

DR. HELMUT SCHREINER
(University of Salzburg, Austria)

OPEN SOCIETY - TOLERANCE WITHOUT LIMITS

The model of an open society is classical-liberal. Its dynamics is derived from its foundation on individual autonomy. The more this is considered the more the unhindered persuance of individual interests becomes the only legitimate aim. "Public welfare" is always a function of the unhindered persuance of individual interests. The State is only entitled to be a kind of custodian, as it has to care for the maintainance of a frame which guarantees the unhindered effectiveness of particular interests.

The open society in Karl Popper's meaning is epistemologically characterized by an asymmetry of verification and falsification: Whereas claims to truth were not redeemable, its disproof is possible in any case. A familiar quotation says that truth is approached by trial and error. Therefore for the open society the endaveour of many individuals who pursue their interests is substantial. Planning for the future - for our purposes we say normative hypothesis - is not the task of States or other collectives but of individuals. Not only for the economic but also for the spiritual realm of ideas, values and aims the market is the decisive paradigm, it is wiser and more effective than any centralistic planning. In this way the open society is - as already the name says - developable into all directions. The motor of this development is not a collective body but the intentions of the individuals towards a development. The nucleus of the institutional democracy therefore is to allow for this alternative. Theories on democracy which are close to this conception and which want to describe the representative parliamentary system are mostly theories, which proceed from the struggle of elites for power - as for instance Schumpeter's theory of democracy.

FREEDOM IS DEFINED BY THE SUBJECT, NOT BY THE STATE

Freedom is an important building stone of democracy. According to the liberal concept freedom means the autonomy of the citizen as a subject. On the one hand every citizen is regarded as being competent to exercise freedom; on the other hand the citizen's freedom asks for being claimed, because freedom only proves its worth in practice. Freedom thus is based on the ability and preparadness of the citizens for "a constant initiative, effort and education ... which it (the democracy) cannot enforce and does not want to enforce". (Paul Kirchhof. Die Voraussetzungen der kulturellen Freiheit, C.F. Müller-Verlag, Heidelberg 1995,1).

An important nucleus of this notion of freedom lies in the constitutionally guaranteed liberal fundamental rights, as for instance freedom of communication, of assembly, of religion, of arts and sciences. These and further liberal fundamental rights do in no case put the direction and the intensity of the use of freedom into the hands of the State but into the competence of the subject concerned. In this context it is essential that there are no freedoms "directed" by the State or by the majority. Individuals and minorities have the same right to use freedom as the majority. Also the individuals use of freedom, which contradicts the majority is as legitimate as the majority's use of freedom. Both, majority and minority have to endure the others use of freedom, they have to tolerate it.

The use of freedom does not occur in a vacuum but in the frame of a legal order, where a plurality of legitimate aims can be pursued which collide with each other. Thus barriers result from the general laws which do not aim at the infringement of liberal fundamental rights. This for instance is the case when a statute on traffic gives the order that one has to stop if the traffic light ahead is red. As a rule nobody will assume that this means an infringement of the fundamental right of personal freedom. These mentioned barriers can be misused (by the State) in a particular case; but in civilized legal orders there are enough means to prevent this.

Those barriers which according to their intention or according to their usual effects prove to mean an infringement of the use of freedom are of higher importance: If we proceed from the sole competence of the subject of fundamental rights to decide whether freedom can be exercised, about the direction and the extent of the use of freedom, then society is open in all directions. But this was never true nor is it today. A short glance at the European Convention on Human Rights shows this: Art. 10 para. 2 of this Convention permits the State to infringe the freedom of communication: this infringement must be based on law and has to aim at certain purposes, which materially are described in detail. This infringement must be proportional and can only be exercised as the protection of legal goods proves this to be absolutely necessary.

These relevant, in many European States acknowledged and practiced infringement of the freedom of communication is to serve us as a path into a dimension of communication which lies behind the law.

IS THE MARKET A SUFFICIENT PARADIGM OF SOCIETY?

First we have to put the question whether a community so individually constructed as the open society can be sufficiently described in all its realms of function by means of the paradigms of the market. Is it sufficient to have the society develop solely according to laws of the market? Or are moral, especially socio-ethical prerequisites necessary? In other words: Should the open society be allowed to move in all directions or should it be limited? That is the practical question.

Indeed no society can do without a minimum of common convictions of values, which are regarded as obligatory. Enlightenment as a secular movement for freedom has effected that the State is limited to the creation of an external order of freedom, peace and balance. However, the spiritual ethical fundament of living together is not ob-

ligatorily determined by the State and is also not guaranteed by it. As every society needs a common conviction about values, which is connected with the meaning of human life, one can say that the modern State is founded on a sense which it can not produce itself and which cannot be guaranteed by it.

As far as this is concerned the individual is more and more referred to himself: Institutions which in former times had enjoyed the masses obligation to certain inner meaning, as for instance churches or certain parties, have lost these functions in a dramatic manner. Their answer to the question "whatfor does freedom exist" seems to meet only a weak echo. This is a matter which is responsible for the growing number and sharpness of conflicts in our society.

The diminishing normative importance of traditional socio-ethical ideas and the growing normative importance of the autonomy of the subject in an increasing number of respects, mainly as far as the problem of inner meaning is concerned, is accompanied by a new social idea, which increasingly becomes generally obligatory and herewith normative. This idea does not from the beginning concern certain contents, but is concerned with the process of making material socio-ethical ideas obligatory: In the state of a growing openness and loss of orientation facticity becomes more and more normative. Interpretations which - when supported persistently in public - increase for a growing audience into a normative role of an shaping example. What in the practice of society is factually effective longer than a day, forms, changes and stabilizes moral standards and attitudes and thus normatively establishes the way of the society and of the democratic State. Consequently in such a situation the question of the bearer of decisions is not anymore what is socio-ethically right in a material sense, but only what in this field is trend-setting at present and what has obviously the chance to be trend-setting also in the future. The increasing number of opinion polls become the basis of politics in modern communities to a growing extent. (See instead of many others: Neil Postman, *Das Technopol*. Fischer Verlag, Frankfurt a.M. 1992, esp. 134 ss., 145 ss.)

The nucleus of the dispute about the shaping power in a democracy, where the traditional institutions for the creation of inner meaning do not enjoy the loyalty of the masses, is therefore not - anymore - the struggle for the better argument, but - as already said before - the domination of those institutions, which in fact regulate the social practice - even if this does not happen from today to tomorrow, but in longer periods. Whoever regards plurality as the characteristic of modern democracy, whose existence is to be secured by tolerance, the order of mass communication and especially the guarantee of plurality in the realm of the media is a by far more centralistic and more important topic than the important care for more direct democracy.

The open society aims at a world, where also the moral horizons are completely open; where everything goes, everything is equally weighty and therefore unimportant (of course always from the point of view of the universal), there a dilemma of liberal societies becomes visible: On the one hand this liberal society permanently causes changes and adaptations to individual ideas. On the other hand, however, it undermines exactly this liberal society and thus every material order. Communication in an open society as a rule cannot be divided into a constructive and a subversive or destructive one. It is as a rule and necessarily both of them! The principal prevention of the se-

cond, the subversive or destructive aspect in communication would cut the ability to self-development or, as modern German sociologist say, the self-reflexivity of democracy and herewith the openness of society to the quick.

THE OPEN SOCIETY'S SELF-IMPERILMENT

Through the sudden ruin of the former East Block the liberally inspired democracy of the West has lost its most powerful opponent. After a short period of euphoria it soon became clear that also these democracies contain problems which endanger them from the inside: One of these endogenous dangers of Western liberal democracies lies in the fact, that open society contains not a different picture of society than that of the formal securing of openness. Everything, which reaches above this formal aim of principal openness, which is common to all democrats, underlies principally a change and finally the decline, even if in the moment the citizens agree to a high extent. Thus open society proves to be an effective pacemaker of a constant „modernization“.

This open society has - in the eyes of young people who look for an inner meaning - the defect that it is not able to confer a meaning of life and does not offer material prospects for the future. The individual is set back to something which he grasps as an individual fulfilment. If he does not find such a fulfilment society does not offer any support.

TOLERANCE IN THE OPEN SOCIETY

A central question of legal and social philosophy, which leads us behind the open society, is how in a democracy the individuals liberal rights can exist together with the liberal rights of all. Hanna Arendt (*Das Urteilen*, München/Zürich (1982, 1985, 126) puts the problem into the question how one can construct freedom, “so that human beings should be able to distinguish justice and injustice and even then, when all, what they can do, is only their own decision, which is completely contradictory to that which they have to regard as the unanimous opinion of all”?

A possible answer to this question, which lies at the basis of an individually conceived liberal democracy, is that for a certain philosophical conception of the world truth as a discernible element is claimed and thus, in consequence, the disparity of individual and major conception in the sense of a presupposed, more or less without a problem conceived notion of truth is eliminated. Such fundamentalistic answers today seem to boom more and more. This is especially so in times, when the European welfare States are no more able to legitimize themselves by a permanently increasing output. Such concepts conceive tolerance only as a form of practical wisdom in the intercourse with others; they exercise it only because of tactical considerations. If the circumstances would allow for it they would claim totality, which would be based on discernible truths. The hope of the open society to remain open would therefore be frustrated by such groups. The open society as a rule also exercises tolerance towards them - obviously hoping that these groups would not get the chance to have the power of decisi-

on. Whether this hope will be fulfilled depends to a great extent on the social development inside society. This I shall show more clearly.

In an open society the answer to this mentioned principal question starts from pluralism, which because of the seriously taken radical indication towards autonomy of individuals cannot be questioned, is irreducible and therefore final. Here tolerance means more than the mere toleration of other conceptions. When following Popper's concept it is a guarantee, that a society is on a justifiable way: the more individuals use their autonomy communicatively, the more freedom is realized, because freedom is absolutely bound to individuality. Vice versa one can say: Where plurality is not realized communicatively, a strong assumption can be uttered, that a liberal concept of freedom is only weakly developed and, consequently, tolerance in its liberal sense of an open society plays only a minor role, or that public or social structures exist which prevent the actualization of an individual communicative competence.

CONFLICT AND VIOLENCE ARE SPECIAL CHALLENGES IN AN OPEN SOCIETY

Societies which consider themselves and first of all their members to be emancipated are pluralistic and thus especially exposed to conflicts. On the surface of a democratically structured liberal society there are by far more conflicts than it is the case with other communities, which are structured differently. A tendency to conflicts also indicates a tendency to violence. If conflicts of identity and of interests in an open society should not lead to a self-imperilment of the society or even to open force, then a common consent is necessary in spite of, even because of the unstoppable differences; this consent should comprise a peaceful co-existence where everyone acknowledges the other. (Charles Taylor, *Politik der Anerkennung ...*) The contents of this acknowledgement, which respects the respective own, autonomously determined identity, today is described in the various theories of the "civil society" and by "republican virtues", whose nucleus is the improvement of the fundamental rights in this discussed scope.

Some preconditions have to be fulfilled to settle a conflict, which is lasting and safe against crises, in a civilized manner (see for instance Dieter Senghaas, *Hexagon-Variationen. Zivilisierte Konfliktbearbeitung trotz Fundamentalpolitisierung*, in: *Dialektik* 1995, 3, *Zivile Gesellschaft und zivilisatorischer Prozess*, 113 ss.): One of these preconditions is the prohibition of violence in connection with the State's monopoly of power. The State can only exercise it by means of a democratically founded rule of law according to general already existing laws, which were made by organs of the State - organs which were established by the people for this task. Thus violence becomes calculable and controllable for the citizen concerning its manner and its intensity. The more the citizen gets voluntarily involved into such mechanisms for the regulation of violence the stronger his affective self-control becomes, because the successful life with such mechanisms promises social reward. The more extensive the individual's involvement into such mechanisms becomes, the more mobile and changeable society becomes, because the value-horizons of solid small communities are relativized by the

bigger ones. By means of these changeability, however, those phenomena are surmountable, which one calls the relations of structural violence, because there due to the strong stability of some groups they cannot find or are not allowed to find their own identity. The higher the ability for changes is in a society, the greater are the chances to overcome such relationships.

In such a mobile society the democratic participation is an important precondition for the permanent peaceful solution of conflicts: Only the principal changeability of rules and the normative contents produced on their basis improves the chance to be able to agree to rules which frustrate own interests.

Democratic participation presupposes that all have a fair chance to articulate audibly their interests in public without endangering themselves.

In spite of all mobility such societies need a common fundament. Without such a fundament legitimacy is nearly not to be achieved. A frame is needed which we today describe as a welfare-State. It expresses the permanent strive for social justice, even if it can be achieved only partly. This latter element distinguishes a society from a pure liberal one, where common welfare as well as social justice are mere functions of an unhindered and peaceful process of enforcement of individual interests. Such a society, which is mainly enriched by the idea of social justice, is able to create tolerance which can cope with the structural, universal and unquestionable difference of the citizens.

AN OPEN SOCIETY, WHICH WANTS TO EXERCISE TOLERANCE HAS TO TAKE CARE OF ITS PRECONDITIONS

An open society furthers conflicts. It is absolutely pluralistic and often even antagonistic. In order to make tensions bearable it is necessary to define common features.

Such common features have to be based on the above sketched convention, which serves the settlement and which aims at a compromise, even if it is only provisional. It is a convention which does not want to eliminate the distinctness, but which wants to maintain, to attend and to further it.

The proof for this has to be found in the particular constitutional and legal systems: On the occasion of conflicts in a particular constitutional system it has to become obvious that the State in question agrees on the individualistic liberal concept of freedom not only abstractly but also in the special single case: If the individual has to determine the occasion, the tendency and the extent of the exercise of freedom then the limits of tolerance by the majority and by the State have to be extended even and just in a close-meshed legal order. Also the unusual, even the unheard of has to be possible, and has to be tolerated by the majority.

To make this possible in the States practice demands an important legal-methodological prerequisite which in Austria is only recognized since a very short time: In a conflict between the exercise of freedom and other, mostly public legal goods, one is not permitted to use immediately the model of the application of norms. In this way liberal fundamental rights would hardly have a chance to exert a broad effect. One rat-

her has to use thinking in principles and thus open the path to exercise freedom which does not give way to public interests as soon as another norm is in contrast to it, which expresses public interests. In this case it is by way of thinking in principles possible to find a solution by considerations, which do not supersede the liberal fundamental right, but on the contrary to maintain it to a large extent. How painful this path might be for a developed democratic society is shown by the recent decision of the German Federal Constitutional Court (Bundesverfassungsgericht) concerning Tuchsolsky's dictum "All soldiers are murderers".

Such a legitimate disobedience of citizens versus the majority and thus also versus the State gives also the possibility of a disobedience versus the law, even if this sounds paradox: An individual or a group consider a law as so gravely unjust, that they are prepared to accept a well-aimed violation of the law and its consequences, in order to gain the attention of the public and thus to achieve a change of the law. This of course requires that the consequences, which are provided by the State for violating the law, are not provided from the beginning and for each case in such a manner that this form of civil disobedience demands more than personal courage, namely heroism.

Finally in each modern State there are certain conflict-situations, mainly then when the State encroaches on the highest legal good, namely human life. Here the State has to abstain from these encroachments completely if it cannot give a cogent reason, as is for instance the case when capital punishment, torture or degrading treatment in Austria and in the scope of the European Convention for Human Rights is absolutely forbidden. If the State wants to oblige the individual to risk his life for the community, he has to offer a choice, as it is the case in many European States concerning military service. In any case the State has to consider all situations, where inner conflicts regularly between the State and the citizen, who guarantees legitimacy, arise. It has to offer solutions in such cases. It is an important topic of modern constitutional dogmatics to explore in the scope of liberal fundamental rights the point where such conflicts can be solved in the interest of the bearer of fundamental rights.

In the course of my paper it became obvious that the open society cannot produce or guarantee some preconditions on which it lives. One of these preconditions that the individuals search for meaning under the conditions of a modern society is possible, is the fair chance to fulfil the fundamental needs of working and dwelling. Man, mainly young people, who lacks a perspective of life, because they cannot find work is especially inclined to those forces who regard tolerance only as a practical demand of cleverness, who agree on an open society only as long as it offers them the possibility to develop himself, and who would do away with it immediately if they had the possibility. In concluding my paper I would like to say that these phenomena should be prevented not only by means of the law but by enlarging the social concepts through a material socio-ethical perspective as well as by a functioning public dispute, which develops a special sensorium for those forces which want to exclude pluralism.