

THE OPEN SOCIETY MONITORING INDEX

ROUND 2 | 2012



OPEN SOCIETY FOUNDATION FOR SOUTH AFRICA

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The Open Society Monitoring Index

ROUND 2

Developed by the Democracy in Africa Research Unit (DARU), University of Cape Town,
in collaboration with the Open Society Foundation for South Africa (OSF-SA)

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PART 1

THE OPEN SOCIETY MONITORING INDEX

The Open Society Monitoring Index (OSMI) is designed to assess the degree of openness in South African society. The creation of an “open society” is both a fundamental goal¹ and founding principle² of the South African Constitution. How far has South Africa actually moved toward achieving this goal since 1996? The answer to this question is far from clear. While social scientists and civil society organisations have joined together in South Africa and across the world to sharpen definitions and develop ways to measure progress toward a range of related goals such as democracy, transparency, civil liberties or political rights, the concept of “openness” has remained unexplored.

The idea of an “open society” originates in the works of the philosopher Karl Popper and was apparently brought into the discussion of the Constitution’s founding principles by former Constitutional Court Judge Albie Sachs. The presence of this idea in the Constitution is important for a wide range of reasons, but particularly because it helps a developing society like South Africa think more clearly about the interplay between political procedures and socio-economic outcomes. Attempts to measure the extent of many elements of openness in poor societies, such as civil liberties, political rights, transparency or the rule of law have often been criticised on the grounds that they focus on procedures at the expense of important outcomes, such as service delivery, poverty reduction or social transformation. Popper, however, shows that achieving any substantive goal (whether it be eradication of human suffering, the removal of inequalities, or the total transformation of a society) *depends on the very existence of an open society*. Popper concluded that important socio-economic outcomes are rarely, if ever, achieved through grand policies designed by a small group of planners with minimal input or debate, but rather through iterative, incremental processes whereby policies are constantly and publicly questioned, tested and improved. On this view, a procedurally sound policymaking process – i.e. a transparent, responsive, inclusive,

1 Other goals include healing the “divisions of the past”, establishing “a society based democratic values, social justice and fundamental human rights”, improving “the quality of life of all citizens and free[ing] the potential of each person” and building a “united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations”. See Preamble Constitution of the Republic of South Africa, 1996.

2 Constitution of the Republic of South Africa, 1996, Chapter 1, Section 1(d).

fiscally responsible, and legally bound process based on the best available information – underpins the formulation of technically and substantively sound policies.

Popper's conception of "openness" suggests that an open society is characterised by the free flow of information based on maximum transparency, an active civil society that is able to collect information from and about the state, and a free marketplace of ideas and speech through which government policy is vigorously debated. An open society is also marked by government institutions that can be held to account for their actions – particularly in the way in which they manage public funds – by as broad a cross-section of civil society as possible, and that respond to criticism by changing and improving policy. Finally, an open society is one where the behaviour of the state is bound by the rule of law whereby citizens are able to protect their rights to information and speech, and the government's stance toward the law is governed by a respect for constitutional and legal principles rather than by political expediency.

Thus, measuring South Africa's progress toward creating a truly open society is essential not simply as a way to assess its success in putting a set of democratic principles into practice, but as a way to assess the country's ability to realise its substantive social policy goals and avoid the failures – indeed disasters – that are often caused by public policies designed in secret and based on flawed information.

Any attempt to assess South Africa's progress toward creating an open society must begin with, at least, four broad *dimensions*: (1) the free flow of information; (2) inclusive, accountable and responsive government institutions; (3) fiscal accountability; and (4) the rule of law.

The Free Flow of Information

The free flow of information is the lifeblood of an open society because it is the only way in which we can test the efficacy of public policy, criticise, debate and ultimately improve policy. The free flow of information requires that people must be free to *access* whatever information they deem relevant – even from the state, that the state should be required to *provide* certain types of information on a regular basis about what it does, and that all people and groups must be free to *express* their criticisms of the strengths and flaws of existing policy and to vigorously debate what needs to be done to improve it. These conditions are best advanced by a transparent state, a free and vigorous news media, a civil society and academic community that actively works to provide citizens with information about the behaviour of government officials and the consequences of its policies, and a strong legal framework and court system that protects the freedom of speech and freedom of the press.

The OSMI evaluates "the free flow of information" along three sub-dimensions: (1) Public Access to Information; (2) Government Provision of Information; and (3) A Free and Independent News Media.

Inclusive, Accountable and Responsive Government Institutions

Information, debate and criticism are most effective when the occupants of the state are compelled to answer criticisms, justify their policies and behaviours, and respond by changing policies when these cannot be justified. Government must be accountable to ordinary citizens and civil society (vertical accountability) but also to other institutions of government and state (horizontal accountability). Vertical accountability and responsiveness is most likely to occur where government is popularly elected through free, fair and competitive elections featuring widespread public participation, and where elected legislators are accessible to ordinary citizens and legislatures facilitate public participation in law-making processes. Horizontal accountability is most likely to occur where the legislature and other state institutions have the constitutional powers, resources and political incentives to monitor and review executive branch policy and conduct these on a regular basis. Legislatures have more incentives to do this when elections are competitive and participation is widespread, and the legislative process is transparent and encourages maximum public involvement. Legislative oversight may also be complemented by other institutions that have as their main mission the regular review of state policy and implementation, such as an auditor-general, or a human rights commission.

The OSMI assesses government accountability and responsiveness is evaluated by assessing whether citizens benefit from: (1) Free and Fair Elections; (2) Participation in Legislative Processes; and (3) Executive Accountability to Parliament.

Fiscal Accountability

The use of public funds is of such particular importance that it constitutes a distinctive dimension of openness in and of itself. While public officials should be held accountable for the consequences of public policy in general, citizens, civil society and the legislature must be able to scrutinise the way public funds are budgeted and spent. It is true that fiscal accountability is inextricably wound up with the other dimensions of the OSMI. The extent to which executive decision-makers, public servants, and political parties are held accountable for their decisions on the use of public funds is a function of effective parliamentary oversight, citizens' access to reliable and comprehensive information about fiscal matters, public participation in governance, and ultimately, citizens' ability to sanction incumbents by voting them out of government. Additionally, the legislation governing fiscal management is likely to be enforced only in the presence of an effective and independent judiciary and prosecutorial service.

The OSMI Index focuses on how the executive budgets and departments and other public entities spend public funds, as well as how political parties are allocated and spend public funds.

Adherence to the Rule of Law

The free flow of information and inclusive, accountable government institutions depend for their existence on the rule of law. The rule of law entails a wide range of things but, in the context of an open society, its most important implications are that citizens are able to protect their rights to information, expression, speech, participation and political influence, and that the government's stance toward the law is governed by a respect for constitutional and legal principles rather than political expediency, impunity or fiat. The rule of law is upheld by an independent judiciary and by other agencies with sufficient resources and independence to protect citizens, most importantly an independent prosecuting authority and a police service that respects citizens' civil and political rights.

The OSMI evaluates adherence to the rule of law by assessing: (1) The Independence of the Courts; (2) The Independence of the National Prosecuting Authority and the Directorate for Priority Crime Investigation; and (3) The Conduct of Mass Law Enforcement Agencies.

PART 2

THE PROCESS

Round 1 of the Open Society Monitoring Index was released in 2010. We now release Round 2. Each of the first two rounds of OSMI consisted of a two-stage process.

In the first stage, empirical data about the openness of South African society was collected by the Democracy in Africa Research Unit (DARU) in the University of Cape Town (UCT) Centre for Social Science Research. In 2010, this was accomplished by means of an extensive review of the most comprehensive, accurate and current information published on each of the dimensions comprising the index. For the second round of OSMI, DARU also commissioned independent analysts and expert researchers from the Institute for Security Studies, the Open Democracy Advice Centre, and the Democratic Governance and Rights Unit at UCT to assist them in updating and expanding this information across each of the dimensions. The body of evidence for Round 2 was also supplemented by two surveys conducted by DARU: first, telephone interviews with information officers at a range of selected public institutions and second, face-to-face interviews with a nationally representative sample of citizens (carried out by Citizens Surveys).

This information formed the basis for a narrative that identified and compiled four types of evidence about each of the areas of openness discussed above:

1. The constitutional and legislative framework that comprise each dimension (or sub-dimension);
2. The institutional mechanisms and processes designed to achieve the goals set out in national legislation;
3. Secondary data evaluating the empirical performance of each of the identified mechanisms or processes (focusing on functioning, accessibility and compliance) as well as an indication of existing data gaps that prevent a fuller evaluation of the mechanism; and
4. Evaluations of the adequacy of the identified mechanisms or processes. This included taking note of any flaws, omissions or publicly-known attempts to subvert the identified mechanisms or processes, as well as any known recommendations to enhance the implementation of the mechanisms or processes.

In the second stage, DARU compiled a list of 260 researchers and analysts from civil society organisations and universities across the country who work in, or write about, one or more of the four broad dimensions of openness covered by the OSMI. From this larger list, we then randomly selected a sample of 66 expert respondents and sent them the empirical information gathered in the narrative and invited them to score the index accompanying the narrative (see Appendix B for the actual scorecard). We ultimately received responses from 35 respondents (up from the 26 who formed the expert panel in OSMI Round 1). To be clear, the expert respondents were not involved in the conceptualisation of the Index or the production of the narrative that accompanied it. The collective judgement of this panel of experts is reflected in the data discussed in this report. Through this empirically grounded process, the OSMI aims to gauge the openness of South African society in a valid and reliable fashion over time.

The index consists of a series of questions which allow for a longitudinal rating of South African society along the four dimensions of openness, each of which were disaggregated into a further set of 11 *sub-dimensions* as follows:

1. The Free Flow of Information
 - a. Public Access to Information
 - b. Government Provision of Information
 - c. Free and Independent News Media
2. Inclusive, Accountable and Responsive Government Institutions
 - a. Free and Fair Elections
 - b. Public Participation in Legislative Processes
 - c. Executive Accountability to Parliament and Independent Oversight Institutions
3. Fiscal Accountability
 - a. Fiscal Accountability in National Government and Public Entities
 - b. Fiscal Accountability – Contributions to Political Parties
4. Adherence to the Rule of Law
 - a. Judicial Independence
 - b. Prosecutorial Independence
 - c. Conduct of Mass Law Enforcement Agencies

For each of the 11 sub-dimensions, the scorecard lists seven questions about a common series of seven *components of openness* that prompt respondents to evaluate the quality of the legal and institutional framework designed to promote a particular aspect or dimension of openness, the efficacy of this framework when implemented, and the political will to promote the objectives associated with it. For each sub-dimension, respondents were asked to assess:

1. The *strength of the formal institutional and legislative framework* that promotes a specific dimension of openness;
2. The *accessibility* of institutions and legal mechanisms promoting a specific dimensions of openness;
3. The extent to which these institutions and mechanisms are *utilised* by intended beneficiaries;
4. The *sufficiency of the resources* allocated to these institutions and mechanisms;
5. The extent to which the institutions and mechanisms can *ensure meaningful compliance* with the legal framework from which they derive their authority;
6. The *overall effectiveness* of formal mechanisms and institutions; and
7. The *degree of government commitment, or political will, to upholding and strengthening* a specific dimension of openness.

Respondents provided answers to questions about each component of openness using a 10-point scale, where “0” indicates “not at all” or “never”, and “10” indicates “completely” or “all the time”. The midpoint, thus, would be 5.5. The expert respondents could consult the narrative in formulating their responses, but were also expected to draw on their own expertise on the issues covered by the index. Their scores for each of the 77 questions forms the basis of the statistical analysis presented in this document. Where respondents chose to provide a range, rather than a discrete score, we used the midpoint of the range as the final score. For example, the final score included in the dataset would be “7” if the score sheet indicated a range of “6–8” in response to a specific question.

Data Analysis

Respondent scores were averaged together to provide a mean score for each question, but more importantly, further aggregated to create mean scores for:³

- each of the 4 dimensions;
- each of the 11 sub-dimensions; and
- and each of the 7 components of openness.

³ All values were rounded to one decimal point.

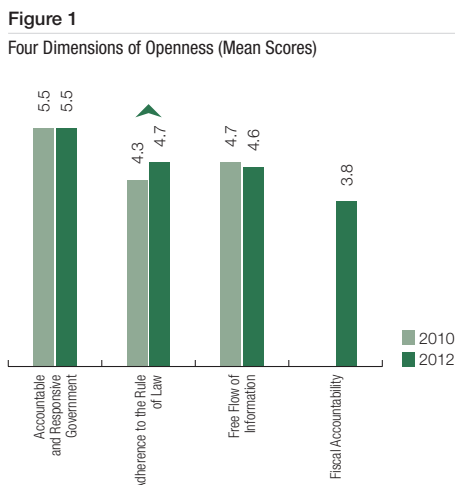
PART 3

FINDINGS FROM ROUND 2 OF THE OSMI

Dimensions and Sub-Dimensions of Openness

As in the first round of OSMI conducted in 2010, our expert respondents did not rate South Africa's performance on any of the four primary dimensions of openness above the midpoint of 5.5 (See Figure 1). Respondents felt that openness was most compromised with respect to "Fiscal Accountability". This dimension earned an overall mean score of 3.8, compared to an average of 5.4 for "Accountable and Responsive Government", 4.7 for the "Rule of Law", and 4.6 for the "Free Flow of Information". Overall, these scores indicate that South Africa is not doing particularly well on three of the dimensions, and is doing particularly poorly in the area of Fiscal Accountability.

Compared to Round 1 of the OSMI, scores from 2010, we see a very slight increase in the area of Rule of Law (from 4.3 to 4.7, which is a slightly larger increase than the confidence interval (margin of measurement error). Fiscal Accountability was added in Round 2, and thus has no Round 1 score. The other two dimensions remained the same. The increase in the broad dimension of Rule of Law was driven primarily by an improvement on one of the three sub-dimensions in that area as discussed below.

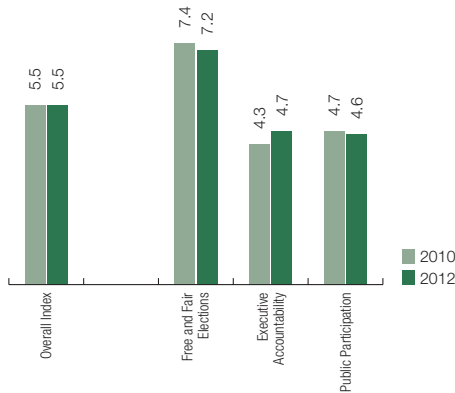


Accountable and Responsive Government Institutions

As indicated above, while the highest score for openness was awarded by our expert respondents to the dimension of “Accountable and Responsive Government”, the score of 5.4 only puts this dimension at the midpoint of the total possible scale. However, this score masks a very large variation between the respondents’ overwhelmingly positive evaluations of South Africa’s progress in routinely conducting “Free and Fair Elections” (7.2), which is the most positive score given to any sub-dimension in this year’s study, and the significantly lower scores for Executive Accountability (4.7) and Public Participation (4.6) (see Figure 2).

The very strong score in the area of elections reflects the continuing efficacy of the Independent Electoral Commission (IEC) in ensuring free and fair elections and its high levels of public legitimacy. Data from public opinion surveys consistently indicate that the IEC is widely regarded as an impartial and effective institution. In the past 18 months, the IEC has successfully conducted local government elections, undertaken repeated national voter registration drives and voter education initiatives, increased the number of polling stations available to voters, issued the first-ever Braille ballots, and concluded a memorandum of understanding with important players in the agricultural industry in order to secure farm workers’ voting rights.

Figure 2
Accountable and Responsive Government (Mean Scores)



The Free Flow of Information

The overall score on this dimension (4.6) masks sharp differences between the experts' ratings for "Free and Independent News Media" (5.5) (the second highest score given to any sub-dimension), and the significantly lower scores given to "Public Access to Information" (4.3) and "Government Provision of Information" (4.2).

Given recent developments over the controversial Protection of State Information Bill, observers may be surprised that our respondents awarded a score to Free and Independent News Media that was essentially unchanged from the 2010 score of 5.7. The relatively stable score for the independence of the news media might suggest a faith in the judiciary's capacity to guarantee an environment in which both journalists' and citizens' rights to information continue to be respected.

In fact, the evidence upon which the judges made their scoring decisions contained several recent examples of these types of judgments. In *Brummer v the Minister of Social Development*, the Constitutional Court declared Section 78(2) of Promotion of Access to Information Act (PAIA) unconstitutional. This section stipulated that, in the event that an access to information request is refused, the requester may challenge the refusal in court provided they do so within 30 days of the refusal. The court argued that "ordinary requesters"⁴ may not be able to prepare an adequate appeal, raise funds, or consult a lawyer within this timeframe.⁵ Though the case was brought before the court by a journalist, Stefaans Brummer, the decision explicitly acknowledged the limitations facing ordinary citizens who wish to challenge access to information requests that are turned down by government.

And in *Midi Television v Director of Public Prosecutions*, the Supreme Court of Appeal (SCA), mindful of the chilling effect of awarding significant damages against the media in cases of defamatory publication, confirmed that damages should not be punitive since this may "act as an unjustifiable deterrent to the exercise of freedom of expression".⁶ Moreover, the Court expressly endorsed the principle that interim interdictory relief should be framed in the narrowest possible terms to protect only those rights that are not capable of subsequent vindication.⁷

The impending passage of the Protection of State Information Bill through Parliament might also lead one to expect deterioration on another dimension, Public Access to Information, rather than a score consistent with that allocated in Round 1. However, it

4 South African Human Rights Commission Annual Report 2009/2010. Annex B, page 149. www.sahrc.org.za/home/21/files/Reports/Annual%20Report%2009_10%20Annexures.pdf. [3 September 2011]

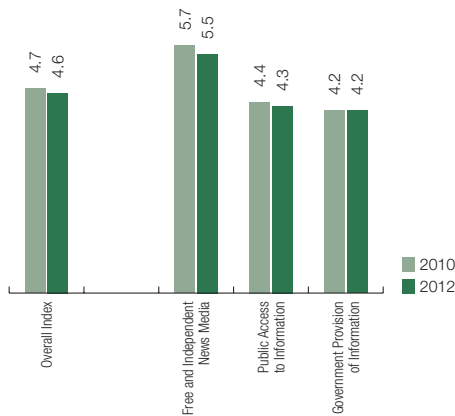
5 *Conrad Stefaans Brummer and the Minister of Social Development and Others*, CCT 25/09, media summary, page 3. Available at: <http://www.saflii.org/za/cases/ZACC/2009/21media.pdf>. (accessed 3 September 2011).

6 *Mogale and Others v Seima* (575/2004) [2005] ZASCA 101; 2008 (5) SA 637 (SCA) (14 November 2005).

7 *Midi Television (Pty) Ltd v Director of Public Prosecutions* [2007] SCA 56 (RSA).

should be noted that the OSMI Round 1 score for this dimension was already relatively low. Indeed, the narrative evidence provided to the respondents indicated that the existing laws on public access to information are complex and expensive to use. The judges might have concluded that public access would not be appreciably diminished from its already problematic state. Alternatively, it could be that the respondents feel that the Bill will be revised to allow for a public interest defence of the publication of classified information, or that it will ultimately fail to withstand challenges in court if it is passed.

Figure 3
Free Flow of Information (Mean Scores)

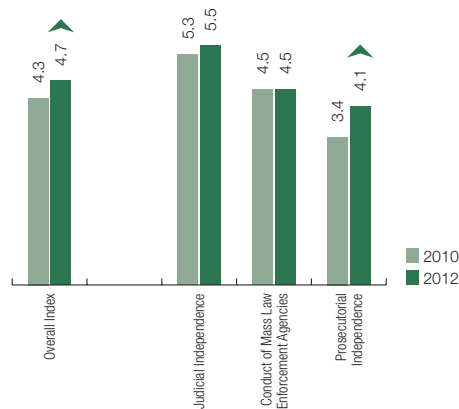


Adherence to the Rule of Law

The OSMI Round 2 score for “Adherence to the Rule of Law” (4.7) indicates a small, but statistically significant increase from the 4.3 awarded in Round 1. This was driven by the increase in the score for the “Independence of Elite Law Enforcement Agencies” which was awarded a score of 4.1, up from a very low score of 3.4 in 2010.

This increased rating may reflect the fact that when OSMI Round 1 was released, the Scorpions had recently been disbanded and the country was only a year away from revelations about attempts to manipulate the National Prosecuting Authority (NPA) in both the Jacob Zuma and Jackie Selebi trials, all of which created a great deal of uncertainty about the future of the NPA and its high-level investigative work. By 2012, however, many of the worst fears had not been realised. There is little evidence that the NPA has become politicised or grossly ineffective. Indeed, since 2010, the NPA successfully concluded the prosecution of Jackie Selebi and prosecuted Sheryl Cwele, the wife of the Minister of State Security.

Figure 4
Adherence to the Rule of Law (Mean Scores)



The improved scores also reflect Adv. Thuli Mandoonela's efforts to assert the independence of the Office of the Public Protector as well as a spate of recent court judgments affirming citizens' rights to challenge government decisions that undermine the autonomy of elite investigative and prosecutorial agencies. For example, a March 2012 SCA decision compelled the NPA to give a political party – the Democratic Alliance – selective access to the record of proceedings that led it to withdraw longstanding corruption charges against President Jacob Zuma.⁸ In late 2011, the SCA unanimously set aside Adv. Menzi Simelane's appointment as National Director of Public Prosecutions (NDPP) on the grounds that it was "inconsistent with the Constitution" because the President had not properly evaluated whether Simelane was a fit and proper person" to serve as NDPP.⁹ Finally, in *Glenister v President of the Republic of South Africa*

8 SAPA and Staff Reporter, "SCA orders NPA to hand Over Record of Zuma Charges". <http://mg.co.za/article/2012-03-20-sca-orders-npa-to-hand-over-record-of-zuma-charges>, 30 March 2012. Statement by the National Director of Public Prosecutions on the matter *S v Zuma and Others* – 6 April 2009, www.npa.gov.za/UploadedFiles/Press%20briefing%20final.doc [26 January 2012]; Megan Lindow, "S. Africa: Outcry as Zuma charges Dropped", www.time.com/time/world/article/0,8599,1889650,00.html, [26 January 2012].

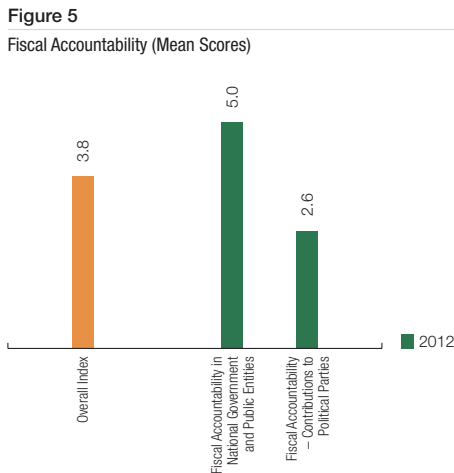
9 Franny Rabkin, "DA takes Simelane case to highest court" www.businessday.co.za/Articles/Content.aspx?id=128459; Sam Sole, "DA accelerates appeal against Simelane", www.mg.co.za/article/2011-01-14-da-accelerates-appeal-against-simelane; Glynis Underhill, "South Africa's Justice System in Turmoil", <http://mg.co.za/article/2011-12-02-justice-system-in-turmoil/>; M&G Staff Reporter and SAPA, "SCA: Simelane's Appointment as NPA Boss "Invalid".", <http://mg.co.za/article/2011-12-01-sca-simelanes-appointment-as-npa-boss-invalid>; Angelique Serrao and Louise Flanagan, "End of Fight for Simelane", www.iol.co.za/news/crime-courts/end-of-fight-for-simelane-1.1205574, 18 January 2012.

and Others¹⁰ the Constitutional Court upheld the independence of the Directorate of Priority Crime Investigation by declaring that the legislation creating the agency was unconstitutional because it failed to ensure that it was sufficiently independent from political interference in its structure and functioning.¹¹

Fiscal Accountability

The low score for “Fiscal Accountability” masks a large variation between the 5.0 awarded to the sub-dimension of “National Government Fiscal Accountability” and the very low 2.6 given to “Political Party Fiscal Accountability”, easily the lowest score earned by any of the 11 sub-dimensions in OSMI Round 2.

A number of factors may explain the disparity in these scores. Most importantly, political parties need only publicly account for the public funding they receive from government, but are not required to disclose how they procure, manage or spend private sources of funding. In contrast, despite the Auditor-General’s routine castigation of government departments for their poor performance in complying with the Public Finance Management Act, the legislative and institutional framework for regulating fiscal accountability within government is extensive, well-designed and effectively monitored by oversight institutions such as the Auditor-General, Parliament’s Standing Committee on Public Accounts (SCOPA), the National Treasury and the Office of the Public Protector.



10 *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (17 March 2011).

11 *Ibid.*

Components of Openness

The components of openness that receive the highest overall average scores are “Institutional Design” (5.3) and the extent with which these institutions are able to secure meaningful “Compliance” with the legal framework from which they derive their authority (5.3). The fact that this component consistently earned high scores across all 11 sub-dimensions reflects the fact that South African legislation has consistently been praised as being well-designed, promoting extensive democratic oversight, and as making use of global best practices.

Given the available evidence, especially a citizens’ survey that asked people about their actual awareness and use of many of these institutions conducted especially for OSMI, judges were fairly negative in their assessment of “Accessibility” (4.7) and the actual levels of “Use” (4.5) of each of these institutions. Judges based their scores on data that indicate that citizens lack the financial resources, information, time, and technical support to access and effectively utilise the public institutions or laws tasked with protecting their rights. For example, very few citizens know about or use laws like the Promotion of Access to Information Act (PAIA) or the Promotion of Administrative Justice Act (PAJA) to obtain information from government. In a survey conducted by Citizen Surveys for the Open Society Foundation for South Africa (OSF-SA) in November 2011, respondents were asked whether they had ever heard of PAIA. The vast majority of respondents had not (86%), and an additional 7% said that hadn’t yet “had a chance to learn about it”. A mere 7% indicated that they had heard of it (though 18% of respondents with a tertiary qualification said they had heard of PAIA). A telephone survey that DARU conducted for OSF-SA in February 2012 indicated that citizens’ access to and use of PAIA may also be hampered by a general lack of awareness amongst public officials about intra-organisational processes for promoting compliance with PAIA.

By far the lowest scores were awarded, regardless of the sub-dimension of openness being evaluated, in the area of “Political Will”¹² (3.9), a sharp decrease from the 2010 score of 4.4. Here scorers may have been responding to information that suggests that government has been slow to comply with various obligations placed on it by courts, investigative commissions or Chapter 9 institutions.¹³ For example, in 2006 Prof. Kader Asmal, in an independent review of Chapter 9 institutions, recommended that Parliament establish a unit on “Constitutional Institutions and Other Statutory Bodies” in the Office of the Speaker. This recommendation was accepted by an ad hoc committee on Chapter 9 institutions in September 2006. However, by July 2011 the unit was still not fully

12 Note that index questions elicit evaluations of the level of political will by asking respondents to reflect on “government’s commitment to upholding and promoting” particular objectives.

13 Independent statutory institutions established under Chapter 9 of the Constitution to safeguard constitutional democracy.

functional and Chapter 9 institutions continue to argue that they are underfunded, that their mandates overlap, and that their reports are often disregarded by Parliament.¹⁴

Scorers were also responding to information about Parliament's slow progress in complying with laws it has authored and enacted. In 2009, for example, Parliament passed the Money Bills Amendment Act which mandated the establishment of an independent Parliamentary Budget Office which would provide non-partisan research expertise and advice on budgeting to members of parliament. However, by March 2012 a fully functioning budget office had not yet been established.¹⁵

In other cases, scorers may have been responding to information about government initiatives or decisions that have been criticised as potentially unconstitutional, but which have nevertheless been pursued and publicly defended by parliamentarians and members of the Executive. For example, the Protection of State Information Bill (POSIB) has been criticised for being inconsistent with the goals of PAIA and many of the rights set out in Chapter 2 of the Constitution. The Bill was nevertheless passed by the National Assembly in November 2011, though it has not yet been passed by the National Council of Provinces. Senior politicians, including the President, have also been criticised for repeatedly expressing doubts about scope of the Constitutional Court's authority vis-à-vis the executive and legislature and for suggesting that the judiciary should be "transformed" in order to ensure that its decisions are in harmony with the political priorities of elected officials.¹⁶ Critics have interpreted these statements as undermining the principle of Constitutional supremacy, and by extension the authority of the Constitutional Court to review the constitutionality of legislation enacted by Parliament.

In sum, the results of OSMI Round 2 indicate that threats to openness are seen to stem mostly from government's lack of commitment to making existing laws, institutions and processes work, rather than from the design of the legal provisions governing the establishment, mandate and functioning of public institutions and oversight mechanisms.

14 Parliament of the Republic of South Africa, *Office of the Speaker and Institutions Supporting Democracy Meet*. (September 2010). www.parliament.gov.za/live/content.php?Item_ID=1317; Parliament of the Republic of South Africa, *Business of Parliament: Office on Institutions Supporting Democracy*, www.parliament.gov.za/live/content.php?Category_ID=320; Lynley Donnelly, "Chapters Nine and 10 Still Trying to Get Their Stories Straight", <http://mg.co.za/article/2011-07-08-chapters-nine-and-10-still-trying-to-get-their-stories-straight>, 15 January 2012.

15 Parliament of the Republic of South Africa, *Study Tour About the Establishment of a Budget Office in Parliament of RSA*, December 2010, www.parliament.gov.za/live/content.php?Item_ID=1415; Lynley Donnelly, "Two Years On, Budget Oversight Office is Still in Limbo", <http://mg.co.za/printformat/single/2011-02-25-two-years-on-budget-oversight-office-is-still-in-limbo/>, 26 January 2012.

16 SAPA, "Cabinet to Have Constitutional Court Decisions 'Assessed'", <http://mg.co.za/article/2011-11-24-concourt-decisions-assessed-in-line-with-transformation/>; Andisiwe Makinana, "State Probe of Judiciary Causes Unease", <http://mg.co.za/article/2011-11-25-state-probe-of-judiciary-causes-unease/>; SAPA, "The Judiciary is Not a Platform for Polokwane", <http://mg.co.za/article/2011-11-27-the-judiciary-is-not-a-platform-in-polokwane/>, 18 January 2012.

At the same time, the scores also indicate that the low levels of citizens' engagement with formal rules and institutions are also a primary threat to openness in contemporary South Africa.

Figure 6

Seven Components of Openness (Mean Scores)

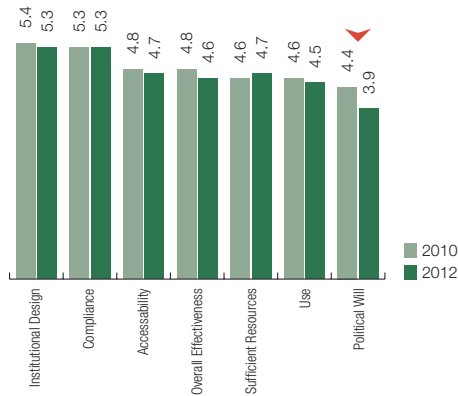
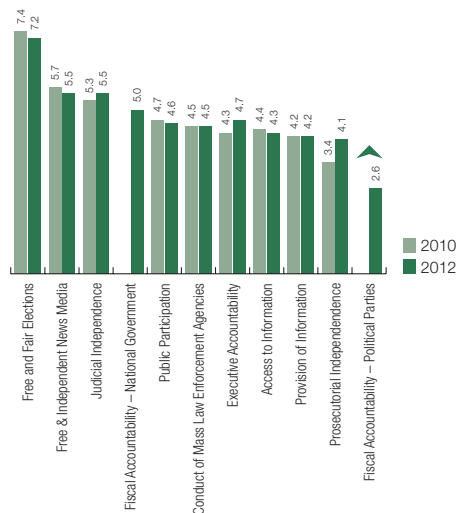


Figure 7

Eleven Sub-Dimensions of Openness (Mean Scores)



Overall, the results from Round 2 of OSMI suggest that the openness of South Africa's political institutions and policy-making process could be judged as relatively strong in the area of elections. However, when attention turns to factors that structure the *possibilities and limits of democratic practices between elections* – e.g. the rule of law, executive accountability, and the free flow of information – the openness of South African society seems much more uncertain.

Methodological Notes

Confidence Intervals: Each mean score should be read as an estimate within a range or “confidence interval” (technically, the standard error of the mean). Standard errors are reported in Appendix A.

Reliability of Mean Scores: The reliability of OSMI can be seen in the large degree of stability between the Round 1 and Round 2 results. Given that over one half of this year's expert judges were new, this stability provides us with an important sense of confidence in the reliability of the Index. Reliability can also be seen in the fact that the Index scores yield an internally consistent measure of openness in South Africa. In this sense, reliability can be measured through a statistic called Alpha. With one exception, the scores are all above .80 with many above .90 indicating an acceptable to high degree of reliability, or consistency.

APPENDIX A

MEANS AND STANDARD ERRORS BY TYPE OF QUESTION

Table 1 Mean, Standard Deviation and Range by Type of Question

Sub-dimension	Institutional Design	Accessibility	Utilisation	Sufficient Resources
Public Access to Information	5.1 0.26	4.3 0.26	3.9 0.21	3.4 0.26
Government Provision of Information	4.8 0.29	4.1 0.27	3.6 0.24	3.8 0.26
Free & Independent News Media	6.2 0.26	5.8 0.29	5.5 0.31	5.1 0.31
Free & Fair Elections	7.5 0.22	7.2 0.28	6.7 0.24	7.0 0.26
Public Participation & Legislative Access	5.5 0.30	4.2 0.27	4.0 0.24	4.5 0.32
Executive Accountability to Parliament	5.4 0.29	4.7 0.27	4.3 0.26	5.3 0.86
National Government Fiscal Accountability	5.7 0.32	5.0 0.32	4.5 0.32	4.9 0.36
Political Parties Fiscal Accountability	2.3 0.30	2.9 0.36	3.1 0.39	2.7 0.38
Judicial Independence	6.4 0.29	5.4 0.30	5.1 0.31	5.1 0.30
Prosecutorial Independence	4.3 0.27	4.3 0.27	4.2 0.25	4.3 0.32
Police Conduct	5.0 0.28	4.7 0.27	4.5 0.25	4.6 0.29
Mean Score for Component of Openness	5.3 0.18	4.7 0.20	4.5 0.19	4.7 0.23

Note:

First line – Mean

Second line – Standard Error of the Mean

Ensure Meaningful Compliance	Overall Effectiveness	Political Will	Overall Mean Score for Sub-Dimension	Reliability (Alpha)
5.3 0.33	4.6 0.22	3.2 0.23	4.2 0.18	0.85
5.6 0.89	4.1 0.23	3.6 0.24	4.2 0.23	0.66
6.1 0.25	5.9 0.27	3.6 0.27	5.5 0.21	0.89
7.2 0.26	7.5 0.24	7.1 0.24	7.2 0.20	0.94
5.2 0.29	4.3 0.29	4.5 0.29	4.6 0.24	0.94
5.2 0.27	4.0 0.24	3.6 0.24	4.7 0.26	0.77
5.4 0.31	4.8 0.33	4.6 0.34	5.0 0.29	0.95
3.0 0.43	2.0 0.32	2.0 0.34	2.6 0.31	0.94
6.3 0.22	6.1 0.26	3.9 0.28	5.5 0.22	0.90
4.6 0.27	4.0 0.26	3.0 0.28	4.1 0.23	0.93
4.8 0.24	3.9 0.22	4.2 0.26	4.5 0.21	0.91
5.3 0.21	4.6 0.16	3.9 0.19		

APPENDIX B

QUESTIONS COMPRISING THE OSMI SCORECARD

Final Score Card

Please rate each item between 0 and 10 where 0 means “not at all” or “never” and 10 means “completely” or “all the time”.

1.	THE FREE FLOW OF INFORMATION	
1a.	Public Access to Information	
1.	To what extent are legal mechanisms and public institutions promoting access to information sufficient for achieving their objectives?	
2.	To what extent are legal mechanisms and public institutions promoting access information accessible to intended beneficiaries?	
3.	To what extent are legal mechanisms and public institutions promoting access to information utilised by intended beneficiaries?	
4.	How sufficient are the resources allocated to legal mechanisms and public institutions promoting access to information?	
5.	To what extent can legal mechanisms and public institutions promoting access to information ensure meaningful compliance with access to information requests?	
6.	Overall, how effective are legal mechanisms and public institutions in achieving public access to information?	
7.	To what extent is government committed to upholding and strengthening public access to information?	

1. THE FREE FLOW OF INFORMATION	
1b. Government Provision of Information	
8. To what extent are legal mechanisms and public institutions promoting government provision of information sufficient for achieving their objectives?	
9. To what extent are legal mechanisms and public institutions promoting government provision of information accessible to intended beneficiaries?	
10. To what extent are legal mechanisms and public institutions promoting government provision of information utilised by intended beneficiaries?	
11. How sufficient are the resources allocated to legal mechanisms and public institutions promoting government provision of information?	
12. To what extent can legal mechanisms and public institutions promoting government provision of information ensure meaningful compliance with access to information requests?	
13. Overall, how effective are legal mechanisms and public institutions in achieving government provision of information?	
14. To what extent is government committed to upholding and strengthening government provision of information?	

1. THE FREE FLOW OF INFORMATION	
1c. Free and Independent News Media	
15. To what extent are legal mechanisms and public institutions promoting a free and independent news media sufficient for achieving their objectives?	
16. To what extent are legal mechanisms and public institutions promoting a free and independent news media accessible to intended beneficiaries?	
17. To what extent are legal mechanisms and public institutions promoting a free and independent news media utilised by intended beneficiaries?	
18. How sufficient are the resources allocated to legal mechanisms and public institutions promoting a free and independent news media?	

19.	To what extent can legal mechanisms and public institutions promoting a free and independent news media ensure meaningful compliance with provisions promoting this goal?	
20.	Overall, how effective are legal mechanisms and public institutions in ensuring a free and independent news media?	
21.	To what extent is government committed to upholding and promoting a free and independent news media?	

2.	ACCOUNTABLE & RESPONSIVE GOVERNMENT	
2a.	Free and Fair Elections	
22.	To what extent are legal mechanisms and public institutions promoting free and fair elections sufficient for achieving their objectives?	
23.	To what extent are legal mechanisms and public institutions promoting free and fair elections accessible to intended beneficiaries?	
24.	To what extent are legal mechanisms and public institutions promoting free and fair elections utilised by intended beneficiaries?	
25.	How sufficient are the resources allocated to legal mechanisms and public institutions promoting free and fair elections?	
26.	To what extent can legal mechanisms and public institutions promoting free and fair elections ensure meaningful compliance with provisions promoting this goal?	
27.	Overall, how effective are legal mechanisms and public institutions in achieving free and fair elections?	
28.	To what extent is government committed to upholding and promoting free and fair elections?	

2. ACCOUNTABLE & RESPONSIVE GOVERNMENT	
2b. Public Participation in Legislative Processes	
29. To what extent are legal mechanisms and public institutions promoting public participation in legislative processes sufficient for achieving their objectives?	
30. To what extent are legal mechanisms and public institutions promoting public participation in legislative processes accessible to intended beneficiaries?	
31. To what extent are legal mechanisms and public institutions promoting public participation in legislative processes utilised by intended beneficiaries?	
32. How sufficient are the resources allocated to legal mechanisms and public institutions promoting public participation in legislative processes?	
33. To what extent can legal mechanisms and public institutions promoting public participation in legislative processes ensure meaningful compliance with provisions promoting this goal?	
34. Overall, how effective are legal mechanisms and public institutions in achieving public participation in legislative processes?	
35. To what extent is government committed to upholding and promoting public participation in legislative processes?	

2. ACCOUNTABLE & RESPONSIVE GOVERNMENT	
2c. Executive Accountability to Parliament and Independent Oversight Institutions	
36. To what extent are legal mechanisms and public institutions promoting executive accountability sufficient for achieving their objectives?	
37. To what extent are legal mechanisms and public institutions promoting executive accountability accessible to intended beneficiaries?	
38. To what extent are legal mechanisms and public institutions promoting executive accountability utilised by intended beneficiaries?	

39. How sufficient are the resources allocated to legal mechanisms and public institutions promoting executive accountability?	
40. To what extent can legal mechanisms and public institutions promoting executive accountability ensure meaningful compliance with provisions promoting this goal?	
41. Overall, how effective are legal mechanisms and public institutions in achieving executive accountability?	
42. To what extent is government committed to upholding and promoting executive accountability?	

3. FISCAL ACCOUNTABILITY	
3a. Fiscal Accountability in National Government and Public Entities	
43. To what extent are legal mechanisms and public institutions promoting fiscal accountability in national government and public entities sufficient for achieving their objectives?	
44. To what extent are legal mechanisms and public institutions promoting fiscal accountability in national government and public entities accessible to intended beneficiaries?	
45. To what extent are legal mechanisms and public institutions promoting fiscal accountability in national government and public entities utilised by intended beneficiaries?	
46. How sufficient are the resources allocated to legal mechanisms and public institutions promoting fiscal accountability in national government and public entities?	
47. To what extent can legal mechanisms and public institutions promoting fiscal accountability in national government and public entities ensure meaningful compliance with provisions promoting this goal?	
48. Overall, how effective are legal mechanisms and public institutions in achieving fiscal accountability in national government and public entities?	
49. To what extent is government committed to upholding and promoting fiscal accountability in national government and public entities?	

3. FISCAL ACCOUNTABILITY	
3b. Contributions to Political Parties	
50. To what extent are legal mechanisms and public institutions regulating contributions to political parties sufficient for achieving their objectives?	
51. To what extent are legal mechanisms and public institutions regulating contributions to political parties accessible to intended beneficiaries?	
52. To what extent are legal mechanisms and public institutions regulating contributions to political parties utilised by intended beneficiaries?	
53. How sufficient are the resources allocated to legal mechanisms and public institutions regulating contributions to political parties?	
54. To what extent can legal mechanisms and public institutions regulating contributions to political parties ensure meaningful compliance with provisions promoting this goal?	
55. Overall, how effective are legal mechanisms and public institutions in regulating contributions to political parties?	
56. To what extent is government committed to upholding and promoting regulations pertaining to contributions to political parties?	

4. RULE OF LAW	
4a. Judicial Independence	
57. To what extent are legal mechanisms and public institutions promoting judicial independence sufficient for achieving their objectives?	
58. To what extent are legal mechanisms and public institutions promoting judicial independence accessible to intended beneficiaries?	
59. To what extent are legal mechanisms and public institutions promoting judicial independence utilised by intended beneficiaries?	
60. How sufficient are the resources allocated to legal mechanisms and public institutions promoting judicial independence?	

61. To what extent can legal mechanisms and public institutions promoting judicial independence ensure meaningful compliance with provisions promoting this goal?	
62. Overall, how effective are legal mechanisms and public institutions in achieving judicial independence?	
63. To what extent is government committed to upholding and promoting judicial independence?	

4. RULE OF LAW	
4b. Prosecutorial Independence (Independence of the NPA and DPCI)	
64. To what extent are legal mechanisms and public institutions promoting the independence of elite law enforcement agencies sufficient for achieving their objectives?	
65. To what extent are legal mechanisms and public institutions promoting the independence of elite law enforcement agencies accessible to intended beneficiaries?	
66. To what extent are legal mechanisms and public institutions promoting the independence of elite law enforcement agencies utilised by intended beneficiaries?	
67. How sufficient are the resources allocated to legal mechanisms and public institutions promoting the independence of elite law enforcement agencies?	
68. To what extent can legal mechanisms and public institutions promoting the independence of elite law enforcement agencies ensure meaningful compliance with provisions promoting this goal?	
69. Overall, how effective are legal mechanisms and public institutions in achieving the independence of elite law enforcement agencies?	
70. To what extent is government committed to upholding and promoting the independence of elite law enforcement agencies?	

4. RULE OF LAW	
4c. Efficacy of Mass Law Enforcement Agencies	
71. To what extent are legal mechanisms and public institutions promoting the efficacy of mass law enforcement agencies sufficient for achieving their objectives?	
72. To what extent are legal mechanisms and public institutions promoting the efficacy of mass law enforcement agencies accessible to intended beneficiaries?	
73. To what extent are legal mechanisms and public institutions promoting the efficacy of mass law enforcement agencies utilised by intended beneficiaries?	
74. How sufficient are the resources allocated to legal mechanisms and public institutions promoting the efficacy of mass law enforcement agencies?	
75. To what extent can legal mechanisms and public institutions promoting good conduct in mass law enforcement agencies ensure meaningful compliance with provisions promoting this goal?	
76. Overall, how effective are legal mechanisms and public institutions in achieving good conduct in mass law enforcement agencies?	
77. To what extent is government committed to upholding and promoting good conduct in mass law enforcement agencies?	



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