

Social Contract and Public Opinion – Two Political Concepts of the Enlightenment

Kant's notion of »publicity« in the context of the development of the concept of »public opinion«

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The concepts of social contract and public opinion have played a crucial role in political self-perception of European societies for a number of centuries. They are two expressions of modern European rationalism and their importance is becoming more and more central today. They are seen as two cornerstones of modern liberty, albeit in its necessary relationship with authority. The question of the political organization of present-day Europe can therefore scarcely be conceived without being articulated in terms of, or at least with recourse to these two concepts. We will therefore try to analyze an important stage in their development, namely the era of Enlightenment, when with the French revolution and the subsequent controversy surrounding it and its meaning for political history of the European continent, the concept of social contract, as articulated last by Immanuel Kant, declined and came under severe criticism, at the same time as the concept of public opinion entered the foreground as an object of political analysis and was given some of its most important and recognizable characteristics.

The two concepts play important roles in political discourses, roles which are not identical and which can be related in different ways in the ideologies of liberalism, conservatism, democracy and socialism. We will therefore take a brief look at their interplay and changing relations.

Sir Henry Maine said in a well-known phrase that modern societies have undergone a transformation »from Status to Contract«¹, meaning a strict rule of law. The political theory of social contract, with theorists like Hobbes, Locke, Rousseau and Kant, has an important role in this process, emphasizing at the same time the importance of legal theory in the constitution of modern political societies.

We will begin our examination with Kant's theory, which contains a detailed articulation of both social contract and publicity, that is to say, public opinion. We will first analyze Kant's distinction between the private and public use of one's own reason, in order to elucidate the character of his distinction between

1. Sir Henry Maine, *Ancient Law*, London 1861, p. 151.

the public and private spheres, to point out its difficulties and problems and thus to find the reason for the decline of Kantian contract theory. We will then compare it with theories and critical remarks by Burke, Bentham and Constant, directed against his rationalism, concept of law and understanding of liberty and public opinion.

It is well known that the tradition of social contract from Hobbes (or better, Aquinas) on has built on notions of consent, voluntary agreement, legitimacy, sovereignty, the rule of law, necessary or minimum conditions of civil or political society, the relationship between reason, authority and liberty, civil and moral law etc. Social contract should be a guarantee of the security of life, liberty and property. Civil laws should therefore be rational, general, abstract and permanent. And perhaps Habermas is right in claiming that Hobbes also made room for the development of the notion of public opinion.

With Locke, social contract theory becomes the basis for a justification not only of government, but also of legitimate resistance to an illegitimate authority. With Rousseau it becomes legitimation for the overthrow of every existing political order. It is evident that such theories have exercised influence, although in rather different ways, on the events of the English, American and French revolutions and on the rise of liberalism.

But if one aim of the Enlightenment was to establish a rational authority through a process of subjecting government, understood as the expression of will, to the demands of reason, dictated either by public opinion or the idea of social contract, it remains a fact that the Enlightenment owes its second face to its intention to bring under control people's irrational passions, which are also in need of subjection to the demands of reason. And on the grounds of such a purpose, notions of will and reason could be built into a different relation within a theory of government, reason being an attribute of government, while irrational will is left to the governed. This is, for example, Hume's view, but he maintains that government should be a »government of laws«, necessarily limited by laws themselves and by no means a mere government of men. However, we will soon see how odd the consequences of this second standpoint could be in other enlightened authors, particularly in Kant.

Our primary aim is to outline and examine Kant's notion of publicity and to assess it in the context of the development of the concept of public opinion. Given that Kant's theory of social contract - some of the most important problems of which have already been described and indicated elsewhere² - contains the same basic arguments or premises as the theories of his predeces-

2. Gorazd Korošec, »Kant, razsvetljenstvo in razvoj ter iztek teorije družbene pogodbe«, *Filozofski Vestnik* XIV, 1/1993.

sors, it is clear that the notion of publicity must play a central role within it. If his theory should answer the question »What fundamental principles must underlie any system of law, if it is to be legitimate?«³, he must express the demand that laws be stated publicly, presented to the public and subject to the possibility of criticism. If their public acknowledgement arouses opposition, they are not just. Kant states this claim in the following words: »All actions that affect the rights of other men are wrong if their maxim is not consistent with publicity.«⁴ The Principle of publicity, itself a version of Kant's Law of Autonomy, should secure the justice of civil laws. They should conform to the Categorical Imperative in the form of the »Universal Principle of Right«: »Every action is right that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law.«⁵

The demands of publicity could be of course satisfied only in conditions of effective freedom of speech. Therefore Kant exhorts his readers with the exclamation: »Sapere aude!«, »Dare to use your own reason!« and demands the unrestricted public use of reason. It is necessary for freedom as such and for the enlightening of the public itself. Besides this, Kant gives a more detailed description of the public use of reason:

»By the public use of one's own reason I understand the use that anyone as a *scholar* makes of reason before the entire *literate* world. I call the private use of reason that which a person may make of it in a *civic post* or office that has been entrusted to him.«⁶

Up to this point, everything sounds right and well. But here the problems begin. If we know that Kant's formula for the conditions that should enable the free public use of reason reads: »Reason, but obey!« or »Argue as much as you want and about what you want, but obey!«⁷, we should not yet see something very problematic in this. Positive law should be obeyed if law is to exist at all.

The other thing that really surprises us is his rather curious definition of the private use of reason and distinction between the public and private spheres

3. Immanuel Kant, *The Metaphysical Elements of Justice* (first part of *The Metaphysics of Morals* (1797)), trans. John Ladd, Bobbs-Merrill, Indianapolis 1965, Preface, pp. 3-8; *Kants gesammelte Schriften (KGS)*, Königliche Preussische Akademie der Wissenschaften, Walter de Gruyter, Berlin 1902-, vol. VI. The question is, of course, analogous to fundamental questions of his three *Critiques*.

4. Immanuel Kant, *Perpetual Peace: A Philosophic Sketch*, in *Perpetual Peace and Other Essays*, trans. Ted Humphrey, Hackett, Indianapolis 1983, p. 139; *KGS* VIII, 381.

5. I. Kant, *The Metaphysical Elements of Justice*, p. 33; *KGS* VI, 230.

6. I. Kant, *What is Enlightenment?*, in *Perpetual Peace...*, p. 43; *KGS* VIII, 37.

7. *Ibid.*

that proceeds from it. We will examine this problem more closely to get a more exact picture of the advantages and disadvantages of Kant's political philosophy.

We can see that Kant opposes limitations on the public use of reason, which is beneficial for the freedom of the mind, but accepts limitations on *civil liberty*, which in his view could be limited to a very considerable degree without great damage to human freedom. And in civil life, Kant claims, men use their reason in *private* way. Here their liberty could be strictly limited, because in actions in the public or common interest, government could coerce the individual and direct him towards the common purpose. Here he is only a *wheel in the machine*, he must *obey, not argue*.⁸ Even a strong army which should prevent civil disobedience and unrest as a result of abuse of the private use of reason and civil liberties is for Kant a guarantee of the freedom of speech.

An individual therefore has no private discretion in carrying out his bureaucratic role. In civil, as opposed to spiritual, life he must *obey, not reason*, and his civil liberties could be restricted arbitrarily. Kant here uses the word »private« in its etymological sense of being without - deprived of - power. Obedience is indeed absolute: the citizen has an unconditional moral and civil injunction to obey even unjust laws.⁹ In the private sphere no free use of reason, expression of opinion or pursuit of private interest is allowed. So the *price* for the free public use of reason is an abandonment of private interests and *private freedom*.

Everyone should leave his privacy and enter the public sphere only as a scholar, because the general will, undisturbed by private interests, is to be expressed there. So freedom of the press is the only palladium of men's liberty, with the limitation that it must not put into question obedience to the authorities. Kant therefore forbids discussion about the origin of authority. Kant is also a severe opponent of any secret societies, even if their existence is due to censorship. If morals and reason should exercise influence upon politics, no private morality (of which Kant denies the possibility anyway) or private interest should enter public sphere.

A very rigorous scheme indeed. Kant's individual capable of his legislative function, that is of giving consent to the laws, ceases to be an individual, he is pure *homo noumenon*. In regard to freedom of the mind, Kant recognizes that public freedom of speech is necessary for (private) freedom of thought, because validity of one's thought can only be tested in communication, but he

8. *Ibid.*, p. 44; KGS VIII, 38.

9. I. Kant, *On the Proverb: That May Be True in Theory but Is of No Practical Use, in Perpetual Peace...*, p. 84; KGS VIII, 299.

fails to recognize the contrary causal relation: to put it in Tocqueville's terms, freedom in great things is impossible without freedom in small ones, therefore the latter is more important; freedom of the mind is therefore impossible without civil freedom, freedom in everyday things and occupations, without *freedom becoming a habit*. If obedience becomes a habit, freedom is irreversibly lost. This is Tocqueville's answer to Kant's typical enlightened rationalistic illusion that absolute obedience and freedom can coexist, that free reason would not become contaminated with obedience. Even if Kant is here following Hume in his concern not to claim too great an extent of liberty, he is much too anxious in this effort, which leads him to an excessive restriction of liberty.

We can gain an even more thorough insight into this problem in Kant's *Conflict of the Faculties*.¹⁰ Here we see that he divides even academic reason into free and unfree, whereby the former is reserved for the faculty of arts (Kant of course uses German term »faculty of philosophy« and it is plain that in his opinion department of philosophy should play the leading role within it), which serves only the interests of *reason*, while the latter is applied to the remaining three. Professors of law are not free to use their own reason: they are bound to teach according to the statutes, which are a product of the arbitrary will of authority, so that they can use their reason only in a private way. The autonomy of the university is thus denied (although the faculty of arts is here at least partly excepted), and with it also the independence of the juridical branch of authority.

He again maintains that all subjective motives should be excluded from academic discussions and so he introduces a further distinction between the civil and the learned, scholarly public. He attacks civil orators who try to influence public's passions and customs, demanding new social arrangements and anarchy. Because people reject reason and are subject to passions, the task of faculty employees is to serve the state in order to adjust public inclinations to their duties. This is a private purpose of the lawgiver, but again the private purpose cannot be law.

Reason alone should be the judge and the source of laws. In order to achieve this, Kant suggests the establishment of a parliament of faculties, in which members of the faculty of arts would defend the cause of truth. They should become advisers to the authorities and, as free teachers of law, enlighten the public about their duties and rights.

We can see clearly enough that his ideal participant in free public discussion or the use of reason is a *philosopher*. He is *the public man*, that is an ideal

10. I. Kant, *Conflict of the Faculties*, trans. Mary J. Gregor and Robert E. Anchor, Abaris Books, New York 1979; KGS VII.

legislator or one that could consent to the laws and make judgements about them. While even a professor of law, although he uses his reason, is doing this in the name of and at the command of another, a philosopher alone is capable of giving up his private interests, taming his passions and acting freely for the good of the community.

This scheme and especially the emphasis on the ideal citizen being a philosopher, at once runs up against serious difficulties. We know that Kant allows the status of *active* citizenship, characterized by an ability to consent to the laws and participation in public discussions, only the owners of property, which is indeed understood in quite a wide sense. A proprietor is thus one whose property secures him a means of living and therefore political autonomy or independence. He serves nobody but the community and in the worse case he lets his property in order to maintain himself. A non-proprietor, in contrast, is someone who must agree to the exploitation of his working capacity.

Kant must of course strive to include learned men under active citizens, so he maintains that intellectual capacities should also count as property. Here he is indeed not very convincing, as Ryan says,¹¹ when he tries to distinguish between a private tutor, who in his view has no property, works on another's orders and is therefore not free (where freedom means being one's own master), and an academic professor, who is free and has property. If we consider the role of a professor of law in this light, we soon encounter serious paradoxes. As we have seen, this professor is not free to reason freely in his work, but is bound to work according to the commands of the state, which again directs his work towards the common good. So he is at first without the property and freedom of the active citizen, because he works in the name of another, but again he serves the community, this service being a private purpose of a lawgiver. But in his spare time, retaining his intellectual capacities, which can now be understood as property, he can as a scholar participate in the public use of reason, thus contributing to the good of the community. We thus have, on the one hand, someone who from being a non-proprietor in his spare time, in an unexplained way, becomes a proprietor, and on the other side, service to the community alone, which is in itself a private purpose. And if we consider closely the example of a private tutor or any other proprietor, we will come to similar paradoxes.

There is of course a way out from this aporetic argument, resulting from Kant's troublesome definitions, which consists in an answer that, on the one hand, the state does not serve the community in a pure, that is pure reasonable, way and that the community it serves is not a wholly reasonable one, and on the other

11. Alan Ryan, *Property and Political Theory*, Basil Blackwell, Oxford 1984, p. 87.

hand, of course, that a citizen can participate in a free public discussion not just only as a scholar, but moreover, only as a philosopher.

A further consequence of this is that the owners who are part of the public and who in the sphere of free exchange pursue their private interest, thus serving the community, can only enter the public sphere by abandoning the very same private interests. One could ask a naive question as to whether individuals, apart from being philosophers, do not use their own reason in pursuing their private interests. And the Kantian answer is of course no, because the pursuit of benefit alone, no matter how ingenious, does not deserve the dignity of reason. Moreover, it is acknowledged only if conformed with the good of the community.

If we know this and if we remember that in all other areas besides the philosophical public use of reason purified of private interests, the state has the right to direct one for the good of community, the extent of the private sphere suddenly appears rather narrow and the field of public or government control quite wide. Kant's views on the nature of civil law confirm this observation. He does not admit any private law, i.e. law regulating free exchanges of private individuals, commonly regarded as private law Kant terms public law. He regards private law as a characteristic of the pre-civil state, while in the civil state all law is public law. His ideas on property and property rights naturally accord with this view. His foundation of property rights is similar to his foundation of contract. Law must guarantee the property of the individual, but rights deriving from this property Kant understands (just as rights deriving from a contract) not only as physical, but as *rational* possession, that is possession, even if not actual, according to the word of law. His views of law are based on Roman law, but he goes even further in breaching the distinction in Roman law between personal and proprietary relations and rights, *jus ad personam* and *jus in rem*, reducing all relations and rights to property rights and relations.¹² In Roman law property is a *real* right or right *in rem*, because the right to a thing possessed is good against all the world, while a *personal* right or right *ad personam* proceeds from a private contract and is good only against the person with whom one has made the contract.

So the property rights in Kant's theory are also not based on occupation and use, as in Locke, but on the *rational intention* of a member of society to occupy a thing and make it his possession by subjecting it to his *will*. Society must recognize this rational intention on the part of its member and it therefore has a right to confer individual property rights. And of course it follows from this that the state must have a certain reserve authority to intervene in the distribution of property in the name of the public good.

12. *Ibid.*, p. 83 sq.

Again we see that Kant in fact does not allow the existence of private contracts, that all contracts in his view are dependent on acknowledgement of community, so that every *contract* necessarily has a *social* dimension; every contract is already a social one. He indeed understands people's rights as their possession, but as a rational one, which need not actually exist.

We can now answer the question as to why Kant's understanding of the private sphere is so narrow and that of the public sphere so wide. Given what has been said already, we can easily recognize in his political theory a *mercantilistic* scheme of public or governmental control and regulation of the field of citizens' private behaviour and political conduct and the sphere of economic relations in which government is obliged to take care of the public good.

We must be aware that in the Germany of Kant's day, public opinion, both as a theoretical concept and in political practice, was still at an early stage of development. Public opinion as we understand it today, that is in its classical form, did not appear until the 1830s,¹³ when it finds its place at private meetings and in newspapers, but even then it has to contend with censorship.¹⁴

Absolutism was still firmly in place, strong and intact. Consequently, the term public still denoted primarily public authorities and there was not yet a separate »private« sphere, liberated from government regulation, part of which would also represent market relations. The private sphere as such was therefore only beginning to develop and was still subject to *mercantilistic regulation*.

The same is true of the development of private law, which was later to be codified through the positivization of natural law, but was still subject to numerous old limitations and needed almost a century to acquire its place and form.

In this historical context, Kant's political ideas are to be understood as an effort to encourage further development of the mercantilistic regulation of the public good under absolutism into a more enlightened form, in the way he thinks most appropriate. Kant in his defence of the function of the enlightened monarch shares the belief of French Physiocrats who defend *legal despotism* as a means

13. Jürgen Habermas, *Strukturwandel der Öffentlichkeit*, Hermann Luchterhand Verlag, Berlin 1962. Slovene trans. *Strukturne spremembe javnosti*, tr. Ivo Štandeker, Studia Humanitatis, Ljubljana 1979, p. 87.

14. Kant too, while writing on such controversial subjects as politics and religion, must consider the possibility of censorship. His experience of it in regard to his work *Religion Within the Limits of Reason Alone*, is well known. He wrote to his friend Mendelssohn: »I am absolutely convinced of many things that I shall never have the courage to say.« This could of course help to explain some of his ambiguities, but it is not enough to change the whole picture of his political philosophy.

of establishing the rule of public opinion.¹⁵ We must bear in mind that in France and Germany at this time, public opinion was even in the view of theorists strictly separated from the legislative function, so that this solution appears as the only possibility for them. But the enlightened monarch remains a fiction. The only possible way towards the rule of law and legislation in accordance with public opinion is a strengthening of the legislative role of parliament as a body of the people's or public's political representatives, which could be achieved only in open political contest and with the participation of the public in exercising influence over political and legislative decisions.

But this is precisely what is missing from Kant's scheme and is something that Kant wishes to avoid. Instead of a political parliament with a legislative function, he demands a powerless parliament of philosophers which should enlighten the monarch. It is indeed true that in the conditions of royal absolutism the insistence on the rule of law and rejection of arbitrary rule is even more important, as Hayek remarks about Kant,¹⁶ and Kant indeed has contributed to such endeavour. The trouble with his theory is that it is not capable of offering a means to secure the existence of the rule of law. And Kant's belief in a monarch's deliberate project to bring about enlightenment and freedom from above openly contradicts Hayek's convictions about planning.

We know that public opinion and its influence on politics, as well as the legal form of private law and the institutions of the free market, which are crucial to the modern understanding of the private sphere, developed earlier in the countries with *common law* legal tradition, that is in Britain and America, than in countries with *Roman law* tradition, such as France and Germany.¹⁷ This was largely due to the legislative role of parliament, also rooted in *common law*, which enables the establishment of the rule of law within a limited monarchy. The mercantilistic phase was there already exceeded and succeeded by modern liberal values of defending privacy, pursuing private interests, exercising influence over legislation through elected representatives and rejecting government interference into self-regulating market relations, which in themselves as a sum of different competing interests are directed towards improvement of the public good. Locke with his articulation of social contract theory stood at the beginning of this development.

We can add here as a comment to Kant's views a historical account, revealing

15. Habermas, *op. cit.*, p. 97. And Pocock is probably right when in contrast to this approach he terms the corresponding contemporary English movement, most notably represented by Adam Smith, *legal humanism*. J.G.A. Pocock, *Virtue, Commerce, and History*, Cambridge University Press, Cambridge 1985, p. 50.

16. F.A. Hayek, *The Constitution of Liberty*, Routledge & Kegan Paul, London 1960, pp. 196-197.

17. Habermas, *op. cit.*, p. 91.

that the term *public opinion*, in the sense of the opinion of the general public as opposed to public authority, seeking to influence, control and shape the latter, has developed from the *private opinion* of the citizens gradually entering discussions in the public sphere, so that public opinion first emerged in discussions at *private* meetings and coffeehouses, where *private freedom of speech* or the private use of reason was regarded as being as essential as daily bread and was in this early stage of its development dependent on secrecy; it needed to be closed to the public in order to survive, because of the dangers of censorship and punishment.¹⁸

Given Kant's rejection of the public or political participation of private citizens with private or, worse still, selfish interests, his well-known example of organizing the society of devils in an essay *Perpetual Peace* might be regarded as merely a symptom.¹⁹

As we have outlined difficulties emerging from a detailed consideration of Kant's political philosophy, we can now review some recent interpretations of the same issue, point out their weaknesses, and raise objections to them.

One thinker who understood the Kantian outlook we have just considered, as an important turning point in the development of modern political philosophy was Foucault,²⁰ who argued that Kant here suggests to the monarch a particular contract, according to which powerless reason should at last by the work of enlightened providence overcome and direct the arbitrary will of the authority, and maintained that Kant's description of the *public* use of reason is directly opposed to a previous conception of *private* freedom of consciousness.

We have already shown that with the limitations that Kant builds into his proposal, he makes himself unable of performing his intended task. We have further shown that in fact these terms are not opposed, but that one developed from the other, and that there is no turning point here, although Kant may have seen one. And we have argued that the *law must not be arbitrary*, that even Kant opposed its being such, and that reason too must not be without power, ceding it completely. As such it would be useless for the intended purpose, as well as an illusion in itself.

But one may discern further, more fundamental reasons for Foucault's insistence on such an interpretation of Kant, revealing as much about him as about Kant himself.

18. Habermas, *op. cit.*, p. 49.

19. I. Kant, *Perpetual Peace*, p. 126; KGS VIII, 366. Could devils be imagined in the role of philosophers? Burke, for example, was more inclined to think the contrary, for he regarded *philosophes* supporting and preparing the French revolution as devils, a danger to society as it is.

20. Michel Foucault, »What is Enlightenment?« in *Foucault Reader*, London 1985.

Foucault is obviously fascinated by Kant's concept of law, his understanding of *law as a command, demanding absolute obedience*. And as Joan Copjec has shown,²¹ this has deeper reasons in Foucault's philosophy. She presents a Lacanian critique of Foucault's understanding of law, for whom desire is identical with law, means obedience to the law, so that in his view *being is obeying*. Desire is supposed to be the accomplishment of law, which is in turn its necessary condition and its cause, so that they are in harmonious relation and law, of course, cannot repress desire.

By contrast, psychoanalysis maintains that the law is based on the prohibition of (incestuous) desire. The subject constitutes himself as the one who rejects desire. Thus Freud in his *Totem and Taboo*²² shows that such views cannot explain either the existence of *prohibition* nor *moral consciousness*, that is interiorization of law.

Such views therefore openly contradict the basic assumptions of Kant's practical philosophy, although this picture of an innocent individual is in turn exactly the mirror image of Kant's publicly reasoning philosopher. The latter, purified of immoral interests and desires and his passions tamed, serves him in the construction of the categorical imperative, connected with the belief that reason alone can motivate an individual to act. The categorical imperative in its purity is the sole source of good and everything beyond it is evil. Such enlightened rationalism was criticized by thinkers as early as Hobbes and Hume, who maintains that behind every action of an individual lies his desire, and Freud's fundamental argument was basically the same.

The Lacanian perspective reveals that the categorical imperative itself, although it should serve as a support for or even an expression of an individual's autonomy, destroys the illusion of his autonomy, for it excludes the individual's most personal and intimate characteristic, namely his desire, which is not translatable into the public sphere or public discourse. It is the erasure of the individual. Some problematic consequences of a such theory in a field of politics have already been pointed out; others of a moral nature appear, for example, in Kant's polemic with Constant.

Psychoanalysis in its experience does not find any categorical imperative: what is more, its claim is that this position is untenable and therefore inaccessible; it cannot be achieved or sustained. Psychoanalysis discovers only the command of the Superego: *Enjoy!* This command maintains the irreducibility

21. Joan Copjec, »The Orthopsychic Subject: Film Theory and Reception of Lacan«, *October* 49, 1989; Slovene trans. »Ortopsihični subjekt: filmska teorija in sprejemanje Lacana«, in *Hitchcock II*, Analecta, Ljubljana 1991.

22. Sigmund Freud, *Totem and Taboo*, in *Pelican Freud Library*, vol. XIII, Penguin, Harmondsworth 1985.

of desire and at the same time charges the individual with guilt for his desire, which is the basis of his subjection.

In contrast to what is frequently asserted, Kant did not discover the function of the Superego, he merely revealed one of its dimensions with his unconditional demand for absolute obedience to positive as well as to moral law. Thus, he fails to consider possible conflicts between the two, and on the other hand he does not see that the categorical imperative is not a way of escaping from desire, that there is no such way, that the interiorization of law never succeeds entirely and that the individual has to face with his desire and recognize it. Kant only succeeded in an absolutization of the individual's subjection,²³ and because he repressed desire, he would have to deal with the *return of the repressed*, appearing as the *radical evil* in the form of the categorical imperative.

If Kant's enlightened rationalistic theory tried to get rid of private interests, but could not offer a satisfying solution, the political theory of his time, for example in Adam Smith, had elaborated a more suitable answer as to how to deal with people's desires and private inclinations, that is by transforming them into (economic) interests and thus making them lawful and beneficial for society. So we can now move to a context where this process is understood as a precondition and which marks another stage in the development of the concept of public opinion.

We will consider the view of one of the most important advocates of public opinion, namely Edmund Burke. Analysis of public opinion as one of the most important issues in political philosophy and practice plays a central role in his thought and with him the concept of public opinion attains its classical form. Writing about America, he observed:

»In a free country every man thinks he has a concern in all public matters; that he has a right to form and to deliver an opinion on them. They sift, examine and discuss them. They are curious, eager, attentive and jealous; and by making such matters the daily subjects of their thoughts and discoveries, vast numbers contract a very tolerable knowledge of them, and some a very considerable one... Whereas in other countries none but men whose office calls them to it having much care or thought about public affairs, and not daring to try the force of their opinions with one another, ability of this sort is extremely rare in any station of life. In free countries, there is often found more real public wisdom and sagacity in shops and manufactories than in the cabinets of

23. It is worth noting that Adam Smith's notion of the *neutral observer* as a foundation of morality and judgement about public matters, which served Kant as a model in the construction of the categorical imperative, has no such absolutistic implications.

princes in countries where none dares to have an opinion until he comes into them. Your whole importance therefore depends upon a constant, discreet use of your own reason.«²⁴

This opinion, already the result of *private* reasoning and reflections of *private* individuals on public affairs in public discussion, with the pretension of being publicly, commonly relevant, Burke names »general opinion«, but it was soon given the name *public opinion* by the Oxford Dictionary in 1781. We have seen that Kant behaves almost as if he does not notice this difference, which for Burke is self-evident, of how private opinions are involved into public one. Burke's eager and attentive discussants need not be Kantian scholars or philosophers, and if they are jealous about the course of political events, they of course do not exclude their private opinions and interests from their considerations. Indeed, they do not hesitate to express their disagreement with certain acts of government which run counter to this general opinion. Thus, Burke notes on another occasion:

»I must beg leave to observe that it is not only the individious branch of taxation that will be resisted, but that no other given part of legislative right can be exercised without regard to the general opinion of those who are to be governed. That general opinion is the vehicle and organ of legislative omnipotence.«²⁵

The influence of public opinion upon the exercise of government is in Burke's case far more direct than in Kant's. Public opinion needs not subject itself to the demands of the government, it is the vehicle of legislative function, so that legislation should be performed according to the interests of public opinion.

Private interests and opinions are of course involved in the general opinion and the public acts according to them, but Burke is convinced that people can distinguish the appropriate use of political power from its misuse, so that politicians who ignore public opinion and its interests surrounding a specific issue, and so lose the trust of the governed, are to be blamed for public resistance. There is no trace here of Kant's reasoning that people should do nothing but subject themselves to even unjust laws of the state.

But of course public opinion is not Burke's only concern. He also involves himself in a polemic about social contract, evading, in contrast to Kant, its rationalistic foundations, and arguing in a famous fragment, which no inquiry into the development of social contract theory should overlook:

»Society is indeed a contract. Subordinate contracts, for objects of mere

24. *Burke's Politics*, ed. Hoffman and Levack, New York 1949, p. 119.

25. Edmund Burke, »On the Affairs of America«, in *Burke's Politics*, p. 106.

occasional interest, may be dissolved at pleasure; but the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead and those who are to be born.«²⁶

This fragment reveals a genuine conservative background and it is indeed to become one of the central elements in a conservative outlook. It is not a direct rejection of the theoretical frame of the social contract and at first sight it appears to be merely a shift of emphasis within it, but closer examination reveals a series of far more important differences. We shall therefore see in it not only the traditionalist component, although that is of course present, but point out with Pocock²⁷ that Burke in his reinterpretation separates the very notion of social contract from its *Roman law* context, characteristic by its understanding of law as an order, an expression of will of the lawgiver, its creator, a context within which contract theory was placed at least from Hobbes on. This context serves Kant's purposes very well, because it fosters the view that it is enough, and at the same time the only appropriate and possible way of changing or improving the law, to persuade the sovereign monarch as a lawgiver with rational enlightened arguments, demanding at the same time absolute obedience to the law.

But Burke replaces this context by placing the notion of social contract within the English *common law* tradition, the tradition of that insular English form of law, used and developed in king's courts and considered by the House of Commons in making their statutes, defined by Coke as immemorial and prescriptive law, that English Janus, as Pocock termed it, because it remains always the same and at the same time always changes and adapts itself to new circumstances, if legal experience approves them. This law has no lawgiver, its origin is beyond memory and it is the result of the accumulated legal reason of many generations, approved by legal experience. Burke also refers to the *common law* myth of the *ancient constitution*, the guarantee of English liber-

26. Edmund Burke, *Reflections on the Revolution in France*, ed. J.G.A. Pocock, Hackett Publishing Company, Indianapolis and Cambridge 1987, p. 84-5.

27. J.G.A. Pocock, *The Ancient Constitution and the Feudal Law. A Reissue with a Retrospect*, Cambridge University Press, Cambridge 1987.

ties and the constitutional role of parliament in legislative power, existing since ancient times, as an ideal necessary to preserve. In regard to this context, which was the cornerstone of Whig ideology, Hayek quotes Burke saying that *laws are not made, but found*.²⁸ And within this ideology Hume could deny that moral rules could be based on reason.

Considering conservative connotations of the *common law* frame, it is not hard for Burke to understand prejudices not as something opposed to reason, but as containing condensed wisdom of the past, a conception that, as much as understanding of legal reason as custom in *common law*, openly contradicts the Kantian rationalistic attack on prejudices. For these reasons Lévi-Strauss could,²⁹ like Tocqueville and Montesquieu before him, favour English liberties, founded on a piece of irrationality, customs, unimportant differences and social codes, in contrast to French rationalistic liberties, based on abstract principles - the prejudices of rationalistic lawyers - in the name of which old historical liberties were abolished during the French revolution and which are regarded as an ideal also by Kant.

Let us put aside for a moment the fact that Burke, like Kant, makes an enlightened appeal for the constant and discreet use of one's own reason, but does not reject the possibility of resistance, as Kant does, a fact that could also be explained in the context of their more fundamental differences. And the latter are also connected with the fact that they are defending two very different political orders. While Kant is writing in conditions and in favour of an *absolute* monarchy, Burke is defending the advantages of a *limited monarchy*, established by the Glorious Revolution but with a much longer tradition in British political thought and practice. Monarchy in Britain at that time was limited, because it indeed represents the most important part, but *a part* nevertheless, of the constitution of government, organized upon an ancient republican principle of *mixed government*, composed of elements of monarchy, aristocracy and democracy. Such a form of government was given the name of *British, mixed or balanced constitution*, because the authority of the crown was limited by the role that the two houses of parliament have in the legislative process, securing at the same time the *balance* in the shares of power of all three main constitutive parts of society. This *balanced constitution* was regarded as the main condition of the rule of law and only protection against the danger of despotism, tyranny, royal absolutism and any other misrule, all of them consequences of disrupted balance of power.

Kant's principal republican egalitarianism, his dislike of aristocracy and rejec-

28. Hayek, *op. cit.*, p. 458.

29. Lévi-Strauss, *Le regard éloigné*, Librairie Plon, Paris 1983. Slov trans. *Oddaljeni pogled*, tr. Braco Rotar et al., Studia Humanitatis, Ljubljana 1983, p. 348 sq.

tion of political compromises mean that among other things he opposes the *British constitution*, which he regards as an illusion, based on false publicity and subject to corruption, not a real and free republican constitution. But this does not make him unable to approve the procedural rule of the British parliament, according to which the king presents his decisions to parliament indirectly, through a speech by one of his ministers, which allows for criticism of the minister's arguments, despite the fact that the authority of king is not to be questioned. Kant uses this rule as a foundation for the role of the faculty of arts in his parliament of faculties which, because he rejects the English political legislative parliament, would be the only truly free arrangement.

As weak as this objection is his denial of the limitation of British monarchy, which in his view remains absolute because of the king's right to make decisions about entering a war, where Kant overlooks that just in his time king or, in fact, his minister, under the pressure of public opinion must actually renounce such a decision.

As we have seen, Burke and Kant hold rather different convictions about the possibility of resistance. And indeed, as Janet Hampton has observed, all theories of social contract must confront the question of resistance and of people's right to it,³⁰ with regard to the extent of power they are inclined to confer on the sovereign. Kant regarded the right to resistance as self-contradictory, because in the case of such a conflict of rights there should be constituted an opposite authority and a judge who should *decide the rights of parties in conflict*, which he regarded impossible and unacceptable.

Burke, on the other hand, does not fear all possibility of resistance; he even approves of it if it is the result of misrule and a demand for a legitimate government. And it is the very *balance* of political power which he defended, together with a consideration of public opinion as the main condition of efficient government, that is for him the best guarantee of the prevention of resistance and at the same time the basis of legitimacy of government. The *balance* and *division of power* which Kant both rejected were precisely the basis of respectively the British and American constitutions. Political philosophy after Kant would therefore have to return to them.

The oddity of Kant's standpoint becomes even more evident if we compare his views with those of another leading proponent of public opinion and its influence on political life, Jeremy Bentham. Bentham strongly maintains that publicity should exist *within* as well as *outside parliament*, because precisely as such it can ensure the continuity of political reasoning and its function,

30. Janet Hampton, *Hobbes and the Social Contract Tradition*, Cambridge University Press, Cambridge 1986, p. 256 sq.

namely to enhance general felicity and to benefit the public good. Parliamentary discussions constitute part of public opinion and must be available to the public, which needs them to keep itself informed. Arguments of statesmen would weaken the strength of common prejudices, so that reason and a spirit of investigation would spread throughout society. Thus the elector's choice of candidate for parliament would itself represent a judgement and conclusion about a given public and political matter.

But parliament can also benefit from judgements of the public. In an elected and periodically renewed parliament publicity is even essential to give *elected* gentlemen the possibility of acting with an insight into the matter. Bentham thus regards public opinion and its criticism as the permanent and supreme *control* over the exercise of political power, which is subject to various temptations. The public constitutes the most important *court* which, even if it embodies conflicting opinions, is incorruptible, strives constantly to enlighten itself and unites in itself all the wisdom and justice of the people, constantly deciding the destinies of statesmen, while its penalties are unavoidable.

Thus, the lively force of public opinion, although still highly imperfect, obtains its influence against the dead statutes, »since public opinion, more enlightened, has had a greater ascendancy.«³¹

Publicity is therefore an absolutely indispensable guide of government and legislation, but it is of course not enough. Society should be ruled by law and all laws should be established through due legislative process in every political body with a share in legislative power, whereas the power of each should be limited and placed under control. In addition, all laws should pass the test of rationality and utility, while the art of legislation also requires skill and proficiency on the part of the legislator, that is familiarity with past and present laws and the purposes they serve.

However, Bentham observes, there are certain political attitudes and views of law that lack reason. Thus, following Hobbes, he undertakes a linguistic analysis in the conviction that much political conflict and unrest is the result of conceptual confusion, false understanding and nonsense. He therefore rejects the concept of natural rights as rhetorical nonsense and opposes the view that government should originate from contract, maintaining that contracts come from government and not vice versa, because contracts derive from government, which is chiefly indebted for enforcing them and maintaining the rule of law, their binding force.³² He also condemns the view that all laws constitute

31. Jeremy Bentham, *An Essay on Political Tactics*, in *The Works of Jeremy Bentham*, vol. II, ed. J. Bowring, Edinburgh 1843, p. 33.

32. J. Bentham, *Anarchical Fallacies*, in *Works*, vol. II, p. 502.

oppression, leading to a declaration of the right to rebellion. All these things are in his view plain *fictions*, fantasies of ignorant people, with no real meaning or physical referent. It is indeed true, as has recently been shown,³³ that Bentham later become aware of the inevitability of such fictions, for in legal theory the use of certain concepts as »contract«, which can only be characterized as *rational fictions*, is necessary and cannot be avoided. These *fictions* therefore do play a role in his theory, similar to the postulates and regulative ideas of reason in Kant's theory, but Bentham is nevertheless much more cautious in admitting their use and in considering possible consequences. Thus, he successfully avoids, for example, the equation of law and reason and the necessary connection of the former with obedience, which Kant supports.

Thus, although Bentham is well known for his saying »*Censor freely, but obey punctually*«,³⁴ which in his opinion distinguishes between a rational censor of law, who may try to exercise his influence in order to legally change or annul a law that is in his view unacceptable, while in the meantime obeying it, or even resolutely try to oppose and prevent the establishment of a proposed law, and an anarchist, who rejects law as such, Bentham by no means demands absolute obedience to any law.

Analyzing the French *Declaration of Rights and Duties of the Man and the Citizen* of 1795, Bentham laughs at the fact that after a long and fictitious speech of rights, the only thing that its author is able to say about duties is that a man's *duty* is to *obey the laws* which are, of course, based on reason.

Bentham energetically rejects such a reductionist and ignorant view, maintaining that »*indiscriminate obedience* is no more to be insisted on with regard to laws in any country, than, under a limited monarchy, passive obedience is with regard to kings.«³⁵ While in a limited monarchy a demand for passive obedience prohibits only open rebellion against the supreme authority and is therefore in no way a wide restriction, it would be much more foolish to demand *equally absolute* obedience to any existent law in the country.

Such an absolute demand would cause just everyday open transgressions of law by many thousands of citizens and the perfect constitution based on such a demand could result only in civil war and anarchy.

Laws are of course necessarily imperfect and thus the law of England, which with all its faults is at least as near to perfection as any other, includes certain laws which, if generally obeyed, would destroy the country. Therefore it must

33. Slavoj Žižek, »Zakaj Bentham?«, in *Razpol* 7, Ljubljana 1992.

34. J. Bentham, *A Comment on the Commentaries*, ed. J.H. Burns and H.L.A. Hart, Athlone, London 1977, p. 399.

35. J. Bentham, *Anarchical Fallacies*, p. 528.

be left to each man's conscience to decide which laws to obey more and which to obey less or even try to evade. Bentham is able to say this because he knows that making laws requires skill, experience and observation and that law is to be regarded as *custom*, which it becomes if it is appropriate, and does not become if it is not. By contrast, Kant as a philosopher of the categorical imperative, does not trust the individual's moral ability and for fear of its abuse demands absolute obedience.

If the Law of Libel were strictly obeyed, continues Bentham, there would be »no more liberty of discussion, publication or discourse on political subjects, in England, than there is on religious subjects in Spain«³⁶ and all people would end up in jail.

A distinction must therefore be made between *disobedience*, which is in England punished slightly, and *rebellion*, which deserves serious punishment. While in France it seems that they have lost the criterion and deny all difference between the two, in England, says Bentham, the best is achieved by constant *infringement* and inconsequent execution of laws.

There is one more point to be noted here, namely that Kant's views have been interpreted within the Rousseauesque scheme of opposition between the *state* and *civil society*, where the state should not interfere in civil society and private sphere, for which some support can indeed be found in Kant's approach, in his distinction between obedience and freedom of mind. We nevertheless maintain that this interpretation lacks consistency. We have shown the illusory nature of this conception of Kant, and furthermore he turns such an interpretation upside down by placing obedience in the private sphere, where freedom should be allowed, and freedom in the public one. We should therefore agree with Ryan that it is not at all evident how Kant tries to sustain this split vision of human nature.³⁷ Moreover, such an interpretation is exposed to another danger, that of veneration of man's natural goodness and understanding of (civil) law as oppression, and hence of making excessive claims for liberty and of undermining the rule of law. To such intentions Bentham unequivocally answers: »The word men, as opposed to citizens, I had rather not have seen.«³⁸

Such views could only cause conceptual confusion; they are nonsensical. For him, there exists only one, rational man under the law which, restricting man's unlimited freedom, renders him capable of freedom under the law.

Bentham also opposes Kant's principal egalitarianism, aimed primarily against

36. *Ibid.*

37. Ryan, *op. cit.*, p. 76.

38. J. Bentham, *Anarchical Fallacies*, p. 402.

the aristocracy, claiming that differences in rights are basic to the existence of society and its organization and that equal rights would destroy it.

We could thus use Bentham's concluding thought to indicate a central difficulty of Kant's theory: just as the French *Declaration* declared rights, which could however be limited by any law which revolutionaries proclaim, the same is true about Kant's political theory. In his theory of social contract as much as in his construction of the principle of publicity, Kant offers with one hand what he authorizes to be taken away with the other.³⁹

Therefore, Kant's political theory, as we have seen, lacks a demand for the limitation of authority. Yet his contemporary Benjamin Constant, whom the French revolution taught the importance of liberty and of limiting the government's power, offers a doctrine of *guarantism*, based on just such a demand. He develops a system of *checks* designed to protect the *rights of the individual* against the encroachment of the state. Constant, also an admirer of the British constitution, strongly *opposes* any *absolute* sovereignty, regardless of who might be chosen as sovereign, demanding a necessary *limitation* on sovereignty and all political power, which should be achieved through a *division of power*, representative government and the influence of public opinion, so that individual rights might be protected, as he says in *Principles of Politics*.⁴⁰

Kant and Constant did, as we know, involve themselves in a polemic about the moral grounds for the possibility of human society, which shows that their views are indeed wide apart. In this polemic Constant asks if we are morally obliged to tell the truth even to a murderer who asks where his victim has fled, and so to collaborate in the murder of an innocent victim, and Kant even here defends the absolutistic view of obedience to a moral rule, regardless of its consequences, even if a guilt in a serious crime is among them.⁴¹

Constant's contribution to political theory lies also in offering a definition of what he named »modern liberty«:

»First ask yourselves, Gentlemen, what an Englishman, a Frenchman, and a citizen of the United States of America understand today by the word 'liberty'. For each of them it is the right to be subjected only to the laws, and to be neither arrested, detained, put to death or maltreated in any way by the arbitrary will of one or more individuals. It is the right of everyone to express

39. *Ibid.*, p. 534.

40. Benjamin Constant, *Principles of Politics*, in *Political Writings*, ed. Biancamaria Fontana, Cambridge University Press, Cambridge 1988.

41. Kant answers to Constant in his work *On a Supposed Right to Lie from Altruistic Motives*, in *Critique of Practical Reason and Other Writings*, tr. L.W. Beck, Garland, New York 1976.

their opinion, choose a profession and practice it, to dispose of property, and even to abuse it; to come and go without permission, and without having to account for their motives or undertakings. It is everyone's right to associate with other individuals, either to discuss their interests, or to profess the religion which they and their associates prefer, or even simply to occupy their days or hours in a way which is most compatible with their inclinations or whims. Finally it is everyone's right to exercise some influence on the administration of the government, either by electing all or particular officials, or through representations, petitions, demands to which the authorities are more or less compelled to pay heed.«⁴²

And he continues: »Individual liberty, I repeat, is the true modern liberty. Political liberty is its guarantee, consequently political liberty is indispensable.«⁴³

It is evident enough that individual liberty of this kind, understood at the same time as freedom from politics, as well as political liberty, have no place in Kant's theory. And if liberty is understood, as Constant defines it, as freedom from interference by the authority of the state in the private sphere, Kant's enlightened rationalistic political attitude appears plainly illiberal.

And Isaiah Berlin has just such a definition of liberty as the absence of constraints in mind, when he emphasizes the difference between *positive* and *negative* liberty, referring to Constant as an advocate of the latter:

»The most eloquent of all defenders of freedom and privacy, Benjamin Constant, who had not forgotten the Jacobin dictatorship, declared that at very least the liberty of religion, opinion, expression, property, must be guaranteed against arbitrary invasion. ... But whatever the principle in terms of which the area of non-interference is to be drawn, whether it is that of natural law or natural rights, or of utility or the pronouncements of a categorical imperative, or the sanctity of the social contract, or any other concept with which men have sought to clarify and justify their convictions, liberty in this sense means *liberty from*; absence of interference beyond the shifting, but always recognizable, frontier.«⁴⁴

Berlin uses this description to distinguish *negative* from *positive* liberty, characterized as *liberty to*. The latter could be described in Kantian terms as consisting in being one's own master, that is free *to* do certain thing, and could become dangerous when that certain thing and a particular view of how to be

42. B. Constant, *The Liberty of the Ancients Compared with That of the Moderns*, in *Political Writings*, p. 310-1.

43. *Ibid.*, p. 323.

44. Isaiah Berlin, *Four Essays on Liberty*, Oxford University Press, Oxford 1969, p. 126.

one's own master are understood as *the only* acceptable and right course. This is the most appropriate ground for a variety of collectivist ideologies which would allow only one unique prescribed way of life.

So Kant too overlooks that his universal and neutral principles and opinions, purified of private interests, according to which society should in his view be organized and laws shaped, are nevertheless certain particular principles, opinions and purposes. And although this scheme appears universal and the only one possible, it is just *one* among a variety of possible views on the matter.

Kant's construction of the categorical imperative as a universal and empty form of moral law faces the same problem. In this construction, as in his articulation of the use of reason, Kant demands the absence of any pathological elements and motives. The difficulty, however, is that they are irreducible. He thus overlooks the inherent performative dimension of the categorical imperative, which could also read: »I act in such and such a way, because *I want the maxim of my action to become the universal law.*« The difference here is only a slight one, but its consequences are far-reaching, because in fact *all* actions, not just good, but bad and evil as well, could meet this formulation. Here the pathological element appears *in the form* of the categorical imperative itself. This is why the form of the categorical imperative suits both *pure good* and *radical evil* acts. The Hegelian interpretation of crime, according to which crime is to be understood as an attempt to reinstate a maxim, underlying criminal act, as a *new general law* instead of the existing positive law, confirms this. And this is something that revolutionaries have always known.

We will end our inquiry with a few concluding remarks. We know, as Schumpeter reminds us, that it was the Reformation which built a theory of royal absolutism against the political theories of scholastics. And if we consider what Pocock somewhere notes, namely that absolutism can best be justified and defended with rational arguments, Kant's theory of *enlightened absolutism* appears in an entirely new light. So Clark observes that every political movement that attacks government, complaining about certain misdeeds perpetrated by it, if successful in overthrowing such a government and having an opportunity to establish a new one, demands for it even greater power than the previous one had, excusing this as a means of preventing similar misdeeds.⁴⁵ Thus he reveals the inner logic of this process of strengthening the power of the authority, which could, besides Kant, be traced equally in Hobbes and in the American and French revolutions.

Kant's philosophy has often been praised for founding morality and freedom in

45. J.C.D. Clark, *Revolution and Rebellion*, Cambridge University Press, Cambridge 1986, p. 80.

the categorical imperative. But if we recall Montesquieu's statement that: »*Liberty* does not mean that man does whatever he pleases, but that he could do what he ought to want and that he is by no means forced to do what he must not want«, Kant's assertions no longer appear so innovative. As a leading modern theorist of *republicanism*, Montesquieu describes an active and virtuous citizen as a patriotic subject of the rule of law, loving the laws of his country and acting politically from this motive. As we have seen, Kant's troubles begin with the second half of Montesquieu's definition, with enforcement of certain citizen's actions by the state.

As Pocock remarks, there exists an important difference between theories of social contract and classical republican theory.⁴⁶ While the former is centred on questions of sovereignty, law and rights, given to the people by the law of the sovereign, it cannot define the personality of the active citizen and the abilities that enable him to participate in the exercise of governing, on which republicanism concentrates. And while contract theory is preoccupied with the problem of resistance, the main problem for republican theory is what it calls *corruption*, that is the *destroyed balance* of government.

Of course, we must bear in mind that Montesquieu takes the *British balanced constitution* as a model for his political theory and as an embodiment of the republican credo. So too Burke's theory, which interprets republican *virtue* as *manners*, supporting morals and representing a new form of virtue, is based upon this republican tradition.

There are however two ways of participating in matters of government. While classical republicanism was centred upon participation in *representative* institutions of government, another view developed with Burke: that of *public opinion* as a means of exercising influence over government. Uniting in this way these two elements of modern republican political theory, he became able to offer arguments to both sides in the controversy over the Reform of parliament in 1832, when the possibility of opening parliament to a greater number of representatives of public opinion was discussed.

Kant tries to unite two other political concepts, those of *social contract* and *public opinion*, which prove to be much harder to reconcile, because he overlooks the importance of the main condition for the efficiency of public opinion, that is the republican concept of participation through political *representation*. He thus encounters serious difficulties and we have seen what strong obstacles he erects to public opinion.

Indeed the concepts of social contract, demanding neutral and *universal* laws on one hand, and of public opinion as necessarily *imperfect* on the other,

46. J.G.A. Pocock, *Virtue, Commerce, and History*, p. 44 sq.

therefore play two different roles in political theory, which could be compared with the Kantian notions of the ideal, or even *noumenal*, sphere on one hand, and the *phenomenal* sphere, on the other. At the same time this explains why these two concepts have different histories and have developed in large degree independently of one another. They could of course appear in the same theory, each serving as a supporting argument to the other, but they could just as well be opposed, in view of the fact that each could be given very different articulations.

In his construction of public opinion, Kant did not admit particular interests, nor did his absolutistic attitude admit the existence of different branches of political power. In spite of certain misleading statements made by him, it remains the case that he demanded neither *balance* nor *division of power*.⁴⁷

But the development of political theory has followed another line, establishing *division of powers* as an inevitable principle of modern politics. Madison already saw that factions and particular private interests cannot be removed and that their effects can be cured not at the level of their causes, but at the level of their consequences, by opposing and balancing them. Thus, he maintains that »ambition should check ambition« and develops a system of *checks and balances* as the basis of constitutional law. And the rule that »nobody should be the judge in his own case« to which he refers also contradicts Kant's demand that the categorical imperative should be the basis of one's judgement of one's own actions.

We know that socialism is the heir of enlightened absolutism and of a number of its supporting ideas. It is also based on the rationalistic outlook, restriction of private interests and public opinion, in so far as it contains elements of them, on wide-ranging restrictions on private freedom and civil liberty and a rejection of political representation, division of powers and control over them. Socialism represents a very narrow and restricted form of social contract, demanding absolute obedience and giving citizens only a heavily limited number of acceptable rights. Although it is true that socialism is far more strongly influenced by Rousseau, conceiving itself as the rule of a certain »general will«, Kant's influence upon it is not to be underestimated.

Moreover, when the first socialist ideas entered the political stage, J.S. Mill was moved to observe that it was no longer a question of whether public opinion should be considered or allowed, for the reign of public opinion was already a fact, but of how to *create the best possible public opinion*. And he

47. If we bear in mind that the *division* or *separation of power*, as distinct from the *balance of power*, is the achievement of the American Constitution.

knew very well that Kantian philosophers could not offer a solution to this problem.

The presence of heated debate about Kant's political philosophy under socialism, especially regarding the fact that its arguments can be used in favour of the socialist absolutistic regime as well as in order to criticize it, come as no surprise. But the position of critical authors, striving to preserve scholarly innocence and fearful of entering the dirty sphere of political compromise and responsibility, is quite inadequate for a successful criticism of socialism. And another question, also not without a connection with socialism, that Kant's political theory opens and leaves unsolved, is the problem of »decisionism«, which became widely discussed in regard to the work of Carl Schmitt.

Social contract theory of course survives in modern liberal democratic political systems too⁴⁸: they are not democratic in the traditional sense because not all the people contribute decisions themselves, but instead have hired *elected* politicians for this purpose. The rule of law, including the limitation and control of government, are necessary conditions for such a system. And procedures for the change and recall of a government no longer enjoying confidence, which are built into constitutional systems, serve as the solution to the problem of the alienation of the rights of the governed, so that *resistance* becomes unnecessary, while *public opinion* has a very important role in exercising control over government and demanding of politicians that they take responsibility for their actions, if this is considered necessary.

We will end with the claim that recognizing the theoretical and political context and consequences of Kant's theory, which we have attempted to outline here, might enable us also to give a more accurate evaluation of present political theory. Thus Rawls, as a Kantian contract theorist, cannot be seen as the author of the only appropriate current theory, but we must also acknowledge all the relevance of Nozick as Lockean and Hayek as Humean Whig. The extent and inefficiency of bureaucracy, for example, is the problem which threatens the theory of the first and about which the latter two theorists have a lot to say.

If one were to suggest that what is to be undertaken is a return to Kant, we should therefore be aware that this attempt in itself has no greater value than, for example, a return to Hobbes, Burke or Bentham. In each case knowing the past enables us to understand better our present.

48. Janet Hampton, *op. cit.*, p. 284.