and, where there was, never to the same extent as in the homeland constitutions.[2]

In political terms it is difficult to evaluate the attempted integration of traditional and modern elements in the national states positively, because of the numerical strength of chiefs and the impossibility of the electorate gaining a legislative majority through the electoral process. While it is argued that the chiefs are the 'natural leaders' in these states, it has been pointed out[3] that when chiefs came to be included in the hierarchy of tribal, regional and territorial authorities in the 'Bantu Authorities' system[4] they began to lose their prestige, as they represented the white bureaucracy, often against their own people. With the advent of self-government they became salaried administrators in the homeland administration, susceptible to administrative removal, and understandably sensitive to the wishes of the homeland and Pretorian govern-

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1. M.H. de Minón 'The Passing of Bicameralism' 23 (1975) American Journal of Comparative Law 236. The Botswana constitution instituted a House of Chiefs with advisory powers but no formal legislative function. See J.C. Bekker 'Kapteins in die Wetgewende vergaderings van Botswana en Transkei' 1978 (3) TSAR 268.

2. Outside southern Africa only Gambia and Sierra Leone expressly accommodated chiefs in the legislature, most pronouncedly in the latter case with twelve chiefs out of one hundred members. Botswana, Lesotho and Swaziland also made some constitutional reference to chiefs. Bekker op cit 269; W. Breytenbach 'Kapteinskap en Politieke Ontwikkeling in die Tuislande' 1975 Afrika-Instituut Bulletin 328 at 329. On the position of chiefs in the Zimbabwe Senate see above, 236 to 247.

3. W.D. Hammond-Tooke Command or Consensus - The Development of Transkeian Local Government (1975) 206-215; see also N.M. Stultz Transkei's Half Loaf - Race Separatism in South Africa (1980) 50-54.

4. By Act No 68 of 1951. See the description in chapter 4, above.

ments.[1] Likewise in terms of the independence constitutions chiefs are dependent for their appointment and powers on the homeland governments.[2] It is also ironic that the chiefs have been accommodated in legislative authorities, when the chief's original position was that of an upholder of tradition and seldom a legislator or initiator of change.[3] But from a comparative constitutional point of view these factors draw attention to the over-neglected principles of African public law; according to these principles consensuality was an important feature of the political decision-making process,[4] and authority itself had to be 'consensually legitimated'.[5] Both these aspects are more in accordance with consociationalism than majoritarianism.

(iii) Constitutionalism and a bill of rights

The Bophuthatswana constitution embodies an institution wholly alien to the Westminster and South African constitutional traditions, a justiciable bill of rights:[6] enjoying prominence after the introductory provisions is a 'Declaration of Rights'[7] comprising eleven sections. In content the Declaration is modelled on the European Convention on Human Rights,[8] and the rights therein may be broadly classified as liberal. As commentators[9] have observed, the Declaration avails all inhabitants of the territory, whether they are nationals or aliens, thus precluding parliament from favouring nationals in any legislation; conversely, however, the approximately fifty percent of Bophuthatswana nationals permanently domiciled outside the territory (and most pertinently those in South Africa) will derive no benefits from these constitutional guarantees in their

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1. See Stultz op cit 52.
2. See, eg, s 66 of the Transkei Constitution Act.
3. Hammond-Tooke op cit 212.
4. Ibid 67.
5. Ibid 74.
6. See on this subject Wiechers and Van Wyk op cit 88-93.
7. Ss 8-17.
8. Noticeably, the Bophuthatswana Declaration makes no reference to the right to form trade unions nor a right of conscientious objection, as does the European Convention.
9. Wiechers and Van Wyk op cit 89.

places of residence and employment. The fundamental rights are declared to be binding on the legislature, executive and judiciary, and their enforceability is entrusted to the Supreme Court; in terms of section eight of the constitution any person may apply to the Supreme Court in the appropriate manner to enforce any constitutional rights, and the court is empowered to adjudicate in such matters and make the necessary orders. The rights and freedoms referred to in the declaration may only by restricted by a law of parliament with general application, but not to the extent that a right or freedom is totally abolished or encroached upon in its essence;[1] it could also be argued[2] that any legislative restriction of a fundamental right amounts to a constitutional amendment, and should therefore be effected according to the rigid amending procedure.[3] In this connection the overall supremacy of the constitution and the implied system of judicial review,[4] both hallmarks of constitutionalism, should be mentioned as salient innovations in the southern African constitutional tradition.[5] The relevance of these factors to the theme of this work is that consociationalism assumes a deep sense of constitutionalism, and if South Africa is

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1. S 18.

2. Cf Wiechers and Van Wyk op cit 93.

3. S 79. The amendment of the first ten chapters of the constitution requires a two-thirds affirmative vote in the assembly unless the s 49(3) procedure is petitioned for, in which case a two-thirds majority is required in each component group of the assembly. Amendments to ch II (transitional and savings provisions) can be made by the ordinary legislative process, subject to the s 49(3) petition.

4. S 7. Laws inconsistent with the constitution will be void, but only if passed after independence. As many of the inherited South African laws (s 93(1)) would contravene the declaration of rights, a law revision commission was set up shortly after independence with the task of investigating such laws and suggesting appropriate reforms. In S v Marwane 1981 (3) SA 588 (BSC) the court declined to invalidate the South African Terrorism Act No 83 of 1967 for repugnancy to the Declaration, on the grounds that it was not passed subsequently to independence.

5. The legal and moral authority of these features was seen to derive from the 'national convention' attributes of the Bophuthatswana assembly when it performed its first task, namely the enactment of the independence constitution, and this factor is specifically alluded to in the preamble.

ever to adopt a consociational form of government, it will have to modify its constitutional system accordingly.

But the Bophuthatswana bill of rights, and its related features, has greater constitutional significance for South Africa than merely providing a more accessible comparative example than its European inspiration, for it introduced a new constitutional function for the South African Appellate Division. The Appellate Division was constituted as final appellate tribunal in respect of all decisions of the Bophuthatswana Supreme Court, on the same basis as appeals from the South African provincial division.[1] While this position endures, the Appellate Division will thus become the ultimate upholder of the constitution and enforcer of its provisions on fundamental rights, a situation of some irony in view of the alien nature of such a function in the South African and Westminster constitutional traditions. The position is, however, not without precedent: the relationship between the Bophuthatswana Supreme Court and the South African Appellate Division is analogous to that between the latter and the Judicial Committee of the Privy Council up to 1950, an analogy which has been expressly drawn by the Bophuthatswana court;[2] and as far as constitutional review is concerned, this was also an 'alien' function for the Privy Council when it acted as appellate tribunal on certain constitutional matters emanating from the dominions, in particular the federal states of Canada and Australia.[3] From the South African point of view this arrangement will afford the court an opportunity to adopt a more activist approach to statutory interpretation, as befits a fundamental constitutional document embodying numerous formal limitations on government. The Privy Council has been accused of 'incurable positivism' in constitutional matters,[4] and to avoid this danger the Appellate Division would,

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1. S 91(e).

2. S v Moloto 1980 (3) SA 1081 (BSC) at 1084 D (per Hiemstra CJ).

3. See E. McWhinney Judicial Review in the English-Speaking World (2 ed, 1960); L.P. Beth 'The Judicial Committee of the Privy Council and the Development of Judicial Review' 24 (1976) American Journal of Comparative Law 22.

4. McWhinney op cit 29.

in its new constitutional function, have to depart from its tendency towards positivism in the process of ordinary statutory interpretation.[1] It would require the re-evaluation, in their application to Bophuthatswana, of such doctrines as 'separate but equal' which have been accepted in relation to South African laws[2] but would seem incompatible with the Bophuthatswana Declaration of Rights.[3] In general it would require the Appellate Division to interpret and enforce the Bophuthatswana constitution, and in particular its provisions on fundamental rights, without undue interference with that country's own interpretations and evaluations of social circumstances.[4] This could be a valuable experience in the practice of constitutionalism for South Africa.

4. The Commissions

A large number of commissions of enquiry has, over the years, provided a significant contribution to the political and constitutional debate in South Africa, but the extent to which the recommendations of these commissions have materially affected political policies and constitutional developments is probably meagre. This may be attributed to factors such as the outright rejection by the government of the recommendations, including those of commissions appointed by the government itself, to the acceptance of the recommendations but the failure to implement them for financial or party political reasons, or to the acceptance of recommendations but the implementation of them in a

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1. See J. Dugard Human Rights and the South African Legal Order (1978) 393-397, and 'Judicial Power and a Constitutional Court' in L.J. Boulle and L.G. Baxter Natal and KwaZulu - Constitutional and Political Options (1981) 189-211.

2. Minister of Posts v Rasool 1934 AD 167; R v Abdurahman 1950 (3) SA 136 (AD); R v Lusu 1953 (2) SA 484 (AD). In the first case the court countenanced equal facilities for different colour groups as being not per se bad in law, and in the other cases set aside regulations which resulted in substantially unequal facilities.

3. S 9 of the Declaration of Rights could, through the process of judicial interpretation, be given the same scope as the 'equal protection' clause (Fourteenth Amendment) of the United States constitution.

4. The Bophuthatswana court (S v Moloto at 1084 C-E) has, on the Privy Council analogy, indicated that it considers itself bound by post-independence decisions of the Appellate Division, but this will have relevance mainly in non-constitutional matters.

manner not intended by the commission. Nevertheless some of the commissions have been influential in the broad constitutional field, and a description of their reports complements the institutional and comparative background against which the government's constitution is analysed. The reports could be distinguished as to whether they are official or non-official, and national or sub-national, but in what follows they are dealt with chronologically, and in a consociational perspective.

(a) The Tomlinson Commission[1]

The terms of reference of the Tomlinson Commission were to report on a comprehensive scheme for the rehabilitation of black areas with a view to developing them within a social structure in keeping with black culture and based on effective socio-economic planning.[2] The commission gave a wide interpretation to its terms of reference, as is clear from its recommendations bearing on the political framework of South Africa.

The findings of the Tomlinson commission were all based on its perception of the fundamental dichotomy facing South Africa, namely complete integration, or the separate development of the two main racial groups.[3] The commission's recommendations involved an unequivocal acceptance of the latter option, and it suggested certain steps for the practical realisation of separate development for blacks and whites, which would involve the full-scale development of black areas to provide for a diversified economy and the creation of development opportunities there. It recommended the consolidation of existing black areas on an ethnic basis into seven blocks, each of which would form the basis for black political development and in which blacks would be gradually incorporated into the administrative process. Several recommendations were made in relation to the financial requirements of the development programme, the conscientious implemen-

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1. The Commission on the Socio-Economic Development of Native Areas within the Union of South Africa was appointed by the government in 1950 and presented its report in 1954. An official summary of the report was published in 1955 (UG 61/1955) and all references are to the summary.

2. Report Summary xviii.

3. On this section see ch 50 of the Report Summary (194-208).

tation of which, it was pointed out, would result in dramatic increases in the proportion of the black population living in black areas.[1]

The commission was of the opinion that its socio-economic development programme would derive its driving force from the prospects it would offer blacks for forms of political expression.[2] It indicated as the first step in political development the assumption by blacks of responsibility for village boards, town councils and municipalities; thereafter administrative responsibility could be increased to government on a regional basis, which might eventually evolve into a system similar to the then provincial system in each of the seven black areas, with locally elected 'provincial governments'. No suggestion was made as to the possible independence of these areas. As a corollary to local and regional black political development in black areas it envisaged the loss of any claim to political rights in non-black areas, into which blacks would only be allowed entry as temporary migrant workers.[3] The Tomlinson commission saw its development programme as the 'logical implementation of state policy as laid down in 1913 and 1936',[4] a reference to the acts of those years[5] which restricted the use and occupation of land by blacks to certain specified areas. The partial geographic segregation established by those acts would now be complemented by economic development of black areas and a gradual

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1. The report cites proportions of 60% by 1981 and 70% by 2000 (Report Summary 203). In 1973 the following estimations of blacks in the homelands and 'common area' were made:

	1980	1985
Homelands	9 675 300	11 221 700
Common area	10 406 200	11 708 200

Mostert, Van Eden, Van Tonder Population Projections for the Black Populations in the Different Homelands and the White Areas of South Africa, 1970 - 2010 (1973).

2. Report Summary 211.

3. Here the Tomlinson report differed fundamentally from the earlier Fagan report (Report of the Native Laws Commission, 1946-48 (U.G. 28/1948)) which recognised that total segregation, in the sense of partition with the transfer of populations, was impossible, and recommended the acceptance of the full implications of a permanent urban black population. For an approving account of the Fagan report see H. Brotz The Politics of South Africa (1977) 132-150.

4. Report Summary 195.

5. The Natives Land Act No 27 of 1913, and the Native Trust and Land Act No 18 of 1936.

accretion of black political rights, so that separate development, as advocated by the commission, would lead to geographical, economic and political separation of blacks and whites.

In its white paper[1] on the commission, the government accepted some and rejected other parts of the report.[2] It rejected as impracticable and unacceptable the consolidation of the existing black areas into single cohesive blocks, and it rejected the majority view that white entrepreneurs should be able to establish industries in the reserves and that 'white' capital be used generally in the economic development programme.[3] Those sections of the report which were accepted were never funded over the years according to the commission's estimates, and the administration was never capable of carrying out the measures necessary for the projected economic development.[4] The result was that the social and economic reorganisation of the reserves, which were essential to the attainment of 'ultimate separate development', was never achieved along the lines recommended by the Tomlinson commission.[5]

Economic underdevelopment, however, was not seen by the government as irreconcilable with political advancement in black areas, and the vague political guidelines set out in the Tomlinson report were to be rigidly pursued as far as the future constitutional development of the homelands was concerned. The Promotion of Bantu Self Government Act of 1959,[6] an elaboration of the earlier

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1. White Paper on the Development of Bantu Areas, published in May 1956.
2. On the black response to the report see Carter, Karis and Stultz South Africa's Transkei (1967) 18.
3. It thereby accepted the minority recommendation (of two of the nine commissioners) which viewed white participation in the economic development of the reserves as contrary to the policy of separate development.
4. See Butler, Rotberg and Adams The Black Homelands of South Africa (1977) 160.
5. On the contemporary economies of the national states see J. Nattrass The South African Economy (1981) 190-224. In 1975 the homelands produced 3% of South Africa's total economic output, although they contained 35,8% of the total population.
6. Act No 46 of 1959.

Black Authorities Act,[1] became an important statutory step in the implementation of separate development policy and the homelands programme,[2] and the preamble to this act showed the unmistakeable influence of the Tomlinson report. In the strategy to reduce the number of blacks who could demand political rights in the republic, great emphasis came to be placed in the ensuing years on the forms of political structures and constitutions,[3] so that independence was eventually obtained without the 'reorientation of the economic structure' which the commission correctly perceived to be necessary to alter the process of integration.[4] The legitimacy crisis of the 1980's may be partially attributed to the failure of 'ultimate separate development', through the outpacing of social and economic realities by constitutional development; the government's 'constellation of states' and 'regional economic organisation' strategies of the 1980's may be seen as a response to this failure.[5]

In calling for a serious rethinking of the reports of various commissions, Wiechers[6] has suggested that the recommendations of the Tomlinson commission, as well as those of the Fagan and Theron commissions, 'point to kinds of consociational arrangements which include elements of federalism and group accommodation'. Reference has already been made[7] to the affinity between separate development and consociationalism, as well as the differences between them. The consociational elements of separate development, however, have been conceived and implemented on an authoritarian, rather than a democratic basis, and their contemporary fate are further illustrations of the fact that consociational institutions, such as homeland 'segmental autonomy', will not in themselves resolve the legitimacy crisis in South Africa and that a prior accommodation of legitimacy is a necessary, though by no means a sufficient, condition of their success.

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1. Act No 68 of 1951.
2. See above, 182-194.
3. Carter, Karis and Stultz op cit 54.
4. Report Summary 194.
5. See chapter 7, below.
6. M. Wiechers 'Possible Structural Divisions of Power in South Africa' in J. Benyon (ed) Constitutional Change in South Africa (1978) 107 at 115.
7. See above, 203 to 205.

(b) The Theron Commission[1]

The Theron commission had wide-ranging terms of reference relating to the past and future development of coloured persons in the social, economic, constitutional and cultural fields. While it was empowered to make recommendations relating to the development of coloureds in these fields, the prime minister[2] emphasised shortly before the release of the report that the commission had not been appointed to devise an alternative to the government's existing policy on coloured persons, but to suggest ameliorations which could be effected in terms of that policy. In the event, the government was to reject several of the key social and political recommendations of the commission which came in conflict with its existing policy.

Of the one hundred and seventy-eight recommendations made by the Theron commission, only one had a direct bearing on the constitutional question of political rights for coloured persons.[3] In view of the subsequent distortions of this recommendation it is appropriate to quote it in full:

> 'Since the Coloured population has no direct share or say in the decisive legislative institutions of the Republic of South Africa (ie Parliament, provincial councils, municipal councils and rural local authorities), and the successful development of the alternative measures taken for purposes of Coloured representation and self-determination is being hampered by strong opposition from the vast and effective majority of Coloureds, as well as by constitutional anomalies which in the opinion of the Commission cannot be eliminated satisfactorily and adequately, the Commission recommends that:
>
> (a) with a view to the further extension of the political civil rights of Coloureds and the creation of opportunities for more constructive participation and co-operation, provision be made for satisfactory forms of direct Coloured representation and a direct say for Coloureds at the various levels of government and on the various decision-making bodies;

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1. The Commission of Enquiry into Matters Relating to the Coloured Population Group was appointed on 23 March 1973 (Proc 81 Gaz Notice 442) and its report (RP 38/1976) was tabled on 18 June 1976. The commission consisted of twelve whites and six coloured persons.

2. House of Assembly Debates vol 12 cols 5133-4 (21 April 1976).

3. Para 178.

> (b) with a view to the implementation of the proposal above, a committee of experts be appointed to make more detailed proposals in regard to the organisational and statutory adjustments required, provided that due regard shall be had to all the problems and considerations set forth fully in Chapters 17 and 21 of this report;
> (c) in the process of constitutional adjustment it will have to be accepted that the existing Westminster-founded system of government will have to be changed to adapt it to the specific requirements of the South African plural population structure.'

The first part of this recommendation was approved by a majority of eleven commissioners to seven but was not accepted by the government in its white paper,[1] and would clearly have involved a major deviation from prevailing policy. In its new constitutional proposals, which were first publicised the following year, the government underlined its rejection of this recommendation, by providing for an increase in the status and powers of the Coloured Persons Representative Council and making no provision for coloured participation in existing political institutions; this involved a continuation, rather than adjustment, of past constitutional trends. The second part of the recommendation was formally accepted by the government, but instead of appointing the 'committee of experts' envisaged in the report, it formed a cabinet committee[2] whose findings formed the basis of the government's 1977 constitution. The third part of the recommendation was more enthusiastically accepted by the government and has been continually restated in various forms since 1976, despite its rather dubious assumption.[3] Another feature of the reformulations of this recommendation of the Theron commission is that they inevitably involve a reversal of the commission's priorities,[4] in that emphasis is given to the need to move away from Westminster, in contrast to the commission's own emphasis on the need for a direct coloured voice in government, which is often ignored;[5] this

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1. Provisional Comments by the Government on the Recommendations of the Commission of Inquiry into Matters Relating to the Coloured Population Group W.P. S - '76. A second, and 'final' white paper was tabled in 1977 - W.P.D. - '77.

2. The committee comprised the following cabinet ministers: Mr P.W. Botha (chairman), Dr C.P. Mulder, Mr J. van der Spuy, Mr O.P. Horwood, Mr M.C. Botha, Mr S.J. Steyn and Mr H. Smit (secretary). The coloured commissioners had emphasised that the committee of experts should include coloured persons.

3. See the analysis in chapter 4, above.

4. See H. Brotz The Politics of South Africa (1977) 96.

5. See, for example, the National Party pamphlet New Political Dispensation for White, Coloured and Indian (Oct. 1977) 6.

phenomenon gives (unwitting) support to the dissenting minority of commissioners, for whom the need to move away from the Westminster system was a point of departure, and not a corollary.

The Theron report was not to have any immediate effect on the constitutional development of the republic since its main constitutional recommendations were inconsistent with the government's existing policy. Nor was the government prepared at the time to accept other recommendations which would have necessitated changes to matters closely related to the constitutional system - amendments to group areas legislation, termination of the mixed marriages prohibition, the opening of separate amenities, and the combining of separate administrations. When the CPRC was discontinued in 1980 and its successor, the Coloured Persons Council, was still-born the same year, the notion of future coloured representation in parliament became prevalent - at least in the speculations of the media - and it seemed that the Theron political option might be accepted after all. But since then the government has indicated its intention to implement the 1977 constitutional proposals, albeit in slightly modified form, and the Theron option seems a more remote eventuality.

Little can be said of the consociational implications of the Theron report's constitutional approach for reason of the absence of any institutional detail. It shares with consociationalism a rejection of the Westminster system of government, but to imply an acceptance of the main consociational principles[1] would not be possible on the evidence available.

(c) The Wiehahn and Riekert Commissions

In 1977 the government appointed two commissions of enquiry whose reports were to have a direct bearing on the government's political strategy in the late 1970's and early 1980's. The Wiehahn

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1. Cf M. Wiechers 'Possible Structural Divisions of Power in South Africa' in J. Benyon (ed) Constitutional Change in South Africa (1978) 107 at 115.

commission[1] was empowered to investigate the country's labour legislation as administered by the Department of Labour and Mines[2] so that effective provision could be made to meet changing needs. The Riekert commission[3] was appointed to enquire into all legislation directly or indirectly affecting the economic use of manpower, excluding that being investigated by the Wiehahn commission; it was in fact to examine statutes with a close bearing on constitutional matters, such as the Community Councils Act,[4] the Black (Urban Areas) Consolidation Act,[5] the Group Areas Act[6] and the Black Trust and Land Act.[7]

The Wiehahn commission, which has been described as the most representative commission that the National Party government has ever appointed,[8] issued a series of reports in 1979, 1980 and 1981, of which the first part was the most important.[9] It recommended the repeal of nearly all statutes which discriminated in the area of industrial relations, and advocated a unified system of collective bargaining and complete freedom for workers in their choice of trade union. In the statutory reforms which followed this report a National Manpower Commission was created to investigate labour matters and make appropriate recommendations, an Industrial Court was instituted to replace the Industrial Tribunal, statutory job reservation was abolished, provision was

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1. Commission of Enquiry into Labour Legislation and Other Related Matters.
2. Inter alia, the Industrial Conciliation Act No 28 of 1956, the Black Labour Relations Act No 48 of 1953, the Wage Act No 5 of 1957, the Factories, Machinery and Building Works Act No 22 of 1941, and, after its term had been widened, the Mines and Works Act No 27 of 1956.
3. Commission of Enquiry into Legislation Affecting the Utilisation of Manpower.
4. Act No 125 of 1977.
5. Act No 25 of 1945.
6. Act No 36 of 1966.
7. Act No 18 of 1936.
8. S. van der Horst 'Employment' in S. van der Horst and J. Reid (eds) Race Discrimination in South Africa (1981) 34.
9. Report of the Commission of Enquiry into Labour Legislation - Part I R.P. 47/1979. The government's response was contained in White Paper W 5/1979. And see A. de Kock 'Three Commissions' 1 (1980) Industrial Law Journal 26ff.

made for the recognition and registration of black trade unions, and provision was made for the general inclusion of blacks in the statutory system of collective bargaining.[1] On one issue of relevance to this work the government hesitated in accepting the Wiehahn strategy, which was that of regulating all employees in South Africa, regardless of race or nationality.[2] The government responded by amending the definition of 'employee' (which determines eligibility for trade union membership) in the Industrial Conciliation Act,[3] but only so as to include blacks with South African nationality and with permanent residence rights in the republic outside the homelands.[4] This arrangement excluded foreign blacks, statutory aliens (that is those denationalised by the various Status Acts), and 'frontier commuters' (that is employees working in 'white' areas but without section ten rights). Subsequently the position was amended by ministerial proclamation[5] so as to incorporate all black South Africans, as well as nationals of states which previously formed part of the republic, but their right to join unions continues to exist by virtue of ministerial exemption. In taking this step the government appeared to contradict its own meticulous denationalisation process affecting blacks associated with the independent homelands,[6] preferring instead the strategy of regulating the whole labour force located within the republic.[7] Another recommendation only subsequently accepted by the government was the right of trade unions to determine whether their membership would be multiracial or not, without any need for ministerial permission.

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1. These changes were effected mainly by the Industrial Conciliation Amendment Act No 94 of 1979, which amended the Industrial Conciliation Act No 28 of 1956. See S. van der Horst op cit 35; W.B. Gould 'Black Unions in South Africa: Labour Law Reform and Apartheid' 17 (1981) Stanford Journal of International Law 99-162.

2. For the commission's majority and minority views on this matter see the Wiehahn Report Part I § 3.43 - § 3.63.

3. S 1.

4. In terms of s 10 of Act No 25 of 1945.

5. Notice R 2167 in Gov Gaz No 6679 (28 September 1979).

6. This matter is dealt with in detail at 495 to 498, below.

7. That is apart from foreign nationals who continued to be excluded, although they comprise a significant proportion of the labour force.

The report of the one-man Riekert commission[1] was published in 1979, and its recommendations were purportedly designed to accord a better deal to urban blacks and to create stable urban black communities. In common with the Wiehahn report it advocated the repeal of discriminatory legislation, in this case relating to the employment and training of labour, and entry into white South Africa, which should become dependent on the availability of employment and housing.[2] The report recommended that a new composite statute, the Black Community Development Act, be enacted for the positive development of urban and rural black communities outside the homelands and to replace several existing statutes.[3] Part of the Riekert strategy was to give urban blacks preference over migrant workers in regard to existing facilities, and it accordingly recommended measures to tighten up influx control;[4] a number of specific recommendations were made in respect of section ten of the Black (Urban Areas) Consolidation Act[5] the effect of which would be to link influx control to the availability of work and approved housing.[6] The report also recommended increased formal mobility for qualified urban blacks by allowing section ten qualifications to be transferred from one urban area to another; although this recommendation was implemented by the government[7] it was not a significant innovation as inter-city mobility was made dependent on the availability of housing, the shortage of which was, in the commission's own findings, a major problem.

Although the government accepted most of the Riekert recommendations, their statutory implementation was to be much slower than in

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1. Report of the Commission of Enquiry into Legislation Affecting the Utilisation of Manpower RP 32/1979. The government's response was contained in White Paper WP T - 1979.

2. S. van der Horst op cit 52f.

3. Such as the Black (Urban Areas) Consolidation Act No 25 of 1945, the Black Affairs Administration Act No 45 of 1971, and the Community Councils Act No 125 of 1977.

4. Thus, eg, the fines for employing unregistered blacks were increased by the Laws on Plural Relations and Development Second Amendment Act No 98 of 1979, which amended s 10 bis of the 1945 Consolidation Act.

5. Act No 25 of 1945.

6. A number of these recommendations, eg the repeal of the 72 hour provision, were not accepted in the white paper.

7. GN R1208 GG 7068 of 13 June 1980 (Reg Gaz 3018) amended reg 14 of the Black Labour Regulations of 1975.

the case of the Wiehahn report. In October 1980 the government published, for discussion and comment, three bills[1] which were designed to give effect to those recommendations approved by the government. While the bills included provisions relating to inter-city mobility, leasehold property rights and increased powers of local government for blacks, a closer examination revealed several harsh innovations such as the preclusion of any blacks from acquiring urban residence rights in the future. The bills clearly did not give effect to the principles on which the Riekert recommendations were premised, and they were withdrawn in early 1981 for further investigation.[2] By the end of that year they had still not reappeared.

The Wiehahn and Riekert reports embody several apparent deviations from the Tomlinson commission strategy and the government's own constitutional policies of the past. In the first place they involve the recognition that, whatever the feasibility of separate political institutions for blacks and whites, there can never be complete physical or economic separation; both commissions accept the permanence of blacks outside the homelands and make some provision for their economic and social development in their place of residence and employment. Secondly, they introduce certain inconsistencies into the constitutional distinction between nationals and aliens, in that 'statutory aliens' who qualify for residence rights would be entitled as well to some other non-political rights normally restricted to South African nationals. Thirdly, the Riekert report in particular draws sharper distinctions between those qualified for urban residence rights and those not so qualified; while the position of the former is designed to be improved, the opportunities of access for the latter to the 'white economy', and consequent benefits, are decreased. And fourthly, the Riekert report again accepts and reinforces the principle that urban blacks should have political rights in autonomous local government institutions in the

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1. The Black Community Development Bill, the Local Government Bill and the Laws on Co-Operation and Development Amendment Bill (Gov Gaz 7280, 7281 and 7282 of 31 October 1980 respectively).

2. By the Grosskopf commission, which had reportedly finalised its report by the end of the year.

'common area', a change of policy first introduced in the community councils legislation.[1] To the extent that the government has accepted these recommendations, it has committed itself to their future statutory implementation. A sense of perspective should be given to these apparent variations in policy, however, by emphasising that they have been accepted within the constraints of the existing constitutional framework - in particular they do not involve any accretion of political rights to blacks outside the homelands, other than at the local government level. Nor, it may be added, do they address themselves directly to the legitimacy problems affecting the existing institutions on which they build.

From a consociational perspective the Wiehahn and Riekert commissions have no direct relevance, but there is some indirect relevance in the repeal of discriminatory statutes in the industrial relations field. This allows workers the freedom of choice in joining trade unions, which is consistent with the consociational model; and the provision for free collective bargaining between employers and employees creates a type of functional autonomy which corresponds to the segmental autonomy of consociationalism. On the other hand the state has imposed new all-embracing forms of control over labour, and the principles of consociationalism have found no further application in this field.

(d) The Schlebusch Commission

The government's 1977 constitutional proposals were embodied in draft legislation and published in bill form in April 1979[2] and immediately referred to a joint select committee of both houses;[3] the terms of reference of the committee were to consider the introduction of a new constitution for the republic. At the end

1. See above, 179 to 182.

2. Republic of South Africa Constitution Bill Gov Gaz vol 166 No 6386 (3 April 1979).

3. House of Assembly Debates vol 8 col 3666 (30 March 1979).

of the parliamentary session the committee was converted into a commission of enquiry[1] consisting of twenty-four members of the House and Senate and with similar terms of reference. Both the committee and the commission had powers to take evidence and call for papers, and public sittings of the commission were held in various centres. Witnesses representing a range of political opinion testified before the commission and a wider range of memoranda was submitted to it. The commission was named after its chairman,[2] who subsequently became the first Vice-State President of the republic.

The Schlebusch commission presented a short interim report[3] in May 1980 which was to result in several deviations from the government's 1977 constitution. As with the Theron commission, it rejected the Westminster system as a normative model for the new South African constitution, and did so in the following terms:

> '... the Westminster system of government, in unadapted form, does not provide a solution for the constitutional problems of the Republic and under the present constitutional dispensation the so-called one-man-one-vote system will probably lead to minorities being dominated by majorities and to serious conflict among population groups in the Republic, with disastrous consequences for all the people in the Republic, and does not provide a framework in which peaceful co-existence in the Republic is possible ...'[4]

This again involved an unmotivated rejection of the Westminster system and an implicit assumption as to the Westminster nature of the South African constitutional system; the report went on to recommend the termination of the bicameral system in South Africa[5] which was heralded at the time as a decisive step in the movement away from Westminster, despite the fact that the Westminster system is fully reconcilable with unicameralism.

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1. Gov Not R1540 (6 July 1979). Regulations applicable to the commission were promulgated in Proclamation No 141 of 1979.

2. Mr A.L. Schlebusch, then Minister of Justice and of the Interior.

3. Interim Report of the Commission of Inquiry on the Constitution R.P. 68/1980.

4. § 8a.

5. The report emphasised that this recommendation did not imply the commission's long term commitment to unicameralism.

In paragraph ten of the Schlebusch report several recommendations were made in relation to the abolition of the Senate,[1] the entrenched clauses of the constitution, the appointment and role of a Vice-State President, the institution of a president's council, its composition and functions, and adjustments to the size of the House of Assembly. Each of these recommendations resulted in statutory amendments which are dealt with subsequently in this work in a consociational perspective, and they do not require specific analysis here. It should be observed, however, that none of the recommendations were motivated in the report, nor was a government white paper issued between the publication of the report and the enactment of constitutional amendments shortly thereafter.

The most significant feature of the Schlebusch recommendations were that, despite the commission's wide terms of reference, they related only to the constitutional development of non-blacks. The only reference to blacks was in oblique terms, namely that a committee of the president's council could, as one of its functions, consult with a council consisting of 'black South African citizens' to be established under an act of parliament, and although the government accepted the concept of a black council it dropped plans for its institution after vigorous objection from homeland and other black leaders. Implicit in the Schlebusch recommendations, therefore, was an acceptance of the Tomlinson vision that black political rights would be restricted to black areas. In relation to the president's council, however, they did contain a partial endorsement of the Theron commission's standpoint that coloured persons should participate on all decision-making bodies, although the non-representative nature of this body and its limited powers[2] rendered this a minimal concession within the overall context of the Theron recommendations.

A further noteworthy feature of the Schlebusch report was its formal deference to constitutional legitimacy and the importance

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1. See below, chapter 6. In their implementation some of the recommendations were also significantly adapted.

2. See below, 326 to 333.

of an authentic process of constitution-making. The report states,

> '... in the process of designing future constitutional structures there should be the widest possible consultation and deliberation with and among all population groups, in an attempt to raise the level of acceptability of any proposals in this regard ...'[1]

While there was no further elaboration of these sentiments (and they in fact contain certain implicit qualifications), they do stand in contrast to the government's previous assumptions about the process of constitution-making; nevertheless the Schlebusch commission itself was an unrepresentative body and its recommendations were themselves tainted with illegitimacy.[2] The minority report[3] was more elaborate in its recommendations on the constitutional process, and emphasised the need for urgent negotiation (as opposed to the majority's 'consultation and deliberation') among the recognised leaders and representatives of all groups in the country; it stressed that where the unilateral creation of new constitutional structures was imperative, these should be only interim in nature, and should be limited in function to matters relevant to constitutional development. Consistently with this view-point the minority recommended the establishment of an interim advisory 'Constitutional Council' consisting of members of all population groups, in order to advise on the development of a new constitution, and it rejected the establishment of the president's council in the form recommended by the commission. The minority also rejected other recommendations of the majority.[4]

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1. § 8(b).
2. See the views of Inkatha in its memorandum to the commission, § 1. (In W. Felgate 'Co-Operation Between Natal and KwaZulu - An Inkatha View' in L.J. Boulle and L.G. Baxter (eds) Natal and KwaZulu - Constitutional and Political Options (1981) 154 at 158).
3. Annexure B. This was signed by the four PFP members of the commission. On the PFP's concept of a national convention see above, 210.
4. That is the creation of a Vice-State President, and the increase in the size of the House of Assembly.

(e) The Ciskei (Quail) Commission

In 1978 the Ciskeian government appointed a commission[1] to enquire into and made recommendations on the practical feasibility of independence for the Ciskei, in the light of all relevant political, economic and social considerations. In membership the commission was more specialist than representative, but it did achieve unanimity despite a divergence of political views among its members.[2] The commission's programme was far-ranging and included enquiries into education, social welfare, nationality and citizenship, agricultural, economic and fiscal matters, and labour and industry; its report also included attitude surveys of blacks and whites towards the various options open to the Ciskei and Ciskeians.

The main constitutional recommendation contained in the Quail report[3] was that the Ciskei should seek an improvement in its existing political status by requesting additional powers from the central government, with a view to the attainment of 'internal autonomy'[4] and an eventual federal arrangement with the rest of the republic. The commission advised strongly against independence for the Ciskei, inter alia on the following grounds:[5] that the terms on which separation was available (as evidenced by the cases of Transkei, Bophuthatswana and Venda) were not favourable, that in terms of size and economic viability the Ciskei would be a poorly endowed state, that international recognition would not be forthcoming, that the attitude surveys showed a large majority of Ciskeians rejected independence, and that from a tactical point of view it would be unwise to accept constitutional independence and the loss of a claim to political and economic rights in South Africa while the republic itself was entering a phase of constitutional change. In the commission's

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1. Gov Not No 14 in Ciskei Official Gazette vol 6 no 177 (4 August 1978).
2. The members were G.P. Quail (chairman), P. Kilby, C.H. Lalendle, E.J. Marais, R.I. Rotberg, A.W. Snelling, M. van den Berg and R. Proctor-Sims (secretary).
3. Report of the Ciskei Commission (Conference Associates) 1980.
4. On this aspect see § 270-275 of the report, and pages 189 to 191, above.
5. § 306-332 and § 347.

view the political evolution of the Ciskei should rather be planned within the context of the new political arrangements being mooted for the rest of the country. In the light of these factors the report recommended[1] that the Ciskei should only opt for independence if the following conditions could be satisfied: a referendum of all Ciskeians indicated acceptance of this step, satisfactory citizenship arrangements affecting the new state were negotiated with South Africa, additional land was added to the Ciskeian territories, residential and employment rights of Ciskeians in the republic were expressly preserved, and South Africa agreed to provide equitable financial support. In the opinion of the commission[2] acceptance of independence would prove fatal to the emergence of any South African federal arrangement involving the Ciskei, and it is suggested that even a loose association, such as a confederation, should be settled on simultaneously with independence, and not thereafter. Similarly, in relation to the 'constellation of states' concept, which the South African government began promoting in 1978, the commission recommended[3] that, if this seemed an attractive prospect to the Ciskei government, it need not necessarily take independence as a means of attaining that particular goal.

From a consociational perspective the most significant aspect of the Quail report was the suggestion of a 'multi-racial condominium'[4] consisting of the unconsolidated Ciskei (including the white-owned areas earmarked for future incorporation), the 'corridor',[5] and East London - an area stretching from the Great Fish river in the south to the Great Kei in the north, and from the Stormberg mountains to the sea. Constitutionally this area would remain a part of South Africa, and all its inhabitants would remain South African nationals, for an experimental period of approximately a decade. It would have a high degree of internal autonomy, greater than that of the self-governing Ciskei but not as great as that of an independent state, and the discriminatory legislation of South Africa would not be enforceable within its boundaries.

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1. § 348.
2. § 282.
3. § 283-287.
4. § 333-339.
5. That is the strip of land between the Ciskei and Transkei, and including Queenstown in the north and East London in the south.

The form of internal government for the condominium would be subject to negotiation prior to its formation, but an essential feature would have to be the institutional provision for power-sharing between blacks and whites - without offering a constitutional blueprint the report suggested possible ways of achieving this objective.[1] These suggestions clearly have a strong affinity with the principles of consociationalism.

As far as fiscal and economic matters are concerned, these would be arranged in negotiations with the republican government, but the condominium concept would be based on the premise that, by remaining part of South Africa, the area would have the right to an appropriate share of the taxation and economic wealth of the whole country. The economic development of the broader region would be a decisive motivating factor of the condominium concept - it would allow the area to be treated as a single economic unit, it would satisfy the Ciskeian demands for consolidation, and it would allow East London to become a free port and the centre of an export manufacturing zone. In its political manifestation it would provide all the advantages of increased autonomy, without any of the disadvantages inherent in independence.[2]

Apart from the consociational system of government implicity advocated for the Ciskeian condominium, the Quail report also made passing reference to the desirability of a consociational system for South Africa generally.[3] In an analysis of unitarianism as a constitutional option for the republic (including the Ciskei), the report briefly compared and contrasted consociationalism with majoritarian and adversarial political systems. In a somewhat

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1. Eg a bicameral legislature with whites and blacks represented in separate houses of equal size and strength; a universal or qualified (but non-racial) franchise with each voter being able to vote for a black and a white candidate in each constituency, a legislative process involving minority vetoes and the need for close co-operation between the two houses, and a parliamentary government with the prime minister and cabinet being responsible to both houses.

2. The commission was unable to point to any close precedents for the type of arrangement it advocated, other than an Anglo-French condominium in the South Pacific and a former Anglo-Egyptian condominium in the Sudan.

3. § 292-293.

inconclusive fashion the report tended to discard consociational democracy as a realistic possibility for South Africa, on the grounds of its slow and cumbersome procedures and its probable unacceptability (as a species of power-sharing) to whites. But the report went on to suggest that on the basis of the government's commitment to the consociational incorporation of coloureds and Indians into the 'white' political system, and the marketability of consociationalism as a system for preventing the white minority from becoming powerless vis-à-vis the black majority, consociationalism could over time come to gain greater acceptance among whites; this approach tends to display a rather one-sided attitude to the question of legitimacy. However, the Quail report had little effect on the eventual terms of Ciskeian independence,[1] let alone on the government's national and regional constitutional programme.

(f) The Lombard Commission[2]

In 1980 a commission of enquiry was appointed by the private sector[3] to investigate alternative solutions to the problems which the South African government sought to solve through the 'consolidation of KwaZulu'.[4] The government had appointed its own consolidation committee, the Van der Walt commission, the previous year,[5] but the Lombard report was finalised and released well before the other,[6] and it strongly affirmed that the basic realities of KwaZulu were such as to preclude any consolidation formula from constituting a feasible and acceptable basis for the consti-

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1. For a full discussion of this matter see the parliamentary debates on the Status of Ciskei Bill: House of Assembly Debates vol 9 cols 4933-5159 (2nd reading, 28 September 1981) and vol 10 cols 6293-6337 (3rd reading, 9 October 1981). In fact the government's earlier response to the report had seemed favourable - House of Assembly Debates vol 12 col 5864 (7 May 1980).

2. Alternatives to the Consolidation of KwaZulu : Progress Report Bureau for Economic Policy and Analysis, University of Pretoria, Special Focus No 2 (1980). The report became better known under the name of its final editor, Prof J.A. Lombard.

3. The commission was appointed by the South African Sugar Association and the Durban Chamber of Commerce (although no mention is made of this in the report), and it consisted wholly of academics.

4. Lombard Report 3.

5. See House of Assembly Debates vol 10 cols 4464-5 (19 April 1979).

6. By the end of 1981 the Van der Walt report's findings had still not been made public.

tutional independence of Kwa Zulu.[1] It suggested that future deliberations should move away from the concept of consolidation-related transfers of land, towards the creation of legitimate political institutions which would allow the effective participation of the governed in the process of government.[2] The report recommended that the search for a new constitutional order in South Africa should be confined to a spectrum of options that,

> '... do not discriminate politically on grounds of colour as such, but at the same time avoid the spectre of colour majoritarianism in a unitary political system. Solutions might be found for the problems of our 'deeply divided society' in approaches that start at the regional level of such problems.'[3]

While it has a regional orientation, the report is not restricted to alternatives for the region of KwaZulu and Natal, but approaches the matter from a national constitutional perspective.

The bulk of the Lombard report[4] is devoted to a description of the 'basic realities' of Natal/KwaZulu, including the existing system of government, the legal system, demographic patterns, education, economic institutions and activity, and the political dynamics. It is on the basis of these realities, and particularly the economic interdependence of Natal and KwaZulu, that the report rejects the consolidation option. The next section[5] of the report is devoted to the 'basic ideas, values or principles' within which alternative solutions for the future of Natal/KwaZulu might be sought. These principles include the retention of the

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1. Ibid. The views of the commission can be seen as a partial extrapolation of the prime minister's earlier statements on consolidation. House of Assembly Debates vol 1 cols 241-4 (7 February 1979) and summarised at page 5 of the report.

2. Lombard Report 5.

3. Lombard Report 7. The rejection of majoritarianism is, however, sparsely motivated: '... majoritarianism under the present unitary constitution of the Republic is an extreme world ... beyond the bounds of realism. The various social cohesions in South Africa are deeply divided and, as in all other "deeply divided societies", majoritarianism has no chance of a democratic outcome.'

4. Section II.

5. Section III.

integrity of the republic as a sovereign state,[1] constitutional government and democratic participation, limited government[2] and free enterprise, and the division and separation of powers. The most important of these principles, and the one which the report recommends as the 'appropriate constitutional philosophy' for South Africa, is that of confederal government.[3] The main purpose of a confederation would be to solve the problem of political power-sharing by all peoples in the southern-African region (including the independent national states) and to strengthen the process of decentralisation of economic activities. It would also, in the commission's perception, resolve the citizenship issue, in that each citizen of the participating states might, 'in terms of his subordination to the circumscribed confederal institutions', also claim the protection of certain of his rights by these institutions.[4] In the South African context the confederal process would require the devolution of responsibility, authority and power on a meaningful regional basis, with only powers pertaining to truly common functions being retained at the central institutional levels. The constitutional form of the confederal political system would be 'a multilateral agreement between otherwise sovereign governments', with the qualification that each government's obligations under the agreement would be properly entrenched within its own constitution.

There is little in the way of direct motivation of the confederal alternative in the Lombard report. In part it builds on the 'confederal direction' evident in the government's homeland policy, which it describes as a form of political reform; it also

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1. This does not, however, seem to denote territorial integrity, but the authority of existing institutions. The report is confusing in its reference to the 'legitimacy of the Republic as a sovereign state' since legitimacy is not a feature of existing structures.

2. That is, limited government in the economic and not the constitutional sense. For Lombard's views on 'limited government' see his book Freedom, Welfare and Order (1978) 19-40.

3. Lombard Report 41-43.

4. Amidst this circumlocution the report seems to be implying that there could be a 'confederal nationality', in terms of which citizens of the constituent states would have certain rights, eg to a passport.

finds some justification for confederalism in terms of pluralist theory.[1] But it refrains from discussing the 'delicate problem'[2] of defining the geographic borders of the respective states in the confederation, which it leaves open to negotiation, and merely suggests certain guiding principles for this task - economic viability for each region, historical patterns of settlement, socio-cultural ties, and the importance of natural constituencies.

It is against the background of its recommendation of regional decentralisation as the means of creating a South African confederation that the Lombard report looks briefly at possible political configurations for the Natal/KwaZulu region.[3] In the light of the basic political and socio-economic realities of the region, and the principles already referred to, it suggests that three geo-political areas could serve as the 'building blocks'[4] for the area: the KwaZulu area, the white-owned rural area along the main transport corridors, and the Durban metropolitan area. Three levels of government would exist in the region - the local government level, which would include all municipal and submunicipal institutions, a subprovincial level serving each of the three abovementioned areas, and the Natal/KwaZulu regional level. At this last level legislative power would vest in a representative assembly, the members of which could be elected by the three subprovincial authorities which could, in the initial stages, be equally represented; the assembly would only have powers over matters truly common to the region. There could be a fixed-term executive council at this level, elected either by popular vote or by the assembly, and a judiciary could be appointed by the assembly or council and could have constitutionally-founded authority to invalidate acts of both these bodies. In addition a bill of rights could be incorporated into the regional constitution. Discriminatory legislation would be constitutionally outlawed in the region, although 'group rights' would be expressly recognised in the constitution. There is some uncer-

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1. Pluralist language is used in various parts of the report (eg at 7 and 38).
2. Lombard Report 43.
3. Section IV.
4. Op cit 49.

tainty as to whether local government would be territorially based, as the report refers to the desirability of 'communities' governing themselves at this level;[1] it is clear, however, that individuals would have unrestricted mobility, in terms of entry and establishment, among the three sub-provincial areas. As far as the constitutional relationship between an internally autonomous Natal/KwaZulu and the republic is concerned, the report suggests[2] that this could range from a federal arrangement with a 'weak' territorial distribution of power, through to partition with limited bilateral ties.

On the Lombard commission's own admission[3] its discussion of the constitutional alternatives for Natal/KwaZulu is tentative and incomplete.[4] Its recommendations are made in terms of general principles on which proposed new structures could be based, and no mention is made of electoral systems, public administration and fiscal arrangements. Its main significance lies in its suggestion of economic and political decentralisation along territorial-regional lines, which stands in contrast to the previous trends of a centralisation of power on the one hand, and the partial devolution to unconsolidated ethnically-based authorities on the other. Decentralisation in a confederal arrangement permits, by implication, regional differentiation in constitutional status and organisation, and while for the Natal/KwaZulu region a strong devolution of power with a three-tiered internal division of authority is recommended, there could be alternative arrangements for other regions; on this aspect the Lombard approach coincides with that of the Quail commission. In Natal/KwaZulu, furthermore, the constitution would be non-racial, discriminatory legislation would be outlawed, and 'race' classification as a basis of political representation would be avoided. There would be a strong spirit of constitutionalism and some resort would be had to consociational devices.[5]

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1. Op cit 50.
2. Op cit 51.
3. Op cit 48.
4. More concrete alternatives were examined at the Workshop on Constitutional Issues in KwaZulu and Natal, University of Natal, 27/28 October 1980. The papers of this conference are included in L.J. Boulle and L.G. Baxter (eds) Natal and KwaZulu: Constitutional and Political Options, (1981), and the edited proceedings in the Supplement to Natal and KwaZulu (1981).
5. The government was reported to have rejected the Lombard proposals because they envisaged a 'power-sharing' arrangement between whites and blacks - 1980 Annual Survey of Race Relations 9.

(g) The Buthelezi Commission

In 1980 the chief minister of KwaZulu appointed a commission of enquiry to 'consider the collective destiny of all people in Natal, with a view to making proposals which will add a new dimension to the political evolution of South Africa'.[1] The commission consisted of over forty members representing a wide range of backgrounds, academic disciplines, economic interests and political ideologies;[2] however neither the National Party nor the African National Congress served on the commission, although both were invited.[3] The terms of reference of the commission were broad and open-ended, and it was asked to make recommendations on the constitutional future of Natal and KwaZulu, and to relate these recommendations to the constitutional future of South Africa as a whole.

The findings of the Buthelezi commission were finalised in October 1981 but the report had not been released by the end of the year. According to press reports[4] the commission rejects constitutional independence for KwaZulu, and calls instead for the merging of Natal with KwaZulu in a regional federation. It also advocates a multi-racial system of power-sharing based on a universal franchise, a system of proportional representation, guaranteed representation for all groups in all branches of government (including the executive), a bill of individual and group rights, a minority veto, and an independent judiciary to test all legislation against the bill of rights. In the transition period the report is said to recommend a merger between the Natal Provincial executive committee and the KwaZulu cabinet. If this speculation is correct, then the Buthelezi commission will be advocating a constitutional arrangement for the region which bears the strong influence of all the principles of consociationalism.[5]

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1. See 1980 Annual Survey of Race Relations 50-51.
2. The chairman was Prof G.D.L. Schreiner, vice-principal of the University of Natal.
3. The NP declined the invitation (see House of Assembly Debates vol 11 cols 5131-4 (29 April 1980)) but attendance by the ANC was never a practical possibility.
4. See the Daily News 21 September 1981.
5. Professor Arend Lijphart was one of the overseas members of the commission.

(h) Other commissions

Brief reference has already been made to two other commissions investigating matters of constitutional significance for South Africa - the Van der Walt committee on the consolidation of the national states,[1] and the Grosskopf commission on urban blacks.[2] Of the other constitutionally-related commissions the most important is the departmental Niewoudt commission, which investigated aspects of nationality and citizenship. It has been speculated[3] that this commission recommended a 'confederal nationality' for all citizens of the constituent parts of the proposed constellation of states, to overcome problems caused by the denationalisation of homeland citizens and the international non-recognition of the national states;[4] the recommendations were submitted to the cabinet but were never publicized, and it appears that the concept of a 'confederal nationality' has been dropped, at least for the short term. Another recent report with implications for constitutional matters was that of the cabinet-appointed Human Sciences Research Council investigation into education;[5] this recommended, inter alia, a single department of education and a uniform national educational policy, but with a strong degree of organisational and functional decentralisation. In rejecting this recommendation[6] the government reaffirmed that, in terms of its policy that each population group should have its own schools, it was essential that each group should also have its own education authority or department; the government further emphasized that the recommendations on education would only be implemented within the government's constitutional framework, a clear commitment to the 1977 constitution. Finally in late 1981 a committee of the president's coun-

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1. At the end of 1981 provision was made for the size of the commission to be increased with the intention of enlarging its scope to deal with matters relating to non-homeland blacks as well. See the Laws on Co-operation and Development Act No 111 of 1981.

2. See above, 269.

3. See eg the Natal Mercury, 23 October 1979.

4. On nationality and citizenship see below, 488 to 508.

5. Report of the Main Committee of the HSRC Investigation into Education (1981). This became known as the De Lange Report, after the investigation's chairman.

6. Interim Memorandum on the Report of the HSRC on the Inquiry into the Provision of Education in the RSA (October, 1981). The government delayed detailed comment on the report until after March 1982.

cil recommended the reproclaiming of certain group areas, a matter dealt with subsequently.[1]

5. Conclusion

In this chapter a broad southern African comparative background to the government's 1977 constitution has been provided. Attention has been given to the constitutional policies of internal political parties, to various empirical constitutional practices in the region, and to the main recommendations of commissions of enquiry having a bearing on constitutional matters. The single theme which these diverging policies, experiences and recommendations have in common, is a rejection, in its constitutional dimensions, of unqualified majority rule; while the government's past and present constitutional policy also excludes the principle of majority rule, it also diverges from all the express or implied constitutional models which have been referred to. Apart from these factors it is not possible to synthesise the subject-matter of this chapter, which has revealed widely differing approaches to constitutionalism, consociationalism and legitimacy. The most consistent acceptance of consociational principles was encountered in the Progressive Federal Party's constitutional proposals, but in view of the remote chances of their implementation, notwithstanding the party's election successes in 1981, they have no greater immediacy or relevance than the other constitutional matters referred to. The political realities of South Africa indicate that the constitutional development over the next few years will be designed and imposed by the existing government as it responds to the various forces operating on the system. The government's first major response consisted of its 1977 constitution, as it has come to be known, and attention is given to this in the following chapter.

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1. At 345, below.

PART THREE

THE CONSOCIATIONAL OPTION

CHAPTER 6

THE GOVERNMENT'S 1977 CONSTITUTION

1. Introduction

Most commentators find the genesis of the government's 1977 constitutional proposals in the Theron commission report, which recommended that provision should be made for direct coloured participation in the existing institutions of government, that a committee of experts should be appointed to advise on the statutory amendments necessary to achieve this end, and that in the process of constitutional change the Westminster-founded system of government might have to be modified.[1] While the government rejected the first recommendation in favour of its existing policy of parallel development for coloured persons, it accepted the third, and ostensibly approved the second. Instead of appointing the committee of experts recommended in the Theron report, however, it appointed a cabinet committee to make recommendations on appropriate amendments to the existing constitution.[2] This response of the government was to have two important consequences - firstly, it placed the emphasis on the shortcomings in South Africa's so-called Westminster constitution, instead of on the shortcomings in the policy of parallel development, which were the main concern of the Theron commission; it in fact reversed the priorities of that body. In the result the new constitution sought to enshrine the premises of parallel development, namely that whites, coloureds and Indians have such different spheres of interest that these can form the basis of separate political institutions,[3] and thereby to entrench the existing power configurations which had been criticised in the Theron report. Secondly, its contents apart, the new constitution was to suffer seriously in terms of legitimacy because of

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1. See above, 263-265.
2. See 1977 Survey of Race Relations in South Africa 7.
3. See M. Wiechers 'Current Constitutional Proposals - A Critique' (paper presented at 28th Summer School, Centre for Extra-Mural Studies, University of Cape Town, 8 February 1978) 8.

the way in which it was conceived, formulated and presented: the findings of the cabinet committee[1] were first divulged to the National party caucus and then at closed sessions of the four provincial congresses of the party during 1977, before being publicly released on a piecemeal basis. From their inception the proposals were therefore perceived as part of a party political programme, and were presented as such by the government during the general election in November 1977. Only in April 1979 were the proposals embodied in bill form, and rendered susceptible to general analysis and discussion.

Although reference is made to the 'government's 1977 constitution' there has never been a definitive constitutional model as such, and the constitutional proposals have made their appearance in three distinct phases. The first phase extends from the early disclosures of a new constitutional dispensation in 1976, until April 1979; the second phase extends from the promulgation of the draft constitution bill in April 1979 to early 1980; and the third phase begins with the publication of the Schlebusch report in May 1980 and includes all the subsequent statutory developments. While there has been an obvious consistency in this revelation process, each succeeding phase has also introduced several variations in the overall plan. One of the factors of irony in these developments is that during the first phase the proposals presented a clear constitutional picture with an internal logic of its own, despite various obscurities and uncertainties, whereas by the third phase the overall plan had become uncertain, despite the fact that individual parts of it had taken statutory form. It is proposed to deal with the government's new constitution in terms of these three phases.

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1. The committee did consult some extra-parliamentary experts.

2. The Early Formulations

The basic principles of the government's constitutional proposals were announced before the general election of 1977 and further disclosures were made during the following year. During this period the main public sources of information were National Party publications,[1] the parliamentary debates,[2] extra-parliamentary communications by government spokesmen,[3] and media reports and commentaries. Despite various inconsistencies in these sources, the broad outline of the new arrangement was reasonably clear.

In the new dispensation there would be three parliaments with equal constitutional status and powers, one each for whites, coloureds and Indians. The parliaments would be predominantly elective bodies, they would have personal jurisdiction over members of the relevant population group in respect of matters of exclusive concern to that group, and they would be sovereign within their spheres of competence.[4] Each parliament would have its own Westminster-type cabinet with traditional executive functions, and a bureaucracy to administer matters within its jurisdiction; each parliament would also have its own budget. Subordinate to each community parliament would be separate regional and local authorities for each group. At the joint level of government there would be an electoral college comprising certain members of the three parliaments; the college's sole functions would be to elect the president and, if necessary, discharge him. The presidency would be the most important institution in the

1. Eg G.P. Terblanche MP (ed) The New Political Dispensation for White, Coloured and Indian (1977), and Questions and Replies on Constitutional Plan (1977). See Also Pro-Nat (November 1977 - Information sheet of Cape National Party) and The Department of Information South Africa's New Constitutional Plan (1978).

2. See House of Assembly Debates vol 1 cols 19-384 (30 Jan - 3 Feb 1978), the censure debate; vol 5 cols 2254-2306 (3 March 1978) (in which a private motion was moved calling for the appointment of a joint select committee to consider changes in the powers, privileges and functions of parliament in the light of the constitutional changes proposed by the government); and vol 10 cols 4548-4555(12 April 1978).

3. Eg 'The South African government's 1977 constitutional proposals' by D. Worrall in J.A. Benyon (ed) Constitutional Change in South Africa (1978) 127-135.

4. See House of Assembly Debates vol 1 col 67 (30 January 1978).

new dispensation - for the first time in South Africa[1] there would be an 'executive president' taking an active role in the political process. He would be assisted in his tasks by a council of cabinets consisting of ministers drawn from the three community cabinets; the executive president would be chairman of this body and would ensure that all its decisions were taken on a consensus basis. The members of the council would exercise executive powers in respect of matters of common concern to all three groups - in fact since most matters would be of common concern,[2] extensive powers would vest in this body. Legislation on joint-concern matters would be initiated by the council of cabinets and then submitted to all three parliaments, which together would constitute a composite tricameral legislature. The council of cabinets would also co-ordinate the legislative activities of the three community parliaments. It would be assisted by two advisory bodies, a presidential council to be elected by the three parliaments, and a nominated financial council, and where it was undecided on a specific issue could submit it to an ad hoc advisory committee for decision; all these bodies would include white, Indian and coloured members. No express references were made to the judiciary, save that coloureds and Indians would qualify for appointment to the bench under the new constitution.

From a constitutionalist's point of view several aspects of this early formulation of the government's 1977 constitution were incomplete or obscure. These included the fiscal arrangements, the division of functions between the joint and communal levels of government, the exact composition of some bodies and their modus operandi, the status of existing constitutional conventions, the amending procedure, the judicial function, and constitutional lines of responsibility. It was nevertheless possible to identify all the main characteristics of consociationalism within the new scheme: the grand coalition principle was evident in the council of cabinets and its subsidiary institutions,

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1. That is since the boer republics, a comparison which was drawn in the media.

2. See Worrall op cit 128.

the presidential council, financial council and joint advisory committees; the proportional sizes of the white, coloured and Indian populations[1] determined the number of members in each parliament, as well as the composition of the joint institutions - the electoral college, council of cabinets[2] and presidential council; the consensus basis on which the council of cabinets would operate implied a mutual veto power, which would also be available in the presidential council;[3] and the three parliaments, with their subordinate institutions, would provide the basis for the segmental autonomy of whites, coloureds and Indians. Within its defined limits the new system would also be democratic, and it implied full citizenship for whites, coloureds and Indians within a single political structure - a point emphasised by government spokesmen on several occasions.[4] It was thus possible to present the system as a form of consociational democracy which involved genuine power-sharing (or magsdeling) among the three groups involved.[5]

But even in terms of this first formulation the government's constitutional proposals were never fully consociational.[6] Most obviously, the complete exclusion of blacks from the whole scheme meant that the new political institutions would not be accommodationist and conflict-regulating bodies in the true consociational sense, quite apart from the democratic implications of this factor. The other major shortcoming from the consociational perspective was that the 'segmental' definitions were statutorily imposed by the white government, and were a source of controversy among those for whom the new deal was specifically designed;

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1. The ratio of 4:2:1 which permeated the plan was based on the mid-1976 population estimates of 4 320 000 whites, 2 434 000 coloureds and 746 000 Indians; the comparable figure for blacks was 18 629 000.

2. In fact coloureds and Indians would be over-represented in the council with 4 and 3 members respectively; there would be 7 white ministers and the (white) chairman.

3. See Worrall op cit 133.

4. See House of Assembly Debates vol 4 col 1474 (20 February 1978), vol 9 col 3923 (1 March 1978), vol 16 col 7923 (26 May 1978).

5. See eg Worrall's (op cit 132-134) references to E. Nordlinger Conflict Regulation in Divided Societies (1972).

6. See L.J. Boulle 'The New Constitutional Proposals and the Possible Transition to Consociational Democracy' in F. van Zyl Slabbert and J. Opland (eds) South Africa: Dilemmas of Evolutionary Change (1980) 14-28.

furthermore, the whole scheme implied the retention of the political interference act[1] and the continued prohibition on free political association. There were also various institutional factors which were not favourable from a consociational point of view: the majoritarian electoral systems, the majority party community cabinets,[2] and the exclusion of minority parties from the joint institutions such as the electoral college and council of cabinets, all reflected a strong majoritarian bias in the whole arrangement. Furthermore, the fact that the composition of the electoral college would be entrenched,[3] as well as the sizes of the three parliaments,[4] indicated an unfavourable rigidity in the proportionality principle. And the fact that consensus would not be an institutional requirement in the council of cabinets and other joint institutions was not a favourable basis, against South Africa's political background, for achieving compromises and a coalescent style of politics. In short, the presentation of the new constitution as consociational in nature proved to be more a favourable interpretation, than an analytical assessment. This interpretation, however, was to persist well beyond the first phase.

Even before the draft bill was published it had become apparent that the early formulations of the new constitution were not only incomplete, but also inaccurate. This may be partially attributed to a tendency to read into the new scheme more than had been

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1. The Prohibition of Political Interference Act No 51 of 1968.

2. Majoritarianism at the intra-segmental level is an acceptable feature of the consociational model, provided the segments are based on voluntary association. Where they are statutorily defined, as in South Africa, it has the effect of excluding minority parties from the joint institutions, where they might have an important brokerage role. It is, however, a reality of South Africa's constitutional politics that the National Party will not provide the basis for collusion between white opposition and non-white parties, for fear of being outvoted; during all three phases of the 1977 constitution the government has sought to strengthen its own institutional position within 'white' politics, while providing some basis for contestation with the new coloured and Indian 'opposition'.

3. The electoral college would consist of 50 whites, 25 coloureds and 13 Indians, and any changes would require the approval of all three parliaments.

4. That is 185, 92 and 46 members for the white, coloured and Indian assemblies respectively.

intended by the government, but it was also clear that the government itself had not perceived the full implications of the new arrangement. Thus it came to be said that the sovereignty of the white parliament would be unaffected by the new scheme,[1] that the coloured and Indian parliaments would be mere 'talking shops' and real power would vest with the (white) President,[2] that members of the council of cabinets would have no portfolios and would exercise no executive power in that capacity, and that there would be no joint bureaucracy to administer matters of 'common concern'.[3] There was also a discernible shift in general emphasis from the notion of power-sharing (magsdeling) to that of dividing power (magsverdeling); the council of cabinets in particular was presented as a forum for consultation and co-responsibility, as opposed to negotiation and power-sharing. These changes in emphasis may have reflected the strains which the constitution was generating within the National Party, but they presaged the shape which the constitution would take in the second phase.

The response of coloured, Indian and black leaders to the government's constitution, as it was presented during the first phase, ranged from outright rejection, to conditional acceptance as a basis for further negotiation.[4] The response of coloured persons, for whom it was primarily designed, was apparent from the Du Preez report,[5] which rejected the new proposals in all material respects. Nevertheless, acting on a 'mandate' received from the white electorate in the 1977 general election, the government took the first step in their implementation even before the draft constitution bill of 1979 had been published - it made statutory provision for changes in the structure and composition of the South African Indian Council.[6] The minister emphasized during

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1. House of Assembly Debates vol 10 col 4546-8 (12 April 1978).
2. House of Assembly Debates vol 1 col 34 (30 January 1978). The 'De Gaulle analogy' was used frequently during the first phase.
3. See the discussion in J.A. Benyon (ed) Constitutional Change in South Africa (1978) 152-159.
4. See 1978 Annual Survey of Race Relations 3.
5. See above, 217-220.
6. The South African Indian Council Amendment Act No 83 of 1978.

the parliamentary debates[1] that the enactment was being passed with the new constitutional dispensation in mind, and it provided for a predominantly elective assembly with a parliamentary executive, which anticipated the subsequent draft bill. No provision was made at this stage for an increase in the SAIC's powers, and the intention was that this act, together with the Indians Electoral Act of 1977,[2] would provide a new representative institution to which powers would be allocated when it was integrated into the new dispensation. For various reasons,[3] these elections were delayed, and the Council was still in its non-representative form when the post-Schlebusch report implementation of the new constitution commenced.

3. The Draft Constitution Bill

(a) General

From a constitutional law point of view, the government's 1977 constitution assumed a more tangible form with the publication of the draft constitution bill in April 1979.[4] The bill was immediately referred to a joint select committee of both houses,[5] which at the parliamentary recess was converted into the Schlebusch commission of enquiry. The bill itself was submitted as evidence to the Schlebusch commission by the government.

The first striking feature of the draft bill was that, although it reduced the new constitution to statutory form, it left many aspects as vague or obscure as they had previously been, and omitted others altogether from its scope. With almost no excep-

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1. House of Assembly Debates vol 17 col 8186 (30 May 1978).
2. Act No 122 of 1977.
3. See House of Assembly Debates vol 2 cols 730-742.
4. Gov Gaz 6386 (3 April 1979).
5. House of Assembly Debates vol 8 cols 3666-76 (30 March 1979).

tion constitutional commentators[1] had difficulty coming to grips with the bill, and in elucidating and evaluating the powers of the various authorities and their relationships with one another. The second striking feature of the bill was that the new constitution was closely modelled on the existing constitutional system;[2] insofar as the Westminster system had hitherto been applied in South Africa, it was left substantially unaffected by the bill, and many of the constitutional features anticipated during the first phase were not in evidence. Thus no provision was made for an executive president, and the parliamentary form of government was retained; the three legislative assemblies were not accorded equal status, nor was there provision for a composite tricameral legislature, and the white House of Assembly remained sovereign; most powers were not vested at the 'joint' level of government, but remained with the white institutions; and the bill did not introduce equal citizenship rights for whites, coloureds and Indians, but reinforced their differential status. Many features of the constitution were left wholly intact, including the provincial councils, the state presidency, judicial and financial matters, the constitutional conventions,[3] and the national symbols. Far from heralding a new constitutional deal, the draft bill rather refurbished the old with the few innovations described below. The third striking feature, although this was not unexpected, was

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1. See on the draft bill Boulle op cit, and 'A Critical Analysis of the New Constitutional Proposals', paper presented at the symposium on The Defects and Merits of the Government's Constitutional Proposals, University of the Western Cape, 26-27 June 1979; N.J.J. Olivier 'Die Regering se Konstitutionele Voorstelle', unpublished paper, Cape Town, 1979; M.P. Vorster and H.P. Viljoen 'Die Nuwe Grondwetlike Bedeling in Suid-Afrika' 1979 TSAR 201; G. Devenish 'A Critical Evaluation of the Theoretical and Political Implications of the New Constitutional Proposals' (University of the Western Cape, 1979); M. Wiechers Staatsreg (3 ed, 1981) 218-221; and the contributions in S.C. Jacobs (ed) 'n Nuwe Grondwetlike Bedeling vir Suid-Afrika (1981), some of which are referred to below.

2. Vorster and Viljoen op cit 203.

3. See on this matter M.P. Vorster 'Die vraag met betrekking tot die voortbestaan van konvensies in die nuwe grondwetlike bedeling' in Jacobs op cit 171-194.

the complete omission of blacks, which was impliedly justified in the bill in terms of the homelands policy;[1] the existing constitutional arrangements for blacks, including the community councils, were left unaffected by the bill, and it became clear that future constitutional developments would occur along the black/non-black axis, as opposed to the previous white/non-white axis. Finally, the draft bill, as the analysis below shows, incorporated fewer consociational elements than had originally been claimed for the government's constitution.

(b) Description of the Draft Bill

In broad terms the draft bill provided for the quasi-consociational incorporation of coloureds and Indians into the constitutional system, while maintaining overall white supremacy. It left intact the existing white political institutions, modified the status, composition and functions of the separate institutions which had been created for coloureds and Indians, and established new joint institutions for consultation and co-ordination. While the bill envisaged three tiers of government (over and above the local level to which no reference was made), attention need only be given to the so-called joint and community levels of government - in fact the only regional constitutional matters referred to in the draft bill were the provincial institutions, which were left intact.

(i) Community level

At the community level provision was made for three predominantly elective assemblies for each of the white, coloured and Indian groups, and an executive council for each assembly. In effect the existing House of Assembly was retained for whites,[2] save that its membership was increased to accommodate twelve indirectly

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1. See the preamble: 'We declare that whereas we ... believe that the Black nations of the Republic should each be given separate freedom in the land allotted to them for the exercise of the political aspirations of all the members of those nations ...'. This clearly premised the bill on the attainment of independence by all the national states, as well as the denationalisation of all blacks (on which see below, 493-498).
2. Draft bill s 27.

elected and eight nominated members,[1] while for coloureds and Indians the Coloured Persons Representative Council (which was then still in existence) and the South African Indian Council were replaced by assemblies called the House of Representatives[2] and Chamber of Deputies respectively,[3] and comprising comparable proportions of elected, indirectly elected and nominated members as applied in the restructured House of Assembly.[4] No provision was made for upper chambers, and each assembly would be a unicameral legislative body - it had in fact been clear from the early formulations of the constitutional plan that the existing Senate would be disestablished. As far as most legislative-related matters were concerned, those previously pertaining to the House of Assembly were retained in the draft bill, and extended mutatis mutandis to the two new assemblies. Among these matters were the electoral system,[5] (including the delimitation arrangements, single-member constituencies and the plurality principle), the franchise qualifications, the qualifications and disqualifications of assembly members,[6] the voting, quorum and dissolution aspects, and the domestic arrangements.[7] Provision was made for an annual session of each assembly.[8] As far as legislative competence was concerned, that of the House of Assembly was left unaffected, while the House of Representatives

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1. Of the 12, 3 would be elected by the already elected MP's in each province, an arrangement modelled on the Senate; the prime minister would nominate the other 8, 2 from each province.
2. S 49.
3. S 52.
4. 82, 6 and 4 members respectively for the House, and 40, 3 and 3 for the Chamber.
5. Ss 49(2) and 52(2) read with ss 32-35. Cf ss 40-45 of the RSA Constitution Act.
6. Ss 49(2) (and s 50) and 52(2) (and s 53) read with ss 36 and 45. Cf ss 46 and 55 of the Constitution Act.
7. Ss 49(2) and 52(2) read with ss 37-44. Cf ss 50, 51 and 58 of the Constitution Act.
8. Ss 49(2) and 52(2) read with s 29. Cf s 26 of the Constitution Act.

and Chamber of Deputies were allocated the legislative powers of their respective predecessors[1] - a somewhat vacuous provision since the South African Indian Council had no legislative powers at that stage. Provision was also made for additional legislative powers to be conferred on the coloured and Indians assemblies by the council of cabinets,[2] but they would clearly remain constitutionally subordinate to the House of Assembly. The distribution of competence at this level was an important feature of the constitution, and is referred to again below.

The draft bill made provision for three executive councils which would serve as Westminster-type cabinets for each assembly.[3] Each cabinet would be headed by a prime minister, to be appointed by the State President in accordance with existing conventions; the prime minister would in turn advise the President in respect of other ministerial appointments and, where appropriate, dismissals. Each cabinet would be parliamentary, subject to the three months' grace period;[4] the members of the community cabinets would be the 'ministers of the republic' and they would administer the various departments of state.[5] While no further reference was made to the powers of the cabinets, it was clear from the respective numbers of ministers,[6] and indeed from the general direction of the constitution, that the coloured and Indian cabinets would have jurisdiction over only those 'separable' matters which affected the respective groups exclusively, while all other matters would fall within the control of the white cabinet. This is again a virtually no-change situation from the existing constitutional system, and is evaluated further subsequently.[7]

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1. S 26(1)(a).
2. S 26(1)(a)(i).
3. S 19(1).
4. S 19(3).
5. S 19(2).
6. That is (a maximum of) 17 white, 5 coloured and 3 ministers respectively - s 19(1)(b). Provision was also made for deputy ministers - s 20.
7. Below, 308-310.

What became evident at the community level of government was that there would be nominally equal political institutions for whites, coloureds and Indians in a more consistent application of the policy of parallel development. Far from this involving a departure from the Westminster model, it actually entailed a replication of Westminster parliamentary institutions for the latter two groups. The majoritarian bias of the Westminster system was also retained and extended, and slightly strengthened through the provision for non-elected elements in the three assemblies. These aspects further detracted from any consociational claim which might be made in respect of the government's constitution.

(ii) The joint level

The draft bill made provision for all the joint institutions envisaged during the first-phase formulations of the government's 1977 constitution, save for the advisory financial council. It was at this level that the main constitutional changes were found, in the form of the electoral college, the council of cabinets and the president's council. Whereas the changes at the community level were essentially modifications of existing structures, those at the joint level were institutional innovations, ostensibly designed to allow consultation and co-operation to take place among group leaders.

(aa) The State President[1]

The draft bill made provision for a State President to serve as head of state and nominal head of the executive government, as had previously been the case,[2] and in addition to preside over the council of cabinets.[3] All the powers and functions of the existing State President were left intact,[4] including his prerogative powers as head of state.[5] The only new function expressly conferred on the President related to the appointment of the community cabinets, including the three prime ministers;

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1. See M.P. Vorster and H.P. Viljoen 'Die nuwe grondwetlike bedeling vir Suid-Afrika' 1979 TSAR 201 at 204f; M. Wiechers 'Die uitvoerende staatshoof: Enkele opmerkings' in S.C. Jacobs (ed) 'n Nuwe Grondwetlike Bedeling vir Suid-Afrika (1981) 139-143.
2. Ss 7(1) and 18(1) respectively.
3. S 16(1).
4. See especially ss 7(2) and (3), 19, 20, 21, 58 and 104.
5. S 7(4).

here his powers were circumscribed by convention and statute.[1] Several other provisions required that he follow the existing conventions in exercising his powers,[2] but it was not stipulated as to whether he should follow the council of cabinet's advice or that of the white cabinet. The indications were that he would continue to function predominantly, if not exclusively, as a ceremonial head of state, and the retention of section 13 of the Constitution Act supported the view that he would not be an executive president.[3] The powers attaching to his new position as chairman of the council of cabinets are best understood from an analysis of that body and its functions.[4]

Most of the ancillary matters relating to the State President were also left intact in the draft bill,[5] but his tenure of office was reduced from seven to five years[6] and there was provision for his election by a differently-constituted electoral college.

(bb) The electoral college

One of the most contentious matters to arise during the first phase of the government's constitution concerned the election of the new 'executive' president. It had been emphasised from the start that qualified whites, coloureds and Indians would be eligible for the presidential office, but it had also appeared that the arithmetic of the presidential electoral college would effectively preclude the election of a coloured or Indian. Both aspects were borne out by the provisions of the draft bill.

The qualifications for presidential candidates were made identical to those for the three communal assemblies,[7] thus nominally opening the office for the first time to coloureds and Indians. The electoral college, which had previously consisted of members of the white Assembly and Senate,[8] was also modified to incorporate coloured and Indian members of the new assemblies.[9] Each assembly was empowered to 'designate' members to the college from

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1. S 19(1). In relation to deputy ministers see s 20(1).
2. S 7(5).
3. That is the provision safeguarding the State President's dignity and reputation, also s 13 in the bill.
4. Below, 301 to 304.
5. Ss 11, 12, 14 and 15.
6. S 10.
7. S 8(4)
8. S 8 of Act No 32 of 1961.

its own ranks - fifty whites, twenty-five coloureds and thirteen Indians.[1] It was not expressly stipulated that these members should be exclusively representative of the majority party in each assembly, but this was implicit in the provisions, and was clearly the government's intention as indicated during the first phase formulations.[2] The bill also purported to entrench the size and composition of the electoral college, by requiring the approval of all three assemblies for its amendment, although from a juridical point of view it is doubtful that this provision would have been binding on the House of Assembly;[3] however, on either interpretation it would be impossible to increase the sizes of the coloured and Indian components in the college without white approval. The electoral college would be an ad hoc body and would convene only to elect the president, or, if necessary, to dismiss him before the termination of his period of office.

In purely arithmetical terms it is clear that the electoral college would be dominated by the majority party in the white assembly. This dominance would be facilitated by the electoral arrangements within the college, as only an absolute majority of votes would be required by a presidential candidate to secure election;[4] without the requirement of a qualified majority the coloured and Indian members would not be able to secure a compromise white candidate, by preventing the election of the white assembly's nominee. On the other hand the 'impeachment' process could only be initiated by a majority vote in the college,[5] thus placing the dismissal of the President beyond the reach of the non-white groups. In both cases the majoritarian aspects favoured the whites. In terms of this analysis the participation of coloureds and Indians in the electoral college would become a matter of form and not substance, their participation being required to legitimate the 'new' presidency. The possibility

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1. This conformed to the 4:2:1 ratio on which the constitution was based.
2. Eg D. Worrall 'The South African government's 1977 constitutional proposals' in J. Benyon (ed) Constitutional Change in South Africa (1978) 127 at 129.
3. That is in terms of s 111 read with s 55 of the bill.
4. S 8(5).
5. S 10(1)(b).

of a boycott strategy by these groups was also pre-empted, in terms of the provision[1] which allowed the college to function notwithstanding a shortfall of members - a similar 'no-quorum' provision was encountered in respect of the other joint institutions.

The position of the State President in the new constitution has been described as 'niks anders ... as die handlanger van die Blanke parlement nie'.[2] In terms of the provisions of the draft bill this is an apposite description, but it also makes assumptions about the presidency which are not justified in terms of the actual powers bestowed on the office. In other words, the draft bill failed to provide for an executive president in two respects - it did not provide for his popular election and independence from the legislature[3] (together with the checks and balances associated with presidential government), nor did it confer any substantial executive powers on him. While these factors showed clear departures from the early formulations of the government's constitution, they were mutually consistent and, together with other factors, exposed the new arrangement as involving merely changes of constitutional form, and not political substance.

(cc) The council of cabinets

The draft bill made constitutional provision for the first time for a council of cabinets, a successor in title, if not in function, to the then existing inter-cabinet council, an ad hoc extra-constitutional body.[4] In the absence of any joint representative and deliberative assembly, it was inevitable that the council would be the focal point of interest in the government's constitution. According to the first phase interpretations it would have extensive executive and quasi-legislative powers, and in these matters would be the principle forum for élite co-operation and accommodation; in other words, it was presented as

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1. S 8(1)(b).

2. M. Wiechers 'Die uitvoerende staatshoof: Enkele opmerkings' in Jacobs op cit 141.

3. Another alternative would be election by all members of the three assemblies sitting together (that is, along the lines of the Bophuthatswana presidency, above 250), although presidentialism usually revolves around the president having a separate mandate to that of the legislature.

4. See above, 201-202.

both a functional political institution, and as the main source of consociational practices. In this case neither contention was borne out by the provisions of the bill, although the first phase interpretations tended to be projected onto it.

The chairman of the council of cabinets would be the State President;[1] it would also include the three prime ministers, ex officio, and eleven other ministers delegated by them from the respective community cabinets - six whites, three coloureds and two Indians. The arithmetic of the council would ensure equal representation for the white and non-white components, with the balance of power vesting in its (white) chairman. It was unclear, however, whether ministers could be dismissed by the chairman, or even by the relevant prime minister, although continued tenure in a community cabinet was a sine qua non for membership of the council, and the President could dismiss members of the former after consultation with the relevant prime minister.[2] As with the electoral college, only majority parties would be represented on the council, so that its members would be severally responsible, in the constitutional sense, to the majorities within each community assembly.

As far as its functions were concerned, the bill vested no executive powers in the council of cabinets - in fact one of its anomalies was that it did not state specifically where executive power would lie in the new constitutional system. Following from this was the fact that no provision was made for the division of cabinet portfolios among council members, which meant that they would have no executive powers in that capacity but only as members of the various community cabinets. On the other hand several functions relating to the legislative process were conferred on the council - these are analysed in more detail below.[3] Only three other functions were expressly mentioned in the bill - the council could request the president's council to advise it on matters of national interest,[4] it could

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1. On the council of cabinets see s 16 of the draft bill.
2. S 19(2).
3. At 305-308.
4. S 25.

authorise participation by a minister in the proceedings of a community assembly of which he was not a member,[1] and a council member had to countersign instruments executed by the State President.[2] In effect the council of cabinets would have been a joint consultative forum for the community cabinets, and a co-ordinator of legislative programmes.[3] Without executive power, or a joint administration to execute its decisions, it would have been a relatively insignificant body, politically subordinate to the white cabinet.

No indication was given in the bill as to how decisions would be taken in the council of cabinets; there was no suggestion of a veto right, nor was there any other institutional requirement of consensus. Nevertheless, much was made by government spokesmen,[4] and even some constitutional commentators, of the consensus approach which would prevail in this body, and the corollary of joint responsibility for its members in respect of all council decisions. This was clearly an attempt to project the workings and conventions of one-party parliamentary cabinets, including that in South Africa, onto a composite, multi-party cabinet. But the comparison is clearly inappropriate.[5] Even where multi-party cabinets do exist in parliamentary systems, they are invariably based on political coalitions or pacts and, while this agreement endures, there is an inducement to achieve consensus in the cabinet and it is justifiable to hold ministers responsible for cabinet decisions. By contrast, the members of the council of cabinets would be drawn from three separate assemblies and would represent three unconnected political parties; there would be no similar inducement to achieve consensus on all decisions, and it would not be constitutionally justifiable to hold ministers

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1. S 44(2).
2. S 18(1).
3. See Vorster and Viljoen op cit 207.
4. Eg Worrall op cit 133; House of Assembly Debates vol 10 cols 4549-4555 (12 April 1978).
5. See S.C. Jacobs 'n Juridiese analise van die konstitusionele voorstelle vir 'n nuwe grondwetlike bedeling in Suid-Afrika' in Jacobs (ed) op cit 88 at 98.

jointly responsible for council decisions.[1] Nor would the position of the State President in 'determining the consensus' be comparable in any way to that of the prime minister in a Westminster cabinet. There would also be further anomalies - the concept of joint responsibility is closely related to that of individual ministerial responsibility,[2] which would not be applicable in this context; and because members of the council would be bound by the convention of joint responsibility in their community cabinets (as well as the oath of secrecy[3]), they might be constitutionally responsible for two possibly conflicting decisions.

(dd) The president's council

Of lesser importance in the early formulations of the government's constitution was the president's council, which, according to the draft bill, would consist of fifty-five members, appointed by the State President in consultation with the three prime ministers.[4] The main qualification for appointment was eligibility to be registered as a voter for one of three assemblies, which effectively excluded blacks from membership. The functions envisaged for the president's council at this stage were to advise the council of cabinets, at the latter's request, on any matter of national interest, and, in its own discretion, to enquire into any matter related to such request.

In view of the subsequent establishment of the president's council in slightly modified form, further description or evaluation of the bill's provisions is unnecessary here. Suffice it to say that during all three phases of the government's constitution it

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1. The reliance by advocates of the government's proposals on Nordlinger's concept of the 'stable governing coalition' (E. Nordlinger Conflict Regulation in Divided Societies (1972) 21f) is misleading, because he restricts the concept to coalitions formed between political parties prior to elections with the avowed aim of regulating conflict.

2. E.C.S. Wade and G. Phillips Constitutional and Administrative Law (9 ed, 1977) 108.

3. S 19(4).

4. Ss 23-25.

has been presented as a prestigious, non-political body, which would attempt to resolve contentious issues in an élite non-public forum; it was thus envisaged as having a consociational form and function.

(iii) The implications of the draft bill

Before examining the constitutional dispensation envisaged in the draft bill from a consociational perspective, it is necessary to provide a more detailed analysis of its probable practical implications in respect of legislative and executive power. This task is complicated somewhat by the meagre, and at times ambiguous, details provided on these matters. Nevertheless it is possible to describe in general terms how the system would have operated, and then to evaluate this in terms of the principles of consociationalism. Lest this be seen as a purely academic enterprise it should be emphasised that the government's commitment to this broad constitutional framework has not wavered, although its implementation has been delayed by intervening political events.

(aa) Legislative competence and the legislative process

The internal logic of the draft bill was dependent on a notional 'federal' division of competence between the joint and community institutions.[1] During the first phase it was indicated that most powers would be exercised at the joint level, and, in the absence of a national legislature, the theory of a 'tricameral parliament' was constructed to accommodate the legislative function at this level. In one symbolic respect the draft bill perpetuated this theory by providing different nomenclature for the three assemblies,[2] but it continued to vest legislative power in the first instance in the House of Assembly;[3] it also gave the Assembly the sole power to appropriate monies from the state revenue fund,[4] and the primary power to amend the constitution[5] (which

1. The possibility of a list of concurrent functions was also mentioned - see Worrall op cit 128.

2. That is House of Assembly, House of Representatives and Chamber of Deputies, which, so the argument ran, together constituted a national parliament. On the importance for constitutionalism of the skilful handling of symbols see C.J. Friedrich Constitutional Government and Democracy (4 ed, 1968) 168f.

3. S 20(1)(a).

4. S 91(2).

5. S 111. The other assemblies could apparently amend the constitution if so empowered by the council of cabinets.

remained highly flexible[1]). As far as the House of Representatives and the Chamber of Deputies were concerned, they retained the legislative powers of their predecessors,[2] which would have meant, in 1979, a few limited areas of competence for the former only. Beyond this allocation of original legislative competence, provision was made for what appeared to be a flexible delegation of powers to the coloured and Indian assemblies.[3] Thus the council of cabinets could, in its own discretion, confer delegated legislative competence over any matter on these bodies, or it could refer a specific piece of legislation to one of them (or the Assembly) for enactment on an ad hoc basis. As far as the distribution of legislative competence was concerned, there was little change with the past, save that the powers of the coloured and Indian assemblies could, at the discretion of the council of cabinets, be extended on a flexible basis. The legislative predominance of the white assembly was underlined by the fact that its enactments would be immune from judicial invalidation,[4] which would not be the case with laws of the other assemblies unless the council of cabinets had specifically referred legislation to them.[5] In other words, the legislative supremacy of the white parliament was left intact, including, by implication, its power to amend the 'new' constitution. While there are various theoretical problems relating to the termination of sovereignty in South African constitutional law,[6] the retention of the white parliament's supremacy in the draft bill should be seen as a deliberate political decision, and not as a consequence of these juridical problems.

As far as the legislative process was concerned, the prevailing arrangement was left substantially intact for community legisla-

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1. Only ss 101 and 111 were entrenched, requiring the familiar two-thirds majority.
2. S 26(1)(a)(i).
3. S 26(1)(a)(ii) and (iii).
4. S 55. In the light of this section it is submitted that the assembly could even have amended s 8(1)(d), which purported to entrench itself.
5. Another aspect of relevance was that provincial ordinances would continue to be void if repugnant to laws of the assembly (s 79), but not, by implication, if repugnant to laws of the other two bodies.
6. For a full discussion of this matter, see below 445-456.

tion; thus each cabinet could, by implication, initiate such legislation in the relevant assembly, and it would become effective after the assent of the appropriate prime minister and the State President had been received.[1] No express mention was made in the bill of matters which would require 'joint legislative action', although in terms of the internal logic of the constitution such legislation would have required the attention and approval of all three assemblies for its validation. But if the council of cabinets considered a bill to be of 'common concern' it could refer it to all three assemblies for their 'consideration ... and views';[2] if differences of opinion were to arise among the assemblies, a decision on the matter could be taken by the council of cabinets, or it could be referred to a joint advisory committee for its views, and if the latter body could also not reach agreement, the State President, in his capacity as cabinet council chairman, could take a decision. A decision taken at any stage of this process would finalise the contents of the legislation, and would be binding on the minister concerned. Such legislation would still require parliamentary enactment, but it could be disposed of by a single community assembly as specified by the council of cabinets. This procedure cannot be constitutionally justified on the same basis as the normal arrangement in a bicameral system where, in cases of deadlock, one chamber (in the Westminster systems the lower representative house) can prevail over the other (usually a hereditary or indirectly elected house); in the government's constitution all three 'houses' would be directly representative of different segments of the electorate, and any legislation enacted according to the procedure described above would be lacking in terms of representative support and legitimacy. It should be remembered, however, that the above procedure was only permissive and not peremptory, and the council of cabinets could in its discretion submit 'common concern' legislation directly to one or other assembly for enactment, without its taking the legitimising route just described. A final significant aspect of 'common concern' legislation is that it would be initiated by the white cabinet and not the council of cabinets, a point alluded to again below.

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1. S 58.
2. S 26(1)(a)(iv).

The analysis has shown that the House of Assembly would have a dominant role in the legislative process in terms of the bill's distribution of competence, the amendment procedure, and the financial arrangements, and it would be neither constitutionally circumscribed nor judicially controlled (despite the fact that the constitution as a whole implied a judicial testing-right). The other assemblies would not be co-ordinate 'parliaments', but subordinate legislatures, with predominantly delegated and not original authority. The council of cabinets would have a co-ordinating function in relation to the preparation and settlement of legislative programmes; it would also have a potential legislative function in relation to 'common concern' legislation, but in the light of its composition and the chairman's method of election, this would not be likely to obstruct legislative proposals emanating from the white cabinet; in this sense it would serve more as a legitimising agent, than as a 'first legislative chamber'.[1] In overall terms, there would be no significant shift in the locus of legislative power.

(bb) Executive power

In the light of the above analysis on legislative power it is unnecessary to provide as detailed an analysis of the draft bill's implications for executive power. Although the bill was surprisingly non-committal on this question, it is clear that the council of cabinets would have had no executive functions and there would have been no distribution of 'national' portfolios among its members.[2] The bill provided[3] that persons appointed to the community cabinets would be the ministers of the republic, and that they would administer the state departments in that capacity. From the sizes of the respective cabinets[4] it is also clear that all 'national' or common concern departments would be administered by white ministers, and the same would apply to most of the State President's powers (for example in respect of black affairs[5]). In short, all executive power would remain with the white cabinet,

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1. Cf J. van der Vyver 'Prospects for the Future Political Development of South Africa' in De Crespigny and Schrire (eds) The Government and Politics of South Africa (1978) 245 at 255.

2. S 18(1) created the seeming anomaly that members of the council of cabinets had to countersign for the State President when he acted as head of the executive government, although in their capacity as members of the council they had neither executive nor administrative powers.

3. S 19.

4. That is 17 white ministers, 5 coloured ministers and 3 Indian ministers.

5. S 19(

save for that relating to matters of exclusive concern to coloureds and Indians which would be vested in the other two cabinets. The implications of this arrangement for the political system are again clear.

Brief reference should be made, in this context, to the administration. It is a measure of the rigidity in contemporary constitutional thinking that the draft bill made so few references to the composition, functions and control of this branch of government. It is by now a trite observation that we are living in the age of the administrative state, in which the gravitation of power from the legislature to the executive has been succeeded by a similar trend from the executive to the administration. Constitutional theory has been slow to accommodate this development, let alone the modern phenomenon of corporatism.[1] In the bill only incidental references were made to the establishment of departments of state,[2] and the only other provisions on this subject[3] empowered the State President to make appointments in the public service, and to appoint the members of an administration commission which would perform certain functions relating to the appointment, discipline and retirement of public servants.[4] By default, as it were, the existing white-dominated bureaucracy would have been left intact, although, insofar as administrative power follows the executive, this clearly fitted into the general scheme.[5] This factor further weakened the 'tricameral legislature' theory, because the execution of common concern legislation would have been undertaken by officials accountable to only one component of the 'composite parliament'.

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1. On corporatism, see above, 41.
2. Ss 18(1)(b) and 19(6).
3. S 21.
4. That is, similar functions to the existing Public Service Commission. The bill did not explicitly restrict membership of this commission to whites.
5. Reference has been made to the importance attached to the administration in Zimbabwe's constitutional development. See above, 234-239.

(cc) The draft bill and consociationalism

It can be said in general that the draft bill would have produced a decidedly less consociational form of government than that envisaged during the first phase of the government's constitution.[1] Nevertheless it still contained several consociational elements - the concept of an institutionalised grand coalition was embodied in the council of cabinets and its subsidiary institutions, the president's council, financial council and joint advisory committees; the principle of proportionality determined the composition of the electoral college, the council of cabinets, the president's council and the joint advisory committees, and the sizes of the community assemblies were also proportionately calculated. The institutional basis for segmental autonomy was provided in the form of the community assemblies and cabinets, elected by and responsible to separate electorates, and having jurisdiction over the respective segments. A closer analysis of the consociational elements, however, supports the views of Hanf, Weiland and Vierdag that,[2]

> '... some of the structural features of consociation have been adopted, as well as its vocabulary. But its essence is missing: the regulation of conflict remains unilateral, rather than being worked out by all the parties concerned. Power remains in the hands of the white group.'

In the first place the exclusion of blacks from the arrangement made it not only undemocratic, but also imperfectly consociational, in that an important conflict group would have had neither segmental autonomy nor a share in political power. For the government the consociational option was only feasible, from a demographic point of view, if blacks were excluded, and it was able to justify this exclusion in terms of the homelands policy.

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1. See L.J. Boulle 'The New Constitutional Proposals and the Possible Transition to Consociational Democracy' in F. van Zyl Slabbert and J. Opland (eds) South Africa: Dilemmas of Evolutionary Change (1980) 14-28, and 'Federation and Consociation: Conceptual Links and Current Constitutional Models' 44 (1981) THR-HR 236; W.B. Vosloo 'Consociational Democracy as a means to accomplish peaceful political change in South Africa: an evaluation of the constitutional change proposed by the National Party in 1977' 6 (1979) Politikon 13-28; A. Lijphart 'Federal, Confederal and Consociational Options for the South African Plural Society' in R. Rotberg and J. Barratt (eds) Conflict and Compromise in South Africa (1980) 51-76.

2. T. Hanf, H. Weiland and G. Vierdag South Africa: The Prospects of Peaceful Change (1981) 412.

Nevertheless the government had disturbed its own pattern of constitutional development when it instituted the community council system,[1] and there were persistent rumours during 1980 that it was considering the creation of a fourth assembly for blacks to complete the 'consociational' arrangement. But even this development would have had drastic implications for the arithmetical equilibrium of the government's constitution, and the concept of a black parliament was gradually dropped.

A second major weakness, in terms of consociational theory, is that the 'segments' in the government's constitution would be predetermined by existing legislation[2] and would not be self-defined in terms of commonly-perceived interests; there would thus be no possibility of 'inter-segmental' mobility. Neither could there be political alliances or co-operation between members of different 'segments' in terms of the Prohibition of Political Interference Act,[3] the retention of which was implicit in the whole scheme. Only the removal of the government-imposed 'segmental' definitions[4] and the allowance of free political association[5] would permit the emergence of the homogeneous segments on which consociationalism depends.[6]

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1. See above, 179-182.
2. Ie the Population Registration Act No 30 of 1950, referred to in the definition provision (s 112) of the draft bill.
3. Act No 51 of 1968.
4. Lijphart (op cit 68) regards this factor as being a 'practical problem' rather than as being inimical to consociational theory. But where political organisation does not follow 'segmental' boundaries (as in South Africa) then significant minorities within each 'segment' will be excluded from the joint power-sharing institutions, particulary where, as in the government's constitution, the majoritarian principle is applied at the intra-segmental level. Thus the 'grand coalition' would be a coalition of majority parties only, to the exclusion of opposition parties. Furthermore leadership-élites would be conscious of the need to preserve their 'majority' status, which might inhibit them from agreeing to compromise arrangements - this problem would not be so acute where each segment was represented by a single political party.
5. See below, 390-394.
6. On free political association and pluralism see above, 78.

The third major deviation from consociational theory relates to the absence of an effective veto power for coloureds and Indians.[1] Thus must be seen in conjunction with the fact that, in relation to the combined white, coloured and Indian electorate, the whites constitute an overall majority - at this level there is no notional 'multiple balance of power',[2] which is a favourable condition for consociationalism. The basic structure of the constitution translated this majority proportionately into a white majority in the electoral college, the president's council and the joint advisory committees, so that in these institutions the coloureds and Indians, the new 'opposition' to the white government, would have constituted, jointly and severally, permanent minorities. Despite their presence in these bodies their minority position would have made them powerless to influence the decision-making process without a veto right. Where coloureds and Indians were over-represented in a joint institution, namely the council of cabinets, they also had no veto power, as the President was empowered to take binding decisions. Proponents of the scheme emphasised that despite the absence of a constitutional veto power, consensus could become a fundamental norm in the political process, but this prediction would seem over-optimistic in the light of South Africa's political background. In Dahl's terms,[3] the constitution would have given rise to a more inclusive political system (in terms of increased citizen participation), but would not have involved greater political contestation because of the new opposition's institutionalised minority status and lack of veto power.

In several other respects the government's constitutional system fell short of the consociational requirements. The earlier analysis of legislative and executive power[4] shows that 'segmental autonomy' for coloureds and Indians could not have materialised in practice. The bill purported to entrench the number of representatives for each group in the joint institutions, instead of

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1. Lijphart op cit 68.
2. See above, 120.
3. R. Dahl Polyarchy - Participation and Opposition (1971) 5ff.
4. See above, 305-309.

allowing for a flexible adjustment to accommodate future demographic changes. As far as the proportionality principle is concerned, this would not have mitigated the influence of the white majority, but would have emphasised it; proportionality was also not contemplated as the basis of making public appointments or allocating the 'spoils' of government. The constitution would have retained that feature of the Westminster system which is most anti-consociational in effect, namely that success in one decisive site - the elections for the white assembly - would permit domination of the whole political system.

(dd) The government's constitution and legitimacy

The first two phases of the 1977 constitution saw the commitment of the government to the terminology, and to a lesser extent the form, of consociationalism, in its search for a new legitimising ideology. The preceding analysis has shown that the 1977 constitution provided for the consociational incorporation of coloured and Indian leaders into the political system on a differential basis, which would have given rise, at the most, to a system of sham consociationalism, or consociational authoritarianism. The negative response to these proposals from coloured and Indian leaders, and the failure of the government itself to implement them, shows that they could have made little impact on the legitimacy crisis facing the state system in South Africa. Thus it was not consociationalism itself, but the government's distorted version thereof, which can be negatively evaluated in terms of these developments. Nevertheless, the question of consociationalism and legitimacy deserves further attention at this stage.

The legitimacy of the new constitution was undermined by a number of factors. These include the unilateral way in which it was drafted and presented to coloureds and Indians,[1] an inauspicious propagation for a consociational system, the exclusion of blacks, to which references have already been made,[2] the dependence of the system of race classification, and the fact that, in spite

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1. See Lijphart op cit 68; Hanf, Weiland and Vierdag op cit 412.
2. See above, 310-311.

of the inclusion of consociational elements, it did not affect the real distribution of political power. Some of these aspects could have been rectified through a more consistent application of consociational principles, but it is submitted that the real legitimation problem arose from the fact that the government's constitution provided a new institutional framework for the same policy of political separatism. It was inevitable that the legitimacy problem affecting this policy should be transferred to the new constitution when it became apparent that it involved no fundamental change in policy. It is important to note that the same legitimation problem would affect any consociational arrangement which incorporated and institutionalised that policy. This can be illustrated by pursuing the line of analysis adopted by Olivier.[1] The government's policy is based on the assumption that it is possible to draw a distinction between matters which affect each of the white, coloured and Indian groups exclusively, and others which affect them all generally. In accordance with this distinction each group should have exclusive legislative and executive control over those separable matters which exclusively affect it, and the institutions exercising that control require both personal and territorial jurisdiction. In the South African context both types of jurisdiction are inherently dependent on existing discriminatory statutes, namely the Population Registration Act[2] and the Group Areas Act,[3] both of which are politically and economically unacceptable to most non-whites.[4] From a functional point of view there are very few powers which can be exercised by institutions which have only personal jurisdiction - education is one such matter, but apart from others relating to linguistic or cultural affairs, the list is comparatively short. Jurisdiction over a territorial area is the only basis on which separate institutions with substantial powers can be justified. There are indications that the government intended to devolve relatively substantial authority to the coloured and Indian institutions, but this could only

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1. N.J.J. Olivier 'Die Regering se Konstitusionele Voorstelle' (unpublished paper, Cape Town, 1979) 24-26.

2. Act No 30 of 1950.

3. Act No 36 of 1966.

4. The analysis could be extended to show that other statutes, such as the Prohibition of Mixed Marriages Act No 55 of 1949, would also be indispensible to the functioning of the 1977 constitution.

have been exercised with the group areas legislation providing the jurisdictional base, a statute which is not only discriminatory per se, but is also enforced by whites. The only way in which this aspect of the legitimacy problem could be avoided is by conferring most powers on the joint authorities - and the consistent application of consociational principles at this level would have significant implications for white political power.

4. The Schlebusch Report and its Sequel

(a) Pre-Schlebusch commission developments[1]

Reference has already been made to the first statutory steps taken in the implementation of the 1977 constitution, even before the publication of the 1979 draft bill;[2] however, by the time the Schlebusch report was published the legislation had not been put into effect, and the post-Schlebusch implementation of the constitution began with the South African Indian Council still in its original non-elected form and without any significant powers.

Concurrently with the investigations of the Schlebusch commission in 1979 and early 1980, three political developments of constitutional significance were taking place. The first related to the position of urban blacks, and involved the government's acceptance, and partial implementation, of the Wiehahn and Riekert recommendations;[3] and the phasing in of the community council system; whatever the political limitations of these changes, they evidenced a greater official acceptance of the permanence of blacks in the 'common area' than the government's constitutional policy suggested. The second development involved changes in the state administration, which were made with the intention of co-ordinating policy-making and its implementation; this included a reduction in the number of state departments, changes to the structure and

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1. On the Schlebusch commission, see above, 270-273.
2. See above, 173-175.
3. These commissions have been referred to above, 265-270.

functions of cabinet committees, and the rationalisation and streamlining of the public service.[1] The third development was the promotion of the 'constellation of states'[2] concept, which was perceived mainly in terms of economic co-operation in southern Africa, but which had implications for constitutional development.

Mention should also be made of a constitutional development of consequence which occurred before the Schlebusch report was published, namely the abolition of the Coloured Persons Representative Council.[3] The significance of this step was that it evidenced a movement away from the principle of representative government, as it had hitherto been applied in South Africa, towards a more managerial system of government;[4] this trend was also evident in the earlier rationalisation of the state administration, as well as in subsequent constitutional developments. This also meant that the consociational incorporation of coloureds into the political system could not take place via a representative institution, and after the government had announced later in the year that the Coloured Persons Council would not be established, it could not even take place via a nominated institution. It was therefore inevitable that there would be a change in emphasis when the constitution came to be implemented; this change was already evident in the Schlebusch report which recommended the creation of a president's council which could be used to incorporate individual coloured élites into the political process.

(b) The Schlebusch Commission recommendations

Five specific constitutional recommendations were made in the majority report of the Schlebusch commission. These were:

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1. The number of cabinet committees was reduced from 22 to 6, and the number of state departments from 40 to 22. For a summary of these changes see 1979 Annual Survey of Race Relations 5-6.
2. On the constellation of states see below, 348-352.
3. By Act No 24 of 1980.
4. On the topic of 'managerial government' see the excellent paper of H. Giliomee 'Structural Change and Political Options' Platform 80 series, University of Natal (13 February 1980).

1. That the Senate be abolished (although this did not imply an acceptance of the principle of unicameralism);
2. That, in view of the recommendations on the Senate, the entrenching procedure be placed within the jurisdiction of the House of Assembly alone;
3. That a Vice-State President be elected on the same basis as the President to serve ex officio as chairman of the president's council;
4. That a president's council, consisting of sixty 'nationally acknowledged experts' appointed by the State President, be established, to advise the State President on various matters;
5. That the House of Assembly be enlarged to accommodate twenty additional members to be nominated by party leaders on a proportional basis.

It is immediately apparent that the majority recommendations are all reconcilable with the broad principles of the 1977 constitution, and in fact amount to a selective endorsement of it. There is also, however, the change in emphasis necessitated by the disestablishment of the Coloured Persons Representative Council: for the first time the president's council assumes a prominent position, and it is necessary for the implementation of the 1977 constitution to be commenced at the highest tier of government. A Vice-State President had not been mentioned in the first two phases of the government's constitution, but was necessary to add prestige to the president's council and to avoid the State President being drawn into the political arena. The government accepted all the majority recommendations and proceeded to implement them within a short period; while the constitutional amendments described below did not all chronologically follow the publication of the report, they are all closely related to the new direction of constitutional development suggested by the commission.

(i) The abolition of the Senate

One of the unanimous recommendations of the Schlebusch commission was that the Senate should be abolished with effect from 1 January 1981, and appropriate legislation was passed for this purpose.[1]

1. S 16 of the Republic of South Africa Constitution Fifth Amendment Act No 101 of 1980 repealed those sections of the Constitution relating to the Senate; in terms of s 37(1) of the act s 16 came into operation on 1 January 1981.

This recommendation clearly accorded with the early formulations of the 1977 constitution and the 1979 draft bill - had the Senate been retained it would have been necessary to establish two additional upper chambers for the coloured and Indian 'parliaments'. The abolition of the Senate was generally perceived as an important step in the movement away from the Westminster constitutional model, whereas in reality bicameralism is only a secondary feature of that model[1] and the Senate's demise had more of a symbolic than a practical significance. In theoretical constitutional terms it involved a weakening of the restraints on the legislature's powers, but in practice the Senate's role as a chamber of review had been very limited.[2] It had also not been conspicuous in representing provincial interests or the interests of those excluded from the franchise, and even in its more specialised role as curator of the entrenched sections it had been manipulated by the House of Assembly. But although it was performing no important constitutional function there is some merit in the view that the Schlebusch commission could have investigated the possibility of a radical reformation of the Senate, so as to build upon its institutional legitimacy.[3] The abolition of the indirectly-elected Senate was further evidence of the trend away from representative institutions in South Africa, the Senate's 'substitute', the president's council, being a fully nominated body.

In anticipation of the abolition of the Senate the entrenching procedure had been statutorily altered[4] to enable the entrenched provisions to be amended by the House of Assembly and State President only, the tradition of rigidity being retained in the requirement of a two-thirds majority in the House. This act was itself passed at a joint sitting of the Senate and the House of Assembly and approved by the required two-thirds majority,[5] and

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1. See above, 24.
2. See above, 150.
3. See on this theme M. Wiechers 'Grondslae vir Politieke Ontwikkeling in Suid-Afrika' in J. Coetzee (ed) Gedenkbundel H.L. Swanepoel (1976) 102.
4. S 1 of the Republic of South Africa Constitution Fourth Amendment Act No 74 of 1980, which amended s 118 of the constitution. See M. Wiechers Staatsreg (3 ed, 1981) 267-8.
5. That is in terms of s 63 of the Constitution. In fact all parties approved the three readings of the bill. See the Debates of the Joint Sitting of the Senate and the House of Assembly cols 1-43 (21-22 May 1980).

when the act became effective[1] it relegated the joint sitting procedure, a focal feature of the constitutional crisis in the 1950's, to constitutional history. As this legislation was enacted prior to the abolition of the Senate[2] the entrenched procedure was not required for the later action, which was effected through the normal bicameral process.

The abolition of the Senate had been preceded in 1980 by another constitutional amendment[3] which could also be said to have indirectly anticipated it, although the amendment was not motivated in those terms.[4] The act provided[5] that for delimitation purposes resort should henceforth be had to a provincial, and not a national, quota for determining the size of each constituency, subject to the discretionary loading and unloading. The quotas would be obtained by dividing the number of voters in each province by the number of members to be elected therein in terms of section 40 of the Constitution. This meant that the quotas in each province, and the number of voters in each constituency, could come to differ, thus affecting the value or weight of the vote in different provinces. This development should be seen against the historical conflict between the 'pegging principle' (namely that each province should have a constitutionally-fixed number of seats in the House of Assembly), and the 'national quota principle' (namely that all constituencies in the country should be of approximately equal voter strength).

Under the South Africa Act each province was guaranteed a minimum number of seats,[6] and it was therefore appropriate to use a pro-

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1. S 2 of the act provided that it would come into operation immediately after the Senate ceased to exist.

2. It was approved by the State President on 17 May 1980.

3. The Republic of South Africa Constitution Third Amendment Act No 28 of 1980, which was the first of the 1980 amendments to come into operation. The fact that this amendment was passed before publication of the Schlebusch report was criticised by opposition members in the debates (eg House of Assembly Debates vol 8 col 3391 (24 March 1980)).

4. See the deputy minister's motivation House of Assembly Debates vol 8 col 3378-9 (24 March 1980).

5. S 1 amended s 43 of the Constitution.

6. This was regulated by s 33 of the South Africa Act and resulted in the following inter-provincial distribution of constituencies - Cape Province 58, Natal 12, Orange Free State 14, Transvaal 37; Natal and the OFS were both over-represented.

vincial quota system to delimit the constituencies within each province.[1] As the size of the Assembly increased the provinces with growing populations acquired additional seats,[2] until the various provincial quotas were approximately equal.[3] In 1941 the pegging principle was discarded, and the delimitation commission was empowered to allocate constituencies among the provinces in proportion to their voter strength;[4] although the provincial quota system was retained it had little practical significance, since the quota in each province now approximated a notional 'national quota'.[5] In 1965 a national quota system was introduced for the first time,[6] and there was no need to refer to the inter-provincial allocation of seats, because it was provided that the country would be divided into 165 constituencies of approximately equal size; this arrangement was implicitly based on the principle that like constituencies should be of equal size throughout the country, and that the value of individual votes should also be equal. But in 1973 the pegging principle was reintroduced,[7] and the Constitution purported to entrench the inter-provincial allocation of seats for a decade.[8] There was now an apparent incompatibility between the pegging and quota principles, but in practice the former prevailed over the latter and the national quota lost all its significance - considerable inter-provincial discrepancies arose between the number

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1. Provided for in s 40(1) of the South Africa Act (later amended by s 22 of Act No 20 of 1940, read with s 1 of Act No 10 of 1946).

2. S 34. The size of the House could be increased to 150 members, which was reached in 1931.

3. See H.J. May The South African Constitution (3 ed, 1955) 82.

4. The Electoral Quota Consolidation Act No 30 of 1942 amended the relevant provisions of the South Africa Act.

5. This system of delimitation and inter-provincial allocation of seats was retained in the republican constitution - ss 40, 42 and 43.

6. The Constitution Amendment Act No 83 of 1965 which amended ss 40 and 43 of the Constitution; the quota would be calculated by dividing the total number of voters in the country by 165 (the act also increased the size of the House to this number). The only deference to the provincial system was that constituencies could not straddle provincial boundaries.

7. The Constitution and Elections Amendment Act No 79 of 1973, s 81 of which substituted a new s 40 in the Constitution. S 83 provided for the first time that the large size constituencies could be unloaded to 70 per cent of the quota.

8. That is Cape Province 55 seats, Natal 20 seats, Orange Free State 14 seats, Transvaal 76 seats.

of voters in like constituencies because seats could no longer be withdrawn from the depopulating provinces to be allocated elsewhere. The 1980 amendment dispensed with the national quota altogether, and buttressed the pegging principle by introducing the provincial quota system. The 1980 delimitation was done on the basis of widely differing quotas for the different provinces[1], and the pegging principle ensured that the Transvaal was, in proportional terms, under-represented in the Assembly; the system of loading and unloading further aggravated the discrepancies in constituency sizes.[2]

The relevance of this excursus to the abolition of the Senate is that the new arrangement compensated the smaller provinces in some measure for the minimal representation which they had lost in the upper chamber. In this sense the over-representation of the minority provinces can be seen as a variation on the consociational principle of proportionality, although to see the amendment in these terms would involve an ex post facto rationalisation.[3] From a democratic point of view it involves a significant departure from the 'one vote one value' principle,[4] which the consociational model attempts to uphold by translating electoral support into proportional legislative representation. Thus while the abolition of the Senate is of no particular significance in terms of consociational theory, one of the related constitutional amendments can be said to have negative implications from a consociational perspective.

(ii) The restructuring of the House of Assembly

As partial compensation for the abolition of the Senate, and in conformity with the principles embodied in the government's 1977 constitution, the size of the House of Assembly was increased in

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1. That is the Cape 12 626, Natal 13 283, Orange Free State 12 863, and Transvaal 15 433. And see above, 149.

2. In the 1981 general election the largest constituency was Bezuidenhout (urban, Transvaal) with 17 308 voters, and the smallest Prieska (rural, Cape) with 8 720 - a ratio of 1,98:1. See above, 147-149.

3. The relevant legislation was perceived by many political commentators as being a product of the internal divisions within the National Party, as it affected the power of the conservative faction whose strength lay in the Transvaal.

4. See I. Duchacek Rights and Liberties in the World Today (1973) 194. On the reapportionment decisions in the United States, see below, 459.

1980 to 177 members,[1] and provision was made for the first time for non-elected members of this body. The directly elected component of 165 members was retained, as was the method of delimitation and the inter-provincial pegging principle; provision was made for an additional four members to be nominated by the State President, one from each province,[2] and for a third component of eight members to be elected on a proportional basis by an electoral college comprising the directly elected members.[3] The nominated and indirectly elected members would require the same qualifications for membership of the House as the elected members, and their membership would be co-terminous with the life of the House; casual vacancies would be filled by nomination or election, according to whether the vacating member had himself been nominated or indirectly elected.[4]

This restructuring of the House of Assembly involved several minor deviations from the 1979 draft bill and the Schlebusch report. The former made provision for twelve additional members, of whom three would be elected on a proportional basis by each provincial electoral college consisting of the elected members from that province, and for eight members to be nominated by the white prime minister, of whom two would be from each province.[5] The latter recommended that all twenty additional members should be nominated, but that this be done by the State President on the recommendation of party leaders and in proportion to the parties' representation in the House.[6] The amendment followed the draft bill, save that the numbers of nominated and indirectly elected members were reduced, and the provincial factor in the election of the latter members was dispensed with. The new arrangement was modelled on similar features pertaining to the former Senate, and its principles were sometimes supported in those terms.[7]

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1. The Republic of South Africa Constitution Fifth Amendment Act No 101 of 1980, s 17 of which substituted a new sub-sec (ii) in s 40 of the Constitution Act.
2. The amended s 40(1)(b) of the Constitution Act.
3. The amended s 40(1)(c) of the Constitution Act. For the regulations pertaining to these elections see No R 2501 Gov Gaz 7325 (5 December 1980).
4. The amended s 40(1B) of the Constitution Act.
5. Draft bill s 27(1)(b) and (c).
6. Schlebusch Report 7.
7. See, eg, House of Assembly Debates vol 16 col 8057 (4 June 1980).

The main justification given by the government for increasing the size of the House of Assembly with nominated and indirectly elected members was that it would enable knowledgeable persons and specialists in various fields to be brought into the House if they were unable to obtain seats by way of ordinary election.[1] A second justification was that it would allow a better representation to be achieved in the House in respect of otherwise unrepresented groups or interests.[2] A comparative constitutional precedent for the proportionately elected component is found in the Federal Republic of Germany, where half the members of the Bundestag are directly elected in constituencies according to the plurality principle, and the other half are elected on a proportional basis through a party list system.[3] But precedents for cabinet-nominated members of a non-secondary legislature are less easy to discover, save in respect of the Venda and Bophuthatswana parliaments.[4]

The main criticisms of these amendments are that they tend to make the House 'undemocratic',[5] they distort the balance of power between the political parties, and they increase the extent of executive control over the legislature. The first criticism is prima facie the strongest, particularly in relation to the nominated members. What may be appropriate for a second and secondary chamber, is less easily justifiable in respect of a unicameral sovereign legislature. While the total non-elective component at present constitutes only a small minority of the members of the House, the introduction of this feature involves a further movement away from representative government which could be accentuated over time, even at the parliamentary level. The usual rejoinder to this criticism is that the undemocratic features of the new system are offset by the better all-round representation which can now be achieved; it is worth noting, however, that the statute prescribes no additional qualifications, in terms of background, experience or specialisation, for either

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1. See the minister's second reading speech, House of Assembly Debates vol 16 col 8037-8 (4 June 1980).
2. House of Assembly Debates vol 16 col 8740 (4 June 1980).
3. Hand, Georgel and Sasse European Electoral Systems Handbook (1979) 58ff.
4. See above, 250-251.
5. That is within the confines of the 'white' political system.

group of additional members, and the experience of the Senate suggests that party loyalties will inevitably predominate over other considerations when these members are chosen.[1] The possible implications of this arrangement should be seen in conjunction with the government's recently-acquired ability to draw 'specialists' directly into the cabinet for a full year, which also entitles them to participate, short of voting, in the proceedings of the Assembly.[2]

The second criticism relates to the inter-party relationships within the House, although in terms of South Africa's political realities this operates at a somewhat theoretical level. The four 'nominated' members give the government an increased majority unrelated to its popular support or parliamentary strength, and in a situation where there was a delicate balance of power between government and opposition they could maintain the government in power, despite losses in by-elections or changes of party allegiance by elected members which would normally unseat it. The government's position has been further strengthened by a subsequent amendment[3] which allows all non-elected members of parliament to retain their seats, notwithstanding the dissolution of parliament and the holding of such election, for at least 180 days after a general election; this could also, in theory, lead to a defeated government remaining in power.[4] Apart from the distortions which these factors involve for the Westminster system of parliamentarianism, they also have an anti-consociational effect in that they strengthen the influence of the majority white party, and any future increase in the size of the

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1. The first election of members by the electoral college took place on 22 January 1981 and resulted in the return of seven additional government members and one from the official opposition. Of the government members, six were former senators and one was a party organiser; the opposition member was a political researcher and former MP. The four nominated members were all active National Party politicians. After the 1981 general election, the government chose two members with 'special expertise'. See H. Rudolph 'Nominated Members of Parliament and the Demise of the Entrenched Sections' 98 (1981) SALJ 346 at 348.

2. See below, 333-336.

3. South Africa Constitution Amendment Act No 40 of 1981.

4. See the example in H. Rudolph op cit 350.

nominated component would accentuate this phenomenon. As far as the eight proportionately elected members are concerned, their presence would not distort the party power-balance within parliament, save insofar as the majoritarian electoral system distorts the initial representation of political parties, and they reflect this distortion; thus from a consociational point of view this is a false 'proportionality'. Proportionality can serve an independent consociational purpose if it exists alongside majoritarianism,[1] but not where it is built onto majoritarianism, in which case it involves merely an extension of the latter. The proportionality principle introduced into the structure of the House of Assembly cannot, therefore, be regarded as a consociational feature.

The third criticism is that the amendments increase the cabinet's ability to dominate the legislature, thereby distorting the reciprocal relationships of control and responsibility traditionally associated with the Westminster form of parliamentary government.[2] This criticism also tends to operate at the level of constitutional theory because the gravitation of power from the legislature to the executive, and the dominance of the latter over the former, are common features of modern systems of government. In relation to this theory the nominated members, and to only a slightly lesser extent the government's proportionately elected members, ensure greater direct control for the cabinet over the legislature, since these members are 'responsible', not to constituents, but to the government, on whom they depend for reappointment; even the partial separation of powers of a parliamentary system is distorted by this arrangement. Secondly, the constitutional responsibility of the cabinet to the legislature, as envisaged in a parliamentary system, is affected by the above factors; and thirdly, the responsibility of the executive to the

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1. For example in the West German electoral system each voter has a second vote for the party of his choice, irrespective of whether there is a party candidate contesting the constituency in which he is entitled to vote. The proportional allocation of seats from party lists thus bears a close arithmetical relationship to the popular support of the parties.

2. See above, 26.

electorate, as mediated through a representative legislature, becomes more remote when the mediating institution is only partly elected. These changes involve a move away from the principle of constitutional government, and, insofar as consociationalism presupposes a deep sense of constitutionalism, they are not favourable developments from a consociational point of view.

(iii) The Vice-State President and the president's council

The Schlebusch report recommended the creation of a new office of Vice-State President, and this recommendation was accepted by the government and given effect in the Fifth Constitution Amendment Act of 1980.[1] Although the two earlier formulations of the government's 1977 constitution had made no provision for this position, it was to assume some significance in view of the emphasis placed on the president's council in the post-Schlebusch developments. It also suggested that the government wished to retain a 'non-political' presidency, because from a functional point of view there was no reason why the President could not perform the tasks conferred on the Vice-State President. But perhaps the most compelling reason for the creation of the new position was that it would give added status and prestige to the president's council, of which the Vice-State President would be chairman; in fact the amendment act provided that the qualifications, election, tenure of office and removal of the Vice-State President would be the same as those relating to the President, and the provisions pertain to his remuneration and pension were also similar.

Two basic functions have been allocated to the Vice-State President. The first is to substitute for the State President when the latter is unable to perform the duties of his office;[2] in this respect he is a replacement for the president of the former Senate, who had previously served as acting State President. The second, and more significant, function is to preside over the

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1. The Republic of South Africa Constitution Fifth Amendment Act No 101 of 1980, s 5 of which inserted a new s 10A in Act 32 of 1961; other sections of the Constitution were correspondingly amended.

2. S 6 of the amending act substituted a new s 11 in the Constitution.

president's council at all times, other than when he is serving as acting State President.[1] This arrangement involves several deviations from the draft bill of 1979, according to which the chairman of the president's council would be nominated from its members by the President, who would himself have been elected by a composite electoral college. It was clearly not possible to use the same kind of electoral college for the Vice-State President, since it depended on nominations made by representative coloured and Indian assemblies. Resort was thus had to the same electoral college used for the presidency, comprising the members of the now unicameral white parliament, and in terms of the applicable qualifications the Vice-State President would also have to be white. The first election resulted in the appointment of a cabinet minister, the former chairman of the parliamentary constitutional commission.[2] One of the contentious aspects of the new office was that the scope of section 13 of the Constitution was broadened to include the Vice-State President, irrespective of which of the two basic functions he performs;[3] the protection from criticism would seem anomalous in respect of his activities on the president's council, which is expected to deliberate on sensitive political issues. In general terms the innovation of the vice-presidency, and the matters relating to the new office, highlight the significant role envisaged for the president's council during the current stage of constitutional development, and it also emphasises the government's commitment to maintaining centralised white control over the process of constitutional change.

In relation to the president's council itself, there were several deviations from the draft bill, but the Schlebusch recommendations were substantially adhered to. The act provided[4] that the coun-

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1. The new s 10A (3) of Act No 32 of 1961.

2. Mr A.L. Schlebusch.

3. S 8 of the amending act.

4. S 34 of Act No 101 of 1980 inserted Part VIIIA in the Constitution Act in substitution for certain provisions relating to the South African Railways and Harbours (ss 102-106).

cil would consist of sixty members,[1] excluding the Vice-State President, to be appointed by the State President[2] for five year periods, subject to the dissolution of the Council within ninety days after a general election.[3] There were three basic qualifications for membership of the council[4] - a minimum age of thirty years, South African citizenship, and membership of the white, coloured, Indian or Chinese groups,[5] and there were two incompatibilities, membership of a supra-local legislative body and governmental employment.[6] Of these factors the most significant is the qualification which ensures that the president's council is exclusively non-black in composition; of secondary significance is the express reference to Chinese persons for the first time in South Africa's constitutional history.[7] The State President is empowered to divide members of the council into standing committees for constitutional affairs, economic affairs, planning, and community relations, and, in his discretion, any additional committees;[8] membership of more than one committee can be held by a single councillor. The council has itself been empowered to draft rules and orders relating to its proceedings, and those of the committees,[9] save that a deficiency in the

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1. This was an increase of 5 over the draft bill which might have seemed necessary to accomodate the Chinese component; however only one Chinese person was appointed to the first council.

2. The State President would clearly act on the advice of the white cabinet in exercising this power; in terms of the draft bill (s 23(1)) he would have had to consult the three prime ministers.

3. S 105(1). This arrangement is reminiscent of the Senate and allows a new government to reconstitute the council.

4. S 103.

5. As with the bill, but unlike the first phase formulations, no quotas for the different groups are stipulated.

6. Subject to the s 55(d) exceptions.

7. The first official indication that Chinese persons would receive constitutional recognition was in the majority report of the Schlebusch commission which recommended their inclusion in the president's council. In 1980 there were 8 000 Chinese in the republic, most of whom were resident in the Johannesburg-Witwatersrand area. See the Official Yearbook of the Republic of South Africa (1980/81) 77.

8. S 104(2).

9. S 104(1).

number of members of the council or a committee will not affect these bodies in the exercise of their powers.[1]

The terms of reference of the president's council proved to be wider than those contained in the draft bill, according to which it could only function on the initiative of the council of cabinets.[2] It was, however, still restricted to advisory functions, and no legislative or executive powers were conferred on the council, nor were the powers of any bodies transferred to it. Its main function[3] is to furnish advice to the State President, either at his request, or in its own discretion if it considers a matter to be of public interest. Although this power is only of an advisory nature the enabling provision is of the broadest kind, and the cabinet can make use of the council in respect of any matter, regardless of whose jurisdiction it normally falls under; at the same time the legislative supremacy of the House of Assembly is left unaffected and reports must be tabled in the House within fourteen days of receipt by the State President.[4] The second, and secondary, function of the council is to advise any supra-local legislative body, at the latter's request, on any draft legislation;[5] this gives it a type of legislative-vetting function, although the views of the council are not of binding force, nor do they have to be tabled before the legislature concerned can enact the legislation.[6] Despite its limited role in the legislative process, and the fact that the council is predominantly an instrument of the executive, the government decided in 1981 to extend to the president's council a wide range of powers and privileges normally restricted to the sovereign parliament in a Westminster system;[7] not only are members given

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1. S 102(7). This proviso was carried over from the draft bill, and its purpose is to prevent boycott tactics from obstructing the operation of the council.
2. Draft bill s 25.
3. S 106(1)(a).
4. S 106(5).
5. S 106(1)(b).
6. Cf the position in terms of the Turnhalle constitution, above 224-228.
7. See the Powers and Privileges of the President's Council Act No 103 of 1981 which is closely modelled on the Powers and Privileges of Parliament Act No 91 of 1963, which in turn shows the strong influence of the Westminster parliamentary privileges. The previous year the government had intimated that the council would function very much unlike a legislature - see House of Assembly Debates vol 17 col 9126 (12 June 1980).

freedom of speech in relation to council matters,[1] but the council can summon witnesses to appear before it, and failure to respond can result in a criminal conviction.[2] In the performance of their functions the council and its committees are empowered to consult with individuals or state institutions, and to establish consultative committees for this purpose;[3] provision was also made, as had been recommended in the Schlebusch report, for consultation with a council of 'black South African citizens' to be established by act of parliament,[4] but shortly after the legislation was passed the government announced that such a council would not be instituted.[5]

In the political deliberations preceding the institution of the president's council its composition was perceived as its most controversial feature, and less attention was devoted to either its status or functions. When it was established, the exclusion of blacks from the council was justified by the government in terms of the different historical constitutional development of blacks, and more particularly on the grounds that their existing constitutional structures were adequate and their inclusion in the council would involve a duplication of the channels of political communication.[6] This two-fold argument was restated a year later,[7] and the prime minister added that even if the president's council itself recommended the inclusion of blacks, the government would not take this step.[8] The same rationale has underlain all the formulations of the 1977 constitution, which in the government's view is designed to complement the homelands' constitutional structures, and not to modify them. Thus the current phase of constitutional development can be seen as a continuation of the developments which have taken place since the early 1950's, and it involves no material change in the government's political policies. In particular, it emphasises the new black/non-black axis of constitutional development, and the fact that the political rights of blacks will be exercised only through

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1. Ss 2 and 3 of Act No 103 of 1981.
2. S 11 read with s 15 of Act No 103 of 1981.
3. S 106(4)(a). 4. S 106(4)(b).
5. See M. Wiechers Staatsreg (3 ed, 1981) 245.
6. See House of Assembly Debates vol 16 cols 8250-5 (5 June 1980).
7. House of Assembly Debates vol 1 cols 246-7 (28 January 1981).
8. House of Assembly Debates vol 1 col 30 (26 January 1981).

the national states.[1] The 'black citizens council' referred to in the legislation was perceived by the government, not as an alternative to the homelands structures, but as the institutionalisation of the existing consultations which take place among the leaders of non-independent national states, and it was envisaged that consultation would take place between this body and the council through a committee system.[2] The exclusion of blacks from the president's council has implications for future constitutional developments in another sense, because the government now regards the council as the prime vehicle for constitutional change in the country;[3] by definition, as it were, it is likely to see constitutional issues in black/non-black terms.

Less attention was given in the parliamentary debates and political columns to other features of the council. It was intended to comprise experts in various disciplines and recognised community leaders,[4] although no requirements along these lines were stipulated in the enactment. As far as the appointment of members is concerned, the enabling provision is of a broad kind[5] and gives the sole effective discretion in the choice of members to the cabinet.[6] The movement away from representative institutions is again apparent here, and it has involved severe setbacks for the legitimacy of the new institution. The constitutional status of the president's council also has implications for its legitimacy, in that it is subordinate to the white parliament and wholly dependent on that body for its powers and continued existence, and it is further dependent on parliament and the white-controlled executive and bureaucracy to give effect to its recommendations. Even in relation to the defunct Senate, for

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1. Some supporters of the council, however, suggested that the exclusion of blacks was a temporary aberration which would be rectified in due course. See the analysis of the leader of the opposition in House of Assembly Debates vol 17 col 9052-9060 (12 June 1980).

2. See House of Assembly Debates vol 15 cols 8251-8252 (5 June 1980).

3. See further on this matter below, 342-345. The last report of the Schlebusch commission (4 February 1981) recommended that in view of the establishment of the council the commission be relieved of its task.

4. See House of Assembly Debates vol 16 cols 8035-8036 (4 June 1980).

5. S 102(1).

6. Subject only to the s 103 requirements.

which it is a partial substitute, it has an inferior constitutional, and probably political, status, and it would take some time for it to acquire a performance-related legitimacy of its own.

Of all the constitutional amendments passed in 1980 those relating to the president's council were regarded by the government as the most important. The council was first constituted early in 1981[1] and was divided into five standing committees.[2] Of these, the most prominent is the constitutional committee, which was given all the evidence submitted to the Schlebusch commission and proceeded to take evidence of its own. The council as a whole meets in public,[3] but the committees, in which the actual work of the council is done, conduct most of their sessions in camera. In view of the importance of the council in relation to constitutional development it is referred to in greater detail in the following chapter. It is, however, relevant to mention here that it was conceived both structurally and functionally as a consociational-type body - a 'grand coalition' of white, coloured and Indian élites, which could depoliticise contentious issues and resolve them along accommodationist lines. The consociational aspects were emphasised in several symbolic respects - the council's seating is arranged in concentric semi-circles, rather than in an (adversarial) horse-shoe shape, and little physical provision has been made for the media and public.[4] On the other hand several features expose the limitations of the consociational comparison: its unrepresentative nature, its limited powers, and the absence of proportionality and a veto system. The comparison with other consociational institutions, such as the Dutch Social and Economic Council, is only of limited value; while these are also appointed advisory bodies, they exist alongside representative institutions and are functionally specialised,

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1. It consisted of 43 whites, 12 coloureds, 4 Indians and one Chinese. During the course of the year 2 whites and one Indian resigned.

2. Apart from those mentioned in the legislation, a scientific committee was also established.

3. S 7 of Act No 103 of 1981 provides that all sessions must be in public, unless the relevant chairman provides otherwise.

4. Nevertheless verbatim reports of the council's sessions are published in Hansard form. See Reports of the President's Council vol 1 (3-12 February 1981) and vol 2 (19-21 May 1981).

whereas the president's council is a 'substitute' for representative institutions, and one of its most salient functions is that of deliberating on fundamental constitutional issues. Above all any 'consociational accommodation' achieved by the council will only have a contingent political relevance, because effective power continues to vest in the white political institutions.[1] Against the unimpressive background of other nominated and advisory bodies in South Africa's constitutional history its future political efficacy would not seem hopeful, but it may be used by the government as a legitimising agent for its constitutional policies and as a device for bypassing a recalcitrant National Party caucus and provincial congresses.[2]

(iv) Changes in parliamentary government

Among the constitutional amendments of 1980 was one which was not specifically related to the government's 1977 constitution, but which fitted closely into the general trend of constitutional developments in the immediate post-Schlebusch report era. This change went to the heart of the Westminster form of parliamentary government.

It has been shown in this work[3] that the Westminster constitutional system is characterised by a close institutional inter-relationship between the legislature and executive, which accounts for several other features of that system. In Britain it is convention alone which prescribes that ministers should be members of either house of the legislature, in spite of the prominence of this principle in British constitutional law. The convention permits a minister to hold office for a limited period before gaining membership of either house, but does not specify the maximum duration of such period.[4] In the Westminster export models it has been customary to enact the convention that ministers be members of the legislature, subject to a period of grace which has varied from case to case. In the South Africa Act[5] this period

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1. On the government's response to the first recommendations of the president's council see below, 344—345.
2. See below, 344.
3. See above, 9-12.
4. See E.C.S. Wade and G. Phillips Constitutional and Administrative Law (9 ed, 1977) 48-50.
5. S 14.

was limited to three months, with a similar period in the republican constitution,[1] but after nominal interludes a minister could, in theory, be re-appointed for an indefinite number of periods. During the period of grace ministers could not participate in any proceedings of either house, and were accorded none of the privileges of members of parliament. In South Africa it was customary for such ministers to be nominated to vacancies in the Senate, and the phenomenon of a non-legislative member of the cabinet was not frequently encountered.

In terms of the 1980 amendment[2] a minister may hold office for a period of twelve months before becoming a member of the legislature, but if he has so held office (regardless of the duration) he cannot be re-appointed as a non-legislative minister.[3] For the first time such ministers are allowed to participate in all parliamentary proceedings, save for voting,[4] and are accorded all the powers and privileges of members of parliament.[5]

These amendments were motivated by the government in terms of the need to introduce persons with exceptional ability or talents directly into the cabinet, without their having to undergo the inconvenience and disruption of contesting an election immediately thereafter,[6] thereby providing greater flexibility for the prime minister in regard to ministerial appointments.[7] During the life of the Senate this flexibility had been provided in a different way, but with its abolition the three month period was

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1. S 20(3); see also s 21(3) in respect of deputy-ministers.
2. S 1 of the Republic of South Africa Constitution Amendment Act No 70 of 1980, which amended s 20(3) of the Constitution Act.
3. This qualification was only introduced at the committee stage of the bill (see House of Assembly Debates vol 13 col 6425 (14 May 1980)) and without it re-appointment for additional twelve-month periods would have been possible.
4. S 2 of the amending act altered s 54 of the Constitution Act.
5. S 3 of the amending act amended s 1 of the Powers and Privileges of Parliament Act No 91 of 1963 so as to include non-parliamentary ministers within the definition of 'members' of parliament.
6. House of Assembly Debates vol 10 col 4713 (23 April 1980).
7. House of Assembly Debates vol 10 col 4562 (22 April 1980).

perceived as inadequate,[1] despite the government's new ability to appoint members directly to the House. In theoretical constitutional terms, the amendment gives the cabinet greater independence vis-à-vis the legislature, and tends to blur traditional lines of ministerial responsibility to the legislature, and via the latter to the electorate. Even the twelve-month limit could be circumvented by appointing a minister to the House under the s 40(1)(b) nomination procedure, and the cabinet could, at any one time, consist of a significant proportion of s 20(3) ministers and nominated members of parliament. Some control was provided by allowing non-elected ministers to participate in the proceedings of the House, and thereby be subjected to questioning and criticism in relation to legislation and the administration of their departments, but the new arrangement involved a clear deviation from the principles of parliamentary government.

The significance of the amendment under discussion should be viewed in the light of the other constitutional amendments of 1980, and in particular the increase in size of the cabinet to twenty members,[2] the provision for nominated members of parliament, the transition to unicameralism, and the creation of the non-elected president's council. In this perspective it makes a small, but not unimportant, contribution to the movement away from representative government towards a more managerial system. The trend was continued in 1981[3] when the State President was empowered to assign any statutory power conferred on a specific minister to any other minister, for any reason whatever;[4] in addition the prime minister was empowered to assign his own powers and functions to other ministers on the same basis. The extension of executive power without the introduction of new devices for controlling and

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1. At the end of 1980 Dr D.J. de Villiers was appointed directly to the cabinet in terms of the s 20(3) procedure. He lost the Gardens constituency in the April 1981 general election, but was able to remain in the cabinet under the 12-months provision until he won a by-election later that year.

2. S 11 of Act No 101 of 1980 which amended s 20(1) of the Constitution Act.

3. Republic of South Africa Constitution Second Amendment Act No 101 of 1981, s 3 of which inserted a new s 20A in the Constitution Act. S 10 of the Interpretation Act No 33 of 1957 was appropriately amended.

4. Previously the State President had been able to empower one minister to perform the functions of another, but only where the latter was unable to perform those functions - s 20(4).

checking the exercise of such power can be seen as a movement away from the principles of constitutionalism. Insofar as these developments involve the concentration of power in the white cabinet they are also anti-consociational in effect. On the other hand this very concentration of power would enable the government more easily to embark on the consociational engineering discussed in the next chapter. The following example may be given of the new theoretical options which the amendments under discussion have made available to the government: as the constitution prescribes no qualifications for cabinet members, other than those pertaining to membership of the House of Assembly, it is now constitutionally possible to appoint blacks to the cabinet for twelve-month periods. In this sense the institutional basis already exists for the adoption of consociationalism as a political crisis model.[1]

5. Conclusion

During the immediate post-Schlebusch phase it was evident that the government had committed itself to two types of constitutional arrangements for South Africa - partition, and quasi-consociationalism. Partition ensures that the political rights of blacks will be exercised through the independent national states, save for the limited local government rights in the 'common area'; the 1977 constitution involves the creation of joint institutions along consociational lines for non-blacks, but without affecting overall white control.

One of the clear themes of this chapter is the political and institutional continuity evident in the 1977 constitution, which has provided a new constitutional framework for the same political policy. To some extent there was a movement away from the Westminster features of the constitutional system, towards a further concentration of power in the executive. The various amendments also strengthened the National Party's institutional position to ensure that it would be in an overall majority in any new joint institutions, and thereby remain in control of the process of constitutional change.

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1. See on this matter below, 520-524.

During all three phases of the 1977 constitution the government's commitment to some structural features of consociationalism has been evident, and since the Schlebusch report it has conceded that constitution-making itself should not be unilaterally undertaken by the government. But the analysis has shown that the government's constitution, particularly in its later stages, is both undemocratic and imperfectly consociational. From the consociational perspective the essential shortcoming is that power-sharing is not an institutional requirement. But beyond that, there are more fundamental problems relating to the legitimacy of any constitutional framework which institutionalises the government's original policy. These problems beset the implementation of the government's constitution, with the failure of the representative institutions on which it depended; but they are likely to apply a fortiori to attempts to implement the scheme through the consociational co-operation of non-elected individuals. This has led to the view that the government's 1977 constitution might be no more than a point of departure for the process of consociational engineering, and this is dealt with in the following chapter.

CHAPTER 7

CONSTITUTIONAL PROSPECTS - NON-DEMOCRATIC CONSOCIATIONAL ENGINEERING

1. Introduction

Part of the government's response to the economic, political and security pressures being exerted on the South African system has, in the late 1970's and early 1980's, been to embark on a strategy of non-democratic consociational engineering which has become apparent, inter alia, in recent constitutional amendments.[1] It has been pointed out that many of these amendments show a basic continuity with the constitutional trends of the last three decades, and that they involve adaptations within the constitutional and political system, and not deviations from it. In this process the National party is depicted as the vehicle for political reform,[2] and the constitutional adaptations take place under the overall legislative control and political domination of whites. In this chapter an attempt will be made, without being unduly speculative, to describe the likely constitutional developments which will succeed this early quasi-consociational phase, given a reasonable consistency in the forces operating on the system, and continued white control. These developments will be analysed from a consociational perspective.

With the publication of the Schlebusch report, and the constitutional amendments which followed it, the government appeared to have shelved its 1977 constitution, at least as far as such fundamental aspects as the three parliament arrangement were concerned. But the government's basic commitment to this constitution has not wavered, despite the setbacks in its implementation

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1. This corresponds to the third of the options referred to by F. van Zyl Slabbert and D. Welsh (South Africa's Options - Strategies for Sharing Power (1979) 3-8), that is the politics of siege under a modernizing oligarchy; the other two options are the politics of repressive siege, and the politics of negotiation. See also A. du Toit 'Different Models of Strategy and Procedure for Change in South Africa' in F. van Zyl Slabbert and J. Opland (eds) South Africa: Dilemmas of Evolutionary Change (1980) 2-13.

2. Du Toit op cit 3.

brought about by the abolition of the CPRC in 1980 and the continual delays in obtaining a fully elected SAIC; in fact the government reaffirmed this commitment several times during 1981.[1] The future implementation of the 1977 constitution, however, is likely to occur on a piecemeal basis, commencing at the lowest level of government, and in this process there are likely to be several modifications of the original plan. The government is also likely to show greater deference to the legitimacy of its constitutional system during this next phase. In this chapter attention will be given not only to the likely prospects of the government's 1977 constitution, but also to constitutional developments for blacks, and the relationship between the two.

Although the analysis which follows is premised on the government retaining control over the initiation and implementation of constitutional change, it is clear that in this process it will be responding to a variety of internal and external pressures. These pressures will require varying degrees of coercive force to maintain government control and the overall stability of the system. While the nature and effect of the pressures and coercion, and their implications for constitutional development, will not be analysed, brief mention should be made of the strategic options which this process will create for non-white leaders, whose responses could influence the pace, if not the nature, of constitutional change. On the one hand, the new and restructured institutions created by the government will provide blacks with a constitutional base and a legitimated platform, as has been the case with the homeland institutions.[2] In terms of the credibility of its own policy the government will not be able to dismiss or ignore those who opt to participate in these institutions, and, although the extent of their leverage will not be great, the participants will have some bargaining strength, at least in terms of the government's need for their continued participation. On the other hand, there is the possibility that participants will be discredited among their communities, if they

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1. See eg the prime minister in House of Assembly Debates vol 1 col 63 (3 August 1981).

2. Cf J. Butler, R. Rotberg and J. Adams The Black Homelands of South Africa (1977) 224f.

are seen as collaborators who are being manipulated by the government to give the system some credibility and stability.[1] Participants are also likely to be discredited if they are given responsibilities without power, the classical political impasse, which could arise, inter alia, if the functions devolved to subordinate institutions are not accompanied by the devolution of control over the resources required to perform those functions.[2] The alternative strategic options of collaboration of non-collaboration will present themselves in respect of all future constitutional changes, and a variety of factors will determine which strategy is adopted by non-white leaders. However, the historical empirical evidence, as well as the extensive patronage at the government's disposal, suggests that the organisational positions created by the government will in fact be filled, and that a boycott strategy will not materially affect the general direction of constitutional change during this period.

2. The Parameters of Constitutional Change

In restricting the discussion in this chapter to 'government-controlled' constitutional changes, it is necessary to refer briefly to the parameters of such change. There is a large number of restraints operating on the government which severely restricts its future constitutional options - these include the demands of the economic system, the need to preserve National Party unity and prevent a right-wing reaction, and the disposition of the bureaucracy to fundamental political change. Attention will, however, be restricted to three other factors which will have a significant influence on future constitutional developments.

The first factor is the government's basic approach to the constitutional politics of South Africa. Whatever the underlying rationale for this phenomenon, the government has defined the

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1. Du Toit (op cit 3) points out that participation could take the form of self-interested collaboration or collaborative opposition, and suggests that the latter has been adopted by Chief Buthelezi.

2. Cf Butler, Rotberg and Adams op cit 222.

main political problem in South Africa as the 'race' issue and the background of all politics is presented as 'race' conflict.[1] The government has been able to use concepts of pluralism as a legitimising ideology for this approach,[2] and other sources of conflict, such as class structure, have not featured on the political agenda. Moreover the government makes use of statutory classifications of race and ethnicity,[3] and it is in terms of these classifications, regardless of their real relevance to the conflicts in South African society, that constitutional adaptations will be made. The official groups provide the government with a convenient basis for consociational engineering, but have disadvantages in terms of the prospects of a fully consociational system.

The second factor is that constitutional changes brought about under government control will inevitably involve the sequential evolution of existing political and administrative institutions. It is therefore convenient to analyse future constitutional prospects in terms of the dual institutional arrangements currently in existence: those which have been created for blacks in the application of the policy of 'separate development', and those created for whites, coloureds and Indians in the application of the policy of 'parallel development'. Evidence of the government's continued commitment to these complementary policies is to be found in the prime minister's 'twelve point plan' which was first announced in 1979, and was subsequently endorsed by the National Party congress.[4] Most of these points have broad constitutional implications, the following being the most important:

1. The recognition of a multi-national society and the existence of minority groups in South Africa (point 1);
2. The acceptance of 'vertical differentiation', with the built-in principle of self-determination on as many levels as possible (point 2);

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1. Cf H. Adam Modernizing Racial Domination (1971) 19; V. Razis Swords or Ploughshares? (1980) 53.
2. See above, 84.
3. In particular the Population Registration Act No 30 of 1950, and the National States Citizenship Act No 26 of 1970.
4. See 1980 Annual Survey of Race Relations 10-11. The plan was a prominent feature of the government's policy manifesto in the 1981 general election.

3. The creation of constitutional structures which make provision for the full independence of the national states, their meaningful consolidation, and the acceptance of a socio-economic programme for their development (point 3);
4. A division of power between whites, coloureds and Indians, with a system of consultation on and joint responsibility for matters of common interest (point 4);
5. The acceptance of the principles of separate schools and communities, wherever possible (point 5);
6. A recognition of the economic independence of southern African states (point 7); and
7. The pursuit of a peaceful constellation of southern African states (point 8).

Although each of the principles in isolation is open-ended and susceptible to a variety of interpretations, cumulatively they provide a good indication of the basic policy which the government is likely to implement in the ensuing years.

The third factor requires greater elaboration. It has become clear that as far as the government is concerned the main forum for constitutional consultation, recommendation and initiation will be the president's council, itself a consociational-type body which will take over the functions of the Schlebusch constitutional commission.[1] This circumstance has several implications for the type of constitutional development which can be anticipated. In the first place the council is government-appointed, and its composition gives an indication of the type of class, ethnic and cultural interests which will be represented in its deliberations, and those of the constitutional committee.[2] Secondly, the council operates through a committee system which depends for its efficient functioning on well-formulated inputs and draft proposals, which are likely to emanate, in the first instance, from the respective chairmen and their staff and ad-

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1. See Debates of the President's Council vol 1 cols 5-6 (3 February 1981).
2. The composition of the first council has been described above (332). Of the 16 members of the constitutional committee, 9 are white ex-politicians and 3 white academics. Of the 5 committee chairmen, 4 are former National Party politicians, and 1 an academic (the scientific committee). Nine members of the Schlebusch commission were appointed to the council, 7 of them to its constitutional committee.

visers. While use will be made of outside experts, it can also be expected that a significant input will be provided by the prime minister's department, which has been organised into five branches which correspond functionally with the committees into which the council is divided. The committee system also favours those in the committee with specialist constitutional expertise, and this is not evenly distributed among its members. Thirdly, it is the government's intention[1] that the council will deliberate only on constitutional matters affecting whites, coloureds and Indians, which places it squarely in the Tomlinson-Schlebusch tradition - in other words, the council is not likely to transverse the black/non-black axis of constitutional development, and it will be primarily concerned with constitutional structures for non-blacks to replace the government's shelved 1977 constitution. Finally, the president's council's priority is likely to be with local government institutions, in accordance with its first directive[2] to investigate local and regional management systems in the light of the reports of several previous commissions on local authorities; what can be anticipated, therefore, is an initial recommendation relating to local authorities for whites, coloureds and Indians.[3] The cumulative significance of these factors is that the constitutional proposals of the president's council are likely to involve the logical continuation of the last thirty years of constitutional development, and to involve the gradual incorporation of coloureds and Indians into the political process on a corporate basis, from the local government level upwards. It will therefore act more as a legitimising agent for the government's version of constitutional reform, than as an independent initiator of more fundamental political or economic changes.

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1. As evidenced by the State President's opening address to the council. See Debates of the President's Council vol 1 col 5 (3 February 1981). It is of interest to note that this address again involved a distortion of the Theron report's priorities in that it gave precedence to the need to move away from the Westminster model, rather than to provide for coloured participation in existing political institutions.

2. Debates of the President's Council vol 1 col 6 (3 February 1981).

3. See below, 374-376.

Although no fundamental conflicts can be expected between recommendations of the president's council and government policy, it is appropriate to look briefly at the status of the council vis-à-vis the National Party caucus and congresses; this has some relevance to South Africa's constitutional politics in that the council's recommendations are likely to involve changes to social segregation and white privilege which have a high symbolic importance for many whites. Two theoretical possibilities can be suggested. The first is that the council will come to rival and surpass the caucus and congresses as far as its influence on the cabinet is concerned; this possibility may be supported by reference to the government's need to increase the council's legitimacy by being seen to be responsive to its recommendations, and to the recent decline in the influence of the caucus and congresses in the movement towards a prime-ministerial form of government.[1] The second is that the caucus, the provincial congresses, and even the parliamentary select committee appointed to report on proposals to amend the constitution,[2] might resist recommendations emanating from the council and prevent the cabinet from implementing them. This possibility may be supported by reference to the apparent strength of the 'anti-reform' factions in the caucus and congresses, and the need to maintain National Party unity.[3] Both the rhetorical and empirical evidence suggests that the latter possibility will prevail in practice. The government has repeatedly stated that it will not countenance certain constitutional changes even if these are specifically recommended by the president's council, for example the inclusion of blacks on the council itself,[4] and

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1. In personal discussions with the writer a senior member of the council, and veteran politician, pointed out that South African prime ministers have always been able to dominate their caucuses, even on major issues. Such dominance will be facilitated by the additional patronage afforded the prime minister by the 1980 constitutional amendments.

2. See House of Assembly Debates vol 2 col 730 (5 February 1981). The select committee replaced the Schlebusch commission, which also originated as a (joint) select committee.

3. In addition may be cited the growth in the anti-reform Herstigte Nasionale Party and National Conservative Party which increased their electoral support from 34 061 votes in the 1977 general election to 210 398 in 1981, though without securing any parliamentary seats. On the option of 'siege politics' or the 'garrison state' see A. du Toit op cit 2-3, H. Adam 'When the Chips are Down: Confrontation and Accommodation in South Africa' 1 (1977) Contemporary Crises 417-435.

4. House of Assembly Debates vol 1 col 30 (26 January 1981).

that other recommendations involving a 'drastic departure' from its constitutional policy will be submitted to the party congresses, and ultimately to the electorate in a referendum.[1] It might be argued that if the cabinet gives the lead to the congresses and electorate the proposals will be endorsed, but this legitimising process nevertheless tends to weaken the argument that the president's council will be used to bypass the anti-reform factions within the National Party. The argument based on the need of the president's council for credibility was also weakened by the government's response to the recommendation of the council's community relations committee that District Six and Pageview be reproclaimed as group areas for coloureds and Indians respectively. This proposal would not have involved a change in government policy, but merely a modification in the application of that policy, but it was rejected by the government almost in its entirety.[2] If this empirical response is projected into the constitutional arena, then it suggests that the government, whether under the influence of the supposedly reactionary caucus and congresses or not, will entertain only constitutional recommendations which involve minor modifications or adaptations of its established constitutional policy.

3. The Separate Development Framework

(a) Self-government

The constitutional development of the national states has resulted in the emergence of partly-representative political institutions for each of the statutorily-delineated black groups in South Africa; within the limits of their powers these authorities have both territorial and personal jurisdiction, but they operate within a system of control, or potential control, by the central gov-

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1. House of Assembly Debates vol 1 cols 217-8 (27 February 1981), and reiterated in vol 1 col 66 (3 August 1981). By implication this refers only to the white electorate. The referendum is a decidedly anti-consociational institution - see above, 117.

2. The government agreed to reproclaim a minor portion of District Six (Natal Mercury 25 October 1981).

ernment. Reference has already been made in this work to the degree of autonomy exercised by the national states at the second stage of self-government,[1] and to the extent to which this corresponds to the 'segmental autonomy' characteristic of the consociational model. The government's policy, however, is that self-government should be no more than an interim constitutional phase, and that each national state should achieve republican status, thereby severing all constitutional ties with South Africa and ensuring a legal-institutional system of political separation for blacks. As is well-known this policy has already resulted in Transkei, Bophuthatswana, Venda and the Ciskei attaining constitutional independence.

It is unlikely that the government will consider any alternative constitutional status for the self-governing national states. In 1977 the concept of 'internal autonomy' was introduced for the first time, to denote an enhanced form of autonomy for the national states short of constitutional independence.[2] Although the legislation in question was never enacted, there seemed to be a growing movement in the ensuing years for the conferment of internal autonomy on national states who were unwilling to accept independence, and for reconsidering the nature of their constitutional links with the central authorities.[3] This movement was generated in part by the Ciskei and Lombard reports, and in part by the problems encountered with homeland consolidation, and particularly at the regional level there was a demand for 'special status regions' within the country, incorporating a homeland and surrounding geo-political areas. The Ciskei government's decision to accept independence, however, significantly weakened the 'special status region' lobby.[4]

From the government's point of view internal autonomy, or any other alternative status for the national states, has always been a remote possibility. The government has repeatedly stated that those homelands which do not accept independence will retain their

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1. See above, 188-189.
2. See above, 190-191.
3. See generally on this possibility L.J. Boulle and L.G. Baxter (eds) Natal and KwaZulu: Constitutional and Political Options (1981).
4. The demand may, however, be revived after the release of the Buthelezi commission report early in 1982.

present constitutional status indefinitely.[1] The new policy of 'regionalism'[2] is intended to affect only the economic, and not the political, aspects of self-government, and there is little possibility of deviation from this aspect of the separate development programme. It is also worth noting that internal autonomy would have involved only an adaptation of existing constitutional arrangements, and would not have affected the central political institutions at all; apart from the greater degree of 'segmental autonomy' which it implied, it also had little relevance from the consociational perspective.

(b) Partition

While the overt objectives of the government's policy of separate development are realised when constitutional independence is conferred on the national states, the government has for some time articulated an intention to institutionalise the post-partition relationships between these states and the republic.[3] The government's terminology for this arrangement is the 'constellation of states', which, in more conventional constitutional terms is a type of confederation operating at the 'supra-national' level of government. Before turning to the constellation concept specifically, however, it is worth observing that in general the post-partition relationships between South Africa and the national states, have some affinity with the principles of consociationalism. This assertion may appear contradictory, since independence is the consequence of a non-consociational option for solving the political problems in a plural society, namely partition. Partition is an attempt to depluralise a society by replacing it with two or more relatively non-plural societies,[4] whereas consociationalism is a method of overcoming the divisive forces in

1. For a recent example see House of Assembly Debates vol 1 col 271 (28 January 1981).

2. See below, 354-357.

3. See point 8 of the 'twelve point plan' at 342, above.

4. In South Africa, 'partition' has only been consistent in its political dimension and has never involved complete physical or economic separation. No attention is given in this work to the numerous forms of 'radical partition' incorporating these two elements which have been advocated for South Africa. For one of the best recent analyses of partition, with reference to previous studies, see G. Maasdorp 'Forms of Partition' in R. Rotberg and J. Barrett (eds) Conflict and Compromise in South Africa (1980) 107-146.

such a society by institutionalising a form of power-sharing. If one looks beyond the concepts of international law, however, the contradiction is less striking. Stultz,[1] for example, suggests that the relations between Pretoria and Umtata after Transkeian independence more closely resemble the consociational ideal than do relations between Pretoria and the non independent black entities, because they require bargaining from independent power bases. While this view over-estimates the bargaining power of the homeland states it does highlight the consociational aspects of these relationships - the emphasis on leadership élites, the nominally equal participating parties, the international 'summit diplomacy' dimensions,[2] and the 'independence' of the different 'segments'. The citizenship provisions applying to the national states give a large formal constituency to each of the independence governments, which serve as a nominal source of proportional influence in the negotiating process. The consociational analogy, however, cannot be taken too far, and the system as a whole operates on a strongly authoritarian basis.

The 'constellation of states' concept was launched by the government in the late 1970's[3] and has been a prominent feature of its political agenda since then. The same concept has been used to refer to both the 'grand constellation', comprising the republic, the national states and other countries in the sub-continent, and the 'inner constellation', comprising only the republic and the national states; the government has in recent times come to accept the term 'confederation' for the latter arrangement.[4] This distinction is not of immediate significance as the emphasis in both arrangements will be on forms of economic co-operation, at least

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1. N.M. Stultz Transkei's Half Loaf - Race Separatism in South Africa (1980) 150.
2. On the similarities between consociationalism and international politics see A. Lijphart The Politics of Accommodation (2 ed, 1975) 104, 112-115, 131-134.
3. Most prominently at the 'Carlton conference' at which the government met with business leaders in November 1979. On the constellation see W.H. Thomas 'A Southern African "Constellation of States": Challenge or Myth?' 1980 South Africa International 113-128; D. Geldenhuys The Constellation of States (S.A. Foundation, 1980).
4. See, eg, the prime minister in House of Assembly Debates vol 1 col 53 (3 August 1981). The 'confederal' dimension was given particular emphasis in the debates on the Status of Ciskei Bill - see the minister's second reading speech in House of Assembly Debates vol 9 cols 4933-4944 (28 September 1981).

in their initial stages. However, in respect of the national states the constellation concept gives implicit recognition to the fact that their independence has operated only at the constitutional-juridical level, and not at the economic or political levels; while the constitutional provisions have formally channelled black political activity into the national states, they have not resolved the socio-economic problems of many blacks in their places of residence and employment. The constellation concept also involves a reassertion of the fundamental economic unity of South Africa, despite the statutorily-induced political separation.

In terms of its emphasis on regional economic co-operation the constellation concept is not in fact new. Forms of functional co-operation have been in existence for some time on matters such as currency, customs, soil conservation, tourism and health,[1] mostly with Botswana, Lesotho and Swaziland, but in some cases with other countries in the sub-continent. More recently a Small Business Development Corporation and a Development Bank have been established, as well as various multilateral committees with the independent national states.

As far as the institutional aspects of the constellation are concerned, these will be arranged in a series of bilateral and multilateral treaties resulting in the establishment of functionally specialised bodies with delegated jurisdiction; as in the confederal model these bodies will operate through the member governments and will have no direct jurisdiction over the state concerned. In fact even when the constellation is given greater institutional support it is unlikely to involve the creation of supra-national bodies with an independent jurisdiction, or a separate constitutional entity; the emphasis has consistenly been on the subordinate nature of the confederal authorities and the continuing independence of the member states. The concept has also

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1. That is the Rand Monetary Union, the South African Customs Union, the South African Regional Commission for the Conservation and Utilization of the Soil, the Regional Tourism Board for Southern Africa, and the Regional Health Organisation of Southern Africa. For references to these, and other forms of co-operation, see House of Assembly Debates vol 1 cols 51-3 (3 August 1981) and vol 7 cols 4226-7 (18 September 1981).

been promoted in consociational terms, as involving continued autonomy over matters of exclusive concern for the individual states, and co-operation on matters of joint concern;[1] the participating states will have nominally equal status (a variation on the proportionality principle) and decisions will be taken on a consensus basis. The 'international' dimensions of the constellation concept also have a close affinity with the grand coalition of consociationalism - deliberations by an élite cartel in a non-public forum.[2] The consociational comparison, however, cannot be extended too far and, as with the homelands policy on which it is based, the constellation can be seen as a device for avoiding power-sharing by internationalising political relationships.[3] Any notion of equality between the republic and independent national states is also simplistic, in the light of the former's economic dominance of the whole region. The constellation's legitimacy will also be clearly affected by these factors, as well as the fact that it does not presuppose any forms of 'internal' political or economic reform.

The attraction of the constellation of states from the South African government's point of view is that it is a logical progression from previous constitutional developments and does not affect the principle of political separation inherent in separate development policy; that it is not an alternative to independence is shown by the government's insistence that self-governing national states will be denied full participation in the constellation, and will at most acquire associate status.[4] It would also be in the particular economic and strategic interests of South Africa to have matters such as defence, communications, agriculture and health regulated at the constellation level, and it would afford a measure of additional control over the national states, which

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1. See House of Assembly Debates vol 1 cols 53-4 (3 August 1981).

2. Because it would be concerned with 'international' politics the constellation would have the 'summit diplomacy' dimensions of consociationalism. See Lijphart op cit 112-115.

3. The constellation, according to Geldenhuys, attempts to 'join together what apartheid has put asunder' - quoted in W. Breytenbach op cit.

4. See the Ciskei (Quail) Report (1980) 107.

will be indefinitely dependent on South Africa for the majority of their budget revenue.[1] But as far as the constellation's ability to effect significant social and economic changes in the member states is concerned, there must be serious reservations; the loose nature of the arrangement, the constitutional subordinacy of its institutions, and continued white domination, would severely circumscribe its reform potential. Schlemmer has said of the confederal option in South Africa:

> 'A major consequence of this type of arrangement would be that differential rates of growth would be maintained by the different units. The 'White' core unit would have most of the developed infrastructure, most productive capacities, and the most fully-developed market economy. It would be highly unlikely that the peripheral units would narrow the gap in development; in fact, the gap would probably widen as a consequence of the magnet effects of employment opportunities, industrial linkages and consumer attractions in the 'White' area. Both as a consequence of lack of development and the demonstration effects of the nearby wealthier economy, the peripheral units would tend to have severe problems in controlling popular discontent. Unstable or authoritarian forms of intra-state government could easily emerge, which would further exacerbate the regional inequalities. South Africa would end up with a number of relatively very poor hostage units locked up in a confederation which would become increasingly unstable.'[2]

A similar prognostication can be made for the constellation of states.[3]

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1. The issue of economic colonisation is clearly relevant here, but falls outside the scope of this work. The 'constellation' metaphor is perhaps not the most appropriate - see the prime minister's explanation in the report of the 'Carlton conference' - Op Weg Na 'n Konstellasie van State in Suider-Afrika (1980) 19.

2. L. Schlemmer 'Social Implications of Constitutional Alternatives in South Africa' in J.A. Benyon (ed) Constitutional Change in South Africa (1978) 258 at 270; see also N. Rhoodie 'Federalism/Confederalism as a Means of Black-White Conflict Resolution: Conceptual Dissonance in White Nationalist Ranks' 7 (1980) Politikon 101-110.

3. The future prospects of the 'grand constellation' were affected by the creation in 1980 of a Southern African Development Coordinating Conference consisting of 9 states in the sub-continent, including Botswana, Lesotho and Swaziland. One of the specific aims of the conference is to lessen the members' economic dependence on South Africa. See 1980 Annual Survey of Race Relations 628.

Closely related to the constellation concept are issues pertaining to nationality and citizenship; the juridical implications of these matters are dealt with in greater detail below.[1] It has been suggested that the problems arising from the denationalisation of blacks at the time of homeland independence, and the international non-recognition of the national states, could be resolved through the creation of a southern African constellation nationality.[2] All constellation nationals would have the same status in international law and would be entitled to travel documents and diplomatic protection in terms of their national status. There would exist, in addition, a separate citizenship for each member-state of the constellation, and this would determine access to political rights within that state. Apart from the problems relating to the international recognition of this system, it was always a remote option for the government as it involved a contradiction of the notion of 'homeland independence', which is a crucial feature of its policy. The government has resorted instead to bilateral agreements with individual homelands, in terms of which the nationals of either state can acquire travel documents and diplomatic protection from the other.[3] In addition the government has mitigated the effects of denationalisation by allowing nationals of the independent homelands some of the rights, mainly in the economic sphere, not usually accorded to aliens.[4] This arrangement, however, operates on a flexible basis and can be unilaterally revoked at any stage.

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1. See below, 488-508.

2. It was speculated that the Niewoudt commission (on which see above, 283) had made a recommendation along these lines but the report was not made public by the government. A similar recommendation had been made earlier by a cabinet committee on urban black affairs - see 1980 Annual Survey of Race Relations 300-1; see also the Lombard Report 42 and the Ciskei (Quail) Report 47.

3. See the Independence Convention between the Government of the Republic of South Africa and the Government of Ciskei in House of Assembly Debates vol 9 cols 4940 - 2 (28 September 1981).

4. See John Dugard's 'South Africa's "Independent" Homelands: An Exercise in Denationalisation' 10 (1980) Denver Journal of International Law and Policy 11-36; and below, 500-506.

(c) Black local authorities

The community council system established for blacks in 1977[1] has involved two deviations from the otherwise consistently applied separate development policy. Firstly, it has resulted in the creation of permanent political institutions for blacks in the 'common area' of South Africa; secondly, the principle of ethnic differentiation among blacks has not been applied in the constitution of these bodies. Two other features of the system show some variation on the current trends in constitutional development: the community councils operate at the lowest level of government, and they are elective institutions.[2] In terms of these factors the community councils are in a somewhat incongruous position in relation to future constitutional developments, despite their subordinate status, financial dependence and, thus far, political unimportance.

On the other hand it is clear from all versions of the government's 1977 constitution that there is no intention to incorporate the community councils into the wider political system. The government's stated policy is quite clear in this regard.[3] The community councils will acquire full municipal status, and in some cases their powers will even be greater than those of existing white local authorities;[4] they will also be empowered to cooperate with other local authorities on matters of common concern, and even to participate at the 'regional co-ordinating level'.[5] But beyond these levels black political rights will only be exercised through the self-governing and independent national states, and if necessary steps will be taken to strengthen the constitutional links between the councils and the homeland structures. In terms of this policy there is no possibility of the community councils providing the institutional infra-structure for the establishment of a fourth 'parliament' for blacks, although this possibility

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1. The Community Councils Act No 125 of 1977. On the community council system see above, 179-182.

2. That is in terms of the statutory provisions; it would not be possible to call them 'representative' bodies - see above, 181.

3. See the prime minister - House of Assembly Debates vol 1 col 1246-7 (28 January 1981) and vol 1 col 54 (3 August 1981).

4. Ibid; thus, eg, the community councils are likely to acquire some authority in respect of educational matters.

5. Ibid.

was mooted during the early formulations of the government's 1977 constitution. The only future developments are likely to be within the departmental structure, where a co-ordinating body could be established, consisting of nominated or elected members of the various councils. If this body were to be institutionalised and given executive functions it might even be represented at the constellation level, where its presence would not conflict with the notion of a black/white division of political power.

Within the constraints of government policy, therefore, the community councils are not likely to be used in the process of consociational engineering, save at the metropolitan, and possibly regional, levels.[1] Here they might participate in nominated co-ordinating authorities with functionally limited powers, and these might even be composed and operate along consociational lines. But this would involve essentially a rationalisation of existing structures within the same constitutional framework. It would be based on existing discriminatory statutes and would tend to perpetuate the present allocation of land and amenities. These factors, together with the already low-credibility of the community council system,[2] suggest that developments along these lines would have little political significance.

(d) Regionalism

Since mid-1980 a new item on the government's political agenda has been that of 'regionalism',[3] and although the concept has primarily to do with economic matters it also has implications for constitutional development. The concept of regionalism is closely related to the issues of consolidation of the national states and the government's proposed constellation of states. As far as consolidation is concerned, a change in the government's policy was induced partly by the economic non-viability of the independent homelands and the potential non-viability of the other

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1. On 'regionalism' see below.
2. See above, 182.
3. See 1980 Annual Survey of Race Relations 390-392.

national states.[1] In terms of the new approach[2] consolidation would be related to the economic development of the national states, and this would require a re-examination of the economic structure of the whole country on a regional basis. This could lead to the creation of regional areas of economic growth and development, and economic co-operation across homeland borders.[3] This would allow land to fall within a decentralised regional economic structure, without actually being incorporated into a homeland, which, according to the government's reasoning, would allow the homelands to benefit economically from developments outside their borders. At the same time the government affirmed its preparedness to move beyond the 1936 land proposals[4] in the actual consolidation process, provided the additional land would be used 'responsibly and productively'.[5]

The main feature which the policy of regionalism has in common with the constellation concept is that it is perceived by the government primarily in economic, and not in constitutional or political, terms. What is envisaged is functional co-operation outside existing political institutions, and it has been asserted[6] that regional economic development will not affect the 'political self-determination' and 'independence' of the national states. This development is thus premised on a rigid notional distinction between political and economic power; while maintaining a system of political separation it, like the constellation concept, reasserts the fundamental unity of the South African

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1. The government was able to assume more direct control over consolidation by removing it from the jurisdiction of the Department of Co-operation and Development, and vesting it in the Commission for Co-operation and Development under the chairmanship of Mr H. van der Walt, the first MP to be appointed by the government in terms of the amended s 40(1)(b) of Act No 32 of 1961.

2. See eg the prime minister in House of Assembly Debates vol 1 col 238-243 (28 January 1981); at col 243 he emphasises the 'close relationship between the consolidation processes and the policy of establishing a confederation or constellation of states'. See also vol 1 col 50 (3 August 1981).

3. The government announced the creation of the first regional economic growthpoint (north of Bronkhorstspurit) in 1980. See 1980 Annual Survey of Race Relations 390.

4. The Native Trust and Land Act No 18 of 1936.

5. House of Assembly Debates vol 1 col 240-1 (28 January 1981).

6. By the prime minister - ibid.

economy. Regionalism can also be depicted as an extension of the 'border industries' system of the past, whereby industries were offered inducements to locate themselves in the vicinity of a homeland labour supply; under the extended system blacks would reside in the national states where they would have political rights, and would commute on a vast scale across state borders to their places of employment, where they would be politically rightless.

In institutional terms the policy of regionalism would require the creation of joint regional agencies to co-ordinate and administer matters of regional economic interest. There could be a functional delegation of power to these bodies by the homeland, provincial and other sub-national authorities within their jurisdiction. Members of these bodies are likely to be nominated by the relevant political institutions and bureaucracies, and they would deliberate in private on a consensual basis; the principles of consociationalism could thus have application at the regional level. But the development of these agencies into structures for political power-sharing in the region is incompatible with present government policy.[1] In this sense the policy of regionalism can be distinguished from those aspects of both the Lombard and Quail reports which contained specific proposals for a system of regional power-sharing, the latter by way of the condominium arrangement, and the former through the three-tier system of regional government. Predominantly because of this incompatibility with existing policy their recommendations were unacceptable to the government. The extent to which economic and other realities could induce changes to the government's regional policy is of course unpredictable. It can be seen that where consolidation would have drastically affected a regional economy, that is in Natal and KwaZulu, the private sector emerged as a powerful lobby against consolidation[2] and forced a reassessment of this aspect of government policy, but corresponding pressure for a form of regional political power-sharing seems more

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1. See N. Olivier 'Implications of Constitutional Development in KwaZulu/Natal for the Rest of South Africa' in Boulle and Baxter op cit 57 at 73.

2. The Lombard Report (op cit) was commissioned jointly by the South African Sugar Association and the Durban Chamber of Commerce.

remote at this stage. The main significance of the regional policy is its emphasis on decentralisation along territorial lines, which, in isolation from other factors, would be an important development in terms of future constitutional reform. But at present it involves essentially a rationalisation of economic relationships within the existing constitutional framework and is likely to be of limited political significance.

4. The Parallel Development Framework

The constitutional framework which has been created for the 'parallel development' of whites, coloured and Indians provides an obvious basis for future consociational engineering within the 'common area'. This was evident from the government's 1977 constitution, which has been referred to in this work as a form of 'sham consociation', and also from subsequent constitutional developments. The 1977 constitution provided for the co-ordination along consociational lines of the main institutions of parallel development - the central parliament, the Coloured Persons Representative Council, the South African Indian Council, and the respective executive authorities. It elevated the coloured and Indian institutions in nominal status, provided for the future augmentation of their powers, and established joint consultative machinery, in the form of the council of cabinets and president's council, in which to co-ordinate their activities with those of their white correlates. As has been shown, however, these changes would not have materially affected the constitutional and political supremacy of the white parliamentary institutions, nor the bureaucratic control of the predominantly white administration. The post-Schlebusch report developments also showed the government's commitment to the forms of consociationalism, and its use of consociational concepts in the construction of a new legitimising ideology for its policies. Despite the setbacks in the implementation of the 1977 constitution the government's commitment to the system has not wavered, and it is likely to be implemented in the coming years, albeit in slightly modified form. The disestablishment of the CPRC is likely to cause at least one change in emphasis: greater attention is likely to be given to sub-national authorities, with the

constitution being implemented from the lowest level of government upwards. This necessitates an examination not only of the institutions for which provision was made in the 1977 constitution, but also of local authorities for whites, coloureds and Indians.

(a) The president's council

Apart from having a deliberative and initiating function in the process of constitutional change, the president's council could itself be subject to modification and adaptation during the period under discussion. In spite of its cursory treatment of the first recommendations to emanate from the president's council,[1] the government continues to have a strong vested interest in it, and is likely to tolerate changes in the council's composition and status which do not affect the supremacy of the parliamentary institutions. It is also possible that pressure will be exerted from within the council itself, or from one of its committees, to effect changes which would enhance its legitimacy. Adaptations could also be used to give credibility to the government's recent acknowledgement that constitution-making should be a multilateral process.

The two areas of possible development for the president's council are in relation to its composition and functions. Logically the composition could be broadened beyond the ethnic groups to whom it is presently restricted, but closer analysis reveals that the inclusion of blacks is not even a remote option during a period of government-controlled constitutional change. In the first place the government has frequently excluded this possibility, on the grounds that, in terms of its basic policy, there are to be separate constitutional structures for blacks and non-blacks;[2] even a request by the council itself for black representation would not be acceded to. Secondly, such a development would involve a reversal of a long process of constitutional evolution, from which the council is a continuation and not a

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1. In relation to District Six and Pageview - see above, 345.

2. See above, 330 and references cited there. See also point 4 of the 'twelve point plan' at, 342 above.

deviation. Thirdly, the inclusion of blacks would disturb the arithmetical 'equilibrium' of the council and place the whites in a minority position, a development which no white government would concede until the political system had so destabilised as to provide a wholly new function for the president's council. In the light of this major restraint on its composition, the president's council could never become a fully consociational institution, because one of the major conflict groups will be permanently excluded from it; at the most it could have a semi-consociational function in respect of whites, coloureds and Indians. Other probable constraints on its future composition will also have negative implications for consociationalism - for example the fact that its composition is likely to remain based on statutory group classifications, without provision for any other type of membership. The composition of the council is only likely to be broadened significantly if the government saw the need for a 'political crisis model' to stabilise the political system, but even then it would be more likely to modify the cabinet (or council of cabinets) along consociational lines, than the president's council.[1] In short, while the government retains the initiative in the constitutional process it seems unlikely that the group-basis of the council will be altered, or that its membership will be made more inclusive.

Within the limits of its present composition, however, the government is less likely to resist moves to make the president's council more representative, as this would involve no major contradiction of previous constitutional developments - although it has been shown that in embarking on the consociational option the government has tended to depart from the principle of representative government, insofar as it has hitherto been applied in South Africa. The government has also not excluded the possibility of the council becoming more representative, although if its composition was made dependent on the participation of coloured and Indian leaders it could suffer the same fate as the CPRC. Within the constraints of the government's constitutional policy

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1. See below, 368-371 and 520-524.

there are three logical alternatives for making the council more representative. The first would be to retain the system of nomination, but to require the State President to appoint those with community support. This would correspond to the position under the draft bill,[1] according to which the State President was obliged to act on the prime minister's advice, but it would be impossible to institute in the absence of representative communal institutions and a system of constituency politics. The second possibility would be for the members to be indirectly elected by the respective communal institutions, as was envisaged in the first phase formulations of the 1977 constitution;[2] this would require the establishment of the communal assemblies envisaged in the government's constitution to act as electoral colleges,[3] together with the white House of Assembly.[4] The third possibility would be for each component of the council to be directly elected by the relevant section of the electorate, in which case it would assume a new status as a 'national'[5] deliberative assembly. It would be speculative to suggest which of these three possibilities might materialize in practice; suffice it to say that, in terms of present realities, the third is somewhat remote because of its apparent propinquity to the notion of power-sharing which has consistently been rejected by the government, and because it would provide the greatest opportunities for the non-collaboration tactics which lead to the discontinuation of the CPRC. It is also relevant to observe that the more representative the council was made, the more overtly 'political' it would become, and this would tend to detract from its 'depoliticised' consociational character.

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1. S 23(1).

2. See D. Worrall 'The South African government's 1977 constitutional proposals' in J. Benyon (ed) Constitutional Change in South Africa (1978) 127 at 129.

3. Another logical possibility is that members be indirectly elected by representative local institutions.

4. At present, however, membership of the president's council is incompatible with membership of other legislative bodies (s 103(d)) of the Constitution Act), and this would require modification for the first-phase arrangement to be adopted.

5. That is in respect of non-blacks.

The second logical area of development for the president's council would be in relation to its functions and powers. At present the council has formal constitutional status,[1] but can function only in an advisory capacity to the State President and parliament - which means effectively to the white cabinet. Despite the open-ended nature of its advisory powers, the council is threatened with potential impotence in the absence of substantive powers of its own.[2] Some vindication for the council's constitutional subordinacy and lack of legislative or executive powers can be derived from consociational institutions in other jurisdictions,[3] but the comparison is somewhat superficial - whereas the other bodies exist alongside representative institutions and have a relatively low political load,[4] the president's council will be a substitute for representative bodies and therefore will have a potentially high load. The government may therefore deem it necessary to give the council a more direct role in the political process to avoid it being perceived merely as a legitimising agent for the government's own innovations.

One method of extending the council's powers would be to incorporate it into the legislative process. It can already perform a quasi-legislative advisory function at the request of a legislative body,[5] and it has many of the 'powers and privileges' of a conventional parliament.[6] But its exact role in the law-making process would depend on other developments in the legislative field, particularly in relation to the coloured and Indian assemblies provided for in the 1977 constitution. It is improbable that it would be given power to initiate legislation independently, as this would enable it to bypass the cabinet and caucus, and it would also usurp the proposed functions of the council of cabinets. On the other hand it is not impossible that it be given a power of legislative review, in which capacity

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1. Against South Africa's constitutional background this factor should not pass unnoticed; a number of earlier institutions (from the Native Representatives Council to the National Indian Council) have existed extra-constitutionally, but have tended to be of limited duration and to have had little political significance.

2. Cf M. Wiechers Staatsreg (3 ed, 1981) 245.

3. Eg the Dutch Social and Economic Council.

4. Cf A. Lijphart 'Consociational Democracy' 21 (1968) World Politics 207 at 218.

5. Constitution Act s 106(1)(b).

6. Conferred by the Powers and Privileges of the President's Council Act, No 103 of 1981; and see above 330.

it could be seen as a reconstituted Senate - which the president's council succeeded chronologically, if not functionally. This development would have some symbolic importance if the council were empowered to review legislation of the white House of Assembly, because it would entail non-white participation in the central legislative process for the first time in South Africa's constitutional history; it would also be of some juridical significance because it would affect the Assembly's legislative supremacy. On the other hand the council would inevitably be a secondary chamber, subordinate to the Assembly, with at most a suspensive veto over legislation passed by that body; in this context its review function would have only a limited political importance, despite its symbolic and juridical significance. The president's council could also serve as an upper chamber to a future joint parliament for whites, coloureds and Indians, however this might be constituted.[1]

It is unlikely that the president's council would be granted executive powers during a period of government-controlled constitutional change, as this would distort existing constitutional patterns and would not conform to the 1977 constitutional model. If the grand coalition principle is to be institutionalised in the future, it is likely to be in relation to the council of cabinets. Any adaptation of the president's council is likely to occur within the broad framework of the 1977 constitution and have only a limited significance; and there may even be a reluctance to extend its powers, lest it lose its character as a 'depoliticised' accommodationist institution.

(b) Legislative authorities

The analysis of the government's 1977 constitution showed that most problems would be encountered in relation to the 'three parliament' arrangement, on which the whole system was ultimately dependent. On the political level it required the support and participation of at least a significant proportion of the coloured and Indian electorates, despite the inherent legitimation problems from which it suffered. On the constitutional level it was beset with jurisdictional problems, which highlighted the

1. See below, 363-368.

difficulty of providing for a functional division of competence between coordinate authorities operating within a single territorial area. The government's continued commitment to the 'three parliament' system is evident not only from its policy statements, but also from its legislative activities: the adaptation of the South African Indian Council in 1978[1] and the House of Assembly in 1980[2] to conform with the broad principles of the 1977 constitution, and the abolition of the Senate.[3] The government's present priority appears to be to provide institutional support for the triple parliamentary arrangement in the form of a system of local, and possibly regional, authorities, from which the super-ordinate bodies might evolve.[4] However, any subsequent parliamentary arrangement would have to cope with similar problems to those encountered in the 1977 constitution.

The first logical possibility would be for the government to establish the three community assemblies along the lines envisaged in the 1977 constitution, but this would introduce the same difficulties identified in that system. In particular, the coloured and Indian assemblies would have legislative competence over only 'exclusive concern' matters and would remain subordinate to the white parliament, which would continue to predominate on matters of 'common concern'. Because of the limitations on legislative jurisdiction inherent in the personality principle, as well as the fact that most legislative matters are of 'common concern' to whites, coloureds and Indians, there would be very limited scope for consociational engineering with a system of three separate parliaments. The internal logic of the 1977 constitution suggests the need for a tricameral parliamentary arrangement, and this would also be more favourable for the consociational option.

The establishment of a three-chambered legislature need not necessarily involve any structural deviation from the 1977 constitu-

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1. The South African Indian Council Amendment Act No 83 of 1978.
2. Republic of South Africa Constitution Fifth Amendment Act No 101 of 1980.
3. Ibid.
4. See, eg, the State President's opening address to the President's Council - Debates of the President's Council vol 1 col 6 (3 February 1981).

tion, but would require a significant change in the legislative process. The draft bill in fact made provision for 'common concern' legislation to be submitted to all three legislative assemblies by the council of cabinets,[1] and this led some commentators to read into the constitution a tricameral parliamentary procedure.[2] But in terms of the provisions of the draft bill this reasoning was unconvincing - the procedure in question was directory not peremptory, and the council of cabinets could, at its discretion, bypass up to two assemblies completely in the enactment of 'common concern' legislation; moreover, even if the 'tricameral' procedure was adopted, a deadlock could be broken through the action of a solitary assembly designated by the council of cabinets for the purpose, an arrangement which could not be justified in terms of normal bicameral parliamentary procedures. The 'tricameral' theory could not, therefore, be sustained in respect of the draft bill.

The single modification which would be required to the 1979 bill to give more substance to the tricameral theory would be the stipulation that all 'common concern' legislation had to be passed by all three assemblies; this would be a logical extension of the principles of bicameralism to the 'tricameral legislature'. This would be a strong consociational development in that 'concurrent majorities'[3] would be required in each of the three assemblies, and, conversely, each would have a legislative veto. But although this arrangement would involve only a small adaptation of the 1977 constitution, it would be irreconcilable with the continued legislative supremacy of the white assembly, and would involve a threat to white political control. It could not be expected to materialise, therefore, without some constitutional 'safeguards' for whites. One such possibility would be to allow the white assembly to overrule a veto applied by either,

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1. S 26(1)(a)(iv).

2. See G. Devenish 'The Doctrine of Parliamentary Sovereignty and the Proposed New Constitution' 42 (1980) THR-HR 15 at 18ff, and 'Specific legal problems concerning a three-parliamentary system in the proposed new constitutional dispensation with specific reference to parliamentary sovereignty and executive sovereignty' in S.C. Jacobs (ed) 'n Nuwe Grondwetlike Bedeling vir Suid-Afrika (1981) 113 at 120f.

3. On the 'concurrent majority' principle see J. Calhoun A Disquisition on Government (1953) 20-21, and above, 101. As the term implies, each assembly would operate on a majoritarian, and non-consensual basis.

or both, of the other bodies, although this would emphasise the subordinacy of the latter, and subvert the theory of tricameralism. A second possibility would be a joint sitting procedure, which is precedented in South Africa's constitutional history;[1] in spite of the symbolic implications of such a system it could still be dominated by the whites, and probably also by the National party if decisions were taken on a majoritarian basis, although this would be to abandon the assumptions of consociationalism. A third possibility, which derives from the consociational model, would be to appoint representative joint committees of all three houses,[2] or to make use of other accommodationist institutions, to resolve legislative deadlocks. But in terms of the realities of South Africa's constitutional politics the latter two possibilities would have only a remote chance of materialising because of their implications for white political control. And it is likely that any concessions made by the government in the direction of a three-chambered legislature would be accompanied by new forms of constitutional rigidity, designed to maintain existing power relationships.[3]

From the constitutional point of view the main advantage of the tricameral model would be in the jurisdictional sphere. The model implicitly, and appropriately, acknowledges that most matters requiring legislative treatment are of joint concern and should fall within the jurisdiction of joint authorities; by down-grading the role and functions of the individual assemblies it would avoid most of the difficulties inherent in the principle of personal jurisdiction. From the consociational point of view it could provide the institutional basis for power-sharing on these matters, and could also provide the basis, in the form of the communal assemblies, for 'segmental' autonomy over those exceptional matters of exclusive concern to each of the white,

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1. Before the Senate Act No 53 of 1955 was passed, a joint sitting of the Assembly and Senate was necessary to resolve a conflict between the two. After 1955 the Assembly was able to prevail over the Senate. For references to joint sittings see M. Wiechers Staatsreg (3 ed, 1981) 293-4.

2. The 1979 draft bill made provision for a joint committee procedure - s 26(1)(a)(v).

3. Cf s 8(1)(d) of the draft constitution, and the references to the trend towards constitutional rigidity as the Zimbabwe political system became more inclusive at 236-249, above.

coloured and Indian groups. One of the main practical implications of the tricameral model is that it would necessitate the establishment of joint executive and administrative institutions,[1] which might be composed and function along consociational lines; while this development would have a lower political salience than legislative 'integration', it would occur in the principle institutions of the modern administrative state, and would not be without practical significance.

From the tricameral arrangement just described it would involve a small institutional step to the creation of a single tripartite parliament, a possibility which became widely mooted in late 1980 and early 1981. What was envisaged was communal representation for whites, coloureds and Indians in a unicameral legislature, with separate voters' rolls being used for the purpose of electing the three different components. This would involve a partial reversion to the pre-1955 position when the principle of communal representation in a single parliament was applied on a limited basis;[2] it would also involve a belated endorsement of the main constitutional recommendation of the Theron commission. And in a comparative context the arrangement would find some support in the Turnhalle and Zimbabwean constitutions, as well as the empirical consociations.

From an institutional point of view the tripartite parliamentary arrangement would again involve a continuation of, rather than a substantial deviation from, previous constitutional developments. In particular, it would perpetuate the black/non-black constitutional dichotomy, which is the most important constitutional factor in the contemporary political system; in fact the same dichotomy would persist even if the parliament were to become fully 'integrated' on the basis of a common franchise, although the government has frequently rejected the possibility of a common voters' roll for whites, coloureds and Indians.[3] From the consociational point of view a tripartite parliament would also

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1. See S.C. Jacobs 'n Juriediese analise van die konstitusionele voorstelle vir 'n nuwe grondwetlike bedeling in Suid-Afrika' in Jacobs op cit 88 at 105.

2. See above, 158-162. At that stage coloured voters could elect only white parliamentary representatives.

3. See, eg, House of Assembly Debates vol 1 col 63 (3 August 1981).

be a favourable constitutional arrangement for power-sharing along consociational lines, provided it did not operate on a simple majority basis and some type of veto was constitutionally permitted. Despite the absence of separate communal assemblies, it would also provide some institutional basis for segmental autonomy, in that each component part of the parliament could be empowered to take binding decisions on matters of exclusive concern to the group; here the Belgian constitution provides a favourable comparative precedent.[1] This arrangement would have the same implications for the executive and administrative branches of government as the tricameral model.

The reservations concerning the government's acceptance of the tricameral model apply, a fortiori, to the tripartite arrangement. Apart from its immense symbolic significance, a single composite legislature would clearly involve the termination of the white assembly's legislative supremacy and the conferment of 'separate but equal' political rights on previously disenfranchised persons. Realistically, the government would only accept this situation in return for various constitutional 'safeguards' designed to maintain white political control, but these would in turn affect the legitimacy of the system, which would already be prejudiced by its statutory group basis.[2] A sine qua non from the government's point of view would be the entrenchment of the proportional sizes of the component parts of the parliament; this trend was evident in the 1979 draft bill,[3] and in terms of the present demographic realities[4] would ensure continued white control of the legislature. This would be an unfavourable feature from a consociational point of view, as the precedents for en-

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1. The 1971 Belgian constitution makes provision for two cultural councils, comprising respectively the French- and Dutch-speaking members of both legislative houses; each council can issue decrees on cultural and educational matters which have the force of law in respect of the relevant group (art 59(b)). And see below, 426.

2. Not only race classification, but also other discriminating practises, such as residential and educational segregation, would be compatible with this arrangement. Even the Prohibition of Political Interference Act No 51 of 1968 could be retained because of the separate electoral rolls; on the other hand it would be difficult to preclude the emergence of post-electoral parliamentary coalitions.

3. S 8(1)(d).

4. If based on the estimated mid-1976 population figures the ratio for whites, coloureds and Indians would be 4:2:1.

trenched 'proportionality' in the empirical consociations are not favourable.[1] Another likely requirement would be that decisions be taken in the legislature on a simple majority basis; this would deny a veto right to coloureds and Indians, and would also have an anti-consociational effect. On the other hand if the composition of the legislature were altered to reflect demographic changes, the government would be likely to insist on qualified majoritarianism and constitutional rigidity to afford it a veto power with which to contain majority rule. The government's attitude to consociational devices will be coloured by its electoral and legislative strength, a phenomenon also encountered in the Zimbabwe constitutional transition - from a minority perspective the principle of concurrent majorities and the mutual veto assume a new significance.

In the future implementation of its constitutional proposals the government will have to introduce some variations on the legislative arrangements provided in the 1977 constitution. The analysis has shown a number of alternatives for consociational engineering in the legislative field, most of which involve a basic continuity with past constitutional developments and are compatible with government policy. While these alternatives cannot be evaluated in isolation from other constitutional developments, they all involve changes within the political system, and not of it. It has been shown that while consociational structures can be used to incorporate coloureds and Indians into the political system without affecting overall white control, genuine consociationalism has serious implications for white political power if consistently applied - even within the limits of the 'non-black political system'.

(c) Executive authorities

Any further implementation of the government's 1977 constitution would require the creation of new executive authorities. The draft bill made provision for three Westminster-type cabinets to serve each of the communal assemblies, and a council of cabinets

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1. See above, 118.

with various co-ordinating functions, mainly in the legislative sphere. But as far as the distribution of executive authority was concerned the white cabinet would have retained all its existing powers, save for the few matters falling within the jurisdiction of the other two cabinets. The same problems and shortcomings identified in the legislative field would have been evident here.

The nature of future executive authorities would depend largely upon which configuration of legislative institutions was adopted, but in any system the joint executive would be of focal importance. In the 1977 constitution there was a nominal joint executive, the council of cabinets, consisting of the State President and various members of the community cabinets, but the council had no executive powers as such. Continued dominance of the executive field by the white cabinet would be irreconcilable with the assumptions of the 1977 constitution, and a future joint executive would have to have more substantial functions and powers, particularly if there is a development towards a tricameral or tripartite legislature. As most executive powers would logically fall within the jurisdiction of this body, the justification for separate community cabinets would diminish, although until their abolition altogether there would be an inevitable political and jurisdictional tension between the joint and community executives.

From a constitutional point of view a joint executive would involve a significant departure from the South African norm of one-party majority cabinets, and it would require a reassessment of several constitutional principles, such as joint and individual ministerial responsibility. Whether it would have any real implications for white political power would depend on how it was composed and operated. On the one hand it could evolve into a consociational-type institution with proportional representation for each group[1] and decisions being taken on a consensus basis; in this form it could become the main accommodationist institution in the constitutional system, exceeding the

1. The draft bill (s 19(1)) actually provided for the slight over-representation of the minority coloured and Indian groups.

president's council in political importance. But what is more probable is that the government would avoid the full implications of consociationalism, by entrenching the composition of the council to ensure white numerical dominance, and by providing for decisions to be taken by majority vote, or to be determined by the (white) chairman. This would again introduce a consociational structure, namely a 'grand coalition' cabinet, without the essential consociational feature of power-sharing. Moreover, the government might well insist on a form of joint ministerial responsibility operating within the council, to be enforced by an oath of secrecy[1] and the President's ability to dismiss dissenting ministers. This Westminster convention would be quite misplaced in the context of a multi-party executive, and could have the effect of giving coloured and Indian ministers co-responsibility for decisions over which they had little formal control.[2] Thus although the council of cabinets would provide scope for consociational engineering, this would not necessarily lead to any material change in the distribution or exercise of executive power.

The practical role and significance of a joint executive would depend on the broader constitutional system in which it operated, and in particular the future of the 'executive presidency'. One of the unfulfilled expectations of the 1977 constitution was that it would provide for an executive president, but the draft bill gave the State President only a minor political role in a predominantly non-presidential system. In the creation of the president's council the government also avoided drawing the President into the political process by making provision for a Vice-State President to preside over the council. Nevertheless the notion of an 'executive presidency' along the lines envisaged in the 1977 constitution was revived shortly after the 1981 general election.[3] It was in fact possible to discern a trend away from the principles of the parliamentary executive in the 1980 constitutional amendments, which increased the prime minister's power and

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1. Cf s 16(3) of the draft bill.
2. Cf point 4 of the 'twelve point plan' at 342, above.
3. See Die Burger 14 May 1981, The Natal Mercury 15 May 1981.

patronage, gave him greater constitutional freedom in choosing the members of his cabinet, and freed him slightly from the restraints of cabinet, caucus and parliament. While it would be misleading to describe these developments in themselves as a movement towards presidentialism, they should be seen together with the tendency for the prime minister to have much greater political power within modern parliamentary systems.[1] With the general movement towards a managerial system of government in South Africa, it may not be unrealistic to anticipate the establishment of an executive presidency, which would involve a substantial departure from the Westminster system.

In terms of conventional concepts of presidential government[2] an executive president would require a popular mandate, a fixed term of office, institutional independence from the legislature, and a free discretion in the selection of his cabinet. Among the conventional functions and powers of an executive president are the initiation of legislation, the making of public appointments, the formulation of policy on domestic and foreign affairs, and the control and co-ordination of the administrative branch of government. The South African government, however, seems more attracted by the hybrid or semi-presidential system, and the presidency under the French Fifth Republic constitution has frequently been referred to as a model for a South African executive presidency. In this arrangement there is a division of executive power between the President, directly elected by universal suffrage, and the government, which derives its mandate from parliament although its members cannot retain their parliamentary seats.[3] While the formal powers of the President are relatively limited and the constitution empowers the government to 'determine and direct the policy of the nation',[4] in practice the influence of the President is greater than that of the prime minister.[5] While the stability of this system demands a delicate

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1. See, eg, J. MacKintosh The British Cabinet (3 ed, 1977) 541-3 and 628-631.

2. See above, 41-46.

3. See Jean Blondel The Government of France (2 ed, 1974) 129-148.

4. Art 20.

5. Blondel loc cit. See in particular the emergency powers provided in art 16 of the constitution.

balance between the two competing claims to executive power, its relevance in the South African context is that it provides for the same non-territorial division of competence which underlies the government's policy for whites, coloureds and Indians. The multiple executive system which the 1977 constitution purported to introduce would in fact have had more in common with the dual executive system of the semi-presidential model, than with either the parliamentary or presidential models - though in reality it provided for continued dominance by the white cabinet.

The most important factor in an executive presidency in the South African context would be the president's method of election. The draft bill made provision for a joint electoral college for appointing and dismissing the President, but the numerical composition of this body would have ensured the domination of the white majority party in both functions. While the prototypes of both the presidential and semi-presidential systems, the United States and French constitutions, also made provision for presidential electoral colleges, a similar trend towards popular election occurred in both, in the former case by convention and in the latter through formal constitutional amendment. In fact from the government's point of view popular election by the white, coloured and Indian electorates would increase the legitimacy of the presidential office, and at the same time maintain the presidency under white control. A white executive president, freed from parliamentary forms of political responsibility, could be used to retain and legitimate white control even despite the existence of a joint executive, and could also be used to pursue the government's reform option, including the constitutional changes which it involves.

The preceding analysis highlights a salient feature of presidentialism, namely that it is not a favourable form of government from a consociational point of view.[1] This is because it concentrates power in a single individual who is at arm's length from the legislature; collegial or coalition cabinets, which are more favourable settings for a consociational grand coalition, are easier to establish in a parliamentary system where all parties represented in the legislature can be drawn into the cabinet.

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1. See A. Lijphart Democracy in Plural Societies (1977) 224, and below, 400-405.

There are, however, various ways of making the presidential system more consociational. One method is to require a qualified majority for the president's election - this would ensure only the election of compromise candidates who had the support of coalition groups. A second method is to provide for the rotation of the presidential office among nominees of the main parties at frequent intervals,[1] and a third is to combine the office of president with other high posts which could be proportionately allocated. But in relating these possibilities to South Africa, it is realistic to assume that the government would accept no modification to an executive presidency which would affect its overall control of the political system. While consociational features may be introduced in the parliamentary system or the council of cabinets, the stakes in an executive presidency would be too high to depart from the majoritarian principle - which could benefit only whites. It is therefore submitted that, despite the consequences for its legitimacy, an executive presidency would be likely to remain a fundamentally non-consociational institution in the government's constitutional system.

Brief reference should be made to a more drastic alternative relating to executive power. The institutional basis already exists for the direct incorporation of non-whites into the cabinet for a twelve month period.[2] This eventuality would clearly only occur in a crisis situation where the political system had been seriously destabilised, and it would inevitably be the prelude to fundamental political and constitutional changes which would terminate white supremacy. But if the crisis option were used, it would clearly constitute a form of authoritarian consociationalism, with at least some of the conflict leaders being drawn into a coalition cabinet. Remote as this eventuality is, it is worth emphasising that there is no institutional restraint on the creation of a temporary 'grand coalition' along these lines, and it would involve little greater distortion of the principles of parliamentary government than has already occurred.

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1. That is, proportionality in the temporal dimension.

2. S 20(3) of the Constitution Act, as amended by Act No 70 of 1980. And see above, 336.

(d) Local authorities

While there is a fully developed system of white local authorities in South Africa[1], the same is not true in respect of coloureds and Indians. The various group areas enactments,[2] as supplemented by provincial ordinances, provide the statutory basis for coloured and Indian participation in local government, but development along these lines has been slow.[3] The legislation makes provision for three stages of development. The first stage involves the creation of advisory committees comprising nominated members, whose main function is to make recommendations to the local white authorities. The second stage involves the creation of partly-elected management committees which, in addition to the advisory powers, have limited executive functions.[4] The final stage involves the creation of autonomous municipalities for coloured and Indian ratepayers, but very few of these institutions have been established to date. Constitutional control of the whole system is maintained by the cabinet, parliament and the white provincial councils. The relative insignificance of this system must be seen in terms of its inherent constitutional limitations, the absence of any independent fiscal sources, and political opposition to the concept of separate political institutions for coloureds and Indians,[5] problems it shares with the more prominent community council system for blacks.[6]

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1. For a comprehensive account of this system see J. Meyer Local Government Law vol 1 (1978), vol 2 (1979).

2. Acts Nos 41 of 1950, 77 of 1957 and 36 of 1966. For references to the provincial ordinances see Meyer op cit vol 2, part 5, §§ 11-1 to 11-3.

3. On the development of coloured local government see ch 19 of the Theron Report op cit.

4. See Meyer op cit vol 2, part 5. In Natal the advisory committees are known as Local Affairs Committees and in some cases their members participate in proceedings of town councils, but without voting rights.

5. See R. Schrire 'Subordinate Political Institutions' in De Crespigny & Schrire op cit 77 at 86f; M. Wiechers Staatsreg (3 ed, 1981) 430.

6. See above, 179-182.

Against the background of this under-developed system, it was understandable that the government's 1977 constitution should focus on the national coloured and Indian institutions, the Coloured Persons Representative Council and the South African Indian Council, and attempt to combine them, with modified status and functions, with the white parliamentary institutions in a single constitutional system. When this strategy was frustrated with the abolition of the CPRC the government adopted the alternative strategy of incorporating individual coloureds and Indians directly into constitutional bodies, the most obvious being the president's council.[1] But it has also given evidence[2] of a concurrent strategy to create representative institutions for coloureds and Indians at the local level, and it can be expected that these will be of central importance in the process of consociational engineering. In many ways the constitutional options for whites, coloureds, and Indians at the local government level are similar to those at the national level. The government could pursue its existing policies more consistently with the object of establishing separate and nominally autonomous local authorities for each group. But in view of the historical inadequacies of this system, it is likely to place greater emphasis on co-ordinating metropolitan authorities. There would be various possibilities for consociational engineering in this arrangement - in composition the metropolitan authorities could be elected or nominated on a group basis, there could be porportional representation for each group, and a veto system could operate in the decision-making process. Developments along these lines would have a number of advantages for the government. The participation of coloureds and Indians is likely to be less problematic at the local than at the national level of government, and their participation would serve to legitimise the government's parallel development policy. It would perpetuate the dichotomy in constitutional structures between blacks and non-blacks, and would

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1. But the strategy was also evident in relation to the stillborn coloured persons' and black citizens' councils.

2. See the State President's opening address to the president's council - Debates of the President's Council vol 1 col 6 (3 February 1981). It would be speculative to suggest the nature of the council's recommendations, but they could bear some similarity to the frustrated local government plan for Natal - see above, 162.

avoid the issue of the national franchise. In relation to the 1977 constitution it would provide the institutional infrastructure for the whole system, and in many ways would facilitate the subsequent establishment of the three parliament system. And if the metropolitan authorities had only limited powers delegated to them by the various local authorities, they could probably incorporate the consociational principles of proportionality and the mutual veto more consistently than at any other level of the constitutional system.

But in overall political terms developments along these lines would have only a limited significance. Co-ordinating metropolitan authorities could not alone resolve the existing problems affecting separate local authorities for coloureds and Indians - economic non-viability, jurisdictional limitations, dependence on race classification and group areas legislation, and the creation of responsibility without power. Even the consociational elements would have limited significance if the metropolitan bodies had narrowly circumscribed functions relating to the co-ordination of shared services, and they were not able to take basic policy decisions, such as the allocation of scarce resources. In terms of the existing availability of resources and amenities most services within the metropolitan area would have to be provided on an agency basis by the white authorities. The system would also perpetrate the black/non-black constitutional distinction, even if additional co-ordination were undertaken by joint committees of the metropolitan authorities and black community councils. Finally the system would operate within an overall system of white constitutional control. Thus while there is scope for consociational engineering at the local government level, it would, within the constraints of the present political system, have only limited significance.

4. Other Constitutional Developments

The constitutional debate in South Africa has been largely restricted to alternative structures for the legislative and executive branches of government, with a corresponding neglect of the bureaucracy and judiciary. The latter branches of government have been least affected by the various constitutional developments since Union, and were also substantially unaffected by the government's 1977 constitution and subsequent statutory developments. They will, however, clearly require attention in any future programme of constitutional change.

The neglect of the bureaucracy is in keeping with traditional constitutional theory which has been pre-occupied with the composition, functions and inter-relationships of the legislature, executive and judiciary, to the virtual exclusion of the administrative branch of government. While this theory has been belatedly updated to take into account the shift of power from parliament to the cabinet, it has not kept pace with the subsequent shift of power from the cabinet to the administration.[1] With the rise of the modern bureaucratic-administrative state the functions of the administration range far beyond the adjudicative role of the 'nightwatchman state'[2] and include the development of infrastructure, the provision of services and the regulation of private activities. The power which has gravitated to the administrative branch of government most immediately and intimately affects individuals in their daily lives and deserves closer attention in any process of constitutional change.[3] This is particularly the case in South Africa where the government itself has alluded to the obstructionist tactics of public servants vis-à-vis the government's reform programme.[4]

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1. On the implications of this trend for constitutional theory see Baxter 'Constitutionalism, Bureaucracy and Corporatism' in L.J. Boulle and L.G. Baxter Natal and KwaZulu: Constitutional and Political Options (1981) 75 at 77ff.

2. See M. Wiechers Administratiefreg (1973) 19.

3. The importance which whites attached to the top public service posts in the Rhodesia-Zimbabwe transition has been shown above, 247.

4. Cf Baxter op cit 91 for references to the tortoise metaphor used by Dr. P. Koornhof in relation to the bureaucracy. See also Zander's description of the role of public servants in formulating legislation - M. Zander The Law Making Process (1980) 29, and his references to R. Crossman vol 1 The Diaries of a Cabinet Minister (1975) 628-9.

The bureaucracy in South Africa operates at the central, provincial and local levels of government[1] and has a relatively high degree of decentralisation.[2] The greatest proliferation of departments and institutions is at the central level - since the 1980 rationalisation of the public service there have been twenty-two government departments, and the two special departments of Transport Services[3] and Posts and Telecommunications;[4] the departments in turn have numerous adjuncts, such as the advisory boards, professional councils and administrative tribunals. The public sector, however, is considerably wider than these departments, and includes the public corporations created in terms of specific legislation,[5] the public companies registered in terms of the Companies Act,[6] and the national research institutions, the agricultural control boards and the universities. At the regional level are found the four provincial bureaucracies consisting of the provincial departments and their adjuncts, as well as the separate bureaucracies of the self-governing states. At the local level are found the municipal administrations attached to the various elected and appointed local government authorities.[7]

The majority of administrative, clerical and professional posts in government departments are filled by whites,[8] although the

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1. See J.N. Cloete 'The Bureaucracy' in De Crespigny & Schrire op cit 54-76; B. Roux 'The Central Administration, Provincial and Local Authorities and the Judiciary' in D. Worrall (ed) South Africa: Government and Politics (2 ed, 1975) 75-132. These studies do not take account of recent changes in the central bureaucracy.

2. See M. Wiechers Administratiefreg (1973) 17-18. However, in respect of non-white affairs the bureaucracy has been highly centralised, and even constitutional matters have been subject to a high degree of central control and regulation. See W.H.B. Dean 'Whither the Constitution' 1976 THR-HR 266.

3. Formerly Railways and Harbours. See SA Transport Services Act No 65 of 1981.

4. The creation of departments and allocation of ministerial portfolios are effected by the cabinet in conjunction with the State President. See ss 20(4) and 21(1) of the Constitution Act No 32 of 1961 and ss 10(4) & (5) of the Interpretation Act No 33 of 1957; and see M. Wiechers Staatsreg (3 ed, 1981) 248-9.

5. Eg the Electricity Supply Commission (The Electricity Act No 40 of 1958) and the Industrial Development Corporation (Act No 22 of 1940).

6. Act No 61 of 1973; an example is the South African Coal, Oil and Gas Corporation (Sasol).

7. In June 1978 there were 1 386 388 employees in the public sector in South Africa. House of Assembly Questions and Replies vol 4 cols 253-5 (28 February 1979).

8. Cloete op cit 66.

Public Service Act[1] does not prevent the appointment of non-whites to even the highest position in these departments.[2] The same can generally be said for the adjuncts of the departments, although there are often other requirements, relating to qualifications, experience or skills, for appointment to these bodies. The members of the Commission for Administration,[3] which has extensive functions relating to the organisation and administration of the bureaucracy, are in practice white, though this also is not a statutory requirement.[4] There is also a preponderance of white officials in the non-departmental public institutions, as well as the regional and municipal bureaucracies, with the exception of the government departments of the national states and the black, coloured and Indian local authorities.

In terms of conventional notions of bureaucratic organisation the government's 1977 constitution would have required separate bureaucracies for each of the white, coloured and Indian groups, each falling under the political control of the relevant cabinet; in addition an integrated bureaucracy would be required to administer matters of joint concern.[5] This arrangement would have involved similar problems and difficulties to those inherent in the triple parliament and triple executive systems. As with the Constitution Act, however, the 1979 draft bill made scant reference to administrative authorities, although for the first time constitutional provision was made for the Administration Commission,[6] which was empowered to perform various functions relating to members of the public service. The Commission was to consist of five members appointed by the State President and the intention seemed, in the context of the draft bill, to have coloured and Indian members, as well as whites. The draft bill also formally vested in the State President the power to establish depart-

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1. Act No 54 of 1957.
2. The political and administrative heads of state departments, cabinet ministers, must be white by virtue of their membership of the House of Assembly (Constitution Act s 20(3)).
3. The new name for the Public Service Commission, which is regulated by the Public Service Act No 54 of 1957.
4. S 4 of Act No 54 of 1957.
5. Alternatively these matters could be regulated on an agency basis by one of the three ethnic bureaucracies.
6. S 21.

ments of state and to appoint or remove persons in the service of the state.[1] For the rest the bureaucracy was left intact, and reforms in this branch of government would have been dependent on the new legislative and executive branches. The constitutional amendments of 1980 and 1981 also involved no statutory changes to the bureaucracy.[2]

The problems encountered in the implementation of the government's 1977 constitution have further delayed any reforms of the bureaucracy. It is clear, however, that even within the existing constitutional framework the number of non-whites in the public sector could be increased, through open employment opportunities in the government departments and additional appointments to administrative tribunals, professional and trade councils, control boards and the other statutory bodies.[3] These developments could be effected through the joint actions of the cabinet and the Commission for Administration, and, on their directives, subordinate administrative bodies. Developments along these lines would have several advantages for the government. By avoiding the sensitive issue of the franchise they would have a relatively low political salience, and, insofar as no parliamentary activity would be required, they could not be directly frustrated by the caucus and congresses. They would also have a stabilising and system maintenance function, in that leadership élites of groups excluded from the franchise would come to share administrative obligations and responsibilities.[4]

The most appropriate consociational principle which could be applied in the reform of the bureaucracy is that of proportionality. In the consociational model public sector appointments are made on a proportional basis among the different segments, with the purpose of avoiding the winner-takes-all effects of majority

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1. See ss 18(1)(b) and 21(1) respectively; cf ss 20(1) and 22 of the Constitution Act. The control and administration of black affairs continued to be vested in the State President, s 104 (cf s 111 of the Constitution Act). See also ss 7(3)(k) and 106.

2. No express provision was made for the president's council to have an 'integrated' staff, and from personal observations it appeared to be predominantly, if not wholly, white.

3. In 1980 the first black was appointed to the management committee of the Natal Parks Board, with considerable publicity.

4. Wiechers (Staatsreg (3 ed, 1981) 245) observes that the president's council has 'staatsregtelik die geaardheid van 'n statutêre raad'.

rule.[1] But while the South African government may resort to the consociational incorporation of individuals into the administrative system on the basis of their group affiliations, it is unlikely to apply the proportionality principle in this process during a period of government-controlled constitutional change; there is rather likely to be a series of unilateral and reversible concessions motivated by the need for stability and legitimacy.[2] As this would be done on a selective and individual basis it would affect only a small élite of non-white leaders and bureaucrats, and it would create the possibility, which is endemic in an authoritarian consociational system, of opponents of the government being co-opted into the bureaucracy. In short, there seems only a limited prospect of consociational engineering in the bureaucratic branch of government, and any changes that are made would have little political significance unless accompanied by other more fundamental constitutional changes.

Even less attention has been given in the current constitutional debate to the future position of the judiciary; this can be partially attributed to the feeling that the judiciary should not be drawn into the 'political arena', although the consociational literature also makes very few references to this branch of government. The government's 1977 constitution, and consociationalism generally, imply additional functions for the judiciary to those it performs in the Westminster system; in particular they imply a power of judicial review, which is dealt with in greater detail subsequently in this work.[3] The other area of relevance which consociationalism has for the judiciary is in relation to its composition and appointment; according to the normative consociational requirements the judiciary should include representatives from all 'segments', and appointments should be made on an objective depoliticised basis. At present membership of the South African judiciary is theoretically open to all qualified

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1. A. Lijphart Democracy in Plural Societies (1977) 38-9.

2. They could also be seen as a response to the drastic staff shortages in the public service which became apparent in 1980, and increasingly so in 1981.

3. See below, 456-469.

persons,[1] although in fact all the judges are white. According to the first-phase formulations of the 1977 constitution coloureds and Indians would also be eligible for judicial appointments,[2] but the 1979 draft bill made no reference to the judiciary.[3] Apart from this potential broadening of its membership, it seems improbable that the composition of the judiciary will be changed during a period of government-controlled constitutional change, or that judges will come to be appointed on a proportional basis.[4] The judiciary, therefore, offers itself as the least likely branch of government for consociational engineering, despite the fact that it could serve as 'a means of diffusing conflict and competition between groups',[5] or in consociational terms as a depoliticising agent.

5. The Extra-Constitutional Process

It is trite that many of the most important political processes take place outside formal constitutional structures and that these can have a considerable influence on a system of government. It has also been shown in this work that, in their empirical application, the principles of consociationalism are often found in extra-constitutional bodies and have no foundation other than convention or agreement. While the South African government is involved in a process of quasi-consociational engineering various forms of informal consultation can be anticipated,

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1. S 10(1)(a) of the Supreme Court Act No 59 of 1959 empowers the State President to appoint 'fit and proper persons' to the bench.
2. See D. Worrall 'The South African government's 1977 constitutional proposals' in J. Benyon (ed) Constitutional Change in South Africa (1978) 127 at 130.
3. Cf ss 87 and 88 of the draft bill.
4. The Cyprus consociational constitution made provision for a Supreme Constitutional Court comprising a Greek judge, a Turkish judge and a neutral president. See S.A. de Smith The New Commonwealth and its Constitutions (1964) 202-3; see further F. van Zyl Slabbert and D. Welsh South Africa's Options (1979) 154-157, J. Dugard 'Judicial Power and a Constitutional Court' in L.J. Boulle and L.G. Baxter Natal and Kwa Zulu: Constitutional and Political Options (1981) 189 at 199, and the discussion below, 417-420.
5. W.H.B. Dean 'Discussion' in Benyon op cit 87.

principally between the government and various strata of non-government élites. While not all these developments would be government-initiated they could be used by the government, in the absence of representative institutions and a system of constituency policies, to stabilise the political system through the direct incorporation of leadership élites into joint consultative bodies. There would also be other advantages for the government: these developments would involve no constitutional changes and would therefore have a relatively low political salience, they would not affect existing power relationships and could be terminated or disregarded by the government if necessary, they would provide a barometer of political and social pressures, and they could be institutionalised by the government on an eclectic basis. A recent example of the institutionalisation of formerly informal or semi-formal processes is the president's council, which gave constitutional form to the prior informal and irregular consultations between the government and coloured and Indian leaders.[1] The same trend is discernible in respect of the independent national states, whose relations with the republic are destined to be formalised along quasi-consociational lines in the constellation arrangement.

There have been other government-initiated developments involving informal or semi-formal consultations which might be institutionalised over time. In 1975 the government announced the establishment of 'public relations committees' consisting of coloured and white leaders, and operating under the auspices of the Department of Coloured Relations. The official aim of the project was to promote sound relations and eliminate points of friction between the two communities, and by 1980 there were 148 relations committees in existence with 2664 members.[2] These committees have had a low general profile and no noticeable political impact, but could be incorporated more closely into the political system if the government saw the need therefor. In 1979 six regional

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1. The council could also be seen as a successor to the informal inter-cabinet council - see above, 201-202.

2. House of Assembly Debates vol 15 col 7441 (28 May 1980).

committees were created to advise the cabinet committee on black urban affairs;[1] the committees consisted of government-appointed members of all ethnic groups, including urban blacks and homeland leaders, and had wide terms of reference on matters relating to urban and rural blacks resident outside the national states. The credibility of the committees was affected by the refusal of several significant black leaders to participate in them, and by the subsequent resignation, through disillusionment, of other prominent black members - as a product of separate development this venture posed the same options and problems for blacks as did the president's council for coloureds and Indians. These committees can be said to have provided very limited scope for the articulation of black interests and for inter-group negotiation, and to date they have had little prominence or impact. And on an even more informal footing have been the government-initiated discussions with the Labour party, which have occurred notwithstanding the establishment of the president's council. None of these developments has much consociational significance in itself, but they do reveal forms of élite consultation which could have an effect on the constitutional process.

An informal process initiated by a provincial government was the establishment of a consultative committee in Natal, consisting of the four Natal executive committee members, the provincial administrator, two members of the KwaZulu cabinet, and two Indian and two coloured leaders.[2] The committee's main function is to discuss matters of mutual concern and it has only advisory powers, but it is clearly a consociational-type body which could be incorporated more closely into the constitutional process if the political will was present. There have also been reports of an eleven-member committee in the same province, consisting of provincial, KwaZulu and central government representatives, with the function of co-ordinating all planning in Natal and KwaZulu.[3]

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1. 1979 Annual Survey of Race Relations 386-387.

2. See the description of F. Martin MEC in L.J. Boulle and L.G. Baxter Supplement to Natal and KwaZulu: Constitutional and Political Options (1981) 41.

3. The chief minister of KwaZulu, however, reacted with 'surprise' to the announcement of this committee, although it had been said to have his support. See The Daily News 24 November 1981.

Other developments which could have an influence on the process of consociational engineering are the various government and non-government commissions of inquiry, which themselves provide the basis for a type of accommodationist process. The Theron commission[1] consisted of twelve whites and six coloureds and made constitutional and socio-economic recommendations with far-reaching political implications; unfortunately it is a reality of South Africa's constitutional politics that important recommendations of commissions, even those appointed by the government, are disregarded, and this was the case with the Theron report. The Schlebusch constitutional commission was restricted to white parliamentarians, although its composition was broadened when it was institutionalised as the president's council. Of the non-government commissions the most significant are those appointed by the Ciskeian and KwaZulu governments, the Quail and Buthelezi commissions respectively. While the former[2] was more in the nature of a specialist committee, the latter[3] was representative of a much wider divergence of views and had a greater potential for inter-group bargaining than any other contemporary process.[4] But in terms of present political realities the real accommodationist role of bodies such as the Buthelezi commission is severely circumscribed by the non-participation of the Nationalist party, since its recommendations could only be implemented to the extent of the legislative competence of KwaZulu, and possibly a compliant provincial council. The main significance of the commission is that it would serve to support and legitimate standpoints adopted by the KwaZulu government in consultations with the central government, and thereby acquire some indirect influence in the political process.

Of the other informal developments one of the most significant was the well-publicised contact between members of the National party and the Inkatha movement in 1979 and 1980.[5] In terms of

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1. See above, 253-265.
2. See above, 274-277.
3. See above, 282.
4. Cf the views of C. Crocker 'South Africa: Strategy for Change' 59 (1980) Foreign Affairs 323 at 340.
5. See 1979 Annual Survey of Race Relations 41 and 1980 Annual Survey of Race Relations 50. At the fourth such meeting the initiative seemed to founder on policy differences.

the present policies, constituencies and strengths of the internal South African political parties this represented the apogee of inter-élite consultation, and took place along fundamentally consociational lines; it was the nearest that white and black nationalism have approached to the 'self-denying hypothesis'. Similar discussions have taken place between Inkatha and white opposition parties,[1] though necessarily with less political significance. Discussions were also held during 1980 between the Inkatha Youth Brigade and the University of Stellenbosch Students' Representative Council,[2] and subsequently between the Inkatha central committee and the Afrikaanse Studentebond executive.[3] As the Zimbabwe experience shows, however, there will be an inverse relationship between the significance of these 'internal agreements' and the growth of 'external' political parties.

What the processes referred to in this section have in common is the fact that they involve various sections of leadership élites in informal consociational-type consultations, albeit with varying degrees of political significance. Apart from having some influence on South Africa's constitutional policies, these developments could also be institutionalised over time as part of the government's programme of consociational engineering. They could also have a demonstration-effect in relation to the consociational option. But like all the other matters referred to in this chapter they are not likely to affect the government's overall control over the political system and constitutional development.

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1. A permanent Progressive Federal Party-Inkatha steering committee was established in 1980.

2. 1980 Annual Survey of Race Relations 50.

3. According to press reports this contact was formalised in 1981 in the establishment of a South African Youth Foundation. See the Natal Mercury 26 November 1981 .

6. Conclusion

In this chapter attention has been given to the likely constitutional developments during a period of government-controlled consociational engineering. Most of these developments involve the evolution of existing constitutional structures in the continued application of orthodox government policy. They suggest a commitment to new forms of sham consociationalism which do not materially affect overall white control. It is indeed understandable that while the government is in a position of strength it should refrain from pushing the consociational principles to the point of genuine power-sharing, even among whites, coloureds and Indians, as this would inevitably affect its position of dominance. Thus consociational engineering in South Africa is faced with the constraining paradox that the government wishes to embark on a process of constitutional reform, without losing overall control of that process. What sham consociationalism entails is that the government can get other groups to share political responsibility for the exercise of power, without actually sharing in the exercise of that power. This subterfuge is not without adverse implications for the long-term prospects of consociationalism; as Hanf, Weiland and Vierdag observe,[1]

> '... sham consociation will preserve white rule in South Africa in the medium term, but reduce the long-term prospect of genuine consociation. Changes of a purely decorative nature have taken place too often and for too long in South Africa ... So we can assume that the majority of blacks will simply regard "consociation" or "plural democracy" as more new labels for apartheid, and that sham consociation will thereby destroy the prospect of a genuine and acceptable regulation of conflict in the future.'

An indication is given in the following chapter of the disjunction between South Africa's form of sham consociationalism and genuine consociationalism.

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1. T. Hanf, H. Weiland and G. Vierdag South Africa: The Prospects of Peaceful Change (1981) 419.

CHAPTER 8

DEMOCRATIC CONSOCIATIONALISM - EXTRA-CONSTITUTIONAL REQUIREMENTS AND CONSTITUTIONAL ALTERNATIVES

1. Introduction

The system of consociational democracy is not being applied prescriptively to South Africa in this work, mainly because the conditions favourable to its emergence and operation are not present here - élite commitment to the maintenance of the system, prior traditions of élite accommodation, a deferential citizenry, a multiple balance of power, an absence of external threats, and a low degree of socio-economic inequalities.[1] Nor has the government shown any indication of accepting consociational democracy as a normative goal, and its strategy of non-democratic consóciational engineering is compatible with its own long-standing policies, as well as its continued political hegemony. To the extent that this strategy involves changes to the political institutions it shows a commitment to the Burkean tradition, which prescribes piecemeal adjustments and reforms to a continuing set of institutions.[2] In these circumstances the transition from authoritarian quasi-consociationalism to democratic consociationalism is improbable, albeit not impossible.[3]

Nevertheless in this chapter attention is given to the main requirements of a democratic consociational system in South Africa. This will serve both to highlight the wide divergences between the present forms of consociationalism and genuine consociationalism, and to illustrate the range of institutional alternatives which could be adopted if legitimate leaders came to find and accommodate one another in a temporary joint coalition, and sought constitutional mechanisms for institutionalising that relationship. While these consociational structures and procedures would

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1. See above, 130-133.
2. See F. van Zyl Slabbert and D. Welsh South Africa's Options (1979) 134.
3. See T. Hanf, H. Weiland and G. Vierdag South Africa: The Prospects of Peaceful Change (1981) 418-9.

not in themselves be a sufficient means to achieve stable democracy, it is probable that if there is to be any democracy in South Africa it would have to be of the consociational type.[1]

At the political level consociational democracy would require two fundamental types of changes - those which would contribute to democratising the polity, including a system of universal franchise; and those which would introduce a process of real power-sharing and negotiated conflict regulation, namely a permanent grand coalition with its subsidiary institutions. However, a constitutional system incorporating these developments could not exist in a societal vacuum, and authentic consociationalism would require additional statutory, social and economic changes before it could be operative in the South African context. A description of these changes is provided in the first section of this chapter. Although they are fairly broadly stated, they must be regarded as minimal preconditions, and would therefore have to be implemented during a pre-consociational 'transitional' period; but as these changes could themselves only be the outcome of mutual negotiations this period could also be seen as part of the consociational process, so that it serves no useful purpose to attempt delineating a 'transitional' period.[2] In the section following an overview is given of the basic constitutional options facing the designers of a consociational system, and this is followed by a brief outline of the optimal constitutional framework for consociationalism. Attention is then given to some of the wide-ranging institutional alternatives which could be adopted to support consociationalism, given the fact that its principles can be applied in a variety of constitutional frameworks. Unlike the essential preconditions, these alternatives comprise a wide range of optional institutions, but they would have to be adopted in one or other combination for the operation of a consociational system.

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1. See A. Lijphart Democracy in Plural Societies (1977) 236.

2. There is clearly a 'cause and effect' problem here; cf C.B. Macpherson The Life and Times of Liberal Democracy (1977) 100.

2. Extra-Constitutional Preconditions

The necessary pre-conditions for a democratic consociational system in South Africa can be referred to in two categories. The first category relates to a legitimate leadership; consociational democracy places a heavy premium on the role of authentic and effective leadership élites, without which it would be unrepresentative and rest on unstable foundations. In South Africa a wide range of statutory amendments would be required to allow the emergence of a legitimate leadership, but they must be regarded as the sine qua non of an authentic consociational system. The second category relates to socio-economic conditions; consociationalism would require the removal of the major contemporary economic inequalities in the South African society, which could not be effected through statutory amendments alone, and would require a re-appraisal of the economic foundations of the constitutional system. These changes are necessarily somewhat relative, for although there is no single reform which can be described as an absolute pre-requisite, substantial socio-economic reforms would be necessary to obtain the commitment of non-white leaders to the rules of the consociational system, since consociationalism itself does not provide the institutional mechanisms for rapid or radical reform.

Consociational democracy assumes a fully representative political system, which in the South African context would require the extension of the franchise to presently disenfranchised groups. But beyond this, consociationalism places a heavy reliance on representative leadership élites because of the necessity for their deliberate joint co-operation to stabilise the political system. Consociationalism is therefore intimately dependent on the freedoms of political association and political expression.[2] In South Africa there are a number of statutes which prevent or inhibit the emergence of legitimate leaders, ranging from those

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1. On the important role of elites see A. Lijphart 'Consociational Democracy' (21) 1968 World Politics 207 at 216-222, and The Politics of Accommodation (2 ed, 1975) 59-70 and 139-180, and in particular E. Nordlinger Conflict Regulation in Divided Societies (1972) 46-87.

2. See generally J. Dugard Human Rights and the South African Legal Order (1978) 146ff.

which impose group membership on individuals, to others which curtail the freedoms of the person, assembly and speech. Furthermore government-created institutions have proved unattractive and discrediting to many black leaders resulting in an underdevelopment of black political leadership, and the proscription of various organisations has led to the formation of movements across the country's borders and has created a significant leadership in exile. These factors are not favourable from the consociational perspective.[1]

A system of free political association to allow the emergence of voluntarily defined political segments in South Africa would require amendments to those laws which prohibit inter-racial or ethnic political organisation[2] and empower the executive to proscribe or otherwise affect parties or organisations.[3] The freedom to form political groupings, however, also implies a range of other civil rights which are presently denied, limited or differentially allowed. These include the freedom of the person,[4] and freedom of movement,[5] the freedom to assemble and hold

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1. The tendency in South Africa has been for constitutional consultations to be conducted between the government and other 'moderate' leaders; this can be of no more than intermediate term significance, as the Zimbabwe experience revealed.

2. The Prohibition of Political Interference Act No 51 of 1968.

3. The Internal Security Act No 44 of 1950, the Unlawful Organisations Act No 34 of 1960, the Affected Organisations Act No 31 of 1974, the Parliamentary Internal Security Commission Act No 64 of 1976, and the Electoral Act No 45 of 1979.

4. The main limitations on this freedom are contained in the pre-trial and preventive detention laws, the most important of which are the Internal Security Act No 44 of 1950 (ss 4,10(1)(a) bis and 12B), the Criminal Procedure Act No 51 of 1977 (s 185) and the Terrorism Act No 83 of 1967 (s 6), and the banning and house arrest provisions of the Internal Security Act. See A.S. Mathews Law, Order and Liberty in South Africa (1971) 133-163; M. Wiechers Staatsreg (3 ed, 1981) 152f.

5. Restrictions here apply mainly to blacks by virtue of the 'influx control' provisions of the Black (Urban Areas) Consolidation Act No 25 of 1945 (ss 10,12,29 and 29 bis) and the 'pass laws' (Act No 25 of 1945, the Blacks (Abolition of Passes and Co-ordination of Documents) Act No 67 of 1952, and the Blacks (Prohibition of Interdicts) Act No 64 of 1956). See Dugard op cit 73-78; L.J. Boulle 'Citizens and Exiles' paper delivered in Platform 80 series, 27 August 1980, at University of Natal, Durban. The denationalisation of homeland blacks introduces new forms of movement and influx control.

meetings, gatherings and processions,[1] and the freedom of political expression and speech.[2] In many of these cases exceptions to these freedoms would be compatible with the Rule of Law and the liberal-democratic tradition, provided they were well defined, of a limited scope, and accompanied by judicial or extra-judicial safeguards.[3] Nevertheless a wide range of statutory provisions, which constitute an intrinsic part of the present political order, would require amendment or repeal so as to allow authentic group formation and the emergence of a legitimate leadership. In addition an administrative reassessment would be required of the position of banned, sentenced or exiled leaders or potential leaders. These would clearly be far-reaching changes, particularly in view of the likelihood that during a period of government-controlled constitutional change there will be an expansion and intensification of many of the security-related provisions in order to retain political stability. This perspective highlights the discrepancy between present constitutional and political realities and the basic essentials of the normative consociational model.

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1. The most important restrictions are imposed by the Riotous Assemblies Act No 17 of 1956 as amended by Act No 30 of 1974, the Gatherings and Demonstrations Act No 52 of 1973, and Procl R268 of 1968 which applies only to black areas. Since 1976 there has been a countrywide ban on all outdoor political gatherings attended by twelve or more persons (unless authorised by the minister or a magistrate). See also s 9(7)(f) of the Black (Urban Areas) Consolidation Act No 25 of 1945 and s 5(1)(b) of the Black Administration Act No 38 of 1927.

2. Insofar as curtailments in addition to those implied by the previous restrictions are concerned, the following statutes are relevant: the Internal Security Act No 44 of 1950, the Publications Control Act No 42 of 1974, the Riotous Assemblies Act No 17 of 1956 and the Official Secrets Act No 16 of 1956. Other provisions prevent the dissemination of information on defence matters, prison conditions, the police and railway police forces, and strategic supplies. The freedom of expression is indirectly restricted in South Africa by the limitations on access to official information; this is dealt with in comparative context by A.S. Mathews in The Darker Reaches of Government (1978). On secrecy and consociationalism see below, 477-488.

3. Even the courts' common law review powers are severely curtailed by many of the statutes referred to above. See SA Defence and Aid Fund v Minister of Justice 1967 (1) SA 263 (AD), Winter v Administrator in Executive-Committee 1973 (1) SA 873 (AD).

Besides contributing materially to a resolution of the legitimacy crisis, a system of free political association would solve one of the recurring problems experienced by contemporary South African commentators, namely which groups in society should be constitutionally accommodated. Both advocates of the government's constitutional dispensation and more innovative constitutional reformers argue that, in recognition of the diversity in South Africa's plural society, certain ethnic, linguistic or religious groups should be constitutionally recognised and that their 'group rights', appropriately defined, should be constitutionally safeguarded. This argument can claim some support from the consociational notion of political participation through communal units, and the empirical consociations have often defined and accommodated these units in specific terms. But the constitutional recognition of these units, or groups, is only possible where there are clearly discernible groups and the constitutional definitions coincide with the groups' own self-concept. In South Africa neither of these two requirements have been complied with, and this now necessitates a system of voluntary group affiliation[2] to ensure the emergence of self-defined groups with legitimate leaders. The principles of consociationalism are intimately concerned with the questions of group autonomy and the protection of 'group rights', but these can be effected in neutral terms through such constitutional features as the electoral system, the distribution of power, and the decision-making procedures, without any specific delineation of such groups. The absence of constitutional references to 'race' and 'ethnicity' would also make a contribution to the resolution of the legitimacy crisis in South Africa.

There is an apparent contradiction between the principle of free political association and the consociational maxim that 'good fences make good neighbours'. Underlying the maxim is the theory

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1. Cf A.S. Mathews 'Security Legislation and Peaceful Change in South Africa' in F. van Zyl Slabbert and J. Opland South Africa: Dilemmas of Evolutionary Change (1980) 181 at 186ff.

2. On the importance of this aspect in Degenaar's pluralist model see above, 78.

that clear boundaries between the groups in a divided plural society have the advantage of limiting mutual contacts, and restricting the chances of potential antagonisms erupting into actual hostility.[1] It must again be emphasised, however, that the main 'fences' in South Africa have been established through a system of 'race' classification which has been unilaterally imposed by the white government.[2] The system is unscientific and arbitrary[3] and has been manipulated for political and economic ends. The maxim does not therefore have the same significance in the South African context as it has in the empirical consociations. Nor is it possible to justify the other laws which are dependent on the system of race classification and which provide for differential access to land, amenities and facilities,[4] or which differentiate equally among the races,[5] by reference to this maxim. These enactments have come to form essential parts of the living constitution, but stand in the way of authentic democratic consociationalism.[6] Their retention in existing or disguised form would also make any attempt at consociational engineering liable to be perceived as an extension of the separatist constitution-making of the past, as was in fact the case with the government's 1977 constitution. It is of course true that in the absence of these laws 'race' and 'ethnicity' may indefinitely remain important factors in the political process, but they would then be voluntarily assumed identities which could exist alongside other types of group formation.

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1. A. Lijphart Democracy in Plural Societies (1977) 88.

2. The system is regulated mainly by the Population Registration Act No 30 of 1950 and the Black States Citizenship Act No 26 of 1970, but many statutes incorporate their own classifications.

3. As numerous commentators have pointed out 'coloured persons' are not positively defined, but comprise a residual group which is neither 'black' nor 'white'. See s 1 of Act No 30 of 1950.

4. The most frequently cited discriminatory statutes are the Group Areas Act No 36 of 1966, the Reservation of Separate Amenities Act No 49 of 1953 and the Black (Urban Areas) Consolidation Act No 25 of 1945. 'Job reservation' as enforced by a number of statutes had also a high salience, but has been largely dispensed with by recent amendments.

5. Eg the Prohibition of Mixed Marriages Act No 55 of 1945 and the Immorality Act No 23 of 1957 (s 16). As has been pointed out these laws are in effect discriminatory. See J. Dugard and W.H.B. Dean 'The Just Legal Order' in S. van der Horst and J. Reid (eds) Race Discrimination in South Africa (1981) 22. See also the useful article by M. Savage 'What Does Removal of Race Discrimination Effectively Mean in the South African Context?' in Slabbert and Opland op cit 156-176.

6. It is of course not being overlooked that these laws have contributed significantly to political instability in South Africa.

Besides the statutory changes mentioned above, there are various types of social and economic reform which would be required before a system of consociational democracy could be expected to operate successfully. The removal of discriminatory legislation would have some effect on existing patterns of socio-economic inequality, but could not alone effect the type of socio-economic reform which numerous commentators have recommended should precede constitutional change; many of these recommended changes would constitute necessary conditions for a democratic consociational system. Amongst those usually cited[1] are: the correction of inequalities in access to resources such as land, amenities, health facilities, and social pensions and other welfare benefits; equitable state expenditure on housing and educational facilities; the appointment of non-whites to all levels of the bureaucracy, and to administrative boards and tribunals, commissions of enquiry and other statutory bodies; the removal of the remaining limitations on occupational mobility of blacks and an increase in facilities for their vocational training; the encouragement of a range of institutional developments for dealing jointly with conflict, particularly in the industrial field; the institution of representative government at the local level; the decentralisation of administrative authority; and the encouragement of political development in black areas. The government has already made a formal commitment to reform in some of these areas, though the actual progress has been slow, sporadic and isolated; there has been a tendency to advance by way of

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1. See eg L. Schlemmer 'Social Implications of Constitutional Alternatives in South Africa' in J. Benyon (ed) Constitutional Change in South Africa (1978) 271-273, and 'Political Structures for Multi-Racial Societies: Basic Concepts and Structures' (SAIRR, 1980); A. du Toit 'Discussion' in Benyon op cit 286-289; the Sprocas Report No 10 South Africa's Political Alternatives (1973) 221-242; H. Adam 'The Preconditions for Peaceful Change and Intergroup Accommodation in a Divided Society', paper delivered at the International Futures Conference: The Road Ahead, Grahamstown, July 1978; F. van Zyl Slabbert and D. Welsh South Africa's Options (1979) 120-132; G. Thula 'A Basis for Constitutional Transformation of South Africa' in R. Rotberg and J. Barratt (eds) Conflict and Compromise in South Africa (1980) 161-172; the papers on economic and social change in Slabbert and Opland op cit; the articles on education, housing, health and social welfare in S. van der Horst and J. Reid (eds) Race Discrimination in South Africa - A Review (1981); and Hanf, Weiland and Vierdag op cit 382-397.

administrative exemption alone, without providing the institutional support to sustain the particular reform.[1] There has also been noticeable neglect of the redistributive aspects of the above reforms,[2] and even in the field of industrial relations, where there has been extensive statutory and administrative activity in the last few years, the reforms have been limited and constrained by other political and economic factors.

A programme of planned social and economic change along the lines suggested above would be a necessary, though not a sufficient, condition for democratic consociationalism. In consociational terms it would serve to replace the present hegemony of a single segment with a 'multiple balance of power', by creating new cross-cutting lines of social differentiation and new politically relevant conflicts of interest. Some of these changes could succeed a consociational accommodation, but it should be re-emphasised that the consociational form of government is slow and cumbersome and not suited to radical reform. Therefore popular loyalties to the system as a whole, and in particular the commitment of black leaders to the rules of the consociational system, would probably depend on the extent to which progress had already been made towards social and economic reform.[3] In the South African context this could require an as yet unapparent political willingness to restructure the society in a far-reaching manner.

3. Basic Options

Having outlined some of the extra-constitutional preconditions for a system of consociational democracy, it is necessary to deal briefly with the most important basic options facing the framers

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1. Eg the admission of blacks to white universities, their occupation of property in white group areas, and their use of entertainment facilities, are 'exceptional' situations requiring an administrative permit.

2. Even moderate internal black parties have called for the nationalisation of land and the mining sector as part of a redistributive strategy. See 'A Constitutional Alternative for South Africa (Inkatha)' by G. Thula in Slabbert and Opland op cit 36-46.

3. For critical black references to the limitations of constitutional change alone see D. Curry in Benyon op cit 90 and the Inkatha evidence to the Schlebusch commission included in W. Felgate 'Co-operation Between Natal and KwaZulu - an Inkatha View' in L.J. Boulle and L.G. Baxter Natal and KwaZulu : Constitutional and Political Options (1981) 154 at 158-162.

of a consociational constitutional system.[1] It has been emphasised in this work that consociationalism does not provide an analytical constitutional model, that it is understood primarily in behavioural-attitudinal terms, and that it can be applied in a variety of institutional frameworks. But before a selection could be made among the various institutional alternatives, there are four preliminary options which would have to be settled:

(a) The first option is whether the consociational rules should be embodied in formal documents, such as a constitution act and electoral act, or whether reliance should be had on informal arrangements, such as conventions or inter-party pacts. Some features would of necessity require a statutory basis, for example a proportional electoral system or a territorial-federal division of power, whereas others, such as the grand coalition and veto principles, could be based on conventions or formal agreements; a combination of the two alternatives is also possible, as evidenced by the empirical consociational democracies, although it is significant that in many of these systems there has been a high degree of reliance on informal agreements. In the South African context, however, it would seem necessary to specify the consociational rules in the constitution[2] since they would involve radical changes from existing constitutional structures and political practises. A legacy of South Africa's political history is an absence of mutual trust at the leadership level, and in the light of this reality it would be unrealistic to rely on informal agreements or pacts.[3] It would therefore be judicious to have

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1. See on this section A. Lijphart 'Consociation: The Model and its Applications in Divided Societies', paper presented at the Study Conference on Models of Political Co-operation held at Queen's University of Belfast, Northern Ireland, 25-28 March, 1981.

2. The term is used loosely here to include other basic laws besides the constitution act.

3. As the consociational option assumes a change in leadership attitudes this point requires further elaboration. As Barry (B. Barry 'The Consociational Model and its Dangers' 3 (1975) European Journal of Political Research 393 at 410) emphasises, prescriptive power-sharing will not be successful where the political will is absent - the failed consociations testify to this point. But the 'corollary' does not necessarily follow, namely that where there is a recognition on all sides that an accommodation is necessary, constitutional prescription is not preferable. Within limits constitutional provisions can restrain power, thereby compelling compromise and affecting attitudes; in the absence of a tradition of élite accommodation they could make a significant contribution to the maintenance of a consociational system.

the principles of consociationalism constitutionally prescribed and to make power-sharing an institutional necessity.[1]

(b) The second option is whether the constitution should define and enumerate the segments in explicit terms, or merely accommodate them neutrally. The empirical evidence tends to support the former arrangement, with constitutional recognition being given to formally specified linguistic or religious groups. It is also possible, however, to avoid any constitutional identification or direct recognition of the segments, and to define power-sharing neutrally in terms of political parties; this approach was consistently followed in the Progressive Federal Party's constitutional proposals.[2] The segmental autonomy principle can also be applied, where circumstances permit,[3] in a territorial-federal arrangement, without direct reference to the segments. In view of the wide-spread opposition to any form of racial or ethnic classification in South Africa and the necessity for a system of free political association, it would be preferable to adopt the neutral, rather than the explicit, constitutional formulation of power-sharing. In specific institutional terms this would entail the avoidance of such features as separate voters' rolls or communal assemblies. On the other hand it might be necessary to make formal distinctions at the very top level of political leadership to ensure, for example, that despite a proportional electoral system no significant group is unrepresented in the coalition cabinet. In this situation there could be a constitutionally-provided 'affirmative action' arrangement.[4]

(c) The third option concerns the extent of the powers and rights of minorities, or conversely the extent to which

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1. Cf R. Schrire 'The Just Political Order' in Van Der Horst and Reid op cit 1 at 14-15.

2. See eg the composition of the Federal Assembly (§ 5.4.1) and the Federal Executive Council (§ 5.4) in the PFP Constitutional Report (1978); cf A. Lewis Politics in West Africa (1965) 83.

3. That is the segments are largely geographically concentrated.

4. See further, below. As Justice Blackmun stated in the celebrated American 'affirmative action' case Regents of the University of California v Bakke 438 US 265 (1978), 'In order to get beyond racism, we must first take account of race' (at 497).

majority rule should apply, notwithstanding the anti-majoritarian nature of the consociational system. This includes such questions as whether minorities should be proportionately represented or over-represented in the legislature and executive, the extent of the powers to be delegated to the different segments, the extent and effect of the veto power, and the content and juridical status of a bill of rights.[1] This category does not provide dichotomous alternatives, and on all the issues mentioned a balance would be required between the legitimate demands of political minorities and the need for effective and efficient government.

(d) The fourth option relates to the levels of government at which the principles of consociationalism would apply. Preferably this should be at all levels of government,[2] but it would be realistic to expect them to be applied initially at the highest levels only. Conversely, consociationalism could be applied at only the subnational level, provided the region enjoyed a relatively large measure of autonomy short of independence; some empirical support for this proposition is found in the case of the Netherlands Antilles and Surinam at various historical stages,[3] and the notion has been implicit in some of the sub-national constitutional alternatives recommended for South Africa.[4]

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1. Some of these matters are investigated in the latter half of this chapter.

2. Except where segmental autonomy is applied on a territorial basis in an asymmetrical federation; as the principles of consociationalism are designed to operate only inter-segmentally they need not be applied at the intra-state level.

3. And, in the light of Aunger's recent study, in New Brunswick, Canada (although Canada itself is a semi-consociational system). See E.A. Aunger In Search of Political Stability: A Comparative Study of New Brunswick and Northern Ireland (1981).

4. For example the 'condominium' suggestion made in the Ciskei (Quail) Report (above, 275) and the institutional recommendations of the Lombard Report (above, 280). Cf N. Olivier 'Implications of Constitutional Development in KwaZulu/Natal for the Rest of South Africa' in Boulle and Baxter op cit 57-74.

4. The Optimal Constitutional Framework

Although consociational democracy cannot be identified with any specific institutional arrangement, and its characteristics are often found extra-constitutionally, some constitutional frameworks are more favourable for its successful operation than others. Thus while consociationalism is not incompatible with presidentialism, majority or plurality electoral systems, and unitary forms of government, a better institutional framework is provided by their 'opposites': parliamentary systems (or semi-parliamentary systems with a plural executive), list systems of proportional representation and, in the case of societies with geographically concentrated segments, federal systems.[1]

The main advantage of the parliamentary system over presidentialism is that it facilitates the emergence of a coalition cabinet; it is easier for all or some of the parties represented in the legislature to be included (on a proportional basis) in a joint executive, because of the close institutional relationship between the two; in fact, even traditional parliamentary systems have transformed their one-party majority cabinets into coalition cabinets at times of instability or crisis, despite the distortions this involves for the conventions of cabinet government. Presidentialism, on the other hand, entails the predominance of a single, usually popularly elected, leader, who is at arm's length from the legislature and has greater institutional freedom in appointing his cabinet. His method of election tends to make him representative of a particular segment, which, combined with his institutional predominance, provides a less favourable constitutional setting for the emergence of a coalition cabinet,[2] despite the fact that there may have been a measure of coalition-building to secure the president's election. On the other hand,

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1. A. Lijphart Democracy in Plural Societies (1977) 224. See also the discussion in Slabbert & Welsh op cit 134-135.

2. Lijphart op cit 33 cites as an exception the Columbia arrangement where the presidency alternated between the two main parties; here presidential predominance was modified by proportionality in the temporal dimension. See also R.H. Dix 'Consociational Democracy - the Case of Columbia' 1980 Comparative Politics 303. Alternatively, there could be a power-sharing executive comprising the president and other top office-holders (deputy-president, prime minister, etc).

the more formal separation of powers normally associated with presidentialism has been cited as a factor which facilitates a coalescent style of government, since élites have more independence from the legislature to co-operate with one another.[1] In this sense the semi-parliamentary Swiss system provides a compromise between parliamentarianism and presidentialism and what is generally regarded as a highly favourable site for élite co-operation, the federal executive council. The members of the council are elected by the federal parliament for a fixed period, during which they vacate their seats in the legislature and do not remain dependent on its support for their continuance in office. The presidency rotates annually among members of the council, in order of seniority, but the president has no greater powers than the other members;[2] it is thus a collegial executive in form and substance.[3] The advantages of this system are that the members of the cabinet can be drawn from the legislature on a proportional basis, but that once appointed the cabinet has tenure and stability, without there being a loss of all constitutional controls over it.[4]

As far as the electoral system is concerned,[5] proportional representation, in consociational theory, ensures that all segments are represented in common institutions to enable them to influence decisions according to their proportional strength: the power of political majorities is thereby mitigated, and minorities are not permanently excluded from office and influence. Clearly a plurality system operating in single-member constituencies, with its well-known electoral distortions and discouragement of minority parties, is the most anti-consociational of all electoral

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1. Cf R. Dahl Political Oppositions in Western Democracies (1965) 351; C. Palley Constitutional Law and Minorities (1978) 20. For a contrary view see C.J. Friedrich Trends of Federalism in Theory and Practice (1968) 29. The former approach tends to overlook the degree of control in fact exercised by the legislature over the executive in, say, the American system.

2. His status is that of primus inter pares, as was the case with the prime minister in a Westminster system.

3. See G.A. Codding The Federal Government of Switzerland (1965) 23.

4. Such as 'interpellation'; see art 22 of the Swiss constitution and C. Hughes The Federal Constitution of Switzerland (1954) 150 and 160.

5. On electoral systems see E. Lakeman How Democracies Vote - A Study of Majority and Proportional Electoral Systems (3 ed, 1970), W.J.M. MacKenzie Free Elections (1958).

systems.[1] Some refinement can be added through such devices as a second ballot or alternative vote, but because these still operate in single-member constituencies the system remains fundamentally majoritarian.[2] The many systems of proportional representation, on the other hand, are designed to allocate seats to all parties in proportion to their electoral strength. Of these the list system ensures the most faithfully institutional reflection of popular support and gives the greatest degree of control to party leaders; it is therefore the most optimal system from the consociational point of view, although most countries using list systems have modified them so as to give voters a choice between candidates in a more or less effective form.[3] The list systems can operate on a national basis or in several multi-member constituencies, with the former (the 'pure form') being the more proportional of the two.[4] Two broad variations are found within the list systems as far as the calculation of the parties' seats is concerned: the d'Hondt or highest average method, and the greatest remainder method.[5] While the latter method tends to favour small parties, and therefore seems preferable for consociational systems, the former is the more widely used, even in the empirical consociations.[6] The second main system of proportional representation is based on the single transferable vote operating in multi-member constituencies. This system was devised before the list system, and it is more democratic than the latter from the voter's point of view

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1. On the other hand plurality elections are not necessarily undesirable at the segmental level, since it is primarily inter-segmental relationships which are regulated on a proportional basis.

2. Lakeman (op cit 80-89) describes various semi-proportional systems, but these are numerically insignificant.

3. Lakeman op cit 98-103 .

4. This is used in Israel (see E. Likhovski Israel's Parliament - The Law of the Knesset (1971) 63ff); in the Netherlands the country is regarded as a single unit for the allocation of seats. The national list system was used in the internal Namibian elections in 1978, and effectively in the 1979 and 1980 pre-independence elections in Zimbabwe. It is interesting to note that Lijphart (The Politics of Accommodation (2 ed, 1975) 214) attributes the breakdown of the Dutch politics of accommodation partially to its countrywide system of proportional representation.

5. Mackenzie op cit 78-80.

6. Such as Belgium and the Netherlands; other countries include the Federal Republic of Germany, Italy and Luxembourg (with a small variation). See G. Hand, J. Georgel and C. Sasse (eds) European Electoral Systems Handbook (1979). In Switzerland the list system is used but the provision for panachage allows voters to choose candidates on opposing lists.

because it allows him a wider range of choice.[1] The main variations within the system concern the number of seats in each constituency, with the degree of proportionality bearing a direct relationship to this factor.[2] While taking second place, in terms of consociational priorities, to the list system of proportional representation, the single transferable vote is designed to make every vote effective, and it is clearly more favourable than plurality elections.

Finally, federalism is more favourable than a unitary system for the operation of consociationalism because its division of power is anti-majoritarian in itself, and because the increase in sites of political competition reduces the distinction between government and opposition and the competitiveness of the contest between the two.[3] It is necessary, however, to add the qualification that the federal constitution should in fact give rise to a decentralised system of government[4] to comply with the requirements of consociationalism. Nwabueze, writing on the subject of constitutional government in Africa,[5] suggests that the decentralisation of functions makes the question of central control less em-

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1. The system was developed in England in the 1850's by Hare and was promoted by J.S. Mill Representative Government (ed by H.B. Acton, 1972 at 263ff) but rhetorically castigated by Walter Bagehot The English Constitution (The World's Classics edition, 1974) 132-140. It came to be used in English-speaking countries other than Britain (save for the University MP's until 1945) - Northern Ireland, Canada, Australia and most consistently in the Republic of Ireland (see Hand, Georgel and Sasse op cit 121-139). For a contemporary critique see G. Doron 'Is the Hare Voting Scheme Representative?' 41 (1979) The Journal of Politics 918.

2. The system will be self-evidently more proportional the greater the number of seats per constituency.

3. See Dahl op cit 351. There is also an affinity between the modern tendency to describe federalism in terms of the political process, and not its constitutional-juridical aspects, and the behavioural-attitudinal emphasis in consociationalism.

4. Numerous commentators have observed that unitary, federal and confederal systems of government occupy different places on the same continuum; a high degree of decentralised government is compatible with a unitary constitution, whereas a federal constitution could in practice give rise to a centralised form of government.

5. B.O. Nwabueze Constitutionalism in the Emergent States (1973) 112.

bittering than it would be in a unitary system; with its limited powers the central government can less easily become 'an instrument of total domination'. Federalism has also been described as a consociational method, a limited and special type of consociational theory;[1] it facilitates the application of the segmental autonomy principle where there is a geographical concentration of segments. Where such concentration does not exist segmental autonomy must be applied on a non-territorial basis, and this has been referred to as 'corporate federalism'.[2] It should be noted, however, that while a federal constitution is well suited to consociationalism, it may be an obstacle to other objectives such as socio-economic reform, national planning or a welfare state, because it is not conducive to uniform development and progress.[3]

This optimal framework can be compared briefly with the South African constitution. Within the context of 'white politics' there has always existed a conventional parliamentary system in South Africa, an institutional tradition which would not require change for the creation of a grand coalition, provided the political system were made more inclusive. The constitutional amendments of 1980 were somewhat ambivalent; on the one hand they increased the prime minister's power and patronage, thereby contributing towards an unfavourable concentration of power in a single individual; on the other hand the new institutional relationships between cabinet and parliament, while not yet involving a semi-separation of powers, would allow the executive (in a future modified form) greater leeway to act as an accommodationist institution, without the normal responsibility and accountability to parliament. As far as the electoral system is concerned, the South African practice has been at variance with the optimal arrangement, as the plurality system in single-member constituencies has been used for most elective or partly elective institu-

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1. A. Lijphart Democracy in Plural Societies (1977) 42-44. On the links between consociationalism and federalism see above, 108-114.

2. See above, 111.

3. I. Duchacek Comparative Federalism - The Territorial Dimension of Politics (1970) 120.

tions;[1] the last vestiges of proportionality disappeared with the Senate.[2] Finally as far as the unitary/federal distinction is concerned, it is generally accepted that the South African constitution is fundamentally unitary with some federal characteristics, but that the system of government is strongly unitarian and highly centralised. There are two apparent exceptions to this description, the decentralisation implicit in the provincial system, but this has not given rise to a significantly decentralised system of government, and the departmental devolution of authority to coloured and Indian institutions and the homeland governments, but the former has been an erratic and limited process, while the latter has taken place under a system of tight central government control with the express objective of partition and constitutional independence. Many constitution commentators have suggested that this latter process might culminate in the national states unifying with the republic in a federal arrangement, but this scenario has a low political probability. In general, then, there has been little affinity between South Africa's constitutional system and the optimal framework for consociationalism.

5. The Institutional Alternatives

Against the background of the optimal constitutional framework for consociationalism it is proposed to describe some of the institutional alternatives for its application in South Africa.

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1. This includes the House of Assembly (s 40 of the Constitution Act No 32 of 1961), the Coloured Persons Representative Council during its existence (ss 2, 8 and 9 of the CPRC Act No 49 of 1964) and the South African Indian Council (s 1(a) of the SA Indian Council Act No 31 of 1968 r.w. the Electoral Act for Indians No 122 of 1977).

2. Save for the relic in s 40(1)(c) of the Constitution Act. Although use is made here of the single transferable vote these indirect elections are based on prior majoritarian elections and do not have a proportional outcome. Cf s 30(3) of the Constitution Act before its repeal by Act No 101 of 1980. Before 1962 provincial executive committees were elected on a proportional basis, but since then each provincial councillor has a single non-transferable vote for each member of the committee, which renders the election purely majoritarian (s 77 of the Constitution Act). But the single non-transferable vote system can have a proportional outcome if used in multi-member constituencies and it has been used in Japan since 1900.

While many of these alternatives would involve a radical break with the constitutional traditions of the past, they would have to be adapted in some combination if South Africa was to move beyond the present stage of sham consociationalism to genuine consociationalism. They are therefore described without particular reference to their likelihood of materialising in the light of the present constitution, the government's political policies, and the economic demands of the society, although these factors are alluded to at times. Furthermore they are all premised on the prior attainment of a universal franchise and a system of voluntary political association, and at least some of the socio-economic reforms already referred to.[1] What is required are constitutional structures which would serve to enforce and sustain the two fundamental and complementary principles of consociationalism, power-sharing and segmental autonomy, should the political actors agree to this type of political arrangement.

(a) The grand coalition principle

The grand coalition principle involves the participation of all significant political élites in the main policy-making institutions. It can either be institutionalised in the national executive, whether of the parliamentary or presidential type, or it can be applied in other co-ordinating and advisory bodies.

In a parliamentary system the principle could be applied in a coalition cabinet in which all parties represented in the legislature would participate, in proportion to their respective strengths. To avoid the formation of one party majority cabinets, or temporary minimum-size coalitions, it would be preferable for a permanent grand coalition to be an institutional necessity. This could be achieved by allowing members of the legislature to elect the cabinet on a proportional basis,[2] or by empowering the head of state to appoint it proportionally, after

1. See above, 395-396.

2. As with the Swiss federal executive - see above, 99.

compulsory consultation with party leaders.[1] The 'collegiality' of the cabinet would be less easy to structure - it would require an egalitarian arrangement in which the head of the cabinet was no more than primus inter partes. Some institutional support for this arrangement could be provided by limiting the chairman's powers and patronage and his ability to dismiss ministers; it would in any case be inappropriate for collective ministerial responsibility to apply in the conventional sense and this would strengthen the position of individual ministers. Another factor which would affect the collegiality of the cabinet would be the distribution of portfolios among its members; this is also an important aspect for minority leaders, for whom mere participation in the grand coalition would be insignificant, unless accompanied by powers of some substance to increase their bargaining power. This would require a qualitative dimension, and some form of balance, in the distribution of crucial portfolios such as finance, defence, and justice. The coalition cabinet as a whole would have traditional executive functions, such as the initiation of legislation, the formulation of policy, fiscal and economic control, and the conducting of foreign affairs. On all these matters the consociational norm would require compromise and consensus, and this would be institutionally enforced through a veto arrangement. Individual ministers could be expected to co-ordinate and supervise their respective government departments and be answerable to parliament for departmental affairs, but they would not be subject to removal by that body in terms of traditional notions of individual ministerial responsibility. This greater political freedom from the cabinet could be institutionalised in a semi-separation of powers arrangement, following the model of the Swiss federal executive.

In a presidential system it would be less easy to constitutionally enforce the grand coalition principle, and there would have to be limits and controls on presidential power for presidentialism to be reconciled with consociationalism. The competitive and majoritarian nature of the presidential electoral contest could be only minimally mitigated through the use of a second ballot or alternative vote electoral system; but the intensity of the competition could be partially mitigated through the use of indirect elections to avoid extensive popular involvement in

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1. As provided in the PFP constitutional proposals and the Zimbabwe-Rhodesia constitution - see above, 209f and 240f respectively.

the campaign. One way of applying the coalition principle would be through the allocation of other high offices, such as the deputy-presidency, prime-ministership, or office of speaker, to groups not 'represented' in the presidency; this could be more easily effected in a semi-presidential system, such as that of the French Fifth Republic.[1] Alternatively, the constitution could require the President to make allowances for the representation of different political parties or regions in his cabinet, a convention which already exists in many presidential systems.[2] Finally the presidential period of office could be made relatively short, to allow for a frequent alternation in office. While all these factors would involve variations on the established concepts of presidential government, they would enhance the prospects of applying the grand coalition principle in a generally unfavourable institutional setting.

The grand coalition principle need not, however, be restricted to the national executive, and it could be applied, particularly (though not exclusively) in a presidential system, through various advisory and co-ordinating councils. These could be permanent or ad hoc bodies and, provided they were broadly representative, the members could be elected or nominated. The councils could have certain areas of functional specialisation, such as the national budget or economic affairs, and although not having formal legislative or executive powers could serve in an advisory capacity to the central legislature and executive. They could also function as deadlock-breaking mechanisms for various legislative or executive bodies, where the consociational principle of élite bargaining behind closed doors could be applied. A prototypal model for the non-executive 'grand coalition' is the Dutch Social and Economic Council[3] which has been described as a 'permanent confederal organ in which the leaders of all organizationally separate interest groups that are important in the economic realm,

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1. See J. Blondel The Government of France (2 ed, 1974) 129-148.
2. K.C. Wheare Modern Constitutions (1966) 131-132.
3. See A. Lijphart The Politics of Accommodation (2 ed, 1975) 113ff.

meet and compromise'.[1] Although it has limited formal powers its status and prestige give the council considerable political significance. A similar institution of comparative interest is the Economic and Social Council under the Fifth French Republic which can be consulted on all social or economic questions and can itself make recommendations to the government, although it cannot initiate legislation.

Besides the expertise which these institutions would be able to provide, they could also have a depoliticising function in relation to controversial political issues, an important element of consociationalism.[2] They also draw attention to an additional possibility for consociational engineering, namely the institution of an economic or vocational or functional second or third chamber in the legislature.[3] Such a chamber would be designed to reflect non-territorial interests and would be expected to provide a different perspective to the lower chamber, or chambers, on matters under the legislature's consideration. While this concept has been promoted by various constitutional writers their suggestions have had little practical impact.[4]

An additional dimension can be added to this analysis by reference to the Norwegian system of extra-parliamentary corporate pluralism.[5] Here corporate negotiation and bargaining takes place in a highly formalised manner, but outside the immediate sphere of the government, parliament and political parties. Annual rounds of negotiation are held among government representatives, trade union leaders, representatives of small businesses, and delegates of the employers' association. In this process,

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1. Ibid.
2. Cf E. Nordlinger Conflict Regulation in Divided Societies (1972) 26.
3. Cf K.C. Wheare Legislatures (1968) 213.
4. Ibid. The Republic of Ireland has a functional second chamber (the Senate) but it has proved to be predominantly a party assembly in practice; this is not an uncommon fate for subordinate chambers.
5. See S. Rokkan 'Norway: Numerical Democracy and Corporate Pluralism' in R. Dahl (ed) Political Oppositions in Western Democracies (1965) 107ff; also the Sprocas Report South Africa's Political Alternatives (1973) 166-169.

> 'The parliamentary notions of one member, one vote and majority rule make little sense. Decisions are made through complex considerations of short-term or long-term advantages in alternative lines of compromise.'[1]

While these negotiations are limited to matters of economic policy and could not be a substitute for representative politics, they have an important supplementary role in the system of government. As the Sprocas report observes,[2]

> 'The main advantage of such a complex of extra-parliamentary organised national bargaining is that it extends the opportunities for the effectiveness of participation in authoritative decision-making ... Opportunities for bargaining with the executive and the bureaucracy, and a significant place for collective negotiations and associations and corporations, provide ways of supplementing ... the limited political participation possible at the ballot box.'

Although important and effective decisions are taken in this process it is as yet without institutional support.[3]

These alternatives for applying the consociational grand coalition principle must be seen together with the constitutional alternatives for the principles of proportionality and the mutual veto, as the three principles are complementary features of the consociational concept of power-sharing. However, they would all involve substantial deviations from South Africa's present constitutional politics, in which the president's council is the only concession to the grand coalition principle.

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1. Rokkan ibid. The concept leads back to the American notion of political pluralism and shares its shortcomings and weaknesses. See above, 64-68.

2. Op cit 167; see also A. Lijphart Democracy in Plural Societies (1977) 107.

3. The creation of formal institutions of consultation between the government and corporate groups is, of course, a general phenomenon of modern government as pressure groups have shifted their attention from the legislature to the executive and bureaucracy. Cf Harrison's concept of 'concertration' in R.J. Harrison Pluralism and Corporatism - The Political Evolution of Modern Democracies (1980) 64-97. On corporatism and consociationalism see above, 114-115.

(b) The proportionality principle

It has been shown that the principle of proportionality operates at various levels in the consociational model - in the electoral system, in the composition of all public authorities, and in the allocation of the 'spoils' of government. Thus the grand coalition should consist of segmental representatives in proportion to each segment's numerical or electoral strength to ensure the equitable participation of all groups, including minorities.[1] But the most important area of application for the proportionality principle is in the electoral system; this serves not only as a basis for the composition of the legislature, but also a basis for the application of proportionality in other areas in the constitutional system. The electoral system could make provision for each communal group to elect its proportional number of representatives on the basis of separate electoral rolls, but communal representation along these lines[2] is effectively precluded for South Africa because of the necessity for a system of voluntary political association;[3] there are however, other ways in which proportionality can be applied at the electoral level.[4]

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1. The Belgian Constitution (art 86(b)) provides that the cabinet must comprise equal numbers of French- and Dutch-speaking ministers, the prime minister excepted.

2. Communal representation has been used at various historical stages in the constitutions of India, Indonesia, New Zealand, Pakistan (to ensure the parliamentary representation of women), Cyprus, Lebanon, Rhodesia and Zimbabwe, and South Africa. This can, however, be arranged in a flexible manner. Thus the New Zealand Electoral Act No 107 of 1956 makes provision (ss 11(b) and 23) for four Maori representatives to be elected to the New Zealand parliament, but Maoris can register as voters for either these constituencies or for the general constituencies (s 41). Likewise the Bangladesh Constitution of 1972 (s 65(3)) reserved 15 seats in the national parliament exclusively for women for a minimum period of ten years, but did not exclude them from contesting other seats. See also I. Duchacek Comparative Federalism (1970) 101-108; S.A. de Smith The New Commonwealth and its Constitutions (1964) 117-121.

3. See above, 390-394.

4. For a discussion of possible 'transitional electoral regimes' see W.D. Burnham 'Milestones on the Road to Democracy: Electoral Regimes and Their Relevance to South Africa' in R. Rotberg and J. Barrett Conflict and Compromise in South Africa (1980) 77-105.

It has been shown that of the many alternatives to plurality elections in single-member constituencies[1], the list system of proportional representation is most in line with consociational theory. When the list system is used on a country-wide basis[2] there is no need for the delimitation of constituencies and this has the effect of depoliticising a controversial feature of most electoral systems; delimitation tends also not to be a critical feature where the list system is used on a regional basis because of the relatively small number and large electoral sizes of the constituencies[3] - nor do regional lists detract materially from the overall proportionality of the system. Apart from the different methods of calculating parties' seats under the list system[4], there are other variations which affect the degree of party control over the elections, and the voters' ability to choose not only between parties but also among candidates.[5] The Belgian system offers one such variation - preferential voting within one list.[6] The voter can vote not only for one of the party lists of candidates, but can also indicate one preference of candidates from within that list; these preferential votes are taken into account in deciding which individuals on a party's list of candidates should be allocated its proportional component of seats. But since preferential voting is not compulsory, the original list order of party candidates remains of importance in the allocation of seats, and other refinements have been introduced to increase the voters' influence.[7] The variation can be taken further, as in the Swiss system,[8] by extending the voter's

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1. Reference has been made to the second ballot and alternative vote; semi-proportional systems include the limited vote, the single non-transferable vote and the cumulative vote. See E. Lakeman How Democracies Vote (3 ed, 1970) 80-89.
2. As in Israel and the Netherlands.
3. In Luxembourg there are four constituencies, in Belgium thirty, and in Italy thirty-two.
4. That is the d'Hondt and greatest remainder methods. See above, 402.
5. See W.J.M. Mackenzie Free Elections (1958) 81f; Lakeman op cit 98-103.
6. See G. Hand, J. Georgel and C. Sasse European Electoral Systems Handbook (1979) 1-28.
7. For example provision for multiple preferences within a party list (as in the Swedish or Finnish systems); or by making preferential voting compulsory (Sweden).
8. C. Hughes The Federal Constitution of Switzerland (1954) 83-84.

choice beyond a single party list. Each voter has as many votes as there are vacancies, and he can distribute them among the candidates in any manner; this allows the voter to divide his vote between parties and to influence more directly the allocation of seats to individual candidates on the party lists. This increased flexibility shows some approximation to the single transferable vote system. A further variation within the list systems is the existence of a threshold which has to be crossed by a political party before representation is possible, the minimum size of this threshold varying from case to case. In some systems there is a formally prescribed percentage of votes which has to be acquired before a party can compete in the national distribution of seats,[1] but there are other informal thresholds inherent in the different list systems.

The single transferable vote system has fewer empirical precedents and fewer variations than the list system. The main variation concerns the number of seats in each of the multi-members constituencies;[2] the greater the number of seats the more proportional the system will be, since proportionality operates only at the constituency level. The constituencies need not be of equal size and in practice tend to range between three and seven seats; this flexibility in the sizes of constituencies emphasises the need for an independent and impartial delimitation authority.[3] The second main variation concerns the quota of votes required by a candidate to secure election. Each voter has only a single vote which can be cast for the candidate of his preference, but additional preferences among the remaining candidates can be indicated on the ballot paper. In allocating the seats all first preferences are counted, the number of votes required by a candidate depending on whether the Hare quota[4] or Droop quota[5] is used.

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1. For example in Denmark two percent, and the Federal Republic of Germany five percent, of the total votes cast.

2. The main practical application of this system has been in Ireland where there are six five-seat, ten four-seat and twenty-six three-seat constituencies.

3. Cf ss 42-44 of the RSA Constitution Act No 32 of 1961.

4. The formula for the Hare quota is $\frac{\text{total valid votes}}{\text{total seats}}$.

5. The formula for the Droop quota is $\frac{\text{total valid votes}}{\text{total seats} + 1} + 1$.

The former is larger than the latter, and has the advantage of making use of every vote cast, but it also has the disadvantage that votes are withdrawn from active participation in the election at an earlier stage;[1] the Droop quota tends to be the more proportional of the two, and is the one used in practice.[2] In both systems a candidate receiving the quota on first preferences is elected, and his surplus votes above the quota are distributed according to second preferences.[3] Where there are no such surplus votes the candidate who at this stage is at the bottom of the list is eliminated, and his votes are distributed in accordance with their next preferences. This process continues until all the seats have been allocated, or there are only two candidates left for one seat and neither has the quota: in this case the one with more votes is declared elected. While political parties are not indispensible to the workings of this system, as with the list system, it is clear that party preferences will be strongly reflected in electoral outcomes.

This brief description shows that the principle of proportionality can be applied in a number of ways at the electoral level, although no reference has been made to many other important features of the various systems, such as the legal status of political parties, party financing, the position of independent candidates, and the filling of casual vacancies arising between general elections,[4] all of which would be important in assessing their suitability for South Africa. They would require evaluation both in terms of the various purposes which elections are designed to serve, and the different ideologies upon which electoral systems are based.[5] Other more technical aspects would also require consideration: the potential difficulty of the different systems for the average voter, the procedure for illiterate voters, the length of time taken for elections and counting of votes, and the costs of elections for parties, candidates and

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1. See Lakeman op cit 137-139.

2. For example in Ireland.

3. Or more accurately, a number of votes equivalent to his surplus is distributed in proportion to the next preferences on all his first preference votes. See Hand, Georgel and Sasse op cit 131 and Lakeman op cit 113.

4. See generally Hand, Georgel and Sasse passim.

5. See M. Wiechers 'The Franchise and Alternative Electoral Systems' in L.J. Boulle and L.G. Baxter Natal and KwaZulu - Constitutional and Political Options (1981) 185.

the government.[1] It should also be remembered that the two main systems of proportional representation could be combined with each other, or could even be juxtaposed with the plurality system. The best example of the latter combination is found in the Federal Republic of Germany:[2] half the members of the Bundestag are elected in single-member constituencies on a plurality basis, but each voter also has a second vote which can be cast for a party list. The two systems are combined by subtracting the constituency seats won by a party from the seats owing to that party according to its proportion of second votes;[3] the remaining seats are filled by candidates on the lists who were not directly elected in constituencies.[4] The aim of this electoral arrangement is to correct any misrepresentation of parties arising from the constituency elections, while retaining a substantial personal element in the representative system. The hybrid system of 'personalised proportional representation' has been generally accepted as being politically effective[5] and is compatible with the principles of consociationalism.

Reference has already been made to the two variations of the principle of proportionality, namely the deliberate over-representation of minorities, and parity of representation for all groups. These devices are particularly useful when there is a large majority segment and several minority segments, and no 'multiple balance of power'. While in theory these variations could be incorporated into the electoral system,[6] it would be difficult to achieve them in practice because even systems of proportional representation tend to favour larger parties at the expense of small ones,

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1. See Lakeman op cit 141-159.
2. See Hand, Georgel and Sasse op cit 58-86.
3. The allocation of seats is calculated according to the d'Hondt largest average method.
4. To share in the distribution of seats a party must cross one of the two thresholds: five percent of the second votes, or three constituency seats by first votes.
5. But cf D. Rae The Political Consequences of Electoral Laws (1971) (111-113)
6. Clearly both variations are more easily attainable when the segments are explicitly defined by the constitution.

although they are designed to mitigate the biases of majority and plurality elections.[1] On the other hand parity of representation for federal states is a common feature of federal upper chambers and could be structured into the consociational arrangement under discussion.[2] Over-representation of minority parties could also be an institutional requirement for a coalition cabinet, with the principle being incorporated into the nomination or election procedure for ministers.

The other major area in which the principle of proportionality should be applied is in the distribution of the 'spoils of government'. Under this general category attention will be given to two specific matters - the allocation of the financial resources at the government's disposal, and the appointment of members in the public service and other government and quasi-government bodies. In respect of both matters a complicating dimension in the South African context is the need for redistributive measures to overcome existing inequalities.

The proportional allocation of public funds is a matter closely related to the issue of segmental autonomy, and is dealt with further under that heading.[3] It is easier to achieve in a territorial-federal arrangement where a degree of fiscal autonomy can be created for state governments by guaranteeing them a proportionate share of public funds - and various formulae can be designed to determine these amounts. On the other hand federalism is notoriously inept at removing gross economic disparities among its constituent units, even where equalising institutions and mechanisms have been established by the federal government. The debate on consociationalism in South Africa tends not to address itself to the problem of redistributive mechanisms, and the effect of the 1977 constitutional proposals would have been to freeze constitutionally the 'unequal distribution of commonly produced wealth' and the existing class relationships.[4] Without

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1. Rae op cit 69-86.
2. Cf § 5.4.2 of the Progressive Federal Party's constitutional proposals; a state's Senate representatives could be elected directly by the state electorate, or indirectly by the state legislature.
3. See below, 425-433.
4. H. Adam and H. Giliomee The Rise and Crisis of Afrikaner Power (1979) 295-297.

a territorial-federal arrangement (and in the absence of a system of statutory race/ethnic classification) the proportional allocation of public funds would require at least the provision of public goods to everyone on an equal basis - educational, health, social and other welfare services; in some countries the 'welfare state' has been perceived as the main means of accelerating egalitarian trends against an historic background of ethnic, racial and class inequalities.[1]

As far as proportionality in the public sector is concerned it is unusual to find its stipulation in formal rules, and it is in any case difficult to achieve without some constitutional recognition being given to specific groups. Nevertheless proportionality in the national and local civil service was a key feature of the politics of accommodation in the Netherlands,[2] and the principle has been institutionalised in other countries in relation to linguistic or religious segments.[3] In the South African context a quota system for recruitment to the public service, and for promotions within the public service, poses a number of problems,[4] and even the full equalisation of opportunities, in terms of education and training, could obviate the need for such

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1. J. Grove 'A Test of the Ethnic Equalisation Hypothesis' 1 (1978) Ethnic and Racial Studies 175, quoted in M. Savage 'What does Removal of Race Discrimination Effectively Mean in the South African Context?' in F. van Zyl Slabbert and J. Opland South Africa: Dilemmas of Evolutionary Change (1980) 156 at 158.

2. A. Lijphart The Politics of Accommodation (2 ed, 1975) 128; see also E. Nordlinger Conflict Regulation in Divided Societies (1972) 22-24, D. Smock and A. Smock The Politics of Pluralism (1975) 272ff.

3. The Official Languages Act of Canada, 1968-69, c54 provides (s 39(4) that there must be equitable appointment to the public service for both language groups, subject to 'the maintenance of merit selection'. See also the Canadian Supreme Court Act, 1949 (in relation to the composition of the judiciary). The Lebanese constitution applied the proportionality principle extensively to the civil service. S 75 of the Zimbabwe Constitution also attempts to reconcile the claims of proportionality and merit as far as appointments to the public service are concerned.

4. For example expertise and efficiency could be jeopardised if 'proportionality' replaced merit as a basis of appointment and promotion. Cf W. Gutteridge 'The Public Services in a Plural Society' in N. Rhoodie (ed) Intergroup Accommodation in Plural Societies (1978) 174-178.

a system only in part. Suggestions that a quota system be enforced,

> 'carefully and discreetly by bodies of unimplacable integrity, insulated from manipulation by politicians seeking to distribute patronage',[1]

are imbued with the spirit of consociationalism and are made with the specific object of avoiding the necessity for any type of group classification, but would be difficult to institutionalise and remain somewhat idealistic. Nevertheless the organisation, composition and control of the whole public service, and in particular the key positions, are no less important than the more prominent constitutional arrangements relating to the electoral system, representative institutions, and the judiciary. In particular the powers and composition of the armed forces and the police force would pose complex problems during a period of consociational transition,[2] and may be the one area in a consociational system where ethnic or racial quotas would be indispensible.

An issue raised by the discussion of proportionality and quota systems is that of 'affirmative action', which has received little serious consideration in South Africa.[3] The concept is closely associated with recent American constitutional experience,[4] where it has been felt that the contemporary equal treatment of blacks and other minority groups through the enforcement of non-discrimination provisions has done little to mitigate the effects of past discrimination. The American experience of moving beyond formal equality of opportunity has revealed additional features of inequality which had not been previously considered, and which

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1. F. van Zyl Slabbert and D. Welsh South Africa's Options (1979) 160.
2. See Gutteridge op cit 176-178.
3. But see the thoughtful contribution by M. Savage op cit 176.
4. See L. Tribe American Constitutional Law (1978) 1043-1052 (in relation to race) and 1066-1070 (in relation to gender). Two of the more recent American decisions of note are Regents of the University of California v Bakke 438 US 265 (1978) in which the Supreme Court ruled that racial quotas were justified to cure past acts of discrimination, but that racial specifity should be minimised as far as possible, and Weber v Kaiser Aluminum and Chemical Corp 563 F 2d 216 (1979) in which a company was permitted to run a training-programme which aimed to put blacks on an equal competitive footing with whites for jobs. For a series of articles on this topic, including the unresolved constitutional problems of reverse discrimination, see 67 (1979) California Law Review 3-190. See also N. Glazer 'Individual Rights Against Group Rights' in E. Kamenka and A. Tay Human Rights (1978) 87-103.

require in turn additional forms of 'reverse discrimination'. But the process has encountered a number of legal difficulties[1] and is surrounded by controversy.[2] Nevertheless affirmative action programmes have a close affinity with the consociational principle of proportionality[3], and the various examples could provide models for a consociational system; in South Africa they would be worth consideration with a view to addressing the effects of past discrimination and assessing the need for a form of historical compensation.[4]

In view of the many difficulties surrounding the institutionalisation of proportionality in the South African context, substitute arrangements might be necessary to achieve a similar object. This would involve going beyond traditional notions of constitutional and administrative law and adjusting to the realities of the modern bureaucratic state. Dean[5] has made an important theoretical contribution along these lines. He points to the limitations of the franchise in securing effective popular participation in government - even a sophisticated proportional electoral system leaves the voter little say in the formulation of state policy.[6] Moreover the traditional popular controls over government are remote, indirect and often quite ineffective. As an alternative, Dean advocates the opening of the administration to greater public participation and consultation; while recognising the important and necessary policy functions of the administration, new and more effective forms of control could be achieved through the direct participation of the electorate in its activities. Such participation would lend itself to a greater variety of forms than representation through the franchise. Apart from direct elections, other constitutional mechanisms would

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1. One of the difficult questions which the American courts have had to answer in assessing the propriety of affirmative discrimination is whether the Fourteenth Amendment of the U.S. Constitution entails a right to colour-blind government (cf Justice Harlan in Plessy v Ferguson 163 US 537 (1896)) or a right to government which does not discriminate against racial minorities. See Tribe op cit 271.

2. See for example the arguments against affirmative action programmes in Nathan Glazer Affirmative Discrimination (1975).

3. And in particular the varients of proportionality, namely over-representation of minorities and parity of representation.

4. M. Savage op cit 160.

5. 'The Administration: Control and Participation - Some Preliminary Thoughts' in Boulle and Baxter op cit 109-127.

6. These remarks apply a fortiori in the normative consociational model, with its heavy reliance on leadership élites and a quiescent electorate

include the direct and indirect representation of interested parties on the decision-making body, formal or informal consultation with interested parties, public hearings, and referenda and public opinion polls.[1] Where this type of arrangement has been provided by statute, for example in relation to urban and town planning, the courts have insisted on strict compliance with the provisions,[2] but these instances are limited and there is scope for the principle to be expanded into many other areas.[3] In the United States statutory requirements for citizen participation in administrative policy-making have increased at all levels of government since the enactment of the Administrative Procedure Act of 1964.[4] While citizen involvement cannot be a substitute for the representative political process, it can be a complementary means of improving that process. In the context of this discussion it may be seen as a compensatory process for groups who would inevitably be excluded from the public service itself during a period of constitutional transition, and as a method of obviating the difficulties of applying the proportionality principle in this branch of government.

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1. Dean op cit 118.

2. Eg in McCarthy v Mustheights (Pty) Ltd and others 1974 (4) SA 328 (C) (at 347) in relation to the Townships Ordinance No 33 of 1934 (C): 'It must be remembered that the Ordinance recognises the public interest in the planning of urban and village development. The public is entitled to notice of such proposed development and must be given the opportunity ... to object and any objection must be considered ... the public cannot be robbed of this right ...'; and on the return day (McCarthy v Mustheights (Pty) Ltd and others 1974 (4) SA 627 (C) at 630: 'The democratic process through which public involvement in various aspects of government is secured often requires compliance with what may seem to be elaborate procedures and may result in irksome delays ... the function of the Court (is) to be anxiously on its guard that it protects the public against any erosion of its rights to notification and protest.' See Dean op cit 123.

3. The principle has some application in relation to professional councils and industrial relations - see eg the provisions of the Industrial Conciliation Act No 28 of 1956 on industrial councils (ss 18 and 19) and conciliation boards (ss 35, 36 and 37).

4. See the essays in S. Langton (ed) Citizen Participation in America (1978). Citizen participation in the United States has been associated with three distinct developments - the civil rights movement, the public-interest movement, and the demands for more open government. See also C.B. Macpherson The Life and Times of Liberal Democracy (1977) 93ff.

(e) The mutual veto principle

The principle of a veto power is not unfamiliar in modern constitutionalism and is usually encountered in some form in the legislative process, whether it be a suspensive veto for the upper chamber[1] or a nominally absolute veto for the head of state.[2] In this context the veto is usually perceived as one of the institutional checks and balances, a safeguard against precipitate action by the lower chamber acting alone. In the consociational model the veto principle is also designed to empower minorities to discourage prejudicial action by the majority, but it is also intended to have another, more positive, function, namely to induce a system of power-sharing. Thus, it is argued, the institutional requirement of unanimity or near-unanimity in the legislative and executive process will necessitate compromises from the majority to ensure the necessary support of minorities for a specific proposal - hence the notion of the concurrent majority.[3] It is seen as essential for minorities not only to participate in various representative institutions, but to be able to influence decision-making as well; in the adversarial model, by contrast, it is traditionally accepted that once the opposition has had its say the government is entitled to have its way.[4] The mutual veto is therefore one of the most important features of the consociational system, an essential complement to the other anti-majoritarian principles of porportionality and the grand coalition. The extent to which the principle can contribute to compromise and induce power-sharing is of course limited,[5] and some of its other shortcomings and dangers have already been referred to,[6] but its absence from the government's

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1. Eg The House of Lords' powers as provided in the Parliament Act of 1949; cf s 63 of the RSA Constitution Act No 32 of 1961 before its repeal in 1980.

2. Eg the American president's suspensive veto (U.S. Constitution art 1 s 7.2) which at the end of a congressional session can become absolute - the well-known 'pocket veto'; cf s 64 of the RSA Constitution Act No 32 of 1961.

3. J. Calhoun A Disquisition on Government (ed by C. Gordon Post, 1953) 20-31. Calhoun's concurrent majority applied only to the legislature but it could apply in other areas as well.

4. K.C. Wheare Legislatures (1968) 159.

5. In particular Calhoun's eulogy is naive and misplaced; and see D. Rae 'The Limits of Consensual Decision-Making' 69 (1975) American Political Science Review 1270-1294.

6. See above, 102-103.

1977 constitutional proposals can be described as their most important institutional weakness from a consociational point of view. It will be discussed here in relation to the main decision-making processes, the relationship between an upper and lower house, and constitutional amendments.

In the first place the minority veto should be available in both the national legislature and executive to prevent minorities from being outvoted or overruled. In its practical application there are, besides the basic options already referred to,[1] three different, but closely-related, issues which would have to be settled. The first is the size of the minority entitled to exercise the veto - most commentators suggest a minimal size of between five and fifteen percent.[2] The second concerns the matters in respect of which the veto is available - here distinctions could be drawn between less important or non-controversial decisions, and those with greater significance because of their high political salience or because they needed to be taken urgently for the smooth running of government.[3] The third is the effect of the veto - whether it would be absolute or suspensive, and if the latter, for what period it would operate; this aspect also raises the question of veto-breaking mechanisms, such as neutral consultative committees or overrule through referendum.[4] As each of these factors interrelates closely with the others they could be arranged on a highly flexible basis, so that, for example, on specified crucial issues the veto would be absolute and could be invoked by any minority group of five percent, whereas on less important everyday matters it could only be used by a fifteen per-

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1. See above, 396-399.

2. See Slabbert and Welsh op cit 153-154.

3. Most constitutions distinguish so-called money-bills because of this factor.

4. The referendum has come to be closely associated with the Swiss political system, where its direct popular majoritarianism stands in contrast to the otherwise coalescent style of Swiss politics. A referendum can be popularly initiated in respect of both federal laws and constitutional amendments, but in the latter case both cantonal and popular majorities are required for its success. See C. Hughes The Federal Constitution of Switzerland (1954) 100-103, 132-138, and M. Mowlam 'Popular Access to the Decision-making Process in Switzerland' 14 (1979) Government and Opposition 180-197.

cent minority and would have a suspensive effect for a ninety day period, after which the matter could be reconsidered and passed with only majority support.[1] In resolving these issues a delicate balance would have to be struck between two conflicting interests - the consociational requirement of effective minority participation in government, and the demand in the modern administrative state for efficient and effective government. In the South African context the latter considerations cannot be underestimated, since future governments will require extensive powers to redress socio-economic imbalances and promote other reforms. Persistent deadlock and immobilism, brought about through the over-use of the veto power to block progressive legislation, would inevitably favour the status quo, and prove politically destabilising. It is an ironic reality that the case for a constitutionally entrenched veto power in a transformed political system is likely to be strongly made by the whites, despite the absence of this institution in the constitutional history of South Africa. In comparison to the grand coalition and proportionality principles, therefore, the greatest circumspection would be required in the institutionalisation of the veto principle.

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1. The revised Belgium constitution of 1971 gives a suspensive veto over legislation to each of the French and Dutch language-groups. Art 32(b) provides that the elected members of each house shall be divided into their respective language-groups; while normal decisions require an absolute majority in both houses (art 38), three-quarters of the members of one group may declare that the provisions of a draft bill have serious consequences for their community in which case the bill is referred back to the cabinet for reconsideration (art 38(b)). The veto is operative for thirty days, and can only be used once in respect of the same bill.

2. The breakdown of the consociational system in Cyprus is generally attributed to the misuse and overuse of the veto power, which lead to deadlock and immobilism.

3. A veto right was only introduced in Zimbabwe once the transition to majority rule had properly commenced; see above, 240f. The Turnhalle constitution for Namibia also made a veto power freely available; see L.J. Boulle 'The Turnhalle Testimony' 1978 SALJ 49-62.

4. Vide the circumvention of the entrenched clauses during the constitutional crisis. Since the abolition of the Senate the only formal veto is in relation to the official languages and avails one third or more of the numbers of the House of Assembly - s 118 of the RSA Constitution Act No 32 of 1961. As in other Westminster systems the cabinet operates on a 'consensual' basis, but this does not imply an informal veto. For a former prime minister's account of cabinet procedure see House of Assembly Debates vol 10 cols 4552-3 (12 April 1978).

The veto principle is also relevant as far as the relationship between the two chambers in a bicameral system is concerned. In parliamentary systems it is customary for the upper house to have a suspensive veto of specified duration in respect of non-financial bills, whereas in presidential systems the upper house's veto power tends to be more extensive, if not absolute.[1] In a consociational system a veto for the upper house would also seem desirable, particularly if it were representative of particular segmental, functional or regional interests. On the other hand, the problems of deadlock and immobilism would be compounded if the veto could operate cumulatively in two sites, and the factors referred to in the previous paragraph would apply a fortiori in deciding on the scope and effect of an upper chamber's veto power over legislation.

Finally, a special type of veto arrangement could be anticipated in relation to constitutional amendments since these are generally regarded as belonging to a special category of legislative activity, except in those jurisdictions where the doctrine of legislative supremacy is still prevalent.[2] Consociational theory would seem to indicate the need for a highly rigid and supreme constitution since the main rules of the consociational system would be institutionalised in its provisions - the veto power, by necessary implication, should avail relatively small minorities in respect of all constitutional amendments, and should be absolute in its effect. The same argument could be applied to other basic statutes, such as the electoral law and a bill of rights. But the issue cannot be seen simply in terms of the traditional debate between the merits and demerits of rigid and flexible constitutions. Constitutional rigidity is never a politically neutral factor, let alone in a consociational system with its emphasis on the sharing, diffusing, dividing and limiting of authority. Whatever the normative attractions of these features, they

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1. In the semi-presidential French system the constitution (art 45) requires approval of a bill by both houses; if the houses disagree on two occasions a joint committee is established to draft a compromise text. If there is also disagreement on the compromise the bill is quashed, unless the government intervenes and directs the lower house to rule definitively. Cf s 26(1)(a)(v), (b) and (c) of the 1979 RSA Draft Constitution Bill.

2. Notably Britain, Israel, New Zealand and South Africa.

must be balanced against the requirement at times for decisive, quick and efficient government, and formal changes to the consociational rules might be necessary to accommodate these requirements. In order to prevent the fulfilment of Salmond's well-known prophecy,[1] the potentially destabilising effects of over-rigidity would have to be forestalled by introducing an additional variable into the amending procedure - namely that the constitution should only be rigid for a specified period of time. This was done in both the Zimbabwe-Rhodesia[2] and Zimbabwe[3] constitutions and was not uncommon in African constitutions in the decolonisation period.[4] A temporally qualified constitutional rigidity could be of both functional and symbolic importance in the short term, even if it allowed an easier formal transition to a majoritarian-based constitution.

(d) Segmental autonomy

Segmental autonomy would seem to be the most difficult of all the consociational principles to apply in the South African context. Its theoretical function is to complement the power-sharing features of the joint national institutions, by allowing each (minority) segment to control and regulate matters of exclusive concern to it; whereas the power-sharing requires élite summit diplomacy and a depoliticised public, segmental autonomy requires more conventional features of representative government. It requires a devolved political structure, which could have a communal or territorial basis.[5]

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1. '... a constitution which will not bend will sooner or later break'. J. Salmond Jurisprudence (11 ed, 1957) 523. The over-entrenchment of inter-segmental ratios in both Cyprus and Lebanon contributed to the destabilisation of these systems; this danger is more remote where the segments are not constitutionally defined.

2. Ss 155-159.

3. S 52. As has been shown whites only accepted the principle of constitutional rigidity once the transition to majority rule had begun. Cf ch 3 s 3(g)(i) of the Turnhalle constitution and s 8(1)(d) of the RSA Draft Constitution Bill of 1979.

4. See R. Luyt 'African Constitutionalism: Constitutions in the context of decolonisation' in J. Benyon (ed) Constitutional Change in South Africa (1978) 15-24.

5. No attention is paid here to local government systems, though clearly these could play an important role in establishing a devolved political structure.

In the past the government has sought to devolve power on a communal basis through a system of non-territorial communal assemblies, but apart from its political inadequacies the system has had manifest constitutional shortcomings: the absence of complementary national authorities, the difficulties inherent in personality-based jurisdiction, and the relatively few matters which could be of exclusive concern to communities lacking a clear territorial base. Apart from these difficulties the creation of community assemblies would be problematic where a system of voluntary political association was introduced for the first time, and in the South African context it would tend to be perceived as an extension or modification of separate development policy and practice. It is therefore logical to examine first the possibilities of applying segmental autonomy in a federal arrangement. At the same time, and without identifying the groups specifically, constitutional allowance could be made for religious, linguistic or cultural groups to establish their own representative councils where they felt the need therefor,[1] and for these councils to have structured access to national and sub-national authorities in respect of decisions which might vitally affect their specific religious, linguistic or cultural groups.[2]

The close empirical and conceptual links between consociationalism and federalism have been described,[3] and it has been shown that federalism is a special form of consociationalism in which segmental autonomy operates on a territorial basis, provided there is a geographical concentration of the segments. Besides the traditional constitutional characteristics,[4] a federal system requires three additional features before it can become fully consociational.[5] First, the autonomy given to the federal units must be a

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1. The revised Belgium constitution of 1971 recognises the existence of three cultural communities in the country, the French, Dutch and German (art 3(c)). It further provides for the existence of two separate cultural councils to comprise the French- and Dutch-speaking members respectively of both legislative houses. These councils can issue decrees on cultural and educational matters which have the force of law in respect of the relevant language group (art 59(b)).

2. Cf s 5.4.2 of the PFP constitutional proposals.

3. See above, 108-114.

4. See G. Sawer Modern Federalism (1976) 1-3.

5. See A. Lijphart 'Consociation: The Model and its Applications in Divided Societies', paper presented at the Study Conference on Models of Political Co-operation held at Queen's University, Belfast, 25-28 March 1981.

method for allowing the segments to run their own affairs - conversely the state boundaries should be drawn so as to coincide as nearly as possible with segmental divisions. Second, the federation should be decentralised so that the constituent states can have a strong measure of self-government and political autonomy.[1] Third, the segmental autonomy must be supplemented by the other main principle of consociationalism, power-sharing, operating through the central authorities of the federal system. A federal model incorporating these additional features would provide an optimal constitutional framework for a consociational system of government in an appropriate situation. Unfortunately the South African situation does not appear highly appropriate.

There is a wealth of literature on federalism in the South African context,[2] and the subject has been approached from a number of perspectives. In some cases the federal model is applied prescriptively, with due emphasis to those features which are perceived as a guarantee of constitutional government - the separation of powers, the checks and balances, and the availability of judicial review. In others federalism is seen as a logical evolutionary development in view of the existing 'federal' features of the constitutional system: the decentralised provincial system and the stages of self-government through which the homelands proceed.

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1. Contemporary trends are towards organic and co-operative forms of federalism in which the centre gives a strong lead to the units, even on matters within their sphere of competence (eg the United States, India, Austalia) but there are other federations where regional autonomy remains strong (Canada, Switzerland). On the stages of federalism see Sawer op cit 98-108.

2. Some of the more worthwhile contributions can be found in D.V. Cowan Constitution making for a Democracy (1960), the Molteno Report for the Progressive Party (1960), L. Marquard A Federation of South Africa (1971), the Sprocas report South Africa's Political Alternatives (1973), A. du Toit Federalism and Political Change in South Africa (1974), M. Wiechers 'Grondslae vir Politieke Ontwikkeling in Suid Afrika' in J. Coetzee (ed) Gedenkbundel H.L. Swanepoel (1976) 102ff, W. Thomas Plural Democracy (1977), the Slabbert Constitutional Report for the Progressive Federal Party (1978), F. van Zyl Slabbert and D. Welsh South Africa's Options (1979) 134-151, several of the contributions in J. Benyon (ed) Constitutional Change in South Africa (1978), W. Thomas 'South Africa Between Partition and Integration' 1979 Aussenpolitik 326. Some contributors base their discussion specifically on a more generous consolidation of the homelands: R. Botha Suid-Afrika - Toekomsblik (1979), G. Maasdorp 'Forms of Partition' in R. Rotberg and J. Barratt 'Conflict and Compromise in South Africa (1980) 107 at 135ff. See also the Royal Institute for International Affairs A Survey of Proposals for the Constitutional Development of South Africa (London, 1980).

In yet others it is seen as a temporary compromise arrangement which could subsequently develop into a majoritarian, unitary system. Despite these different approaches, a recurring theme in the literature is the difficulty of drawing state boundaries;[1] quite apart from factors of motive and legitimacy which complicate this aspect,[2] it is generally seen as impossible to create federal units which are more 'homogeneous' than the country as a whole, without extensive 'gerrymandering' of state boundaries[3] or large-scale resettlement programmes. In terms of present statutory concepts of race and ethnicity, therefore, a federal arrangement could only be partially asymmetrical and would not provide an escape from 'majority domination', or in consociational terms could not serve as a method of applying the segmental autonomy principle.[4] In each of the federal units there would be a high degree of heterogeneity and diversity, and it would be necessary to achieve a coalescent style of politics at these levels as well.[5] Even within a system of voluntary group formation and free political association this position would pertain, as the existing, imposed group affiliations would tend to be politically relevant for some time to come and new types of group formation, for example along class lines, would be unlikely to follow regional boundaries.

Therefore even if the preconditions for consociationalism were all satisfied, it is unlikely that the consociational characteristic of segmental autonomy could be directly applied through a federal division of power in South Africa. But the fact that federalism cannot, in the South African context, be seen as offering a ready vehicle for achieving segmental autonomy, does not render it irrelevant as far as a consociational system is concerned; after all both systems involve a rejection of majority rule

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1. Marquard op cit 71f; Du Toit op cit 17f.
2. There is also a tendency to see federal government primarily in legalistic terms.
3. For example with the Group Areas Act No 36 of 1966 as a basis.
4. In only one of these contributions (the PFP constitutional proposals) is an attempt made to incorporate the principles of consociationalism consistently and comprehensively into a federal constitution.
5. Slabbert and Welsh op cit 140.

in all matters[1] and federalism has been frequently advocated as the optimal constitutional arrangement for heterogeneous societies,[2] despite its poor record in many cases. And despite the existence in South Africa of a number of unfavourable factors as far as federal government is concerned,[3] there does exist an institutional infrastructure which, in modified form and without any ethnic or racial basis, could be used as part of the federal constitutional framework. Other institutional requirements would include a division of authority between the central and regional institutions, a system of public finance to ensure a measure of regional autonomy, and the interpretation and enforcement of the constitution by a federal judiciary. If the power-sharing aspects of consociationalism were introduced at both central and regional levels of government a federal arrangement would in fact enhance the prospects of a consociational political system and reduce the necessity for segmental autonomy in the accepted consociational sense.

A variation on the federal theme which has been recommended by some commentators is the territorial devolution of authority to one or more specific regions within the country.[4] The justification for this differential status if usually found in the particular economic, geographic, demographic or political characteristics of the relevant region. The concept of a special status for some regions in an otherwise unitary system is not without constitutional precedent, although the main empirical example is not encouraging.[5] It finds support in South Africa in the already existing forms of devolved government, in particular the self-governing states which at the second stage of self-government have a special constitutional status via-à-vis other regions, in-

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1. M.J.C. Vile 'Federal Theory and the "New Federalism"' in D. Jaensch (ed) The Politics of "New Federalism" (1977) 4ff.

2. Cf E. McWhinney Federal Constitution-making for a Multinational World (1966); I. Duchacek Comparative Federalism: The Territorial Dimension of Politics (1970); K. Heard Political Systems in Multi-Racial Societies (1961).

3. Chief among these are the gross socio-economic imbalances among existing regions of the country.

4. Cf Duchacek's (op cit 277ff) notion of 'asymmetric federalism'.

5. Northern Ireland had a special status within the United Kingdom from 1921 to 1972 during which it had virtual autonomy on local affairs. This should be distinguished from the position of 'associated' states, such as Puerto Rico (which is associated with the U.S.A.). See Duchacek op cit 184-187: M. Wiechers Staatsreg (3 ed, 1981) 47.

cluding the provinces.[1] The recommendations call for a greater devolution of power to existing institutions, an extension of their territorial jurisdiction, and a lessening of the central government's institutional and fiscal controls; but such an arrangement would also require constitutional changes in the national institutions to ensure the direct participation there of the special status regions, and thereby indirectly to safeguard their regional autonomy. While this idea itself is not new,[2] it has been given considerable impetus recently by both the Quail[3] and Lombard[4] reports, and implicit in both is the notion of segmental autonomy along regional-ethnic lines for specific geo-political units. While it is beyond the scope of this work to evaluate these recommendations,[5] they do highlight another institutional possibility whereby the consociational principle of segmental autonomy might be applied on a quasi-federal basis.

The preceding analysis has shown that a federal arrangement would, in terms of traditional notions of constitutionalism, enhance the prospects of a consociational system, but would not provide a suitable way of applying the segmental autonomy principle as it is understood in consociational theory. On the other hand the alternative of devolving authority to constitutionally created communal assemblies with personal jurisdiction has been effectively excluded by the earlier-stated pre-conditions for consociationalism in South Africa.[6] A third alternative would be to make constitutional provision in neutral terms for the flexible delegation and re-delegation of certain matters between various government authorities and voluntarily constituted community councils. The potential number of such matters is relatively few, but the

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1. The powers conferred by the National States Constitution Act No 21 of 1971 are nominally more extensive than those of the provincial councils (cf s 84 of the Constitution Act No 32 of 1961).

2. See the suggestions of P. Malherbe in Multistan: A Way out of the South African Dilemma (1974).

3. Report of the Ciskei Commission (1980). See above, 274-277.

4. Alternatives to the Consolidation of KwaZulu: Progress Report, Bureau for Economic Policy Analysis, University of Pretoria (1980). See above, 277-281.

5. See Natal and KwaZulu: Constitutional and Political Options by L.J. Boulle and L.G. Baxter (eds), and the Supplement (1981) by the same authors which contains an edited version of the discussions at the Workshop on Constitutional Issues in KwaZulu and Natal held at the University of Natal in October, 1980.

6. See above, 390-394.

arrangement can be illustrated with reference to education.[1] The basic principle is that alongside a system of state schools there would be provision for a private school system which could be made use of on a flexible voluntary basis. Any group of a certain minimum size would be empowered to establish a private school to cater for its linguistic, religious or even specialist educational requirements; educational responsibility would then be transferred by the state to the school authorities, or to an umbrella organisation which wished to co-ordinate a number of similar schools. The schools could have a relatively large measure of educational autonomy within a framework of loose state supervision;[2] they would also be supported by public funds to ensure financial viability and autonomy. The funding would take place in accordance with the two basic principles of equality of expenditure on education and equal access to educational opportunity.[3] The system could also be extended to all types of tertiary education, though inevitably with less flexibility and greater state control; thus on the question of establishing a university in a particular locality, for example, the autonomy principle might have to give way to local or regional feelings as expressed in a referendum, because of the scale of the undertaking and its implications for public funds.

At different times the above arrangements have been used in varying combinations to provide segmental autonomy over educational matters in Switzerland, Belgium, the Netherlands and Lebanon. They would also have certain attractions in the South African context. They are based on a system of individual choice and voluntary association without any need for the constitutional recognition of segments, nor is a significant geographic concentration

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1. See T. Hanf 'Education and Consociational Conflict Regulations in Plural Societies' in Slabbert and Opland op cit 224-237 (and references cited there), and the succeeding discussion (238-248); A. Lijphart The Politics of Accommodation (2 ed, 1975) 110-112.

2. For example in relation to the minimum period of obligatory schooling, or inter-school recognition of attainments.

3. In practice this could be achieved in various ways - by providing schools with a per capita subsidy in proportion to expenditure on state schools, or through the individualisation of expenditure in a voucher system: here each child of school-going age would receive a voucher representing a certain claim on public funds which could be made by the school attended by the child; the voucher could either cover all claims on state funds by the school, or additional funds could be allowed for capital expenditure and special projects. Cf also Ivan Illich (Deschooling Society (1971) 87.

of segments necessary. They are based on the egalitarian principles of equal educational opportunity and expenditure throughout society, but not at the cost of having central government control over all crucial aspects of an educational programme - medium of instruction, curricula, methods of examination and broad educational philosophy.[1] They serve to depoliticise a potentially divisive issue[2] by removing it from the overt political agenda, and even preventing such abuses as government attempts at political socialisation through the educational process. They also provide the greatest degree of segmental autonomy possible, short of a system of communal authorities. But past policies of differentiation in education would make the goal of equality of opportunity somewhat elusive, in spite of equalised formal access to, and expenditure on, education. In particular whites would have an immense advantage in terms of existing schools, facilities and teachers, and even a per capita subsidy system would not necessarily result in an equalisation of these features since wealthy parents or communities would be able to subvent their institutions from private resources. A loaded subsidy, or affirmative-action type formula, for funding the institutions of relatively deprived communities would provide some amelioration, although it would be politically contentious. In short, this type of segmental autonomy would tend to encourage at least some perpetuation of privilege, segregation or other exclusivity in the educational system.[3]

A final alternative would require the adaptation of constitutional structures to the realities of the administrative state. Here Dean has suggested the establishment of a system of 'issue politics' through a process of functional decentralisation[4] - this is closely related to the question of greater public participation in the administrative process.[5] The essence of 'issue politics'

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1. Cf Nordlinger's emphasis on purposive depoliticisation in Conflict in Divided Societies (1972) 26.

2. Cf the De Lange education report (above, 283) at 210f.

3. In the American South the voucher system was used to avoid the integration of schools.

4. See W.H.B. Dean 'The Administration: Control and Participation' in Boulle and Baxter op cit 109 at 119ff; see also D. Cohen 'The Public-Interest Movement and Citizen Participation' in S. Langton (ed) Citizen Participation in America (1978) 55-64.

5. See above, 419-420.

is the practice of organising politically around particular issues;[1] it can exist separately from political party organisation, or ethnic or racial sectional group politics, but is clearly easier to sustain where sectional interests are not overtly dominant, as in consumer or environmental issues. Institutional support could be provided by establishing parastatal bodies with greater autonomy than government departments, but still subject to some state control. The authority to determine state policy in particular areas could be allocated to these bodies instead of to the central government, and provision could be made for active public participation in their activities. According to Dean,[2]

> 'Such "issue fragmentation" has a number of advantages in the South African context. It could provide for inter-group co-operation on an "issue" rather than group basis. In other words the control of activities in which people have a common interest can be determined by that interest rather than simply by group identity. The proposal could also provide a mechanism for insulation from party political influence ... (through) direct active public participation ... The proposal lends itself to such participation because it reduces the size of the policy making units and the range of issues which they will have to consider.'

Issue decentralisation, therefore, would both provide an alternative to (or even variation of) the segmental autonomy principle, and give effect to Nordlinger's concept of purposive depoliticisation.'[3] In the South African context it would require a new approach to the functions of the bureaucracy and a reassessment of certain administrative law principles such as locus standi.

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1. Cohen op cit 56.

2. Op cit 119.

3. E. Nordlinger op cit 26. On the 'citizens' initiatives' which have arisen in the Federal Republic of Germany without constitutional support see B. van Niekerk 'The German Bürgerinitiativen - a New Form of Plebiscitary Control of Government' 1979 SALJ 424-432; but see the cautionary warning of Baxter in Boulle and Baxter op cit 95.

5. Conclusion

In this chapter attention has been given to the range of institutional alternatives which would be supportive of a consociational system of government, should the necessary political will be present. In many cases these alternatives highlight well-known structures and mechanisms of constitutional law, or close variations thereof. In fact, although consociationalism does not provide an analytical constitutional model, its four main principles have well known constitutional equivalents,[1] and are encountered in both semi-consociational and non-consociational constitutional systems. The main conclusion of this chapter, however, is that in the process of consociational engineering it is possible to range far beyond a single constitutional model in order to find institutions which might be suitable for the social, political and economic realities of South Africa.

In this reduction of consociationalism to constitutional terms a number of institutional details have been overlooked altogether. These include the size of the legislature and executive, the qualifications and tenure of office-holders, legislative procedures, details of the party and electoral systems, forms of executive and administrative responsibility, and the composition and functioning of the bureaucracy. Another institution which has been omitted is the judiciary, its structure, composition and powers, and in particular its constitutional function in relation to a possible bill of rights. Other aspects of lesser importance in modern constitutionalism include the nature and use of national symbols. Many of these aspects are relevant to the principles of constitutionalism generally, but not to consociationalism itself; where they have implications for both constitutional theory and consociationalism they are dealt with in the following chapter.

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1. Cf De Smith's 'nine types of safeguards against the abuse of majority power': S.A. de Smith The New Commonwealth and its Constitutions (1964) 107f.

CHAPTER 9

CONSOCIATIONALISM AND CONSTITUTIONAL THEORY

1. Introduction

In recent times an increasing number of constitutional principles and doctrines have been challenged by contemporary social, economic and political realities, leading to an ever-widening chasm between constitutional theory and the modern practice of government.[1] By and large modern constitutionalism was conceived for a relatively simple form of the plural society and, whatever its resemblance to reality in that setting, it has clearly not been updated to take account of the most important developments in modern systems of government - in particular the continued growth of the administrative state, the contemporary importance of the bureaucracy and corporate power, the economic forces operating on the constitution, the technological dimensions and complexity of modern decision-making, and the influence of international politics and economics on national systems. Amongst the constitutional doctrines which have been affected by these developments are the separation of powers, the rule of law, the authority of parliament, notions of ministerial responsibility, theories of representation, and the judicial function and judicial independence - in other words the most important areas of constitutionalism.[2]

South Africa has not been unaffected by the developments mentioned above and suffers from the same dilatoriness in updating constitutional theory. In this chapter attention will be given to some of those areas which are of particular concern to the subject-matter of this work, namely consociationalism. The first topic, the legislative supremacy of parliament, is likely to be of relevance mainly during the period of government-controlled constitutional development along quasi-consociational lines; the other three topics, the role of the judiciary, the

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1. See L.G. Baxter 'Constitutionalism, Bureaucracy and Corporatism' in L.J. Boulle and L.G. Baxter Natal and KwaZulu: Constitutional and Political Options (1981) 75-108.

2. See R.W.M. Dias 'Götterdämmerung : gods of the law in decline' 1981 (1) Legal Studies 3-23.

notion of responsible government, and the question of citizenship, are also relevant to this period, but require further reassessment in the light of the principles of consociational democracy.

2. The Legislative Supremacy of Parliament

In its modern sense parliamentary supremacy denotes that there are no constitutional limitations on the legislative competence of parliament; parliament cannot be limited in the substance of its authority by earlier parliaments, it has no legislative rivals, and the judiciary cannot invalidate acts which it has duly passed. The doctrine has been consistently applied in South Africa since the removal of the external limitations on parliament's competence in the 1930's,[1] and commentators ascribe to it a central importance in relation to constitutional and political developments since that time.[2] During the constitutional crisis of the 1950's there was a strong vindication of the concept by the government,[3] and on other occasions of constitutional significance subsequent prime ministers have emphasised the importance of parliamentary supremacy to the political system.[4] From the political point of view the principle can be said to have both substantive and symbolic importance, and it is therefore not likely to be readily discarded during a period of government-controlled constitutional change.

From a juridical point of view the principle of parliamentary supremacy raises the following issues relating to constitutional development in South Africa: can procedural or substantive restraints be imposed on the existing parliament without terminating its existence, can the scope of the judiciary's review

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1. By the Statute of Westminster of 1931 (22 Geo.5,c.4) and the Status of the Union Act No 69 of 1934. See s 59(1) of the RSA Constitution Act No 32 of 1961.

2. See J. Dugard Human Rights and the South African Legal Order (1978) 14-36; F. van Zyl Slabbert and D. Welsh South Africa's Options (1979) 77-89.

3. See the then prime minister in House of Assembly Debates vol 78 col 3124 (25 March 1952).

4. In relation to the republic constitution see Dr. Verwoerd House of Assembly Debates vol 1 col 101 (20 January 1960) and in relation to the 1977 constitution Mr. Vorster House of Assembly Debates vol 10 col 4547 (12 April 1978). Dugard (op cit 28) observes that in the 1940's government enthusiasm for parliamentary supremacy waned but was restored after the constitutional crisis.

powers over legislation be extended, and can parliament terminate its supremacy completely? The answers to these questions will determine the extent to which the following constitutional features are feasible in terms of present legal realities: a justiciable bill of rights, constitutional entrenchments, a rigid amending procedure, a secured 'federal' or 'corporate' division of power policed by the courts, and the creation of a wholly new constitutional order. These innovations would be relevant not only to a consociational system, but to any form of fundamental constitutional change, but they will be examined with particular reference to the government's form of quasi-consociationalism. In order to resolve some of these issues it is necessary to turn to English constitutional law whence our concept of parliamentary supremacy derives.

In English law the nature and significance of parliamentary supremacy has been subjected to increased analysis in recent times, most particularly in relation to the possible introduction of a bill of rights;[1] although there is no unanimity on the legal status of such rights, there is a significant body of opinion in favour of their constitutional entrenchment and judicial enforceability.[2] There are also other areas of constitutional topicality which have revived the debate on parliamentary supremacy,

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1. Among the many writings on this topic are Lord Scarman English Law - The New Dimension (1974), J. Fawcett 'A Bill of Rights for the United Kingdom' 1976 Human Rights Review 57-64, Lord Lloyd 'Do We Need a Bill of Rights?' 1976 Modern LR 121-129, Lord Hailsham The Dilemma of Democracy (1978), N. Anderson Liberty, Law and Justice (1978), M. Zander A Bill of Rights? (2 ed, 1979), J. Jaconelli Enacting a Bill of Rights: The Legal Problems (1980), H.W.R. Wade Constitutional Fundamentals (1980). As commentators point out the debate has been prompted in part by the fact that Britain is a party to the European Convention on Human Rights and Fundamental Freedoms and has accepted the compulsory jurisdiction of the European Court of Human Rights, yet it seems to fall short of many of the Convention's provisions. There is also a perceived need to prevent a minority government from making fundamental constitutional changes for which it has no mandate. P. O'Higgins Cases and Materials on Civil Liberties (1980) 49; Lord Hailsham op cit 21-22.

2. Other possibilities are that it form an ordinary statute which repeals earlier inconsistent statutes but could itself be repealed by subsequent inconsistent legislation; or that it could have the status of presumptions of statutory interpretation. The Canadian bill of rights, as interpreted in the celebrated R v Drybones (1970) 9 DLR (3d) 473, provides that an inconsistent statute is rendered inoperative but not invalid, that is it remains in force but cannot affect the outcome of the case in issue. See Jaconelli op cit 159-161.

such as the possibility of introducing a 'federal' division of authority within the United Kingdom, and the probability of the future strengthening of institutional links with the European Economic Community. Unfortunately, even the English law commentators are not agreed on the nature and significance of parliamentary supremacy, although the notion that no parliament can bind its successors has long been recognised as the 'ultimate rule of recognition'[1] or 'grundnurm'[2] of the English constitution. There is, first of all, a division of opinion as to whether or not the sovereign parliament's competence includes the power of self-limitation - that is whether parliament at a particular moment in its history can terminate its sovereignty in such a way as to bind all its successors. Corresponding to the responses to this question are the two views of 'continuing' and 'self-embracing' supremacy, respectively.[3] But while the adherents of the continuing view of supremacy are agreed that the sovereign parliament cannot impose any substantive limitations on its legislative powers, there is further disagreement as to whether or not it can impose procedural limitations; those favouring this possibility have formulated the so-called 'new view' of sovereignty.

The notion of continuing legislative supremacy is advocated by Hart[4] and Wade,[5] who build in turn on Dicey[6] and Salmond.[7] According to this view legislative supremacy is the one rule of English constitutional law which parliament cannot alter by statute. This view can be justified in terms of logic, namely that a fundamental rule cannot contain the conditions relating to its own amendment (the problem of self-reference[8]), and the constitu-

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1. H.L. Hart The Concept of Law (1961) 145.
2. H. Kelsen General Theory of Law and State (Transl by A. Wedburg, 1946) 115.
3. See Hart op cit 146.
4. Ibid.
5. H.W.R. Wade 'The Basis of Legal Sovereignty' 1955 Cambridge Law Jornal 172; see also O. Hood Philips Constitutional and Administrative Law (6 ed, 1978) 80-91.
6. A.V. Dicey An Introduction to the Study of the Law of the Constitution (10 ed with intro by E.C.S. Wade (1959) 68-9).
7. J. Salmond Jurisprudence (12 ed, 1966 ed by Fitzgerald) 111.
8. G. Marshall Constitutional Theory (1971) 46; P. Mirfield 'Can the House of Lords Lawfully be Abolished?' 1979 Law Quarterly Review 36 at 41.

tional reality that judicial loyalty to the fundamental rule is not a function of parliament's bidding, but a simple political fact.[1] Thus a subsequent expression of parliament's will must always prevail over an earlier enactment,[2] including one which purports to impose a limitation of substance or procedure on parliament, or to entrench itself.[3] The courts' only function is to apply the law, after having ascertained its authenticity from the parliamentary roll.[4] The implication of this view is that, as long as parliamentary supremacy endures, there can be no limitation of parliament's competence by way of an enforceable bill of rights, constitutional rigidity, changes in parliamentary procedure, or a judicial testing-right; a further implication is that parliament is not only unable to abolish the House of Lords legally, but can also not make fundamental reforms to it.[5] It is thus argued that the Parliament Acts of 1911 and 1949[6] did not involve a redefinition of parliament for certain purposes, but made provision for the exercise of delegated legislative power by the Queen and Commons.[7]

As far as the partial abdication of its legislative authority is concerned, the traditional notion of sovereignty is committed to saying that any such attempt leaves parliament unfettered in its competence;[8] it could thus theoretically repeal both the Statute of Westminster[9] and the independence legislation relating to the Commonwealth countries.[10] But refuge is usually sought in Lord Sankey's well-known observation that 'that is theory and has no

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1. Wade op cit 29.

2. Lex posterior derogat priori.

3. Here the case law provides support, most importantly Vauxhall Estates Ltd v Liverpool Corporation /1932/ 1 KB 733; Ellen Street Estates Ltd v Minister of Health /1934/ KB 590. But see the criticism of these cases in Jaconelli op cit 163-165.

4. Edinburgh and Dalkeith Rly v Wauchope (1842) 8 Cl & F 710(HL); but see S.A. de Smith Constitutional and Administrative Law (2 ed, 1973) 86-88, R.F. Heuston Essays in Constitutional Law (2 ed, 1964) 17.

5. G. Winterton 'Is the House of Lords Immortal?' 1979 Law Quarterly Review 386-387; see also P. Mirfield op cit 36.

6. Parliament Act (1 & 2 Geo 5, c.13) and Parliament Act (12, 13 & 14 Geo 6, c.103) respectively.

7. See Wade op cit 193, Hood Phillips op cit 89.

8. Marshall op cit 62-3; Hood Phillips op cit 70-74.

9. 22 & 23 Geo 5, c.4.

10. Eg the Indian Independence Act of 1949 (10 & 11 Geo 6, c.30), the Ghana Independence Act of 1957 (5 & 6 Eliz 2, c.6), and the Nigerian Independence Act of 1960 (8 & 9 Eliz 2, c.55).

relation to realities',[1] and the political reality is that the domestic courts would neither recognise nor enforce a subsequent English statute.[2] More problematic is the European Communities Act of 1972, which transfers legislative authority over certain matters to the European parliament and purports to give EEC regulations overriding preference over inconsistent British statutes,[3] without otherwise affecting parliament's status or authority. Those favouring the continuing view of supremacy would argue that subsequent legislation could impliedly repeal the earlier transfer of authority and that the Communities Act could be repealed in toto.[4] But the position is by no means clear and will have to await judicial determination.

While the proponents of the notion of continuing sovereignty rely heavily on Dicey, even he readily conceded that parliamentary supremacy could be terminated, by parliament legally dissolving itself and either leaving no means whereby a subsequent parliament could be summoned, or by transferring supremacy to another body.[5] But in terms of the continuing view this would require a technical revolution, a breach of legal continuity between the old constitutional order and the new, because a new grundnurm, or ultimate legal reality, cannot derive its authority from the old. As Hood Phillips explains,[6]

> 'the only way by which the legislature of this country could become legally limited would be for the United

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1. British Coal Corporation v R /1935/ AC 500, in relation to the possible repeal or disregard of s 4 of the Statute of Westminster which purported to prevent parliament from legislating for a dominion unless the act embodied the dominion's request and consent.

2. In the unlikely event of the English courts being called on to do so, they might well invoke the maxim 'freedom once conferred cannot be revoked'. Ndlwana v Hofmeyr 1937 AD 229 at 237; and see Denning M.R. in Blackburn v Attorney-General (1971) 2 AER 1380.

3. Ss 2(1) and (4).

4. Provided the intention to override was clear: Macarthys Ltd v Smith /1979/ICR 174; G. Winterton 'The British Grundnurm: Parliamentary Supremacy Re-examined' 1976 Law Quarterly Review 591 at 603-4; E. Ellis 'Supremacy of Parliament and European Law' 1980 Law Quarterly Review 511-514, Hood Phillips op cit 75-80. It is doubtful, however, that the doctrine of implied repeal would apply: Ellis ibid; E.C.S. Wade and G. Phillips Constitutional and Administrative Law (9 ed, 1977) 76 suggest that the Communities Act alters the former doctrine of the implied repeal of statutes.

5. Op cit 68-69.

6. Op cit 91.

> Kingdom Parliament to extinguish itself, after surrendering its powers to a new written constitution with entrenched provisions ... and judicial review.'

Additional moral sanction could be given to the new constitution by invoking a constituent authority to draft it, and by submitting it to the electorate in an inaugural referendum.[1] In this way a bill of rights could be introduced, constitutional provisions could be entrenched, a federal division of power among the constituent parts of the United Kingdom could be effected, or a closer organic bond with the European Economic Community could be institutionalised. Wade, somewhat paradoxically, suggests an even simpler solution for the entrenchment of any sort of fundamental law:[2] mindful of the fact that judicial loyalty to the laws of parliament is ultimately only a political fact, he points out that loyalty to a new fundamental law could be secured through a new judicial oath of office. The fundamental question, namely what will the judges recognise as an act of parliament, can now be answered by reference to the new judicial oath: they will recognise only those acts which do not (for example) conflict with the bill of rights or entrenched clauses. This again amounts to a de facto change in the ultimate constitutional rule of recognition.

The 'new view' of parliamentary supremacy allows for a more flexible interpretation of the rule, and this avoids many of the constitutional problems associated with continuing supremacy. The 'new view' is favoured by the majority of constitutional lawyers[3] and also has judicial support.[4] It involves drawing a distinction between the content and scope of parliament's legislative competence, and the 'manner and form' in which it legis-

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1. Ibid; N. Johnson In Search of the Constitution (1977) 200.

2. H.W.R. Wade Constitutional Fundamentals (1980) 24-39.

3. Eg I. Jennings The Law and the Constitution (5 ed, 1959) 137-170; R.F. Heusten op cit 6ff; S.A. de Smith op cit 88-92; G. Winterton 'The British Grundnurm' op cit 591.

4. Att-Gen (NSW) v Trethowan (1931) 44 CLR 394; Harris v Minister of Interior 1952 (2) SA 428 (AD); The Bribery Commissioner v Ranasinghe /1965/ AC 172; Akar v Att-Gen of Sierra Leone /1970/ AC 853. Wade, drawing support from Dicey, distinguishes Trethowan's case on the basis that it involved a subordinate and not a sovereign legislature, but other writers dismiss the importance of this distinction. See Wade 'The Legal Basis of Sovereignty' op cit 182.

lates;[1] in relation to the former there can be no limitation on parliament, but in relation to the latter there can be a redefinition of the legislative procedure which will be binding on subsequent parliaments. According to this view supremacy is 'substantively continuing' and 'procedurally self-embracing'.[2] The implication of this view is that a bill of rights and other constitutional provisions could be introduced and legally entrenched without any constitutional break with the past, and, provided the entrenching provision was itself entrenched,[3] could be neither expressly nor impliedly repealed by subsequent legislation, unless parliament followed the prescribed procedure. Theoretically the new procedure could involve special majorities in one or both houses, the assistance of extra-parliamentary bodies, or even the approval of the electorate in a referendum. And the ability of parliament to change its manner and form of legislating includes the ability to redefine itself,[4] as it did, according to this view, in the Parliament Acts, the Statute of Westminster,[5] and even, it has been suggested,[6] in the European Communities Act which created a new composite legislature; the redefinition could also extend to the abolition or fundamental reform of the House of Lords,[7] without in any way affecting parliament's substantive supremacy. In all such cases subsequent parliaments would be bound by the procedures then in force and, although there is as yet no recognition in English law of the possibility of judicial review of

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1. The term 'manner and form' derives from s 5 of the Colonial Laws Validity Act (28 & 29 Victo c 63) which was the subject of interpretation in Trethowan's case.

2. Winterton 'The British Grundnurm' op cit 604; J.D. Mitchell Constitutional Law (2 ed, 1968) 81) describes it as a distinction between parliament 'incapacitating itself' and 'imposing limitations which do not incapacitate'.

3. As in Trethowan's case. In 1956 the New Zealand legislature provided that certain institutional provisions should not be amended without a seventy-five percent majority in parliament, but the 'entrenching' provision was not similarly safeguarded. There is a similarity here with s 114 of Act No 32 of 1961.

4. Notionally there is a difference between changing the 'manner and form' of legislating and redefining parliament, but it is of no practical significance.

5. See I. Jennings op cit 163-165.

6. See Winterton 'The British Grundnurm' op cit 614.

7. G. Winterton 'Is the House of Lords Immortal?' 1979 Law Quarterly Review 386 at 389. In Diceyan terms the abolition of the Lords would involve a transfer of sovereign authority from Queen, Lords and Commons to Queen and Commons. P. Mirfield, 'Can the House of Lords Lawfully be Abolished?' 1979 Law Quarterly Review 36 at 39.

legislation, the courts would be able to ensure compliance with the required procedures.[1] And in the process of enforcing these procedures the courts would likely go beyond the formality of the 'parliament roll' rule, to ensure that what purported to be a duly enacted statute was in fact so, or in the language of this approach, that parliament had indeed spoken; this investigation could not, however, affect the privilege of each House to regulate its own proceedings.[2]

But the new view of parliamentary supremacy is not altogether without theoretical and practical difficulties. As many commentators have pointed out,[3] the line between what relates to the 'manner and form' of legislating and to the substantive authority of parliament is one of degree only: a requirement of a sixty percent affirmative vote in the legislature for the enactment of certain laws is clearly a matter of 'manner and form', but the requirement of ninety percent approval for a matter in a referendum among the electorate, while ostensibly a procedural limitation, could be so difficult to achieve in practice as to amount to a curtailment of parliament's substantive authority.[4] As yet this problem has not arisen in English constitutional law, and no theoretical solution can be offered in advance. A related problem is whether the concept 'manner and form' should be widely understood, so as to include any redefinition of parliament's legislative procedure, or more narrowly, so as to include only redefinitions relating to the internal workings of parliament (eg special majorities), and not those which involve external parties, such as subordinate institutions or the electorate in a referendum.[5] As with the first problem this could only be

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1. See on this matter Mitchell op cit 82-91. A judicial testing-right could of course be expressly introduced by parliament.

2. See Wade and Phillips op cit 71.

3. Winterton 'The British Grundnurm' op cit 605; J. Jaconelli Enacting a Bill of Rights (1980) 159; De Smith op cit 91; H.L. Hart The Concept of Law (1961) 147.

4. But see the argument of H.R. Gray 'The Sovereignty of Parliament Today' 10 (1953) University of Toronto Law Journal 54 at 71-2.

5. This point is clearly made by G. Marshall Constitutional Theory (1971) 50-51; it has particular relevance to the 'section 114' controversy in South Africa and is dealt with below (448f). See also Jennings op cit 6.

solved by judicial resolution: where the circumstances of a case required it the court would have to decide whether specific rules were of such fundamental importance as to constitute absolute preconditions for the validity of legislation.[1] And finally it is by no means clear that the new view of supremacy provides a satisfactory basis for determining the future constitutional effect of the European Communities Act, since it is at least arguable that it is an attempt at substantive limitation.[2] Nevertheless this remains the preferred view of parliamentary supremacy in British constitutional law.

According to the third view of supremacy[3] parliament is legally capable of irrevocably limiting the competence of future parliaments; supremacy is thus 'self-embracing' in that it includes the wider self-limiting power not associated with continuing supremacy. Therefore parliament could introduce substantive limitations, such as a justiciable bill of rights and constitutional entrenchments, or it could create a wholly new constitutional order, such as a federal system within the United Kingdom or a close confederal relationship within the European Community. A new grundnurm would emerge, but there would be no break in legal continuity with the past - the new order would derive its authority from the old. This view, however, has little academic support and has received no judicial recognition.[4] The real objection in principle to this view seems to be that it could lead to a legislative vacuum if there were a total renunciation of legislative competence in any field,[5] but this does not seem to be a problem with much practical significance. Legal theorists also reject this view on the grounds that a constitutional norm

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1. See De Smith op cit 86; in this grey area Wade's criticism of the uncertainties of the 'manner and form' approach are trenchant: Constitutional Fundamentals 29.

2. Jaconelli op cit 168-173.

3. Hart op cit 146; Winterton 'The British Grundnurm' op cit 612; Marshall op cit 45-48. See also Jennings op cit 152-153; Mirfield op cit 40.

4. Winterton 'The British Grundnurm' op cit 613 suggests that the only circumstance in which the courts might accept this view is one in which the traditional political setting is radically altered, enabling the courts to say that a new grundnurm has emerged. But judicial acceptance of a new grundnurm is equally consistent with the continuing view: Wade 'The Basis of Legal Sovereignty' op cit 196.

5. Mitchell op cit 77.

cannot contain the conditions relating to its own amendment the problem of the self-referring or reflexive proposition.[1]

Although the English principle of legislative supremacy was received into South African constitutional law[2] it was never to cause the same theoretical problems as in the English constitution.[3] The South Africa Act[4] vested in the Union parliament 'full power to make laws for the peace, order and good government of the Union', but until 1931 there were limitations on its legislative competence by reason of the Union's subordinacy to Britain. As with similar subordinate legislatures the rules governing the Union parliament were provided by the imperial enactment which brought it into existence, and since its inception these procedural measures,[5] not all of which related to the Union's subordinate status, were regarded as binding by both the courts[6] and parliament.[7] The constitutional crisis resolved the issue of the status of the remaining entrenchments after the Statute of Westminster: in the result both the efficacy of the entrenching procedure and the principle of legislative supremacy were confirmed. In the process the 'new view' of supremacy be-

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1. See Marshall op cit 48; Hood Phillips op cit 61; and cf J.C. Hicks 'The Liar Paradox in Legal Reasoning' 1971 Cambridge Law Journal 275.

2. The reasons for the historical reception of the doctrine in South Africa, and not for example in the United States, are explained by John Dugard Human Rights and the South African Legal Order (1978) 14-16. There was only a brief pre-Union rejection of this notion by Kotze C.J. in the celebrated Brown v Lloyds NO (1897) 4 OffRep 17, in which he held that sovereignty vested in the constitution and not the Volksraad.

3. M. Wiechers Staatsreg (3 ed, 1981) 33; H.R. Hahlo and E. Kahn The Union of South Africa : The Development of its Laws and Constitution (1960) 146.

4. 9 Edward VII c 9, s 59; cf s 59(1) of Act No 32 of 1961.

5. Ss 35(1) and 152 of the South Africa Act. There were also substantive limitations (ss 20 and 24) but these were qualified temporarily. S 5 of the Colonial Laws Validity Act also required adherence to the 'manner and form' of legislating at any time in force.

6. R v Ndobe 1930 AD 484; but the existence of the Colonial Laws Validity Act (ss 2 and 3) clearly affected this decision.

7. Eg in passing the Official Languages of the Union Act No 8 of 1925; the Native Administration Act No 38 of 1927, which was challenged in R v Ndobe, above, did not deal directly with electoral qualifications.

came firmly established in South Africa; it[1] influenced the first Harris decision,[2] which in turn became a leading judicial authority for this view. Since then the 'new view' of supremacy has been upheld by the majority of constitutional commentators,[3] and has also found additional judicial support,[4] and since the constitutional crisis parliament has, with one notable but inconsequential exception,[5] held itself bound by the 'manner and form' laid down in the entrenching provision[6] of the Constitution.[7] Conversely, there are no substantive limitations on parliament's competence, and the ordinary legislative procedure has been used for such far-reaching constitutional purposes as establishing the republican Constitution[8] and abolishing a component part of parliament.[9]

It has been shown that a corollary of parliamentary supremacy is the absence of any judicial testing-right over the scope or content of legislation. This position is confirmed in South Africa by s 59(2) of the Constitution, which limits the courts' review powers to enactments affecting the entrenched provisions. This statutory formulation was first introduced in the wake of the

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1. As expounded mainly by D.V. Cowen Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act (1951).

2. Harris v Minister of the Interior 1952 (2) SA 428 (AD).

3. B. Beinart 'Sovereignty and the Law' 1952 THR-HR 101; Hahlo and Kahn op cit 151-163; H.J. May The South African Constitution (3 ed, 1955) 25, J. van der Vyver 'The Section 114 Controversy - and Governmental Anarchy' 97 (1980) SALJ 363-374; Wiechers op cit 33-37 and 333-340; G.N. Barrie 'Die gebondenheid van die parlement aan die reg rakende sy struktuur en funksionering' 1981 TSAR 46-56; P.J. Laubscher 'The Foundation of Sovereignty - Parliament as a Law-Making Body' 98 (1981) SALJ 529-541. For other authorities, and contrary views, see Hahlo and Kahn op cit 154.

4. S v Hotel & Liquor Traders' Association 1978 (1) SA 1006 (W); Cowburn v Nasopie (Edms) Bpk en andere 1980 (2) SA 547 (NC).

5. When Act No 32 of 1961 repealed the South Africa Act, including ss 137 and 152, the entrenched procedure was not followed, but either this repeal was ineffectual and the sections are still in force, or else the corresponding sections of the republican constitution (ss 108 and 118) can be regarded as a valid re-enactment of them.

6. Now s 118 of the RSA Constitution Act No 32 of 1961.

7. For example in amending s 108 (Act No 1 of 1971) and s 118 (Act No 74 of 1980). R. Goldblatt in W.A. Joubert (ed) vol 5 The Law of South Africa 7.

8. Act No 32 of 1961.

9. The Senate was abolished by Act No 101 of 1980.

constitutional crisis.[1] Before this innovation no express testing right had been conferred on the courts but Wiechers argues persuasively,[2] and it is submitted correctly,[3] that the courts did have such a right at common law. This right was clearly terminated so far as parliament's substantive competence is concerned,[4] but it does not seem to have affected the courts' common law right to determine whether a statutory measure has been properly passed.[5] The courts in South Africa are thus able to enforce the 'manner and form' of legislation from time to time in force.[6]

But as in English constitutional law so in South Africa, the 'new view' of supremacy does not clearly indicate which aspects of parliamentary proceedings can be regarded as 'manner and form' and are therefore subject to judicial enforcement.[7] The Constitution provides[8] that copies of acts in the office of the registrar of the appellate division will be conclusive evidence of the provisions of every law, but this does not prevent the court from going behind the enrolled copy to ascertain the validity of an act.[9] On the other hand the privilege of regulating its own

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1. The South Africa Act Amendment No 9 of 1956 (s 2). On the possible invalidity of this section see E. Kahn 1961 Annual Survey of South African Law 12; but the issue is now academic since s 59(2) of the republic Constitution was undoubtedly validly passed.

2. Wiechers op cit 334-339; see also Hahlo and Kahn op cit 152-153.

3. On the authority of R v McChlery 1912 AD 199; R v Ndobe 1930 AD 484; Minister of the Interior v Harris 1952 (4) SA 769 (AD) - in this case, heard after the Statute of Westminster, legislation was invalidated for exceeding parliament's competence, and not for non-compliance with procedural requirements. In Ndlwana v Hofmeyr 1937 AD 229, which was overruled in the first Harris decision, the court disclaimed any such power.

4. S v Tuhadeleni 1969 (1) SA 153 (AD).

5. This can be deduced from the wording of the section, which precludes the courts from invalidating 'any Act passed by Parliament' but not from declaring an 'Act' not duly passed; the only problem with this interpretation is that it renders the proviso in respect of the entrenched clauses superfluous. But see B. Beinart 'The South African Appeal Court and Judicial Review' 1958 Modern Law Review 605.

6. See Bhendeli v Attorney-General Transvaal 1961 (3) SA 232 (T).

7. Wiechers op cit 320-321.

8. S 64.

9. G.N. Barrie 'Die bevoegdhede van Die Howe om Wette van die Parlement te Toets' 1969 THR-HR 209. But see Nasopie (Edms) Bpk en andere v Minister van Justisie en andere 1979 (3) SA 1228 (NC) at 1243.

procedure and domestic rules of conduct has always been enjoyed by the House of Assembly and falls beyond the courts' jurisdiction,[1] although the exact scope of this privilege is not clear.[2] Another area of uncertainty concerns the rules 'defining' parliament and the extent to which these are binding - this has given rise to a division of opinion on the significance of s 114 of the Constitution, which stipulates that prior petitions from the relevant provincial councils are required before provincial boundaries can be altered or the powers of provincial authorities can be abridged.[3] This procedure was not followed when the various Status Acts[4] were enacted, but their validity is supported by the views of Schmidt[5] and Wiechers[6] who argue that s 114 does not involve an essential redefinition of parliament, but at the most extends the power of legislative initiative to the provinces; should parliament therefore disregard this procedure the provision will be repealed by implication, on the strength of the lex posterior derogat priori maxim. Van der Vyver,[7] on the other hand, argues that s 114 does embody a procedural prerequisite which must be complied with by parliament, and that the above maxim will only be relevant if parliament has enacted a valid act. On this argument the Status Acts would be legislative nullities, since parliament 'had not spoken'. But this approach overlooks the fact that there is no single, correct, and legally verifiable interpretation of 'manner and form', but only different interpretations which prevail from time to time.[8] It is possible to

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1. See Masai v Jansen 1936 CPD 361, R v Ndobe 1930 AD 484. The Australian court has used the term 'the intra-mural deliberations' of parliament - Cormack v Cope (1974) 3 ALR 419.

2. See B. Beinart 'Parliament and the Courts' 1954 Butterworths SA Law Review 134.

3. For a description of the history of s 114 and the one occasion when it was adhered to see L.J. Boulle 'The resurrection of s 114 of the constitution' 95 (1978) SALJ 594.

4. Acts Nos 100 of 1976, 89 of 1977, 107 of 1979 and 110 of 1981.

5. C.W.H. Schmidt 'Section 114 of the Constitution and the Sovereignty of Parliament' 79 (1962) SALJ 315.

6. Wiechers op cit 34-35; see also Hahlo and Kahn op cit 162.

7. Op cit. In this article he elaborates on 'Rigidity and flexibility in constitutions: The judiciary, the rule of law and constitutional amendment' in J. Benyon (ed) Constitutional Change in South Africa (1978) 52-84. Support for these views was found in the celebrated obiter in Cowburn v Nasopie (Edms) Bpk 1980 (2) SA 547 (NC) at 554. See also Barrie 'Die gebondenheid van die parlement aan die reg rakende sy struktuur en funksionering' op cit 46.

8. Marshall op cit 52-53.

discover the prevailing interpretation through empirical investigation[1] but not through academic theorising, and the former[2] shows that the court does not regard s 114 as involving a redefinition of parliament for certain purposes, but as constituting a moral declaration of policy. It is well to bear in mind that the changing content of parliamentary supremacy has a close affinity to political realities and that there was never any substantial chance of the judiciary invalidating the whole homelands' programme by resorting to notions of 'manner and form'. And even if the courts did interpret s 114 as part of the essential 'manner and form' of parliament's functioning, it would mean no more than that the provision was impervious to implied repeal, such as through a Status Act. A constitutional crisis could be averted by the government resorting to the express repeal of that section, which, it was generally agreed[3] (and the court has accepted to be the case),[4] could be done through the normal legislative procedure. Fortified by judicial support, the government resorted to this expedient to prevent any future challenges to the homelands programme, and, ex abundanti cautela, made the amendment retrospective to 1961.[5]

As far as the termination of parliamentary supremacy in South Africa is concerned, this is analogous to the English law position,

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1. See Hart op cit 46.

2. Nasopie en andere v Minister van Justisie en andere (2) 1979 (4) SA 438 (NC) at 447F: although Mpangele and anor v Botha and others Case No M 1189/81 (17 July 1981) CPD was concerned with the express repeal of s 114 the same inference may be drawn from it, especially as the judgment was delivered by Van den Heever J. who provided the celebrated obiter in Cowburn v Nasopie, above. On the other hand it might be argued that this generally unsatisfactory judgment leaves the question of implied repeal open.

3. In terms of ss 118 and 59(2) of the Constitution. In the face of these two sections it is difficult to argue on the basis of the second Harris decision that to curtail or limit the safeguards afforded by s 114 the safeguarding procedure should itself be followed - that is acquire petitions from all four provincial councils.

4. Mpangele v Botha, above. The judgment, however, made no reference to the constitutional crisis and made only a cursory reference to the available literature, and none to the history of s 114. It also adopted the unusual (South African) practice of referring to parliamentary debates to assist in the interpretative process.

5. The Second Constitution Amendment Act No 101 of 1981 (s 7) narrowed the scope of s 114(a) to provincial boundary alterations involving transfers of land from one province to another, thus precluding any further challenges to the Status Acts; however this action strengthens the view that the s 114 procedure is binding on future parliaments in this restricted form.

as described by those upholding the 'substantively continuing' view of supremacy.[1] Thus in constitutional theory there can be no complete transfer of supremacy without a legal revolution, although the revolution can be obscured by legal camouflage.[2] The legal authority of the new constitutional order cannot be derived from the old, for otherwise the old grundnurm would remain in existence; instead it arises from the political fact of judicial recognition. Thus supremacy could be terminated through the establishment of a new constitutional order inconsistent with the continuance of the doctrine, provided the judiciary came to accept and thereby validate the new arrangement - a supreme constitution, or a division of sovereignty between federal and state legislatures, or a 'supra-national' arrangement in terms of which parliamentary enactments would be subordinate to those of a higher authority. The question of the partial abdication of sovereignty has arisen in relation to the Status Acts, and is dealt with below.[3]

In the light of this theoretical and historical background it is possible to analyse the implications of parliamentary supremacy for constitutional change in South Africa. The most immediate implication of the doctrine is that in the short term the government, acting through its parliamentary majority, will be the only formal initiator of constitutional change, and there will be no constitutional-juridical limitations on the nature of that change. While legal authority can be derived from a constituent assembly, the government's process of quasi-consociational engineering involves only piecemeal constitutional adjustments, which in terms of present legal realities can only be made by the supreme white parliament. This has clear implications for the legitimacy of any constitutional innovations, whether or not they are presented as recommendations of the president's council. In fact the constitution has become a highly flexible and volatile institution, as evidenced, inter alia, by the many formal

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1. That is adherents of the first two views described above.

2. H.W.R. Wade 'The Basis of Legal Sovereignty' 1955 Cambridge Law Journal 172 at 196.

3. At 451-452.

amendments to the Constitution Act,[1] and by virtue of its supremacy parliament has amended constitutional provisions by implication,[2] made retrospective amendments,[3] and empowered the State President both to amend the constitution,[4] and decrease the territorial jurisdiction of parliament.[5]

It is also probable that the existing parliament's legislative supremacy will endure during a period of government-controlled constitutional change. This would be consistent with recent constitutional developments, none of which has involved any derogation from parliament's legal competence, including the establishment of the national states' authorities for self-government,[6] the Coloured Persons Representative Council, the South African Indian Council, the president's council, and the community councils. The Status Acts were drafted on the premise that parliament can limit its sovereignty,[7] but this limitation was only conceded in return for a comprehensive denationalisation arrangement which left those affected with only contingent rights and tenure in South Africa, and further weakened their claim to effective political participation. Likewise the government's 1977 constitution (as embodied in the 1979 draft bill[8]) continued to vest ultimate legal authority in the white House of Assembly, although this was inconsistent with the

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1. Since 1961 forty-two subsequent enactments have amended or repealed provisions of Act No 32 of 1961.

2. As with the Status Acts, above. See also Freeman v Union Government 1926 TPD 638 at 650.

3. Act No 101 of 1981.

4. Proclamation No R249 of 1977 amended ss 28 and 33 of the constitution before their eventual repeal in 1980.

5. See the Borders of Particular States Extension Act No 2 of 1980 which allows the State President to proclaim scheduled land to be part of an independent national state, upon which the republic ceases to have any authority over it.

6. Homeland legislatures are even empowered to repeal or amend acts of parliament (s 30(1))(b) of Act No 21 of 1971) but this clearly does not involve an abdication of sovereignty.

7. See W.B. Harvey and W.H.B. Dean 'The Independence of Transkei - A Largely Constitutional Inquiry' 16 (1978) Journal of Modern African Studies 189 at 196.

8. S 111 read with ss 26 and 55. S 8(1)(d) purported to prevent alterations in the composition of the electoral college without the approval of all three legislatures but in the light of the above three sections, and the fact that it was not itself entrenched, it would clearly have had no greater legal efficacy than the existing s 114 of the constitution.

scheme's internal logic which implied a division of sovereignty among the three legislative bodies.[1]

Nevertheless, even during a period of government-controlled constitutional change there is likely to be a movement towards entrenchment and constitutional rigidity as the political system becomes more inclusive.[2] In terms of the 'new view' of supremacy this could be effected by extending the scope of s 108 of the Constitution, thereby requiring the two-thirds procedure for subsequent legislation on such matters.[3] Alternatively new types of entrenchment could be introduced, their efficacy depending in all cases on the entrenchment of the entrenching provision itself. Because these new arrangements would involve a redefinition of parliament for specific purposes, it would not strictly be necessary to amend s 59(2) to ensure their judicial enforcement,[4] although consistency would indicate the need to extend the proviso therein to include the new entrenchments. As has been indicated, however, the permissible extent of this redefining process is not clear. The requirement of electoral approval in a referendum to validate certain enactments, for example, could be regarded as redefining the legislature in terms of a third element and therefore as being binding on future parlia-

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1. Some commentators, such as Worrall and Devenish, have tried to explain the proposals in this way but there is clearly no substance to the notion of a new grundnurm. See G. Devenish 'The Doctrine of Parliamentary Sovereignty and the Proposed New Constitution' 1979 THR-HR 85-91; C. Murray 'The New Constitution: Can Parliament Bind Itself?' 1978 Responsa Meridiana 305 at 310 (on Worrall). Cf S.C. Jacobs 'n Juridiese analise van die konstitusionele voorstelle vir 'n nuwe grondwetlike bedeling in Suid-Afrika' 1979 THR-HR 252 at 262.

2. As has been shown (above, 240f) this was also the constitutional trend in the transition from Rhodesia to Zimbabwe. See also s 8(1)(d) of the 1979 Draft Constitution Bill.

3. S 118. Little attention is given in the literature to the question of how new procedural requirements should be enacted. A strict 'new view' approach would suggest according to the prevailing procedure, regardless of the nature of the new entrenchment, but logic suggests that in establising a new procedure, (eg, a 2/3 legislative majority on certain matters) that procedure should be used. Wiechers (Staatsreg (3 ed) 320) seems to prefer the latter view but it would be impractical in relation to some matters, such as a referendum requirement.

4. See above, 447.

ments;[1] on the other hand as it purports to include extra-parliamentary bodies in the legislative process it could be regarded as directory only, in which case it would be subject to implied repeal,[2] as was the case with s 114 of the constitution. At present it is only possible to indicate the range of possible judicial attitudes, as the courts' decisions on such an issue would be as 'political' as they were in the Harris decisions.[3] On the other hand it would clearly not be possible to go beyond procedural limitations while parliament's substantive supremacy endured.

A more remote possibility is that the government could impose substantive limitations on parliament's competence at some stage during the implementation of its constitutional dispensation. Thus, to give greater credibility to the 1977 constitution it might deem it necessary to divide sovereignty between the three legislative bodies, or to introduce a justiciable bill of rights. In either case it would be necessary to limit the scope of s 59 (2) of the Constitution, to allow the judiciary to invalidate legislative activity for excess of jurisdiction. The main juridical problem in these circumstances would be to determine whether the constitutional changes were so far-reaching as to prevent the existing parliament, or its successors, from re-asserting ultimate legal authority over the system - in the last resort it would be for the judiciary to decide whether or not a new grundnorm had been established. The same problem would

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1. See S.A. de Smith Constitutional and Administrative Law (2 ed, 1973) 91; I. Jennings The Law and the Constitution (5 ed, 1959) 16. G. Barrie ('Die gebondenheid van die parlement aan die reg raakende sy struktuur en funksionering' 1981 TSAR 46 at 54) assumes that because a referendum requirement is a procedural and not a substantive limitation it will be binding; but this is again to beg the question which remains, which procedures will the courts regard as involving an essential redefinition of parliament and therefore as peremptory, and which as merely directory because they do not affect the essential nature of parliament. See C. Schmidt 'Section 114 of the Constitution and the Sovereignty of Parliament' 79 (1962) SALJ 315.

2. Very much would depend on the way the statutory provisions were worded. The possibility of future 'referenda' was first mooted in 1980 as a method of gauging the white electorate's attitude to constitutional changes, and if introduced would probably be plebiscitory in nature; while they may have been conceived as a device to outflank the National Party caucus and congresses, referenda could come to be used as a legitimising process for constitutional change affecting non-blacks and therefore pose a challenge to parliamentary supremacy.

3. See H.W.R. Wade 'The Basis of Legal Sovereignty' 1955 Cambridge Law Journal 172 at 192.

arise in a movement towards a closer confederal institutional arrangement between the republic and the national states, although here it is even less probable that there would be a transfer of supremacy to a 'supra-national' institution. The 'constellation' proposals raise the issue of the South African parliament's competence to repeal the Status Acts,[1] which provided[2] that the 'Republic of South Africa' would cease to exercise any authority over the respective territories as from the operative dates of the enactments, thereby purporting to restrict parliament's territorial jurisdiction. This is clearly at variance with the 'new view' notion of 'substantively continuing' supremacy, and from a theoretical legal perspective, it could be argued that the unilateral revocation of these acts would involve an 'extra-territorial' exercise of competence[3] which, in the light of s 59(2) of the Constitution, would be judicially enforceable. But in terms of the same theory the judiciary of the relevant national state would not recognise the validity of such 'external' activity, and in justification could cite the maxim first invoked in a South African case when the roles were reversed - 'freedom once conferred cannot be revoked'.[4] But such judicial niceties would be of little value if South Africa were determined to reassert its authority over the national states and, remote as this contingency might seem, it is perhaps not so far from reality as was the possible repeal of the Statute of Westminster and the statutes conferring independence on the commonwealth states; it would also not be irregular in international law and politics because of the non-recognition of the independence of the national states. Nevertheless if the South African parliament were to repeal the Status Acts in the furtherance of its (confederal) constitutional plans, it would most likely be complemented by legislation of the relevant national state, thus precluding any dispute involving parliamentary supremacy.

Finally, it is necessary to describe the implications of a fully consociational system for the principle of parliamentary supremacy. It is clear that the optimal constitutional framework for

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1. Acts Nos 100 of 1976, 89 of 1977, 107 of 1979 and 110 of 1981

2. S 1(2) of each Act.

3. See I. Rautenbach 'The Constitution of Transkei' 1977 TSAR 199 at 200; Wiechers op cit 505.

4. Ndlwana v Hofmeyr 1937 AD 229 at 237.

consociational democracy[1] is incompatible with the continuance of the supremacy of the white parliament, or of any legislative successor. The consociational division of competence, whether it be on a territorial or non-territorial basis, would require a corresponding division of sovereignty between the respective legislative bodies, which implies a substantive limitation on the competence of each. An additional substantive limitation, in the form of a justiciable bill of rights, is also a possibility, and is discussed further below.[2] Further procedural limitations are implicit in the principles of proportionality and the mutual veto, and in the inevitable requirement of a measure of constitutional rigidity, and a traditional form of judicial control would be required to enforce both substantive and procedural restraints. It is clear that in terms of the prevailing 'new view' of supremacy there is no juridical obstacle to the termination of the existing parliament's supremacy, but the 'hand-over' to a new constitutional order incorporating the above features would involve a technical break in constitutional continuity, requiring clear evidence of judicial allegiance to the new order. It is unlikely that this would not be forthcoming, but it could be enhanced by giving additional moral sanction to the new order by having it approved by a constituent assembly or the electorate in a referendum.[3]

As a constitutional doctrine, then, parliamentary supremacy does not, in English or South African law, impose any constraints on future constitutional changes. But its symbolic political significance might involve considerable resistance to its termination in both systems: opposition to British participation in the EEC has been articulated, inter alia, in terms of the threat to the sovereign authority of British parliamentary institutions; and in South Africa the doctrine is not only of symbolic political importance, but has historically been the one constitutional factor which has most enabled the government to institutionalise its political and economic policies. Within its framework of quasi-consociationalism the government is only likely to abandon this institution in return for a rigid constitution, a bill of

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1. See above, 400-405.

2. At 464-469.

3. Cf K.C. Wheare Modern Constitutions (2 ed, 1966) 52-66.

rights and judicial review: this would be to follow the Zimbabwean example of accepting limitations on the powers of government once the transition to a more inclusive political system has begun, although such a development is likely to be perceived by black leaders as a means of retaining the existing distribution of political and economic power.[1] The more remote eventuality of democratic consociationalism, on the other hand, would presume an acceptance by the government of more fundamental change, including the termination of the existing parliament's supremacy.

3. The Judicial Role

Implicit in the previous section is the suggestion that judicial review will not be an uncontroversial factor in future constitutional developments, and this necessitates an assessment of some aspects of the judicial function in the South African context. Needless to say the question of the judicial function is a very extensive one which cannot be adequately dealt with here, but the aspects referred to will be important in any attempt at developing a theory of the judicial role in relation to consociationalism.

By judicial review is understood the ability of the courts to annul or override enactments of the legislature on the grounds that they are unconstitutional.[2] As a method for imposing legal limitations on power it is an important feature of modern constitutionalism,[3] and South African constitutionalists writing in the liberal-constitutional tradition have, expressly or impliedly, advocated its adoption in South Africa.[4] Although insufficient

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1. Cf J.A.G. Griffith 'The Political Constitution' 1979 Modern Law Review 1 at 17.

2. This is to follow E. McWhinney's definition of 'direct judicial review' (Judicial Review (4 ed, 1969) 13). In South African public law the concept has a more restricted 'administrative law' meaning. See below, 467.

3. Cf C.J. Friedrich Constitutional Government and Democracy (4 ed, 1968) 114 at 165.

4. Eg D. Cowen (The Foundations of Freedom (1961), K. Heard (Political Systems in Multi-Racial Societies 1961), W.H.B. Dean ('Whither the Constitution?' 1976 THR-HR 266), A.S. Mathews (Law, Order and Liberty 1971), J. van der Vyver (Die Beskerming van Menseregte in Suid-Afrika 1975), J. Dugard (Human Rights and the South African Legal Order 1978) F. van Zyl Slabbert and D. Welsh (South Africa's Options 1979), M. Wiechers (Staatsreg 3 ed, 1981).

attention has been given at times to such aspects as the suitability of our courts and judges to perform this function,[1] or the exact contents of the proposed justiciable bill of rights, these writers have generally approached the subject in a comprehensive and critical manner. And despite differences in approach they are all agreed on the desirability of judicial review and an enforceable bill of rights.

The arguments in favour of judicial review are well-known and well documented - suffice it to refer to two aspects here. Firstly, judicial review is seen as indispensible for keeping public bodies within the limits of their constitutional authority - this derives from the principle of constitutionalism, or limited government, according to which governmental action must be justified in terms of an express or implied conferment of authority, and it is also supportable in terms of the rule of law doctrine. In terms of this reasoning the courts should declare acts of government unconstitutional if they were not carried out in the prescribed manner, if they usurped the functions of another organ or level of government, or if they involved an unauthorised delegation of authority.[2] Secondly, it is argued that there are certain fundamental rights and liberties which are morally inalienable and should therefore not be subject to political bargaining in the 'political' organs of government, but should be stringently enforced by the judiciary,[3] a view which derives from a philosophy of natural rights.[4] In terms of this reasoning courts should invalidate acts of government if they violate constitutionally guaranteed rights. The arguments against judicial review are also many and varied, but the most important for present purposes can be summarised as follows: judicial review is fundamentally undemocratic because it removes certain matters from the competence of representative institutions, and, conversely, it allows decisions on social and

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1. But see J. Dugard 'Judicial Power and a Constitutional Court' in L.J. Boulle and L.G. Baxter Natal and KwaZulu - Constitutional and Political Options (1981) 189-211; W.H.B. Dean 'Discussion' in J. Benyon (ed) Constitutional Change in South Africa (1978) 88.

2. See B.O. Nwabuese Judicialism in Commonwealth Africa (1977) 229.

3. See J. Rawls A Theory of Justice (1972) 4.

4. J. Jaconelli Enacting a Bill of Rights (1980) 206; cf R. Dworkin Taking Rights Seriously (1977) 142ff. But a doctrine of natural rights is not necessarily a deduction from the theory of natural law - K. Minogue 'Natural rights, ideology and the game of life' in E. Kamenka and A. Tay (eds) Human Rights (1978) 15-35.

economic policy to be taken in an unrepresentative and accountably remote institution with the possibility of defeating, or at least obstructing, the popular will.

In analysing this issue it will be helpful to turn to the American constitutional experience where judicial review holds a more pre-eminent position than in any other system, although it is by no means an exclusively American institution. The American Supreme Court first assumed a legislative testing power in the celebrated case of Marbury v Madison[1] and, although there is a lively academic debate concerning the source of this power, it is now an established feature of American constitutionalism and allows the courts to invalidate legislative or executive activity for contravention of the constitution or the bill of rights. There has thus been a long tradition in the United States of presenting social and political problems as questions of law to be resolved by the courts.[2] Commentators have always been critical of this state of affairs,[3] but it is only in the last few decades that they have more insistently argued that the Supreme Court has intervened in matters in respect of which it had no jurisdiction, and which should have been decided by the legislative and executive organs of government.[4] In particular the Warren Court has been accused of judicial 'usurpations'[5] in its pursuit of a broadly-based egalitarianism,[6] and of being responsible for a radical shift of focus from the supervision of

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1. 1 Cranch 137 (1803).

2. See L.J. Theberge (ed) The Judiciary in a Democratic Society (1979) xi.

3. For an early description of the 'anti-democratic' nature of this function see H.S. Commager 'Judicial Review and Democracy' 19 (1943) Virginia Quarterly Review 417.

4. There is a wealth of literature covering all aspects of this issue but it is only possible to touch on a few factors here. For an extensive bibliography see G. Schubert Judicial Policy Making (rev. ed, 1974) 214-231. See generally the essay of L.L. Fuller 'The Forms and Limits of Adjudication' in 92 (1978) Harvard Law Review 353-409, in which he looks at the question of what kinds of social tasks can be assigned to courts.

5. The term given by Hamilton (The Federalist, No 81) to encroachments on legislative authority.

6. A. Bickel The Supreme Court and the Idea of Progress (1978) 3. Bickel returned to this theme in much of his writing; he sought reform through the gradual workings of the political system rather than judicial intervention in areas of social policy, and in his final work (The Morality of Consent (1975) 3-25) acknowledged the influence of Edmund Burke.

legislative procedure to the control of legislative policy-making.[1,2] Thus the court has been referred to as a 'third, unelected chamber' of the legislative branch,[3] and a 'super-legislator',[4] and Kurland has suggested[5] that the 'imperial judiciary' of recent times is constitutionally analogous to the 'imperial presidency' of the Watergate era.[6] And from early charges that the Supreme Court was 'counter-majoritarian',[7] and therefore capable of frustrating the wishes of popular majorities,[8] has come the accusation that recent judicial behaviour has involved the subjection of the majority to the 'tyranny of the minority'.[9] An important element of these criticisms of

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1. R. Berger Government by Judiciary (1977) 249. Berger's thesis is that the fourteenth amendment does not authorise the extensive judicial behaviour justified in its name on matters such as desegregation (Brown v Board of Education 347 U.S. 483 (1954)) and reapportionment (Baker v Carr 369 U.S. 186 (1962), Reynolds v Sims 377 U.S. 533 (1964)), which were intended to be left to the state governments. On reapportionment see also M. Uhlmann's incisive essay 'The Supreme Court and Political Representation' in Theberge op cit 91-109.

2. R. Winter in his analysis of this development posits two corresponding models of judicial review, the 'interpretive model' and the 'judicial-power model': 'The Growth of Judicial Power' in Theberge op cit 29-66; see also T.C. Grey 'Do we have an Unwritten Constitution?' 27 (1974) Stanford Law Review 703.

3. Bickel op cit 27.

4. Berger op cit; Berger (2-3, 408) is one of many who reject the notion that the court should function as a 'continuing constitutional convention' and constantly be in the process of revising the constitution.

5. P. Kurland in Theberge op cit 21-22; see N. Glazer 'Towards an Imperial Judiciary' 41 (1975) The Public Interest 104-123.

6. See P. Kurland Watergate and the Constitution; (1978); A. Schlesinger The Imperial Presidency (1974).

7. A. Bickel The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1963) 16-17. The title derives from Hamilton (The Federalist, No 78) who, with support from Montesquieu, held that the judiciary would be less dangerous than the legislature or executive because it would have 'neither force nor will but merely judgment'.

8. But cf E.V. Rostow's classic defence of judicial review 'The Democratic Character of Judicial Review' 66 (1953) Harvard Law Review 193 in which he responds to points made by Commager op cit.

9. See P. Kurland in Theberge op cit 23.

perceived judicial usurpation is the fact that justices of the Supreme Court are not elected, enjoy tenure for life,[1] and constitute a relatively isolated, intellectual élite. The fact that the ultimate power of constitutional amendment rests with the political organs[2] is not seen as being of great significance, since this process is not easy to invoke.

Needless to say there have been numerous rejoinders to these attacks and it has been suggested that the notion of 'government by judiciary' is a gross overstatement of the case.[3] It is pointed[4] out that the court and other institutions of the constitutional system are a product of the long-standing dualism in American political thought: a desire for limited government on the one hand, and for democratically responsible government on the other.[5] Judicial review is inextricably linked with the former, and serves to contain the other branches of government within the limits of their constitutional authority; it also has a clear rationale in relation to the federal division of competence, although there has, for a variety of legitimate reasons, been a considerable expansion of judicial responsibility beyond these two areas in the last two decades.[6] The Supreme Court has always had a 'political' role, although it has in fact imposed upon itself a comprehensive body of rules aimed at encouraging self-restraint and avoiding controversial issues.[7] In respect of the unrepresentative nature of the judiciary, it is pointed out that similar accusations have been made against other important institutions, such as the bureaucracy and the presidency,[8] and to the charge that the judicial review is 'counter-majoritarian' it is retorted that the judicial majority

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1. Although the impeachment procedure (Art II s 4 of the U.S. Constitution) has been instituted against Supreme Court justices in the past, it has yet to result in a conviction.

2. Art V of the U.S. Constitution.

3. R. Funston Constitutional Counter-Revolution? The Warren Court and the Burger Court: Judicial Policy Making in Modern America (1977) 12.

4. Ibid 11-12.

5. Cf Bracton's notions of gubernaculum and jurisdictio as outlined by C. McIlwain Constitutionalism: Ancient and Modern (rev. ed, 1947) 77ff.

6. See D. Horowitz The Courts and Social Policy (1977) 4-9, where he refers to the new areas of adjudication which have opened up and observes that litigation has become more explicitly problem-solving than grievance-answering.

7. Funston op cit 23.

8. Horowitz op cit 18.

usually reflects the dominant majority in the larger political system.[1] Thus attempts have been made to construct a constitutional theory in which the principles of judicial review and democratic theory can be reconciled: Ely proffers a 'representation-reinforcing' theory of judicial review,[2] in terms of which the courts would be actively concerned with ensuring representative and effective participation in the political process, without at the same time deciding on the substantive merits of political choices. By concentrating on procedural matters, and ensuring that the political process was democratic and open, judicial review could perform the important constitutional function of reinforcing the representative political institutions. Other writers have referred to specific ways of improving the resources and processes of the courts in relation to their review function.[3]

It is not only in the United States that the tension between judicial review and the principle of popular control of government has been experienced. In Israel the human rights legislation, which purports to restrain the Westminster-modelled supremacy of the Israeli parliament, has been described as having a 'schizophrenic quality; it appears to give with the right hand and take with the left'.[4] In France the matter is seen as a separation of powers issue, and the judicial review of the constitutionality of legislation has long been regarded as an infringement of that doctrine.[5] In the Federal Republic of Germany the Federal Constitutional Court has a very extensive

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1. Schubert op cit 20. But this is to meet the argument head on; other commentators (eg C. Black The People and the Court (1960), B.O. Nwabuese Judicialism in Commonwealth Africa (1977)) argue that to speak of a 'counter-majoritarian' effect is to misconstrue the true basis of majority rule.

2. J.H. Ely Democracy and Distrust - A Theory of Judicial Review (1980) 181.

3. Eg Horowitz op cit 255-298.

4. L. Ratner 'Constitutions, Majoritarianism, and Judicial Review: The Function of a Bill of Rights in Israel and the United States' 1978 American Journal of Comparative Law 373.

5. G. Marshall Constitutional Theory (1971) 99; M.C.J. Vile Constitutionalism and the Separation of Powers (1967) 237-262; J. Blondel The Government of France (2 ed, 1974) 196-197. It is interesting to note that in recent English decisions the separation of powers doctrine has been invoked to prevent the judiciary from intruding in the legislature's field: Hind v The Queen /1977/ AC 195, Duport Steels Ltd v Sirs /1980/ 1 W.L.R. 142; and see C. Munro 'The Separation of Powers: Not Such a Myth' 1981 Public Law 19-24.

review jurisdiction but has been criticised recently for its lack of self-restraint, and has been accused of becoming a 'super-legislator' and exercising ultimate political control.[1] And amidst the demands in Britain for a justiciable bill of rights and other legal restraints on the powers of government, has come the warning from Griffith[2] against substituting law for politics - to require a court to make certain kinds of political decisions does not make those decisions any less political. In a socio-political sense, argues Griffith, there are no overriding human rights, but only political claims which can be made by individuals and groups. The decisions on these claims should be made by politicians who are accountable and removable, and their responsibility to the electorate should be facilitated by forcing government 'out of secrecy and into the open'.[3] This would require, inter alia, greater opportunities for discussion, more open government, less restriction on debate, more access to information, and changes in the law of contempt. While Griffith presents the case against judicial review and a bill of rights in the British constitutional system the most forcibly, his is not the only such voice.[4] Among the many objections raised to a system of judicial review, it is most frequently argued that it would require a revolution in constitutional thinking, it would demand of the judiciary a role which they are not qualified to play, it would be fundamentally undemocratic

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1. See G. Brinkman 'The West German Federal Constitutional Court: Political Control through Judges' 1981 Public Law 83-104.

2. J.A.G. Griffith 'The Political Constitution' 1979 Modern Law Review 1; for responses to these views see H.W.R. Wade Constitutional Fundamentals (1980) 75-79; M. Zander A Bill of Rights? (2 ed, 1979) 48-50.

3. Griffith op cit 16.

4. See eg B. Sedgemore The Secret Constitution (1980) for an endorsement of Griffith's views; Lord Boston 'Arguments Against a Bill of Rights' in C. Campbell Do We Need a Bill of Rights? (1980) 12-37; J. Jaconelli Enacting a Bill of Rights (1980) 200-211. While Zander (A Bill of Rights?(2 ed, 1979)) joins issue with Griffith, he concedes the need to leave the final authority in human rights issues with parliament. Cf N. Johnson In Search of the Constitution (1977) 139-142, and Nwabueze's chapter on 'Judicial Review and Democratic Government' in Judicialism in Commonwealth Africa (ch 10).

and would increase the influence of unrepresentative individuals,[1] it would lead to political appointments to the bench and the politicisation of the judiciary, it would stifle popular and legislative initiatives in the protection of fundamental rights, and it would tend to preserve the social and economic status quo.

This last point is of particular relevance in relation to the possible introduction of judicial review in South African constitutional law, and it is an aspect which has tended to be overlooked by liberal-constitutionalists advocating this innovation.[2] It is worth reiterating, therefore, that to give the courts a constitutional function is ipso facto to give them a 'political' role, because constitutional law is by its nature 'political'. A bill of rights, moreover, is inevitably a statement of political values,[3] and in a socio-political sense can never be functionally neutral, although some rights, such as civil rights, are less 'political' than others.[4] From the perspective of reforming inequalities in South African society, legal limitations on authority might appear as reactionary obstructions in the way of social reforms and be responsible for a future government having 'unconstitutional thoughts'.[5] Thus any theory of judicial review must take into account the complex inter-relationship between the judiciary and the other organs of government and must be evaluated, in part, by the extent to which it allows for a necessary programme of social reform by legislative means. It should also be open to the possibility of pro-

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1. That is elderly, upper middle class, conservative men. (See Bayefsky's review of A Bill of Rights? 1980 Public Law 505-507). But cf Dworkin's views (op cit 126, 240-258) on the correct judicial course when an appropriate rule does not exist: the judge must apply a principle not because it advances an economic or social situation, but because it is a requirement of justice or fairness. As these principles are discoverable there is no need for a judge to 'legislate'. In the suggestion that community values must be refined by the judge in a way that removes prejudice, emotional reaction and rationalisation, the influence of consensus theory is clear.

2. See the critique of liberal-constitutionalism in the Sprocas Report South Africa's Political Alternatives (1973) 127-142.

3. See Johnson op cit 139.

4. Zander (op cit 50) distinguishes between civil and political rights on the one hand and economic, social and cultural rights on the other, and would withhold the latter from judicial influence.

5. Sprocas Report op cit 140-141.

tecting civil rights through the constitution, while at the same time leaving the electorate and 'political' institutions free to decide on socio-economic issues.

Against this theoretical background it is possible to examine the question of judicial review in South Africa. Clearly the prominence of the principle of parliamentary supremacy in South Africa's constitutional history implies the absence of any tradition of judicial review. Even the government's 1977 constitution, which implied a system of review, would have involved no change to this aspect of the constitutional system. From a political point of view it is highly improbable that the government would graft a bill of rights and a system of judicial review onto the present constitutional order; this would in any case involve an inversion of priorities, since it would occur before the resolution of such basic constitutional issues as the franchise. But if the political system becomes more inclusive through the consociational incorporation of coloureds and Indians, such constitutional features as judicial review, constitutional rigidity, and a justiciable bill of rights, are likely to appear more attractive to the government as devices to check the power of the 'majority'.[1] There is also likely to be a tendency to secure the liberal rights such as freedom of property and contract, and a corresponding neglect of economic rights,[2] which would serve as a means of retaining the existing distribution of economic power. The relevance of the American experience is that the objections to basic issues of social and economic policy being decided by an unrepresentative institution, would apply *a fortiori* during a period of constitutional and political change in South Africa, during which even the basic rules of the system would be in issue. To allow the judiciary, as presently composed and constituted, to invalidate the decisions of a representative legislature on grounds of substantive unconstitionality is not likely to enhance the stability of the political system. At the most the judiciary should police a constitutional divi-

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1. Cf s 8(1)(d) of the 1979 Draft Constitution Bill.

2. This trend is clearly evident in the Lombard Report (Alternatives to the Consolidation of Natal and KwaZulu: Progress Report, 1980) 19 which draws on F.A. Hayek The Constitution of Liberty (1960). Cf Dugard's comments in Boulle and Baxter op cit 191.

sion of powers and safeguard basic civil rights. Thus although the government is at present uncommitted to a system of judicial review, its position may change at a later stage in the process of consociational engineering; but in any future system of authoritarian consociationalism judicial review would have to be evaluated in terms of its potential effects on the political system.

As far as consociational democracy is concerned, one encounters a dearth of references in the literature to the role of the judiciary; this is partially attributable to the fact that the field has been dominated by political scientists and sociologists with little contribution from constitutional lawyers, and it results in a noticeable deficiency in consociational theory. The furthest that the constitutions of the empirical consociations have gone, is in providing that the judiciary should be appointed on a segmental, and at times proportional, basis;[1] but there is no mention of any specifically consociational function or procedural method for the judiciary. On the face of it there would seem little need to justify the inclusion in a consociational system of a device which checks the power of the majority; indeed a system of judicial review, particularly in its 'counter-majoritarian' aspects, would seem to supplement the other features of consociationalism. And in line with consociational theory commentators have suggested that a 'universally respected judicial system can be a valuable agent of depoliticisation'[2] and 'a mechanism of further diffusion of political power .... a means of defusing conflict and competition between groups'.[3] But this would be to assume that general

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1. The 1960 Cyprus constitution established a Supreme Constitutional Court comprising a Greek judge, a Turkish judge and a neutral President, with a similar arrangement for the High Court; it was also provided that Greek and Turkish coroners should conduct inquests for Greeks and Turks respectively. S.A. de Smith The New Commonwealth and its Constitutions (1964) 202 and 282-295. Art 107 of the Swiss constitution provides that the Federal Court shall include members of the three official language groups. On the regional and linguistic composition of the Canadian Supreme Court see P. Hogg Constitutional Law in Canada (1977) 122; since 1949 the chief justiceship has alternated between English and French-speaking incumbents.

2. F. van Zyl Slabbert and D. Welsh South Africa's Options (1979) 156; cf E.Nordlinger's concept of 'purposive depoliticisation'- Conflict Regulation in Divided Societies (1972) 26.

3. W.H.B. Dean 'Discussion' in J. Benyon (ed) Constitutional Change in South Africa (1978) 87.

agreement had been reached on a range of issues affecting the judiciary and its functions: the method of appointment of judges, the structure and procedures of the courts, the system of constitutional remedies, and the scope and nature of judicial power.[1] And notwithstanding such agreement, the reservations about an activist judiciary in the American system would also apply to a fully consociational system, with its heavy emphasis on bargaining amongst genuinely representative leadership élites on all crucial issues. Judicial review of the constitutionality of legislation, moreover, would add an additional factor of delay to an already cumbersome and slow decision-making process, rendering it prone to immobilisation. On the other hand there would seem no objection to the courts performing a traditional federal function of policing the constitutionally defined division of power among the various segments, and of ensuring compliance with procedural requirements by the various organs of government, and safeguarding the constitutionally entrenched features of a consociational system such as the 'grand coalition' principle and the mutual veto.

But to exclude or limit the courts' power of direct review of legislation does not exhaust its possible functions in a consociational system, including the government's form of authoritarian consociationalism. Besides direct review there is also the possibility of a system of indirect judicial review, or, as it has been called 'judicial braking'.[2] There are three main variants of indirect review:[3] using a bill of rights as an interpretative aid for the judiciary[4] - while this would be of limited efficacy it could 'weight the scales of statutory presumption in favour of the individual and against the State';[5] requiring special majorities for the enactment of legislation in contravention of the bill of rights - this is a familiar consti-

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1. Cf J. Dugard 'Judicial Power and a Constitutional Court' in Boulle & Baxter op cit 189-200.

2. E. McWhinney Judicial Review (4 ed, 1969) 13.

3. J. Jaconelli Enacting a Bill of Rights (1980) 42-49; 62-91.

4. As with both the New Zealand and the Canadian Bills of Rights; see also s 20 of the Israeli Basic Law: Rights of the Individual and the Citizen, in the Appendix to L. Ratner 'Constitutions, Majoritarianism, and Judicial Review' 1978 American Journal of Comparative Law 373 at 394-396.

5. Jaconelli op cit 44.

tutional principle in relation to rigid amending procedures and can be associated with the consociational principle of the mutual veto; requiring a statute which infringes the bill of rights to contain an 'express derogation' clause declaring it to be operative notwithstanding such infringement - here the government could render its legislation immune from all judicial review, but in doing so would have to draw attention to this fact at the risk of political embarrassment.[1] In all three cases the judiciary acquires only limited control over the legislature; it can ensure compliance with the required procedures, but cannot invalidate legislation on the grounds of substantive unconstitutionality. Likewise, where the judiciary is limited to providing an anticipatory advisory opinion on the compatibility of draft legislation with a bill of rights, the enforcement of such rights[2] is seen as a political issue with final authority vesting in the legislature.[3] There is thus a range of possibilities to be taken into account in constructing a suitable theory of judicial review for a consociational system.

Finally, the type of judicial review more familiar in South Africa[4] is quite compatible with a consociational system and is

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1. This system is used in Canada and is favoured by both Jaconelli (op cit 282-286) and Zander (A Bill of Rights? (2 ed, 1979)) for Britain.

2. As, eg, in France and the Irish Republic. This arrangement should be distinguished from a system of 'political review' where the constitution sets out general principles for the guidance of the legislature but provides no legal sanction for their non-observance. Examples are found in the Irish constitution (art 45), the Indian constitution (part IV) and the Turnhalle constitution (see L.J. Boulle 'The Turnhalle Testimony' 95 (1978) SALJ 49-62). The proposed draft constitution for Switzerland has, besides certain enforceable rights, several 'principles of government action' (ch 2 arts 4-7).

3. In a formal sense even direct judicial review leaves ultimate authority with the legislature through its power of constitutional amendment, but this reserve power might be difficult to exercise and therefore operate as only a remote constraint. The constitutional crisis in South Africa saw the reversal of judicial decisions through constitutional amendment (eg the S.A. Act Amendment Act No 9 of 1956) and there have been subsequent examples of this phenomenon (cf the legislative and executive response to Theron v Hylton-Smith 1978 (2) SA 294 (N) on s 55(d) of the Constitution: Act No 54 of 1978, Gov Notice 1350/1979 in Government Gazette No 6509 of 22 June 1979, and Act No 99 of 1979). In the United States the amendment procedure has been used on four occasions to override Supreme Court decisions - the eleventh, fourteenth, sixteenth and twenty-sixth amendments - see L. Tribe American Constitutional Law (1978) 50-51.

4. The term is used loosely here to include the second and third types of review referred to in Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111, although there is much inconsistency in the use of the term: Tickley and others v Johannes N.O. & others 1963 (2) SA 588 (T); Rosenburg v South African Pharmacy Board 1981 (1) SA 22 (AD).

likely to be of particular importance as a protection against the abuse of executive power during the government-controlled phase of quasi-consociational authoritarianism.[1] Here the courts can ensure compliance by officials and tribunals with the statutory and common law rules regulating the scope of their authority and its method of exercise, without encroaching on the right of the administrative agency to determine the merits of the decision. Unfortunately South African administrative law remains relatively undeveloped and unsystematic,[2] and lacks a sound theory of judicial review; it is further enervated by a rigid system of classification[3] and a tendency by the legislature to curtail or oust completely the courts' common law review jurisdiction.[4] Nevertheless there are well-recognised grounds on which administrative decisions can be set aside as ultra vires and, particularly from the academic point of view, there have been attempts to build up systematic principles of administrative law.[5] This type of judicial review has an invaluable constitutional function, without involving the same problems as a system

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1. Cf B.O. Nwabueze Judicialism in Commonwealth Africa (1977) 236-241, where he slightly overstates the case that judicial review cannot be counter-majoritarian where the government is a minority one.

2. A function of the Diceyean legacy and the relatively late emergence of the administrative state in South Africa.

3. Between so-called 'quasi-judicial' and 'purely administrative' functions, the rules of natural justice applying only in respect of the former. Despite academic criticism of this classification, and judicial cognisance of its dangers (Pretoria North Town Council v A.I. Ice Cream Factory 1953 (3) SA 1 (AD)), it has persisted.

4. There are innumerable examples of 'ouster clauses': eg s 6(5) of Act No 83 of 1967 and s 10 sex of Act No 44 of 1950, although the courts have interpreted them restrictively - Union Government v Fakir 1923 AD 466; Winter v Administrator-in-Executive-Committee 1973 (1) SA 873 (AD): Honey and anor v Minister of Police 1980 (3) SA 800 (TSC).

5. M. Wiechers (Administratiefreg (1973) made the first serious attempt to systematise administrative law and supply a supporting theory, though at times it became abstracted from the case law; his 'legaliteitsbeginsel' remains a valuable contribution. Baxter has begun constructing a theory of 'fairness' to replace the concept of natural justice (see 'Fairness and Natural Justice in English and South African Law' 96 (1979) SALJ 607-639) and draws on English and Canadian developments in support; some judicial recognition for this notion was forthcoming in Roberts v Chairman, Local Road Transportation Board and others (2) 1980 SA 480 (C) at 496 (C) (on which see Baxter's case note 98 (1981) SALJ 308-320); and see also the earlier decision Motaung v Mothiba NO 1975 (1) SA 618 (O) at 629 A-B.

of direct review of legislation, because it emphasises the need for administrative bodies to act within the bounds of their authority, to comply with prescribed formalities, to apply their minds to relevant considerations and ignore those that are irrelevant, to act in good faith and without ulterior purpose, to give reasons for their decisions, and above all to adhere to the obligation to act fairly. All these factors combine not to restrict the exercise of discretionary power, but, negatively, to prevent its abuse and, positively, to ensure that it is exercised correctly. Judicial review at this level would also buttress any moves towards making administrative bodies more representative, responsible and open.[1]

Thus the 'consociational option' in South Africa requires an extensive reassessment of the judicial role. Insofar as consociationalism implies a deep sense of constitutionalism, it suggests the need for a more prominent constitutional role for the judiciary. The consociational division of competence between different institutions, the jurisdictional problems which it involves, and the constitutional rigidity which it implies - all suggest the need for the judiciary to keep the various institutions within the limits of their constitutional authority. But as the analysis has shown the court's 'counter-majoritarian' role in other areas must be evaluated in the light of the other anti-majoritarian features of consociationalism, and their potential for obstructing democratic government. In the government's form of authoritarian consociationalism, moreover, judicial review could only have a limited positive effect if grafted onto the existing constitutional order, without the prior resolution of basic political issues. Nevertheless in two areas there is clear scope for judicial review, and in both cases it is reconcilable with the consociational option - the safeguarding of basic civil liberties, and the control of the administrative branch of government.

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1. See above, 419-420.

3. Responsible Government

To the extent that the preceding section has indicated a need to limit the judicial control of government, so it would seem to imply a heavy reliance on the other element of traditional constitutionalism, namely the political responsibility of the government to the governed.[1] If political decisions are to be taken by politicians, then their responsibility and accountability to the people, whether direct or mediated, should be real and not fictitious.[2] A variety of constitutional mechanisms are designed to ensure this responsibility in the liberal democracies, but the contemporary political reality is that these are generally ineffective.[3] The gap between constitutional theory and political reality indicates an urgent need to revise the former, and it will be shown that the principles of consociationalism pose additional problems for this process.

Theories of constitutional responsibility in South Africa are derived largely from English constitutional law. Despite the growing realisation of their inadequacies, there has been an enduring acceptance of the theoretical foundations of the Westminster system: thus there are still vestiges of the notion that sovereignty vests in the people, who delegate it to their political representatives to hold in trust for them.[4] Accordingly members of the legislature are seen to be responsible to the electorate, who can remove them from office in periodic elections if they do not carry out their mandate. The legislature in turn is the mediating institution through which the executive is made accountable to the electorate - it enforces the individual responsibility of ministers through the mechanisms of parliamentary questions, departmental budget votes, legislative debates and the select committee procedure. The

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1. C. McIlwain Constitutionalism: Ancient and Modern (rev. ed, 1947) 146; C.J. Friedrich Constitutional Government and Democracy (4 ed, 1968) 31.

2. See J.A.G. Griffith 'The Political Constitution' 1979 Modern Law Review 16.

3. See C.B. Macpherson The Life and Times of Liberal Democracy (1977) 64-69.

4. This may be attributed in part to the cumulative influences of John Locke (Two Treatises of Government (Everyman's Library edition, 1977) 192-198), Walter Bagehot The English Constitution (The World's Classics edition, 1974) 25), and A.V. Dicey (An Introduction to the Study of the Law of the Constitution (10 ed by E.C.S. Wade, 1959) 432).

cabinet is also collectively responsible to parliament for its policy decisions, and must resign jointly if subjected to a motion of censure, or if defeated at the third reading of an important bill. The bureaucracy, according to this theory, can be called to account vicariously through its administrative and political head, the relevant minister, and through other devices such as the compulsory tabling of subordinate legislation. What is significant about these traditional forms of responsibility is that, by and large, their status is no greater than that of the notoriously elusive constitutional conventions, and this distinguishes them from the well-known checks and balances of the American constitutional system, which provide an elaborate institutional basis for the responsibility of government. South Africa, however, accepted most of the English conventions into its constitutional law,[1] including those upon which constitutional responsibility is founded, despite the differences in political culture between the two countries.

There is now general agreement that the forms of responsibility associated with the Westminster system are not functionally effective, despite the nostalgic attraction which they hold for some contemporary constitutionalists. Their break-down in practice can be attributed to a number of factors. The party system has made parliamentary representatives responsible to the cabinet and prime minister, and not to their respective constituencies[2] - this in turn has allowed the cabinet to dominate parliament in complete contradiction of constitutional theory; the doctrine of individual ministerial responsibility has been circumvented whenever the cabinet has elected to extend the shield of collective responsibility over a recalcitrant minister;[3] the extent and complexity of bureaucratic activity has precluded any possibility of effective ministerial control over

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1. M. Wiechers Staatsreg (3 ed, 1981) 172-186.

2. C.B. Macpherson The Life and Times of Liberal Democracy (1977) 67-68. This loyalty is ensured through a combination of patronage, the threat of expulsion from the party, and the threat of a premature dissolution of parliament. But Macpherson goes on to argue that strict responsibility is irreconcilable with the manoeuvre and compromise which a one-party government requires to mediate between opposed class interests in British society.

3. S.E. Finer Five Constitutions (1979) 86-87.

the bureaucracy, or its effective monitoring by parliament; the notion that the bureaucracy is politically neutral and should therefore enjoy anonymity and protection from political accountability has become an anachronism in the administrative state;[1] and finally the modern phenomenon of corporatism tends to bypass ministers, parliament and the public, thereby distorting all traditional notions of responsibility.[2] These factors have also contributed to the weakening of responsibility in the South African constitutional context, and the position has been aggravated by local political and constitutional peculiarities: the idiosyncracies of the socio-political tradition, the unrepresentative nature of the mediating institution between cabinet and people (the white parliament), the ability of administrative organs to exercise extensive discretionary powers, and the absence of institutions such as the British Joint Committee on Statutory Instruments.[3] However, attention will be given to only one additional factor which is common to the British and South African political systems and which affects all forms of responsibility: the absence of a meaningful degree of open government. After demonstrating the extent of closed government, and its contribution to the widening gap between constitutional theory and political reality, it will be related to the principles of consociationalism, with specific reference to the need for responsible government.

Openness in government can be justified on a number of grounds, both philosophical and practical:[4] it can be argued that the availability of information is an integral feature of any theory of representative government, or that an open administration is a necessary condition for the prevention of official corruption. But in this context openness in government is justified on the

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1. This point is made in different ways from a number of perspectives - class theory (R. Milliband The State in Capitalist Society (1969) 107), group theory (J. Richardson and A. Jordan Governing under Pressure (1979) 25-31), and the corporatist perspective (R. Harrison Pluralism and Corporatism (1980) 115-131).

2. B. Sedgemore The Secret Constitution (1980) 36; Harrison op cit 189; J. Richardson and A. Jordan op cit 41ff.

3. See H.W.R. Wade Administrative Law (4 ed, 1977) 733-736. In South Africa delegated legislation has to be tabled in parliament in terms of s 17 of the Interpretation Act No 33 of 1957 but this monitoring is quite inadequate, and does not preclude the judiciary from invalidating legislation subsequently: Bestuursraad van Sebokeng v Tlelima 1968 (1) SA 680 (AD).

4. See P. Bathory and W. McWilliams 'Political Theory and the People's Right to know' in I. Galnoor (ed) Government Secrecy in Democracies

purely functional basis that without it all forms of responsibility, in a representative system, cannot operate adequately; in the most simple terms, government cannot be called to account unless the governed are informed as to its activities and their consequences. A political system will not be open to the extent that, inter alia, it excludes the public from official meetings, it confers on the public no right of access to administrative records, it has a stringent form of censorship and anti-disclosure laws, it enforces a wide definition of contempt of court and commission, it has no administrative law means of eliciting information from the bureaucracy, and it allows the ready use of state privilege in judicial proceedings. Clearly the 'right to know' is intimately related to a range of other rights and liberties, in particular that of freedom of speech.[1] Secrecy is most problematic in respect of the executive and bureaucratic organs of government, the main repositories of information, and only marginally so in respect of the legislature and judiciary,[2] which are usually themselves constitutionally empowered to force the public disclosure of information.

As with its constitutional theory, so in respect of openness in government, South Africa has followed the British rather than the American example.[3] In Britain[4] there is no constitutional

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1. In the United States the right to gather information has been held to derive from the First Amendment right to free speech. See F. Lawrence 'The First Amendment Right to Gather State-Held Information' 89 (1980) Yale LJ 923. On freedom of speech in South Africa see J. Dugard Human Rights and the South African Legal Order (1978) 146-202, B. van Niekerk 'The Uncloistering of the Virtue. Freedom of Speech and the Administration of Justice' 95 (1978) SALJ 362-393, 534-573.

2. The sessions and records of parliament are open to the public, subject to the provisions of the Powers and Privileges of Parliament Act No 91 of 1963 and the House of Assembly Standing Orders. Judicial proceedings are held in open court save for certain criminal trials (s 153 of the Criminal Procedure Act No 51 of 1977); court records are public documents and can be publicised, subject to certain exceptions (eg s 154 of Act No 51 of 1977, s 12(1) of the Divorce Act No 70 of 1979).

3. See A.S. Mathews The Darker Reaches of Government (1978), in which he analyses comparatively the law and practice of secrecy in government in South Africa, the United States and the United Kingdom.

4. There are some specialist studies on openness in government in Britain, and a significant number on the United States. A useful comparative, though undetailed, source book is Administrative Secrecy in Developed Countries (1979) by D. Rowat (ed) which surveys twelve countries in Scandinavia, Western Europe, Eastern Europe and North America; see also I. Galnoor (ed) Government Secrecy in Democracies (1977).

right of access to information[1] and the prevailing principle is one of discretionary secrecy. On the other hand there is a range of direct and indirect prohibitions on access to and dissemination of information, of which the most important are the Official Secrets Acts:[2] apart from prescribing activities such as espionage, these acts also criminalise the communication without authority of almost any official information.[3] There are also other acts which allow the bureaucracy to function covertly, secrecy is implicit in such constitutional principles as collective cabinet responsibility, and even the courts have tended to reinforce the system of secrecy in government.[4] These factors all encourage closed government, and in exercising the principle of discretionary secrecy the government uses a system of administrative classification[5] which allows it to select, and even distort, the information which is made available. The extent of secrecy in government can be illustrated by two examples: while the principle of collective responsibility depends on a high degree of openness within the cabinet, ministers are frequently kept in the dark on major issues and have difficulty penetrating the secrecy enveloping decisions taken by the 'establishment';[6] and it has been shown that individual members of parliament are so lacking in information as to be unable to fulfill their roles adequately.[7] The implications of these

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1. Save for a limited right in respect of local government created by the Public Bodies (Admission to Meetings) Act of 1960 (8 & 9 Eliz. II c 67) and other less important statutes. See R.E. Wraith in Rowat op cit 195-198.

2. The Official Secrets Act of 1911 (1 & 2 Geo v c 28), 1920 (10 & 11 Geo v c 75) and 1931 (2 & 3 Geo vi c 121) which have not been consolidated.

3. Mathews op cit 103-116; Wraith op cit 184-5. Civil servants are obliged to sign secrecy declarations in terms of these acts.

4. Eg in their development of a breach of confidence action in public law (Attorney-General v Jonathan Cope Ltd [1975] 3 AER 484 in respect of the Richard Crossman diaries) and their attitude to contempt of court (eg Attorney-General v Times Newspapers Ltd [1973] 3 AER 54 (HL), The Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd [1975] 1 AER 41 (QB). For the judgments of the European Court of Human Rights on the latter cases see 1979 Yearbook of the European Convention on Human Rights 400-408.

5. This functions quite separately from the Official Secrets Acts.

6. That is, according to B. Sedgemore (The Secret Constitution (1980)) a handful of politicians, civil servants, industrialists, trade unionists and scientists.

7. J.A.G. Griffith Parliamentary Scrutiny of Government Bills (1974) 234.

developments for the responsibility of the government are clear. Nevertheless, there have been some signs[1] of a recent liberalisation in British secrecy practices in relation to administrative planning, Crown privilege,[2] maladministration,[3] and the investigatory functions of parliamentary committees,[4] although these developments fall well short of any constitutional right to information, nor have the anti-disclosure laws been affected as such.[5] In the United States, by way of comparison, there is a sounder tradition of open government:[6] not only are the anti-disclosure laws less stringent, but in recent times there have been an increasing number of enactments bestowing a positive right to information and access to meetings.[7] The most prominent of these laws is the Freedom of Information Act of 1967,[8] which provides that anyone may request certain types of information from designated government agencies; there is no right of disclosure in respect of certain statutory exemptions, but in these areas it is still possible for the administration to disclose information voluntarily, and there is a general right of appeal against refusals to disclose. Also operating at the federal level of government is the Sunshine Act of 1976[9] which

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1. See Wraith op cit 185-186.

2. As a result of the well-known decision in Conway v Rimmer /1968/ 1 AER 874.

3. Through the ombudsman-type Parliamentary Commissioner for Administration. As H.W.R. Wade (Constitutional Fundamentals (1980) 55) observes, this institution provides for the first time the constitutional means of going behind the responsible minister's parliamentary responses to investigate departmental activities.

4. See S.A. Walkland 'Committees in the British House of Commons' in J.D. Lees and M. Shaw Committees in Legislatures (1979) 242-287.

5. The Departmental Committee on s 2 of the Official Secrets Act 1911 (Franks Committee, Cmnd 5104/1972) reported that the present law was unsatisfactory and should be changed so as to specify what matters should be kept secret; it made no recommendation on a right to information.

6. This has been partly a function of the American political culture, but also of constitutional features such as the First Amendment right of free speech (see above, 473) and the checks and balances flowing from the separation of powers system (thus the congressional committees monitoring the executive have investigatory powers far surpassing those of their British counterparts).

7. See Mathews op cit 39-100; M.J. Singer on the United States in Rowat op cit 309-356.

8. 5 USC 552. The act was extensively amended in 1974.

9. 5 USCA par 552(b).

allows public access to meetings of various federal agencies and departments. And at the state level there have been numerous laws pertaining to openness in government, so that in both law and practice it is relatively difficult for the various administrations in the United States to clothe their activities in secrecy.[1]

In following the British example South Africa has both refrained from granting any positive rights to information, and enacted stringent secrecy laws which have facilitated an appreciably closed system of government.[2] The South African Official Secrets Act[3] is a close replica of the British statutes and penalises a vast range of activities relating to the communication of 'official' information. There are in addition several far-reaching censorship laws,[4] and numerous other acts providing for an absolute or qualified restriction on the publication of information.[5] In his survey of secrecy practices in South Africa Mathews concludes that 'the situation in practice more than matches the expectations which the laws arouse',[6] and the problem is compounded by the restrictions on open government implicit in the many statutory limitations on other freedoms.[7] The 'information scandal' of the late 1970's gave some indica-

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1. American commentators are less sanguine; see F. Rourke on the United States in I. Galnoor Government Secrecy in Democracies (1977) 113-128; and for an account of the presidential abuse of the executive privilege to withhold information (the American counterpart of British crown privilege) see in the same work B. Schwartz 129-142.

2. See Mathews op cit 138-173.

3. Act No 16 of 1956.

4. The main acts are the Publications Act No 42 of 1974 and the Internal Security Act No 44 of 1950. On censorship see Dugard op cit 191-201; J. van der Vyver in W. Joubert (ed) vol 2 The Law of South Africa 93-185.

5. For example the Defence Act No 44 of 1957, the Police Act No 7 of 1958, the Prisons Act No 8 of 1959, the Nuclear Installations Act No 43 of 1963, the Terrorism Act No 83 of 1967, the Atomic Energy Act No 90 of 1967, the Armaments Development and Production Act No 57 of 1968, the National Supplies Procurement Act No 89 of 1970, the National Key Points Act No 102 of 1980, the South African Transport Services Act No 65 of 1981. In many cases the restrictive provisions of these acts were introduced in the wake of the 'information scandal'. For other statutory prohibitions on the publication of information see K. Stuart The Newspaperman's Guide to the Law (2 ed, 1977) 186-204.

6. Op cit 168.

7. See above, 390-394.

tion of the extent of secrecy in the administration[1] but the government's legislative response to this episode involved a tightening of secrecy in certain areas;[2] even the Advocate-General Act,[3] which makes provision for an ombudsman-type investigation into the improper use of state monies, contains new anti-disclosure provisions.[4] Apart from these institutional factors, the political culture of South Africa is not conducive to openness in the administration. The secrecy implicit in the convention of collective responsibility has allowed the responsible ministers of maladministered departments to be protected by the cabinet as a whole;[5] a survey of parliamentary questions over the last few years shows that government backbenchers seldom elicit information through this public method;[6] and the government has at times refused to respond to the opposition's questions, on the grounds that the publication of the required information would not be in the public or national interest.[7] The government engages in the common practice of press briefings, with its well-known opportunities for presenting one-sided or distorted information, and it has also abused[8] the

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1. See generally the Report of the Commission of Inquiry into the Alleged Irregularities in the Former Department of Information RP113/1978 (the Erasmus report). The report found that one of the main causes of administrative malpractices and irregularities was secrecy. (§ 13.2)

2. Eg the Secret Services Act No 56 of 1978 makes provision for money to be appropriated to a Secret Services account from where it can be flexibly transferred to other accounts for use by government departments in services of a secret nature (s 2(3)); the Minister of Finance can determine the extent to which such monies should be audited by the Auditor-General (s 3(2)). See also the Information Services of South Africa Special Account Act No 108 of 1979.

3. Act No 118 of 1979; the Advocate-General's reports must be tabled in parliament, unless he directs otherwise.

4. Ss 6(3) and 8(1).

5. This was shown, inter alia, in the government's responses to the Erasmus report (op cit) and the Report of the Commission of Inquiry into the Riots at Soweto and other places in the Republic RP 55/1980 (the Cillie Report).

6. The number of such questions in the years 1976-1981 was 7,3,3,1,17 and 27 respectively.

7. This phenomenon is not unique to South Africa (cf T.C. Hartley and J.A. Griffith Government and Law (2 ed, 1981) 208, B. Sedgemore op cit 183-191), but here there is no method of going behind the minister's responses.

8. For references to one of the few empirical surveys on the partiality of the SABC, the largest disseminator of information in South Africa, see House of Assembly Debates vol 7 cols 4183-7, 4193-4 (18 September 1981). Propaganda is the reverse of the secrecy coin, and has the same implications for open and responsible government.

control which it has over the electronic media in South Africa.[1] Thus at both the constitutional and socio-political levels there are numerous ways of controlling information in South Africa, and the principle of discretionary secrecy has not lead to a system of open government in practice. Nor has the judiciary been able to further the cause of open government significantly, by reason of the constitutional context in which it operates, the nature of many of the laws it has to implement, and its own caution in some matters, such as in requiring administrative bodies to furnish reasons for their decisions.[2] It is against this background that the implications of consociationalism for openness in government, and therefore theories of responsible government, must be assessed.

From its very nature it appears that consociationalism would inevitably compound the problem of administrative secrecy. In the focal institution of the consociational model, the grand coalition, there would seem to be a greater need for secrecy than exists even in single-party or coalition cabinets, so that élite bargaining can be successfully pursued. This aspect of consociationalism is essentially conspiratorial and it puts a premium on the non-circulation of leaders and a deferential citizenry,[3] both of which would tend to aggravate the problem of closed government. Lijphart in fact cites secrecy as one of the seven rules of accommodationist politics.[4] There is a close affinity between the rule of secrecy and the third rule of consociationalism, namely summit diplomacy or government by élite,[5] and Lijphart justifies it on the basis that,

> 'the leaders have to be able to make concessions and to arrive at pragmatic compromises even when religious or

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1. The South African Broadcasting Corporation was created by statute (Act No 22 of 1936) and all the members of its board are appointed by the State President (s 14).

2. See on this and related matters, below, 485-487.

3. E. Nordlinger Conflict Regulation in Divided Societies (1972) 79-80.

4. A. Lijphart The Politics of Accommodation (2 ed, 1975) 131-134.

5. Op cit 126; cf J. Richardson and A. Jordan Governing under Pressure (1979) 103-105.

> ideological values are at stake. The process of accommodation must, therefore, be shielded from publicity. The leaders' moves in negotiations among the blocs must be carefully insulated from the knowledge of rank and file. Because an "information gap" is desirable, secrecy is a most important rule. In this respect, the politics of accommodation again resembles international politics.'[1]

Lijphart goes on to point out that at the height of Dutch accommodationist politics both academics and the press were partners in the conspiracy of silence. In this way leaders were able to take their followers with them on compromise decisions without constant public scrutiny and the possibility of mass resentment. In terms of this approach consociationalism would seem to be heavily dependent on popular nescience and to provide little scope for traditional forms of government accountability.

On the other hand in two respects the normative consociational model would seem to indicate the need for, or at least the possibility of, greater openness in government than in the traditional liberal democracies. Firstly, the notion of power-sharing implies at least a measure of information-sharing.[2] Thus at the top leadership level, such as in the grand coalition, it would be necessary for participants from all sectors to have reasonable access to information; in the adversarial system, by contrast, there is no such justification for information-sharing, but rather a strong inducement for the government to withhold information from the opposition. But this internal circulation of information is clearly not inconsistent with greater secrecy as far as those external to the grand coalition are concerned; the tendency, therefore, would be to withhold such information from the legislature, party caucuses and the public, with the result that this apparent exception to the rule of closed government might not in fact contribute to the prospects of responsible government. The second exception appears less illusory. The consociational model's emphasis on the division and diffusion of power to regional and functional authorities indicates a need to disseminate appropriate information to

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1. Op cit 132.

2. See A.S. Mathews The Darker Reaches of Government (1978) 6-9.

these authorities, thereby precluding the possibility of a central monopoly over the control of information. And in respect of administrative records at their disposal, or meetings and hearings held by these authorities, there would not be the same justification for secrecy as pertains to the inter-segmental authorities. Thus although the decisive factor would be the extent and nature of the authority and information conceded by the central government, there could be a largely open administration at these levels, and therefore a greater measure of responsible government.[1] Further attention will be given to these possibilities after investigating the implications of South Africa's form of consociationalism for open government.

While South Africa's constitutional development has introduced only a form of sham consociationalism, it has to a large extent incorporated restraints on open government implicit in the consociational model, and this has had a significant effect on the existing secrecy practices. This can be shown in relation to both the separate development and parallel development aspects of the government's policy, the institutionalisation of which has not contributed to a system of open government. Thus decisions relating to the constitutional development of the national states are taken along quasi-consociational lines, with the negotiations preceding each stage of development being conducted by representatives of the government and homelands on a secretive and confidential basis; in other words the very process of constitution-making is shielded from both the homeland and general South African citizenries, including such salient factors as a homeland's institutional, financial and citizenship arrangements.[2] Even at the early stages of this process the 'summit diplomacy' dimensions are strongly apparent, with only the final product of the negotiations being publicised, either by government announcement or promulgation in the gazette, although in some cases the formal legitimising procedure of a par-

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1. This exception might also involve a contradiction in that it requires an ambivalent attitude to information on behalf of the public - a lack of inquisitiveness on national issues, and a healthy probing on local or communal issues. But against the background of a general apathy towards open government it can be expected that any demand for information would be in respect of matters most immediately affecting the public.

2. See N. Stultz Transkei's Half Loaf (1980) 44-75.

liamentary debate and legislative enactment is required.[1] But even the latter procedure is not always accompanied by full and adequate disclosure, as evidenced, for example, by the confusion over the so-called 'Ciskeian package-deal' in the debates[2] on the Status of Ciskei Act.[3] And while the diffusion of authority to the national states might create additional potential sites for open government there has been no evidence of a lessening of secrecy during the pre-independence stages,[4] and there has in fact been a trend for the homelands accepting independence to enact their own secrecy laws along the same lines as those of the republic.[5] Thus, for example, an individual Transkeian resident in South Africa is faced with a double veil of secrecy, and is further hampered by the fact that he is an alien in the country of his residence and permanently absent from the country of which he is a national[6] - the implications of this situation for the principle of responsible government are significant. Furthermore, the post-independence relations between a national state and South Africa will assume an 'international' consociational form,[7] whether conducted on an ad hoc basis or through the proposed constellation arrangement; 'foreign affairs' are by convention conducted in secrecy, with lessened formal accountability to parliament and little judicial intervention.[8] Although such negotiations could

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1. Most obviously the Status Acts.

2. House of Assembly Debates vol 9 col 4933-5158 (29 September 1981). Furthermore the South African-Ciskeian 'convention' was only made available to MP's at the beginning of the second reading, and the exact borders of the Ciskei were still not known during the third reading - House of Assembly Debates vol 10 col 6304 (9 October 1981). Needless to say the 'package deal' had not been finalised when Ciskei held a referendum on independence in 1980.

3. Act No 110 of 1981.

4. The Inkatha movement has emphasised the need for the 'elimination of secrecy in public administration' (see the Inkatha evidence to the Schlebusch commission in W.S. Felgate's paper 'Co-operation Between Natal and KwaZulu - an Inkatha View' in Boulle and Baxter op cit 154 at 158-162), but there is no evidence of any such trend in KwaZulu.

5. See B. Streek and R. Wicksteed Render unto Kaiser: A Transkei Dossier (1981) 286-302 for an account of information control in post-1976 Transkei.

6. This matter is dealt with further, below, 490-508.

7. See N. Stultz op cit 150.

8. M. Wiechers Staatsreg (3 ed, 1981) 342-343.

have important consequences for homeland nationals, they would be surrounded by an additional layer of secrecy as far as the persons affected thereby would be concerned.

As far as the government's 'internal' constitutional proposals are concerned they tend to involve a similar form of dual secrecy - that is the process of constitutional change takes place with limited public awareness, and the quasi-consociational constitution itself implies the same degree of closed government and lack of responsibility as consociationalism. One of the remarkable aspects of the government's 1977 constitution was that it was 'approved' by the white electorate in the general election of that year, without ever having been published in draft form, elucidated in a white paper, or given any greater substantiation than a general exposition from political platforms and in published propaganda; it appeared subsequently that even the closed National party congresses which enthusiastically endorsed the scheme received only scanty information as to its content. The piecemeal implementation of the scheme had already begun before the Draft Constitution Bill of 1979 was published,[1] and even the bill was subject to differing interpretations because of its incompleteness and vagueness. The Schlebusch commission held public hearings and issued a public provisional report, although it is evident from the report that a measure of confidential party caucussing preceded its drafting. But subsequent implementations of the government's constitution also followed the consociational pattern, in that decisions were taken during secret consultations before being publicly legitimised in parliament.[2]

The implications of the 1977 constitution itself for open government can be assessed by reference to the focal joint institutions, the president's council and the council of cabinets. The president's council, which is to have a central role in the process

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1. This can be dated to Act No 122 of 1977, the Electoral Act for Indians.

2. See, eg the references of the Minister of Internal Affairs to discussions held with Indian leaders in relation to the holding of elections for the S.A. Indian Council: House of Assembly Debates vol 2 cols 731-2 (5 February 1981), vol 4 cols 2050-1 (26 August 1981). The Indian electorate also had no definitive version of the government's constitutional plans before these elections on 4 November 1981.

of constitutional change, has some of the characteristics of a consociational grand coalition, and is generally not likely to be conducive to a system of open government - its members are not elected and therefore have no constituency to whom they are accountable, the council operates mainly through a system of closed committees,[1] its chairman is protected from public criticism,[2] and its agenda is more secretive than that of parliament. Because of the constitutional status of the council its members are also in a client position as far as the receipt of information from the government is concerned. During the first year of its existence the Powers and Privileges of the President's Council Act[3] was passed, extending to the council many of the privileges of parliament[4] and introducing specific secrecy provisions. Now it is possible for sessions of the whole council, or individual committees, to be held in camera on the direction of the respective chairman, if he is of the opinion that the public's presence would be undesirable;[5] and councillors and the council's officials are expressly disbarred from disclosing any information entrusted to them in confidence.[6] The 'secret summit diplomacy' dimension of consociationalism is strongly prevalent in this body. Much the same can be said of the council of cabinets as envisaged in the 1979 draft bill. The members of this body would also have no immediate constituency and its chairman would be protected from public criticism.[7] As with most cabinets, the proceedings of the council would not be public and, despite its heterogeneity, members would take an oath against divulging directly or indirectly any information entrusted to them under secrecy.[8] In any event no mechanism was provided for members of one of the three parliaments to elicit information from a member of the

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1. These proceedings are not reported, unlike the plenary sessions of the council.
2. S 13 of Act No 32 of 1961.
3. Act No 103 of 1981.
4. Such as the freedom of speech and the right to summons witnesses before it.
5. S 7.
6. S 10. S 22 provides that the act does not affect the provisions of the Official Secrets Act No 16 of 1956.
7. S 13 of the draft bill.
8. S 16(3) read with s 19(5) of the draft bill; cf s 19(5) of Act No 32 of 1961.

council of cabinets belonging to another parliament.[1] At the most the government's constitution would involve a sharing of information between the government and new leadership élites - in fact the extent to which such sharing did take place might be taken as one yardstick of the government's commitment to consociational politics.[2] But for non-élites it would seem to involve a discernible closing of the deliberative processes of government, and no reason to anticipate easier access to administrative records. It complements the other factors mentioned in this work which have contributed to the movement away from representative and responsible government, towards a managerial system. In short the trends in South Africa's constitutional politics are antipathetic to both openness in government and traditional notions of responsibility.

But although consociationalism, including South Africa's version thereof, has negative implications for open government, it is necessary to ascertain more closely what degree of openness it might allow, although in conformity with this work's approach no attempt will be made to be prescriptive. The control and manipulation of information is a crucial component of power, and it is clear that the government will not readily surrender these advantages while it remains in control of constitutional development; during this period the principle of discretionary secrecy is likely to endure, and to be exercised even more stringently as the system becomes increasingly authoritarian. However, to complement the earlier description of the optimal constitutional framework[3], it is proposed to describe areas of government in which openness is compatible with the essential features of consociationalism, and by implication South Africa's quasi-consociational system, and based on these suggestions new theories of responsibility may in time be constructed.[4]

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1. This assumes that the council of cabinets would have executive functions but the problem would be compounded if, as appeared from the draft bill, executive powers vested in the cabinets of the three parliaments, and predominantly in the white cabinet.

2. See A.S. Mathews The Darker Reaches of Government (1978) 8.

3. See above, 400-405.

4. Cf A.S. Mathews 'Monitoring the Administration: New Perspectives' in Boulle and Baxter op cit 128-142.

Reference has been made to the potential for breaking down secrecy in the consociational emphasis on the division and diffusion of authority. The consociational system requires that only crucial decisions be taken through 'secret summit diplomacy' in the grand coalition and poses no such requirements for the less sensitive decisions taken by devolved authorities. Thus open meetings legislation, along the lines of the American federal or state models, could be made applicable to segmental authorities, local authorities, quasi-public boards and public corporations. In terms of this legislation all such agencies could be compelled, subject to defined exceptions, to open their meetings to the general public; this would also be a necessary condition of the system of 'issue fragmentation' referred to earlier.[1] Also compatible with consociationalism would be open records legislation at these levels of governments, and such legislation could in fact apply throughout the system, short of encroaching on the grand coalition's legitimate preserve. This legislation could confer on the public generally a positive right of access to administrative records, subject to defined exemptions which would accommodate the need for secrecy on certain matters and the protection of personal privacy. The important feature of right-to-know laws is that they would terminate the existing principle of discretionary secrecy, which can be used to withhold information for illegitimate or spurious reasons, in favour of a clear delineation of those areas where secrecy might be preserved, with disclosure being available as of right in all other areas. Additional safeguards could be afforded by a speedy and inexpensive system of reviewing administrative decisions against disclosure. Depending on the degree to which the separation of powers doctrine was applied in the consociational system, other forms of internal (that is non-public) monitoring of the administration could be instituted, such as investigatory functions for legislative committees, to ensure that proper effect is being given to legislation and that its objects are not being frustrated by bureaucratic obstructionism,[2] and to supervise more closely delegated legislation.

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1. See above, 433.

2. Mathews 'Monitoring the Administration' op cit 140-142.

An open administration in these areas would be of general benefit to the public, but a more immediate need for openness occurs once an individual is involved in a specific dispute with the administration. In this administrative law area there is at present a great deal of needless secrecy in South Africa. Thus while the disclosure of documents is of importance at an early stage of administrative proceedings, there is no general right of discovery in South Africa;[1] and although the courts are aware of the need for disclosure[2] they are at times reluctant to order it.[3] The furnishing by an administrative body of reasons for its decisions is also an important source of information in relation to possible appeal or review proceedings. At common law it is not necessary for an administrative body to give reasons and there is an unfortunate tendency not to do so unless compelled by statute,[4] and even then, at times, to furnish inadequate reasons.[5] The courts have refrained from discouraging this practice of non-disclosure by drawing an adverse inference from the absence of reasons; they have gone no further than regarding it as a factor to be taken into account where there is an allegation of improper purpose, bad faith or bias, and there is evidence aliunde to support such allegation.[6] The courts could also play a constructive role in opening the administration by virtue of their common law power to overrule the state's objection to the disclosure of evidence on the grounds of state privilege,[7] except where privilege is claimed on the basis that

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1. Huyser v Louw 1955 (2) SA 321 (T).
2. Loxton v Kenhardt Liquor Licensing Board 1942 AD 275.
3. Minister van Justisie v Alexander 1975 (4) SA 530 (AD). See H. Corder 'The content of the audi alteram partem rule in South African administrative law' 1980 THR-HR 156 at 164-7.
4. See M. Wiechers Administratiefreg (1973) 222; L. Rose-Innes Judicial Review of Administrative Tribunals in South Africa (1973) 189-200.
5. Steyn v Estate Agents Board 1980 (2) SA 334 (T). On the distinction between 'reasons' and 'information', and its significance - see L. Rose-Innes op cit 191-193.
6. Pretoria North Town Council v A.I. Ice Cream Factory Ltd 1953 (3) SA 1 (AD); Winter v Administrator-in-Executive Committee 1973 (1) SA 873 (AD).
7. Van der Linde v Calitz 1967 (2) SA 239 (AD); Geldenhuys v Pretorius 1971 (2) SA 227 (O).

disclosure would affect the 'security of the state' in which case the courts have no such residual power.[1] In all these areas of administrative proceedings there would be no irreconcilability between greater open government and the principles of consociationalism. The same can be said of other secrecy-inducing factors encountered in the judicial process - the wide test used for contempt of court,[2] and judicial acceptance of the principle that a minister defamed by criticism levelled at the cabinet can institute a personal action,[3] despite the fact that the government itself cannot be defamed.[4] And the judicial process can be manipulated in other ways to encourage secrecy in government: the use of commissions of enquiry to put political issues 'on ice' and prevent their public discussion can be judicially buttressed through enforcement of the contempt of commission rule,[5] and investigative journalism can be inhibited through the use of the courts to force revelation of reporters' sources.[6] None of these practices can be justified solely by reference to the principles of consociationalism and could therefore all be modified in a consociational system to create a more open administration.

It can be asserted, in conclusion, that the secrecy inherent in the normative consociational model has negative implications for the popular control of the central executive authority, but not necessarily for other branches or levels of government. The analysis has shown that many of the negative restrictions on

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1. S 29 of the General Laws Amendment Act No 101 of 1969, as amended by s 25 of the General Laws Amendment Act No 102 of 1972.

2. That is, conduct with a tendency to influence the courts (S v Van Niekerk 1972 (3) SA 711 (AD)) rather than a narrower test of whether it constituted a real risk of prejudice. See J. Dugard Human Rights and the South African Legal Order (1978) 298-299.

3. South African Associated Newspapers Ltd v Estate Pelser 1975 (4) SA 797 (AD); see C. Forsyth 'Recent Judicial Attitudes to Free Speech' 94 (1977) SALJ 19.

4. Die Spoorbond and anor v South African Railways & Harbours 1946 AD 999.

5. In terms of the Commissions Act No 8 of 1947 and the regulations framed in terms thereof. For a description of the usual regulations and their significance for secrecy see K. Stuart The Newspaperman's Guide to the Law (2 ed, 1977) 101-102. Because a commission appointed by the State President is not a quasi-judicial body the public has no right of access to its record. Bell v Van Rensburg NO 1971 (3) SA 693 (C).

6. In terms of s 205 read with s 189 of the Criminal Procedure Act No 51 of 1977. In many jurisdictions (Sweden, United States) reporters are protected from revealing their sources. D. Rowat (ed) Administrative Secrecy in Developed Countries (1979) 9.

open government in South Africa would find no inherent justification in the principles of consociationalism, nor are those principles incompatible with laws conferring a positive right to information. Indeed the consociational model points to new forms of responsible government to replace those which have become ineffective in modern political systems[1] - the devolution of policy formulation to administrative agencies and parastatals, greater popular consultation and participation in these agencies, breaking down the anonymity of the bureaucracy, and making the exercise of discretionary power rational, public and open to criticism. These features have some affinity with the concept of participatory democracy,[2] with its emphasis on direct citizen participation in administrative decision-making, local authorities, neighbourhood movements and the industrial work place. Developments in these directions might even tend to weaken traditional lines of responsibility, but could introduce more suitable replacements.

5. Citizenship

In the previous section reference was made to the recent phenomenon in South Africa of 'internationalising' political relationships along consociational lines, and to the consequences of this trend for the popular control of government. The government has made use of the symbols and terminology of international law in an attempt to remove matters of potential conflict from the arena of domestic politics to the field of 'international relations'. Another important aspect in this process is the use and manipulation of concepts of nationality and citizenship, which has an important role in South Africa's version of consociationalism. By reference to these concepts it is possible to add a useful additional perspective to South Africa's constitutional politics - they provide a key to an understanding of both the constitutional developments of the past, and the likely developments of the future. This is also an important area as far as the government's attempted legitimisation of its policies is concerned.

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1. Cf W.H.B. Dean's challenging paper 'The Administration: Control and Participation - Some Preliminary Thoughts' in Boulle and Baxter op cit 109-127.

2. Cf C.B. MacPherson The Life and Times of Liberal Democracy (1977) 93-115. These institutional changes clearly assume significant changes in the public consciousness.

At the outset it is important to provide some terminological clarity to this topic because constitutionalists, politicians and statutory draftsmen have in the past tended to blur the distinction between 'nationality' and 'citizenship'. 'Nationality' denotes essentially a continuing legal relationship between an individual and the particular state of which he is a national;[1] although matters of nationality are regulated mainly by municipal law, it has predominantly an international law significance, in that it entitles the individual to travel facilities, diplomatic protection abroad, and the right of re-entry into the state of which he is a national. 'Citizenship', on the other hand, denotes the status of an individual within a particular political community; it has exclusively a municipal law significance in that it determines the extent of an individual's political, civil and socio-economic rights within the state of which he is a citizen, and these rights are subject to fluctuation over time. Weis observes that conceptually and linguistically the terms emphasise different aspects of the same notion: state membership.[2] 'Nationality' stresses the international, 'citizenship' the national, municipal aspect.[3] While the two terms overlap, 'nationality' is clearly a wider concept than 'citizenship': all citizens of a state will ipso facto be nationals, but not all nationals need be citizens[4] (although in most jurisdictions this will be the case). Thus those nationals enjoying full political, civil and socio-economic rights according to the municipal laws of a state can be described as 'citizen-nationals'. While international law has various rules and conventions pertaining to nationality and citizenship, it recognises the fundamental right of sovereign states to regulate

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1. D.P. O'Connell vol 2 International Law (2 ed, 1970) 670ff; M. Akehurst A Modern Introduction to International Law (3 ed, 1977) 83; L. Oppenheim vol 1 International Law (7 ed, 1948) 585ff.

2. P. Weis Nationality and Statelessness in International Law (2 ed, 1979) 4-5.

3. South African writers tend now to use the terms in these senses. See W. Olivier's chapter 'Burgerskap' in M. Wiechers Staatsreg (3 ed, 1981) 344ff; C. Schmidt 'Citizenship and Nationality' in W.A. Joubert (ed) vol 2 The Law of South Africa 260; H. Booysens Volkereg - 'n Inleiding (1980) 108.

4. The corollary is that loss of nationality always involves loss of citizenship, while the converse is not necessarily the case.

these matters in terms of their own municipal law,[1] although there is a modern tendency for international law to restrict the discretion of states in matters of nationality.[2]

South African constitutionalists have avoided developing a theory of citizenship, and have tended to analyse it as a juridical concept without regard to the various elements of citizenship. There are basically three such elements, the civil, the political and the social, and the citizenship complex developed chronologically through these three phases.[3] In the first phase the emphasis was on the civil rights of the citizen, the protection of which became an obligation of government: religious rights, freedom of the individual, and freedom of speech and thought. The second phase in the development of citizenship concerned participation in public affairs and involved the political rights: extension of the franchise, freedom of assembly, and the right to participate in political institutions. The third phase is concerned with the social element of citizenship, the welfare of citizens; here the emphasis is on the right to economic welfare, education and health services and to 'share ... in the social heritage and the life of a civilised being'.[4] The public institutions associated with these three phases are the courts, the legislature and other political institutions, and the educational and social welfare systems, respectively. As Wiechers observes,[5]

> 'The reason why citizenship is considered a crucial factor in the equal distribution of power is that citizenship, as a juridical concept, contains within

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1. Weis op cit 65ff; O'Connell op cit 678-9; D.W. Greig International Law (2 ed, 1976) 370.

2. I. Brownlie Principles of Public International Law (2 ed, 1973) 367ff; Akehurst op cit 98-99.

3. See T. Parsons The System of Modern Societies (1971) 20ff; R. Dahrendorf Society and Democracy in Germany (1967) 70ff.

4. Dahrendorf ibid.

5. M. Wiechers 'Citizenship and Intergroup Accommodation in Plural Societies' in N. Rhoodie (ed) Intergroup Accommodation in Plural Societies (1978) 430.

> itself the three components which are supposed to comprise the total of a subject's public law competences, that is political, civil and social rights.'

According to the pluralist model citizenship implies impartial treatment by the law, in politics, and in the social context, for all citizens of a particular country.[1]

Consociationalism also has no developed theory of citizenship, a state of affairs partially attributable to the fact that it has been approached from a behavioural-attitudinal and not a constitutional-juridical perspective. In its democratic variant it presupposes a single nationality as well as an equal citizenship status for all members of a nation state. However, implicit in the segmental autonomy principle is the notion of 'separate but equal' political and social rights, particularly as far as segmental matters are concerned. The equalisation of such rights, in the normative consociational model, is assured through such devices as the proportional allocation of public funds. Thus although the segmental autonomy principle might result in the political rights of citizenship being exercised primarily through different subordinate political institutions, this should not imply a differential political status for different groups of citizens; by and large these conditions have been satisfied in the empirical consociations. Likewise equal citizen participation in national affairs is ensured by the principles of the grand coalition, proportionality and the mutual veto.

The best developed system of citizenship in a consociational system is found in Switzerland, and brief reference will be made to its main features; the relevance of this comparative exercise is heightened by the fact that the Swiss 'canton system' has received approving reference from government spokesmen in the past.[2] A Swiss national is entitled to three types of citizenship.[3] The first of these is communal citizenship which follows

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1. J. Degenaar 'Pluralism and the Plural Society' in A. de Crespigny and R. Schrire The Government and Politics of South Africa (1978) 223 at 236; and see chapter 2, above.

2. Eg Dr. P. Koornhof. See the references in Royal Institute of International Affairs A Survey of Proposals for the Constitutional Development in South Africa (1980) 9.

3. See C. Hughes The Federal Constitution of Switzerland (1954) 52-53; G.A. Codding The Federal Government of Switzerland (1965) 47-48; H. Huber How Switzerland is Governed (1968) 16-20.

the ius sanguinis rule[1] and is inalienable during an individual's lifetime. Apart from its symbolic and emotional significance, communal citizenship entitles an individual to the support of his commune of origin if indigent, but this historic right is of diminished contemporary importance with many Swiss living outside their citizen communes and an increasing number of arrangements for the reciprocal sharing of welfare costs. But citizenship of a commune is a necessary precondition for cantonal citizenship, the second type of Swiss citizenship, which also follows the ius sanguinis rule. Cantonal citizenship, however, is of even less practical significance than communal citizenship, because the constitution provides that Swiss citizens may settle in any part of the country[2] where, within three months of settling, they will acquire the right to vote in cantonal and communal affairs.[3] Finally every citizen of a canton is also a Swiss citizen,[4] and the constitution guarantees to all Swiss citizens equality before the law[5] and equal treatment in the legislative and judicial proceedings of all cantons.[6] The interdependence of these three forms of citizenship can be illustrated by the fact that an alien can only acquire Swiss citizenship (or nationality) by naturalisation if he has first acquired communal and cantonal citizenship. But although for historic reasons Swiss citizens may be distinguished according to their internal communal and cantonal citizenship, these distinctions do not have much practical significance because the right of political participation at all levels of government is determined by an individual's place of domicile, and the non-political rights attaching to communal and cantonal citizenship are not of great importance. Within each level of government there is no hierarchical ordering of citizenships and all Swiss nationals may be classified as full-citizen nationals. The same position prevails in most other composite states, although nationality is usually a matter within the exclusive jurisdiction of the central government, and state nationality usually carries unit citizenship, subject to additional condi-

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1. That is by descent, in this case through the father. The ius soli (place of birth) principle does not generally operate in Switzerland.
2. Art 45.
3. Art 43.2; political rights may not be exercised in more than one canton.
4. Art 43.1.
5. Art 4.
6. Art 60.

tions such as residence.[1] In the United States the constitution did not originally make clear whether national citizenship was anterior to state citizenship, or vice versa, and in the celebrated Dred Scott case[2] the Supreme Court accepted the priority of state citizenship. The Fourteenth Amendment,[3] however, reversed this decision, and provided for the first time a definition of citizenship which made national citizenship anterior to that of the states, so that the citizenship of blacks had, perforce, to be recognised;[4] state citizenship has little contemporary significance other than in relation to residence within a state, and does not denote a differential political status. In other federal systems, such as Australia and Canada, nationality is also regulated by the federal government and individual state citizenship is of comparatively little importance.[5] Within most jurisdictions, then, all nationals are also full-citizens, and the terms nationality and citizenship can be used interchangeably.

In South Africa the distinction between nationality and citizenship has always been of greater significance because of the differential access to political, economic and social rights provided for by South African municipal law.[6] As a general rule nationality can be acquired without regard to colour or ethnicity according to the ius soli and ius sanguinis principles;[7] however, the acquisition of South African nationality through naturalisation, whether on voluntary application or involuntary operation

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1. Weis op cit 13-15.

2. Dred Scott v Sandford 19 How. 393 (1857).

3. The Fourteenth Amendment, section 1, of the U.S. Constitution, adopted in 1868.

4. See C.H. Pritchett The American Constitution (2 ed, 1968) 759-761.

5. Cf also par II arts 4 & 5 of the Belgium constitution and arts 4-6 of the Netherlands constitution.

6. On South African nationality and citizenship generally see Schmidt op cit 260-277; Wiechers op cit 344-396; W.H. Olivier 'n Juridiese evaluasie van burgerskap' 1979 TSAR 212-225, 1980 TSAR 22-31, 127-151.

7. Nationality is regulated by the South African Citizenship Act No 44 of 1949, one of the many statutes contributing to the conceptual confusion between nationality and citizenship.

of law,[1] is effectively precluded for those who are not white.[2] Likewise the loss of South African nationality, whether through renunciation, operation of law or administrative deprivation, operates on a non-discriminatory basis, save for the compulsory denationalisation of blacks only, which is a crucial component of the homelands' independence process.[3] But as far as the public law rights of citizenship are concerned South Africa has always differentiated among its nationals, and this has given rise to different types of citizenship.[4] Thus as far as political rights are concerned only whites have continuously enjoyed electoral rights and the right to hold office in the main political institutions; they can thus be designated full-citizen nationals. Coloureds in the Cape enjoyed electoral rights until the constitutional crisis, but since then have had no direct representation in the central organs of government and have never had access to public office, while neither Indians nor blacks had ever had effective political rights in the central government. On the basis of their political status the three non-white groups can thus be designated part - or non-citizen nationals. Likewise the non-political rights of citizenship avail the groups on a differential basis, in particular rights of movement, settlement, educational and social-welfare benefits, and employment and trading rights, and to a lesser extent civil rights. In terms of the constitutional system as a whole, coloured, Indian and black 'citizenship' has had a negative or exclusionary significance, and the government has attempted to give it a more positive orientation in the recent institutionalisation of its policies.

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1. Since 1978 certain white aliens become nationals after two years residence to make them eligible for military service - s 11A of Act No 44 of 1949; (see House of Assembly Debates vol 5 col 2150 (1 March 1980); the provisions of this section were tempered somewhat by Act No 95 of 1981. See also D.H. van Wyk 'The Ebb and Flow of South African Citizenship Law' 1978 SAYIL 148-152. On international law aspects of the involuntary nationalisation of aliens see Brownlie op cit 376-9.

2. Ss 10 and 11A of Act No 44 of 1949 read with s 4(3)(b) of the Aliens Act No 1 of 1937.

3. This matter is dealt with below.

4. Wiechers op cit 386ff.

The first attempt to systematise a form of black citizenship can be dated to the passing of the Transkei Constitution Act[1] and the National States Citizenship Act.[2] These statutes provided that all South African blacks would be citizens of one or other national state on the basis of birth, descent, place of domicile, and linguistic or cultural association.[3] Homeland citizenship did not attribute to non-blacks, but it comprehensively affected all blacks, for whom there was no option save that of forfeiting citizenship of one homeland to acquire that of another.[4] But the nationality of blacks at this stage was left unaffected, and it was expressly provided that homeland citizens would not be regarded as aliens in the republic, but would continue to enjoy the international law benefits of South African nationality.[5] All South African blacks were now South African nationals but homeland citizens, and their political rights of citizenship would be exercised only through the homeland authorities.[6] Conversely, non-blacks could not acquire the political rights of citizenship in a dependent homeland through place of birth or domicile. As far as the non-political rights of citizenship are concerned, the statutes purported to leave intact all 'existing rights, privileges or benefits'[7] of homeland citizens, nor did they expressly affect the position of non-blacks resident in the national states. At this stage the main significance of homeland citizenship was that it further institutionalised the principle of political separation in South Africa: henceforth every black would be required to acquire an appropriate citizenship certificate[8] which would designate, inter alia, the regional/ethnic institution in which he could exercise political rights.

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1. Act No 48 of 1963.
2. Act No 26 of 1970 which should be seen in conjunction with the National States Constitution Act No 21 of 1971.
3. S 7(1) and (2) of Act No 48 of 1963 and s 3(1) and (2) of Act No 26 of 1970. For some theoretical problems associated with these provisions see F. Venter 'Bantoeburgerskap en Tuislandburgerskap' 1975 THR-HR 239- 253.
4. S 4 of Act No 26 of 1970.
5. S 7(3) of Act No 48 of 1973 and s 2(4) of Act No 26 of 1970. The term 'alien' is defined in both the Aliens Act No 1 of 1937 (s 1) and Act No 44 of 1949 (s 1) as a person who is not 'a South African citizen'; in the present context it clearly refers to a non-national.
6. S 7(1) of Act No 48 of 1963 and s 2(3) of Act No 26 of 1970. See J.F.H. 'A Transkeian Citizen of South African Nationality' 1963 THR-HR 44-49.
7. S 7(4) of Act No 48 of 1963 and s 2(5) of Act No 26 of 1970.
8. S 5 of Act No 26 of 1970.

The Status Acts[1] built on the existing citizenship legislation in that they denationalised all those who, according to its provisions, were citizens of the relevant national state immediately before independence, as well as new categories of persons, and conferred on them nationality of the independent state;[2] the process has been described as the most comprehensive transfer of nationality that legal draughtsmanship could achieve.[3] As far as South African municipal law was concerned these persons became aliens;[4] furthermore the arrangement is of a self-perpetuating nature in that all future generations of blacks having the statutorily prescribed association with the independent national state will be regarded as aliens, irrespective of their place of birth or permanent residence.[5] As far as international law is concerned the position is slightly more complex: it is accepted that the power to denationalise, along with other matters of nationality, falls within the domestic jurisdiction of an individual state,[6] but this is subject to the existence of treaties for the elimination of statelessness,[7] the principles against arbitrary denationalisation on racial, ethnic, religious or political grounds,[8] and the fact that for it to be recognised by other states the denationalisation should conform to the general principles of international

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1. Acts Nos 100 of 1976 (Transkei), 89 of 1977 (Bophuthatswana), 100 of 1979 (Venda) and 110 of 1981 (Ciskei). On the political manipulation preceding the Transkei Act see P. Laurence The Transkei - South Africa's Politics of Partition (1976) 109-118.

2. S 6(1) read with Schedule B of each Act. In fact, however, a state denationalising its nationals cannot ascribe to them nationality of another state, so that this second aspect is of no juridical significance.

3. The Quail Report (1980) 43.

4. For the sake of clarity they will be referred to as 'statutory aliens' to distinguish them from 'foreign aliens'.

5. That is nationality would not attribute to those born in the republic after independence according to the ius soli principle in terms of s 3 of Act No 44 of 1949; this assumes that the national state would confer nationality indefinitely according to the ius sanguinis principle, whereas most countries, including South Africa (s 6 of Act No 44 of 1949), confer nationality by descent on only one generation.

6. See D.P. O'Connell vol 2 International Law (2 ed, 1970) 678-9, 683; I. Brownlie Principles of Public International Law (2 ed, 1973) 376ff; M. Akehurst A Modern Introduction to International Law (3 ed, 1977) 87; G. Barrie Topical International Law (1979) 62; H. Booysen Volkereg - 'n Inleiding (1980) 108.

7. See P. Weis Nationality and Statelessness in International Law (2 ed, 1979) 126.

8. See Art 9 of the UN Convention on the Reduction of Statelessness, 1961; cf Art 15 of the Universal Declaration of Human Rights, 1948.

law.[1] Nominally the Status Acts do not denationalise on the grounds of colour or ethnicity but on the basis of language and culture, and they would seem to conform with the principles of international law.[2] But since the Status Acts are 'rooted in [earlier] citizenship provisions which were founded on colour'[3] and in practice apply to blacks only, it could be said that they are discriminatory in effect and therefore in violation of international law principles.[4] However, the real objection to denationalisation is that it could result in statelessness,[5] and this requires separate consideration.

Among the many consequences of the homelands' nationality and citizenship arrangements statelessness is one of the more remote problems for those concerned, and it can be dealt with fairly briefly. Statelessness will arise by operation of municipal law if an individual does not fulfill the nationality criteria of any state, and in the present context would arise if an individual denationalised by a Status Act did not acquire nationality of the appropriate independent national state. An analysis of the two relevant sets of criteria shows that they complement each other to a large extent, and they give rise to very few, if any, instances of statelessness.[6] This may be attributed to a compliant attitude thus far by the national states, as evidenced by their own criteria of nationality which

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1. Such as the doctrine of 'effective link' as laid down in the Nottebohm case 1955 ICJ Reports 4. See below, 498.

2. See W.H. Olivier 'Statelessness and Transkeian Nationality' 1976 SAYIL 143-154, and 'Bophuthatswana Nationality' 1977 SAYIL 108-118.

3. W.H.B. Dean 'A Citizen of Transkei' 1978 CILSA 57 at 65.

4. See J. Dugard 'South Africa's "Independent" Homelands: An Exercise in Denationalisation' 10 (1980) Denver Journal of International Law and Policy 11 at 26-27. The Status Act schedules do include non-blacks having linguistic or cultural associations with the relevant ethnic group, but the policy is clearly to denationalise only blacks and there is no instance of non-blacks being regarded as aliens because of this connection.

5. See O'Connell op cit 684.

6. See Dean op cit 62-63; Olivier 'Statelessness and Transkeian Nationality' op cit 154; Dugard op cit 27. The possibilities of dual nationality are less remote, but also less significant.

have replaced those provided in the Status Acts;[1] but should these criteria be unilaterally narrowed in the future,[2] those denationalised by the national state would not, in terms of South African law, revert to South African nationals, but would be rendered stateless.[3] Statelessness in turn has implications for the right of admission to a national state, the freedom of movement between states, and state protection in the international sphere. However de facto statelessness could also arise in international law in the following circumstances: if South Africa's denationalisation process is not recognised as lawful, if blacks born and resident in the republic are not regarded as having the necessary 'genuine link' with a national state to qualify as its national,[4] or if the independence of the national states fails for an indefinite period to secure recognition by the international community.[5] In all these cases South Africa would exercise no diplomatic protection over those affected and international law would not recognise the right of any other state to protect them, and they would be effectively stateless.

The more immediate consequences of the nationality/citizen arrangements relate to the political, social and economic rights of blacks within the republic. The government's policy is that

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1. See ss 57-59 of the Transkeian Constitution Act of 1976 and the Citizenship of Transkei Act No 26 of 1976; s 80 of the Bophuthatswana Constitution Act of 1977 and the Bophuthatswana Constitution Act No 19 of 1978; and s 60 of the Venda Constitution Act of 1979.

2. Cf D.H. van Wyk 'A Note on Bophuthatswana Citizenship' 1978 SAYIL 163-9.

3. In 1978 provision was made for those denationalised by the Status Acts to regain South African nationality subject to certain conditions, including the acquisition of citizenship of one or other non-independent homeland; this right avails only former South African nationals and not future generations of statutory aliens, and would be effective only until the homeland in question acquired independence. S 3(3) of Act No 26 of 1970 introduced by Act No 13 of 1978.

4. This was the ruling in the Nottebohm case 1955 ICJ Reports 4, although the exact scope of the decision is not clear. See Akehurst op cit 99, Brownlie op cit 393-407. As the ius sanguinis rule is used cumulatively with succeeding generations the link with the national state will become more and more remote.

5. Dugard op cit 28.

the political rights of blacks will be exercised only in the national states and not in the political institutions of South Africa. In an important symbolic sense the denationalisation process legitimises the implementation of this policy, because it is easier to justify the exclusion of statutory aliens from political rights, than the exclusion of non-citizen nationals; moreover their participation in separate political authorities can be legitimised in the name of 'self-determination'.[1] The South African government's strategy, as evidenced by recent constitutional developments and ministerial pronouncements, is that when the process of 'internal decolonisation' has run its course there will be no black nationals of South Africa who could make a claim to the political rights of citizenship. It is generally recognised that the political status of aliens can be defined by municipal law, and it is a principle of international law that sovereign states are not required to accord political rights to aliens within their jurisdiction; in the South African context this rule can be invoked in support of denying statutory aliens, on the basis of their 'nationality' and not their colour, the right to elect or be elected to the central political institutions. But the process has other consequences extending beyond the symbolic: as a substitute for a claim to future political rights in the 'common area', it provides for blacks inferior rights in a nominally sovereign, but financially dependent and jurisdictionally limited, legislature, which is remote from many electors; and the process divides the black constituency, pitting sections thereof against one another, and decreases the sense of urgency to resolve internal political problems. In the words of well-known commentators,

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1. The most well-known is that of Dr. C. Mulder (House of Assembly Debates vol 2 col 579 (7 Feb 1978); see also the preamble of the draft constitution of 1979 and the third and fourth points of the government's twelve point plan (above, 342).

2. A.C. Evans 'The Political Status of Aliens in International Law, Municipal Law and European Community Law' 1981 International and Comparative Law Quarterly 20-41.

3. Cf the provisions which exclude aliens from the state presidency, cabinet, parliament and president's council (ss 8(4), 20(3), 46(c) and 103(c) of Act No 32 of 1961 respectively) and the franchise (s 3 (1) of the Electoral Act No 45 of 1979), although in all cases there are additional qualifications besides nationality.

4. Quail Report 39.

> 'the semantics of international law are being used to create fictions on levels of constitutional development so as to solve vexing political problems'.[1]

The only exception to this arrangement consists in the limited local government rights afforded by the Community Councils Act[2] to both black nationals and resident statutory aliens; but while this feature is at odds with the internal logic of the government's citizenship policy, it should be seen in the light of the very limited functions and powers of the community councils.[3]

As far as the non-political rights of citizenship are concerned the government has not been prepared to take the national/alien distinction to the same logical conclusion as with political rights, although the distinction has given it new forms of control and manipulation.[4] The Status Acts include a provision purporting to retain all 'existing rights, privileges or benefits ... except as regards citizenship'[5] for those denationalised thereby, provided they were resident in the republic at the commencement of the respective acts. Apart from the fact that this proviso affects only the present generation of republican residents and does not avail residents of the national states, its scope is by no means clear.[6] In the light of the preceding

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1. M. Wiechers and D.H. van Wyk 'The Republic of Bophuthatswana Constitution' 1977 SAYIL 85 at 86. Booysens (op cit 401-402) is the most extreme in arguing that relationships between South Africa and independent homelands should be seen purely in terms of international law concepts. Wiechers (Staatsreg (3 ed, 1981) 502) rightly rejects this approach.
2. Act No 125 of 1977 (s 3(5)); on the face of it future generations of statutory aliens would not acquire these rights. There are precedents for allowing resident aliens to participate in local government elections, for example the Irish Republic and Switzerland (in some cantons).
3. See above, 179-182.
4. N. Stultz (Transkei's Half Loaf (1980) 110ff) emphasises that many of the consequences of homeland independence and denationalisation have been deferred to a future uncertain date.
5. S 6(3) of the Transkei, Venda and Ciskei Acts and s 6(4) of the Bophuthatswana Act.
6. See Wiechers op cit 390-393; Booysens op cit 409-410.

analysis it has no bearing on the political status of those to whom it applies, but it could hardly be said they do not become aliens because of this provision.[1] In the only case in which it has been judicially interpreted[2] it was held that this provision preserved an individual's right to permanent residence in the republic,[3] notwithstanding the passing of the Status of Bophuthatswana Act. It also appears that the so-called 'section ten rights' of blacks to reside in urban areas[4] were intended to be preserved, and in 1978 the legislature narrowed the definition of 'foreign blacks' (who do not qualify for 'section ten rights') so as to exclude the present generation of statutory aliens;[5] 'section tenners' are in turn eligible for other rights, such as home ownership under the ninety-nine year leasehold scheme.[6] However, all future generations of statutory aliens will be in the same position as foreign aliens, and in terms of the present legal order will require individual administrative approval or a general ministerial exemption[7] in order to reside permanently in urban areas. Some indication of the government's intention can be gleaned from the treaties and conventions entered into between the re-

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1. Cf W.H.B. Dean 'A Citizen of Transkei' 1978 CILSA 57 at 58.
2. Ex parte Moseneke 1979 (4) SA 884 (T). It is not certain that this generous interpretation would extend to other issues such as deportation.
3. That is for the purposes of the Attorneys Admission Act No 23 of 1934 (since repealed), but this does not necessarily include 'permanent residence' for other matters such as naturalisation.
4. S 10 of the Black (Urban Areas) Consolidation Act No 25 of 1945.
5. S 12 of Act No 25 of 1945 as amended by Act No 12 of 1978.
6. S 6A of Act No 25 of 1945; in terms of s 1 of this Act the scheme avails only those with s 10(1)(a) or (b) 'rights'. In Rikhoto v East Rand Administration Board and anor Case No 9290/81, 22 Sept 1981 (WLD) it was held for the first time that contract workers could acquire s 10(1)(b) 'rights'. In terms of s 6A(5)(c) leasehold rights can be let or bequeathed only to 'qualified persons' and thus not even to a wife or child who qualifies in their own right for urban residence under s 10(1)(c). Cf Komani v Bantu Affairs Administration Board 1980 (4) SA 448 (AD) which reversed the decision in Komani v Bantu Affairs Administration Board 1979 (1) SA 508 (C). See M.L. Dixon 'Black Residence Rights: The Appellate Division on Section 10(1)' 90 (1981) SALJ 42-55.
7. In terms of ss 12 and 41A respectively of Act No 25 of 1945; there remains an administrative discretion to reverse both types of concession.

public and the national states which regulate matters such as the sojourn of statutory aliens in South Africa, and the crossing of inter-state boundaries,[1] and the statutory provisions purporting to buttress such treaties.[2] But none of these rights or privileges are inviolable and they could be abolished at any time by the South African government on an ad hoc or systematic basis to give greater effect to the national/alien distinction.[3]

The extent of the new forms of control afforded to the South African government can be shown in relation to the single issue of influx control. Historically the movement of blacks generally, and into urban areas in particular, has been statutorily regulated. The main contemporary source of influx control is the Black (Urban Areas) Consolidation Act,[4] section ten of which prevents blacks from settling in prescribed urban areas unless they qualify in terms of birth, long employment or dependence on someone qualified in their own right; this provision is complemented by section 29 of the act, which allows for the removal of

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1. See Booysens op cit 412-417; the Quail Report 40; J. Dugard 'South Africa's "Independent" Homelands: An Exercise in Denationalisation' 10 (1980) Denver Journal of International Law and Policy 11 at 31-2. Against the background of the Quail Report's unequivocal rejection of the citizenship aspects of the earlier Status Acts it was expected that the Ciskei would demand a different arrangement, but it accepted the standard-form Status Act which gave effect to none of the commission's recommendations. Instead a convention was entered into between the two governments retaining for Ciskeian nationals residential rights, free movement across boundaries, preferential employment opportunities, use of community benefits, and social benefits. It was announced that other national states could acquire similar privileges and that the convention might be re-enacted in the constituent charter of the constellation of states. See House of Assembly Debates vol 9 col 4939-4943 (28 September 1981).

2. But individuals derive no rights from the treaties (Pan American World Airways Incorporated v SA Fire & Accident Insurance Co Ltd. 1965 (3) SA 150 (AD)); in Maluleke v Minister of Internal Affairs 1981 (1) SA 707 (B.S.C.) the subordinacy of these treaties to national law was emphasised by the Bophuthatswana Court which upheld action taken under the Bophuthatswana Aliens Act against the applicant, a South African national.

3. The Designated Neighbouring Countries Act No 41 of 1978 empowers the State President to proclaim the provisions of the Act applicable to any independent state, thereby causing laws relating to entry into, sojourn in and departure from the republic applicable in respect of such state's nationals only in so far as they are not inconsistent with treaty agreements between the two countries. The act is a sequel to an agreement between the republic and Bophuthatswana, but does not provide immunity against unilateral rescission of these agreements. See D.H. van Wyk 'The Ebb and Flow of South African Citizenship Law' 1978 SAYIL 148 at 149-150.

4. Act No 25 of 1945.

blacks from urban areas, including those who qualify under section ten, if there is a finding at an administrative hearing that they are 'idle and undesirable'. The implications of the national/alien distinction for this arrangement are that it provides more effective mechanisms of influx control and gives the system greater apparent legitimacy. Thus not only can the movement of statutory aliens be controlled at border posts with support from the international law principle that a state may prevent aliens from entering its territory,[1] but the policing of such movement is shared to some extent by homeland governments.[2] Moreover for the removal of statutory aliens from the 'common area' the government can make use of the existing non-discriminatory mechanisms for deportation,[3] which do not require the prior hearing involved in section 29 proceedings,[4] and are not subject to judicial review.[5] Again this can be legitimated

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1. D.P. O'Connell vol 2 International Law (2 ed, 1970) 706; I. Brownlie Principles of Public International Law (2 ed, 1973) 505; Booysens op cit 112-3; M. Akehurst A Modern Introduction to International Law (3 ed, 1977) 88. Maluleke v Minister of Internal Affairs 1981 (1) SA 707 (B.S.C.).

2. In view of the financial indebtedness of the national states to South Africa they are likely to accept this function as if acting for the republic on an agency basis.

3. Ss 42-45 of the Admission of Persons to the Republic Regulation Act No 59 of 1972 (s 45 allows the minister to order the deportation of aliens 'in the public interest') and s 14 of the Internal Security Act No 44 of 1950. The former act was used for the deportation of squatters from Nyanga in 1981.

4. The limitations of such an enquiry must be conceded: it is not a judicial hearing, the rules of evidence do not apply, and there is a reversal of the normal onus (s 29(6)(b)). Nevertheless the hearing must be fair. Some guidelines were set out in Moeca v Addisionele Kommissaris, Bloemfontein 1981 (2) SA 357 (O); see also S v Nkabinde 1967 (2) SA 157 (T)), S v Mangena 1978 SA 585 (T).

5. Orders under s 29 are reviewed by a Supreme Court judge who may set aside or vary them; in the course of such reviews the judiciary has commented on the harshness of the process and its consequences. See Hashe and Others v Cape Town Municipality and Others 1927 AD 380, S v Nkabinde 1967 (2) SA 157 (T) and In re Dube 1979 (3) SA 820 (N). On the other hand there exists an ouster clause in respect of decisions taken under s 45 of Act No 59 of 1972 and deportees are not entitled to the audi alteram partem rule or to reasons for the minister's decision. Deportation orders could only be challenged on the notoriously narrow grounds that they were taken in bad faith or that the functionary failed to apply his mind. Union Government v Fakir 1923 AD 466, Nairainsammy v Principal Immigration Officer 1923 AD 673, and see Steyn Uitleg van Wette (5 ed, 1981) 285-289; aliter the position when a permanent residence permit is cancelled (s 8(2) of Act No 1 of 1937): this is a quasi-judicial discretion and the audi alteram partem principle applies. Everett v Minister of the Interior 1981 (2) SA 453 (C)). There is an extreme judicial restraint in respect of deportation orders in the United Kingdom. Schmidt v The Home Secretary /1969/ 1 AER 904.

in terms of basic principles of international law[1] - and these principles also require the national state concerned to readmit its own nationals.[2] Thus the South African government is afforded greater manoeuvrability in controlling the movement of homeland blacks and of regulating the labour force, and can do so without overt reference to factors of colour or ethnicity; in particular, at times of political instability or economic recession statutory aliens can be returned to their national states, in apparent conformity with principles of international law.[3] These new arrangements conform to the Wiehahn-Riekert strategy of abolishing racial divisions in the labour market, but intensifying the system of influx control.[4] On the other hand the government has shown no commitment to treating statutory aliens according to the minimum standards required by international law[5], and the discriminatory legislation applying to black nationals continues to apply to them as well;[6] although they enjoy some preferential treatment over black foreign aliens they are clearly in an inferior public law position to both citizen-nationals and white aliens.

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1. See the references at 503, above. However the right to expel an alien is not as well established in international law as the right to exclude him, and even where the right to expel exists the manner of expulsion can give rise to a claim for compensation.

2. Akehurst op cit 84-85; and see A.C. Evans 'The Political Status of Aliens in International Law, Municipal Law and European Community Law' 1981 International and Comparative Law Quarterly 20 at 21.

3. That the economic system will not allow this to occur on a mass scale is self-evident, but that it occurs on ad hoc and selective bases is shown by the fate of the Johannesburg municipal strikers in 1980 and the Nyanga squatters in 1981. And see the Quail Report 46-48.

4. On the Wiehahn and Riekert reports see above, 265 to 270. The latter report also envisaged individual employers playing a greater role in the enforcement of influx control.

5. International law requires that states treat resident aliens according to the 'minimum international standard', or alternatively the 'national standard', which can be higher or lower than the former. Failing to comply with the applicable standard engages international responsibility. See Akehurst op cit 90-92; Brownlie op cit 509-514; O'Connell op cit 693ff; Booysens op cit 112-113.

6. See the Quail Report 46; Dugard op cit 30-33.

Several aspects of the preceding arrangements show an apparent affinity with the principles of consociationalism. Firstly, as has already been shown, the 'internationalisation' of political relationships through the homelands programme and its citizen features takes on the 'summit diplomacy' dimensions of the consociational model. Secondly, the compulsory conferment of citizenship and then nationality on the various black ethnic groups leads to the creation of statutorily-defined 'segments', for whom self-government and independence resemble forms of 'segmental autonomy'; to further the comparison, members of the segments exercise political rights through the respective segmental authorities, regardless of their place of work or residence, and these authorities have jurisdiction over members of the segment on the basis of the personality principle. And thirdly, the mooted prospect of a common 'constellation nationality' for all inhabitants of the republic and national states, with the retention of separate citizenships of the constituent parts with concomitant political rights, bears some resemblance to a consociational system operating in a nation state. But on closer analysis the comparisons prove to be largely illusionary. The vast difference in quality between citizenship rights in the republic and the national states destroys the notion of 'separate but equal' citizenships; neither the existing dispensation, nor the proposed constellation arrangement, makes any provision for the representation of all citizens in joint political institutions as would be required for a democratic form of consociationalism - in fact particularly at the pre-independence stage inter-segmental contact takes place severally, and not jointly, between representatives of South Africa, on one hand, and the national states, on the other; while there may be some demographic balance between the citizen-blocs, there can be no question of equal bargaining status in view of the republic's complete economic domination of the region; the compulsory conferment of citizenship and nationality is irreconcilable with the

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1. In 1979 the Niewoudt Commission was appointed to investigate nationality and citizenship matters; it reported to the cabinet in 1980 but its recommendations have not been released. It was speculated at the time that the commission would recommend a common confederal nationality but this possibility now seems more remote. In any event it negates the government's standpoint that the national states are fully independent in international law. See above, 283.

consociational principle of free political association and the pluralist model generally;[1] and finally the rigidity of the system is exposed by the Swiss consociational system which allows all citizens political, social and economic rights in their places of domicile, regardless of their communal or cantonal citizenship. And from a narrower institutional point of view the system has many inconsistencies - in fact the citizen/national distinction is consistently applied only is so far as it serves to deprive blacks of political rights in the central government, irrespective of their places of permanent residence or employment. But where the distinction would be dysfunctional to the economic system, or where a-political supra-national matters are concerned, the distinction is not rigidly maintained.

As far as non-blacks are concerned it is clear that whites, coloureds and Indians are all South African nationals, but that there is a difference in each group's citizenship status. In terms of their present political position it would be premature to speak of a coloured or Indian 'citizenship', but to the extent that there are, or have been, subordinate representative institutions for coloureds and Indians it is possible to speak of an inchoate 'citizenship'; and in so far as they have more substantial access to residential, housing, educational and welfare facilities than blacks, it would be possible to designate them part-citizen nationals. But their status is clearly inferior to the full-citizen status of whites. Nevertheless it is clear that the government envisages an enhanced political and socio-economic status for coloureds and Indians in the South African 'common area', and the government's 1977 constitution was based implicitly on the notion of 'separate but equal' political and social rights for whites, coloureds and Indians, al-

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1. See above, 78.

2. Eg statutory aliens are allowed access to industrial areas, to residence rights there, and they may join trade unions. This gives rise to a type of 'economic citizenship' for blacks in the common area.

3. Eg statutory aliens can acquire South African passports and diplomatic protection (see the Quail Report 40 and art 1(a) and (b) of the South African/Ciskei convention - House of Assembly Debates vol 9 col 4940-1 (28 September 1981). This is an unorthodox arrangement, although not without precedent in international law. See O'Connell op cit 691.

4. In 1972 M. Wiechers ('Kleurlingburgerskap in Suid-Afrika' 1972 THR-HR 1-18) predicted in the light of contemporary developments the evolution of a 'coloured citizenship'. The abolition of the CPRC confounded this prediction, but a similar prognosis could be made for 'Indian citizenship' in the wake of the SAIC elections in November 1981.

though this principle was not borne out by the institutional arrangements. Again there is an apparent affinity with the consociational model: each group of citizens would be represented in exclusive 'segmental' authorities, which would have personal jurisdiction over group members regardless of their geographic location. But again the comparison is destroyed by the quality-differential inherent in the nature of the three 'citizenships', the absence of joint institutions representative of all citizens, and the imposed definition of group membership. Yet as long as the national/alien distinction endures for blacks and they are excluded from political rights on the basis of their foreign nationality, it is not inconceivable that the government will give greater institutional effect to the notion of 'separate but equal' citizenships for coloureds and Indians, as they are incorporated consociationally into the central political system.[1] This could even culminate in a single South African citizenship if whites, coloureds and Indians were granted equal electoral rights and equal access to office in joint political institutions, and formal equality in relation to the non-political rights of citizenship.[2] At this stage the significance of the nationality/citizenship distinction would fall away, as all South African nationals would have the status of full citizens.

The preceding analysis shows that matters of nationality and citizenship are fundamental to an understanding of South Africa's constitutional politics and that it is possible to develop a corresponding theory of citizenship. This theory has important implications for the traditional constitutional doctrines analysed in the preceding section (in particular the concept of responsible government), and others not dealt with in this chapter, such as theories of representation and human rights. The analysis shows the significance of the denationalisation process to the government's constitutional strategy - it provides the institutional basis for denying resident blacks political rights in

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1. Cf the institutional alternatives referred to in chapter 7, above.

2. It may not be entirely coincidental that the first attempts to construct a coloured and Indian 'citizenship' began soon after the denationalisation of blacks had commenced. By 'depluralising' the polity in this way the government was given greater scope for making innovations in the 'non-black' political system.

the 'common area', which in turn provides the political leeway to incorporate coloureds and Indians more closely into the political process. Furthermore it has both a legitimising and an economically functional role, and will not be readily departed from by the government. And although it shows some affinity to consociational theory at both the intra-national and supra-national levels of government, it is nevertheless antipathetic to the fundamental principles of consociational democracy.

6. Conclusion

The analysis in this chapter has shown that the trends in South Africa's constitutional development necessitate an updating of constitutional theory in several important areas. Although consociationalism is used at times as an explanatory and legitimising model for this development, it does not in itself make any contribution to constitutional theory. In fact the government's embracement of various forms of consociational politics has contributed to the widening gap between constitutional theory and political reality. Any form of constitutional change in South Africa, including the piecemeal introduction of the government's 1977 constitution, has implications for the traditional doctrine of parliamentary supremacy. The prevailing trends in modern systems of government, including South Africa's, necessitate the developing of new notions of governmental responsibility and the judicial role. And developed theories of citizenship, both normative and South African-specific, are indispensible to an understanding of the government's constitutional proposals and their shortcomings. On all these matters the emphasis has been mainly on highlighting aspects requiring the attention of constitutionalists and public lawyers, rather than on prescribing alternative theories.

CONCLUSION

AND

SUMMARY

CHAPTER 10

SOUTH AFRICA AND CONSOCIATIONALISM - CONCLUDING REMARKS

1. Introduction

In the general introduction to this work reference was made to the legitimation crisis facing the state system in South Africa. As part of its response to this crisis the government has embarked on a wide-ranging process of constitutional change, which has emphasised its own perception of the need for some type of rational-legal legitimacy. This process has not, however, followed the historical patterns of liberal-democratic constitutional development, which have involved the gradual introduction of the democratic franchise into the liberal state.[1] Instead the government has articulated the need to move away from that tradition of liberal constitutionalism which has been most evident in South Africa, namely Westminster parliamentarianism, to a more appropriate *sui generis* constitutional system. The government's present conception of this system is a combination of partition and the triple-parliament plan, with eventual overarching co-ordination in a constellation arrangement. The institutional basis for this system has been developed over the last few years, although it in fact has its roots much further back in South Africa's constitutional history. But because these constitutional developments have continued to deny excluded groups access to the political system they have made no material contribution to the resolution of the legitimacy crisis, and have probably aggravated it.[2]

In rejecting the traditional forms of parliamentarianism and presidentialism as normative models because of their association with a universal franchise and majoritarianism, the government has made some use of consociationalism as a new legitimating ideology. However, the analysis in this work has shown that

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1. See C.B. Macpherson *The Real World of Democracy* (1966) 1-11.

2. See S.M. Lipset *Political Man* (1959) 80: 'Political systems which deny new strata access to power except by revolution also inhibit the growth of legitimacy by introducing millenial hopes into the political arena.'

although the terminology and some of the trappings of consociationalism are becoming increasingly apparent, neither the process nor the substance of contemporary constitutional developments measures up to the essential principles of consociational democracy. The prevailing trend is for the white government to consult formally or informally with nominated or elected 'representatives' of the other statutorily-defined groups and, where necessary, to institutionalise these arrangements through the sovereign white parliament; while these processes have some of the 'élite cartel' dimensions of consociationalism, they do not have a representative basis, nor do they involve any significant increase in political participation for political outsiders. At the most these developments have given rise to a form of 'sham consociationalism',[1] but in view of their extensive divergences from the principles of consociational democracy it might be questioned whether concepts of consociationalism should be used to describe them at all. In this chapter attention is given to the alternative theory of 'control', and it will be shown that control has a useful analytical function in describing the present system in South Africa.

As far as future constitutional developments are concerned it has been suggested in this work that the government will continue to indulge in forms of consociational engineering, as it adapts with a series of gradualist reforms to the range of pressures which will be exerted on the state system. Writing in 1979 Lawrence Schlemmer[2] predicted that in the 1980's,

> 'The government's constitutional proposals of the late seventies will have flowered into a complex consociational arrangement involving separate legislative chambers for whites, coloureds, Indians (or coloureds and Indians together), certain urban Africans, linked together by a painfully cumbersome joint cabinet ... with white cabinet ministers enjoying at least a parity of numbers, as well as a veto or blocking right. This

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1. T. Hanf, H. Weiland and G. Vierdag South Africa: The Prospects of Peaceful Change (1981) 410, and see above, 337.

2. South African Society in the 1980's: An Exercise in Hazardous but Concerned Speculation (CASS, University of Natal, 1979) 18.

> executive will in turn be linked via another federal structure to certain non-independent and enlarged homelands ... A "supreme council" or body of a similar description with a white executive president and one or two African executive vice presidents will be the highest tier of government, projecting great prestige to the outside world but controlled pretty effectively by the white power segment in the lower-level executive council.'

Developments along these lines would involve a further continuation of previous constitutional trends and none of the constitutional changes of the early 1980's detract from the probable accuracy of Schlemmer's prediction. Other writers have also suggested that new forms of sham consociationalism will emerge in the future and that there is unlikely to be an evolutionary transition to genuine consociationalism. Nevertheless it is relevant to look briefly at consociationalism from a different perspective, namely as a 'political crisis' model.[2]

Finally in the light of this work's constitutional-juridical approach to the subject-matter, some concluding remarks are made in this chapter on constitutionalism and consociationalism.[3]

2. Consociationalism Versus Control

The legitimacy crisis affecting the state system in South Africa has resulted in the use of a high degree of coercion by the government to maintain the stability of the system, but it is clear that the stability cannot be explained solely in terms of coercion. The forms of sham consociationalism which have been adopted have been used not only to legitimise the present system, but also to stabilise it through the co-optation of various strata of élites. A sense of perspective can be given to this arrangement by referring to Lustik's theory of 'control',[4] which he presents as an alternative explanation for the persistence over time

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1. Hanf, Weiland and Vierdag op cit 419.
2. Below, 520-524.
3. Below, 524-527.
4. I. Lustik 'Stability in Deeply Divided Societies: Consociationalism versus Control' 1979 World Politics 325-344.

of deeply-segmented socio-political systems. Control incorporates elements of both consociationalism and coercion. It shares with consociationalism the pluralist notion of deep and continuing divisions in a society and intense rivalry between the different segments for social, economic and political resources. But whereas the consociational approach emphasises the factors of compromise and consensus among leadership élites, which lead to a coalescent political process, the control approach focuses on the superior power of one segment, which is used to constrain the political activities and opportunities of other rival segments; the dominant segment can enforce stability by sustaining this manipulation over time. And the control approach emphasises the role of coercive techniques in maintaining a stable pattern of intergroup relations, but also accommodates non-coercive techniques.

Lustik is not the first to use concepts of control or domination to explain why plural societies continue to function,[1] and the mechanisms of control he refers to show some convergence with class theory. Lustik, however, attempts to make a contribution to a developed theory of control, and to compare and contrast this with consociational theory. This has a useful analytical purpose as far as South Africa is concerned, in that it highlights the combination of control and consociational techniques which are used by whites to retain their political domination over other groups. This can be illustrated by referring to the seven conceptual distinctions which Lustik draws between consociationalism and control.[2] The distinctions relate to the following matters:

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1. Cf M.G. Smith's concept of 'differential incorporation' (at 71, above); A. Rabushka and K. Shepsle (Politics in Plural Societies (1972) 90) refer to the 'dominant majority configuration'; P. van den Berghe ('Pluralism and the Polity; A Theoretical Exploration' referred to at 72, above) emphasises the economic techniques of control. See also the central theme of H. Adam's work Modernizing Racial Domination (1971) 15-16.

2. Lustik op cit 330-332.

(i) The criterion that effectively governs the authoritative allocation of resources

In the consociational system this is 'the common denominator of the interests of the segments as perceived and articulated by their respective élites', while in the control system it is 'the interest of the dominant segment as perceived and articulated by its élite'. On this aspect South Africa unquestionably follows the control approach, as evidenced by the superior resources allocated to the dominant white group: residential, educational, health, recreational, welfare and trading facilities.[1] While there has been an official commitment to the equalisation of facilities in some areas, such as education, there has to date been no material progress in this direction.

(ii) The linkages between the segments

In the consociational system this takes the form of political or material exchanges, that is 'negotiations, bargains, trades and compromises', whereas in the control system the linkage is penetrative in character and the dominant group extracts the property, political support and labour it requires from the other groups, and delivers what it sees fit. Again South Africa conforms more closely to the control system: this is particularly evident at the political level, where instead of genuine negotiation there tends to be sporadic consultation with subordinate groups to give credibility to decisions taken in advance by the dominant group, but it is also evident in other areas - for example, the functional role of the homelands in relation to labour resources and the white-dominated economic system. However, there may be some tentative steps towards negotiational linkages in institutions such as the president's council, and in the industrial field.

(iii) The significance of bargaining

In the consociational system bargaining is 'a fact of political life' and a sign that the system is operating successfully, whereas in the control system genuine bargaining would signal 'the breakdown of control as the means by which the political stability of the system is being maintained'. The relevance of this

1. See generally S. van der Horst and J. Reid (eds) Race Discrimination in South Africa - A Review (1981).

distinction in South Africa is highlighted by the following observation of de Kadt:[1]

> '... the government is not prepared to allow oppositional groups - especially those concerned with attempts to articulate and mobilize black interests - to grow. This means that whatever form of concessionary politics they are likely to engage in will tend to be of a manipulative and co-optive sort rather than a kind that is premised on negotiation. The point about a "politics of negotiation" is that it requires the growth of organisations and movements whose interests are in conflict with those of the dominant group and with which the dominant group can bargain over the contents of the latter's rights claims. In other words, the "politics of negotiation" implies a "politics of autonomy" in terms of which interest and pressure groups can emerge free from government tutelage. There seems to be little evidence that the government is making much provision for the emergence of such groups. If anything, it seems as though the strategy for which they are opting is one that involves a substantial amount of control over all political activity - whether on the labour or on any other front.[2] This process of granting concessions on its own terms rather than establishing the basis for negotiating change seems also to be inherent in the present constitutional reconstruction.'

In South Africa the emergence of open-ended bargaining would signify the end of what has been referred to in this work as the period of 'government-controlled constitutional change', and in whatever form it might occur would have a similar significance to that of the Lancaster House conference in Zimbabwe's constitutional development. As has already been indicated such an eventuality appears far distant on South Africa's political horizon.

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1. Raphael de Kadt Democracy and Development - The South African Challenge (unpublished paper, University of Natal, 1981) 6-7.

2. De Kadt seems to understate the case here, in that many political organisations have actually been proscribed or subdued by the government. See above, 91.

(iv) The role of the official regime (that is the public service, courts, educational system, police, armed forces).

In the consociational system it must 'translate the compromises reached between sub-unit élites ... into appropriate legislation and effective administrative procedure (sic) and enforce these rules without discriminating', whereas in the control system the official regime is the 'legal and administrative instrument of the dominant group'. Here the convergence with class theory is apparent, as it is a fundamental principle of the marxist perspective that the state apparatus is an instrument of the capitalist class in its domination of the economically subordinate classes.[1] But even within the pluralist perspective it has been suggested that the predominantly white bureaucracy in South Africa is an administrative instrument of the white Afrikaner group,[2] and although constitutionalists have historically not questioned the independence and freedom from bias of the judiciary,[3] it is increasingly being accused of executive-mindedness.[4] It is also noticeable that within the confines of white party politics there was a recent suggestion of partisanship by the defence force.[5] Thus although South African constitutional theory is based on the notion of an impartial bureaucracy and an independent and unbiased judiciary it can be said that, at least as far as their composition and orientation are concerned, they reflect the interests of the dominant white group. Therefore, as far as the official regime is concerned South Africa tends to follow the control rather than the consociational system.

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1. See eg R. Milliband The State in Capitalist Society (1969) 107-130; A. Szymanski The Capitalist State and the Politics of Class (1978) 20ff.

2. See H. Adam and H. Giliomee The Rise and Crisis of Afrikaner Power (1979) 61-82; see also S. Greenberg Race and State in Capitalist Development (1980) 401-403.

3. See for example the traditional views in H.R. Hahlo and E. Kahn The South African Legal System and its Background (1973) 38-48.

4. See J. Dugard's section on the judicial process in Human Rights and the South African Legal Order (1978) 279-390. However South African constitutionalists have yet to produce a critical study like that of J.A.G. Griffith - The Politics of the Judiciary (1977).

5. On 12 February 1980 the Defence Force issued a document entitled 'Psychological Action Plan : Reference Budget Debate' which was allegedly aimed at nullifying the parliamentary opposition's criticism of the defence vote. The chief of the Defence Force appointed a board of enquiry under a former chief, H. Biermann, to investigate the matter, but the board's report was not made public. See House of Assembly Debates vol 8 col 3325 (24 March 1980).

(v) The type of normative justification for the continuation of the political order espoused by the regime's officials.

In the consociational society the system is likely to be legitimised in terms of the common welfare of all groups and 'warnings of the chaotic consequences ... of consociational breakdown', whereas the control system is likely to be justified in terms of the interests of the dominant group. This distinction, however, requires further refinement, in that the regime's officials in a control system may have a certain public justification for the continuation of the system, but have a different private or inarticulated justification. Historically the South African system was justified purely in terms of white interests, whereas the subsequent justifications tended to be less white-group specific - for example 'western civilization' or 'Christian principles' or 'national security'.[1] The present system and policies, moreover, are sometimes justified along consociational lines, in terms of the common welfare of all groups, the need to protect group identities, and the adverse consequences for all of a breakdown in the existing socio-economic arrangement. But here the public legitimisation runs far ahead of actual constitutional and political changes, and it can be assumed that the regime's private justification for the system accords more closely with the control model.

(vi) The character of the central strategic problem that faces leadership élites.

In the consociational system all élites must effect compromises without jeopardising the integrity of the whole system, and they must maintain sufficient segmental cohesion and discipline to be able to enforce such decisions. But in the control system the different sets of élites have different strategic problems: élites of the dominant group must 'devise cost-effective techniques for manipulating subordinate groups', while those of the subordinate groups must 'cope as satisfactorily as possible with the consequences of subordination' and 'evaluate opportunities for bargaining or resistance'. In South Africa the roles of the

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1. Cf Adam's views on the 'ideology of survival' in H. Adam and H. Giliomee The Rise and Crisis of Afrikaner Power (1979) 128ff. During 1980 and 1981 the 'total onslaught' rhetoric became increasingly prevalent.

respective élites have generally conformed to the asymmetrical pattern of the control system, and for those subordinate élites that do exist, one of the central strategic problems has been whether or not to participate in official structures.[1] The recent incorporation of subordinate élites into institutions such as the president's council and South African Indian Council has involved some movement towards the symmetrical problem pattern of the consociational system. However, a major difference here is that many non-white élites are either nominated by the dominant group, or elected with very little popular support; furthermore there can be no real problem of 'internal group discipline' without a system of constituency politics. There is even evidence that the nominated white élites on the president's council were unable to gain acceptance among the white group for a compromise decision reached in that institution.[2]

(vii) Finally, the visual metaphor appropriate for consociationalism is 'a delicately but surely balanced scale', while that for a control system is 'a puppeteer manipulating his stringed puppet'. In terms of existing constitutional realities the control metaphor is clearly more appropriate for South Africa, and the prospect of even a mixed metaphor does not seem high during a period of government-controlled constitutional change.

Lustik's seven categories are not necessarily exhaustive of the conceptual differences between consociational and control systems, but they highlight the fact that in South Africa there is an overwhelming preponderance of control over consociational features, although consociationalism is used explicitly and implicitly to justify current constitutional developments. The control is exercised through a variety of social, economic and political mechanisms, and in the preceding chapters some of the main constitutional factors facilitating control have been identified: the homelands structures and the nationality/citizenship arrangements which divide the black constituency and 'depluralise' the

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1. See above, 339-340.

2. In October 1981 the president's council recommended that the group areas of Pageview and District Six be returned to Indians and coloureds respectively; the government, apparently under pressure from conservative factions, accepted the recommendation in relation to only a small portion of District Six. See above, 345.

South African polity; the incipient constellation of states, which in its developed form will rationalise and extend white control over the economy of the sub-continent, and over other matters of 'joint interest' to the national states and the republic; the president's council, which enables the government to control constitutional developments and serves as a legitimising agent for the government's socio-political and economic reforms; the government's proposed new constitution, which will consolidate the non-black constituency while retaining effective control for whites; and the community councils, which are intended to stabilise the position of urban blacks. In addition, within the confines of white party politics various constitutional amendments have added to the government's resources for controlling existing or potential opposition parties. These patterns of control, with their negative implications for personal freedom and civil liberties, are likely to endure during a period of government-controlled constitutional change, or even be extended, as was the case in some respects with the 1979 Draft Constitution Bill.[1] There may even be an attempt to use quasi-consociationalism to disguise the fact that non-white élites are being made to share control in order to stabilise and legitimise the system.[2] This will tend to weaken the prospects of consociationalism over time, because the control system militates against the emergence of opposition parties and authentic leaders.

However, as Lustik points out,[3]

> 'One society can contain both kinds of relationships between different sets of groups. For example, two groups which relate to one another in the consociational mode, might, in their joint relationship to a third group, adopt and enforce a relationship of the control type.'

Lustik cites Israel as an empirical example of such an arrange-

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1. Cf Kuper's much earlier views that the system of control is not self-sustaining but relies increasingly on force and repression. L. Kuper 'Political Change in White Settler Societies: The Possibility of Peaceful Democratization' in L. Kuper and M.G. Smith (eds) Pluralism in Africa (1971) 182.

2. Cf Hanf, Weiland and Vierdag op cit 419.

3. Op cit 335-336; and see A.J. Venter 'n Kritiese Ontleding van die Konsosiasiemodel van Arend Lijphart, unpublished M.A. thesis, Unisa (1980) 168.

ment,[1] but the same situation would prevail in South Africa if the relationships between whites, coloureds and Indians came to reflect the consociational pattern more faithfully, but the composite non-black group maintained a control relationship over blacks; and even the latter relationship could be further divided, so as to distinguish between the quasi-consociational relationships which are tending to develop between the government and the self-governing and independent national states, and the more overtly control relationship it has with the citizens and nationals of those states resident within the republic. And in all these cases various degrees of coercion would be blended with consociationalism and control, to maintain overall political stability.

Finally, in view of the limited relevance of consociationalism in the South African context, it is appropriate to note that Lustik suggests that control may even serve as a normative model:[2]

> 'In deeply divided societies where consociational techniques have not been, or cannot be, successfully employed, control may represent a model for the organization of intergroup relations that is substantially preferable to other conceivable solutions: civil war, extermination, or deportation.'

However, no such prescription is made for South Africa, inter alia, because the present forms of control are largely responsible for the legitimation and other crises facing the state system.

3. Consociationalism as a 'Political Crisis' Model

Constitutional outcomes are intimately related to the timing of socio-political developments. At present the white government has a virtual monopoly of bargaining strength, and it has the political power and legal competence to introduce unilaterally a wide range of constitutional reforms, but the actual rate and

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1. Op cit 336. While consociational techniques are used to stabilise intra-Jewish political relations, Jewish-Arab relations are conducted on a control basis. For references to Israel as a semi-consociational system see above, 116.

2. Ibid.

scope of constitutional change will be determined by the real and perceived internal and external pressures operating on the system. In the past blacks have had insufficient bargaining strength to induce whites to share political power and have exerted relatively little pressure on constitutional changes; their main strength has lain in their ability to confer legitimacy on, or deny it to, institutional innovations introduced by the government. This position will change over time, but it is nevertheless possible that in the short-term the government will be more sensitive to internal pressures exerted by anti-reform groups, than to the combined internal and external pressures for reform: thus pressure from the reputedly strong anti-reform factions within the National party and Afrikanerdom, the predominantly conservative white electorate, the powerful and conservative bureaucracy, the influential militarist-minded members of government, and even the growing number of non-white élites working within existing structures, might impose severe restraints on the government's reformist policies. This would force the government to rely increasingly on coercive and control measures, at the expense of consociational measures, to maintain the system. A no-change situation would lead in turn to an intensification of external diplomatic and economic pressures on the system, and an increase in internal pressures caused by political instability, industrial action, and the security situation. But at that stage it would be more difficult than at present for the government to introduce a consociational-type arrangement, because this would be seen by subordinate groups as a reactionary rear-guard measure designed to maintain white political control.[1] The rejection of belated changes would require an intensification of control, and particularly coercive, measures to stabilise the political system; this could lead to an intractable Northern Ireland-type situation which could only be terminated by abdication or violent revolution, in which case there would be little institutional continuity from the past and the new constitutional order would probably show little evidence of liberal-constitutionalism or consociationalism. In short the prospects of consociationalism are closely related to the timing of constitutional change.

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1. Cf Hanf, Weiland and Vierdag op cit 419.

What requires consideration in the light of these factors is the relevance of consociationalism as a 'political crisis model'.[1] This eventuality pre-supposes a massive destabilisation of the socio-political system through a combination of social and political disturbances, industrial unrest, sabotage and insurgency, to the point where the state is hardly able to keep the system functioning through coercive, control and quasi-consociational measures. Where the government perceived the costs of continuing in this situation to be greater than the probable costs of open-ended negotiation with its adversaries to terminate it, the stage of the 'political crisis model' would be reached. This would be the notional 'no-win' situation, in which the perceived bargaining strengths of the respective parties would be equal, and the period of government-controlled change would come to an end.

The Zimbabwean experience[2] suggests the possibility of two distinct phases in this process. At the first phase the government might incorporate internal non-white leaders directly into the cabinet[3] to form a grand coalition with effective control over the political system; this would have strong consociational features but would probably lack the accommodation of legitimacy needed to resolve the crisis situation. This could lead to a second, and more protracted phase, during which the authentic leaders of the most significant internal and external groups would negotiate on a future constitutional dispensation. Whether this took place at a single 'national convention' or a series of connected conferences, it would involve a difficult and drawn-out bargaining process by leadership élites behind closed doors. Genuine negotiation would presuppose a coalescent style of decision-making involving a series of reciprocal concessions, compromises, package deals, and 'log-rolling',[4] facilitated by the perceived equality in bargaining strength of the participants. This would require the commitment of participating élites to

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1. Cf L. Schlemmer in L.J. Boulle and L.G. Baxter (eds) Supplement to Natal and KwaZulu: Constitutional and Political Options (1981) 59.

2. See above, 234-249.

3. See above, 336.

4. Cf A. Lijphart Democracy in Plural Societies (1977) 40-41; E. Nordlinger Conflict Regulation in Divided Societies (1972) 27-29.

reaching an accommodation which would be impossible at the mass level, and they would face the common strategic problem of acquiring acceptance of these compromises from their respective followers after, and not before, they had been agreed on. In all important respects this process would show an affinity with consociationalism - an example of the 'self-denying hypothesis' resulting from the mutual perceptions of the costs of a continued siege-situation.

The important feature of this process would be the 'joint coalition' formed by leadership élites to break the crisis deadlock. This would be likely to endure for some time without extensive popular political participation or a developed political infrastructure, and without any general acceptance of consociationalism as a normative model. But inevitably the coalition would be compelled to institute more permanent decision-making bodies, and these would again be likely to embody the constitutional structures and processes associated with consociationalism. This must be seen in the light of the fact that the main constitutional issue[1] is likely to be seen as the accommodation of both black and white non-negotiables: a significant share in the political process at all levels of government, and an alternative to a unitary system operating on a winner-takes-all basis, respectively. The grand coalition, proportionality, mutual veto, and possibly segmental autonomy principles, are likely to be applied through corresponding constitutional features: joint executives, proportional electoral systems, constitutinal entrenchment, a devolution of authority, and a justiciable bill of rights. These features would probably be combined with some institutional features of the past, although one of the many imponderable factors would be the future constitutional status of the national states.

Thus consociationalism could have particular relevance as a 'political crisis' model, both in respect of the initial initiatives to resolve the crisis, and the nature of the resultant

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1. This is to assume a measure of cohesiveness in both the black and white constituencies, which probably will not exist. But in the light of past discriminatory practices, constitutional issues are likely to be seen in black/white terms. In Zimbabwe whites were seen as a cohesive group requiring protection through guaranteed parliamentary representation, etc.

constitutional system. It could be more authentically implemented at that stage than during the present phase of government-controlled constitutional change with the government making concessionary constitutional changes on a piecemeal basis, although to endure it would require eventual acceptance as a normative model. While the prospects for consociationalism will deteriorate over time, a point of destabilisation could be reached where it provides the only option short of abdication or revolution. Nevertheless this remains a remote possibility in the light of the government's existing dominance over the political, economic and strategic resources of the country.

4. Consociationalism and Constitutionalism

The constitutional-juridical perspective from which the subject-matter of this work has been approached necessarily provides only a limited view of a complex overall picture. The emphasis has tended to be on legal and institutional matters and not on the dynamic economic and political forces behind constitution-making.[1] Even consociationalism, which is a concept of political sociology and not constitutional law and which does not provide an analytical constitutional model, has tended to be reduced to constitutional terms to conform with this disciplinary approach. But, notwithstanding these limitations, this one-dimensional approach may be justified on several grounds: the government has so defined the political agenda that the focal socio-political issue in South Africa has become the constitutional accommodation of whites, coloureds, Indians and blacks;[2] the legitimation crisis which the state system faces exists predominantly at the highly symbolic constitutional level; and if any form of democracy is to emerge in South Africa without extensive violence it is likely to be a form of constitutional

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1. Cf I. Duchacek Rights and Liberties in the World Today (1973) 8-9.

2. Cf E. Schattscheider's well known statement, 'All forms of political organisation have a bias in favour of the exploitation of some kinds of conflict and the suppression of others, because organisation is the mobilisation of bias. Some issues are organised into politics while others are organised out' (The Semi-Sovereign People: A Realist's View of Democracy in America (1960) 71). See S. Lukes Power: A Radical View (1974) 16ff.

democracy.[1] Thus the constitutional system, no matter how unrealistic in the sense of 'nondescriptive of who actually governs',[2] has a definite contemporary value.

While constitutions are both enabling and restraining, the real emphasis of constitutional democracy is on the restraint of power through its legal limitation, dispersal, devolution and diffusion, and on making the government responsible to the governed. Consociationalism, with its heavy emphasis on the restraint of power, is easily compatible with the broad principles of constitutionalism - indeed consociationalism 'presupposes a deep sense of constitutionalism'.[3] But consociationalism is restricted in its concern to public power, and the rules of the political game; it is compatible with a range of social and economic systems, and if a favourable constitutional framework for constitutionalism were introduced in South Africa this would not necessarily involve any restructuring of the socio-economic system.

Unfortunately, even with their limited scope many of the principles of constitutionalism have been undermined by the modern phenomena of the administrative and corporatist state. Our constitutional theory was conceived for a very simple form of the plural society[4] which no longer exists today, and the problem is compounded in South Africa by the emergence of a managerial style of government which bypasses many forms of responsibility, and by the situational nature of many constitutional rules.[5] In some respects consociationalism also compounds the problem - it tends to blur lines of responsibility and accountability, and diminish the extent of popular participation in government. And in the South African context as long as the state uses consociationalism as a legitimating ideology while in

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1. R. de Kadt Democracy and Development - The South African Challenge (unpublished paper, University of Natal, 1981) 2-6; he also suggests that the present economic circumstances favour the establishment of a constitutional democracy, although there is clearly no sign of the political liberalisation necessary for its attainment.

2. C.J. Friedrich Constitutional Government and Democracy (4 ed, 1968) 583.

3. M. Wiechers 'Possible Structural Divisions of Power in South Africa' in J.A. Benyon (ed) Constitutional Change in South Africa (1978) 112.

4. L.G. Baxter 'Constitutionalism, Bureaucracy and Corporatism' in Boulle and Baxter op cit 75 at 81f.

5. See the author's review of Staatsreg (3 ed, 1981, by M. Wiechers) to be published in 1982 THR-HR.

reality maintaining the existing system through coercive and control measures, constitutional theory will be threatened by an ever-increasing irrelevance. This requires of public lawyers a thorough reassessment of traditional notions of constitutionalism, with the assistance, where necessary, of the functional methods of the social sciences, and an energetic adaptation of constitutional theory.

But the challenge extends beyond a mere updating of constitutional theory. South African constitutionalists will have to begin analysing more closely the nature of the relationship between law and society, and whether law can be a vehicle of change or whether material changes must precede legislative changes.[1] This of course is to enter a much wider intellectual enquiry, but one which will have to be entered if constitutionalists wish to make a valuable contribution to the current constitutional debate and to keep that debate in touch with South Africa's economic, political and social realities. Barrington Moore has said[2] that historically democracy has developed as,

> 'a long and certainly incomplete struggle to do three closely related things: (1) to check arbitrary rulers, (2) to replace arbitrary rulers with just and rational ones, and (3) to obtain a share for the underlying populations in the making of rules. The beheading of kings has been the most dramatic and by no means the least important aspect of the first feature. Efforts to establish the rule of law, the power of the legislature, and later to use the state as an engine for social welfare are familiar and famous aspects of the other two.'

While constitutions are considered 'too serious a business to be left to constitutional lawyers alone',[3] the developments described by Barrington Moore require purposive constitution making in

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1. While constitutionalists in this country have not ignored these matters altogether (eg W.H.B. Dean 'Discussion' in Benyon op cit 86f) they have not given it sufficient attention; if anything they tend to show unconscious deference to Nkwumah's well-known adage, 'seek ye first the political kingdom, and all things else shall be added unto you' (see B.O. Nwabueze Constitutionalism in the Emergent States (1973) 161), although not without some justification in the light of South Africa's political history. Of the many recent books on this matter see T. Mathieson Law, Society and Political Action (1980).

2. Barrington Moore Social Origins of Dictatorship and Democracy (1966) 414.

3. Duchacek op cit 9.

which an important role must be played by constitutional lawyers. This role must be seen against the need for any movement towards democracy in South Africa to involve changes in behaviour, attitudes and structures.[1] As Du Toit has pointed out,[2] it is easier to change values and attitudes than structures, but structures can in turn embody values and constitute the means in terms of which values can be mobilised.

Constitutionalists have in the past tended to be over sanguine about the role of constitutional rules and conventions, and their relevance for society. The high-point in constitutional optimism can be found in a provision of the Mexican constitution which reads,[3]

> 'This constitution shall not lose its force and effect, even if the observance is interrupted by rebellion. In the event that a government whose principles are contrary to those that are sanctioned herein should become established through any public disturbance, as soon as the people recover their liberty its observance shall be re-established ...'

A very different view was expressed by Walter Bagehot in typically extravagant style, namely 'the men of Massachusetts could work any constitution'.[4] Yet in its epigrammatic way this statement is much closer to reality than the Mexican provision, and gives a useful perspective to the relevance of constitutionalism, although it is in need of updating to avoid the chauvinistic exclusiveness of the day. The point is that if the present conflicting forces in South African society, whether operating on the self-denying hypothesis or not, sought accommodation at the constitutional level, it would be possible to provide an appropriate constitutional framework to embody and give effect to their agreement, and within certain limitations to entrench the new 'social contract'. And the principles of constitutionalism and consociationalism would probably feature prominently in this arrangement.

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1. De Kadt op cit 16.
2. A du Toit 'Discussion' in Benyon op cit 286-289.
3. Art 136 of the Constitution of Mexico, 1917, as amended.
4. W. Bagehot The English Constitution (World's Classics ed,1974) 202.

5. Conclusion

This work has examined aspects of the constitutional politics of South Africa from a consociational perspective. In common with other recent works on this topic no attempt has been made to formulate a constitutional blueprint for the country, nor has specific attention been given to the problems of 'constitutional transition'. For the reasons already advanced in the text, consociationalism has not been applied prescriptively and any speculations on the constitutional future have been of a modest nature. Instead it has been sought to provide an analysis of past and contemporary constitutional developments, to identify the main themes in these developments, and to project these themes into the short term future. It has been possible to show that while consociationalism is used as a legitimising ideology for some constitutional changes, both the process and the substance of these changes fall well short of the essential principles of consociationalism. These principles do have some relevance in the South African context, but whether they will come to be embodied in future constitutional arrangements depends on a variety of unpredictable extra-constitutional factors. And whether consociationalism would contribute to the resolution of the acute socio-economic and political problems facing South Africa requires more extensive and intensive investigation.

SUMMARY.

1.

The South African State system has been faced with an acute legitimation crisis during recent years, and as part of its response to this crisis the government has embarked on an extensive programme of constitutional adaptation; in this process some use is made of consociationalism as a legitimising ideology, although past and present constitutional developments involve only a very limited use of consociational institutions and practices.

2.

The two main traditions of liberal-constitutionalism, Westminister parliamentarianism and American presidentialism, are both based on the fundamental principle of majority rule, although majoritarianism is mitigated in practice by a range of political and constitutional factors. The liberal tradition in South Africa has generally adopted these two systems as normative models.

3.

According to traditional notions of pluralism a system of majority rule is unsuited for divided plural societies, as it will result in the creation of permanent majorities and minorities, with disadvantageous consequences for the latter and the destabilisation of the polity. According to this view the liberal-constitutional models are not suitable for South Africa's version of the plural society.

4.

Consociationalism challenges the notions that democracy must be equated with majority rule, and that democratic stability is impossible in divided plural societies; it replaces the majoritarian and adversarial aspects of liberal-constitutionalism with a system power-sharing on matters of common interest, and autonomy on matters of exclusive interest to each of the politically-organised segments in society. The consociational model clearly has relevance for South Africa, but it is not applied prescriptively because many of the crucial conditions for its success are not found here; it is used instead as a basis of analysis for South Africa's political constitution.

5.

South Africa has never embraced either of the two traditional forms of liberal-constitutionalism but its constitutional history shows the strong influence of the Westminister model, although particularly in recent years there has been an apparent movement away from that model; however, neither the Westminister nor the non-Westminister features of the constitution show much affinity with the principles of consociationalism, and 'majoritarianism' has a strong normative influence in the constitutional system.

6.

In the wider southern African context several alternatives to majoritarianism and liberal-constitutionalism can be identified in the various empirical constitutional experiences, party political policies, and commission reports, and in some instances there is a close affinity with the principles of consociational democracy.

7.

The government's 1977 constitution for whites, coloureds and Indians involves a basic continuation and rationalisation of previous constitutional developments, but it incorporates some of the structures of consociationalism and would give rise to a system of sham consociationalism; South Africa's relationships with the national states also display some consociational features, and the overall system can be described as a form of quasi-consociational authoritarianism.

8.

The indications are that the government will pursue further strategies of quasi-consociational engineering in the future, including the implementation of its 1977 constitutional proposals, in an attempt to resolve the contemporary legitimation crisis; however, this is again likely to involve the continuation of previous constitutional developments and to occur under the overall control of the existing government. A transition to genuine consociationalism is unlikely to occur in this way.

9.

Although consociationalism can be applied in a wide variety of constitutional frameworks its application in South Africa would require a radical change in the present directions of constitutional development; it would also require a wide range of political, social and economic reforms before it would have a chance of being accepted in South Africa, as well as some fundamental attitudinal changes from leadership elites.

10.

Apart from the challenges to constitutional theory posed by contemporary socio-economic and political realities, both consociationalism, and South Africa's attenuated version thereof, have implications for traditional constitutional law concepts, including the legislative supremacy of parliament, the roll of the judiciary, theories of governmental responsibility and the question of citizenship; in all these areas there is a need to re-examine and update conventional notions of constitutionalism.

11.

It is possible to describe South Africa's contemporary constitutional politics in terms of two theoretical systems, consociationalism and control; at present there is an overwhelming preponderance of control features and this has adverse consequences for the future emergence of a fully consociational system, but consociationalism could take on a new relevance as a political crisis model.

12.

The suitability of consociationalism for the resolution of the serious socio-economic and political problems in South Africa requires more extensive and intensive investigation.

BIBLIOGRAPHY

1. Principal Works Cited

Adam, H. Modernizing Racial Domination - The Dynamics of South African Politics (1971)

Adam, H. and Giliomee, H. The Rise and Crisis of Afrikaner Power (1979)

Akehurst, M. A Modern Introduction to International Law (3 ed, 1977)

Almond, G. & Powell, G. Comparative Politics - A Developmental Approach (1966)

Anderson, N. Liberty, Law and Justice (1978)

Apter, D. The Political Kingdom in Uganda : A Study in Bureaucratic Nationalism (1961)

Aunger, E.A. In Search of Political Stability : A Comparative Study of New Brunswick and Northern Ireland (1981)

Bagehot, W. The English Constitution (1867, World's Classics ed, 1974)

Ballinger, M. From Union to Apartheid - A Trek to Isolation (1969)

Barrett, E.L. Constitutional Law - Cases and Materials (5 ed, 1977)

Barrie, G.N. Topical International Law (1979)

Bentley, A.F. The Process of Government : A Study of Social Pressures (1908)

Benyon, J.A. (ed) Constitutional Change in South Africa (1978)

Berger, R. Government by Judiciary - The Transformation of the Fourteenth Amendment (1977)

Bickel, A. The Least Dangerous Branch : The Supreme Court at the Bar of Politics (1963)

_____. The Supreme Court and the Idea of Progress (1978)

Birch, A.H. The British System of Government (4 ed, 1980)

Blaustein, A.P. and Flanz, G.H. (eds) Constitutions of the Countries of World

Blondel, J. The Government of France (2 ed, 1974)

Bogdanor, V. Devolution (1979)

Booysen, H. Volkereg - 'n Inleiding (1980)

Boulle, L.J. The Changing Constitution (1979)

Boulle, L.J. and Baxter L.G. (eds) Natal and Kwa Zulu : Constitutional and Political Options (1981)

Brotz, H. The Politics of South Africa - Democracy and Racial Diversity (1977)

Brownlie, I. Principles of Public International Law (2 ed, 1973)

Butler, D. (ed) Coalitions in British Politics (1978)

Butler, J., Rotberg, R. and Adams, J. The Black Homelands of South Africa : The Political and Economic Development of Bophuthatswana and KwaZulu (1977)

Calhoun, J. A Disquisition on Government (The American Heritage Series ed. by Gordon Post C, 1953)

Campbell, C. (ed) Do We Need a Bill of Rights? (1980)

Carter, G. and Herz, J. Government and Politics in the Twentieth Century (3 ed, 1973)

Carter, G., Karis T. and Stultz, N. South Africa's Transkei - The Politics of Domestic Colonialism (1967)

Codding, G.A. The Federal Government of Switzerland (1965)

Cowen, D.V. Constitution - Making for a Democracy : An Alternative to Apartheid (1960)

_____. The Foundations of Freedom - With Special Reference to Southern Africa (1961)

_____. Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act (1951)

Dahl, R.A. (ed) Political Oppositions in Western Democracies (1965)

_____. Polyarchy : Participation and Opposition (1971)

_____. Who Governs? Democracy and Power in an American City (1961)

Dahrendorf, R. Class and Class Conflict in Industrial Society (1959)

_____. Society and Democracy in Germany (1967)

Dean, W.H.B. The Riots and the Constitution in 1976 (1976)

De Crespigny, A. and Schrire, R.(eds) The Government and Politics of South Africa (1978)

Degenaar, J. Moraliteit en Politiek (1976)

D'Entrèves, A.P. The Notion of the State - An Introduction to Political Theory (1967)

De Smith, S.A. Constitutional and Administrative Law (2 ed, 1973)

De Smith, S.A. The New Commonwealth and its Constitutions (1964)

De Tocqueville, A. Democracy in America (1835, World's Classics ed, 1946)

Dicey A.V. An Introduction to the Study of the Law of the Constitution (10 ed, 1959)

Drucker, H.M. (ed) Multi-Party Britain (1979)

Duchacek, I. Comparative Federalism : The Territorial Dimension of Politics (1970)

_____. Rights and Liberties in the World Today - Constitutional Promise and Reality (1973)

Dugard, C.J.R. Human Rights and the South African Legal Order (1978)

_____. Independent Homelands - Failure of a Fiction (1979)

Du Toit, A. Federalism and Political Change in South Africa (1974)

Dworkin, R. Taking Rights Seriously (1977)

Eckstein, H. Division & Cohesion in Democracy : A Study of Norway (1966)

Ely, J.H. Democracy and Distrust - A Theory of Judicial Review (1980)

Finer, S.E. Comparative Government (1970)

_____. (ed) Five Constitutions (1979)

Friedrich, C.J. Constitutional Government and Democracy - Theory and Practice in Europe and America (4 ed, 1968)

_____. Limited Government : A Comparison (1974)

Funston, R.Y. Constitutional Counter-Revolution? The Warren Court and the Burger Court : Judicial Policy Making in Modern America (1977)

Furnivall, J.S. Colonial Policy and Practice - A Comparative Study of Burma and Netherlands India (1948)

_____. Netherlands India - A Study of Plural Economy (1944)

Galbraith, J.K. The New Industrial State (2 ed, 1972)

Galnoor, I. (ed) Government Secrecy in Democracies (1977)

Geldenhuys, D. The Constellation of States (S.A. Foundation, 1980)

Glazer, N. Affirmative Discrimination (1975)

Greenberg, S. Race and State in Capitalist Development - South Africa in Comparative Perspective (1980)

Greig, D.W. International Law (2 ed, 1976)

Griffith, J.A.G. The Politics of the Judiciary (1977)

_____. Parliamentary Scrutiny of Government Bills (1974)

Habermas, J. Legitimation Crisis (transl. by T. McCarthy, 1976).

Hahlo, H.R. and Kahn, E. The South African Legal System and its Background (1973)

_____. The Union of South Africa : The Development of its Laws and Constitution (1960)

Hailsham, Lord The Dilemma of Democracy - Diagnosis and Prescription (1978).

Hamilton, A., Madison, J. and Jay, J. The Federalist Papers (1788, Mentor Books ed, 1961)

Hammond-Tooke W.D. Command or Consensus - The Development of Transkeian Local Government (1975)

Hand, G., Georgel, J. and Sasse, C. (eds) European Electoral Systems Handbook (1979)

Hanf, T., Weiland, H. and Vierdag, G. South Africa : The Prospects of Peaceful Change - An Empirical Enquiry into the Prospects of Democratic Conflict Regulation (1981)

Harrison, R.J. Pluralism and Corporation - The Political Evolution of Modern Democracies (1980)

Hart, H.L. The Concept of Law (1961)

Hartley, T.C. and Griffith, J.A. Government and Law - an Introduction to the Working of the Constitution in Britain (2ed, 1981)

Harvey, J. & Bather, L. The British Constitution (1966)

Heard, K.A. General Elections in South Africa 1943-1970 (1974)

_____. Political Systems in Multi-racial Societies (1961)

Heuston, R.F. Essays in Constitutional Law (2 ed, 1964)

Hicks, U. Federalism : Failure and Success - A Comparative Study (1978)

Hood Phillips, O. and Jackson, P. Constitutional and Administrative Law (6 ed, 1978)

Horrell, M. (ed) Laws Affecting Race Relations in South Africa (1978)

Horowitz, D.L. The Courts and Social Policy (1977)

Hosten, W., Edwards, A., Nathan, C. and Bosman, F. An Introduction to South African Law and Legal Theory (1977)

Huber, H. How Switzerland is Governed (1968)

Hughes, C. The Federal Constitution of Switzerland (1954)

_____. The Parliament of Switzerland (1962)

Jacobs, S.C. (ed) 'n Nuwe Grondwetlike Bedeling vir Suid-Afrika (1981)

Jaconelli, J. Enacting a Bill of Rights : The Legal Problems (1980)

Jennings, I. The British Constitution (4 ed, 1962)

_____. The Law and the Constitution (5 ed, 1959)

Johnson, N. In Search of the Constitution - Reflections on State and Society in Britain (1977)

Kamenka, E., and Tay, A. (eds) Human Rights (1978)

Kariel, H.S. The Decline of American Pluralism (1961)

Kelsen, H., General Theory of Law and State (Transl. by Wedburg, A., 1946)

Kornhauser, W. The Politics of Mass Society (1960)

Kuper, L. Race, Class and Power - Ideology and Revolutionary Change in Plural Societies (1974)

_____ and Smith M.G. (eds) Pluralism in Africa (1971)

Kurland, P.B. Watergate and the Constitution (1978)

Lakeman, E. How Democracies Vote - A Study of Majority and Proportional Electoral Systems (3 ed, 1970)

Langton, S. (ed) Citizen Participation in America : essays on the state of the art (1978)

Laski, H.J. A Grammar of Politics (1925)

_____. Parliamentary Government in England; A Commentary (1938)

Laurence, P. The Transkei - South Africa's Politics of Partition (1976)

Lees, J.D. The Political System of the United States (1969)

_____. and Shaw, M. Committees in Legislature - A Comparative Analysis (1979)

Lehmbruch, G. Proporzdemokratie : Politische System und Politische Kultur in der Schweiz und in Oesterreich (1967)

Lever, H. South African Society (1978)

Lewis, W.A. Politics in West Africa (1965)

Lijphart, A. Democracy in Plural Societies - A Comparative Exploration (1977)

_____. The Politics of Accommodation : Pluralism and Democracy in the Netherlands (2 ed, 1975)

Likhovski, E.S. Israel's Parliament - The Law of the Knesset (1971)

Lipset, S.M. Political Man (1959)

Locke, J. Two Treaties of Government (1690, Everyman's Library ed, 1977)

Lukes, S. Power : A Radical View (1974)

Mackenzie, W.J.M. Free Elections (1958)

Mackintosh, J.P. The British Cabinet (3 ed, 1977)

Macpherson, C.B. The Life and Times of Liberal Democracy (1977)

_____. The Real World of Democracy (1966)

Malherbe, P. Multistan : A Way out of the South African Dilemma (1974)

Marquard, L. A Federation of Southern Africa (1971)

Marshall, G. Constitutional Theory (1971)

Mathews, A.S. Law, Order and Liberty in South Africa (1971)

_____. The Darker Reaches of Government - Access to Information about Public Administration in Three Societies (1978)

May, H.J. The South African Constitution (2 ed, 1949 and 3 ed, 1955)

McIllwain, C.H. Constitutionalism : Ancient and Modern (rev.ed, 1947)

McRae, K. (ed) Consociational Democracy : Political Accommodation in Segmented Societies (1974)

McWhinney, E. Federal Constitution - making for a Multi-National World (1966)

_____. Judicial Review in the English-Speaking World (4 ed, 1969)

Meyer, J. Local Government Law vol. 1 (1978), vols 2 and 3 (1979)

Middlemas, K. Politics in Industrial Society - The Experience of the British System since 1911 (1979)

Mill, J.S. Representative Government (1854, ed by Acton, H.B., 1972)

Milliband, R. The State in Capitalist Society - The Analysis of the Western System of Power (1969)

Mitchell, J.D. Constitutional Law (2 ed, 1968)

Nicholls, D. Three Varieties of Pluralism (1974)

Niewoudt, C., Olivier, G. and Hough, M. (eds) Die Politieke Stelsel van Suid-Afrika (1979)

Nordlinger, E. Conflict Regulation in Divided Societies (1972)

Nwabueze, B.O. Constitutionalism in the Emergent States (1973)

_____. Judicialism in Commonwealth Africa (1977)

O'Connell, D.P. vol 2 International Law (2 ed, 1970)

Oppenheim, L. Vol 1 International Law (7 ed, 1948)

Palley, C. The Constitutional History and Law of Southern Rhodesia 1888 - 1965 with special reference to Imperial Control (1966)

Parsons, T. The System of Modern Societies (1971)

Potter, D.M. The South and the Concurrent Majority (1972)

Presthus, R. Elite Accommodation in Canadian Politics (1973)

Prinsloo, D. South West Africa : The Turnhalle and Independence (1976)

Pritchett, C.H. The American Constitution (2 ed, 1968)

Rabushka, A., and Shepsle, K. Politics in Plural Societies - A Theory of Democratic Instability (1972)

Rae, D. The Political Consequences of Electoral Laws (1971)

Rawls, J. A Theory of Justice (1972)

Razis, V.V. Swords or Ploushares? South Africa and Political Change : An Introduction (1980)

Republic of South Africa, Official Yearbook 1980/81

Rex, J. Race Relations in Sociological Theory (1970)

Richardson, J., and Jordan, A. Governing Under Pressure - The Policy Process in Post-Parliamentary Democracy (1979)

Riker, W. The Theory of Political Coalitions (1962)

Rose-Innes, L. Judicial Review of Administrative Tribunals in South Africa (1973)

Rotberg, R., and Barrett, J. Conflict and Compromise in South Africa (1980)

Rowat, D.C. (ed) Administrative Secrecy in Developed Countries (1979)

Salmond, J. Jurisprudence (11 ed by G. Williams, 1957)

Sawer, G. Modern Federalism (2 ed, 1976)

Schaar, J.H. Legitimacy in the Modern State (1981)

Schlesinger, A.M. The Imperial Presidency (1974)

Schubert, G. Judicial Policy Making : The Political Role of the Courts (rev. ed, 1974)

Schwartz, B. Constitutional Law - A Textbook (1972)

Sedgemore, B. The Secret Constitution - An Analysis of the Political Establishment (1980)

Shiels, E.A. The Torment of Secrecy (1956)

Slabbert, F. van Zyl and Opland, J. (eds) South Africa: Dilemmas of Evolutionary Change (1980)

Slabbert F. van Zyl and Welsh, D. South Africa's Options : Strategies for Sharing Power (1979)

Smith, M.G. The Plural Society in the British West Indies (1965)

Smock, D.A. The Politics of Pluralism (1975)

Steiner, J. Amicable Agreement Versus Majority Rule - Conflict Resolution in Switzerland (1974)

Steyn, L.C. Uitleg van Wette (5 ed, 1981)

Streek, B. and Wicksteed, R. Render unto Kaiser - A Transkei Dossier (1981)

Strong, C.F. Modern Political Constitutions (8 ed, by Clarke, M.G. 1972)

Stultz, N.M. Transkei's Half Loaf - Race Separatism in South Africa (1980)

Szymanski, A. The Capitalist State and the Politics of Class (1978)

Theberge, L.J. (ed) The Judiciary in a Democratic Society (1979)

Thomas, W.H. Plural Democracy - Political Change and Strategies for Evolution in South Africa (1977)

Tribe, L.H. American Constitutional Law (1978)

Tugwell, R.G. The Emerging Constitution (1974)

Van den Berghe, P. South Africa - A Study in Conflict (1965)

Van der Horst, S. and Reid, J. (eds) Race Discrimination in South Africa - A Review (1981)

Verloren van Themaat, J.P. Staatsreg (2 ed, 1967)

Vile, M.J.C. Constitutionalism and the Separation of Powers (1967)

Wade, E.C.S. and Phillips, G. Constitutional and Administrative Law (9 ed by Bradley, A.W., 1977)

Wade, H.W.R. Constitutional Fundamentals (1980)

Weis, P. Nationality and Statelessness in International Law (2 ed, 1979)

Wheare, K.C. Federal Government (4 ed, 1963)

_____. Legislatures (1968)

_____. Modern Constitutions (2 ed, 1966)

Wiechers, M. Administratiefreg (1973)

_____. Staatsreg (3 ed, 1981)

Wolff, R. The Poverty of Liberalism (1968)

Worrall, D. (ed) South Africa : Government and Politics (2 ed, 1975)

Young, C. The Politics of Cultural Pluralism (1976)

Zander, M. A Bill of Rights? (2 ed, 1979)

2. Articles, Reviews, Reports and Theses

The following abbreviations have been used for South African law journals.

ASSAL	-	Annual Survey of South African Law
CILSA	-	Comparative and International Law Journal of South Africa
SALJ	-	South African Law Journal
SAYIL	-	South African Yearbook of International Law
THR-HR	-	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	-	Tydskrif vir Suid-Afrikaanse Reg

Abernathy, C. 'America's Supreme Court and the Balance of Justice' (Byliner series, Oct. 1979)

Adam, H. 'When the Chips are Down : Confrontation and Accommodation in South Africa' 1 (1977) Contemporary Crises 477

Bachrach, P. and Baratz, M. 'Power and its Two Faces Revisited' 69 (1975) American Political Science Review 900

Barrie, G.N. 'Die Bevoegdhede van Die Howe om Wette van die Parlement te Toets' 32 (1969) THR-HR 209

_____. 'Die gebondenheid van die parlement aan die reg rakende sy struktuur en funksionering' 1981 TSAR 46.

Barry, B. 'Review Article : Political Accommodation and Consociational Democracy' 5 (1975) British Journal of Political Science 478

_____. Review of Steiner, J. Amicable Agreement versus Majority Rule : Conflict Resolution in Switzerland (1974) in 5 (1975) British Journal of Political Science 477

_____. 'The Consociational Model and its Dangers' 3 (1975) European Journal of Political Research 393

Bathory, P. and McWilliams, W. 'Political Theory and the People's Right to Know' in Galnoor op cit 3

Baxter, L.G. 'Constitutionalism, Bureaucracy and Corporatism' in Boulle and Baxter op cit 75

_____. 'Fairness and Natural Justice in English and South African Law' 96 (1979) SALJ 607

Beinart, B. 'Parliament and the Courts' 1954 Butterworths SA Law Review 134

_____. 'Sovereignty and the Law' 15 (1952) THR-HR 101

_____. 'The South African Appeal Court and Judicial Review 21 (1958) Modern Law Review 587

Bekker, J.C. 'Kapteins in die wetgewende vergaderings van Botswana en Transkei 1978 TSAR 268

_____. 'Re-writing the Text books : a re-evaluation of some traditional South African constitutional law assumptions' 1979 CILSA 272

Bekker, S. 'The Pluralist Approach of Pierre van den Berghe' 1 (1975) Social Dynamics 11

Beth, L.P. 'The Judicial Committee of the Privy Council and the Development of Judicial Review' 24 (1976) American Journal of Comparative Law 22

Bogdanor, V. 'Devolution and the Constitution' 1978 Parliamentary Affairs 252

Bohn, D.E. 'Consociational Democracy and the Case of Switzerland' 42 (1980) The Journal of Politics 165

Booysen, H., Wiechers, M., van Wyk, D.H., and Breytenbach, W. 'Comments on the Independence and Constitution of Transkei' 1976 SAYIL 1

Boston, Lord 'Arguments Against a Bill of Rights' in Campbell op cit 23

Boulle, L.J. 'A Critical Analysis of the New Constitutional Proposals', paper presented at the symposium on The Defects and Merits of the Government's Constitutional Proposals, University of the Western Cape, 26-27 June 1979.

_____. 'Citizens and Exiles' Platform 80 series, 27 August 1980, University of Natal, Durban.

_____. 'Federation and Consociation : Conceptual Links and Current Constitutional Models' 44 (1981) THR-HR 236

_____. 'The New Constitutional Proposals and the Possible Transition to Consociational Democracy' in Slabbert and Opland op cit 14

_____. 'The resurrection of section 114 of the constitution' 95 (1978) SALJ 583

_____. 'The Second Republic : it's constitutional lineage' 1980 CILSA 1

_____. 'The Turnhalle Testimony' 95 (1978) SALJ 49

Boynton, G.R., and Kwon, W., 'An Analysis of Consociational Democracy' 3 (1978) Legislative Studies Quarterly 11

Breytenbach, W. 'Kapteinskap en Politieke Ontwikkeling in die Tuislande' (1975) Africa Institute Bulletin 328

Brinkman, G. 'The West German Federal Constitutional Court : Political Control through Judges' 1981 Public Law 83

Burnham, W.D. 'Milestones on the Road to Democracy : Electoral Regimes and Their Relevance to South Africa' in Rotberg and Barratt op cit 77

Caney, G. 'The Separation of Powers' in Graham G., and Graham, S. (eds) Founding Principles of American Government (1977) 98

Carpenter, G. 'The Independence of Venda' 1979 SAYIL 40

Cilliers, A. 'Die Westminister - sisteem en Suid-Afrika se Konsepgrondwet' 1979 Obiter 86.

Cloete, J.J.N. 'The Bureaucracy' in De Crespigny and Schrire op cit 54

Cohen, D. 'The Public-Interest Movement and Citizen Participation' in Langton op cit 55

Commager, H.S. 'Judicial Review and Democracy' 19 (1943) Virginia Quarterly Review 417

Corder, H. 'The content of the audi alteram partem rule in South African administrative law' 43 (1980) THR-HR 156

Crocker, C.A. 'South Africa : Strategy for Change' 59(1980) Foreign Affairs 323

Cronin, T.E. 'A Resurgent, Congress and the Imperial Presidency' 95 (1980) Political Science Quarterly 209.

Cross, M. 'On Conflict, Race Relations and the Theory of the Plural Society' 12 (1971 Race 477

Daalder, H. 'On Building Consociational Nations : the Cases of Netherlands and Switzerland' 23 (1971) International Social Science Journal 355

_____. 'The Consociational Democracy Theme' 26 (1974) World Politics 604

_____. 'The Netherlands : Opposition in a Segmented Society' in Dahl R Political Oppositions in Western Democracies (1965) 188

Dean, W.H.B. 'A citizen of Transkei' (1978) CILSA 57

_____. 'The Administration : Control and Participation - Some Preliminary Thoughts' in Boulle and Baxter op cit 109

_____. 'Whither the Constitution?' 39 (1976) THR-HR 266

Degenaar, J. 'Pluralism and the Plural Society' in De Crespigny and Schrire op cit 223

De Kadt, R. Democracy and Development - The South African Challenge (unpublished paper, University of Natal, 1981)

_____. The South African State System in Crisis (unpublished paper, University of Natal, 1981)

De Kock, A. 'Three Commissions' 1 (1980) Industrial Law Journal 26

De Minón, M.H. 'The Passing of Bicameralism' 23 (1975) American Journal of Comparative Law 236

Devenish, G. 'A Critical Evaluation of the Theoretical and Political Implications of the New Constitutional Proposals', University of the Western Cape (1978)

_____. 'Specific legal problems concerning a three-parliamentary system in the proposed new constitutional dispensation with special reference to parliamentary sovereignty and executive sovereignty' in Jacobs op cit 113

_____. 'The Doctrine of Parliamentary Sovereignty and the Proposed New Constitution' 42 (1979) THR-HR 85

Dias, R.W.M. 'Götterdämmerung : gods of the law in decline' 1981 (1) Legal Studies 3

Dix, R.H. 'Consociational Democracy - The Case of Columbia' 1980 Comparative Politics 303

Dixon, M.L. 'Black Residence Rights : The Appellate Division on Section 10(1)' 90 (1981) SALJ 42

Dugard, C.J.R. 'Judicial Power and a Constitutional Court' in Boulle and Baxter 189

_____. 'South Africa's "Independent" Homelands : An Exercise in Denationalization' 10 (1980) Denver Journal of International Law and Policy 11

Dugard, C.J.R. and Dean, W.H.B. 'The Just Legal Order' in Van der Horst and Reid op cit 19

Du Pisani, A. 'Namibia : the Search for Alternatives' 1981 South Africa International 292

_____. 'SWA/Namibia : 1980 Review' 1981 Africa Institute Bulletin 25

Du Toit, A. 'Different Models of Strategy and Procedure for Change in South Africa' in Slabbert and Opland op cit 2

Du Toit, D. 'Geskiedkundige oorsig van Suid-Afrikaanse konstitutionele modelle met besondere verwysing na die Westminster-staatsmodel' in Jacobs op cit 8

Ellis, E. 'Supremacy of Parliament and European Law' 96 (1980) Law Quarterly Review 511

Evans, A.C. 'The Political Status of Aliens in International Law, Municipal Law and European Community Law 30 (1981) International and Comparative Law Quarterly 20

Faris, J. 'Elections' in W.A. Joubert (ed) vol 8 The Law of South Africa (1979) 283

_____. 'South Africa's Severance of Links with South West Africa' 1977 SAYIL 49

_____. 'The Western Proposals and Elections in South West Africa/Namibia : A Summary of the Events for 1978' 1978 SAYIL 90

Fawcett, J. 'A Bill of Rights for the United Kingdom' 1976 Human Right Review 57

Felgate, W.S. 'Co-operation between Natal and KwaZulu - An Inkatha View' in Boulle and Baxter op cit 154

Forsyth, C. 'Recent Judicial Attitudes to Free Speech' 94 (1977) SALJ 19

Fuller, L.L. 'The Forms and Limits of Adjudication' in 92 (1978) Harvard Law Review 353

Geldenhuys, D. 'South Africa's Constitutional Alternatives' 1981 South Africa International 190

Giliomee, H. 'Structural Change and Political Options' Platform 80 series, University of Natal (13 February 1980)

Glazer, N. 'Individual rights against group rights' in Kamenka and Tay op cit 87

_____. 'The Universalisation of Ethnicity' 44 (1975) Encounter 8

Goldblatt, R. 'Constitutional Law' in W. Joubert (ed) vol 5 The Law of South Africa (1978) 3

Gould, W.B. 'Black Unions in South Africa : Labor Law Reform and Apartheid' 17 (1981) Stanford Journal of International Law 99

Gray, H.R. 'The Sovereignty of Parliament Today' 10 (1953) University of Toronto Law Journal 54

Grey, T.C. 'Do we have an Unwritten Constitution?' 27 (1974) Stanford Law Review 703

Griffith, J.A.G. 'The Political Constitution' 42 (1979) Modern Law Review 1

Gutteridge, W. 'The Public Services in a Plural Society' in Rhoodie N. (ed) Intergroup Accommodation in Plural Societies (1978) 174

Habermas, J. 'Legitimation Problems in the Modern State' in Habermas Communication and the Evolution of Society (transl. T. McCarthy, 1979) 178

Hanf, T. 'Education and Consociational Conflict Regulation in Plural Societies' in Slabbert and Opland op cit 224

Harris, P. 'Interest Groups in the South African Political Process' in Worrall op cit 253

Harvey, W.B. and Dean, W.H.B. 'The Independence of Transkei - a Largely Constitutional Enquiry' 16 (1978) Journal of Modern African Studies 189

Heisler, M. 'Managing Ethnic Conflict in Belgium' 433 (1977) American Academy of Political and Social Science Annals 33

Hirsch, M. 'Lessons from Rhodesia for Constitutional Change in South Africa' in Slabbert and Opland op cit 54

Horowitz, D.L. 'Quebec and the Canadian Political Crisis' 433 (1977) American Academy of Political and Social Science Annals 19

Jacobs, S.C. ''n Juridiese analise van die konstitutionele voorstelle vir 'n nuwe grondwetlike bedeling in Suid-Afrika' in Jacobs op cit 88

J.F.H., 'A Transkeian Citizen of South African Nationality' 26 (1963) THR-HR 44

Kahn, E. 'The New Constitution' 78 (1961) SALJ 244

Kariel, H.S. 'Pluralism' in International Encyclopaedia of Social Sciences 164

Kieve, R.A. 'Pillars of Sand : A Marxist Critique of Consociational Democracy in the Netherlands' 1981 Comparative Politics 313

Kirchheimer, O. 'The Waning of Opposition in Parliamentary Regimes' 24 (1957) Social Research 127

Kuper, L. 'Ethnic and Racial Pluralism : Some Aspects of Polarization and Depluralization' in Kuper and Smith op cit 459

_____. 'Plural Societies : Perspectives and Problems in Kuper and Smith op cit 7

_____. 'Political Change in White Settler Societies - The Possibility of Peaceful Democratization' in Kuper and Smith op cit 169

Laski, H. 'The Pluralistic State' in Laski The Foundations of Sovereignty (1921) 24

Laubscher, P.J. 'The Foundation of Sovereignty - Parliament as a Law-Making Body' 98 (1981) SALJ 529.

Lees, J. 'Committees in the United States Congress' in Lees and Shaw op cit 7

Legassik, M. 'South Africa: Capital Accumulation and Violence' 3 (1974) Economy and Society 253

Lehmbruch, G. 'Consociational Democracy in the International System' 3 (1975) European Journal of Political Research 377

_____. 'A Non-Competitive Pattern of Conflict Management in Liberal Democracies : The Case of Switzerland, Austria and Lebanon' in McRae op cit 90

Lijphart, A. 'Consociation and Federation : Conceptual and Empirical Links' 12 (1979) Canadian Journal of Political Science 499

_____ 'Consociation : The Model and its Applications in Divided Societies', paper presented at the Study Conference on Models of Political Co-operation at Queen's University of Belfast (March 25-28, 1981)

_____. 'Consociational Democracy' 21 (1968-9) World Politics 207

_____. 'Cultural Diversity and Political Integration' 4 (1971) Canadian Journal of Political Science 1

_____ 'Federal, Confederal and Consociational Alternatives for the South African Plural Society' in Rotberg and Barratt op cit 51

_____. 'Majority Rule Versus Democracy in Deeply Divided Societies' 4 (1977) Politikon 113

_____. 'Religious vs Linguistic vs Class Voting: The "Crucial Experiment" of Comparing Belgium, Canada, South Africa and Switzerland' 73 (1979) The American Political Science Review 442

_____. 'Typologies of Democratic Systems' 1968 Comparative Political Studies 3

Lloyd, Lord 'Do We Need a Bill of Rights?' 39 (1976) Modern Law Review 121

Lombard, J.A. (ed) Alternatives to the Consolidation of KwaZulu: Progress Report Bureau for Economic Policy and Analysis, University of Pretoria Special Focus No 2 (1980)

Lorwin, V. 'Segmented Pluralism - Ideological Cleavages and Political Cohesion in the Smaller European Democracies' 3 (1971) Comparative Politics 141

Lustik, I. 'Stability in Deeply Divided Societies : Consociationalism versus Control' 1979 World Politics 325

Luyt, R. 'African Constitutionalism : Constitutions in the context of decolonization' in Benyon op cit 15

Maasdorp, G. 'Forms of Partition' in Rotberg and Barrett op cit 107

Mathews, A.S. 'Monitoring the Administration : New Perspectives' in Boulle and Baxter op cit 128

_____. 'Security Legislation and Peaceful Change in South Africa' in Slabbert and Opland op cit 181

Mazrui, A.A. 'Pluralism and National Integration' in Kuper and Smith op cit 333

McKIrvine, D. 'Plural Societies and constitution-making' in Benyon op cit 94

McRae, K.D. 'Comment: Federation, Consociation, Corporatism - An Addendum to Arend Lijphart' 12 (1979) Canadian Journal of Political Science 517

_____. 'The Plural Society and the Western Political Tradition' 12 (1979) Canadian Journal of Political Science 675

Minogue, K. 'Natural rights, ideology and the game of life' in Kamenka and Tay op cit 13

Mirfield, P. 'Can the House of Lords Lawfully be Abolished?' 95 (1979) Law Quarterly Review 36

Molteno, D. The Molteno Report for the Progressive Party (1960)

Mowlam, M. 'Popular Access to the Decision-making Process in Switzerland : The Role of Direct Democracy' 14 (1979) Government and Opposition 180

Munro, C. 'The Separation of Powers : Not Such a Myth' 1981 Public Law 19

Murray, C. 'The New Constitution : Can Parliament Bind Itself?' 1978 Responsa Meridiana 305

Noel, S.J.R. 'Consociational Democracy and Canadian Federalism' 4 (1971) Canadian Journal of Political Science 14

Olivier, G. 'The Executive' in De Crespigny and Schrire op cit 17

Olivier, N.J.J. 'Die Regering se Konstitutionele Voorstelle' unpublished paper, Cape Town, 1979

_____. 'Implications of Constitutional Development in KwaZulu/Natal for the rest of South Africa' in Boulle and Baxter op cit 57

Olivier, W.H. 'Bophuthatswana Nationality' 1977 SAYIL 108

_____. 'n Juridiese evaluasie van burgerskap' 1979 TSAR 212, and 1980 TSAR 22 and 127

_____. 'Statelessness and Transkeian Nationality' 1976 SAYIL 143

Powell, G.B. 'Review of Arend Lijphart : Democracy in Plural Societies' 73 (1979) American Political Science Review 295

Presthus, R. 'The Pluralist Framework' in Kariel H.S. Frontiers of Democratic Theory (1970) 274

Rabie, A. 'The Principle of Legality and Parliamentary Sovereignty : Unbridled Power Behind the Throne' 40 (1977) THR-HR 179

Rae, D.W. 'The Limits of Consensual Decision-Making' 69 (1975) American Political Science Review 1270

Randall, P. (ed) SPROCAS Report No 10 South Africa's Political Alternatives (1973)

Rautenbach, I. 'The Constitution of Transkei' 1977 TSAR 199

Report of the Commission of Inquiry into the Riots at Soweto and other places in the Republic (RP 55/1980) - Cillie Report

Report of the Main Committee of the HSRC Investigation into Education (1981) - De Lange report

Report of the Commission of Inquiry into Alleged Irregularities in the Former Department of Information (RP 1131/3 1978) - Erasmus report

Report of the Native Laws Commission 1946-48 (UG 28/1948) - Fagan report

Report of the Royal Commission on the Constitution Cmnd 5460 (1973) - Kilbrandon report

Report of the Commission of Inquiry into Improper Political Interference and the Political Representation of the Various Population Groups (RP 72/1967) - Muller report

Report of the Ciskei Commission (1980) - Quail report

Report of the Commission of Inquiry into Legislation Affecting the Utilization of Manpower (RP 32/1979) - Riekert report

Report (Interim) of the Commission of Inquiry on the Constitution (RP 68/1980) - Schlebusch report

Report of the Constitutional Committee of the Progressive Federal Party (1978) - Slabbert report

Report of the Commission of Inquiry into Matters Relating to the Coloured Population Group (RP 38/1976) - Theron report

Report (Summary) of the Commission for the Socio-Economic Development of Bantu Areas within the Union of South Africa (U G 61/1955) - Tomlinson report

Report of the Commission of Enquiry into Labour Legislation - Part 1 (RP 47/1979) - - Wiehahn report

Report of the Commission of Inquiry into the Cape Coloured Population of the Union (UG 54 of 1937) - Wilcocks report

Rex, J. 'The Plural Society : The South African Case' 12 (1971) Race 401

Rhoodie, N. 'Federalism/Confederalism as a Means of Black-White Conflict Resolution : Conceptual Dissonance in White Nationalist Ranks' 7 (1980) Politikon 101

Richings, F.G. 'The Applicability of South African Legislation in the Self-Governing Bantu Territories' 93 (1976) SALJ 119

Rokkan, S. 'Norway : Numerical Democracy and Corporate Pluralism' in Dahl R. (ed) Political Oppositions in Western Democracies (1965) 107

Rosen, P. 'Legitimacy, Domination and Ego Displacement' in Vidich A. and Glassman R. (eds) Conflict and Control - Challenge to Legitimacy of Modern Governments (1979) 75

Rostow, E.V. 'The Democratic Character of Judicial Review' 66 (1953) Harvard Law Review 193

Roux, B. 'The Central Administration, Provincial and Local Authorities and the Judiciary' in Worrall op cit 75

Royal Institute for International Affairs A Survey of Proposals for the Constitutional Development of South Africa (1980)

Rudolph, H. 'Nominated members of Parliament and the Demise of the Entrenched Sections' 98 (1981) SALJ 346

Savage, M. 'Major Patterns of Group Interaction in South African Society' in Thompson L and Butler J (eds) Change in Contemporary South Africa (1975) 280

_____. 'What Does Removal of Race Discrimination Effectively Mean in the South African Context?' in Slabbert and Opland op cit 156

Schlemmer, L. 'Conflict and Conflict Regulation in South Africa' in De Crespigny and Schrire op cit 160

_____. 'Political Structures for Multi-Racial Societies : Basic Concepts and Considerations' in SAIRR Towards Economic and Political Justice in South Africa (1980) 74

_____. 'Social Implications of constitutional alternatives in South Africa' in Benyon op cit 258

_____ South African Society in the 1980's : An Exercise in Hazardous but Concerned Speculation (CASS, University of Natal, 1979)

_____. 'The Devolution of Power in South Africa : Problems and Prospects' paper presented at the conference on Intergroup Accommodation in Plural Societies, Cape Town, 1977

_____. 'Theories of the Plural Society and Change in South Africa' 3 (1977) Social Dynamics 3

Schmidt, C. 'Citizenship and Nationality' in Joubert W.A. (ed) vol 2 The Law of South Africa (1977) 259

Schmidt, C.W.H. 'Section 114 of the Constitution and the Sovereignty of Parliament ' 79 (1962) SALJ 315

Schrire, R. 'The Just Political Order' in Van der Horst and Reid op cit 1

Smith, M.G. 'Institutional and Political Conditions of Pluralism' in Kuper and Smith op cit 27

_____. 'Social and Cultural Pluralism' 83 (1960) Annals of the New York Academy of Sciences 763

_____. 'Some Developments in the Analytic Framework of Pluralism' in Kuper and Smith op cit 415

Steiner, J. 'Review Article - The Consociational Theory and Beyond' 13 (1981) Comparative Politics 339

_____. 'The Principles of Majority and Proportionality' 1 (1971) British Journal of Political Science 63

Thomas, W.H. 'A Southern African "Constellation of States" : Challenge or Myth?' 1980 South Africa International 113

_____. 'South Africa between Partition and Integration' 3 (1979) Aussenpolitiek 305

Thula, G. 'A Basis for the Constitutional Transformation of South Africa' in Rotberg and Barratt op cit 161

_____ 'A Constitutional Alternative for South Africa (Inkatha)' in Slabbert and Opland op cit 36

Uhlmann, M. 'The Supreme Court and Political Representation' in Theberge op cit 91

Van den Berghe, P. 'Integration and Conflict in Multi-National States' 1 (1975) Social Dynamics 3

_____. 'Pluralism and the Polity: A Theoretical Exploration' in Kuper and Smith op cit 67

Van der Horst, S. 'Employment' in Van der Horst and Reid op cit 34

Van der Vyver, J. 'Prospects for the Future Political Development of South Africa' in De Crespigny and Schrire op cit 245

_____. 'The Function of Legislation as an Instrument for Social Reform' 93 (1976) SALJ 56

_____. 'The Section 114 Controversy - and Governmental Anarchy' 97 (1980) SALJ 363

Van Niekerk, B. 'The German Bürgerinitiativen - a New Form of Plebiscitary Control of Government' 96 (1979) SALJ 424

_____. 'The Uncloistering of the Virtue. Freedom of Speech and Administration of Justice - A Comparative Overview' 95 (1978) SALJ 362 and 534

Van Wyk, D.H. 'A Note on Bophuthatswana Citizenship' 1978 SAYIL 163

_____. 'The Ebb and Flow of South African Citizenship Law' 1978 SAYIL 148

_____. 'Westminsterstelsel - requiescat in pace? of: kan 'n luiperd sy kolle verander?' 44 (1981) THR-HR 105

Venter, A.J. 'n Kritiese Ontleding van die Konsosiasiemodel van Arend Lijphart, unpublished M.A. thesis, Unisa (1980)

Venter, F. 'Bantoeburgerskap en Tuislandburgerskap' 37 (1975) THR-HR 239

_____. Die Suid-Afrikaanse Bantoestaatsreg, unpublished LL.D. thesis, PU for CHE (1978)

Vile, M.J.C. 'Federal Theory and the "New Federalism"' in Jaensch, D. (ed) The Politics of "New Federalism" (1977) 4

Vorster, M.P. and Viljoen, H.P. 'Die nuwe grondwetlike bedeling in Suid-Afrika' 1979 TSAR 201

Vosloo, W.B. 'Consociational democracy as a means to accomplish peaceful political change in South Africa: an evaluation of the constitutional change proposed by the National Party in 1977' 6 (1979) Politikon 13

_____. Pluralisme as teoretiese perspektief vir veelvolkige naasbestaan in Suid-Afrika' 1 (1977) Politikon 4

Vosloo, W.B. and Schrire, R. 'Subordinate Political Institutions' in De Crespigny and Schrire op cit 77

Wade, H.W.R. 'The Basis of Legal Sovereignty' 1955 Cambridge Law Journal 172

Walkland, S.A. 'Committees in the British House of Commons' in Lees and Shaw op cit 242

Welsh, D. 'The Evolution of South Africa's Constitutional Structure' (unpublished paper, Cape Town, 3 February 1978)

Wiechers, M. 'Citizenship and Intergroup Accommodation in Plural Societies' in Rhoodie, N. (ed) Intergroup Accommodation in Plural Societies (1978) 430

_____. 'Current Constitutional Proposals - A Critique' (paper presented at 28th Summer School, Centre for Extra-Mural Studies, University of Cape Town, February 1978)

_____. 'Die uitvoerende staatshoof: Enkele opmerkings' in Jacobs op cit 139

_____. 'Grondslae vir Politieke Ontwikkeling in Suid-Afrika' in Coetzee, J. (ed) Gedenkbundel - H.L. Swanepoel (1976) 102

_____. 'Kleurlingburgerskap in Suid-Afrika' 1972 THR-HR 1

_____. ''n Kritiese ontleding van die Turnhalle-grondwet vir 'n tussentydse regering' 18 (1977) Codicillus 4

_____. 'Possible structural divisions of power in South Africa' in Benyon op cit 107

_____. 'The Franchise and Alternative Electoral Systems' in Boulle and Baxter op cit 182

Wiechers, M. and van Wyk, D.H. 'The Republic of Bophuthatswana Constitution 1977' 1977 SAYIL 85

Winter, R. 'The Growth of Judicial Power' in Theberge op cit 29

Winterton, G. 'Is the House of Lords Immortal?' 95 (1979) Law Quarterly Review 386

_____. 'The British Grundnurm: Parliamentary Supremacy Re-examined' 92 (1976) Law Quarterly Review 591

Worrall, D. 'The South African government's 1977 constitutional proposals' in Benyon op cit 127

Yardley, D. 'Devolution in the United Kingdom' in Essays in Honour of Ben Beinart vol III (1978) Acta Juridica 359