SUNLIGHT IS THE BEST DISINFECTANT

What is the role of the media in the struggle for an open democracy? Justice Brandeis said that sunlight is the best disinfectant, but the truth is that all government everywhere is dettol-averse. Bureaucracy abhors disclosure, and there is a pervasive flight from the light. It is pre-eminently the responsibility of the media to fight the flight. Laws and decisions aimed at establishing an open democracy can work properly only if the media are vigilant and vigorous.

The proceedings of the Judicial Service Commission, which sat recently to choose nominees for the Constitutional Court, illustrate the point. At its first meeting, the Commission decided that it would hold public selection hearings. That was a bold decision, one which put South Africa, in principle, at the frontiers of the international movement towards open governance.

But the moment that procedure was adopted, panic set in. At its second meeting, the Commission immediately started retreating from the ideal of openness. It took several decisions that represented a serious regression from the ideal of public scrutiny. It limited the hearing of the candidates to an average of an hour each, far less than the several days of questioning to which candidates for the United States Supreme Court are expected to expose themselves - even after immeasurably closer private scrutiny than happens here. The Commission decided to withhold its minutes, even although it had already agreed that they would not contain personal information about the candidates. It decided not to release the CVs of the candidates whom it had shortlisted for public hearings, although the candidates themselves, when approached by the press, experienced no difficulty in making their CVs available. The Commission even decided to withhold the CVs of its own members from an organisation which had asked for them.

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It seems that the moment you commit yourself to open governance, luminophobia sets in. There descends a great panic that you might have let too much light in. That is when the shutters start coming down. And that is when the duty of the media to be vigilant becomes critical.

How well did the media do in monitoring the Commission - in making the Constitutional Court selection hearings a live, interactive process between a constitutional commission wielding immense power in a matter of the utmost public importance, and the public which this process is supposed to serve?

On the positive side, some newspapers took the process very seriously indeed. They assigned first-rate journalists to cover the process, and they covered it continuously. Several journalists wrote careful, and sometimes insightful and powerful, stories. Continuous coverage was expensive for the newspapers, and it showed real commitment on their part. But the negative side is that the front line journalists did not always get the kind of support from their editors and sub-editors that they - and the importance of their material - deserved.

The Commission was involved in the selection of judges to sit on the highest court in the country, the first court in our history with full powers of judicial review of legislation - jurisdiction to strike down Acts of Parliament. The Constitutional Court has the power to give direction on practically every important public policy front. The selection of the judges was in its own way as important a set of choices as those made in the April election. The issues at stake merited, in many instances, lead story coverage - not four or five column inches on page five. This is a pervasive problem with our newspapers. First-rate front line journalists just do not get the right kind of support from their editorial colleagues. Journalists routinely submit excellent stories which are eviscerated during editing.

A few months ago, when the government chose the four judges who were promoted from the existing judiciary to the Constitutional Court without going through the Judicial Service Commission, there was an outcry among discerning observers over the exclusion of Judge John Didcott. Judge Didcott is widely regarded as the pre-eminent human rights judge of our times, and many considered his exclusion a national scandal. Several critics came forward to protest it. There was expected to be very prominent coverage that Sunday in our press.

There was coverage, but it was buried deep. What was the lead story in the Sunday Times that week? The obviously more important issue of the resignation of Dr Louis Luyt as chairman of the Rugby Board, a story which was not only a non-event, but, as it transpired, a non-fact, because a week later he was still chairman of the Rugby Board.

The Judicial Service Commission decided that the Constitutional Court selection hearings would be open only to the print media, not to direct coverage by the electronic media. Clearly, radio coverage is of the utmost importance as an educational medium in this country. Huge numbers of our fellow-citizens cannot read. Nor can the print media be expected to cover every aspect of the detailed questioning in a week-long hearing. If this kind of public interaction is to be the educational process that it ought to be, it has to have continuous coverage, or at least actuality coverage, by radio and television. In the United States the equivalent hearings would be broadcast on a dedicated television channel from beginning to end. That makes of the process something which can educate the nation about the issues at stake - educate it about the meaning of constitutional democracy.

The Commission decided in its wisdom to exclude the electronic media from this process. They were not allowed to broadcast it directly. What is very disturbing is that that decision passed without any serious debate in the electronic media themselves, even when it become a subject for discussion at the selection hearings. At the hearings, six candidates were asked whether they thought that television and radio should have been permitted to cover the hearings directly. All six answered in the affirmative. Ms Justice Mkgoro is also on record as supporting the idea that such hearings should be open to the electronic media.

That means that four judges of the new Constitutional Court, Justices Langa, Mkgoro, Kriegler and O'Regan, believe the Commission failed in this regard. In addition, prominent candidates who were not appointed to the Court - Advocate Skweyiya, and Professors Dugard and Cameron - also favoured direct coverage.

You would have thought that a television service which takes seriously its duty of monitoring public accountability would have given full coverage to the question of its own exclusion, made it a matter of close scrutiny and intense debate. It just did not happen. I find that very disturbing.

But turning back to the print media, it is not good enough, either, for the press simply to report what was said in the hearings on a particular day. The object of the hearings is to foster public participation and public accountability. The job of the press is not just to record, but to scrutinise. One of the functions of the press, for example, should be to compare the candidates' performance in the hearings with the actual decisions of the Commission. If a newspaper believes that the hearings showed an unsuccessful candidate to have outstanding judicial qualities, qualities which plainly outshone those of some of the successful candidates, that should call for comment. Conversely, if a candidate displayed unsuitability for judicial office in the hearings and was nominated for the Court, that, too, should call for comment. There was some commentary along these lines, but I do not think that it was nearly sufficiently comprehensive.

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Furthermore, it is the job of the press to scrutinise not just the outcome, but also the questioning. Is it proper to question the female candidates, but not the male, about their child-care responsibilities? Is it right to ask candidates whether they voted in the general election? These ought to be matters of public debate. If some candidates are not asked the kinds of questions which reveal judicial ability, the press should notice that and comment on it. If it is obvious that some of the commissioners are wholly unfamiliar with the candidates' written records, the press should ask why. Whatever the importance of the hearings, candidates

should not be judged on a one-hour interview, but on their entire records. If it seems that commissioners are not familiar with those records, that is something for the press to notice. The press is there to scrutinise the diligence of the commissioners as well as the quality of the candidates.

What is more, it is the job of the press to scrutinise not just the hearings, but also the candidates. In the United States, which has by far the most developed model of this kind of process, many newspapers would consider it their responsibility to investigate the candidates' backgrounds, to read their judgments if they are judges, to read their articles if they are academics, and to take positions, supporting or opposing the candidates. At the very least, one would have thought that a press which takes seriously its commitment to freedom of the press should have been looking at the candidates' records in defence of that freedom, supporting those who are strong in its defence and opposing those who are weak. The real content of the guarantee of press freedom in the Bill of Rights is not the wording of the clause. It is the commitment to that right of the judges on the Constitutional Court.

The key issue is this: are the exemptions going to be worded as narrowly as possible, consistent with the interests that they are supposed to protect?

What are the lessons of this process for the role of the media in developing an open democracy? The next major step on the road to an open democracy is the enactment of a Freedom of Information Act. The central purpose of such an Act is to give citizens a right of access to official information. What does the performance of the media during the Constitutional Court selection hearings teach us about such a law?

For one thing, in the lawmaking process which has now commenced, there are a number of critical issues to be watched by the media. All Freedom of Information Acts exempt certain classes of information from the citizen's right of access. The exemptions have to be there, but the central content of freedom-of-information law is their boundaries. There has to be a national security exemption, a privacy exemption, a commercial confidentiality exemption, a law enforcement exemption. The key issue is this: are the exemptions going to be worded as narrowly as possible, consistent with the interests that they are supposed to protect? If the exemptions are not as narrow as possible, they will suppress important classes of information which ought to be accessible to the nation.

Secondly, the enforcement mechanisms - the means by which citizens enforce their rights to information against unco-operative officials - must be effective. They must also be independent of government, they must be cheap, quick, and easy to use. Thirdly, there ought not to be any unnecessary obstacles in the way of the citizen who wishes to access official information. One ought to be especially wary of threshold requirements that can be manipulated by an astute bureaucrat to frustrate access. These are issues that need to be watched very carefully by the media.

Finally, the Freedom of Information Act can be an effective means of holding government accountable only if the media use it to do that. If our media fail energetically to exercise the rights of access that the Act will give, it will become paper law.

A genuine open democracy cannot be attained without much livelier participation by the media than we now have.

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