

Address by Dr Max Price
Launch of the Open Society Index

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The Open Society Monitoring Index (OSMI) aims to help us to take a barometer reading on the degree of ‘openness’ of our South African society. But it does much more than that. In my opinion the OSMI does at least three things:

1. Firstly, the OSMI does indeed offer us a baseline measure against which we can monitor progress or retreat over time. There will undoubtedly be many critics of the OSMI. Some will take issue with the choice of thematic indicators that are taken as measures of the society’s openness. Some will be uncomfortable with the attempt to put a quantitative measure on a set of qualitative indicators of degrees of freedom, accountability or political will. Some will take issue with the choice of the 25 experts whose subjective opinions on some 63 questions are the core of the methodology. How can one be sure that a different 25 experts might not have produced a very different set of scores? But while the OSMI’s *absolute* measure might well be challenged by methodological critiques, it nevertheless provides a set of relative values which can be used in longitudinal repeat studies to highlight aggregate and specific trends, and raise the warning flags early on, if necessary.
2. Secondly, in order to develop criteria by means of which to measure openness (in the context of ‘the OS’), it gets a debate going on *what would count* as progress or retreat from the goals of the OS. That debate, in itself, distinct from the findings, is an educative process for the polity. It challenges both the left and the right, liberals, conservatives, nationalists, statist to engage with the principal Popperian idea of the OS, namely, that just as scientists can never finally know the truth and scientific progress is the result of progressive falsification of current received wisdom, so no political party or government or academic analyst can know for certain that their policies are *the* right or *the* best way, and that only repeated subjection of these policies to public scrutiny, and a vibrant ‘marketplace of ideas’, can improve public policy. This must extend even to the holy cows such as the death penalty, the apparently immutable and unchallengeable clauses in the bill of rights, as much as it does to the ideas of the developmental state, and economic policies, or customary law. Of course the sine qua non for such

debate is the free flow of ideas and the ability of everyone to engage in the debate and have some influence over policy.

- 3 Thirdly, the OSMI disaggregates the constituent elements of the requirements for an OS into enabling conditions, such as institutional and legislative arrangements; proactive interventions on the part of the state; the need to provide resources to implement the activities that fulfill the purposes of an open society; and crucially, the insight that all the other conditions can be in place - the transparency, information flow, accountability mechanisms, protection of and respect for rule of law, even the political will to implement. Yet these are only the necessary conditions for an open society. They are not sufficient in the absence of non-government agencies and individuals fulfilling their own roles, the roles of active citizenship. In disaggregating these elements, and analyzing them individually, we are also pointed in the direction of how to intervene to make the society more open, rather than just bemoaning government's or the ruling party's actions and attitudes.

To quote the report, "these scores indicate that South Africa is neither doing particularly well, nor particularly poorly on any of the three primary dimensions of openness that the OSMI evaluates. On the whole, respondents felt that openness in South Africa is least compromised by the design of the formal institutions and legal mechanisms governing each of the substantive areas. Respondents' high regard for the quality of the rules that structure public life suggests that the foundations for open society in South Africa are both present and sound. However the scores also indicate that citizens' engagement with formal rules and institutions, as well as the government's commitment to preserving their integrity and functioning, are the primary threats to openness in contemporary South Africa".

So the report contrasts two findings: positive findings on the legal and institutional scaffolding and safeguards that enable an OS, and negative findings on the implementation and in particular, citizens' engagement.

I want to comment on an aspect of each in turn.

The legal and institutional scaffolding

In spite of the findings that the laws and constitutional provisions that currently provide the enabling framework for an OS, the key dimension of the OSMI - namely the 'free flow of information', particularly information about government - has recently come under threat, and the current proposals must ring alarm bells for all of us as to how fragile the rules are. I refer of course, firstly, to the *Protection of Public Information Bill*. Dr Ramphela is addressing this at some length in her

talk and it has been extensively covered in the media, so I will not speak further on that here.

I will, instead, address another current threat to the rules and institutions that protect the freedom of the printed press, namely the proposal by the ANC, in its Polokwane resolution in 2007, and in its recent document to go to the National General Council in September, proposing a parliamentary media tribunal.¹

Let me say, in parentheses, that there are several proposals in the ANC discussion document that are positively supportive of the Open Society. For example, a requirement of the OS is that ordinary citizens should be able to make their voices heard on matters of public interest and policy. The ANC paper proposes a toll-free sms facility to public broadcasters so that poorer people's opinions are readily heard. Another proposal, that public broadcasters be less dependent on commercial support, would clearly allow the broadcaster to air views and programmes which were not dependent on popularity amongst viewers, allowing greater diversity of views to be publicised. Another ongoing theme is greater diversity of ownership recognising that the limited number of publishers is likely to reflect the interests of limited and particular sectors of society.

However, the proposed parliamentary appeals tribunal is a lethal threat to the OS. Allow me briefly to review what it is and the arguments for and against it.

The Media Tribunal would be appointed by parliament, available as an appeal structure when anyone believes the media have acted irresponsibly or unfairly. It would have the power to fine and imprison journalists and publishers, and perhaps even ban them from publishing.²

Some authority to ensure responsible reporting is not, in itself, a bad thing. If journalists could not be held to account for publishing scandalous or partisan stories on flimsy unconfirmed evidence, then we, the public, would never know whether to trust what we read or not. The OS would hardly be well served if anyone who could afford to publish a newsheet were free to confabulate the stories simply for the sake of entertaining the readers, while passing it off as the truth. A reliable and trustworthy press is essential to an OS.

¹ I have borrowed extensively from Guy Berger's article in response to Jeremy Cronin for many of the points made on this issue.

² See quote: "...it would have the power to punish journalists if found wanting. If you have to go to prison, let it be. If you have to pay millions for defamation, let it be. If journalists have to be fired because they don't contribute to the SA we want, let it be". Jackson Mthembu, ANC national spokesperson, quoted in Mail & Guardian 23-29 July 2010.

Why then the criticism of the tribunal proposal?

Some critics argue that it is not necessary because we have laws related to defamation which can be used to keep journalists honest. Let us recognize though, that fighting defamation cases often takes months or years to set the record straight; secondly it is costly, particularly for individuals against big media companies; thirdly, it is generally limited to natural persons – so the ANC, for example, cannot claim it has been defamed no matter how untrue and unkind the story. Fourthly, it is hardly ever possible for a public figure to claim that his/her reputation is compromised even if a report is untrue – it is regarded as simply par for the course.

So indeed, it may be necessary to have more protection than offered by the courts through defamation litigation. The most commonly used additional safeguard is the press ombudsman. This is a quick process (usually a complaint is adjudicated within days) and results in a quick response (usually a published apology). The criticism of this mechanism is that it lacks teeth – it cannot punish. Yet that is precisely the key criticism of the proposed tribunal, i.e. that it *can* punish. For even though the tribunal will act after the fact, i.e. it responds to a complaint about something that has already been published, dispensing punishing fines and jail sentences etc. will in a short time have the effect of creating withering self-censorship.

What about the ANC's argument that the Ombud is appointed by the press themselves through a Press Council, i.e. it is a form of self regulation? The ANC questions whether the press can be player and referee.

Yet this accusation is unfair or ill informed. When the Ombudsman conducts a hearing, s/he sits with two people, one a journalist and the other a public representative. The Appeals Panel - which is engaged when either the complainant or the defending newspaper appeals against the Ombudsman's finding - is chaired by a non-journalist. S/he is a retired judge of the Supreme Court of Appeal and when s/he holds a hearing s/he sits with one public and one press representative. In 2007 the New Zealand Press Council conducted a world wide survey and listed 87 countries with press councils. One of its major findings was that 86% of them adopted the self-regulatory method which has been adopted in South Africa.³ Thus the vast majority of democratic societies believe, based on extensive experience that self regulation can and does work to ensure responsible reporting.

In SA too, the evidence is that the Press Ombudsman has indeed functioned effectively, eliciting apologies when necessary, alerting the public to shoddy

³ Statement by the Press Council chairman Raymond Louw

reporting and investigation, casting doubt on the reputation of the occasional reporter (which is in fact a reporter's most prized asset). The Press has an interest in preserving its collective credibility with the reading public. If people cease to trust the newspapers, the latter will have no role with respect to news, comment and analysis, and will become sports and entertainment magazines.

Handing over the appointment of an Ombud or tribunal to a political structure, or any organ of state, would frequently create conflicts of interest leading to suppression of reporting. To quote the ANC discussion document on the need for a parliamentary media tribunal, it expressed concern that "some factions of the media continue to adopt an anti-transformation, anti-development and *anti-ANC stance*." And the track record of appointments of similar structures that should be immune from political interference, such as the SABC Board, or the Director of the National Prosecuting Authority indicates a willingness to control. Would a parliamentary appointed tribunal have been able to remain neutral and immune to the pressure from MPs who were exposed through the press investigations into the Travelgate scandal and would those MPs have reappointed the tribunal for another term? Would the media's persistent challenge to President Mbeki over AIDS denialism have been tolerated by a tribunal who believed the President represented the national interest, or the public good? Political oversight of the media is far more dangerous to the OS than the risk of self-regulation.

Jeremy Cronin, defending the tribunal proposal, argues that oversight panels appointed by parliament can be neutral and will not automatically defend the interests of the ruling party. He points to the Chapter Nine institutions, such as the Human Rights Commission, which have a similar role of protecting the public interest, often from the government, yet are appointed in terms of our constitution, by parliament. So the question is, if in taking account of the critics, the tribunal were appointed and protected in the same manner as the Chapter Nine institutions, and if its powers of punishment were limited to warnings, demanding apologies and public criticism of journalists, would the tribunal then be acceptable?

The answer is "no" for precisely the arguments that underpin the requirements for the OS. The ideology underpinning the ANC's position is that the state has a duty or perhaps even a right to harness all instruments of policy, all instruments that may shape public debate and criticism, towards what the State – in fact, the ruling party - believes to be the right goals. Thus the ANC argued in the position paper on the Tribunal that the ANC was voted into power on a platform of services that government should deliver: job creation, rural development, land reform, better education and health, and combating crime and corruption. It observes: "They are not the stuff that sell newspapers and make news, but they are what people want ..."

More generally, the document proposes that because the ANC stands for progressive social change, “we must take charge to ensure they dominate the national discourse and that our voice is heard clearly above the rest”. Newspapers should be “instruments of transformation” in building a better South Africa. This is the totalitarian vanguard party view of development, or less pejoratively, it is the Platonic benevolent philosopher king version of good government. And it may even be democratic, if the wise rulers have been elected in free and fair popular elections. But it is still an ideology that is antithetical to the OS. The OS shares Mandela’s view. Speaking to the International Press Institute Congress in 1994, he said:

“No single person, no body of opinion, no political or religious doctrine, no political party or government can claim to have a monopoly on truth... It has therefore always been our contention that laws, mores, practices and prejudices that place constraints on freedom of expression are a disservice to society ... I have often said that the media are a mirror through which we can see ourselves as others perceive us, warts, blemishes and all.”

We should remind current ANC leaders, that Mandela went on to say: “The African National Congress has nothing to fear from criticism. I can promise you, we will not wilt under close scrutiny. It is our considered view that such criticism can only help us to grow, by calling attention to those of our actions and omissions which do not measure up to our people's expectations and the democratic values to which we subscribe.”

A parliamentary media tribunal will sound the death knell to the free flow of information and hence the ability of the public to know enough to contribute to, criticize or challenge policy-making, hold government accountable for its decisions and actions of commission or omission, and ultimately to know enough to vote for change. If you start from the position that the ANC, or any ruling party for that matter, does not have the monopoly on truth, then such restrictions and the consequent paucity of public debate can only lead to worse policies, i.e. policies that are worse for the public good as opposed to the ruling party.

The ideology underpinning the OS is one which doubts the automatic wisdom of authority; one which believes in, and arguably has demonstrated empirically, the value of the marketplace of ideas, including good ideas, bad ideas, whacky ideas - a market place that cannot exist without a free press that needs to be quite distinct from, and uncontrolled by, any organs of state.

Finally, a system which protects the press from any state policing serves the public good, not only because it promotes the OS through denying that anyone has a privileged position on policy, but also because it performs a watchdog role on behalf of citizens – ferreting out corruption in government and private sectors;

spotlighting poor performance of CEOs and civil servants, uncovering injustice and unpleasant facts (such as inequality) that some in authority would rather conceal. A free press also confronts us citizens with images and stories that disturb us and shift us from our comfort zone – so that we cannot put our heads in the sand and say, “we did not know what was going on”. Ultimately the free press makes us accountable as citizens for the improvement of society. That is perhaps one of the most important roles of the press in a democracy – because it is citizens who must in turn hold their leaders accountable.

So, in conclusion on the topic of the proposed media tribunal, if there are concerns about lack of responsibility among certain sections of the media, the way to address this is through improving the current system of self-regulation and possibly strengthening of the Ombudsman’s powers – this is in line with Open Society practice in most democratic countries.

But more generally, there is a lesson here in the findings of the OSMI that the legal frameworks are reasonably secure, namely that they are also fragile, that powerful political interests can quickly subvert them and that the only real safeguard of an OS, is not the legal system, but vigilance and active defence by the citizenry. This brings me neatly to the other finding of the OSMI that I wish to address, viz “that citizens’ engagement with formal rules and institutions, as well as the government’s commitment to preserving their integrity and functioning, are the primary threats to openness in contemporary South Africa”.

This passive or apathetic citizenry is the real enemy of the OS. Why and how did SA moved from such an active, revolutionary civil society in the 1970s and 1980s to such a passive one in the 1990s and 2000s? There are many plausible explanations, from respectfulness during the honeymoon period, loyalty to our liberators, other priorities such as racial reconciliation, optimism and naivety, and more. But we must recognize that we must become activists again.

In responding to this challenge, the universities have a special role to play in challenging the threats to the OS. Firstly, they have a self interest in protecting the freedom of speech, ideas, the press, and rejection of dogma which is inimical to the idea of a university whose core mission is the search for truth. Threats to the free flow of information are a direct threat to the ability of universities to fulfill their roles in society. Secondly, the university today, as in the past, is regarded by society as the home for the pursuit of truth and independent thought; it is an important authority to which people turn for help in making sense of the natural and social world around us, for guidance on values, politics, and the future. Society expects the university to play a leadership role within it, to be a counterpoint to the State and indeed to religious authorities for knowledge, analysis and ethical guidance, and that the university must take responsibility for playing that role and recognise the authority it has been granted to do so. Thirdly,

Universities can also promote democracy by educating their students, our future leaders in critical thinking and in the skills of citizenship.

It is for these reasons that at the University of Cape Town we vigorously promote the search for truth, and equally vigorously defend academic freedom.

Serendipitously, the Open Society Monitoring Index is being launched at UCT on the same day that UCT hosts the annual TB Davie Memorial Lecture, established by UCT students in 1959 to commemorate the fragility of academic freedom when the Nationalist government closed the university to black students.

We should not rely on a wait-and-see approach - allow the tribunal to be introduced and see whether it interferes inappropriately. As a University we need to be vigilant and add our voice where needed, especially where transparency and the right of the public to know may be compromised. And as citizens we need to take heed of the OSMI's warning, that our apathy is the greatest threat to the Open Society.