

OPEN GOVERNMENT, ACCOUNTABILITY AND DEMOCRACY IN SOUTH AFRICA

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The concept of "open government" is narrower than that of the "open society", articulated most strongly by Karl Popper in his Open Society and its Enemies. The open society is one in which those in authority are subject to the constant criticism - negative or positive - of those who constitute the society. This is based on Pericles' dictum that "Although only a few may originate policy, we are all able to judge it". The popular demand to "know", which lies at the heart of the freedom of information debate is directly associated with democratic theory generally. We could perhaps extend the notion "no taxation without representation" to suggest, radically "no taxation without information"!.

The demand for open government and freedom of information has often been made simply as a demand without suggesting definite reasons for them. Peter Bayne has already indicated the liberal conclusion which simply boils down to an understanding that good government - in the fullest sense of the term - can only be achieved through the effective use of "an informed and critical public attitude." As such, an "open information system to ensure informed decisions" has been recognised as a general condition, amongst others, for participatory democracy (Held, Models of Democracy, 1987, p 290). Such general positions are sufficient as far as they go, but there is a need to suggest concretely in which way and in which areas such "an informed and critical public attitude" is best put to use, in what way it is put to use, and what to do if it is not recognised as fundamental to the institution of government, either by the governors or the governed.

I would suggest that at the very least, open government requires freedom of information not only to allow Pericles' public to judge policy. It is necessary to enable those in authority (as

government, as members of individual government departments and bureaucracies, as directors of companies and trade union bosses, etc) to make intelligent choices concerning policy itself. In other words, the few who for all intents and purposes are responsible for government are also able to make intelligent choices to hopefully minimise the delays of public incredulity, dismay and hostile reception of inadequate policy. Second, the idea of "openness" within government and between arms of government is necessary to permit a better system of prioritisation within the overall planning process itself. For example, the secrecy of the State Security Council operations undermined even the limited exercise of policy-making within the PW Botha regime. Open government, third, becomes one of the bulwarks against corruption and dishonesty within government and the public service. But open government and freedom of information, based on an informed citizenry is good in itself as well. Ultimately, the degree of openness within a democratic political system ensures that its legitimacy or otherwise is ascertained more easily.

These introductory comments appear at first hearing to be glib and rather 'common cause'. Perhaps so, but a number of developments in recent times suggest that we should not take these matters for granted. Without wanting to present an elaborate and thorough assessment or catalogue of these let me cite a few examples that suggest particular threats to the idea and practice of open government in the modern world. Too often "state interests and national security" have been used to protect corrupt practices. South African examples of this phenomenon abound, but the "Spycatcher" saga that embraced the Australian and British public and an obdurate Thatcher government is a case in point. Similarly the cover up in the Contragate "arms for hostages" debacle in the USA, or the recent discovery of undercover arms dealing involving British government ministries during the war against Iraq, serve

MCH 94-103-5-8

to illustrate the point. Note that the emphasis here is not on a

simple right of the public to know - which appears at the centre of the salacious reviews of personal telephone calls between a Prince and his mistress - but rather of the question of government and officials' accountability.

As many commentators have noted too, the twentieth century has seen an enormous increase in the powers of the executive arm of government over the legislative, and in those political systems where the judiciary is provided a special role, their role has been questioned more and more. This increase in executive control has been influenced and encouraged by the tremendous growth in the production and control of information through systems of information technology. The microchip, like nuclear power, can either assist or retard development. In many

instances, government controls in these areas have secured that government, parading under an assumed neutrality has been able to harness enormous resources for partisan interests. That much of the information technology systems have been produced from within the burgeoning military-industrial complex and the arms race is a separate worry that does not concern me here.

Central Statistics Offices, no different from our own, have a well-documented history of 'cooking the books' or at least distributing information that is voluminous but not very illuminating. One interesting factor in this regard is the simple situation in our own country where there is no-one, even if we accept the normal constraints, who actually knows how many people live within our boundaries, or indeed how many of them are eligible to vote in the elections we are moving towards. The absence of statistics in many instances could be as dangerous for the ability

of governments to govern as their overproduction: the experience of the command economies of eastern and central Europe shows that

masses of information may look impressive but becomes a major disaster when they are simply incorrect or irrelevant.

But there is another danger that lurks in a concern about open government and freedom of information. Too often the emphasis in the discussion is inherently biased towards concepts of literacy. In other words, "freedom of information" becomes the necessity for access to documents, reports, statistics, etc. Now this may be all very well for a society that enjoys maximum literacy. Albie Sachs amongst others has warned that we must beware a system whereby the powerful and the rich become the beneficiaries of human rights litigation in the future. We need to be equally aware of another problem. In those societies such as ours where the education systems have ensured that different forms of illiteracy are in fact perpetuated rather than dissolved, "freedom of information" can become the preserve of privileged groups as a result of societal differentiation based on the rewards of the apartheid system.

"Open government and freedom of information" in these terms then goes beyond measures to ensure access to standard forms of information, but would involve real abilities to shape information systems, control them and to check

regularly those institutions throughout society, from the civil service bureaucrats, the military, arms producers, multinational companies and monopolies, through to political parties and other bodies of civil society.

In South Africa at the present time we find ourselves at a particular juncture where there is some debate over the issue of

openness and transparency as they relate to future institutions. Hence, there are discussions around Bills of Rights, adjustments to the civil service, and of course the proceedings of this conference

itself. The present context however reveals another area which needs assessment, that of openness of "government" in the transition to democracy itself. Here, government could be defined narrowly as the present De Klerk government with its monstrous bureaucracy doing its bit; but it should rather encompass the reality of the negotiation situation where inputs from outside government are being made and for all intents and purposes being taken seriously at some levels. So, it could be argued than in the messy political situation we are in at the moment, it would be in all our interests if the public is informed much more than it is about the various twists and turns that are taking place in the creation of the formal structures of the new political system that, hopefully, will be less complicated than the current one. In short, the object of open government as final goal should not be ignored in the process of getting there. The process is perhaps as important as the outcome.

But modern society itself, and particularly society in transition, is a complex system of interrelated forces, including political, economic and social ones that impact directly on each other. Thus, open government that tries to regulate the tensions within society in this situation also requires "openness" within the economic realm. The example of the Economic Forum, however disjointed and disrupted its work may be, is partly a recognition of this. Such political comment is made of the effects of continued sanctions on the South African economy, for example, that it becomes absolutely critical for the public to make choices as to who is talking nonsense and who is not for us to have the data which is still denied. Even at the present time, information concerning for example South Africa's oil reserves, who it exports arms to, who it trades with, its gold and diamond dealings, is still proscribed

from public access. The secret accounts system of certain government departments, particularly Defence, has been an important factor in the perpetration of abuse within government. Although

certain institutions such as the Auditor-General's office and others have attempted to unravel certain irregularities, it has been a difficult ride. And it has been difficult not simply because of the inadequacies of the legislation, but rather because of a singular lack of political will on the part of those in authority to act on the information that they eventually receive.

This latter point emphasises what appears to be a simple truism: reliance simply on legal constructs without a corresponding acknowledgement of proper forms of conduct is inadequate. Formal legal constructions must be given concrete realisation in society as a whole. In the language of rights theory, rights must be both formal and concrete. But systems of rights include the need for the development of a wide, popular, culture of rights. What this means is that acquiescence to the principle of "the rule of law", another essential component of constitutionality, involves "a central concern with distributional questions and matters of social justice." (Held, 1987, p 285). The importance of this becomes clear if we assess briefly the track-record of "open government" in its broad South African application, the minority Government on the one hand and the liberation movement on the other.

Minority South Africa operates a formal, legal system that attempts to check abuse and to subordinate government and civil service to parliament as the (limited) representative body of public opinion. The operation of the system, however, as well as its historical development shows that the system operates to check abuse rather than from a commitment to open government. This is so particularly in the light of the frequent efforts and acts to curb public access to information (through the extension of censorship; the

administration of secret accounts; the failure to disclose information in terms of 'state security'; the subordination of the judicial system to parliament and the like). Furthermore, the extension of executive rule through constitutional amendments

exacerbated the situation. The formal system of parliament, which permits members to ask questions and to receive answers, participate in debates and motions, engage in private correspondence, participate in committees, and have

access to the Auditor-General and the Advocate General are all limited for the political reasons mentioned already. Besides, the intrusion of political parties into parliamentary life obstructs the role of the "constituency representative" as well as dictates, except in the most extraordinary circumstances (such as the declaration of war in 1939), the way in which parliamentary votes - and hence the life of government - will go. Added up, this means that even if the parliament were to become a majority parliament, parliamentary control of itself is insufficient as an instrument of control.

A second area of formal controls in South Africa is judicial control, exercised by the civil courts and located within the Supreme Court's inherent right of review. Legal remedies exist (statutory appeal; interdicts; mandamus; declaration of rights). The limitations of these are well known under the current system but the largest problem is that they operate within an overarching system whose main reason for existence is the denial of equality and justice to the majority of citizens.

A third and apparently the least successful form of control is internal administrative control, a set of procedures which permit reexamination of decisions and procedures, and disciplinary action

of various degrees. In effect, it becomes largely a case of bureaucracy policing itself, a principle that has been shown in numerous instances to be more trouble than it is worth.

It is interesting to note that the South African Law Commission

itself has noted that "the present constitutional and parliamentary usages do not make sufficient provision for the hearing of genuine and justified complaints regarding maladministration." (Constitutional Models Report, vol 3, October 1991, p 1271). Furthermore, where improvements to the system have been made, even though they do not go far enough - for example the Advocate-General's position, these have been forced out of a reluctant regime and have studiously ignored the area of protection of human rights, concentrating solely in administrative restraint rather than principles of human conduct.

The failure of government to address itself to transparency within its own ranks

- an important element in any discussion of the basic concept - is starkly illustrated in the South African case with the limitations of the Amnesty Act which does not demand the identification of crimes or personnel who would benefit from the amnesty. Furthermore the numerous laws on the statute book at present which restrict the operation of open government have not been reviewed or repealed in anything like sufficient degree. The recent conversion to Bill of Rights thinking within National Party and establishment circles is perhaps encouraging but falls far short of enthusiasm when the narrow terms of their proposals for a future Bill of Rights is considered.

The exercise of "open government" within the ranks of the liberation movement can be determined likewise through historical and formal institutional linkages. Historically, particularly

during the period of the 1980s the years of the States of Emergency notwithstanding, open government/administration was exercised primarily through the operation and consensus on public or community discussion of issues. Rudimentary forms of direct and popular control over higher structures was supposed to be exercised within the terms of the street committee systems and also the

structures of people's courts etc. The failure in most instances of these practices to go beyond a nascent form of democracy does not undermine the inherent definitions of accountability and popular participation connected with the ideas of mandates and notions of recall.

At a more formal organisational level, attempts at clean administration and the rejection of abuse was contained in the ANC's world through the formal adoption of a Code of Conduct in 1985, which although aimed at discipline in the main and arising from the particular circumstances of the early 1980s experiences of abuse in some camps, and a formal set of structures to maintain judicial review and constraint. The inadequacies of implementation that emerged after 1985 have to a certain degree underpinned the debate within the organisation to entrench strict controls of an administrative and political kind within a future constitution.

Within this schema, the ANC builds into its wholesale adoption of an empowering Bill of Rights particular references to practical measures to overcome the types of shortcoming operating within apartheid institutions at the moment as well as others. Thus, it calls for an independent office of the ombud at the national or central level of government; a strong commitment to freedom of information; recognition of the need for practical access for people to invoke the constitution in the case of grievances (mentioned specifically are women, health patients and the police); the creation of "special agencies" and

other unspecified mechanisms to deal with accountability (both in terms of fiscal spending and administrative decisions), transparency and administration; the establishment of a labour commission, a sports commission, a land claims court, a media ombud, as well as local government tribunals. (ANC, 1992, passim). The 1990 Draft Bill of Rights also stipulated a commitment to the right of judicial review (Art 2.24) and the right to freedom of

information (Art 4.3).

In short, at the present juncture of South African institutional political debates, the ANC's proposals concerning open government and freedom of information go furthest along the road of ensuring success. But a number of areas for further examination present themselves.

Hugh Corder has itemised some questions from his analysis of international comparisons that deserve mention and discussion. He identifies six areas: the amenability of a future executive government to the questions of openness and accountability; the level of skills, flexibility and ability to develop, within the legal profession from top to bottom; the ability of a transforming civil service to break the traditional resistance bureaucracies have for notions of openness; the balance of cost as related to the priorities of a cash-strapped central authority and the need to provide the basic human needs of the majority; the ability to balance policies of state which need each other - cost of formal structures as an imperative for the development of a necessary culture to develop which permits a system in transition to cope; and, finally, "do South Africans care about executive accountability?". (Corder, 1991, pp 44-5)..

Whatever answers we can provide to Corder's concerns, the following should also be noted as a point of departure. Whatever structures

are envisaged, they must, in the South African context, operate within a set of rules that are notable for their clarity, simplicity and a conscious recognition of the need to link openness and clean administration with the broader task of building and entrenching democracy. Any single model may not be appropriate, and indeed it seems that a combination of different offices and agencies - ombuds, tribunals, monitoring and reporting commissions or whatever - adapted to our particular conditions

would be better. It is also important that whatever different structures are created that they are linked into a manageable and non-bureaucratic system that allows coordination and interaction to avoid duplication, delay and expense. Flexibility is a necessary principle, not for expediency but for the fact that the South Africa of the future will be swift-flowing and adaptation will be necessary as we eliminate apartheid practices and procedures from the body politic. To facilitate this flexibility a formal system of analysis and review should be created to ensure that changes to the system, the identification of weaknesses and strengths, etc, are not conducted on an ad hoc basis. Critical to the whole plan, for reasons of cost but also for reasons of access, is to ensure that the system is user-friendly, where the user is defined not 'as the person with the PhD but the category of people who are most likely to need such a system, ie the oppressed of the moment and all those at the bottom of the social hierarchy, black and white. Thus extensive bureaucracy, complicated procedures, and a proliferation of specialised tribunals and the like should be avoided. Local and regional tribunal structures that can be mobilised quickly and effectively should be the centre-piece of any system of administration. Fundamental to the whole process is the need to break the monopoly on information which state structures have traditionally assumed, as well as to demystify the power of the official who is able to refer to regulations and rules that exist in the mind of an endless bureaucracy alone.