The problem of accommodating all sectors of the population has, until now, rightly been the prime pre-occupation of advocates of constitutional reform in South Africa. The fact that it has engaged us so long is an indication of its intractability. However, this Workshop does, to a certain extent, presuppose the possibility of a major breakthrough in the foreseeable future. Such a breakthrough would, presumably, be accompanied by a generally shared commitment to the notion of constitutional government and therefore to the ideology of constitutionalism itself. Constitutionalism is the philosophy of limited government,¹ that is, the antithesis of arbitrary, uncontrolled and unaccountable government.² But constitutionalism has, over

¹ This is an over-simplification of the meaning of the term 'constitutionalism' (see P Sigmund 'Carl Friedrich's Contribution to the Theory of Constitutionalism-Comparative Government' in J R Penmook & J W Chapman (eds) Constitutionalism : Nomos XX (1979) 34), but it will do for the present purposes. Cf C W McLwain Constitutionalism Ancient and Modern (1940) 24.
² Thus I use the term 'limited government' in the political sense and not the economic sense in which it is used, for example, by Professor J A Lombard in his book Freedom, Welfare and Order (1978) Ch 1.
the centuries, engendered a mass of constitutional theory which has not always kept pace with the times even though many of us as constitutional law teachers go on propagating it - perhaps half in the hope that, so long as we continue to shout out the theory long and hard enough, reality will eventually succumb or at least stop changing. Yet, for the purposes of law reform - and especially constitutional law reform - it is imperative that we understand the present realities in society and, since constitutionalism is about the proscription of power, the real loci of power in the modern state.\footnote{W C Andrews, Constitutions and Constitutionalism 2ed (1963) 13-14.} The central thesis of this paper is that our orthodox constitutional theory needs a major overhaul if constitutionalism is to survive; for it no longer corresponds with reality. In particular it fails to take into account the emergence of two inter-related phenomena which, as repositories and generators of power, have acquired a new significance in the modern state. These are bureaucracy and corporatism. Our society, almost as much as most modern states in the World, is undergoing a pattern of change which is having the effect of profoundly altering its internal power structure. Because of the effects of industrialization, urbanization and the advancement of technology, large scale organization, regulation and control accompanies rising expectations. The result is the re-emergence of bureaucratic activity to perform the functions of modern government, as well as the growth of various forms of corporate power, public and private, which, due to the consequences of organization and scale, are at once more powerful and less accountable than any power which could be possessed by individuals. Here I wish to consider these two phenomena and attempt to relate them to our constitutional theory, ultimately raising some of the questions which I would suggest constitutional lawyers should consider before embarking on the necessary law reform and highlighting some of the areas in which we most need the assistance of political scientists, sociologists and political economists. If KwaZulu/Natal were permitted to determine her own constitutional future to some

\footnote{Cf O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Mod L Rev 1.}
extent, this would provide, as a program of decentralization always
does, a marvellous opportunity to consider these phenomena whilst con-
structing a new constitutional framework for government. Already we
have been set a sound example for enterprising and realistic thinking
on the subject by what has been popularly labelled as the Lombard
Report after its final editor, Professor J A Lombard.

THEORY AND A BURGEONING REALITY

A PRESENT THEORY

Modern constitutionalism and the constitutional theory with which
we are all familiar were conceived in and for a bygone age. The
question is, is this still appropriate in the modern state? Put brief-
ly, our constitutional theory runs something like this:

Democratic theory requires that if we are to be governed at all,
we should be governed in accordance with laws to which we all consent.
The fiction of consent is maintained by the devices of representation
and periodical elections. Thus primacy is placed upon the law-making
power in the state which, being representative (in theory) of the wish
of the people, renders the law-maker the supreme legal authority: ie
the legal sovereign. The legislation created by the legislature is
'the law' and many laws are aimed at conferring authority (legal power)
upon other organs of government to carry out acts of government (ie
executive functions of government).

Not only does the legislature thus empower the executive branch of
government; under the Westminster system which we have inherited, it
also exercises control over the executive by means of the principle of
accountability known as responsible government. In terms of this
principle the heads of the executive (prime minister and cabinet) must
also be members of the legislature. Various conventions such as
members' question-time, no confidence debates and votes, and the

5 In federal states this sovereignty is, of course, divided between
federal and state legislatures.
6 Egs 20(3) of the Republic of South Africa Constitution Act 32 of
1961.
creation of certain specialized committees of parliament, are all meant to give meaning to this notion of cabinet and ministerial responsibility; and they provide, in our case, the only 'significant' legislative controls on the use of governmental power. Of course these controls presuppose that cabinet ministers are in full control of their departments and can realistically account for them; that parliament has the time, inclination and expertise to call ministers to account for the various aspects of administration under their control; and that the composition of parliament is such that a vote of no confidence could possibly be carried.

Apart from legislative controls, there is also judicial control of government power. The Supreme Court, in South Africa's case established by Parliament 7 although also claiming inherent or common law jurisdiction, 8 will set aside acts of the executive which are contrary to law. Thus at the instance of affected persons it will review acts of the executive branch of government in order to ensure that these acts comply with the authority created by statute (or, in a possible few remaining respects, the prerogative). 9 The underlying principle of justification for this 'interference' by the courts is the principle of legality (or, stated in its negative form, the doctrine of ultra vires), and it is applied whenever the courts have not been prohibited from doing so by the sovereign parliament. Thus whatever is not legally authorised may be declared ultra vires by the courts and set aside at the instance of someone who has been adversely affected and who enjoys locus standi to challenge the unauthorized act. As is obvious, for as long as there is a sovereign parliament - the case in South Africa 10 - what is 'legal' depends upon what parliament says or permits. However, what parliament says depends upon what the courts say it says. And so the acts of parliament (and subordinate legislation authorized by parlia-

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7 Eg S 94 of Act 32 of 1961.
8 Ex parte Millestone Investment Co (Pty) Ltd 1965 (2) SA 582 (T), 585.
9 Cf s 7(4) of Act 32 of 1961; and see generally Sachs v Donges 1950 (2) SA 265 (A).
10 Ndlovu v Hofmeyr 1937 AD 229; Harris v Minister of the Interior 1952 (2) SA 428 (A). This has not been affected by any of the recent changes to the Constitution.
ment), in order to receive meaning, undergo a process of interpretation by the courts. This process of interpretation is inevitably, though not obviously, coloured by the attitudes of the judges themselves. The judges are specialists in applying the common law, and, even in South Africa, they are steeped in the ethos of the doctrine of the Rule of Law.\(^\text{11}\) The consequence is that judges interpret statutory authority in a manner which makes it seem 'reasonable' and as similar to the 'ordinary' common law as the words of the statute will permit.\(^\text{12}\) Statutory discretions, and the authority to invade private property or personal liberty, are thus interpreted as restrictively as possible, since the Rule of Law and the rule of administrative discretion are inimical,\(^\text{13}\) while two of the fundamental tenets of the common law are the notions of personal freedom\(^\text{14}\) and the sanctity of private property and freedom of contract.\(^\text{15}\)

From what has been said above it is clear that another aspect of constitutionalism, namely the doctrine of separation of powers, is implicit in our constitutional theory.

Montesquieu thought that the separation of governmental powers was the secret to the fact that there was a relatively higher degree of liberty in England during the eighteenth century than elsewhere in Europe. In fact this interpretation of the English constitution was

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11 The Rule of Law doctrine, and indeed the philosophical pitch of the common law itself, is probably a highlight of the Gesellschaft view of society (see Kamenka & Tay in Feudalism, Capitalism and Beyond (below n 26) 127-8).


14 Cf Wood v Odonga Tribal Authority 1975 (2) SA 294 (A), 310.

mistaken;16 nevertheless it has gained a foothold even there.17 Thus it is fundamental to our mode of thought on constitutional matters and we automatically distinguish between the legislative, executive and judicial functions of government. And it is also a fundamental feature of the orthodox constitutional theory which we have inherited that economic power ought to be separated from governmental power altogether, in order to avoid the possibility of tyranny18 and in accordance with the Gesellschaft view of private property discussed below.19 Thus government interference in economic affairs is viewed with apprehension, even though there is no reason to suppose that it is always incompatible with orthodox constitutionalism.20 So the dominant approach so far as the regulation of private power is concerned is21 to not regulate; ie to allow the maximum freedom of action and use of private property as is thought compatible with the security of the state. Consistent with this approach, regulation is used only in order to ensure that this freedom of action does not interfere with that of others; and apart from various aspects of criminal law the regulations which do exist are generally thought to be aspects of private law.

17 Eg Duport Steels Ltd v Sires [1980] 2 All ER 529, 541 (H): '...it cannot be too strongly emphasized that the British Constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the judiciary interpret them' (per Lord Diplock). Cf our Republic of South Africa Constitution Act 32 of 1961 which is divided into: Part V Parliament (The Legislature), Part IV The Executive, and Part VII The Administration of Justice (Judiciary). Cf Minister of the Interior v Harris 1952 (4) SA 769 (A), 792; M Wiechers Administratiefreg (1973) 16-17; D H van Wyk 'Suid-Afrika en die Regstaatidee' (1980) TSAR 152, 158.
19 See below 82f.
21 With the exception of our own peculiar curiosities, such as the policy of separate development.
The theoretical structure just described may have complexities of
detail, but by and large it is the framework within which our consti-
tutional and administrative law operates. For lawyers it provides a
simple model of legislative and judicial control of government power,
and it reluctantly admits of piecemeal regulation of abuses of private
power.

The trouble is that this simple model is expected to correspond
to a complex reality. The reality is not that of an omniscient parlia-
ment granting detailed instructions to an obedient executive acting
under the direction and watchful eye of cabinet ministers who will re-
sign in shame if they fall into error. Nor is the statutory authority
which empowers the executive capable of simple translation into 'ordi-
nary' law to be applied by judges in a simple, legalistic fashion.
Neither is non-governmental society entirely the picture of benevolent
individuals, busy advancing the interests of society in general by their
own pursuit of happiness. Unfortunately this is the image of a society
which has long since passed if, indeed, it ever existed.22 To assume
that it still exists today, or even that it could, is to believe in
myths. What, then, is the reality?

B  PRESENT REALITIES : FROM PLURALISM TO CORPORATISM,23 OR THE RISE
OF THE ADMINISTRATIVE STATE

THE GENERAL TRANSFORMATION OF SOCIETY

Modern constitutionalism was conceived during a period in which
society was perceived to be comprised of competitive, individualistic
and relatively disorganized units. It was conceived for what has been

44: '...there are few fictions so misleading as that which looks
back at the early nineteenth century and says that it was an "era"
of laissez faire.' See too T S Ashton 'The Treatment of Capita-
lism by Historians' in F A Hayek (ed) Capitalism and the Historians
(1954) 33; H B Falkena The South African State and its Entrepre-
neurs (1980) 16.

23 Here I have borrowed from the title of the recent book by
R J Harrison, Pluralism and Corporatism : The Political Evolution
of Modern Democracies (1980).
described as the plural society. But the plural societies of the enlightened states which had emerged from Absolutist Europe and post-Tudor England were relatively simple then. They were still drifting blissfully toward the Industrial Revolution. The modern state is much more complicated. It is more organized, more regulated, more specialized and technologized than anything known before the advent of industrialization. It is better described as corporate in structure.

While discussing this transformation, it may be useful to employ the classical terminology used by sociologist Ferdinand Tönnies as this terminology has been adopted by the historian, Eugene Kamenka and his lawyer wife, Alice Ehr-Soon Tay. Thus we may distinguish between the:

(i) Gemeinschaft: the 'organic, personalized community' resting on 'kinship, shared locality and religion or ideology, on "natural" and traditional leadership, on the sense of an organic community or social family';
(ii) Gesellschaft: the 'individualistic, commercial-contractual society', that is 'Nobben's society of atomic individuals, standing in relation to each other as abstract right- and duty-bearing individuals, held together by contracts and commercial exchange under the rule of an abstract, depersonalised, impartial and impersonal legal system';
(iii) Bureaucratic-administrative society, where social policy and

24 See Harrison id 185. I use the term 'plural' in the more general sense when related to a multiplicity of ethnic or racial groupings (eg A Lijphart Democracy in Plural Societies : A Comparative Exploration (1977) 3).
27 Kamenka & Tay in Bureaucracy op cit 130.
28 Ibid.
social planning is elevated as 'complex and developing technical and rational exercises, requiring the organization of knowledge, the allocation of resources, the planning and supervision of activities'.

Put crudely, the organic, Gemeinschaft community corresponds to the tribal, or feudal or rural societies of medieval Europe, recent Africa and elsewhere; and is, contrary to first assumptions, an extremely complex grouping. The Gesellschaft, on the other hand, corresponds more closely to the societies of post-Absolutist and Enlightened Europe, the developing industrial state and what we have named as the pluralist model - perhaps what some of us assume to be the case in South Africa, at least so far as Whites are concerned. But the new society which has emerged from the era of industrialisation (the 'new industrial state', or 'post-industrial society') is the bureaucratic-administrative state. This phenomenon has emerged with the expansion of governmental activity. Accompanying this expansion of government activity, sometimes causing or encouraging it, sometimes being caused by it, is the growth of big business, large-scale corporations, non-commercial organizations and the like. In short, the bureaucratic-administrative society is the product of the organisation of both governmental and private power. It is the inevitable result of industrialisation and capitalism itself, for as Professors Griffith and Street have put it, '[t]he very success of laissez-faire was its undoing. Concentrations of large sections of the population in overcrowded cities brought problems of housing, disease, and smoke that could not be ignored. The Administration had to intervene in the interests of public safety and health...'

29 Ibid.
30 Especially rural, for as Tönnies pointed out, the historical key to the Gemeinschaft is the agrarian household (see Kamenka & Tay in Feudalism, Capitalism and Beyond op cit 136-7).
31 Ibid.
34 See further below 14ff.
35 This is not to say that these phenomena only exist in the bureaucratic-administrative, post industrial state. In fact their origins are much older (see C Northcote Parkinson The Rise of Big Business (1977) Part 1). However their specialisation is, today, a distinguishing feature (see Parkinson id 3).
so far as capitalism was concerned, the protestant ethic upon which it rests has given way to a pervasive hedonism[^37] in which welfare benefits and other governmental largesse are now 'social entitlements' or a new form of 'property'.[^38] The fact is that the industrial, urban development of society engenders a pattern of (frequently contradictory) forces, environmental, sociological, economic and psychological which demand big government, big business, specialization and functional differentiation - in short, a planned, and hence corporate, society.

It could be argued that South Africa and especially KwaZulu/Natal is hardly 'post-industrial' or even fully industrial. While this is true, I do not believe this renders comparison inappropriate or that it is misleading for present purposes to draw from the experience of more advanced states. There are many elements of our society which fit into the corporate and bureaucratic-administrative model. The hedonism which fundamentally distinguishes the post-industrial state from the Gemeinschaft (despite their similarities of hierarchical direction) is as much a part of our society as any state in Europe. The advance of technology, cultural sophistication and power of the media is not bound by geography any longer.[^39] Indeed the very fact that we have still to be developed as an industrial economy ensures that governmental planning and economic activity is likely to be high, in accordance with 'Wagner's law'.[^40] And the scale of large corporations and other private organizations is also such in South Africa as to distance the real management of these organizations from its members.[^41] If anything the features I am describing are exaggerated in a developing country: necessary state action, on the one hand, and less competition on the other, tend to increase bureaucratic and corporate power.

[^38]: Eg C A Reich 'The New Property' (1964) 73 Yale LJ 733.
[^39]: Cf Kahn-Freund (above n 4) 7-10.
[^41]: Cf Lombard *Freedom, Welfare and Order* Ch 4; and see J Blondel (ed) *Comparative Government* (1969) where the editor points out (at p xlvii-xlxi) that bureaucracies are even more pronounced in developing societies.

[^93]: Cf Lombard op cit 93; and, more generally, Harrison *Pluralism and Corporatism* Chs 5 and 6.
Of course many of us believe that the reaction to the inadequacies of the Gesellschaft society and the myth of 19th Century 'Economic Man' has gone too far; that the planned society has itself become a 'source of most of our troubles'; that what is needed is the right mix. Such arguments are variously put, from the relatively moderate views of Friedrich Hayek to the more extreme of Milton Friedman and Robert Nozick. But irrespective of our standpoints we are all subject to the 'tyranny of circumstance'; and whatever elements of the Gesellschaft we can reintroduce or salvage, we live inevitably in a bureaucratic-administrative society by virtue of the consequences of urbanization, technological development, expectations and attitudes. It is essential that constitutional lawyers recognize the extent of the bureaucratic and corporate power which exists in such society; and that they appreciate the consequences for constitutional theory.

THE IMPLICATIONS FOR CONSTITUTIONAL THEORY

(i) Bureaucratic Power

It has long been evident that, despite the apparent 'responsibility' to parliament of the cabinet under the Westminster form of government, there has nevertheless been a dramatic shift in the loci of real power away from parliament and to the executive. Thus Bagehot in 1867 distinguished the efficient aspects of the English constitution from its dignified aspects, the latter characterising the institution of

44 Eg Friedman *Free to Choose* op cit. Cf A D Wassenaar *Assault on Private Enterprise* (1977).
47 The bureaucratic-administrative society does not automatically exclude all elements of the Gesellschaft or Gemeinschaft. Indeed, unlike the (usually) earlier structures, the bureaucratic-administrative model does not stand in sharp uncompromising opposition (see eg Kamenka & Tay in *Feudalism, Capitalism and Beyond* op cit 139-140).
parliament in particular, and the former characterizing the close union of the executive and legislative powers: ie the cabinet. The cabinet was the 'efficient secret' of the English constitution.\textsuperscript{48} The make-up of parliament is different now,\textsuperscript{49} but Bagehot had analyzed just the beginning of a trend. The last century has witnessed a massive transfer of power from parliament, both in Britain\textsuperscript{50} and, even more so, South Africa,\textsuperscript{51} to their respective executives.

What we have, then, is the rise of the administrative state.\textsuperscript{52} The 'night-watchman state' engaged itself primarily in the functions of protection of the citizen and the state itself, and adjudication of private disputes between its subjects. And in developing states the machinery of government was, and is in the case of South Africa, engaged in the development of infrastructure and provision of essential services which private developers either cannot afford or have no profit-incentive to develop or provide.\textsuperscript{53} However, with the advent of industrialization and its consequent problems relating to urbanization, health and the environment, the machinery of government has increasingly been directed toward regulation of private activities, for example by means of factory regulation, zoning laws and legal restraints on freedom of contract.\textsuperscript{54} And with the rise in expectations on the part of its subjects, the state has increasingly embarked upon the role of provider of welfare services,\textsuperscript{55} such as pensions, subsidised or free

\textsuperscript{48} W Bagehot The English Constitution Balfour ed (1928) esp 9.
\textsuperscript{49} N Johnson In Search of the Constitution : Reflections on State and Society in Britain (1977) 43-5.
\textsuperscript{50} See Johnson op cit Chs 4-6.
\textsuperscript{51} Cf eg P J van R Henning 'Die Administratieve Staat' (1968) JHRHR I; W H B Dean The Riots and the Constitution in 1976 (1976). The recent changes to our Constitution by the Republic of South Africa Constitution Fifth Amendment Act 101 of 1980 emphasize this trend (see eg the analysis of the new structure of government under Mr P.W. Botha by Ivor Wilkins, Sunday Times September 28 1980 p 31).
\textsuperscript{52} See F Morstein Marx The Administrative State : An Introduction to Bureaucracy (1957); and E S Bedford Democracy in the Administrative State (1969) esp Ch VIII.
\textsuperscript{54} See eg Friedman The State and the Rule of Law in a Mixed Economy 30ff.
\textsuperscript{55} Id 24ff.
housing, medical treatment and the like, even in South Africa. Lastly, and most controversially, the state has increasingly involved itself in the business field as an entrepreneur wherever it has considered the industry concerned to require public intervention or assistance.⁵⁶

All these activities have led to the state taking on an ever increasing rôle of consumer,⁵⁷ since in order to perform the functions expected of it, the state makes heavy use of the produce of private enterprise where it cannot produce the same goods or provide the same services itself, or where it is uneconomic to do so. And, of course, to finance these activities, the scale of taxation is ever increasing. Needless to say, in order to carry out these functions of government, the modern administrative state requires a massive bureaucracy⁵⁸ with diverse and differentiated functions at both central and, more preferably,⁵⁹ local level. The bureaucracy is needed to raise the money necessary to spend it (on itself) and on the activities outlined. It is required to implement these programmes of action on a day-to-day basis, and it is required to bring the political decision-making process down to the practical level by making allocation choices when dispensing the finite, and therefore scarce, amount of 'largesse' available.

(ii) Corporate Power

Corporate power is not necessarily private power. Corporatism is very much a feature of each organ of modern government as well,⁶⁰ and

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⁵⁶ Id Ch 3; H J J Reynolds 'The Relative Contributions and Rôles of the State and the Private Sector in Growth and Development, with Particular Reference to the Republic of South Africa' (1975) 10 Journal of Public Administration 120; Falkena op cit 21.

⁵⁷ Eg C Turpin Government Contracts (1972) 15⁷⁷; Falkena The South African State and its Entrepreneurs Ch III.

⁵⁸ As at 30 June 1978 there were a total of 1,386,388 employees of the public sector in South Africa (Hansard House of Assembly : Questions and Replies (1979) Vol 83 Cols 253-5). And a recent estimate put the number of statutory bodies ('quangos') at 952 (Sunday Times November 18 1979). The number of government departments has recently been drastically reduced as part of the Prime Minister's rationalization programme. However this is rationalization and not necessarily less government.

⁵⁹ Eg Johnson In Search of the Constitution 87⁷⁷; Lombard Freedom Welfare and Order Ch 5; Harrison Pluralism and Corporatism 191-2.

⁶⁰ Harrison Pluralism and Corporatism 140⁷⁷.
in particular the bureaucracy. Indeed, corporatism and bureaucracy seem to go hand in hand: bureaucracies have become 'corporatised' and large private organizations frequently become 'bureaucratised'. Nor, in the non-governmental sector, is corporatism confined to business. For privately possessed power of whatever nature has undergone a metamorphosis through the process of organisation: a process which is both necessary - given the scale of society and the complexity of our activities - and an inevitable consequence of the rationalism underlying the cultural ethos of capitalism itself. Organized private power can be entrepreneurial, labour-oriented, religious, cultural or ideological. And it is not unusual to hear talk of the 'corporate castle', the 'fifth estate', or even the 'super Afrikaners'.

It is this process of organization which, so it would seem, has brought about a change in the nature of private power. With the advent of industrialization and advanced technology has emerged the practice of specialization and functional differentiation. The consequence is that the individual participant in the production process has paled into insignificance so far as planning the product as a whole is concerned. The planning is, in large organizations, carried out by a managerial group which has a tendency to remoteness from the share-holders and the

61 Id Ch 7.
63 See esp Galbraith The New Industrial State Chs 2 & 3; Economics and the Public Purpose Ch 9.
64 Socialism is not excluded: the 'axial principle' of contemporary society is functional rationality and this is the product of the capitalist culture (see Bell The Cultural Contradictions of Capitalism 10ff).
68 Lawyers need the assistance of social scientists to test the veracity of this assumption. See eg M Savage 'The Ownership and Control of Large South African Companies' (1978) 4 S A Labour Bulletin 9.
factory floor itself. 69

But this phenomenon is not restricted to the entrepreneurs of society alone. Trade unions have experienced a similar remoteness, usually in proportion to their size. 70 So have political parties. 71 And, although I can claim no authoritative support for the proposition, it seems reasonable to suppose that a similar accumulation of power accrues to the organizers of cultural, religious or any other large organization.

Thus the notion that private power enjoys a relatively even, atomistic dispersal throughout society is far from being realistic for modern society. And when that breaks down, so does the traditional theory that individuals are best left to exercise and enforce their rights on their own since they have control over their actions and the obligations they incur. In fact, the power accruing to the managers of these corporate organizations is not easily controlled by its members if, indeed, they can control it at all under the prevailing private-law model of rights and obligations.

(iii) The 'Bureaucratic Symbiosis' 72

Not only has the nature and potency of governmental and private power changed with the development of the modern administrative and industrial state. The two are able to combine for the mutual benefit of the bureaucracy and the private organization and not infrequently to the disadvantage of the individual or other less fortunate groups. This mutual alliance has been called the 'bureaucratic symbiosis' by Galbraith and it has been particularly noticeable in America so far as the weapons industry is concerned. 73 However, it is also noticeable between trade unions, employers and the government. 74 And one need hard-
ly add the example of the 'alliance' of the Broederbond and the South African Government. This bureaucratic symbiosis serves to create a form of 'neo-feudalism', since the combination of bureaucratic and corporate pressure can force unwilling individuals to toe the desired line, even if this pressure is not formally authorized by law. And where one corporate institution already has the ear of the bureaucracy, others may find themselves ignored, and individuals or ad hoc deputations may be dismissed by government as 'nuisances' who should act or operate through the institutionalised (ie 'accepted') organizations.

(iv) The Widening Chasm between Theory and Reality

The metamorphosis in society - the transition from the Gesellschaft to the bureaucratic-administrative state - which has cultivated bureaucracy and corporatism on a scale unprecedented in Gesellschaften has rendered traditional theory badly out of touch with reality. First the theory cannot account for the power of the modern administrative state:

'The unregulated market of the 19th century was capricious and cruel, but the unregulated state is likely to be even more so; and the state is much harder to regulate than the market ever was. But although social democracy has been extraordinarily fertile in expedients for regulating the market, it has shown little or no interest in regulating the state. As a result, one of its chief legacies is an overmighty state which is also becoming, in the current jargon, "overloaded".'

The complaint that parliament is unable to control effectively the actions of the executive arm of government is not restricted to

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76 Harrison op cit 69.
77 Id 68.

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It is a feature of other European states and, of course, our own. Not only is it difficult for parliament to bring ministers to account for their departments; it is also very difficult for ministers to obtain the co-operation of their departments for the implementation of new and (from the bureaucracy's point of view) unwelcome policies. Thus the obstructionism of Dr Roome's 'tortoise', necessitating a warning to public servants by the then Minister of Justice, Mr Schlebusch.

So far as judicial control of bureaucratic power is concerned, the remedies are limited indeed. Where jurisdiction of the courts to review is not ousted (as is often the case with security legislation, although this is not the only type of legislation which ousts review jurisdiction) it is nevertheless restricted to the legality, or regularity of the action complained of. The merits of the action is not

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80 Eg France (see Harrison op cit 119). See too A S Mathews The Darker Reaches of Government (1978) 12ff.

81 Eg W B Dean 'Whither the Constitution?' (1976) 39 THRHR 256, 273ff.

82 Harrison op cit 116ff.

83 So named by the Minister himself. See eg the reports by Fleur de Villiers 'How the tortoise is scuppering P W's plea to avert revolution' (Sunday Times August 10 1980), and Neil Hooper 'Dr K foiled again by the new pass laws' (Sunday Times September 28 1980).

84 In an address to the South African Institute of Public Administration on September 8 1980 (Natal Witness September 9 1980 p 5).

85 Eg s 10 sex (1) of the Internal Security Act 44 of 1950; s 6(5) of the Terrorism Act 83 of 1967.

86 The extent of the prohibition on review varies from partial to extensive, depending upon the wording of the legislation. Cf s 19(bis) (1A) of the Citizenship Act 44 of 1949; s 3 of the Reservation of Separate Amenities Act 49 of 1953; and s 45(2) of the Admissions of Persons to the Republic Regulation Act 59 of 1972.

87 This is trite law: eg Commissioner for Inland Revenue v City Deep 1924 AD 298, 306-7; Steyn v City Council of Johannesburg 1934 WLD 143, 146-7.
a concern for the courts.\textsuperscript{88}

So the rise of the bureaucratic phenomenon and bureaucratic power has posed serious problems for the symmetry of present theory.

In the second place, corporatism, whether public or private, has generated a form of power which is not only more potent than the power possessed by individuals under the Gesellschaft model, but also less easily identifiable and more remote (and therefore less subject to individual control). It is an appreciation of these features of corporate power that renders anachronistic the following statement, however realistic it might once have been:

'\[1\]t cannot be conceded for one moment that the Court should be more astute to read a provision for a fair hearing into a contract voluntarily entered into between two or more equal contracting parties, than into a statute by which an all-powerful Parliament set up a tribunal (consisting of a Minister, an official, a statutory board or the like) entitled to interfere with the rights of ordinary citizens. In truth, the position is more likely to be the converse.' \textsuperscript{89}

The behests of reality have coerced modifications and additions to the constitutional institutions and practices of most modern states, including our own; modifications and additions which do not happily fit into the theory.

Recent times have witnessed various adjustments to existing institutions and the addition of some new ones; all in order either to control, or at least render accountable, bureaucratic power, and all with

\textsuperscript{88} Eg Crossley v Durban Town Council 1934 NPD 226, 248; Jivan v Ious NO 1950 (4) SA 129 (T), 131; Krog v Druklisensiering vir Gebied 42 1961 (3) SA 415 (A), 420-1. However, see further below 94.

\textsuperscript{89} Bekker v Western Province Sports Club (Inc) 1972 (3) SA 803 (C), 820 (per Theron J). Cf Carr v Jockey Club of SA 1976 (2) SA 717 (W), 721ff; Theron v King van Wellington 1976 (2) SA 1 (A), 21, 34ff. It is recognition of new realities that has brought about signs of a change in attitude by English judges at least where the consequences of the private action are likely to be serious (see eg P Jackson Natural Justice 2ed (1979) 125-6; S A de Smith Judicial Review of Administrative Action 4ed by J M Evans (1980) 184 n 3). The justification for ignoring the ostensible terms of the contract is, as in the case of restraint of trade agreements, 'public policy'.

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varying degrees of success. Thus parliaments have developed their investigatory powers by means of select committees or commissions, ombudsmen and the requirement of laying of subordinate legislation and reports. The executive has been provided with internal appeal.

90 Especially in Britain: see eg Dean (above n 51) 273-4; N Johnson 'Select Committees as Tools of Parliamentary Reform: Some Further Reflections' in S A Walkland & N Ryle The Commons in the 70's (1977) 175.


92 The British Parliamentary Commissioner for Administration is an officer of Parliament. Cf the South African Advocate-General who has a duty to report to Parliament (s 5 of Act 118 of 1979). However the attachment of an ombudsman to parliament is not a necessary feature of the institution itself. In numerous countries they exist at central, local and even municipal level. (For a useful survey of the spread of the ombudsman institution, see the report by JUSTICE (British Section of the International Commission of Jurists) entitled Our Fettered Ombudsman (1977) Appendices A & B; and see F Stacey Ombudsman Compared (1978) passim). One may remark, in passing, that there is no reason why these institutions should not be considered by either the KwaZulu or Natal Provincial administrations, or, for that matter, the cities of Durban and Pietermaritzburg.

93 See eg Interpretation Act 33 of 1957 s 17.

94 See eg the requirement that the annual reports of public enterprises be submitted to Parliament, as discussed by J J N Cloete 'Public Enterprises in South Africa: Administrative Aspects' (1978) Journal of Public Administration 5, 23ff. It is interesting that Professor Cloete notes that this safeguard is 'of little value for control purposes' (at 24).
mechanisms, adjudicative, investigatory and advisory bodies. And in some countries there has been a trend towards openness in government which is an indirect method of facilitating regulated and honest administration. There has also been some response to academic pressure for extension of the ambit of judicial review, while appeals on the merits to the courts have in some cases been provided.

So far as private power is concerned, there has been an increasing tendency to regulate this power and to provide for statutory remedies beyond those normally existing in the common law. Thus monopolies, labour disputes, public companies, private welfare organizations, and many more are regulated by statutory provisions extending way beyond the vision of the enlightened liberals of the semi-laissez faire.

95 See the useful collection of examples at central government level by A Rabie 'Administratiefregtelike Appelle' (1979) 12 De Jure 128, 141ff.


98 See eg the judgment of Jansen JA in Theron v Ring von Wellington 1976 (2) SA 1 (A), 13ff.

99 See again the collection of examples by Rabie (above n 95) 130ff.
Gesellschaft Society. \textsuperscript{100}

But there have been few attempts to grapple with the fundamental corporatist tendencies in both the (traditional) public and private sectors. The corporatist phenomenon does not seem to have attracted much serious attention from public lawyers, \textsuperscript{101} yet it is often a form of power without authority, and power without accountability. \textsuperscript{102}

II

THE DILEMMA OF THE PRESENT

A CHANGING CONCEPTS

(i) Private Property and Government

The new bureaucratic-administrative world in which we find ourselves presents us with an intractable dilemma: do we accept it, do we encourage it, or do we try to stop it and turn the clock back? There are significant opinions of all persuasions and naturally our choice of action depends upon our political ideology. However, I think it is fair to say that the majority of us have mixed and confused feelings:

'...bureaucratization and the rejection of bureaucracy and bureaucratic values have emerged as equally notable features of our time. Perhaps the most striking "contradictions" - or tension - of our time are the simultaneous pursuit and limited

\textsuperscript{100} The list of examples is endless. For a few examples of statutory restrictions upon freedom of contract, see Aronestam Consumer Protection, Freedom of Contract and the Law Ch III; and the new Credit Agreements Act 75 of 1980.


\textsuperscript{102} This, it is submitted, is the sad but unacknowledged danger of the very organizations which Professor B van Niekerk welcomes as a challenge to bureaucracy and the power of big business and the establishment (p 427 loc cit), namely the German Bürgerinitiativen: see B van Niekerk 'The German Bürgerinitiativen - A New Form of Plebiscitary Control of Government' (1979) 96 SALJ 424.
elevation of three classical paradigms of social life – the organic, personalized community (Gemeinschaft), the individualistic, commercial-contractual society (Gesellschaft) and the bureaucratic-administrative welfare state. We seek and fear all three. We strive for and will have to live with an optimal mix. Abusing bureaucracy as a substitute for thinking will not speed us on the way, even if it has special appeal to, and in connection with, a fourth underlying trend of our time, connected above all with affluence and the prolongation of a work-free youth – the elevation of the "free" individual and his "right" to instant and constant gratification.103

So we want bureaucracy, large scale organization and the benefits which each of these bring; but we want these self-same monsters to be controlled. And wanting to have our cake and eat it has influenced our conception of the nature of the role of law itself. Our conception of the notion of property – long the organizing principle or basis for the system of rights and duties104 – has been and is still changing. In the Gemeinschaft it embraces common as well as private property,105 and property is seen as a right to a revenue (in the form of either service or money).106 However the Gesellschaft conception of property is essentially individualistic,107 and property is seen as a right to material things or even as the material things themselves,108 while the underlying rationale for such a view is that property is to be an incentive to labour.109 And this very conception itself is presently undergoing a metamorphosis: 'property is again being seen as a right to a revenue or an income, rather than as rights in specific material things.'110

This is not quite as true in developing as opposed to advanced capital-

103 Kamenka & Tay in Bureaucracy: The Career of a Concept op cit 129-130. Cf their comments in Feudalism, Capitalism and Beyond op cit 132.
104 Cf C B Macpherson 'Capitalism and the Changing Concept of Property' in Feudalism, Capitalism and Beyond op cit 105; J Vining Legal Identity: The Coming of Age of Public Law (1978) passim and esp Ch 2.
105 Macpherson op cit 106.
106 Id 110.
107 Id 106ff.
108 Id 110ff.
109 Id 112-4.
110 Id 114.
ist societies; since resources are not as plentiful, and our expectations not yet as high. But it is surely the trend.\textsuperscript{111} No longer is our labour the natural source of our property; it is increasingly dependent upon the licenses and regulations; and those unable to work have as their sole property state assistance paid for by taxes.\textsuperscript{112} Property is becoming viewed in terms of political power, since control of the 'new property' is political;\textsuperscript{113} and it is increasingly conceived of as a right to a full life, predicated upon the assumption that once-scarce goods are, through the fruits of organization and technology, no longer scarce.\textsuperscript{114}

This change in the concept of property has undermined the symmetry of the Hohfeldian model of jurial relations.\textsuperscript{115} In particular, the distinction between the correlative rights and privileges is breaking down. Whereas judges have, until recently, referred to government dispensations of largesse such as welfare benefits, pensions and permits as pri-

\textsuperscript{111} It could be argued that far from being on the brink of the post-industrial society, South Africa (a) has no \textit{common} society, (b) has some groups which are still in the \textit{Gemeinschaft} state, and (c) has others which are only just entering the \textit{Gesellschaft} state; and that those who are of the state of mind suggested above as characteristic of the bureaucratic-administrative society are, in fact, in the minority. In reply, I would accept this to be the case, but would submit that while the \textit{conditions} under which some groups live may still resemble the \textit{Gemeinschaft}, their \textit{attitudes} are nevertheless becoming influenced by the new culture; that those who have entered the \textit{Gesellschaft} state of mind will undergo a very much shorter period of transition than did their predecessors in Western Europe, since they will be influenced by news of the new society outside. Nevertheless I accept that this is conjecture unverified by empirical research.

\textsuperscript{112} See Reich 'The New Property' (1964) 73 \textit{Yale LJ} 733; Macpherson (above n 104) 114-6. Cf Robson \textit{Justice and Administrative Law} 541ff.

\textsuperscript{113} Macpherson id 120-1.

\textsuperscript{114} Id 121ff. And where property is inherently scarce, for example land, there is pressure for this to be removed from absolute, individualized control; see eg B A Ackerman (ed) \textit{Economic Foundations of Property Law} (1975) 92ff. Related to this are growing environmental issues.

\textsuperscript{115} W N Hohfeld \textit{Fundamental Legal Conceptions} (1923). See eg H R Hahlo & E Kahn \textit{The South African Legal System and its Background} (1968) 80-82.
vileges unrelated to pre-existing rights, they are now having to develop alternatives, such as the 'legitimate expectation' concept, and 'entitlement triggers'. The suggestion by the recipients of this 'largesse' that they have a right to its receipt is no longer widely viewed as symptomatic of personal dishonesty or ingratitude. In this respect government is now on the defensive, and the new regime of rights and duties is at odds with the 'ethic of self-help, individualism, competition and achievement'.

(ii) Freedom of Contract

A related development is the decline of freedom of contract, not merely so far as individuals are concerned but, more significantly, so far as governmental freedom of contract is concerned. Until now it has hardly been questioned that government, like any individual, has as much right to contract where and how it pleases (so long as it does not contravene any statute). This was thought to be a natural element of executive prerogative. However, the matter was brought into sharp relief in England in 1977 and 1978 when the government of the day attempted, as part of its anti-inflation measures, to enforce a 'voluntary' pay policy by means of a 'blacklist' in terms of which any private company which breached its wage increase guidelines would be barred from receiving government contracts. Although the matter was never challenged

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116 Eg Laubecher v Native Commissioner, Pies Retief 1958 (1) SA 546 (A). Such an attitude was criticized by Beck J in Tabakain v District Commissioner, Salisbury 1974 (1) SA 604 (R), 606.


120 Id 53.

in court (it was arguable that the 'blacklist' constituted a fettering of its discretion), there has been strong reaction and it has been pointed out that where statutory authority has not been obtained, such a means of enforcing a policy is an arbitrary abuse of the prerogative power and ought to be controlled.\textsuperscript{122} The attack on government freedom of contract is another manifestation of the mixture of attitudes to government: on the one hand it is consistent with \textit{laissez faire} revulsion of governmental activity in the economic sphere, and it represents the attitude that all aspects of government action should be governed by the Rule of Law; on the other hand, it is equally a manifestation of the attitude that when government is dispensing lucrative slices of contractual cake, everyone has a 'right' to be considered.

(iii) \textit{Locus Standi}

Under massive attack at the moment is the traditional, private-property-orientated conception of \textit{locus standi} or standing.\textsuperscript{123} The thrust of the attack is that the traditional conception of \textit{locus standi} is too private-interest-orientated and that where there is a failure on the part of government to take action to vindicate the public interest, or the interests of private individuals who cannot satisfy the requirements of standing because their interest is considered (by individualistic standards) too remote, private individuals ought to be able to


\textsuperscript{123} See esp Vining Legal Identity: the Coming of Age of Public Law p. 82 et seq. Cf eg L L Jaffe 'The Citizen as Litigant in Public Actions: the New-Hohfeldian or Ideological Plaintiff' (1968) 116 Un of Pennsylvania L Rev 1033; A Rabie & C Eckhard \textit{Locus Standi: the Administration's Shield and the Environmentalists' Shackles} (1976) 9 CILSA 141; J D van der Vyver \textit{Actiones Populares and the Problem of Standing in Roman, Roman-Dutch, South African and American Law} 1978 Acta Juridica 191. Administrative lawyers are watching with interest the case presently pending before the House of Lords in England which, if the decision of the Court Appeal is upheld, will constitute near-recognition of the extinct \textit{actio populares: R v Inland Revenue Commissioners [1980] 2 All ER 378 (CA) (on appeal)}. (For discussion so far, see Wade Constitutional Fundamentals 57-9; P Cane 'The Fleet Street Casuals' (1980) 96 LQR 355.)
come before the courts as if they were 'private attorney-generals'. Likewise there is pressure for, and in the United States development of, 'class actions'. This development Professor Cappelletti describes as part of the 'newest wave in the worldwide movement to make rights effective' and is a major pre-occupation of the recent Florence 'Access-to-Justice' project. The trend is toward 'recognizing the social rights and duties of governments, communities, and individuals'.

(iv) Administrative Discretion

A further mammoth and constantly underestimated problem being experienced by modern legal systems, including our own, is the notion of discretionary power. It is accepted as inevitable that the bureaucracy should possess considerable quantities of discretionary power, yet this violates the Rule of Law doctrine since discretion is inherently inimic-


al to law.¹³⁰ In order to cope with the phenomenon, judges and writers have developed frameworks for 'confining, structuring and checking',¹³¹ the exercise of discretionary power. In other words, the object is to 'fetter' the discretion in some way so as to avoid arbitrary tyranny while maintaining efficient administration. However, we are only just beginning to understand the problems, let alone grapple with them. I am sure that it is the common experience of all administrative lawyers to be confounded by the sheer mass of contradictory cases concerning the exercise of discretionary powers. At times the judges have been criticized for inconsistency, possibly rightly; nevertheless it would seem that part of the problem is caused by the commentators themselves: for they nearly all treat administrative discretion as if it were one type of power, easily identifiable and capable of uniform control.

In fact this is precisely what administrative discretion is not. The complexity of bureaucratic power¹³² entails a complex range and variety of discretionary power envisaging various functions: adjudicative; recommendatory; investigatory; executive and advisory; prosecutorial; legislative; and political. The powers are conferred upon a wide range of officials of varying status and type; their significance varies from 'high acts of state' to decisions of low level or no extraordinary significance; their impact when exercised may vary from profound economic consequences for the country as a whole or deprivation of individual liberty or property, to small financial loss or benefit or only inconvenience to isolated individuals. Their complexity may call for technical expertise and know-how, or it may require no more than the good sense of the ordinary layman; they may presuppose a knowledge of factual circumstances requiring preliminary investigation; and - often overlooked - the nature of the discretions may assume divergent philosophies: thus in social services discretions may be exercised beneficently and with great flexibility, whereas with regulatory discretions,

¹³⁰ See above n 13; and cf the discussion by P Devlin The Judge (1979) 101ff.
¹³¹ To use the words of the leading exponent on this topic, K C Davis Discretionary Justice: A Preliminary Enquiry (1969) 3-4: '...we should do much more than we have been doing to confine, to structure, and to check necessary discretionary power.'
¹³² See above 86ff.
stricter criteria may dominate. Moreover the sheer quantity of these
discretions is vast.

Perhaps an appreciation of the complexity of this concept of dis-
cretion will go some way to explaining why, despite our protests, courts
still insist upon a classification of functions. The objection against
this practise is not against classification itself, but the fact that it
has been used in too crude a form and at the wrong times by judges.

More important, this complexity indicates the impracticality of a simple
set of rules for controlling all discretionary power. And discretions
involving political or ideological elements are ill-suited to control by
the judiciary; they are simply not justiciable. In other words, the
problems are political, not legal, and ought to be dealt with via poli-
tical, not judicial, institutions.

(v) The Public/Private Law Distinction

The growth in governmental regulation of private activity, the per-
vasiveness of government entrepreneurial activity itself, and the scale
of private corporate power, are, more than anything else, manifestations
of the current metamorphosis of society itself. For these developments

133 Here I am greatly indebted to a former teacher, D G T Williams, and
his unpublished paper: 'Public Interest and the Courts' presented
at the recent Colloquium of the Society of Public Teachers of Law
(Colloquium on Civil Litigation and the Public Interest : Cambridge
September 16 & 17 1980); and also the succinct discussion in the
Interim Report of the Committee on Administrative Discretions
(Bland Committee) (Australia : 1973) paras 17-22.

134 Eg: Bland Committee op cit para 18 - '...literally tens of thou-
sands'; Anisman A Catalogue of Discretionary Powers in the Revi-
ised Statutes of Canada 1979 (1975) 23: '14,885 powers' in Cana-
dian federal statutes alone (quoted by Arthurs (above n 12) 23
n 124). No similar studies seem to have been undertaken in South
Africa, although an unpublished dissertation by a law student at
the University of Natal entitled 'Scientific Applications in a Legal World' (S D L Hayeson) indicates that we are no exception.

135 Cf Baxter (above n 118) 609ff.

136 This is admirably discussed by Williams 'Public Interest and the
Courts' (above n 133). Cf De Smith Judicial Review of Administra-
tive Action 31ff.

137 See esp Griffiths 'The Political Constitution' (above n 12). This,
perhaps, is the key to the wide success of the ombudsman institu-

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have revived the question of an existence of a boundary between public and private law.\(^{138}\) The extent of the confusion is indicated by the diversity of views on the matter: first, the 'lack' of a distinction between public and private has been criticized.\(^{139}\) Secondly, the 'presence' of just such a distinction has come under attack.\(^{140}\) Those who recognize that there is a distinction either say there shouldn't be,\(^{141}\) or they argue for a colonization of public law by private law (ie the 'privatization' of public law),\(^{142}\) or they argue for the 'publicization' of private law,\(^{143}\) or for a synthesis of both.\(^{144}\) My own view is that the actual delineation does not really matter unless we are using it for jurisdictional purposes. What does matter is the fact that power has, in recent years, become public in the sense that government is more and more frequently becoming a party, and that the actions of private individuals or organizations are of wider impact, and therefore concern, than ever before.\(^{145}\) Whether we like it or not, refusing to recognize it won't help to control it.

\(^{138}\) Of course, in a jurisdictional sense our law knows no such distinction anyway, since all law is meant to be applied by one jurisdiction of courts, unlike the dual jurisdiction prevailing in, eg, France. Neither, since the Crown Proceedings Act 1 of 1910, have we known such a distinction so far as remedies are concerned. However, the distinction is part of our scholastic tradition inherited from Roman-Dutch law, and in this respect public and private law is distinguished in South Africa as it is on the Continent.

\(^{139}\) Eg J D B Mitchell 'The State of Public Law in the United Kingdom' (1966) 15 ICLQ 133; Johnson In Search of the Constitution Ch 8; Arturs (above n 12).

\(^{140}\) Eg C Harlow 'Public' and 'Private' Law: Definition without a Distinction' (1980) 43 MLR 241.

\(^{141}\) Ibid.


\(^{143}\) See the discussion by Merryman (above n 18) 13-16.

\(^{144}\) Eg Merryman id passim; W Friedmann 'Public and Private Law Thinking: The need for a Synthesis' (1959) 5 Wayne L Rev 291. Cf Stewart (above n 126) 1759-60.

\(^{145}\) Cf Merryman (above n 18) 14-18; Friedman The State and the Rule of Law in a Mixed Economy 11ff; Kamenka & Tay in Feudalism, Capitalism and Beyond 133-4; Bureaucracy: the Career of a Concept op cit 127; Harrison Pluralism and Corporatism 188.
B OUTDATED THEORIES

In the swirling maelstrom of social change which we are experiencing, with the accompanying changes in attitudes which are only just beginning to filter through to the law, it is very difficult to make predictions or prescribe new theories. Nevertheless, one thing seems to be clear: existing constitutional theory fails to take adequately into account or cater for these new developments. This is particularly true so far as two of our theoretical lynchpins are concerned: they are the notion of parliamentary (responsible) government; and the doctrine of the separation of powers.

(i) Parliamentary Government

The theory of parliamentary government is unrealistic in a number of respects. First, the conventions relating to individual and collective ministerial responsibility have, with the advent of the party-system, broken down. Even where the governing party enjoys only a very small majority, party organization usually ensures that a minister will not be in danger of having to lose his job if he enjoys prime ministerial and caucus support. The example of the recent information scandal renders this situation, so far as South Africa is concerned, too obvious for comment. However, even in Britain the principle of ministerial responsibility is woolly and unpredictable, to say the least.

Secondly, the combination of the scale and complexity of bureaucratic government on the one hand, and the inevitable tendency to corporatism within the bureaucracy on the other, not to mention corporatism within the cabinet itself, has rendered it almost impossible for

146 Tentative attempts have been made, for example, by Galbraith in Economics and the Public Purpose Part 5, and Harrison Pluralism and Corporatism Ch 10. However, these are very vague and generalised, as one would expect at this stage.

147 Unfortunately I do not have the space to deal here with what is also increasingly becoming a non-issue: the theory of parliamentary sovereignty. On its decline, see eg Koopmans (above n 101) 319-322.

148 Cf Hailsham The Dilemma of Democracy esp Ch XX; Koopmans (above n 101) 319-20.


150 Eg Harrison Pluralism and Corporatism 140ff. Cf Sedgemore The Secret Constitution passim.

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ministers to properly direct, or bear the responsibility for, the operations of their departments. And the notion of ministerial responsibility assumes that everything which happens below the minister is purely a matter of administration, that matters of policy will be dealt with at the higher (ministerial) - and therefore politically accountable - level. This assumption is patently false since it is increasingly obvious that policy decisions are made at all levels of government. 151

Thirdly, the sort of controls which are required for complex, modern administration require a specialist knowledge which places a high demand on the members of parliament themselves. This leads to the establishment of select committees which are themselves a form of corporatism. 152

In short, there is 'an inherent contradiction between the parliamentary and corporatist pattern, and the surrender of so much importance to corporate decision-making leads to cynicism about the parliamentary system, which reduces either to apathy or protest politics'. 153

Lastly, a further and even more fundamental factor contributes to the breakdown of parliamentary control. This is the necessity for delegating not only executive but legislative and judicial powers to the administration, which makes a mockery of the doctrine of separation of powers.

(ii) Separation of Powers

The doctrine of separation of powers has, under the Westminster form of government, never played as important a role as it has in the United States or France. Nevertheless, as was pointed out above, 154 it has come to form an important part of our theory because of the great deal of sense it contains. Moreover, while it has never been capable of rigid application, 155 it has for long survived various, and sometimes trenchant, criticism. 156

151 See further below 106.
152 Cf Galbraith Economics and the Public Purpose 267ff on the Congressional Committee system in the United States.
153 Harrison op cit 189.
154 Above 79-80.
155 Vile Constitutionalism and the Separation of Powers 2.
But now it has completely broken down. Legislatures are obliged to delegate powers to the bureaucracy on a massive scale in order to meet the exigencies of government,\textsuperscript{157} and no longer is there any hope of maintaining even a formal separation of powers among the agencies of government.\textsuperscript{158}

Far worse, a further, more subtle distinction which was developed in order to keep the doctrine intact has been perceived to be false: that is, the distinction between policy and administration. This distinction implied that the top-executive would formulate policy objectives, obtain legislative authorization for them (in parliament), and then leave it to the bureaucracy to carry out these objectives in terms of the legislative guidelines which had been obtained. In fact '[a]n important decision about "policy" will often be the climax of much administrative activity, rather than the initiation of it'.\textsuperscript{159} It is too frequently overlooked, especially in the distribution or award of scarce governmental resources, that the decision reached by the bureaucracy is, no matter how technical, at bottom one of policy. 'Expertness' will not remove this fact from reality.\textsuperscript{160} Whereas it was relatively easy (in theory) to make the top-executive politically responsible, appreciation of the truth that all sectors of the bureaucracy make policy decisions creates a problem for democratic theory of mind-boggling proportions.\textsuperscript{161}

The corollary of the \textit{Gesellschaft} view of separation of powers was the separation of government activity from private, economic activity.\textsuperscript{162} The growth of government entrepreneurial activity and the ever-

\textsuperscript{157} Eg Stewart (above n 126) 1693 ff.

\textsuperscript{158} Eg B Schwartz \textit{Administrative Law} (1976) Ch 2.


\textsuperscript{161} Part, but by no means all (see Stewart (above n 126) 1711-1789), of the answer may lie in greater participation by interested parties in the administrative process itself (see eg Baxter (above n 118) 629 ff and Ch 6 below.

\textsuperscript{162} See above 80.
increasing sphere of influence of private activity has caused this aspect of separation to crack as well. On the other hand, governmental economic activity is subject to different constraints, and pursues different objectives from that of the private sector.\textsuperscript{163} So the orthodox approach to these problems is not adequate. On the other, private activity is, as a result of the process of corporatization, becoming public, in the sense that we are often as much influenced by what private organizations do as by the actions of public authorities; and frequently we have no choice in the matter.

\section*{CONCLUSION}

The combined effect of the general break-down in the separation of powers doctrine has led to what Professor James Freedman has called a 'crisis' in the administrative process,\textsuperscript{164} leading, for example, to what Professor Stewart terms the 'reformation of American administrative law'.\textsuperscript{165} But it goes even further than this; for I submit that we face a crisis in our constitutional theory. Our existing paradigm\textsuperscript{166} is so stretched that it barely makes sense to continue using it. Are we not really indulging in 'half-baked nostalgias'?\textsuperscript{167} Is it not time to get back to the fundamentals of reality and to construct a new theory which fits? Or can the existing one be patched sufficiently to make do?

I must confess to an inability to see any satisfactory answers but what is clear is that even recent fundamental assumptions need to be challenged. Questions that need to be asked include whether we should directly elect our executive, whether a bill of rights will do any good

\begin{footnotesize}
\textsuperscript{163} See eg Freedmann \textit{The State and the Rule of Law in a Mixed Economy} 97-101; Falkena \textit{The South African State and Its Entrepreneurs} 18.
\textsuperscript{165} Stewart \textit{op cit} (above n 126).
\textsuperscript{166} See T S Kuhn \textit{The Structure of Scientific Revolutions} 2ed (1970) 43ff.
\textsuperscript{167} Freedmann \textit{The State and the Rule of Law in a Mixed Economy} 98.
\end{footnotesize}
at all,\textsuperscript{168} whether we should have a proper ombudsman\textsuperscript{169} or many ombuds-
men, and even whether we should reopen the controversy as to whether a  
separate system of administrative courts is necessary?\textsuperscript{170} And of course  
decentralization seems to become particularly attractive; which is what  
this Workshop is all about.

\textsuperscript{168} Cf Griffith (above n 12); D M Davis 'Human Rights - A Re-Examina-
tion' (1980) 97 SALJ 94.  
\textsuperscript{169} Which is what our Advocate-General thinks (see 1980 De Rebus 379-
380).  
\textsuperscript{170} Despite specialization of the Bench (see Wade Constitutional Funda-
mentals 73-74), the question has recently been raised again in  
England by W Robson 'Justice and Administrative Law Reconsidered'  