

“Elections do not make a democracy. Accountability does.”

Open and accountable government

By LUCI NYEMBE

Most South Africans will tell you that their experience of government is of a closed, antagonistic and secretive elite, of domination of blacks by whites and of a state administration which has systematically engaged in human rights abuses, from the imprisonment of children to meagre pensions for black citizens, to the denial of access to information and freedom of association. Democrats have always stressed the need for open and accountable government as essential for democracy. In fact, democracy could not survive if the various levels of government were not obliged to account publicly for their actions and decisions.

When is a government “open”?

An open government must be, as a minimum,

- ☐ transparent in its decisions and their implementation
- ☐ accountable for its actions (to the extent where defaulting officials can be removed and prosecuted)
- ☐ an active promoter of freedom of expression and freedom of information
- ☐ an active promoter of popular

participation in the mechanisms of democracy.

The new constitution coming into effect in 1994, proposes a number of bodies and procedures to ensure government accountability.

What the Interim Constitution says about open government

There are many ways in which government can be held accountable – through Parliament, through the courts and other means. Let’s look at some of these:

Chapter 3 of the Constitution deals with the *fundamental rights of persons and organisations*. These fundamental rights include the right to freedom of expression, freedom of association, access to information and the right to administrative justice. The right to administrative justice provides, among other things, that every person has the right to a review of a decision made by a public official or a public institution, if that decision affects or threatens their interests. The decision can be reviewed by an impartial body or tribunal presided over by a judge and the ruling of the judge can be made binding on the official or institution.

The Constitution also provides for *public access to Parliament* ie to sittings of the National Assembly or the Senate and to joint sittings of the National Assembly and the Senate. This arrangement already exists with the present apartheid Parliament. One means of restricting public access to Parliament is to have a very small public gallery, so that citizens have to rely on the media for information.

The Constitution establishes a number of agencies to promote open government. *The Public Protector* has the power to investigate any complaint of maladministration, abuse of power, corruption with respect to public money, bribery of public officials or acts which prejudice any person. He/she must try to rectify the situation by mediation or negotiation, or, if it appears that an offence has been committed, to inform the authority



responsible for prosecutions. This is not a substitute for judicial review and public officials may be called before a judicial tribunal or be prosecuted in the ordinary courts.

Provincial assemblies may also establish public protectors with the same powers and functions as at the national level.

The Human Rights Commission will consist of ten members and a chairperson, and its composition must be broadly representative of the South African community. The Commission shall have the power to promote open government in two key ways: (a) to make recommendations to state departments and public institutions on measures for promoting human rights and (b) to request government to provide information on legislative and executive actions taken in relation to human rights. The Commission can investigate any violation of human rights and can assist the affected persons to remedy the matter, including providing financial assistance so that the matter may be taken to court, if and where necessary.

The Commission on Gender Equality has the aim of promoting gender equality and making recommendations to Parliament or a provincial legislature on any laws which may affect gender equality or the status of women. The powers and functions of the Commission are not established in the constitution and this will be dealt with by an Act of Parliament.

The Public Service Commission is responsible for making appointments to public service posts. The Commission is independent of government and the Commissioners are obliged to act fairly and impartially in making such appointments. For the first time, appointments to key civil service posts will be open to all South

Africans, without discrimination on grounds of race or gender. In fact, the Commission is responsible for ensuring that black people and women are recruited for all posts in which they are presently under-represented, in both the professional and scientific fields (architects, engineers, economists, research and air traffic control to name a few) and in the management echelon (directors to director-generals). *The Judicial Service Commission* has a similar task in relation to the appointment of judges.

Public spending

Accountability is nothing if it is not accountable for public spending – corruption, mismanagement and wastage have plagued past governments. Apartheid governments have been authoritarian and have refused to accept public responsibility for corruption. In Britain or the US, government ministers are under pressure to resign in the event of a scandal and large-scale corruption can be the downfall of a democratic government.

In South Africa, all the major scandals have been uncovered by the press, rather than by the Auditor-General, who is meant to be responsible for controlling the public purse and ensuring that public funds are spent efficiently and effectively. Previous Auditor-Generals have been servants of the government and have not had the power to investigate secret government accounts such as the accounts relating to hit-squads.

The Auditor-General appointed in terms of the new Constitution will have the power to act in the public interest, to investigate any government accounts. The Auditor-General shall have access to all information required to carry out such investigations and, most important of all, the Auditor-General can make his/her report public 14 days after submitting the report to the authorities. The Auditor-General can not be influenced by a Minister or public officials and can not be forced by government to participate in a "cover-up".

While much of the substance of accountability depends on the character of

the persons in government, the offices and procedures outlined above will play a crucial role in building open and accountable government.

Reconstruction and Development and access to information

The Constitution represents a vast improvement over the existing arrangements, but this does not mean that these ideals will become reality overnight. There will be struggles over the implementation of the principles of fairness and impartiality and when all the new laws have been drafted, it will depend on ordinary people – workers, women, students, the landless and the homeless, who must use the constitution and other means at their disposal to actively build democracy.

The Reconstruction and Development Programme or RDP, which has been worked on as the key ANC policy document for the democratic government, and which has been drawn up from inputs by all partners in the Tripartite Alliance, as well as the SA National Civic Association and other community groups, is a programme which will form the cornerstone of our fragile democracy in its first few years. Elements of the RDP include programmes for meeting the basic needs of people (jobs, land, housing, water, sanitation, etc), developing our human resources (better education, skills upgrading and professional training) and building the economy.

Achieving the goals of the RDP will require open government, so that programmes for development do not fail because of claims that there are insufficient funds, while Parliament votes itself salary increases. Open government must promote ways in which ordinary citizens and their organisations can participate in drawing up the plans for housing, job creation and so on, as well as having the opportunity to influence major public decisions, such as increased taxes.

The RDP has a section entitled A

Democratic Information Programme. This section calls for a new information policy to allow the free flow of information between government and non-governmental bodies and communities. Information must be accurate and comprehensive, so that people can influence government decisions based on accurate information. I remember a story which a friend likes to tell about how the people of Valhalla Park went to the Cape Town City Council complaining about the high electricity costs. The Councillor brought in lots of files with lots of information that people could not see, read or analyse, and told them that they had been charged too little. He then turned them away. People protested outside the Council offices, without much success. Government was not obliged to give people information.

Some models from other countries

Canada, the United State and Australia have Access to Information laws which allows the right of any person to seek information from any government body. There is also the right to appeal to an independent body, usually an Information Commissioner, if the request is denied. In this scenario, a person has to request specific information, which, if released is then regarded as public information. This aspect of the law has been criticised as being too restrictive, as information can only become public on request.

Another area of debate around this law, was whether requestors should pay for the information or whether the taxpayer should pay. Providing information to members of the public can be costly for government, but

Many countries have "Access to information" Laws, and the right of appeal if access to information is denied



unnecessarily high fees can prevent ordinary people from getting access to government records. A general principle would be that fees should not be so high as to deny the public

access to information. In these countries, government departments deal with thousands of requests every year – the Canadian Federal Government dealt with 60 656 requests between 1983 and 1992.

Another example of open government is the Open Meetings Law of the State of New York where the public may attend meetings of the legislature, city councils, town boards, planning boards, zoning authorities, industrial development agencies and other such committees. The meetings of non-governmental bodies are not open to public scrutiny as they do not receive funds from government.

In the Phillipines, a number of organisations have been established to promote open government. These are organisations established by ordinary citizens, not by government, like the National Citizens Movement for Free Elections (NAMFREL) which the organisers say “is always necessary because democracy can never be taken for granted. Elections do not make a democracy. Accountability does.”

NAMFREL has three main projects – the first is pollwatching, to ensure that there is no cheating during the counting of electoral votes. The second is CongressWatch, which publishes posters, reports and newsletters giving the public information about individual parliamentarians and the policies and programmes they have voted for or against. This is conducted as a non-partisan activity and information is provided about all parliamentarians, not

just about those who may be from unpopular political parties. The third project is CourtWatch, which studies the problems in the justice system and make proposals on how to correct them.

In South Africa, the Cape Town based Community Law Centre has run a project where student legal advisors have gone out to juvenile courts and insisted on fair representation for young people standing trial. This has received a positive response from some magistrates and has given young offenders greater opportunity for a fair trial.

During the days of British rule, India, like South Africa, had an Official Secrets Act. In 1978, the Consumer Education and Research Centre was established to promote public accountability, ensure consumer safety and fair trading practices. The CERC has challenged government to make certain “privileged documents” public and won. In one case, a corrupt public health official was found guilty of accepting bribes and disbarred from practice.

Conclusion

South Africans are entering a new era. The dark ages of official secrets are being replaced by the right to know what is happening in government. Though government may create many agencies to ensure greater accountability, it is the duty of all South Africans to exercise our rights to build democracy. This can be done by democrats working within government to build openness, and by individuals or groups working through the organs of civil society who persistently hold government accountable and will not be satisfied until their demands are met. ☆

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