

SOME PERSPECTIVES OF THE PARLIAMENTARY INTERNAL SECURITY COMMISSION

by John Milton

The Parliamentary Internal Security Commission (Piscom) was established earlier this year by the enactment of the Parliamentary Internal Security Commission Act 67 of 1976.

The background to this legislation is well known. In 1972 a parliamentary select committee was appointed to enquire into certain organisations. The select committee was unable to complete its work by the end of the session and because parliamentary procedure does not allow of a committee to function when Parliament is not in session, the committee was converted into a Commission of Enquiry. This Commission, in an interim report, recommended that there should be established a permanent body to keep under review matters of internal security, that the body should be established by Act of Parliament and consist of members of parliament. The government response to these recommendations was the Parliamentary Internal Security Commission Act of 1976.

The main provisions of this Act are that it establishes 'a body to be known as the Parliamentary Internal Security Commission' which consists in not more than ten 'members of Parliament' appointed by the State President. The function of the commission is stated to be to 'investigate matters which, in the opinion of the State President, affect internal security, and which are referred to it by the State President' and also 'to investigate and report on 'any matters concerning existing and contemplated legislation and existing and contemplated administrative procedure affecting internal security' which may be referred to the commission by the State President.'

The Act further provides that the reports of the commission are to be laid upon the tables of the Houses of Parliament, except if the Prime Minister 'in consultation with the leader of the opposition' is of the opinion that it 'is not in the public interest' that a report or portions of a report should be so tabled.

The Act also makes provision for the powers of the commission concerning the summoning of witnesses and the taking of evidence as well as certain other procedural and administrative matters.

II

From a constitutional point of view, what is remarkable about Piscom is not so much its existence as its form. It is not unusual in modern western democracies for legislatures to undertake investigations and enquiries. This is a necessary adjunct to the legislative function in that it provides a means by which the legislature may gather information necessary to enable it to legislate wisely and effectively.

This information-gathering process is usually performed by parliamentary committees (which may be either 'standing' committees or 'select' committees) or by commission of enquiry.

The parliamentary committee, of course, is in its nature an agent of Parliament itself. It is created by Parliament, staffed by members of Parliament, and derives its powers and functions from Parliament. As such it has powers of coercion derived from the parliamentary power to count for contempt and is subject to the supervision and regulation of Parliament. Naturally the committee submits its report to Parliament which is thereby informed on the matters into which the committee was charged to enquire.

The commission of enquiry, on the other hand, is an extra-parliamentary organ. It is created by exercise of Executive power (specifically the prerogative power of the head of state) on a recommendation of a minister of the state. The terms of reference of the commission, its membership and powers are prescribed by the Executive and the report of the commission is submitted to the head of state.

In theory therefore there are very clear distinctions between parliamentary committees and commissions of enquiry, distinctions which may be epitomised by saying that the Parliamentary committee is an instrument of the legislative organ while the commission of enquiry is an instrument of the executive organ. Traditionally this basic distinction is maintained by a practice of not appointing members of parliament as members of commissions of enquiry. (Of course, members of the public cannot be members of parliamentary committees).

What is remarkable about Piscom then is that it is in theory and practice a commission of enquiry yet consists entirely of members of parliament. It is thus a new sort of institution, a hybrid of parliamentary select committee and commission of enquiry. Put another way, it is, as it were, a parliamentary select committee which does not report to parliament nor is amenable to the supervision of parliament, its report goes to the executive and need not necessarily be made available to parliament. From the constitutional point of view the question is whether it is right and proper that members of the legislative organ who are not also members of the executive organ (i.e. ministers of State) should in this way be made to be instruments of executive government. Certainly the whole arrangement is contrary to the doctrine of separation of powers, as indeed, the legislation recognises. The Act provided that members of the commission shall not be regarded as holding an 'office of profit under the Republic'. In terms of the Constitution a person who holds an office of profit under the Republic is disqualified from being a member of Parliament. This constitutional provision is an expression of a basic principle of the doctrine of separation of powers, namely, that a person may not simultaneously be a member of the legislative and executive organs of government. By specifically exempting members of Piscom from this constitutional provision, the Parliamentary Internal Security Act tacitly recognises that Piscom violates the doctrine of separation of powers.

III

However such disquiet as may exist in the public mind concerning Piscom is unlikely to have arisen from a concern for these constitutional niceties. It arises rather from the fact that Piscom as constituted is an inquisitorial body with coercive powers.

Now it must be said at the outset that the existence of inquisitorial organs is not an uncommon feature of modern systems of democratic government. Indeed all committees or commissions of enquiry may properly be described as being inquisitorial in nature, inquisitorial that is, as a South African judge once put it 'in the Iaconical, not the Spanish sense'. In other words any organ charged with investigative functions, which must gather information or elicit facts is, in its nature, inquisitorial.

Be this as it may, the fact remains that the public tends to be suspicious of inquisitorial processes, and it is as well to consider why this should be so.

In part it is because inquisitions tend to operate differently from their analogues the courts of law. Legal proceedings—particularly those of criminal jurisdiction—are subject to, and regulated by, a host of inter-locking procedural safeguards which go by the general description of due process of law. Inquisitorial proceedings seldom observe these procedures nor—and this is a point which is not always fully appreciated—are they inherently obliged to do so.

The fundamental reason for the exclusion of principles of due process of law in inquisitorial proceedings, it is usually said, is because the proceedings are inquisitorial rather than accusatorial. The inquest is charged to seek and obtain facts or information. Persons who have knowledge of pertinent facts or relevant information cannot be seen as being in the position of the accused in ordinary legal proceedings and therefore have no inherent right to claim or invoke the pro-

tective devices of due process of law. These general principles, it may be said, have been spelled out on many occasions by eminent judges both in this country and elsewhere, and have been applied by them when acting as commissions of enquiry.

A further noteworthy feature about inquisitorial proceedings is the fact that citizens may be compelled and coerced to attend and give evidence. This is because it is the civic duty of all to co-operate with these agencies, charged as they are with the duty of obtaining facts necessary for intelligent governmental action. It is the unremitting duty of the citizen to respond to subpoenas to respect the dignity of the enquiring organ, and to testify fully and truthfully with respect of matters within the province of the investigation. Persons summoned as witnesses who refuse to appear, or to be sworn or to testify are thus liable to punishment by way of committal for contempt of Parliament (where the inquisition is a parliamentary committee) or to be prosecuted in a court of law (in terms of the provisions of the Commissions Act 1947 where the inquisition is a Commission of Enquiry). It may be mentioned in passing that Piscom enjoys basically the same powers in this regard as do other commissions in terms of the Commissions Act 1947.

In this regard it is also worth noting that at common law a person summoned as a witness before an inquisition is not entitled as of right to be represented by counsel.

It must also be said that persons liable to be summoned to give evidence before Piscom are in a slightly better position than witnesses appearing before other inquisitorial agencies. This is because the Act provides in section 8 (8) that in connection with the giving of evidence before the Commission 'the law relating to privilege as applicable to a witness' which is applied in a provincial division of the Supreme Court of South Africa 'shall apply'. This means then that a witness will be entitled to claim the privilege against self-incrimination as well as being able to invoke the professional privilege accorded to legal advisers.

Finally it should be borne in mind that it is often one of the functions of the inquisitorial process to expose individuals. In modern democracies corruption in high and low places is usually sought out by inquisition rather than accusation, and those who are revealed to be venal, deceitful, dishonest or negligent will suffer the loss of reputation, dignity and privacy that is the inevitable consequence of exposure at the bar of public opinion.

IV

What then are we to make of Piscom? One thing is plain. Although it is ostensibly a parliamentary body, it has no direct responsibility to Parliament. Piscom does not seem to fall into the usual category of legislative investigatory bodies constituted by Parliament for the purpose of informing and educating Parliament. Parliament has no say in who shall be the members of the commission (they are appointed by the State President) what shall be the subjects of enquiry by the commission (the Act says that the commission shall enquire into those aspects of internal security 'which are referred to it by the State President') nor is it of right entitled to receive the reports of the commission (these may be tabled in Parliament but whether or not they are depends upon whether the Prime Minister thinks it is the public interest to do so).

The other thing about Piscom is that it is a commission consisting entirely of politicians. What is important about this fact is that the commission is to enquire into the delicate and explosive subject of national security. National security is a topic which involves among other things the impact of political beliefs and activities of individuals and groups within the State. This means that such civil rights as freedom of belief, freedom of expression, freedom of association are drawn into the matter. Now this does not mean that it would be inappropriate or improper for the commission to make enquiries in relation to these interests, but it does mean that the individuals whose beliefs, activities and associations are to be investigated are entitled to have their legitimately claimed and exercised civil rights respected and protected. And here is the rub. Traditionally these rights are protected by the procedures of impartial courts of law. But as we have seen inquisitorial organs are not obliged to observe these procedures. And the

fact is that politicians are not, nor have they been trained to be, nor indeed can they reasonably be required to be, as independent as a judge. This is not said in any slighting sense. Politics is undoubtedly one of the most important activities in a democracy. The simple fact is that a politician, whatever his allegiance or policy, is a person engaged in the process of gaining support for his views and his party and must, by the nature of his function, always be aware and sensitive to this fact in whatever he does.

History and experience have shown that legislative investigations can and have been conducted conscientiously and fairly. But it has also shown that the powers of inquisition of these bodies can be abused. Senator McCarthy taught an old lesson that freedom—in this case, to investigate—can be debased into licence to denigrate, humiliate and destroy. It is a lesson that must not be forgotten.□

MAY YOU LIVE IN INTERESTING TIMES

A speech delivered at the University of Cape Town, August, 1976

by David Welsh

Some eight years ago Senator Robert Kennedy began his speech in this very hall by quoting an ancient Chinese curse—"May you live in interesting times". Our times, in the Southern Africa of 1976, are more than interesting—they are stirring, momentous and fraught with cataclysmic possibilities.

I am not here to protest solely against the recent detentions under the Terrorism Act or against the banning of my friend and colleague Fatima Meer in terms of the Internal Security Act. These laws are appalling instruments of tyranny. They will not bring real security to our country: only justice can do that.

For those of us who believe in the Rule of Law, law is above all things a protection against public and private predators. There is that wonderful speech in "A Man for All Seasons" where Sir Thomas More challenges his son-in-law: 'And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you

really think you could stand upright in the winds that would blow them?'

I want to say to you bluntly that laws like the Terrorism Act and the Internal Security Act are the inevitable concomitants of a misguided attempt to shore up racial privilege. I protest against that privilege and its dehumanizing effects on all who are part of it, whether they be white or black.

I cannot be fully human if I am enmeshed in an all-pervasive web of inequality; and I cannot be fully human if I am a member of the group that spins the web. I have long believed that the corrosive effects of racial discrimination are ultimately more destructive of those who practice it than of those who are its captives.

I recognise that for many of you these are troubling times, times when you may easily despair at the spate of violence that seems to be engulfing this sub-continent. It may seem to you to be futile to go on protesting or doing whatever thing you do.

Don't despair; don't be consumed by a sense of futility; and