

- (53) *Makwanyane, op cit.*, at pp. 60-63.
- (54) See Kriegler J, *ibid*, at p. 50, and Madala J, *ibid*, at p. 173.
- (55) Interview, June 1997.
- (56) *op cit.*, at p. 9.
- (57) *ibid*, at p. 22.
- (58) *Makwanyane, op cit.*, at pp. 158-162.
- (59) *ibid*, at pp. 166-167.
- (60) Justice Sachs (*ibid* at 229) similarly argues that judges should "take account of the traditions, beliefs and values of all sectors of South African society", and that the Constitution already reflects these values, as it emerged from "an inclusive process in which the overwhelming majority were represented", *ibid*, at p. 229.
- (61) *Makwanyane, op cit.*, at pp. 123-124.
- (62) *AZAPO and others v the President of the RSA CCT/17/96*, at pp.3, 22, 43 AZAPO challenged the constitutionality of the Promotion of National Unity and Reconciliation Act 34 of 1995 on the basis that it limited the right in s22 of the Interim Constitution to "have justiciable disputes settled by a court of law, or... other independent or impartial forum."
- (63) CCT 25/94.
- (64) R. Wilson, "The Sizwe will not go away : The Truth and Reconciliation Commission, Human Rights and nation-Building in South Africa". Paper presented at the Institute for African Studies, University of the Witwatersrand, Johannesburg, 1996, p. 5.
- (65) D. Davis, "Fundamental Rights in the New Constitution : A Response to Derek Powell". *The South African Journal on Human Rights*, 1995, 11, 593-594.
- (66) A. Cockrell, "Rainbow Jurisprudence". *South African Journal on Human Rights*, 1996, 12, 1-38.

CHAPTER 6 COMMISSIONS OF INQUIRY AND POLICY-MAKING IN SOUTH AFRICA. BETWEEN THE 'GRAND TRADITION' AND DEMOCRATIC CORPORATISM

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Adam Ashforth (1990), in his study of policy-making in South Africa, argues that reports of Commissions of Inquiry are "schemes of legitimation" (1990, p.8). According to Ashforth, "schemes of legitimation elaborate the ways in which the state in its principal, if fictional, guise as speaking subject (author of the 'law') should address its subjects - in this instance, the ways in which state power 'speaks' to the 'Natives'. Commissions of Inquiry are characterised by statements expressed in a language observing the rules of 'objective knowledge' " (1990, p.8).

These reports are designed to do two things: firstly, they are designed to suggest new policy options within the constraints of government policy. Secondly, to persuade government why it is necessary to "develop new terms for referring to social reality" (1990, p.8 -9). These 'schemes of legitimation', Ashforth calls, the 'Grand Tradition'.

Using discourse analysis Ashford examines institutional processes of Commissions of inquiry and identifies three phases; The first, the investigative phase where commissioners hear oral and other evidence, are not only modes of scientific investigation but are also 'performances that serve to authorise a form of social discourse' (1990, p.9). The second phase begins with the publication of the Commissions report, Ashforth calls this the persuasive phase where a dialogue takes place between the state and society. The report becomes 'an authoritative statement' and 'a plan of action' (1990, p.9-10). The third phase - the historical - begins when the report is placed in the archives and becomes a subject of historical research. 'Commission reports, then, could be said to embody discourses that shape social reality within modern states and reflect realities that constrain political discourse' (1990, p.11).

The study examines five reports of commissions of inquiry that address the 'native question' since the beginning of the century. Ashforth treats the reports as literary texts rather than repositories of objective facts. These reports become, what he calls the 'grand tradition', and through discourse analysis he attempts to explain the policy-making process in South Africa.

At the centre of this policy-making process is the 'expert', the bearer of truth. Ashforth's argument is that the experts' function is not simply to solve

'the problem'; it is also to legitimise a particular view of 'the problem'. The expert both legitimises an authoritative view of social reality ('the problem') and delegitimises alternative views of this reality.

Dan O'Meara (1996), in his recent study of the Nationalist party in Government over the last forty years, has raised four criticisms of Ashforth's study. He argues, firstly, that Ashforth is functionalist in his analysis of Commissions of Inquiry as his aim is to explain the reproduction of political power. Secondly, O'Meara argues that Ashforth cannot explain why some recommendations of commissions, such as the Fagan report and the Tomlinson commission, are rejected by the government while others are accepted. Thirdly, he criticises Ashforth for not giving an account of how these reports are received by the subjects. Finally, and most importantly, he argues that Ashforth ignores the politics of commissions of inquiry. His focus on the language of the commission leads him to assume that knowledge equals power.

Our approach to policy making is different. Policy making, we argue (1994), is about process and power. It is concerned with who influences whom in the making, of policy and how that happens (1994, p.10). Knowledge is an adjunct: it is only a bit player in a democratic South Africa.

In this paper we are concerned with policy making with specific focus on the Labour Market Commission appointed by the President in March 1995 and the Task team appointed by the minister of finance to develop macro-economic policy. We argue that in the new south Africa there is a shift away from the Grand Tradition, towards policy making through consensus between the major social partners. We call this process a form of democratic corporatism where experts become less important than reaching agreement between the major players. We argue that 'experts' have changed from being the 'servants of apartheid' to being bit players who play a secondary role to that of the social partners. However, this shift is an equivocal one, as running parallel to democratic corporatism 'is a more traditional approach to policy making that draws on experts. Originating in the department of finance in late 1995 a group of senior civil servants and economists began to develop what was to become GEAR. Launched a week before the LMC in June 1996, GEAR was to overtake the consensus building approach of the LMC.

The Labour Market Commission

The election of a democratic government in April 1994 began a process of development and reconstruction in South Africa. Arguably the most successful department in the new government has been the department of labour under the leadership of Minister Tito Mboweni.

The department formulated an extremely ambitious five year programme of action. One of the key objectives of this programme was "the development

of a comprehensive labour market policy, based on worker and union rights, consensual policy formulation, rising average living standards, employment creation and productivity enhancement". (Department of Labour 1997, p.6)

The Labour Market Commission was charged with developing labour market policies necessary to meet those RDP employment-related objectives that are consistent with productivity enhancement and macroeconomic stability. In particular, the commission was asked to report on:

- An institutional framework for integrating economic growth and employment creation. This involved investigating the idea of a national incomes accord.

- Investigate appropriate policies and institutions for productivity enhancement,

- Develop policies - such as a Social Plan Act - to address the negative implications of economic restructuring,

- Develop new mechanisms - such as a policy framework for affirmative action in employment - to redress discrimination in the labour market,

- Develop an appropriate policy framework to address labour migration.

Initially 17 commissioners were appointed but two recused themselves later because of other commitments. In appointing the commission attention was paid to ensuring formal representation of the two social partners - business and labour, who each had three representatives. The other commissioners were all experts in the field of labour, mainly University-based labour economists and lawyers. Significantly, seven of the commissioners were black although only two commissioners were women, one of whom dropped out early on in the process. In addition, an International Reference Group comprised of four eminent international scholars was appointed.

In practice, although the majority of the experts were sympathetic to labour, and COSATU in particular, the interests of the two social partners tended to predominate in the deliberations of the commission. The emphasis in the commission became then, that of seeking consensus between the social partners. This can best be illustrated through an examination of the key differences that emerged during the deliberations of the commission. These differences revolved around the degree of regulation of the labour market - with business arguing for greater market regulation and labour for greater social regulation.

In their deliberations on all these issues the emphasis of the Commission was on the need for the interests of the two social partners to be accommodated. In practice this meant a compromise had to be struck between these two positions - social regulation versus market regulation. The concept used to grasp this compromise was 'regulated flexibility'. For example, the idea of a separate Social Plan Act was abandoned in the short term in favour of an amendment to the current Labour Relations Act which

would provide for mechanisms for the parties to bargain over these issues. This represented a significant watering down of NTUN/t and COSATU's proposals for a Social Plan Act.

Another example is the recommendation on employment equity. The commission acknowledged the necessity of measures to redress past and current discrimination but recommended that "legislated quotas be avoided in favour of a target-based approach". This IV effectively retained the principle of voluntarism - in practice this means leaving it to labour and employers to negotiate the issues and arrive at agreements.

What implications does this analysis of the process have for the relationship between policymaking and power? There is a saying that knowledge is power. This is not true in policymaking. In policy making, *power* is power. Knowledge is an adjunct; it is not the star of the show, it is only a supporting actor - sometimes only a bit actor. The reasons are obvious, say the Harvard policy analyst, Carol Weiss (1994):

"People make their policy decisions primarily on the basis of their ideological commitments and interests (usually self interests). Facts alone cannot make much headway." (1988, p.5)

What then are the implications of this conclusion for the experts on the commission - and more generally - expert knowledge? Time constraints made it difficult for the commission to systematically gather evidence through written and oral submissions. Although there were submissions, these were done in a haphazard and hasty way. More importantly, the commission did not have the infrastructure to record the oral submissions or even the discussions that took place in commission meetings. Indeed, the commission did not even have a dedicated minute taker.

At the same time as the commission was deliberating, the Minister of Labour invited the ILO to conduct a comprehensive assessment of the labour market in South Africa, reviewing the evidence and consulting a broad cross-section of opinion in the country, as well as relevant international evidence. The result was the publication, at the same time as the commission report, of a comprehensive review of the South African labour market. (Standing, Sender and Weeks, 1996) In addition, a survey of 450 workplaces, the South African Labour Flexibility Survey (SALFS) was conducted. (Macun 1997) This was coordinated by the Sociology of Work Unit (SWOP) and aimed at providing the LMC with reliable labour market information.

Given that the minister wanted quick answers to very complex questions, the invitation to the ILO to help the Department of Labour develop new labour market policies was bold and imaginative. However, the problem was that the ILO research ran parallel to the commission's deliberations and was thus not always able to inform the commissioners. Indeed, the two reports were

released at the same time and the ILO Country Review and the SALFS were only publicly debated at a conference some eight months later.'

The result of the two processes taking place simultaneously is that debates in the commission were virtually concluded when the provisional results of the ILO study were made available to the commission. Indeed some of the findings of the ILO country review could have redefined some of the recommendations of the commission. For example, the ILO review cites comparatively poor labour productivity in South Africa. But it says, the problem is often attributable to outdated management and organisational structures, not necessarily high wages.

This conclusion underlines our argument that knowledge becomes a bit player and that the policy making process is shaped by the interests of the social partners. This is the implication of South Africa moving in a direction of democratic corporatism. However, in moving in this direction there is an equivocation about how democratic policy making should be. This can best be illustrated by the policy making process around GEAR.

Unlike the policy making processes of the Labour Market Commission which sought to establish consensus, GEAR reverted to a more traditional style of policy making. Gear was launched a few weeks before the labour market commission's report. Its emphasis on fiscal conservatism followed closely business' recommendations and, in effect, undermined the delicate social consensus established in the LMC.

This is not surprising as the process of policy making that led to GEAR did not involve the social partners. Its origins lie in an initiative by the Department of Finance which set up a technical team comprising of three senior civil servants, three representatives from the Development Bank of South Africa, two from the SA Reserve Bank, five academic experts and two representatives from the World Bank. Although the technical team was appointed in December 1995, the currency crisis of February 1996 made its deliberations a matter of extreme urgency.

Shortly before it was released last minute attempts were made by the government to win the support of the ANC and its allies in the Triple Alliance, COSATU and the SACP. However they were not shown the full document and when it was released the Minister said it was nonnegotiable. In spite of initial condemnation, both because of the lack of consultation and the emphasis on macroeconomic conservatism, public criticism has been muted. Instead, its opponents are approaching their criticism of GEAR indirectly by pointing towards its failure to create jobs and stimulate economic growth. Opposition to GEAR has also been expressed indirectly through a national strike over the Employment Standards Bill in early June 1997.

Conclusions

The two opposing approaches identified in this paper suggest an equivocation towards policy making, placing the government between the Grand Tradition and democratic corporatism. This places the progressive intellectual in a dilemma: are they to play the role of technicians for the new power elite, or are they to be relegated to bit players? We would suggest an alternative role, that of social critic. As Baran (1965) argues:

"An intellectual is thus in essence a social critic, a person whose concern is to identify, to analyse and in this way to help overcome the obstacles barring the way to the attainment of a better, more humane, and more rational social order. As such they become the conscience of society and the spokesman of such progressive forces as it contains in any given period of history". (1965, p. 1).

This, we believe, can best be achieved through a process of critical engagement. Squaring this circle is never easy as it involves a difficult combination of commitment to the goals of democracy while being faithful to evidence, data, and your own judgement and conscience. The dilemmas raised by this approach have been explored elsewhere in an analysis of research undertaken over the last fifteen years by the Sociology of Work Unit (SWOP). (Webster 1997)

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