



PART II

POLICIES AND PROSPECTS





3

Policy and Law-making

Introduction

This chapter describes how policy is formulated and reformed by the post-apartheid government in South Africa. It also illustrates the processes public policies go through to ultimately become law in South Africa. The main purpose of the chapter is to add to the understanding and knowledge of the public sector by examining policy reforms in the post-apartheid South Africa. The chapter also provides a description of the policy approaches (i.e. models) and other related issues while also discussing the three main levels of the government as prescribed by the Constitution of the Republic of South Africa (Act 108 of 1996), namely, the National, Provincial and Local levels. In addition, some of the important decision-making processes within these spheres are discussed in order to highlight the democratic principles inherent in the South African governmental system.

There are many definitions of public policy. In the main, a policy refers to a plan, principle, programme or an initiative aimed at improving a particular condition or achieving a particular goal. In the context of public policy, policies are intents of what government wants to achieve. For instance, a government would have policies on healthcare, education, the economy, transportation and many other areas. In such cases, there are many role players and processes in the policy formulation and implementation.

Defining Public Policy

According to Gumede,⁶⁸ given that public policies usually involve many institutions and various processes, they entail ‘all formal and public known decisions of government that come about through predetermined channels in a particular administration’. As this definition suggests, public policies entail decision-making in the administration of government. It is also suggested that public policies have to be publicly known.

Gumede⁶⁹ summarises what scholars of ‘public policy’ have said about this term:

- A label for a field of government activity (such as foreign policy, social policy, etc);
- An expression of general purpose, which would entail many public statements and announcements that members of the cabinet make;
- A set of specific proposals, which could be on how to address – for example – service delivery challenges;
- Formal authorisation for action by ministries or similar set-ups;
- Policy as programme: A series of linked proposals and means of implementation. This might be expressed in a slogan such as the ‘war against poverty’ (e.g. in the recent case of South Africa’s anti-poverty initiatives);
- Policy as output or outcome: Government often attributes a good result in government agency to some policy that may not necessarily be publicly known;
- Policy as process: Policy emerges from the interaction of many people representing many interests. Most policies build on existing activities and institutions which themselves have become an interest, and are modified during implementation as the actions of agency confront the realities on the ground.

In view of the above, public policies can be influenced or shaped by various contexts and are mainly aimed at the welfare of the nation concerned. In other words, they are directed to positively impact a particular group or the population at large. It is also important to note that when policies change or shift, as the environment or context changes, that is referred to as ‘policy reform’. In every country, at some point there are policy reforms. A distinction also needs to be made between policy making and policy implementation: policy making involves different processes and decisions in the formulation of public policies while policy implementation is about putting in place programmes and projects that are aimed at ensuring that the goal of a policy is accomplished.

Public Policy Reforms

As indicated above, policy reforms often take place when change or shift occurs either in the context, environment or government. For instance, as leaders in government change, even within the same political parties at times, policies change or shift. Leaders have different ideals of the country and that influences public policies.

The different policy emphases can be viewed as overarching ideals of the national policies by the national government during the time of the different leaders in the presidency – the emphasis or focus of each leader could also be influenced by the domestic and global context. Given the political history of

South Africa as briefly presented in Chapter 2, Nelson Mandela had to prioritise reconciliation and reconstruction, Thabo Mbeki needed to focus on socio-economic transformation and it makes sense that Jacob Zuma has prioritised rural development and poverty reduction. It should however be noted if the same ruling party leads government for a longer period the various or successive administrations are likely to pursue similar overarching goals. For instance, as indicated in Chapter 1, the African National Congress in South Africa is guided by the National Democratic Revolution theory and shaped by the aspirations expressed in the Freedom Charter. Therefore, even though the different administrations, since 1994, may seem to have prioritised different objectives the main overall goals have not changed.

In formulating national policy, it is of significant importance that the functions and responsibilities of the different role players are clear. In the case of South Africa, the functions and responsibilities are indicated in the 1996 Constitution. Broadly speaking, the national government is responsible for policy formulation, developing standards and norms, as well as rules and regulations. Functional areas for provincial governments include abattoirs, ambulance services, provincial planning, provincial cultural matters, provincial roads and traffic management. Local governments take care of local government matters which include local amenities, municipal abattoirs, municipal roads, pollution and street trading.

In undertaking policy reforms, public management officials require appropriate management tools in both public and private domains. These tools maximise efficiency and the effectiveness of public administration. Public policy development can be described in three ways, namely, the efficient and effective use of all categories of resources for implementing public policies; increase in public policies performances through adaptability to the needs of society; engagement and building of consensus amongst public actors by creating a reflective and action space. This indicates that public management is a commitment to change and maintaining equilibrium of change.

Public administration theory posits two paradigms of influence in many countries, including South Africa. The first theory consists of the bureaucratic system, associated with Marx Weber, namely, the traditional system of public management. The second theory is that of the new public management. Of late, there is also a theoretical proposition called third generation reforms.

Traditional System of Public Administration

According to Stewart and Walsh,⁷⁰ the traditional system of public management is based on a set of fundamental characteristics which are: administration, job depersonalisation and functionaries. Stewart and Walsh⁷¹ further suggest that the

traditional model of organising and delivering public services is based on the principles of the bureaucratic hierarchy, planning, centralisation and direct control. This implies that the public administrators do not own the technical or financial means of the administration. Therefore, according to Stewart and Walsh, it should be noted that the traditional model was eventually replaced by a management of public services based on the market rules, which was called the new public management.

The New Public Management

Ferlie et al⁷² indicate that the methods and techniques specific to the new public management have been used to bring changes into the public services management of the countries that have a relatively unstable economic and social environment. These practices and techniques have been generically named the ‘new public management’ or the ‘new managerialism’.

Bale and Dale⁷³ describes new public management as ‘a move away from input controls, rules and procedures towards outputs measurement and performance targets – the accountability control with improved reporting and monitoring mechanisms, a preference for private ownership, contestable provision and contracting – out of publicly funded services; adoption of private sector management practices in the public sector such as short-term contracts and performance-linked remuneration schemes’.

Although there are still aspects of traditional management and new managerialism in the South African public sector, it would appear that there has been more of a new public management application and the third generation reforms, such as the integrated governance approach.⁷⁴ Another important aspect of the government arrangements is that South Africa has put in place what could be characterised as a combination of distributed ‘institutional monopoly’ and ‘institutional pluralism’. This implies a combination of various forms and types of decentralisation, or the devolution of certain decision-making powers to other spheres of government and/or certain agencies of government.⁷⁵

Public Policy Making Approaches

The models or approaches that are generally applied in the formulation of public policies include:

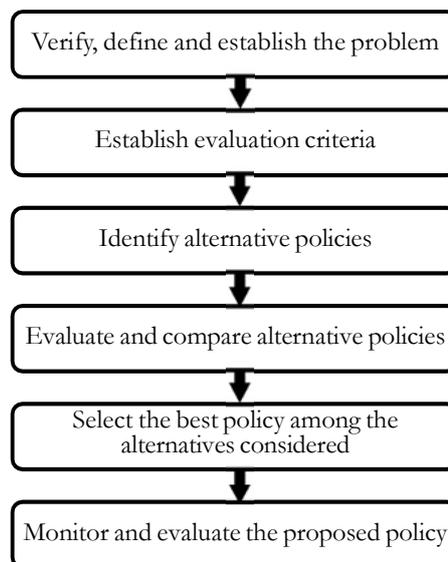
- The rational model,
- The garbage-can model, and
- The incremental and mixed-scan model.

The Rational Model

The rational model, which was influenced by the field of economics, provides a structured and sequenced approach to decision making. The model involves a number of sequential and ordered steps. Additionally, the model suggests that there are interconnections and sequential phases in policy making. The interactions between policy actors and policy makers on the one hand, and affected parties on the other hand, take place during the policy formulation phase. Interactions or consultations could also take place during the issue definition or objective setting stage.

Morse and Stryuk⁷⁶ propose six basic steps in policy analysis which have similarities with the rational model of policy making:

Figure 3.1: Policy Process: Sequential Steps and Stages



Nonetheless, many criticism of the model arise due to claims that the model is impractical and premised on unrealistic assumptions. Although the rational model appears ideal for policy making, it might not apply in reality. For instance, it 'assumes' that there is adequate capacity and time to make a particular policy, do forecasting, undertake a cost-benefit analysis, and so on. The model also 'assumes' that policies are outcomes of an objective of fact and thus ignore the externalities and context that shape public policy making. The model underplays the role and significance of power relations in the policy-making process. It is suggested that, in many times during the policy making process, other factors comes into play. This is so as most policy decisions are effectively political ones and stages such as forecasting are hardly undertaken.

The Garbage-can Model

The garbage-can model can be viewed as a 'messy' policy-making process that does not follow a linear or specific approach and sequence. It is applied in organised 'anarchical' situations where there are no agreed and shared goals or resolution of problems. Furthermore, it does not follow any sequential processes because procedures are non-existent and participants change from time to time.

The garbage-can model involves decision making that is based on three principles:⁷⁷

- That decision making is based on problematic preferences that are generally inconsistent and ill defined;
- That the preferences are broadly a loose coalition of ideals that are often harnessed in a trial-and-error procedure, based on experience and invention of necessity;
- That participation is fluid, as time devoted and effort made differ with actors in the policy sub-system.

The garbage-can model can be compared to an open or upside-down hat into which various problems and solutions are put and from which they are taken out by participants. The mix of 'garbage' in a hat depends partly on the labels attached to the alternatives as well as on what 'garbage' is being produced at that moment, on the mix of cans available, and on the speed with which 'garbage' is collected and removed from the scene (metaphorically speaking). The garbage-can model has been criticised for being ad hoc, haphazard and lacking order. The model is trying to make a point that the goals are often unknown to decision makers. In addition, policy actors simply define goals and choose means as they go along in a policy process that is necessarily contingent and unpredictable.

Organisations are characterised as garbage cans into which problems, people, choice situations and solutions are dumped and selected. A crucial variable in this model is timing. It is assumed that there is a continual stream of people, solutions, choices and problems that flow in an organisation. Every now and then, some clusters of these elements coincide, and a decision is produced. Therefore, Weick⁷⁸ argues that the problems may attach themselves first to one choice situation then to another, and the same holds true for people and solutions.

The Incremental and Mixed-scan Models

When the incremental model was developed in the 1960s, it was conceived of as a policy-making process that does not require a thorough review of policy alternatives. The model provides for a broad review of the policy options. This implies that the approach does not require a linear decision-making process and

it has most of the attributes of incrementalism and rationality. Such policy making proposes small steps which bring about a change or a shift in an existing policy. Decision makers only consider alternatives for dealing with a problem that differs marginally (incrementally) from existing policies. This posits that incremental policy models do not need to be completely re-created every time a policy decision is made. However, they re-fashion existing policy. For each alternative, only important consequences are considered. Problems confronting the decision maker are continually re-defined.

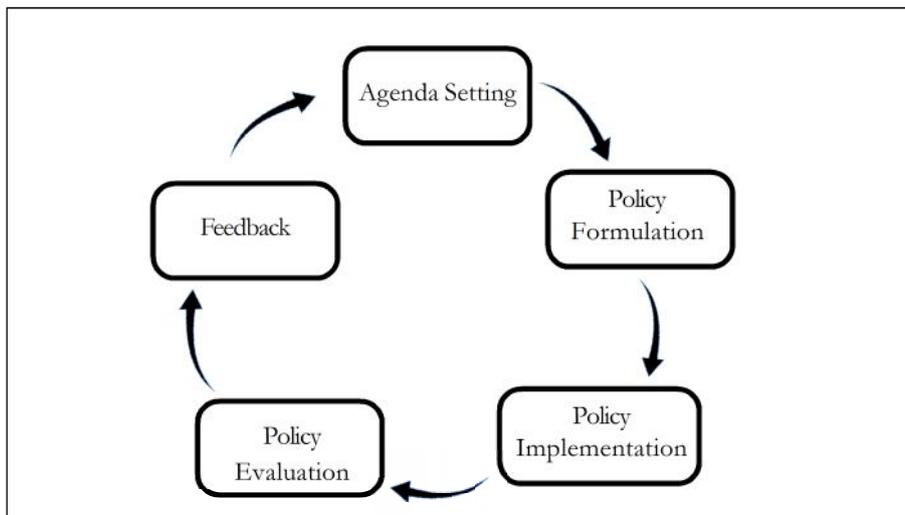
According to Dye,⁷⁹ proponents of the incremental model argue that agreement is often achieved relatively easily when the policy issues contested are only about increases or improvements as compared to when they are about major shifts in a case of 'all or nothing'. Incrementalism is particularly applicable in instances where societal values are contestable.

Alternatively, Mitchell⁸⁰ argues that the mixed scanning approach considers both fundamental and incremental decisions. According to Mitchell, the mixed-scan model tries to involve the strengths of the rational planning approach and the incremental model and eliminate the weaknesses. Mixed scanning incorporates a broad-based analysis on occasions and an in-depth analysis at other times. It considers the differing capacities of decision makers.

Public Policy Cycle

A policy cycle refers to the different stages and processes that should be taken into account when formulating public policy. There are five stages in the policy cycle:

Figure 3.2: Public Policy Cycle



Agenda Setting

The starting point in policy formulation is the acknowledgement of the policy challenge that needs to be addressed. For instance, if all the children that are supposed to be at school are not at school, the policy needs to be formulated to ensure that all children are at school. This recognition and acknowledgement of the policy challenge is called 'agenda setting'. The agenda setting stage is viewed as the most critical stage in the policy cycle because it is the first stage and what happens during this stage shapes the policy making process. According to Howlett and Ramesh,⁸¹ agenda setting refers to a socially constructed process in which actors and institutions, influenced by their ideologies, play a fundamental role in determining the problems or issues requiring action on the part of the government.

Policy Formulation

Policy formulation is the process of deciding on a particular policy option relative to other possible policy alternatives. Once the policy challenge has been identified and discussed, the policy needs to be formulated. There are many factors that come into policy formulation, hence it normally takes a very long to make a policy. There are two types of constraints that affect policy formulation: subjective constraints and procedural constraints. According to Howlett and Ramesh,⁸² substantive constraints are related to the nature of the problem itself and entail considerable use of state resources to resolve a policy challenge. Procedural constraints, on the other hand, also affect all aspects of the formulation stage, are characterised either as institutional, based on government procedures, or as tactical, based on relationships between various actors or social groups.

Public servant actors and social groups, as Howlett and Ramesh put it, are component parts of the policy subsystems, and the cohesiveness between the two components with respect to discourse (reflecting values and beliefs) and their social bonds has a fundamental influence on policy formulation. Also, the relationship between the government and social actors is an important factor influencing the formulation of public policies.

Implementation

This is the process of putting public policy into effect. According to Mégie,⁸³ this is when a decision is carried out through the application of government directives and is confronted with reality. Policy implementation involves carrying out activities and processes towards resolving the policy challenge. Like other stages in the policy cycle, policy implementation is characterised by many challenges. Skills for implementing a policy are among the most important factors for policy implementation. Because of the various challenges, many policies are not properly

implemented. Also, policies can have unintended consequences, as another policy challenge might happen while implementing a particular policy.

Policy Evaluation

Once the policy has been formulated, it is important to assess or evaluate its effects: How has the policy worked? How can policy implementation be improved? Answering these questions is essential to providing policy makers with necessary feedback to incorporate into future decision making.

Law-making

The governance arrangements in South Africa are enacted in the supreme law of the country – the Constitution. Public policy, as explained in the preceding sections, outlines what a government department hopes to achieve and the methods and principles that will be applied to accomplish them. Law, on the other hand, is about ensuring that policies are implemented by holding government legally accountable.

A law refers to set out standards, procedures and principles that must be followed. If a law is not followed, those responsible for not following it can be prosecuted in court (to put it simplistically). This implies that public policy which sets out the goals and planned activities of a department, as an example, may have to be translated into a law to enable government to put in place the necessary institutional and legal frameworks to achieve its objective.

It should be noted that the process of making law in South Africa – and probably in many other countries, if not all – involves a number of structures. By the time the draft legislation reaches parliament (from government departments), where it is tabled as a Bill, it would have gone through a lengthy process. The process generally begins with a discussion document, called a Green Paper, or is followed by it. This is drafted in the ministry or department dealing with the particular issue at hand, with an aim to demonstrate the way that the ministry or department is thinking on a particular policy.

The Green Paper is then published so that anyone who is interested and/or affected can give comments, suggestions and ideas. The Green Paper process is followed by a more refined discussion document called a White Paper, which is a broad statement of government policy. The White Paper is drafted by the relevant department or a task team appointed by the relevant head of that government department. Comments may again be invited from interested parties. The relevant parliamentary committees may propose amendments or make other proposals and then send the policy paper back to the ministry for further discussion and final decisions.

Once approved by the Law Commission and Cabinet, the document is sent to the State Law Advisers who assess the legal and technical implications of the draft law. Before the Bill reaches parliament, it is a requirement that it must have already gone through a public participation process where organs of civil society, other bodies and the general public are given opportunities to make inputs during the drafting of the law. To ensure that public consultation occurs, departments are required to indicate in the explanatory memorandum all those consulted in the process of drawing up the Bill.

Although the law is passed by parliament in sittings of the two houses, that is the National Assembly (NA) and the National Council of Provinces (NCOP), it is only at Cabinet level and its committees and clusters that the details of the draft law are examined. At the provincial level, the power to make laws is vested in the provincial legislature. A provincial legislature is governed only by the Constitution, and if it has passed a constitution for its province, it is also governed by that constitution; and so, must act in accordance with and within the limits of the both the national Constitution and the provincial constitution. In exercising its legislative power, a provincial legislature may consider, pass, amend or reject any bill before the legislature; and initiate or prepare legislation.

A provincial legislature must provide for mechanisms to ensure that all provincial executive organs of state in the province are accountable to it; and monitor the exercise of executive authority in the province, including the implementation of legislation, and any other provincial organ of state. As in the case of the NA and the NCOP, a provincial legislature must ensure involvement of the general public in all legislative processes, whether executed by the legislature itself or by any of its committees, in a regulated manner.

South Africa has what some call ‘quasi-federalism’ because certain powers and functions are with the provinces. The political discourse remains very robust on this issue because some argue that the current governance arrangements constrain effective service delivery due to limitations imposed on the central government in determining and shaping the affairs of provincial (subnational) governments, although the Constitution does provide some recourse in extreme cases, such as when there is a breakdown in the functioning of a provincial (subnational) government.

Under each provincial government is the local sphere of government. This consists of municipalities which have been established round the whole of the territory of the Republic of South Africa. The executive and legislative authority of a municipality is vested in its Municipal Council. A municipality – either local or district or metro – has the right to govern, on its own initiative, the affairs of its locality, subject to national and provincial legislation, as provided for in the

Constitution. Municipalities have the right to exercise their powers and perform their functions without the control of national or provincial governments. In addition, municipalities are capable of making and administering bylaws for the effective administration of their respective communities. At that level, public participation forms a cornerstone of the administration processes.

Although there is provision for public participation in all spheres of government and its policy making processes, it is mainly the local government sphere that is a product of a conscious policy and institutional design, and this is to ensure accessibility of local governments to communities and citizens at the grassroots. Section 152 (1) of the Constitution of South Africa⁸⁴ states the following as some of the objects of local government:

- Providing for a democratic and accountable government for local communities;
- Ensuring the provision of services to communities in a sustainable manner; and
- Encouraging the involvement of communities and community organisations in the matters of local government.

Policy Coordination and Monitoring and Evaluation

Monitoring and Evaluation (M&E), in general, is a practice intended to assist the public sector in evaluating its performance and in identifying the factors that need attention in order to ensure that policies are effectively implemented. M&E provides its users with the ability to draw fundamental connections between the choices of policy priorities, the resourcing of those policy objectives, the programmes designed to implement them, the services actually delivered and their ultimate impact on communities.

It is important to note that monitoring and evaluation has evolved since 1994, or since 2004 in particular when specific institutions and processes were put in place for monitoring and evaluation. From when the Policy Coordination and Advisory Services (popularly known as the Policy Unit) was established in the late 1990s, it undertook policy-making and its various components such as policy analysis, policy coordination and policy advice as well as led medium to long-range planning as well as government-wide monitoring and evaluation. The Policy Unit was disbanded (in 2010) then the National Planning Commission (NPC) and the Ministry for Planning as well as the Department of Performance Monitoring and Evaluation (DPME) were established. However, once the National Development Plan (NDP) was concluded in 2012, DPME was reconfigured to include planning responsibilities hence the name changed to

Department of Planning, Monitoring and Evaluation (DPME). This is meant to briefly illustrate changes that have taken place since 1994 with regard to monitoring and evaluation as well as planning to some extent, at least as far as institutional *Izimbiizo* (where a president visits a particular community to discuss issues that the community is concerned with) and *Siyablola* (which are surprise visits by the president to front-line offices to examine service delivery).

Similarly, policy coordination has evolved since 1994. As indicated above, one of the key institutions in the policy-making landscape in post-apartheid South Africa – besides Parliament – had been the Policy Coordination and Advisory Services (which used to be normally termed the ‘Policy Unit’ as indicated above). The Policy Unit was located in the South African state Presidency. Essentially, the Policy Unit was the main clearing-house in the policy-making processes in South Africa. However, with the establishing of the Department of Performance Monitoring and Evaluation in 2010, the government-wide monitoring and evaluation functions were moved to the Department of Performance Monitoring and Evaluation. With the establishment of the National Planning Commission and the Ministry of Planning in the Presidency, also in 2010, planning responsibilities were to be undertaken within the Planning Ministry and the National Planning Commission – a Secretariat dealing with planning was established (also in 2010) to coordinate planning activities. The Planning Ministry and the National Planning Commission appear to have mainly focused on developing the National Development Plan which was unveiled in 2012. It also seems that the Department of Performance Monitoring and Evaluation and its successor (i.e. Department of Planning, Monitoring and Evaluation) have not been dealing with policy coordination. The Jacob Zuma administration established Ministerial Committees on one hand and Implementation Forums made up of Directors-General (i.e. Permanent Secretaries) on the other hand that are supposed to coordinate on the basis of government priorities – this might have been informed by a view that the challenge regarding service delivery relates to implementation and not policies. There is however the Presidential Infrastructure Coordinating Commission (PICC), chaired by the President, whose mandate is to ensure that all infrastructure programmes are planned for and coordinated through one body dedicated to such work. Lastly, with the increase in capacities in the Presidency broadly – as in the numbers of technocrats – and the increase in capacities in the Private Offices of the President and of the Deputy President, it might be that policy coordination would eventually get back, if not better than, the levels observed during the Thabo Mbeki administration.

Conclusion

This chapter has described how policy is formulated and reformed, generally, and by the government of South Africa. It also illustrated the processes public policies go through to ultimately become law in South Africa. It also discussed policy coordination and monitoring and evaluation. The main purpose of this chapter was to add to the understanding and knowledge of the public sector. It discussed the policy formulation and reforms which have taken place in the post-apartheid dispensation. In the main, it would seem that South Africa, since 1994, has put in place rigorous policy and law making processes. However, it appears that there has been weakening of the policy and law making processes since the disbanding of the Policy Unit in 2010. The author has published other aspects pertaining to policy and law making in post-apartheid South Africa,⁸⁵ so, those aspects are not covered in detail in the chapter. The next chapters detail the overall performance of the post-apartheid governments so far, by examining the different political economy themes.

Key Terms

Policy: Strategic intent or a plan aimed at achieving a predetermined agenda or outcome

Policy Analysis: Review or evaluation of a policy, including the monitoring and evaluation of a policy implementation.

Policy Coordination: A process that oversees and ensures that all relevant role players are involved in policy-making.

Policy Formulation: Also called policy making or policy development, referring to a process that identifies a policy problem or a challenge that needs to be addressed.

Policy Implementation: Activities and processes carried out towards achieving the objectives of a policy.

Public Policy: Policies pursued by a government in order to achieve the goals of developing a society.

Monitoring and evaluation: the analysis of collected data (i.e. evidence) regarding the effects of policies, programmes and projects.

Wellbeing: The quality of life of an individual and access to opportunities.

