

PUBLIC OPINION AND DELIBERATIVE DEMOCRACY¹

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ABSTRACT:

I analyze the prerequisites for the existence of public opinion in society, reflecting on whether the absence of prejudices should be one of these. At the same time, I delve, among other questions, into the process of forming public opinion, to what degree public opinion acts as a control or brake on political power, and on the role of intellectuals in the context of a deliberative democracy.

KEYWORDS:

public opinion – democracy – deliberation – freedom of expression – equality – political pluralism – power – control - social change – prejudices – education – communication media – intellectuals

“*Ex facto oritur ius*”, Law arises from social reality, from the social group:² “every social sphere tries to transform the position it has achieved in its confrontations with others by codifying it into law.”³ This brings about a transition from social into legal rules. In society’s influence upon Law we can identify public opinion as one way society channels its demands, at least in such societies that uphold, one might say, a liberal or democratic model of public opinion.

Public opinion is a fact which tends to turn into a regulative principle or basis of social behavior; thus, something which starts out as being merely descriptive becomes a normative principle of what ought to be done. It is here that opinion connects to Law, from the moment that Law reacts to social demands and sets into motion the process of positivization, which will have important consequences, not only qualitatively but also quantitatively.⁴

For this reason, we will begin by asking what conditions make the existence of public opinion possible within society. Two of the principal components are freedom of expression in the broad sense and the possibility of a public dissemination of ideas.⁵

It is evident, above all, that the free expression of ideas and opinions must be guaranteed, “which, therefore, enable one to choose between distinct alternatives or possibilities”, thus serving as the foundation for autonomy and self-realization, as JÜRGEN HABERMAS and others claim.⁶ Secondly, the free expression of ideas and opinions must be developed not in the private sphere but in the open, be it in a “public

¹ This article has been written in the framework of the investigation project <<Principio de no discriminación y nuevos derechos>> (DER2011-26903).

² It was this point upon which DIAZ, ELIAS insisted in his article <<De las funciones del Derecho: organización y cambio social>>, published in: *Estudios Jurídicos en Homenaje al Profesor Aurelio Menéndez*, Tomo IV, Civitas, Madrid, 1996, p. 5443.

³ GUMPOWICZ, L.: *Grundriss der Soziologie* (1885), Italian translation by V. Pocar, Unicopoli, Milano, 1981, pp. 156-157.

⁴ See HERMIDA DEL LLANO, CRISTINA: <<¿Es el derecho un factor de cambio social?>>, in: *Isonomía. Revista de Teoría y Filosofía del Derecho*, n°10, abril de 1999, México D.F., pp. 173-189.

⁵ RODRÍGUEZ URIBES: *Opinión pública. Concepto y modelos históricos*, Marcial Pons/ Instituto de Derechos Humanos <<Bartolomé de las Casas>>, Barcelona, 1999, p. 95.

⁶ See *ibídem*, p. 96.

space” or in the “public political sphere”. So it is not enough to be able to comment and discuss freely. Indeed, it is necessary that the discussion occurs in the context of transparency and visibility (or in its negative formulation, in the absence of the age-old practice of deliberating and deciding in secret), not only in relation to the exercise of power, but also in relation to the legal-political process in general.⁷

To these two requirements I would add a third one that guarantees the existence of public opinion, which is that the subjects who express their ideas freely and publicly do so in the context of equality, in which all opinions have equal weight, even though some opinions might only represent minority groups within society. When public opinion is based on the thoughts and ideas of only a few, I think we cannot refer to it as a legitimized public opinion -as it does not have the backing of the social majority-nor as a legitimate public opinion -as it was not formed according to a criterion of legitimacy-. ROUSSEAU devoted much thought to this question, insisting that the opinion that matters or the will that should shape or determine what is law (or the rule of law that binds everyone) should not be the will of one person or of some persons only, but that the majority, based on the participation, in the decision-shaping process, of everyone on equal footing.⁸ In accordance with the philosopher from Geneva, I hold that public opinion constitutes a “supra individual reality” that transcends the individuals, implying that it should not be understood as the sum or aggregate of the opinions or personal decisions, as these would lead to a version of public opinion that is excessively associacionist.⁹

The analysis of the distinguished Spanish philosopher MARÍAS concerning the concept of public opinion, as laid out in his book “The social structure”, is worth recalling in this context.¹⁰ Public opinion is something that the individual finds is not uniquely his, but belongs to the public, to the people. It is the opinion in which many subjects, not just those who are especially qualified, converge. It is something in which I coincide with all the others, something “evident” to everyone. Opinion in the sense that it is public opinion is always a *topos*. In other words: a place of convergence of a plurality of indistinct individuals. MARÍAS noted also that the opinion “must encompass”-it is not sufficient, as he wrote that I know, that the others know, or that I know that others know. It is essential for the fact of public opinion that we can base ourselves upon this opinion, which is to say, that we can interpret it as something which we can rely upon because it possesses a public and social existence.

The question of true interest is whether we must consider the “absence of prejudices” as an essential element for public opinion, that is, whether it is necessary for the ideas and opinions freely and publically expressed, without secrecy or pretense, should compete on the basis of equality and without *apriorisms*. With other words, whether the ideas and opinions should not be limited or impeded by certainties that are either evident or preconceived, such as “false received hypotheses”, or as LOCKE called them, “dangerous

⁷ See *ibídem*, p. 106.

⁸ ROUSSEAU, J.-J.: <<Du Contrat social ou principes du droit politique>>, Chapter II. Book III, in: *Oeuvres Complètes*, vol. III, *Du Contrat social. Écrits politiques*, Introductions et notices bibliographiques par B. Gagnebin, éd. De B. Gagnebin et M. Raymond, Gallimard, Paris, 1964, pp. 395 y ss.

⁹ As was explained by CARPINTERO, H. in: *Revista Cuenta y Razón del pensamiento actual*, nº 92, May-June 1995, Fundes, Madrid, p.144, one cannot ignore that society is not the sum of the individuals but is a structure of distinct type and superior to any of the parts or individuals: a supraindividual reality.

¹⁰ MARÍAS, JULIÁN: *La estructura social: Teoría y método*, Alianza, Madrid, 1993 (1955).

hypotheses”, that have not passed through the scrutiny of reason and of open and free discussion. Free discourse would end in such a case where the following begin: the *apriorisms*, the forbidden topics, or the objective or evident truths, which in the absence of rational discussion will never be more than mere prejudices in the literal sense, even though they could be the product of a solipsistic reason.¹¹

In this respect, if we follow the reasoning of BOBBIO who claims that prejudice is nothing but “an opinion or (...) a set of opinions, sometimes also a doctrine, that is accepted without criticism and in passive manner because of tradition, custom, or because of an authority whose decisions we accept without discussion”,¹² we see, from my point of view, that public opinion is generated, whether we like it or not, within a society in which prejudices coexist with judgments that are reflexive, autonomous, and rational.¹³

LOCKE insisted that one should not confound prejudices or preconceived ideas, from which one should liberate one’s self according to ORTEGA,¹⁴ with wrong opinions.¹⁵ But, from my point of view, I reiterate that it is inevitable that both will coexist in the same scenario.

It is evident that a public opinion can emerge that is mistaken, even under perfect conditions of liberty, rationality, and public outreach; for this reason, I hold that the quintessence of public opinion lies not in its degree of infallibility or certainty but in its provenance from a debate that is free, transparent, and rational among participants that are on equal footing. According to Spain’s Constitutional Court,¹⁶ public opinion is either free public opinion, because it is linked to certain guarantees of liberty and political pluralism, or is, put simply, cannot be considered to be public opinion. In this context, it is worth mentioning article 1.1 of the Spanish Constitution, which states the superior values in the Spanish legal system to be freedom and political pluralism, together with equality and legal security.

It would be desirable that citizens were conscious of the conditioning factors which, whether we like it or not, accompany us since the day of our birth and decisively influence us in our approach to reality and create value judgments. In the words of ORTEGA Y GASSET, we have to understand the difference between beliefs (prejudices) and ideas: “beliefs form the basic substrate, the most profound element of the architecture of our lives. We live of them, and, for that reason, we tend not to think of them. We think of that which is subject to greater or lesser question. Which is why we say that we *have*

¹¹ LOCKE, JOHN: *Ensayo sobre el entendimiento humano*, Fondo de Cultura Económica, México, 1982, pp. 644 y 650.

¹² BOBBIO, NORBERTO: <<La naturaleza del prejuicio>>, in: *Elogio de la templanza y otros escritos*, Traducción de Francisco Javier Ansuátegui Roig y José Manuel Rodríguez Uribe, Temas de Hoy: Ensayo, Madrid, 1997, p. 157.

¹³ OLLERO, ANDRÉS - GARCÍA AMADO, JUAN ANTONIO - HERMIDA DEL LLANO, CRISTINA: *Derecho y moral: una relación desnaturalizada*, Fundación Coloquio Jurídico Europeo, Madrid, 2012.

¹⁴ ORTEGA Y GASSET, J.: <<Investigación psicológica>>, cap. III, in: *Obras Completas*, volumen 12, Revista de Occidente-Alianza Editorial, Madrid, 1988, pp. 361-364.

¹⁵ LOCKE, JOHN: <<Epístola al lector>> del *Ensayo sobre el entendimiento humano*, op. cit., p. 7.

¹⁶ See STC 127/1982, of 31 March 1982, FJ 3º, *BJC*, 1981 (12), p. 278. Vid. STC 104/1986, of 17 July 1986, FJ 5º, *BJC*, 1986 (64/65), p. 1054. Vid. STC 15/1993, of 18 January 1993, *BJC*, 1993 (142), p. 100.

these or other ideas, but our beliefs, more than having them, we are them”.¹⁷ Secondly, it is important to understand the mechanisms by which one could transform these beliefs or prejudices into judgments of true rationality and reflection.

And it is here that I touch upon the topic of “education”, which is fundamental for us to grasp the meaning of public opinion. As CARPINTERO has formulated, if we want a democratic society, it needs a foundation in a well-formed public opinion, and such an opinion cannot be formed if the members of this society have not been educated to face the problems of living together.¹⁸ Without question, the goal is to educate the people to develop the sense of critical rationality, so that individuals learn to justify their own decisions, so that they remain flexible and are willing to accept an opponent’s opinion, so that they value fair play and appreciate the liberty to choose between distinct options. First, to achieve such a goal, one has to transmit the value of tolerance through all stages of the educational system, but not any kind of tolerance, but only what I call tolerance in the “strong sense” as opposed to tolerance in the “weak sense”. Secondly, one has to teach respect for everyone, especially, for minorities.¹⁹ Within this context, it is worth mentioning the resolution of the European Parliament, dated March 9, 2011, on the 2010 report on the progress in Turkey towards cohesion with the European Union, which called on the Turkish government to pay special attention to the educational material used in schools, so that these reflect the religious pluralism of Turkish society and are “free of prejudice”.²⁰

¹⁷ ORTEGA Y GASSET, J.: *Obras completas*, Revista de Occidente in Alianza Editorial, Madrid, 1994, VI, p. 18. As HIERRO S.-PESCADOR, JOSÉ observed in his book *El Derecho en Ortega*, Ediciones de la Revista de Occidente, Madrid: Estudios Ortegüianos, 1965, p.55. On the same line FERRATER MORA, JOSÉ specifies in: *Ortega y Gasset. Etapas de una filosofía*, Seix Barral, Barcelona, 1973, p. 88.

¹⁸ CARPINTERO, H. in <<Opinión pública y educación>>, in: Revista *Cuenta y Razón del pensamiento actual*, nº 92, op. cit., p. 146.

¹⁹ What I mean by “tolerance in the weak sense” is tolerance based on the negative idea of non-interference and mere preservation of the minorities. The logical consequences of this weak version of tolerance are different types of a minimal interference of the State in matters like religion, culture, ethnics, etc. We find a good example of this notion of weak tolerance in the political-legislative situation in Spain on the part of those who defended, during the past political legislative period, that the concept of equality of treatment has been understood as a insufficient intervention of the State.

²⁰ See the European Parliament Resolution of 9 March 2011 on Turkey’s 2010 Progress Report. In particular, nº 25 states specifically: <<... urges the Government to pay special attention to educational materials in schools, which should reflect the religious plurality of Turkish society, and to the need for unbiased learning materials>>. Vid. Commission Staff Working Document Turkey 2010 Progress Report *accompanying the* Communication from the Commission to the European Parliament and the Council. Enlargement Strategy and Main Challenges 2010-2011. COM (2010) 660. Brussels, 9 November 2010. SEC (2010) 1327: <<Access to education, health, social and public services for persons with disabilities are still critical issues, despite legislation in this field. Physical barriers to access to public buildings are a particular problem. Awareness-raising efforts to fight prejudices about people with disabilities need to be intensified, with a view to increasing their participation in social and economic life>>, p. 30.

As regards the progress of Turkey in connection with the its access to the European Union, see OREJA AGUIRRE, M., “A dónde va Turquía”, Real Academia de Ciencias Morales y Políticas, Madrid, Sesión del 20-03-2012. GOTTSCHLICH, J., *Die Türkei auf dem Weg nach Europa. Ein Land im Aufbruch*, Ch. Links, Berlín, 2004. ÇAGLAR, G., *Die Türkei zwischen Orient und Okzident. Eine polistische Analyse ihrer Geschichte und Gegenwart*, Unrast, Münster, 2003. HAUSTEIN, L.; SARTORIUS, J.; BERTRAMS, C., *Modell Türkei? Ein Land im Spannungsfeld*

When education is intended to fail or is full of prejudices, the two following adverse effects can arise:

-It will generate a destructive effect on society that can transform it into a society lacking in ideas or opinions

- Because the public opinion is changing continuously, the constant change of the public opinion has the origin in a tendentious or illegitimate manipulation.

It is here where I think that intellectuals fulfill an important role, or rather, a “moral obligation”. As ARANGUREN stressed, the moral function of the intellectual consists, precisely, after having liberated himself from these presuppositions, to denounce their falsehood and unmask-including, at times, in front of them, those who lie, whether they be individuals or collectives.²¹ Basically, what lies behind these words of the philosopher of Avila is the obligation of the intellectual to unmask social prejudice. As ARANGUREN wrote in another context: “In all of this we can see the important role that the intellectual plays, whose primary duty is to critically reassess his own society, his culture, and, above all, the language which he speaks.”²² Once again, to unmask the inherent prejudices of his society.

Let us reflect on this vision of the intellectual as an *outsider* or as a speaker for the oppressed, the manipulated, or those who cannot speak for themselves,²³ as opposed to other views of former centuries, such as the one proposed by BENJAMIN CONSTANT²⁴ who differentiated between a public opinion that is institutional²⁵ versus one that is not. In his interpretation, it is the second, non-institutional arena of public opinion that is formed by intellectuals in a broad sense (philosophers) and the press, who is the most important channel for the transmission of information and opinions²⁶, followed by the land-owning citizens to whom this opinion is addressed. In the model of CONSTANT, these citizens, one hopes, will critically reflect upon the received opinion. Without a doubt, it is worthy of praise that he highlights in his liberal model the existence of a non-institutional public opinion, even though it is easy to criticize that it fails to have universal character from the moment he literally excludes minors, the dim-witted, women, foreigners, and the unemployed²⁷.

zwischen Religion, Militär und Demokratie, Wallstein, Göttingen, 2006. VEIGA, F., *El turco. Diez siglos a las puertas de Europa*, Debate, Barcelona, 2006. HERMIDA DEL LLANO, C.: <<La Alianza de Laicidades>>, Revista *Persona y Derecho*, vol. 65, 2011/2, Navarra, pp. 117- 138.

²¹ ARANGUREN, J.L.: *Moralidades de hoy y de mañana*, Taurus, Madrid, 1973, p. 135. On this issue, have also recourse to HERMIDA DEL LLANO, CRISTINA: *J.L.L Aranguren. Estudio sobre su vida, obra y pensamiento*, chapter III <<La misión del intelectual dentro de la sociedad>>, Universidad Carlos III de Madrid. Dykinson, Madrid, 1997, pp. 323-363.

²² ARANGUREN, J.L.: *Moralidades de hoy y de mañana*, op. cit., p. 109.

²³ See ARANGUREN, J.L.: *Memorias y esperanzas españolas*, Taurus, Madrid, 1969, Col. Ensayistas 64, p. 115.

²⁴ CONSTANT, H.B.: <<<Principios de política>> in: *Escritos políticos*. Translation by María Luisa Sánchez Mejía, Centro de Estudios Constitucionales, Madrid, 1989.

²⁵ On this issue, have recourse to RODRÍGUEZ URIBES, J. MANUEL en *Opinión pública. Concepto y modelos históricos*, op. cit., pp. 268-273. According to him, the subject of the institutional public opinion is constituted by the representatives who are property owners, economically independent and with talent.

²⁶ Vid. *Ibidem*, p. 255.

²⁷ Vid. *Ibidem*, pp. 255-262.

With respect to the intellectuals, I would like to clarify that while CONSTANT insists that the true intellectual is, above all, an “economic and political man”,²⁸ other philosophers such as ARANGUREN never tired of stressing that the true intellectual must be completely independent of everything, including his socio-economic or political condition, so as to not end up as what he pejoratively termed a “pseudo-intellectual” or “ideologue”. This is due to the fact that the intellectual, “representing the ethical attitude, firmly insists on the moral inseparability between the means and the ends, and, to use the famous distinction by MAX WEBER, the intellectual is much more bounded to the ethics of conviction than of the ethics responsibility; he upholds “*fiat iustitia*” with less regard to its consequences, even if these consequences go as far as “*pereat mundus*”.”²⁹

Public opinion as a legitimizing instance of power

Public opinion degenerates when the individuals who uphold it forget one of its most important functions: namely that society gives its backing through public opinion to those who have been entrusted the mission to exercise power within society: “public opinion as general will, in addition to being the instance that legitimizes power and empowers legislation, even with ROUSSEAU becomes a means of control, a “brake” or limit of power, interpreted in a wide or diffuse sense. That is to say, public opinion-general will not only limits the acts of the legislator “but also the acts of the executive, the government, as well as the judges and any other power in fact, including all citizens, considered individually or in groups, who begin as sovereigns over public opinion-general will, and end up, in real democracy, as its subjects”.”³⁰ In this sense, it is important that government does not control public opinion (understood as the sovereign public opinion or the people in the meaning of ROUSSEAU); instead, quite on the contrary, it should be public opinion that directs government, restraining and conditioning it.

It is true that “public opinion plays a fundamental role when it comes to creating authority”,³¹ that is, to legitimize established power. Yet, I would add, not only can it contribute to give backing to those individuals who are in power, but more importantly, lend authority to certain lines of thinking and ideas. ORTEGA Y GASSET in “The revolt of the masses” (*La rebelión de las masas*) already tried to indicate that such control is “the normal exercise of authority”, is “the exercise of public power”, and that such control always acts in accordance with public opinion.³² This thesis largely stems from a very positive conception of power and authority, because the exercise of both “leads to moralize society, realizing an important educational and cultural task.”³³ ORTEGA clearly held that

²⁸ CORTINA, ADELA: *Ética aplicada y democracia radical*, Tecnos, Madrid, 2ª ed. 1997, p. 95. With the words of CONSTANT, H.B. in: <<Principios de política>>, chapter. VI, in *Escritos políticos*, op. cit.: “Cualquier trabajo intelectual es, sin duda, honorable, (y) todos deben ser respetados. (...) resulta peligroso en los asuntos políticos, a menos que sea contrapesado. (...) Contrapeso que sólo puede encontrarse en la propiedad”, p. 75.

²⁹ HERMIDA DEL LLANO, CRISTINA: *J.L.L. Aranguren. Estudio sobre su vida, obra y pensamiento*, op. cit., p. 361.

³⁰ RODRÍGUEZ URIBES, J. MANUEL: *Opinión pública. Concepto y modelos históricos*, op. cit., pp. 243-244.

³¹ CARPINTERO, H. in <<Opinión pública y educación>>, in: *Revista Cuenta y Razón del pensamiento actual*, nº 92, op. cit., p. 143.

³² HIERRO S.-PESCADOR, JOSÉ: *El Derecho en Ortega*, op. cit., p. 63.

³³ HERMIDA DEL LLANO, CRISTINA: <<El poder y la autoridad en el pensamiento filosófico de José Ortega y Gasset>>, *Revista de Estudios Ortegaianos*, 8/9 Centro de Estudios Ortegaianos. Fundación José Ortega y Gasset, mayo-noviembre de 2004, Madrid, pp. 139-140.

it is not possible to govern against public opinion, as such opinion represents the system of common usage, of social custom, the most intimate essence of society.

Real information: a basis for constructing public opinion

It is obvious that public opinion is formed on a basis of information. The information that people receive is decisive in forming the opinion *a posteriori*. In many cases, information and facts are tinged by prior opinions, either deliberately or unconsciously. Such opinions are always subjective opinions, even though they are presented as *pure facts* on which to base later discussion and reflection.³⁴

Constructing general public opinion from the singular opinions of a few individuals, who claim to represent all of society as spokesmen, is inherently dangerous, if one knows that many citizens have not had the opportunity to express their own opinions or, even worse, when information has been withheld from those citizens. Whether democracy exists in a State is to be established by the information provided by the public institutions: what is required is that such information exists, is permanent and sufficient, and not manipulated.

It is perhaps for this reason that ROBERT DAHL noted that “the possibility of democracy in contemporary state institutions is intimately associated with the possibility that the people (*demós*) exercises the ultimate control over the program of action that is executed by the elites. This presupposes a “critical mass” of well-informed citizens that are sufficiently numerous and active. (...) When the people (or citizenry) do not have the prerequisites necessary for the role demanded by this system, democracy slides into paternalism”.³⁵

As CONSTANT accurately points out, the secrets of the State “are not as many as the charlatans would like to claim and to make the ignorant ones believe: secrecy is only necessary in particular, extraordinary and transitional circumstances, for instance, for a military expedition, or some decisive alliance, in times of crisis. At any other time, authority insists on secrecy only to be able to act without opposition,³⁶ or, what amounts to the same thing, to act without control. This, in turn, is tantamount to open the possibility to commit arbitrary acts with impunity. This would spell the end not only of public opinion, but above all, of the rule of law”.³⁷

The right to access public information becomes an essential condition for correctly forming public opinion and, in addition, is a mechanism by which citizens participate and help building a transparent State: “its existence constitutes one of the transcendental pillars of a functioning democracy, as it could not well claim to be one unless it guarantees the fulfillment of the republican principle of openness in the acts of government”.³⁸

³⁴ CONSTANT, H.B.: <<De la libertad de folletos, panfletos y periódicos considerada en relación con el interés del gobierno>>, in: *Escritos políticos*, op. cit., p. 225.

³⁵ CALETTI, SERGIO: <<¿Ciudadanía global o ciudadanía precarizada?>>, in: REIGADAS, María Cristina y CULLEN, CARLOS A. (Compiladores): *Globalización y nuevas ciudadanía*s, Ediciones Suárez-Instituto de Investigaciones Gino Germani, Mar del Plata, Argentina, 2003, pp. 94-95.

³⁶ CONSTANT, BENJAMÍN: <<Principios de Política>>, en *Escritos Políticos*, CEC, Madrid, 1989. Cap. IX., p. 93.

³⁷ RODRÍGUEZ URIBES, J. M. “*Opinión Pública. Concepto y modelos históricos*”. Editado por Instituto de Derechos Humanos “*Bartolomé de las Casas*” y Marcial Pons, Madrid, 1999, p. 326. (My translation).

³⁸ BASTONS, JORGE LUIS Y ELIADES, ANALÍA: <<El derecho de acceso a la información pública en el ámbito iberoamericano>>, *Noticias Jurídicas*, March 2007. <http://noticias.juridicas.com/articulos/00-Generalidades/200703-5102003278491354578.html>