

South Africa

as an “Open Society”?

MC O'Dowd

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Foreword

The purpose of FMF *Monographs* is to use the analytic method of political economy to shed light on how best the promotion of free markets will improve the workings of the South African economy. In particular, authors are urged to apply the microeconomic approach of studying how individuals, firms and households behave in response to either naturally occurring or regulatory induced incentives. This requires that they display a sound, institutional knowledge and understanding of their theme.

Monograph 20 by Mr Michael O'Dowd, the Chairman of the FMF, reverses this emphasis and returns us to first principles. Unless we get the institutions right markets cannot be free and individuals can be neither free nor equal. As Nobel Laureate Douglass North wrote in 1990: "Institutions provide the incentive structure of an economy; as that structure evolves, it shapes the directions of economic change towards growth, stagnation or decline."

O'Dowd's objective is to examine how an institutional structure can evolve. In fact he is out to persuade us that it is not at all inappropriate if the South African Constitution itself is amended. The country is but a year or so away from a general election when a major issue which will be raised is whether the government will achieve over 66 per cent of the vote – which will permit such amendment. O'Dowd's point, however, is that evolutionary changes can already be achieved through parliament under Section 36 of the Constitution.

In particular Section 36 allows for limitation of rights specified in the Bill of Rights – provided that the limitation is consistent with "an open and democratic society based on human dignity, equality and freedom" (p1). O'Dowd stresses that "limitation" is not removal (p3) and that moreover any adjustment must be consistent with the other five criteria. O'Dowd's aim is to make us aware of proper conditions for evolution and limitations.

O'Dowd focuses in particular on the presumption of an "open" society. The wording is unusual in a national constitution (p7). One interpretation, of course, is that it is simply a synonym for the currently politically correct phrase "transparency" in government. If so, this would be a matter for concern. Transparency in decision taking can be quite incompatible with "dignity, equality and freedom". Autocratic decisions can be taken in full public view, are they then "open"?

Fortunately there is a major philosophical source relating to *The Open Society and its Enemies* written by Karl Popper in 1943. This work has been drawn on heavily by later philosophers such as Hayek in *The Constitution of Liberty* (1960) but as O'Dowd points out (p.9) it has not been negatively appraised by any. Indeed, O'Dowd emphasises, the writers of the South African Constitution clearly embraced Popper. It is beyond the bounds of credibility that the only authoritative expositor of the phrase would be ignored by the legislators in favour of a politically correct ephemeral aphorism. Or so one hopes.

Popper, of course, is also well known as the philosopher of science who argued (in later books) that scientific propositions could not be proven, they could only be refuted or disproven. This methodology is apparent in his work on the open society where he does not define it, but rather says what it is not. (He draws on three main enemies of openness to illustrate this – Plato, Hegel and Marx). O'Dowd helpfully, however, breaks with that tradition to help the reader (Chapter 4). If it is known what the open society is not we can at least make inferences as to what it is. Since it is not collectivist it must have a strong bias towards *individualism* properly understood. It is *democratic* in that "rulers can be dismissed by the ruled" (p.12). It is "*egalitarian*" (Popper's word) in that all must be equal before the law. And the state has a positive (and not minimalist) role. Furthermore, it could be described as *transparent* (p.15), but the transparency would be in the promotion of criticism and debate. That is, the transparency would exist in the decision making process – which is rather different from the publicising of decisions once taken followed by a refusal of debate.¹

But it is to the negative characteristics of the open society's enemies to which Popper and O'Dowd devote most attention. Plato's rulers claimed superior wisdom as their basis for taking

decisions to maximise collective welfare. The Soviet Union was governed in this way, and such governors or guardians exclude others from their ranks (p.19). Hegel argued for the recognition of those with superior wisdom who governed the state to be closely identified with the nation. Popper, when picking on this idea, was obviously influenced by the times in which he wrote when National Socialism was at its height.

It is when Section 36's use of the "open society" is juxtaposed with "freedom" and "equality" that Popper's critique of Marx is most relevant. O'Dowd notes how Popper rejected Marx's distinction between "formal freedom" and "material freedom" as "nonsense" (p.24). "Freedom" is the ability to choose to do something without being overridden by the will of another (formal freedom). "Material freedom" is possessing the wherewithal to do it. But this is not freedom but material well-being, which is important but has little to do with freedom (O'Dowd contrasts the well fed animal in the zoo and the starving creature in the wild). Thirdly, there is "collective freedom" where individuals give up freedom of individual action to attain a joint goal collectively worth more than pursuit of individual attainments. (Marriage, the firm, the golf-club are examples). Which of the three "freedoms" does Section 36 refer to? Only that which is compatible with open society. O'Dowd has no doubt that "the freedom which is primary in the open society, which is fundamental and takes priority over other values" is formal freedom (p.27).

A similar argument is made to prioritise equality of opportunity over that of outcome (pp. 28-29). There is no easy or clear-cut answer. But we can return to Douglass North and market economics.

North's message was both simple and profound. If individuals have proper incentives they will behave in ways which enrich both themselves and the rest of society. But it is not as straightforward as it sounds, for North was quick to emphasise that "economic history is overwhelmingly a story of economies that failed to produce a set of economic rules of the game (with enforcement) that induce sustained economic growth". The crux of the matter is the right to own and exchange property. It insulates property owners from the power of the state to grant privileges to special interest groups. Society is open. Yet historically there has been no easy road to security of property rights. In an open society the state is both essential and a potential villain. It must protect and enforce property rights, yet its arbitrary interference with economic activity must be shackled. For an open society the right balance is crucial.

The views this *Monograph* expresses are those of the author and are not necessarily shared by other members or staff of the Foundation. Nevertheless it lays out ideas which will be essential inputs into the forthcoming debates on the interpretation of Section 36. As such it is recommended for close study.

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Author's note

At the beginning of the notes to Volume 1 of *The Open Society and its Enemies*, Popper tells us, "The terms 'open society' and 'closed society' were first used, to my knowledge, by Henri Bergson in *Two Sources of Morality and Religion* (Engl. Ed. 1935). In spite of a considerable difference (due to fundamentally different approaches to nearly every problem of philosophy) between Bergson's way of using these terms and mine there is a certain similarity, which I wish to acknowledge."

Clearly Popper borrowed the terms, but not the meaning. There is nowhere to go further back than Popper himself, in order to understand the terms as Popper used them.

All citations of *The Open Society and its Enemies* in this *Monograph* refer to the Princeton University Press (5th ed.) 1966.

**MC O'Dowd
Sedgefield, 1998**

Introduction

Section 36 of the first South African Constitution gives the National Legislature the power, under certain conditions, to “limit” the rights set out in the rest of the Constitution. It reads as follows:

“(1) The rights in the Bill of Rights may be limited only in terms of laws of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitations;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and the purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

The inclusion of Section 36, Clause 2, in the constitution has been criticised – it has even been called a ‘weasel clause’, that is, one which removes all power from what goes before – in this case from the Bill of Rights itself. This criticism seems to me to be excessive. Since, given general contemporary constitutional practice, the inclusion of some such clause was probably inevitable, I think we have to say that this one is not bad.

2

Limiting the “weasel” clause

The restrictions on the power of Section 36, Clause 2, to override the Bill of Rights are severe. They are as follows:

1. The power is to ‘limit’ rights, not to abolish or override them. This is not the same thing. Only something which exists has limits. Clearly to abolish something is not to limit it. A country with no franchise does not have a limited franchise. But I would argue that the restriction goes further. In accordance with the ordinary use of words, to limit something is to do something around its edges, not to go to the heart of it. I would argue that ‘limiting’ can never remove the greater part of anything.
2. Then the ‘limiting’ has to be ‘in a law of general application’. This excludes enactments aimed at particular individuals (like the Mediaeval Act of Attainder, which enacted that a named individual should be punished – usually executed), or aimed at particular institutions like, for example, a single named university or town council. I would argue that it also excludes laws applying only to particular groups, like the *apartheid* laws or Hitler’s laws against the Jews.
3. Then, most interesting of all, it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

At first glance one might suppose that we were presented here with a cumulative list of requirements, as it were a series of hoops each of which the proposed legislation has to jump through successfully. But closer examination does not support this view. We do not have here a list of distinct requirements, but rather a number of largely (though not entirely) synonymous and certainly overlapping concepts, some more and some less vague, and some ambiguous.

It is submitted that what the Constitutional Assembly has done here, and done very well and wisely, is to bring together a number of similar but not identical concepts in order that they shall qualify each other, so that all the words together give a meaning more precise than any one of them would do on its own. So we exclude any concept of democracy which is not compatible with human dignity, any conception of equality which is not compatible with freedom, any conception of freedom which is not compatible with human dignity, and so on. Since terms of this kind are in their very nature and of necessity somewhat vague and some of them have been rendered highly ambiguous in the course of political debate, this was much the best way of addressing the problem.

The most powerful and emotionally charged of the terms are ‘democratic’, ‘equality’ and ‘freedom’ but these are precisely the words which have been rendered radically ambiguous. In order to know which of the varieties of democracy, freedom and equality which have been advocated are intended by the Constitution, we have to refer to the other two terms ‘open society’ and ‘human dignity’. Of the two, human dignity is much used in constitutions, particularly in those of countries which have recently liberated themselves from communist dictatorships (e.g. Bosnia, Belarus, Croatia, the Czech Republic, Estonia, Lithuania, Rumania) but also in many others including Germany.

Dignity

In a number of constitutions the undertaking to uphold human dignity is directly linked, in the same clause, with the prohibition of torture, and sometimes of forced labour. The following provision of

the Constitution of the Republic of Hungary, gives a fairly clear indication of what ‘human dignity’ means in constitutional law:

- “ (1) In the Republic of Hungary, every human being has the innate right to life and the dignity of man and no one may be arbitrarily deprived of these rights.
- (2) No one may be subjected to torture or to cruel, unusual, inhuman or humiliating treatment or punishment. It is absolutely impermissible to perform medical or scientific experiments on human beings without their consent.”

The second paragraph would seem to give a fair definition of the meaning of ‘human dignity’ in international constitutional practice.

It is submitted, however, that we can find a richer, though not contradictory, definition in our own legal heritage. *Dignitas* (the Latin word from which ‘dignity’ comes) was a concept of Roman private law. In early Roman law it inhered in every Roman citizen, in later times in every free person (women as well as men), but not in slaves. Any slander, any verbal insult, any physical assault (even if trivial in terms of its ability to inflict bodily harm or pain) was an invasion of *dignitas*, and as such prohibited by law, and actionable.

This, it is submitted, is what is meant by ‘human dignity’. By adding the adjective, we are making it clear that there are no exceptions, as Ancient Rome excepted slaves, many mediaeval communities excepted non-citizens, or Jews, and, of course as Communist dictatorships excepted the large and elastic category of ‘class enemies’. We are saying that there is no qualification for dignity except humanity.

3

Dignity and “openness”

The important new thing that these modern constitutions, including our own, are doing is to protect dignity against the state. This Roman law did not do. It protected the dignity of individuals against other individuals, but the Emperor Nero did not respect the dignity of the Christians, nor that of his political enemies. States, including democratic states, have persistently invaded the dignity of the individual in the past, which is why South Africa’s Section 36 talks of a ‘democratic state based on human dignity’. There have been other kinds of democratic state, but we are not talking about them.

There is one very interesting question about human dignity which must be regarded as an open one, but which needs to be pursued. Is it not absolutely of the essence of dignity to be free to take your own decisions about your own welfare? What is less dignified than to be told that nanny knows best! I would submit that the concept of human dignity places limits – rather narrow limits – on the legitimacy of paternalist or ‘nurse maid’ activities of the state. This would only be relevant, under Section 36, if the state was claiming to override people’s rights ‘for their own good’. In such a case it would be very relevant indeed.

Then there is the term ‘open society’. Unlike ‘human dignity’ this is not a common term in constitutions. Indeed, its use in our Constitution appears to be unique. This means that the Constitutional Assembly deliberately found this term and deliberately adopted it, not as a matter of following established constitutional practice, but as a special decision. This means, it is submitted, that these words must be given their greatest weight, more, if anything, than is given to the rest of the clause.

The ‘open society’

So, what is an ‘open society’? It is not an accepted term of constitutional law (like ‘human dignity’) nor of private law (like *dignitas*), so, in accordance with well-established legal rules of interpretation, we have to look to the ordinary meaning of the words.

Clearly, a society cannot be ‘open’ in the literal sense of the word (like a window). We are dealing here with a metaphor, and we have to give attention to all the possibly relevant meanings of the word. There are dozens of entries under ‘open’ in the *Oxford English Dictionary*, and the following four would seem to be relevant. (The words in brackets are the author’s comments and do not form part of the quotation from the *Dictionary*.):

1. “Open (adj.) of a door, gate, etc. – set up to allow free passage through. Hence ‘free of entrance to all’.” (An open university.)
2. “Exposed to mental view, patent, plain, easy to understand.” (Much what we mean today by ‘transparent’.)
3. “Not confined or limited to a few, that may be used, shared or competed for without restriction.” (An open scholarship, an open competition.)
4. “Open minded – accessible to new arguments or ideas.”

These, especially taken together, certainly point us in a general direction but they are not really very helpful. However, in the *Addenda* at the end of the *Dictionary*, we find – “‘Open Society’: one characterised by an absence of over-rigid structures and beliefs; opposed to a ‘closed’ tribal or totalitarian society.”

The definition itself is still not very helpful, but it gives us the crucial clue. The equation (for this purpose) of ‘tribal’ and ‘totalitarian’ societies is basic to the argument of Karl Popper’s book

The Open Society and its Enemies. The *Dictionary* tells us, what is confirmed by other investigations, that though he did not actually coin the phrase, Popper most certainly gave currency to the term 'open society'. Nor has anybody else taken it up, or reinterpreted it. Unlike 'freedom', 'democracy' and 'equality' which have been endlessly redefined by different thinkers and schools of thought, we have only one description of the 'open society', and that is Popper's.

This is an enormous advantage. It is not that Popper is cleverer or wiser than the many people who have written about 'freedom' or 'democracy', but those wise and clever people did not always agree, and there was not any one of them that the Constitutional Assembly could conveniently identify as authoritative. With Popper, they could and did. The issue is not whether Popper is clever, nor is it whether we agree with him. It is whether the Constitutional Assembly liked what he said, and incorporated it, by clear implication into the Constitution – and they did.

It is submitted that in interpreting the words 'open society' in the Constitution, the courts must regard Karl Popper's *The Open Society and its Enemies* as the principal, if not the only, authoritative exposition of the meaning of the term, it having been the only such exposition in existence when the Constitution was drafted, so again, in accordance with established legal rules of interpretation, we have to assume that it could not but have been in the minds of the legislators when the term was chosen.

What, then, according to Popper, is an open society? We will not find a definition in the book, for Popper did not approve of definitions. Nowhere does he tell us what is the 'essence' of an open society, for he disapproved of the concept of 'essence'. He describes it largely in terms of what it is not, in dealing with its enemies. Nevertheless, in the book taken as a whole we learn perfectly clearly what an open society is, and what it is not.

Obviously it is not possible, in this *Monograph*, to do justice to Popper's book, and anybody called upon to interpret the Constitution would need to read the whole of it, but what follows will give the reader a fair guide to what is to be found there.

The nearest we come to a definition is found in the following three passages:

"In what follows, the magical or tribal or collective society will be called the 'closed society' and the society in which individuals are confronted with personal decisions the 'open society'." (Vol. 1, p. 173)

"The transition from the tribal 'closed' society with its submission to magical forces, to the 'open' society which set free the critical powers of man," (Vol. 1, p. 1)

"Totalitarianism is not simply amoral. It is the morality of the closed society, of the group or tribe... It is not individual selfishness but it is collective selfishness." (Vol. 1, p. 108)

The central issue from which much else follows, is that each individual should to the greatest extent possible be free to make his or her own decision on the basis of his or her own judgement.

4

Individualism

We should perhaps pause a moment to discuss Popper's apparently pejorative use of the term 'tribal'. Popper is not claiming that tribal societies were or are totalitarian or even authoritarian. The characteristic of the tribe to which he refers is that individual behaviour was very tightly constrained by custom behind which there was believed to be a supernatural sanction. (Hence the reference to 'magical forces'.) The similarity to totalitarian societies is only in the fact that in them, too, individual behaviour is heavily constrained, but in their case by rules and orders coming from the rulers.

Popper is not concerned to attack tribal society which he regards as something which, for most of the world is irretrievably lost. He does not therefore go into the way in which the 'magical' customs of tribes, having been evolved over time and tested by much experience, actually served the interests of tribal society well, so long as surrounding circumstances remained essentially unchanged. Their drawback was that their rigidity made adaptation to change difficult.

Popper does not leave us with just these general principles. We can find a number of very clear statements about the open society. The following are the most important:

The open society is individualist

Popper rejects all forms of collectivism. Indeed, what the three enemies of the open society whom he identifies, Plato, Hegel and Marx, have in common is their collectivism. However, Popper is no radical libertarian. He recognises the need to limit the freedom of individuals in order to protect the freedom of others, and he asserts the value of altruism, but as a concern of individuals for other individuals. Collectivism, he asserts, is not altruism but 'collective selfishness'.

The open society is democratic

Popper is perfectly clear what he means by democracy.

"Democracy is a situation where its rulers can be dismissed by the ruled." (Vol. 1, p. 124)

"The theory of democracy is not based on the principle that the majority should rule. The various egalitarian methods of democratic control such as general elections... are to be considered as no more than well tried... and reasonably effective institutional safeguards against tyranny.

He who accepts the principle of democracy in this sense is therefore not bound to look upon the result of a democratic vote as an authoritative expression of what is right. Although he will accept a decision of the majority for the sake of making the democratic institutions work, he will feel free to combat it by democratic means, and to work for its revision." (Vol. 1, p. 125)

The open society is 'equalitarian' (Popper's word)

Popper is also quite clear what he means by equality.

"In an open society many members strive to rise socially and to take the place of other members.

Since there is nothing in the organism to correspond to one of the most important characteristics of the open society – competition for status amongst its members – the so-called organic theory of the state is based on a false analogy." (Vol. 1, p. 174)

“It cannot, of course, be denied that human individuals are, like all other things in our world, in very many respects very unequal. Nor can it be doubted that this inequality is of great importance and even in many respects highly desirable. But this simply has no bearing upon the question whether or not we should decide to treat men, especially in political issues as equals or as much like equals as is possible; that is to say as possessing equal rights and equal claims to equal treatment.” (Vol. 2, p. 234)

The requirement of ‘equalitarianism’ is certainly not equality of outcome, which is incompatible with “one of the most important characteristics of the open society” (i.e. competition for status). It is not that the state should reach out to try to bring about equality of opportunity. It is simply that the state should treat its citizens (and in most respects all others under its jurisdiction also) equally. If it reduces people’s freedom, it must do so to everybody equally. If it imposes burdens it must do so to everyone equally. If it hands out benefits, it must do so on relevant and objective criteria (like academic merit for tertiary education, or need for welfare programmes).

If this sounds a bit tame, it is worth remembering what it prohibits. All *apartheid* legislation contravened this principle, as did all Hitler’s measures against the Jews, as did all the discriminatory rationing (from basic food in the famine years to foreign travel and foreign currency in the 1980’s) practised by the Communist dictatorships in favour of the party members or rulers’ favourites. Popper’s “equalitarianism” is no small thing.

The state is a limited state...

“I demand that the fundamental purpose of the state should not be lost sight of; I mean the protection of that freedom which does not harm other citizens. Thus I demand that the state must limit the freedom of the citizens as equally as possible, and not beyond what is necessary for achieving an equal limitation of freedom.” (Vol. 1, p. 110)

“The individualist must maintain that the morality of states (if there is any such thing) tends to be considerably lower than that of the average citizen, so that it is much more desirable that the morality of the state should be controlled by the citizens than the opposite.” (Vol. 1, p. 113)

...but with definite positive functions

Popper does not advocate a ‘minimalist’ or ‘night watchman’ state.

“I certainly believe that it is the responsibility of the state to see to it that its citizens are given an education enabling them to participate in the life of the community and to make use of any opportunity to develop their special interests and gifts...”

“Although I do not advocate ‘laissez faire’ with regard to teachers and schoolmasters, I believe that the policy is infinitely superior to an authoritative policy that gives officers of the state full power to mould minds...” (Vol. 1, p. 131)

He also accords the state a definite, but again limited role in the pursuit of social welfare. He advocates what he calls ‘piecemeal social engineering’.

“The piecemeal engineer will accordingly adopt the method of searching for and fighting against the greatest and most urgent evil in society rather than searching for and fighting for the greatest ultimate good. It is the difference between a reasonable method of improving the lot of man and a method which, if really tried, may easily lead to an intolerable increase in human suffering.” (Vol. 1, p. 158)

He does not seek to prescribe what policies should be followed, and clearly a wide range of policies are compatible with an open society, but the requirements which always apply are that policies should be cautious and pragmatic (governments are not entitled to gamble with the lives of their citizens), and should always respect individual liberty as a major positive value, and should bear in mind the very grave danger which is always involved in increasing the power of the state. It is of interest to note that Popper states that he considers that the kind of 'piecemeal' social engineering, which he has in mind is quite compatible with the proposals of FA Hayek in *The Road to Serfdom*. (Vol. 1, p. 285)

***The open society is rational
and positively promotes criticism and debate***

Popper is very clear on what he means by 'rational'.

"Rationalism is an attitude of readiness to listen to critical argument and to learn by experience." (Vol. 1, p. 225)

"Rationalism in our sense is diametrically opposed to all three modern platonic dreams of brave new worlds in which the growth of reason would be controlled or planned by some superior reason. Reason, like science grows by way of mutual criticism and the only possible way of planning its growth is to develop those institutions that safeguard the freedom of criticism." (Vol. 1, p. 226)

According to Popper all progress, both in science and in society at large, depends above all on open criticism and debate which, he says, (Vol. 1, p. 189) "is the very life of democracy".

"Democrats who do not see the difference between a friendly and a hostile criticism of democracy are themselves imbued with the totalitarian spirit. Totalitarianism, of course, cannot consider any criticism friendly." (Vol. 1, p. 189)

5

Popper contra mundum

Although what has been said is probably a fair summary of Popper's views on the open society we cannot do justice to his book without paying some attention to the enemies to whom he devotes so much space. They are, as we have already noted, Plato, Hegel and Marx. They are all collectivists, and that fact alone makes them enemies of the open society, but the matter does not end there. Popper has a particular quarrel with each of those writers.

Plato

Plato is indeed the total enemy of the open society, for in his writings he advocates, and gives an elaborate blue-print for, a totalitarian state. The design is a clever one, and although it has never been realised in its totality in the real world, virtually all attempts to create totalitarian states which have been made in Europe since Plato's time, and some elsewhere (notably the communist dictatorship in China, in its early phases, and in Vietnam and Kampuchea) have been profoundly influenced and indeed guided by Plato.

Plato taught that the state is everything and the individual nothing except as a part of or servant to the state. He advocated a society organised in a number of castes between which there would be absolutely no mobility. All political power, which would be quite unlimited, would be concentrated in the ruling military caste (which alone would bear arms). In their youth the members of this caste would be soldiers, under the severest discipline, and in fact power would be exercised only by the elderly members of the ruling caste; but even they would have no personal freedom.

"The greatest principle of all is that nobody, whether male or female should be without a leader; nor should the mind of anybody be habituated to letting him do anything at all on his own initiative, neither out of zeal, not even playfully... He should get up or move, or wash, or take his meals, only if he has been told to do so. In a word he should teach his soul by long habit never to dream of acting independently, and to become utterly incapable of it." (Plato *Laws* 741)

This does not refer only to the members of the servile castes, but also, and rather particularly to the members of the ruling caste. Somewhere, hidden away, there will presumably be a few people who do act on their own initiative and in fact initiate all the orders but Plato is very coy about this. It is fairly clearly his intention that these real rulers would at least pretend that they did not exercise initiative, but merely administered pre-existing laws or customs.

The most interesting and innovative aspect of Plato's state is the basis on which power is legitimated. Most traditional aristocracies have based their claim to power either on a claim to genetic superiority ('blue blood') or simply on immemorial custom. Plato does not do this. His rulers base their claim to rule on superior knowledge which, Plato asserted, fitted them to rule 'for the happiness of all'. Plato is very strong on this point. His rulers are not aristocrats using the state for their own pleasure. They are trustees charged with the collective welfare of the state as a whole, which Plato assures us is the best way of securing the happiness of all. The only problem is that he has proposed absolutely no safeguards or sanctions to ensure, or even to render it probable, that his guardians will in fact act as he intends.

Probably one of the closest approximations to the Platonic state that has ever been attained in history was the 'Vanguard Party' dictatorships of the Communist states of the Soviet Union and Eastern Europe. Except that the ruling caste were policeman rather than soldiers and that they had not yet, at the time of their downfall, fully closed access to the ruling caste from below (although

they were moving steadily in that direction) their state closely resembled Plato's in many respects, and most of all in the rationalisation of their claim to power. The 'Vanguard Party', like Plato's guardians, were in possession of a secret knowledge (scientific socialism) which enabled them to rule everybody in the supposed overall interests of the collective.

Plato had one interesting idea which is worth noting in passing. He obviously felt that the real basis of his rulers' power might not appeal very much to the masses. So he suggested that it would be a clever trick for the rulers to create a myth that they were descended from the original indigenous inhabitants of the country while all others were descended from immigrants.

Hegel

Hegel followed Plato in most essentials, but he added two new points which have been of great importance in recent history. Plato's state could be composed of anybody provided it was not too big to be manageable. Hegel said that the state *must* represent the nation, which was a pre-existing entity, held together by common language, common history and (perhaps) common descent. (It is an interesting question whether Hegel was in fact taking Plato's advice and creating a myth.)

Then, Plato's state had no purpose beyond itself; like any organism it existed in order to exist. Hegel, however, considered that the state existed to 'play a role on the stage of history', which meant to aggrandise itself by military means and to seek world domination.

As the most efficient form of governance for this purpose, Hegel advocated absolute monarchy, but, like Plato, he made no provision to ensure that the absolute monarch would perform his functions. Suppose the autocrat did not want to play a role on the stage of history? Suppose he preferred to play the piano (like one of the emperors of Austria), or to hunt the red deer (like the young Henry VIII), or to enjoy the company of Madame Pompadour (like Louis XV)? According to the older theory of absolute monarchy, that was his right, but in Hegel's terms this amounted to a gross abuse of power. Yet Hegel's system makes no provision to prevent or remedy such abuse.

We do not need to spend much time discussing why Popper disagreed with Hegel, but Popper's view on Hegel's idea of the nation is worth quoting:

"None of the theories which maintains that a nation is united by a common origin or a common language or a common history is acceptable or applicable in practice. The principle of the national state is not only inapplicable but it has never been clearly conceived. It is a myth. It is irrational, a romantic and Utopian dream." (Vol. 2, p. 51)

In South Africa the Hegelian idea of a nation is obviously unattainable. It is a consolation to realise that it was never worth attaining.

Marx

When we come to Marx the position is more complex. In Popper's view, in terms of many of his utterances and attitudes, Marx ought to have been a supporter of the open society but in spite of that fact certain doctrines which become central to modern Marxism are quite pernicious so that Marxism, if not necessarily or always the real Marx, is properly listed among the enemies of the open society.

The issues are three. The first is Marx's theory of historical determinism. This is a matter of little importance now since, following on the events of 1988 and afterwards in the Soviet Union and Eastern Europe and recent developments in China, nobody can, any longer, take Marx's theory of history seriously. Nevertheless it is worth noting that long before this (*The Open Society and its Enemies* was written in 1943) Popper refuted the theory with great thoroughness, not in favour of an alternative but contending that the development of an overall theory of history is inherently impossible, a view which is very much in accordance with present day thinking but was quite unfashionable when Popper first published it.

The second issue, which has much greater practical importance, is that while Marx did not actually advocate the uncontrolled and tyrannical states which were in fact set up in the name of Marxism, he opened the door to them.

In Popper's view this stemmed from Marx's doctrine of the essential irrelevance of political power. The state would 'inevitably' serve the class interest appropriate to the particular stage of history. He says:

"Of course, in practice Marxists never fully relied on the doctrine of the impotence of political power... but their plans and actions were never based on a clear refutation of the original theory nor upon any well considered view of that most fundamental problem of all politics, the control of the controller, of the dangerous accumulation of power represented by the state. They never realised the full significance of democracy as the only known means to achieve this control.

As a consequence, they never realised the danger inherent in a policy of increasing the power of the state." (Vol. 2, p. 124)

Now that the truth has finally come to light of what really happened in the Soviet Union under Lenin and Stalin and, indeed, afterwards; in China under Mao Tse-Tsung, in Rumania under the Ceauscuscus, and many more, we can see just how prescient Popper was all those years ago.

The third issue, which from a practical point of view is much the most important, is Marx's countenancing of the idea that a violent revolution can legitimately be directed against a democratic state, for this, by making the ultimate arbitrament of who should rule not the democratic process but the successful mobilisation of violence, is in conflict with all of the principles of the open society.

Popper says:

"The use of violence is justified only under a tyranny which makes reforms without violence impossible, and it should have only one aim, that is to bring about a state of affairs which makes reform without violence possible. A violent revolution which tries to attempt more than the destruction of tyranny is at least as likely to bring about another tyranny as it is likely to achieve its real aims." (Vol. 2, p. 151)

We may note here that what happened in Eastern and Central Europe and what happened in South Africa to the extent that it was revolutionary, exactly conformed to Popper's requirement. The 'revolution' brought about a democratic constitution. The present governments (including the present government of South Africa) owe their legitimacy not at all to any revolutionary action but only and solely to the fact that they have been elected by a legitimate process.

One of the things that follows from this is that these governments, again including the government of South Africa, need have no compunction about using whatever force may be necessary to repress any movement which attempts to use against them the very method which they (or some of their members) used to bring the democratic Constitution into being. Revolutionary activity, including attempts to coerce the government by threats of violence is, when directed against a democratically elected government, nothing but gangsterism and should be treated as such.

Popper says:

"In a democracy, the full protection of minorities should not extend to those who violate the law, and especially to those who incite others to the violent overthrow of democracy." (Vol. 2, p. 160)

6

Freedom and equality

Such, then, is our understanding of the term ‘open society’. How are we to use this to interpret Section 36 of the Constitution? I shall illustrate what I believe to be the correct approach by showing how two terms in the section which are themselves highly ambiguous become clear when interpreted in the light of the concept of the open society. The two terms are ‘freedom’ and ‘equality’.

‘Freedom’ has come, in the literature of politics, to have three distinct meanings, each of which refers to something which is real and important, but the three are quite distinct and not always even fully compatible with each other.

Formal freedom

First of all we have the original sense of ‘free’ in which a slave is contrasted with a free man, an animal in the wild is said to be free (as in Joy Adamson’s title *Born Free*) and an animal in a zoo is not free. It refers essentially to the ability to make one’s own decisions which cannot be blocked or overridden by the will of another.

Marx did not think this was good enough. He called this ‘formal freedom’ or ‘mere formal freedom’ and contrasted it with ‘material freedom’, which meant having the resources to enable you to do whatever you want.

Material freedom

Now Marx was not talking nonsense. Somebody who has a motor car is clearly, in a very real sense, more free than somebody who does not. The first can do things that the second cannot do. Nevertheless, I think that it was unfortunate that instead of calling the ‘other thing’ by another name – he is talking about ‘material well-being’ or ‘affluence’ – he defined it as not merely a ‘kind of freedom’ but as ‘real freedom’, for by doing so he made the discussion of the difference between the concepts and of the conflicts and trade-offs that exist between them much more difficult. (Perhaps that is what he meant to do.)

Nobody doubts that material well-being is important and that people may, and often do, sacrifice freedom for well-being, just as they may, and do, sacrifice well-being for freedom. But these issues arise precisely because they are not the same thing. It seems to me much better to stick to the older terminology in which the slaves who successfully escaped from plantations in the West Indies and lived in the forests were free, even if they were living in great hardship, while those who remained on the plantations, even those few who were well-fed, well-housed and well-treated, were not free. An animal in the wild is free even though starving while an animal in a zoo is not free however well-housed and fed.

However, it is too late for this argument. Marxists, and many others influenced by them, have established the term ‘material freedom’.

Collective freedom

Nor is this the only alternative definition of freedom. There is also the concept of ‘collective freedom’, the situation where people by banding together and giving up much individual freedom for the purpose, obtain freedom (or power) to do things that they would otherwise be unable to do. An extreme example is the ‘freedom’ of the gangster. By subjecting himself to the ferocious discipline of the gang, in terms of which he may be put to death in a particularly savage manner and without trial, he obtains the ‘freedom’ to prey on his fellow human beings. In the same way a mercenary soldier of the eighteenth century by subjecting himself to the discipline of flogging and

shooting, obtained (if he was lucky) a freedom to plunder which he could not have had as a private individual.

The fact that these highly negative examples of 'collective freedom' come immediately to mind must not mislead us into thinking that 'collective freedom' is necessarily a negative thing. On the contrary, it is something which pervades human society. People are constantly and voluntarily giving up some part of their individual freedom in order to gain some other end. It may be power to coerce their fellows, as in the example given above, but it may be many other things. Everybody who enters into a contract of employment or a contract of partnership gives up some freedom for the sake of the advantages of co-operation. Those who join religious orders give up virtually all freedom to obtain other non-material benefits, while everybody who joins even a sports or social club sacrifices some freedom in doing so. Economic efficiency, security, human closeness are all reasons for sacrificing freedom, all of which enter into the reason for most marriages.

As with 'material freedom' it seems to me that to call the attainment of all or any of these ends a 'higher kind of freedom' is simply to confuse the issue. It is like saying that because money is spent on buying goods, goods are a 'higher kind of money'. Nevertheless, here too, it is too late to come with this argument. The idea of 'collective freedom' is established.

So, we have three kinds of freedom. Which is meant in Section 36 of the Constitution? Here is where we invoke the other words. It must be compatible with equality and it must be compatible with an open society.

As regards 'collective freedom' as applied at the level of a whole society or state, as in Hitler's Germany, it can certainly be argued that it is not compatible with equality since it requires a level of discipline and therefore a concentration of power which negates equality. Good though the argument is, we do not have to rely upon it for when we turn to the open society it is quite clear that the state organised for 'collective freedom' is the absolute antithesis of the open society. It is, after all, precisely what Hegel advocated and Popper passionately rejected. It is the totalitarianism which he says is the morality of the closed society. (Vol. 1, p. 118)

"I demand that the fundamental purpose of the state should not be lost sight of; I mean the protection of that freedom which does not harm other citizens. Thus I demand that the state must limit the freedom of the citizens as equally as possible *and not beyond what is necessary for achieving an equal limitation of freedom*. (Vol. 1, p. 110) (emphasis added)

What then of 'material freedom'? We must remember that we are not asking here whether the state can, or should, or must, seek to promote the material well being of its citizens – only whether it may override the express provisions of the Bill of Rights for this purpose.

Here again the question is: what kind of freedom is compatible with an open society? The issue is not whether 'material freedom' is desirable or should be pursued for there is no incompatibility with this kind of freedom as there is between 'formal freedom' and 'collective freedom'. The issue is the one whether formal freedom should be sacrificed in pursuit of material freedom.

We may note in passing that the acuteness of the debate on the issue has rather subsided since the events of 1988 and thereafter. It used to be strenuously argued by Marxists that the subjects of the Communist dictatorships had 'traded' formal freedom for material freedom. However, now we know that the dictatorships no more delivered the one than the other. (Just as Hitler did not deliver 'collective freedom' that is the advantage of being part of a conquering nation – he delivered defeat and disaster.) There can be no doubts now that in 1988 the inhabitants of East Germany were as far below those of West Germany in 'material freedom' as in 'formal freedom'. Indeed, when the citizens of Leipzig and elsewhere finally rose (as rise they did) it is far from clear whether they were rising in their capacity as 'prisoners of want' as incited by the *Internationale* or claiming their liberty in the tradition of nineteenth century liberal revolutions.

In the light of the now known facts about the Soviet Union, Eastern Europe and China, it is no longer assumed that there is an automatic or even a probable trade-off between the two types of

freedom – rather do they seem to exist together. Nevertheless, it remains true that they are not the same and circumstances may arise where they appear to come into conflict. We need to know which we mean.

First of all we must note that formal freedom can be established, ‘material freedom’ can only be pursued; it cannot be brought about by decree, and it is doubtful whether it can ever be regarded as having been ultimately attained. (One generation’s ideal standard of living becomes the next generation’s ‘poverty’.) This means that encroachment on ‘formal freedom’ for the purpose of ‘material freedom’ will always be of ‘the end justifies the means’ kind, and in this area of debate we must never forget that ends, which are claimed to justify means are not always attained. Whatever end Hitler considered justified his means – it was certainly not that the whole of Germany should be occupied by foreign enemies. Whatever end Lenin and Stalin considered justified the killing of forty million people, it was not that Kerensky should be replaced as ruler of Russia by Yeltsin, who is both less democratic and less socialist than Kerensky claimed to be. Yet that is what happened.

Popper has perfectly unambiguous views on this point. ‘Formal freedom’ comes first: “We must think of these matters (i.e. ‘formal’ and ‘material’ freedom) in even more materialistic terms than Marx did. We must realise that the control of physical power remains the central political problem. In order to establish this control, we must establish ‘merely formal freedom’.” (Vol. 2, p. 128)

Then on “ends justifying means” he says:

“The Utopian approach (i.e. policies aimed at achieving a grandiose long term goal) can only be saved by the Platonic belief in one absolute and unchanging ideal together with two further assumptions, namely:

- (a) that there are rational means to determine once and for all what that ideal is.
- and
- (b) what the best means for their realisation are.

But even Plato himself and the most ardent Platonists would admit that (a) is certainly not true.” (Vol. 1, p. 161)

Taking Popper’s work as a whole we can be left with no doubt that the freedom which is primary in the open society, which is fundamental and takes priority over other values, is ‘formal freedom’. That, then, is the freedom referred to in Section 36.

Equality before the law

A similar analysis may be applied to the term ‘equality’.

‘Equality’, too, has three meanings radically different from each other. The first is the one we have already seen expounded by Popper, sometimes called ‘equality before the law’ or ‘equality of rights’, is equality of treatment by the state.

Equality of outcome

At the other extreme is what is today generally called ‘equality of outcome’ – that everybody should in fact be equal as nearly as possible in all respects. Usually it refers to money incomes, but it does not have to stop there and sometimes does not. The idea that differences between people which have nothing to do with income – in strength, intelligence, appearance, health, etc. should be prevented or rendered ineffectual or compensated for, is sometimes present. We hardly need to argue that this is incompatible both with formal freedom and with the open society. Popper, we recall, tells us that ‘competition for status amongst its members is one of the most important characteristics of the open society’. (Vol. 1, p. 176) Such competition is incompatible with equality of outcome.

Equality of opportunity

In between is a much vaguer area called 'equality of opportunity'. Sometimes this is the same as 'equality before law' – it simply means that the state does nothing to give or allow opportunities to some which it denies to others. But it can go further than this, and becomes a demand that the state should go out of its way to give to certain people opportunities which others have but which these particular people would lack in the absence of state action. This is one of the justifications for free education, although there are others. Finally, it may go over to the demand that when it is not possible to give to everybody the advantages which some people have, those advantages must be taken away – that people with advantages must be positively handicapped. Indeed, the metaphor 'levelling the playing field' is often used to mean quite the opposite – the demand that the playing field should be made to slope steeply in order to help a team whose players are smaller than their opponents.

The three main ideas can be illustrated by analogy with athletics.

Under equality of treatment, the state is the provider of a race track, a starter and judges. Because it provides the track, it must see that all the lanes are of equal length and have surfaces of equal quality. The starter and judges must not cheat. Nobody can be denied the right to run. But the runners are responsible for their own training and their own running shoes, and they bring their own physical and psychological endowments. Those with the best combination of qualities, both qualities which they were born with and qualities which they cultivated through their own efforts and equipment, will win.

Equality of outcome has nothing to do with a race. It is soldiers marching in rank, keeping their dressing and of necessity going at the pace of the slowest.

Equality of opportunity could start with the owners of the stadiums providing running shoes to those who do not have them. It could extend to providing training to those who have not had it. (At some point it will be asked whether it is 'fair' that people should provide their own shoes or their own training which might be better and give them an advantage.) Then it may go over into the demand for handicapping as we have in horse races. The good runners should be actively disadvantaged so that, as far as possible, everybody has the same chances of winning.

This immediately runs into a serious problem. Horse races are not 'open'. If you were allowed to enter a three-legged mule in the Derby and demand that the race horses be handicapped so that the mule had an equal chance, the race would become a farce. Handicapping and openness of access do not actually go together – no more in human affairs than in horse racing.

If the race has a purpose beyond itself – say to produce the best times – we can immediately distinguish measures which help and measures which hinder this result. Anything which brings additional people into the competition (providing shoes, providing training) is likely to improve overall results – it increases competition and widens the pool of talent. Any form of handicapping must obviously make the results worse. Indeed, competition under handicap is not real competition and is a rather pointless exercise. Its purpose in horse racing is to make the outcome as uncertain as possible as a basis for betting – it is emphatically not to produce the best times which it obviously does not do.

What kind of equality is compatible in a free society? Equality of result – obviously not. Equality of provision – obviously yes. Equality of opportunity by handicapping – definitely not. It is incompatible with freedom. "We must demand that every man should be given if he wishes the right to model his life himself, as far as this does not interfere too much with others." (page 165)

To set out to broaden equality of opportunity by means of provisions is a legitimate and desirable activity, but like the pursuit of 'material freedom' (of which it is indeed a part) it is an ongoing process, moving towards a goal which is not ultimately attainable in any final sense. So it is subject to the problem of means and ends. It can and should be done, but it cannot be the basis for overriding other rights.

Freedom, equality and Section 36

In any case, Popper is quite clear what 'equality' means in an open society.

“It cannot of course be denied that human individuals are, like all other things in our world in very many respects, very unequal. Nor can it be doubted that this inequality is of great importance and even in many respects highly desirable. But all this simply has no bearing upon the question of whether or not we should decide to treat men, especially in political issues, as equals, or as much like equals as possible – that is to say, as possessing equal rights and equal claims to equal treatment.” (Vol. 2, p. 234)

That is the kind of equality that has priority in the open society. It is also the kind that is clearly fully compatible with freedom (formal freedom – as we have established). So that is the kind of equality to which Section 36 refers.

7

Conclusion

In conclusion it is as well to remind ourselves what we are talking about. Section 36 is not the Constitution nor is it a general preamble. It does not enshrine the ‘open society’ as the law of the land. It does not give the government a mandate nor does it give it the power (if it does not have the power already) to pursue, or to establish, the open society, or freedom or equality, nor does it forbid it to pursue other things, including equality of outcome.

What it does is to give the legislatures a limited power to limit the rights set out in the Bill of Rights and to circumscribe that power. The legislature may pursue equality of outcome, or ‘material freedom’, or any number of things not mentioned in the Section, but what it cannot do is to use the fact that it is pursuing them as a ground for limiting rights set out in the Bill of Rights. That is all.

Postscript

If this argument is valid, Karl Popper's book *The Open Society and its Enemies* has taken on considerable importance in South Africa, and it is going to be read a good deal, so some background information on Popper and his book would seem to be in order.

Popper was first and foremost a philosopher of science. He is credited with the best-ever theoretical formulation of the scientific method, the method which has in fact been used by all the great scientists since well before Newton. The most important point is that experimentation can never prove anything. It can only disprove, so that the theories which we accept are those which have (so far) withstood repeated and strenuous efforts to disprove them. From this it follows that science can never provide certainty, and all scientific theories are provisional and may one day have to be revised.

Although this view was put forward many years ago and was generally accepted as correct by scientists, its basic implication – that nobody is ever entitled to be dogmatic on the basis of science – has only been grasped by the world at large in recent years. It is the core of the most recent thinking, which is often called 'Post Modern' (because 'Modern' thinking was normally highly dogmatic). Popper must therefore be regarded as a major pioneer of what has been one of the biggest shifts in basic philosophy which the world has seen in two hundred years.

It will not surprise us, therefore, to find that the wisdom of *The Open Society and its Enemies* is much easier to accept today than it was when it was written in 1943. Its rejection of dogmatism, of Utopian visions, and of social engineering was quite unfashionable when it was written, but is now very much like conventional wisdom.

The book was written in 1943 and it has been said the Popper regarded it as his personal contribution to the war effort. It was being written at the time of the Battle of Volgograd (then called Stalingrad) and in the months after, when the tide of the War turned for the first time and when, at least in appearance, its outcome had not yet been decided. At that time it simply was not done (and for good reasons) to be rude about 'our heroic Russian ally'. In the circumstances there can be little doubt that Popper pulled his punches in his criticism of Marxism and his implied criticism of the Soviet Union. The surprising thing is that he was as critical as he was.

Finally, we must note that Popper was no economist, and did not claim to be. Insofar as he makes statements about economics in *The Open Society and its Enemies*, they are often muddled and naïve, and it is clear that he had uncritically swallowed some of the Socialist propaganda that was about in his time. He did not understand, because he had not given it enough thought, why the same principles which he so cogently put forward for the advancement of science also apply to the provision of material goods and services. Reason, he says, both for the purpose of advancing science and in its capacity as "the very life of democracy", is advanced only by open debate and by "an attitude of readiness to learn by experience". What he is calling for is freedom of enterprise – anybody may put new ideas on the table – and competition. The ideas have to stand up both to criticism and to testing in practice, along with others, and the most successful prevail. This is indeed the way, the only effective way, to develop useful new ideas. Is it surprising to find that it also provides the only effective way to deliver almost anything else?

Popper did not see this, and he did not stand up for free markets; but it is no coincidence that in the time – the present time – when his ideas have finally prevailed in science, the idea of the free market has also prevailed.