

Essay

State and Legitimacy

On the Nature of the South African State—A Theoretical Exploration

The South African state can be characterized as totalitarian and capitalist. Its economic successes and limited "democracy" were achieved on the basis of the systematic exploitation of the African majority of the population. Their simultaneous exclusion from the political process guaranteed the hegemony of the white elite. Prior to the watershed elections of 1948, which brought the National Party to power, the National Party articulated its ideology of apartheid in "Colour Policy." Its aim was: 1

the maintenance and protection of the European population of the country as a pure white race, the maintenance and protection of the indigenous racial groups as separate communities, with prospects of developing into self-supporting communities within their own areas, and the stimulation of national pride, self-respect and mutual respect among the various races of the country.¹

The complete separation of the races was its ultimate goal:

In their own areas the non-European racial groups will have full opportunity for development in every sphere and will be able to develop their own institutions and social services whereby the forces of the progressive non-Europeans can be harnessed for their own national development. The policy of the country must be so planned that it will eventually promote the ideal of complete separation in a national way.²

In order for ideology to not remain merely speculative and prescriptive, the National Party repeatedly needed to be given "a material, that is to say, written, presence within the state in the form of a realistic plan of action,"³ articulated in the form of laws, policies, and reports of commissions of inquiry as well as in carefully and rationally argued, "scientific" explanations of its logic within the state structure. Ideology also needed to adapt itself to and counter new problems in material, social, and political reality as they arose. In the years after 1948, the National Party government systematically set about realizing the principles of racial separation through the implementation of new laws and the elaboration of appropriate old ones.

The cost of the implementation of the economic, social, and political framework of apartheid was borne by Africans living under precarious conditions in the reserved areas that were to become the "homelands." Still limited to the original 11.7 percent of the country assigned by the 1913 Natives Land Act, their capacity to adequately support the growing number of people forced to live there because of 5

their exclusion from urban areas had steadily declined since the beginning of the century. The burden was also borne by those living in the urban areas, where the context both of mass migration of Africans there in the 1940s and of extreme competition for government expenditure, aggravated by government prejudice against development of Black areas in the cities, created economically, socially, and politically explosive conditions. Where apartheid produced social contradictions and encountered resistance in the form of political antagonism, the state, through its agents and institutions, brought its whole arsenal of legal instruments to bear while steadily increasing its coercive and physical means of control. Political dissent, countered and driven into exile and underground time and again, reemerged in Soweto with a force that swept the country, making it "impossible ... to manage the crisis politically without an escalation of the use and forms of repressive state power."⁴

South Africa portrayed and saw itself as a modern, rationally organized state.⁵ The justificatory logic of South African ruling-elite ideology of political participation within separate ethnic groups of members of one's own race required that, at least before the white public, the fiction of democracy, strongly symbolized and represented by a "free" press and an "independent" judiciary, be upheld. The state needed to back the fictive ideological construct of a political democracy by seeming to guarantee participation of a kind in political institutions and by calling for an impartial judicial self-analysis in the moment of a legitimacy crisis.⁶ How deep the concept of the independence of the judiciary is, and therefore how deep the concept of the incorruptibility of an institution such as the commission of inquiry, was reflected in Judge Cillie's opinion that no "right-minded person" could hold the view nor could there be any justification for the view that "[t]he Commission is an apartheid institution."⁷

Legality and Legitimation

The official discourse of the state highlighted the significance of legitimacy in the ideological social relations of South Africa and in the public acceptance of arguments establishing the state's right to coercion. The uprising made it necessary to legitimize police action and to produce an authoritative account of what happened. There are two central dynamics that determined the need for and genesis of the Commission of Inquiry and the production of its report.

First, the South African state argued the rationality of its apartheid structures through an ideology of the legitimacy and essentiality of racial and ethnic difference. Put simply, it argued that the reasons for separating the races stemmed not from any deliberate or self-serving plan to dispossess Africans and advance whites but rather from a need to respect their different cultures and from the consequent necessity to let them each develop at their own pace so as to preserve the integrity of that culture. Within its own rationale of the legitimacy of

its ideological arguments, state structures needed to be seen as upheld by just legal codes and an independent, impartial judiciary. Insistence on the lawfulness of its practices and structures, and references to the legal code from which their legality derived, gave even the police and other agencies of surveillance and punishment a semblance of impartiality.

Government countermeasures to resistance were never arbitrary exercise of power, but carefully justified, legally argued and legislatively supported action. An example, which, at least in popular memory, is quickly referred to as the historical reference point for the Soweto uprising, will serve as an illustration here: The Pan-Africanist Congress (PAC), an activist resistance movement politically more Africanist than the more moderate and inclusive ANC, from which it had broken away, was formed in 1959 under the leadership of Robert Sobukwe. It called for and organized a nationwide campaign of nonviolent demonstrations to defy the pass laws. On March 21, 1960, in Sharpeville, the nonviolent gathering turned into tragedy when police opened fire on a crowd of demonstrators, killing 69 and injuring 180. The shooting, which was immediately condemned throughout the world, had blatantly exposed the harshness of a system that the rest of the world condemned as inhumane. As demonstrations and stay-aways increased, the minister of justice and police suspended pass arrests throughout the country. But what seemed like a victory for the PAC was illusory, as subsequent actions of the government, beginning with the banning of public meetings in all areas of disturbance, were to prove. On the March 28, the government introduced legislation to declare the ANC and the PAC illegal organizations. The ban was to take effect on April 8, 1960, but, beginning March 30, more than 18,000 people were detained under new emergency regulations. This state of emergency, imposed that same afternoon, provided the legal arsenal that the state's agents needed. It empowered the authorities to prohibit gatherings, impose curfews, detain suspects, impound publications, search premises, and do whatever was necessary to maintain public order. In the years immediately following Sharpeville and the banning of black organizations, African resistance became more militant⁸ even as it was forced into exile. The South African government countered the growing internal and external security problem with steadily more-ruthless legal provisions to protect the state both physically, by extending police powers, and ideologically, by reining in the media, for example. In the years that followed, the state built up an impressive arsenal of legal provisions and institutions to back up its repressive practices.

In 1963 a new entity, the Publications Control Board, was given extensive powers **10** to prohibit the importation of written works and films considered offensive, harmful to public morals, blasphemous, or prejudicial to state security or good order. In 1961 the Defence Act was amended to enable the government to counter the threat of internal disorder more effectively. The period of military

training for the Defence Force, which was largely white, was extended, and a police reserve was created. The power of the police in interrogation and control of suspects and potential state witnesses was extended to help them uncover plots and obtain convictions. Police authority to detain suspects in solitary confinement without charging them was successively extended to 12 days (1962), 90 days (1963), 180 (1965), for an unlimited period with the authorization of a judge (1966), and then for an unlimited period even without such an authorization (1976). Sabotage and terrorism were declared statutory offenses. As of 1962, sabotage was defined to include tampering with property, illegal possession of offensive weapons, unlawful entry, and willful destruction. In 1966 "terrorism" was defined to include training for terrorist activity, furthering the objects of communism, and committing acts of sabotage. Also in 1962, partial or total house arrest for individuals was added to the already existing arsenal of powers to ban, banish, or list people of organizations. The Prisons Act of 1959 made unauthorized reporting of conditions in prisons illegal. This new draconian legal system, paired with extensive police powers, effectively broke internal resistance to the government. With the seizure and trial of Nelson Mandela and other resistance leaders in 1964 and 1966, political trials became "endemic to South African public life."⁹

With the emphasis on the ideology of legality, therefore, the potential political damage of a legitimacy crisis, especially when it involved the agents of the state, in this case the South African Police, was considerable. Burton and Carlen have defined legitimacy as that "part of hegemonic domination that specifically refers to state legal structures and practices." A crisis in legitimacy can be the consequence of the changes produced when incompatible ideologies and the practices associated with them oppose each other, or they can be the expression of struggles over the tangible forms such domination takes—particular laws (in this case, a law that sought to enforce the state's language as medium of instruction in school); agents of control (in this case, the police, characterized by excessively repressive behavior in the townships); or administrative procedures (in this case, procedures of the West Rand Administration Board, which led to the ongoing denigration of people at the hands of its officials). It is from this perspective that the insistence of the South African state that "the activities of legal state functionaries should appear to be beyond ill repute"¹⁰ needs to be understood.

The crisis in legitimacy also provided the background for the second dynamic that determined the genesis of both the Commission and its report: The state needed to officially justify the means by which it had sought to put down the uprising, the extension of its laws to the contentious area of young children, and, eventually, the alteration or preservation of administrative machinery. All of these changes in the way laws were enforced and against whom, especially when they became more draconian and began to be applied to children,¹¹ required some official

justification. Strategies of justification of new law, procedure, and practices were, in the eyes of the state, more effective and the legal changes smoother if they could be made to fit, in some way or another, with entrenched and accepted notions of the law and of the state and its structures and policies. Just because the state returned to more-repressive measures during this period did not mean that it simultaneously abandoned its project of ideological domination. In order for the public—especially the white public and the older black generation—to accept these repressive measures, the state needed to successfully institutionalize a discourse that explained and justified its strategies of coercion.

Notes:

Note 1: Quoted in Adam Ashforth, *The Politics of Official Discourse in Twentieth-Century South Africa* (Oxford: Clarendon Press; New York: Oxford University Press, 1990), 149.

Note 2: Quoted in Ashforth, *The Politics of Official Discourse*, footnote 1, 181.

Note 3: Ashforth, *The Politics of Official Discourse*, 151.

Note 4: Frank Burton and Pat Carlen, *Official Discourse: On Discourse Analysis, Government Publications, Ideology and the State* (London: Routledge & Kegan Paul, 1979), 9.

Note 5: Ashforth, *The Politics of Official Discourse*, 149-52.

Note 6: The openness represented by the institution of the commission of inquiry was intensely publicized, and witnesses were encouraged to come forward. Certain safeguards were put in place to protect those who wanted to remain anonymous.

Note 7: South Africa, *Report of the Commission of Inquiry into the Riots at Soweto and Elsewhere from the 16th of June 1976 to the 28th of February 1977* (Pretoria: Government Printer, 1980), 1:15.

Note 8: By the end of 1960 Nelson Mandela had gone underground and had begun to establish the new militant wing of the ANC, *Umkhonto we Sizwe* (spear of the nation), with plans to sabotage government installations without taking human lives. The PAC in turn can be identified with the underground movement *Poqo* (pure or we go it alone. Both the ANC and the PAC simultaneously set up headquarters in exile.

Note 9: See T. R. H. Davenport, *South Africa: A Modern History* (London: Macmillan, 1991), 358-67.

Note 10: Burton and Carlen, *Official Discourse*, 10.

Note 11: According to Helen Suzman, the police made extensive use of the Internal Security Act, among other pieces of legislation, to pick up children and hold them in detention. In the period immediately after the beginning of the uprising she was besieged with phone calls from desperate parents in search of their children. Helen Suzman, interview by Helena Pohlandt-McCormick, tape recording, Johannesburg, 1995. See also Suzman, *In No Uncertain Terms: A South African Memoir* (Johannesburg: Jonathan Ball; New York: Knopf, 1993), 178: "I spent hours on the telephone—to hospitals, police stations and even to the mortuary—trying to trace the whereabouts of missing children... It was a spooky feeling, worse than ever before because the police were totally arrogant about

using these powers and refused to give any information."