Aantekeninge/Notes

The open society: What does it really mean?

1 Introduction

The Constitution refers to the *open society* in the Preamble, the limitation clause (s 36), the interpretation clause (s 39), and clauses dealing with public access and participation in the legislature (ss 59, 72, 118). As remarked by Sachs J in his concurring judgement in *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC) (par 146), 'The concept of an open society must indeed be regarded as one of the central features of the bill of rights … ' However, the open society has been under-utilised in our human rights jurisprudence – perhaps because of the legal profession's limited acquaintance with this political philosophical concept. The open society is mostly subsumed by the larger phrase 'open and democratic society', with emphasis on the far better-known concept 'democracy' accordingly rendering the open society meaningless and of no particular relevance in itself. The under-appreciation of the open society as a philosophical guiding light *in its own right* in our human rights jurisprudence, amounts to hiding a vital constitutional light under a bushel.

The purpose of this article is to lift the metaphorical bushel: I intend to focus on the open society and submit that this supposed lodestar of our Constitution can, and must, illuminate our human rights jurisprudence. Based on case law and the principle of purposive interpretation, I argue that the open society should be interpreted according to how the concept was developed in the political philosophy of Karl Popper. I subsequently provide an analysis of the meaning of the open society as developed by Popper – focusing on how the values denoted by the open society complement our extant human rights jurisprudence.

2 The Open Society in Case Law

While the larger phrase 'open and democratic society' (and sometimes 'democratic and open society') is regularly referred to by our courts, the term *open society* as a *distinct concept* has received relatively scant attention. In the handful of cases where the open society was applied as a distinct concept, our courts interpreted it as pertaining to the following values:

- Public adjudication rather than a private ventilation of the dispute (*Luitingh v Minister of Defence* 1996 2 SA 909 (CC) par 5);

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- Pluralism and diversity (*Lawrence supra* parr 146–147 per Sachs J (concurring); *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) par 134 per Sachs J (concurring));
- Transparency (*Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) par 6);
- Protection of freedom of speech in certain contexts (*Laugh It Off Promotions CC v South African Breweries International (Finance) BV trading as Sabmark International* 2006 1 SA 144 (CC) par 88 per Sachs J (concurring));
- Open justice (*Independent Newspapers (Pty) Ltd v Minister for Intelligence Services, In re: Masetlha v President of the Republic of South Africa* 2008 5 SA 31 (CC) par 167 per Sachs J (dissenting));
- Accountability and institutional checks and balances that limit state power (*Primedia Broadcasting, a division of Primedia (Pty) Ltd v Speaker of the National Assembly* 2015 4 SA 525 (WCC) parr 35–37).

However, in not one of these judgments did the court attempt to examine the open society methodically and in detail, or refer to any sources on the concept. The meanings that the courts allocated to the open society were, therefore, nothing more than the unsubstantiated, idiosyncratic opinions of the particular judge or judges. The only (minor) exception to this analytical paucity in our case law is the dissenting judgment by Ackermann J in *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC): In support of his position that the right to freedom as formulated in the Interim Constitution should enjoy an expansive interpretation – which was rejected by the majority of the Constitutional Court in favour of a narrow interpretation – Ackermann J relied *inter alia* on the open society (par 50). In the footnote to his brief analysis of the open society (n 36), Ackermann J cited Karl Popper's *The Open Society and Its Enemies*. Importantly, although the majority in *Ferreira* rejected the expansive interpretation of the right to freedom as formulated in the Interim Constitution as proposed by Ackermann J, the majority did so for reasons other than Ackermann's reliance on the open society. The majority was silent on Ackermann J's analysis of the open society and failed to proffer any alternative analysis of the concept. As I discuss below, Ackermann J's reliance on Popper's *The Open Society and Its Enemies* marks 'X' on the philosophical treasure map of the open society as a distinct constitutional concept.

3 Purposive Interpretation of the Open Society

Where a political philosophical term with an established meaning is included in the text of the Constitution, the most likely purpose for the use of such a term is for its established meaning to be given effect. As I analyse in more detail below, the open society is indeed a technical term in political philosophy with an established, well-developed meaning. It follows that the established meaning of the open society must be given effect.

If the open society is to be interpreted loosely, without specific reference to its established political philosophical meaning, there is a danger that the open society may become a vehicle for advancing any value or objective that can be linguistically connected with the words 'open' or 'openness'. This would not be aligned with the purpose of the inclusion of a political philosophical term with an established meaning, and would, accordingly, be incorrect. Also, it would detract from the understanding that can potentially be gained from analysis of the established political philosophical meaning of the open society.

The concept of an open society is most closely associated with the philosopher Karl Popper, who gave currency to the concept in his book *The Open Society and Its Enemies* (2013, first published in 1945; also see Langlands & Venter 'The Constitutional Court of South Africa and the open society' 2009 *Administratio Publica* 140). Popper constructed a theoretical framework based on a dichotomy between the *open* society and the *closed* society. In his dissenting judgment in *Ferreira*, Ackermann J, referring to this dichotomy (and citing Popper's *Open Society and Its Enemies*), held that the closed society is the 'magical or tribal or collectivist society', while the open society is the kind of society in which 'individuals are confronted with personal decisions' (n 36). Although correct and important, this explanation of the open society only touches the surface of the concept's meaning. In the following paragraphs, my analysis of the open society drills down deeper into the concept's meaning.

The open society must be interpreted in the context of the Constitution as a whole. As is clear from my analysis below, the established, well-developed meaning of the open society *qua* technical term in political philosophy, is aligned with – and complementary – to other constitutional values.

4 The Standards of the Open Society

The decision by the framers of our Constitution to include the open society as a definitive value of the South Africa they were envisioning, must be seen against the historic backdrop of the closed society, which was the apartheid regime: A society ruled by so-called 'moral' or 'ethical' taboos on racial integration and equality, homosexuality, a woman's choice to terminate her pregnancy, and many other aspects of life; and an authoritarian society that suppressed criticism through fostering a closed, tradition-dominated culture and often by using the brute power of the state – especially criticism proffered by the meek and marginalised. The transition from apartheid to our current constitutional dispensation was, I submit, not only a political, but also great moral and spiritual revolution. With reference to such great moral and spiritual revolutions in history, Popper states the following in the Preface to the Second Edition of *The Open Society and its Enemies* (Popper xl, my emphasis):

> It is the longing of uncounted unknown men [and women] to free themselves and their minds from the tutelage of authority and prejudice. It is their attempt to build up an open society which rejects the absolute authority of the merely established and the merely traditional while trying to preserve, to develop, and to establish traditions, old or new, that measure up to their *standards of freedom, of humaneness, and of rational criticism*.

A few initial observations on this quotation will suffice: First, 'traditions' refer to all of society's political and social institutions – including its laws. Second, the three standards listed in the quotation above – (a) freedom, (b) humaneness, and (c) rational criticism – are a golden thread that runs through *The Open Society and Its Enemies* (e.g. Popper 175).

In the following sections, I analyse each of these three standards. In 2001, I published an analysis of the open society that also identified and analysed these three standards of the open society as conceived by Popper ("The open society" 2001 *THRHR* 107). Since 2001, however, the standards of the open society were affirmed in a variety of Constitutional Court judgments. In my analysis below, I highlight the most important of these post-2001 judgments.

4 1 Freedom

Popper espouses a classic, liberal conception of freedom, based on John Stuart Mill's harm-principle (Popper 105). Popper is concerned with freedom as being personal or individual freedom – which approximates to the Constitutional Court's conception of *autonomy* in *Barkhuizen v Napier* 2007 5 SA 323 (CC). In *Barkhuizen*, the Constitutional Court held as follows (par 57):

> Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.

According to the Oxford Dictionary, the word 'autonomy' originates from the Greek 'autonomos' meaning 'having its own laws', from 'autos' (self), and from 'nomos' (law). Given the etymology of 'autonomy', I submit that the phraseology 'self-autonomy' is an unnecessary tautology, and that the court did not intend 'self-autonomy' to mean anything different from 'autonomy'. Besides my critique of the court's phraseology, the *dictum* quoted from *Barkhuizen* is a powerful statement that gives a generous, non-paternalistic interpretation to autonomy *qua* individual freedom ('the ability to regulate one's own affairs, even to one's own detriment'), and posits autonomy as a core value underlying our Constitution – in particular the constitutional values of freedom and dignity.

It is important that freedom is not the antithesis of *tradition*, but rather the antithesis of *blind adherence to tradition*. In fact, aspects of tradition can be inspirational, and can lead to social reform (Popper 63). The dovetailing of freedom and tradition is exemplified in *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC). In this case, the Constitutional Court was confronted with the question of whether voluntary cultural

practices should receive the same protection as mandatory cultural practices. The Constitutional Court held (par 64, footnote omitted):

> A necessary element of freedom and of dignity of any individual is an 'entitlement to respect for the unique set of ends that the individual pursues.' One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.

Pillay is an acknowledgement of the vital role of tradition in people's lives – and that tradition need not be an inhibitor of freedom, but rather can be an object of freedom.

4 2 Humaneness

Humaneness plays a fundamental part in Popper's view on justice in an open society. He pleads for a redirection of philosophical discourse towards the 'least amount of avoidable suffering' (Popper 548; 602). Already in the early cases heard by the Constitutional Court, most prominently *S v Makwanyane* 1995 3 SA 391 and *S v Williams* 1995 3 SA 632, the Constitutional Court held that 'unnecessary suffering' is unconstitutional.

Humaneness, Popper contends, demands an equalitarian and individualistic interpretation of justice (Popper 101). An equalitarian interpretation of justice finds expression in Pericles' oration, which states that the law must guarantee equal justice to all (Popper 91). This accords with *formal* equality, which is guaranteed by the Constitution (*S v Ntuli* 1996 1 SA 1207 (CC) par 18). An individualistic interpretation of justice is expressed in the Kantian maxim to always recognise that human individuals are ends, and to refrain from using them as mere means to ends (Popper 98). This maxim was endorsed by the Constitutional Court in *S v Dodo* 2001 3 SA 382 (CC) (par 38). In contrast, the closed society adheres to a collectivist interpretation of justice which has the interest of the state – *id est* the collective – as its sole criterion of morality (Popper 102).

4 3 Rationality

Popper uses rational criticism interchangeably with rationality. Rational criticism or rationality in Popper's philosophy means more than simply acting for a reason. It requires an assessment of whether the reason itself is aligned with the values we have decided are worthy of being realised (Popper 59) – such as freedom and humaneness. In this assessment, Popper points out that facts alone cannot determine norms (Popper 62). Facts alone have no normative content and only assume such content if seen through the lens of pre-decided norms (Popper 482). In a closed

society, norms are unchanging and perceived to be as inevitable as the rising of the sun – essentially the same as 'natural laws' or facts (Popper 55). In an open society, by contrast, norms must be rigorously distinguished from facts (Popper 55). The fact–norm dualism received an implicit affirmation in *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC), where the Constitutional Court held that (par 74):

> [T]he antiquity of a prejudice is no reason for its survival. Slavery lasted for a century and a half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law; the first two are today regarded with total disdain, and the third with varying degrees of denial, shame or embarrassment.

4 4 Conclusion: Responsibility

Given the dualism between facts and norms, and the human-made nature of norms, we as humans are responsible for the norms we uphold in our societies (Popper 59). The closed society is an obstacle to responsibility, as its norms are typically placed beyond rational criticism, and are not measured against the standards of humaneness and freedom. By contrast, the open society is the necessary outcome of the decision to carry 'the cross of being human': taking responsibility for avoidable suffering, and to work for its avoidance (Popper 189). Accordingly, the individualism that characterises the open society must be infused by individual moral responsibility and an ethic of humaneness.

5 The open society and *ubuntu*: A paradigm shift needed in legal thinking?

Can the individualism of the open society be reconciled with *ubuntu*? When *ubuntu* first appeared in our jurisprudence, some judges implicitly associated it with the opposite of individualism – namely collectivism. The classical example of this is the description by Mokgoro J in *Makwanyane* (par 307) of *ubuntu* as meaning, *inter alia*, 'conformity to basic norms and collective unity'. Clearly, individualism clashes with this collectivist conception of *ubuntu*. As argued by English, the conception of *ubuntu* as expressed by Mokgoro, Mohamed and Sachs JJ in *Makwanyane*, is irreconcilable with individual human dignity (English 'Ubuntu: the quest for an indigenous jurisprudence' 1996 *SAJHR* 645).

However, the jurisprudence that followed *Makwanyane* appears to have largely sidelined the collectivist conception of *ubuntu*, in favour of a conception of *ubuntu* as being *altruism with African roots*. (For an overview of such jurisprudence, see: Himonga, Taylor and Pope 'Reflections on judicial views of ubuntu' 2013 *PER* 67, and for a more

critical appraisal of *ubuntu*, see: Kroeze 'Doing things with values II: The case of ubuntu' 2002 *Stell LR* 252). Key values entailed by this conception of *ubuntu* are, *inter alia*, 'restorative justice', 'reconciliation', and 'humaneness'. This conception of *ubuntu* is of course aligned with the open society.

In the context of altruism, Popper criticises Plato for positing collectivism as the only escape from selfishness, and states as follows (Popper 96):

> Collectivism is not opposed to egoism, nor is it identical with altruism or unselfishness. Collective or group egoism, for instance class egoism, is a very common thing ... and this shows clearly enough that collectivism as such is not opposed to selfishness. On the other hand, an anti-collectivist, i.e. an individualist, can, at the same time, be an altruist; he can be ready to make sacrifices in order to help other individuals.

Popper views the unity between individualism and altruism as the basis for the Kantian central doctrine to always recognise that human individuals are ends, and to refrain from using them as mere means to other ends – and as core to the open society (Popper 98). This may be Popper's paradigm-shifting contribution to the development of South African legal thinking: There is not necessarily any connection between collectivism and altruism; in contrast, our constitutional commitment to the open society enjoins us to promote *altruistic individualism*. While free to live their lives as they please, individuals are also responsible for working to avoid suffering.

6 Differentiating Between the Open Society and Pluralism

In at least two of his concurring judgments as a member of the Constitutional Court's bench, Sachs J interpreted the open society as meaning pluralism (*Lawrence* parr 146–147; *National Coalition* par 134). However, in neither of the two concurring judgements did Sachs J explain why he interpreted the open society as such. It is in the interests of conceptual clarity to clearly differentiate between these two concepts: The political philosophical concept of 'pluralism' in the broadest sense refers to the recognition and acceptance of a multiplicity of beliefs and ways of life in society (Crowder "From value pluralism to liberalism" 1998 *Crit Rev Int Soc Polit Philos* 2). Particular creeds of pluralism have been developed by contemporary philosophers like Isaiah Berlin and John Rawls. Although there may be overlapping elements between the open society and certain creeds of pluralism, the open society and pluralism are distinct concepts. The *Constitution as a whole* celebrates South Africa's diversity and can thus be interpreted as supporting pluralism in the broad sense, as described above (see, e.g. *National Coalition* n 164, where Sachs J held there are many provisions in the Constitution that 'highlight the rich diversity of our country'). However, this does not justify an interpretation of the *open society qua pluralism* – irrespective of the creed of pluralism contemplated. Accordingly, the

conceptual conflation between open society and pluralism should not be followed.

In my 2001 article, I explored the ramifications of Sachs J's judgments in *Lawrence* and *National Coalition*, and proposed that these judgments expanded the concept of the open society to include pluralism. However, I have since reconsidered this proposition. The first weakness of my previous proposition is that it overvalues Sachs J's *ipse dixit*. It should be remembered that Sachs J failed to cite any sources, and failed to present any reasons for his interpretation of the open society qua pluralism. The second weakness of my previous proposition is that it did not take due cognisance of the imperative of purposive interpretation: Given that the open society is a political philosophical term with an established meaning, the most likely purpose for using such a term in the Constitution, is for its established meaning to be given effect. For this reason alone, Sachs J's conceptual conflation between the open society and pluralism should be rejected.

7 The Open Society's Enemies and the Limits of Tolerance

An important aspect of the open society that I did not address in my 2001 article, is the limits of an open society's tolerance towards dissenting political ideologies. How should an open society deal with ideologies within society that aim to undermine the open society itself – or the open society's core values of personal freedom, humanitarian ethics, and rationality? In the 1930s, Popper witnessed how the tolerance of the Weimar Republic was used by the Nazis to overthrow the Weimar Republic and replace it with the Third Reich. As such, Popper had an acute awareness of the problem that unlimited tolerance is self-defeating, and he called it the *paradox of tolerance* (Popper 581). The open society that Popper envisioned would not be paralysed by tolerance as was the Weimar Republic, but rather it would be distinctly confident in the superiority of its core values and be willing to defend these against contrary ideologies. Popper's reasoning in this regard is insightful (Popper 581, original emphasis):

> Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them. In this formulation, I do not imply, for instance, that we should always suppress the utterance of intolerant philosophies; as long as we can counter them by rational argument and keep them in check by public opinion, suppression would certainly be most unwise. But we should claim the *right* to suppress them if necessary even by force; for it may easily turn out that they are not prepared to meet us on the level of rational argument, but begin by denouncing all argument; they may forbid their followers to listen to rational argument, because it is deceptive, and teach them to answer arguments by the use of their fists or pistols. We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant. We should claim that any movement preaching

> intolerance places itself outside the law. And we should consider incitement to intolerance and persecution as criminal, in the same way as we should consider incitement to murder, or to kidnapping, or to the revival of the slave trade, as criminal.

The extent to which an open society should resort to criminalising intolerant ideologies would, therefore, be situation-specific and would be determined by whether the marketplace of ideas is sufficiently effective in exposing and disempowering such ideologies. However, it is clear that Popper is under no illusions as to the rationality or goodwill of humans. If the marketplace of ideas is ineffective in disempowering intolerant ideologies, the open society must employ the force of the law to suppress its enemies. The open society is not a supine, value-neutral society – but instead is unapologetic in actively defending its values.

In his concurring judgement in *National Coalition*, Sachs J indeed held that South Africa *qua* constitutional state is not value-neutral (par 136, footnotes omitted, my emphasis):

> A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and *the limits to which it may go, are to be found in the text and spirit of the Constitution itself*.

The constitutional commitment to the open society should serve as guidance regarding the limits to which the state may – and must – go, in order to enforce the dictates of our constitutional morality.

8 Conclusion

Our courts have only superficially engaged the meaning of the open society, and, usually, have failed to undertake any proper analysis of the concept. The concept of the open society is inextricably bound to the political philosophy of Karl Popper, as published in his *magnus opus The Open Society and Its Enemies*. In this book, Popper posits the core values of the open society as individual freedom, humanitarian ethics, and rationality – values that all resonate with our Constitution. Moreover, these are values that perceived together remind us that altruism need not and should not imply the subservience of the individual to the group, but that individuals can be both ends in themselves and compassionate towards each other. It is further important to differentiate the open society from pluralism, and to recognise that the open society does not necessarily accommodate all belief systems, but takes active measures against intolerant belief systems if the situation so demands. Recognition of the open society as a meaningful concept *in its own right* accomplishes more than reinforcing our constitutional ethos. It opens up a rich source of philosophical thought – Popper's *The Open Society and Its Enemies* –

that can inform and enhance our understanding and application of the Constitution.

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