

Constitutions, Elections and Public Opinion: Montesquieu's 4th Pillar of Power?¹

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Excellencies, my learned Colleagues,

Ladies and Gentlemen,

Friends!

I.

First of all, let me thank the organizers of this conference for their invitation, because it is rather courageous to invite a German Law professor from far away to speak about a bundle of complicated subjects under discussion in SEA. Some of you may spontaneously say these subjects are too important to leave them to the Law Faculty, while they might argue, in contradiction: They are too complicated to leave them to the political sciences and neighboring faculties. The truth is in the middle: The theme of your conference touches several areas and is manifold and complicated by definition and in the competence of scholars from various fields.

Winston Churchill said during WWII, "We live in exciting times" and he added: "Perhaps somewhat too exciting." That indeed seems the situation in SEA countries and in

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Thailand as well. The situation in some of your home countries is manifold, complex, and ambivalent or at least unclear. A scholarly theory in one member country is not acceptable for the neighboring one and difficult to analyze for an outsider, even if he knows SEA a little bit.

So my paper of today is not designed to try to develop a more or less brilliant theory or a breathtaking overview, but it is more or less a bunch of different pieces of a mosaic and we will see at the end of the day or this paper, if it makes an understandable picture called – “actual views on modern democracy” or if it is still a puzzle with missing links.

Not at the end of this day, but during the next 30-40 minutes I will touch upon some of the constitutional – political cornerstones as the question of democracy in general, direct democracy, public opinion, elections, participation, and accountability and constitutional law and constitutional courts. As you might argue: Each of these subjects is worth its own conference, but the keynote lecture should be more like a buffet where you can pick the delicacies for further consumption, digestion, and discussion.

II.

To start with and at the same time well known and hotly disputed notion, the notion of Public Opinion. If I would ask you for a definition, I am sure to get a high number of rather different ones. As a constitutional law professor, we usually draw a strict theoretical borderline between the text of the constitution and public opinion and the connection to both is made more complicated by the theories of the interpretation of the constitution. Outside the US it is not so clear, like what the Supreme Court says, “The Constitution is what the judges say it is.” If you go deeper into this question, you will be really impressed by the extremely high number of scientific and scholarly publications in this field inside and outside Western Europe, but not a superseding unique theory. And you do not find a

clear-cut definition of public opinion acceptable for a constitutional lawyer and a political scientist altogether.

In a case like that - what can we do, when even the most knowledgeable scholars in different countries do not agree on a common single definition of public opinion? As a typical German Law Professor, I take the chance of going back into history and I will pick famous authors when my own arguments are not strong enough.

The English term “public opinion” is not a modern trendy one, but it goes back to the 17th century and the work and writings of John Locke’s *Essay Concerning Human Understanding*. This essay contains an early consideration of the importance of public opinion. In the system of politics, the term was derived from the French word “L’opinion” which was first used in 1588 by the famous author Michel de Montaigne and before it came from the Latin word “Opinio”, *opinionis* = belief, expectation – clearly with a somewhat uncertain sense. The concept of this notion – of course, at the beginning, only in the hands of scholars – developed through the following times through urbanization and other social-political factors. In short: At a very early stage, since the 17th/18th century, it had already become important what people thought. Under people of course we do not see the poor peasants, farmers, etc. James Madison stated later that for a good government to be democratic it would be essential to have strong and knowledgeable citizens, which hold educated opinions that could be shared and expressed. Active citizens then would use this knowledge to participate in their government, with also being able to inform other citizens of current issues. In the terms of political science and in the sense of the political philosophers - not in constitutional law! - Public opinion seems to be defined as the aggregate of public attitudes and beliefs about government and politics.

So public opinion is considered to be the factor that guides an indirect democratic government. It is only through the approval of the public that a government gains the authority to function (example: Breakdown of the GDR-East Germany). Therefore, it is astonishing that the old political theories find some proof in the 20th century.

As early as in the 17th century the emergence of public opinion as a significant force in the political realm can be seen. But the importance can be seen in singular traces much earlier: William Shakespeare had called public opinion the “Mistress of Success” and the French philosopher Blaise Pascal even called it the “Queen of the world.” This astonishing early occupation and realization of the notion is also seen in John Locke’s treatise quoted above, when he considered that man was subject to three laws:

- 1) The Divine Law
- 2) The Civil Law
- 3) The most important in the eyes of John Locke: the Law of Opinion and Reputation.

However, he did not consider public opinion as a suitable influence for governments. William Temple in his essay at the end of the 17th century, *On the Origin and Nature of Government*, stressed the importance of public opinion and contradicted the common opinion that the basis of government lay in a social contract and thought that government was merely allowed to exist due to the favor of public opinion. So we see that public opinion was accepted as an existing phenomenon, but not all scholars had a unique positive judgment about that during their lifetimes.

The prerequisite for the emergence of the phenomenon of a “public sphere” were the general increasing levels of literacy, reading societies, and public libraries. When the people became more and more educated – still a restricted number of citizens – the awareness of a public sphere and public opinion was more and more common. The social changes, in which a closed and largely illiterate public became an open and politicized one became of tremendous political importance in the 19th century as the mass media of the time was circulated even more widely and literacy was steadily improved. Governments increasingly recognized the importance of directly managing public opinion.

Jeremy Bentham was an impassioned advocate of the importance of public opinion in the shaping of constitutional governance. He even thought that it is important that all government acts and decisions should be subject to the inspection of public opinion, because “to the pernicious exercise of the power of government it is the only check.”

III.

But there were critical voices in history as well from time to time: So JJ Rousseau who put public opinion in its modern political place, demanding that law should start from a general will – la volonte general – still spoke of opinions also in the traditional pre-democratic way. In his book (*Nouvelle Heloise*), he compared public opinion with vain prejudices and contrasted them with the eternal truths of morality: “Whoever makes it his business to give laws to the people must know how to sway opinions and through them govern the passions of men.”

Already very early the crucial question came up: To what extent should public opinion be allowed to shape and influence government politics. John Locke did not advocate the view, however, that popular opinion should govern the actions of government. He used the phrase of the “law of private censure” as a synonym for the “law of opinion.” His really critical view was the “law of opinion” to be nothing else but the consents of private men who have not enough authority to make a law.”

And William Temple did not speak of public opinion. He mentioned only “opinion” or “general opinion.” He even used the word “vulgar opinion.” The phrase “public” he reserved for the common good or the common interests of the nation. The discussions during the 18th century came to the result that governments should take account of the popular opinion instead of merely impressing their law on the people. Jacques Necker, the French Minister of Finance, was the first author to popularize the term public opinion throughout Europe at the eve of the French revolution. He spoke of “imagination and hope” as the “precious precursors of the opinion of men.” But it seemed impossible for the older writers and authors that the “multitude” should know more about government than a good ruler, an experienced counselor or minister, or political philosopher. Only when economic and/or social inequalities were abundant and parts of elements of the population became unwilling to put up with political inequality, then the claim could be advanced that the

government should make concessions to public opinion.

Public opinion could always only be a phenomenon of the middle class civilization. At the end of the ancient regime at the turning point of the French Revolution in France one of the king's ministers wrote to him as a warning in view of Necker's words: "If M Necker's public opinion were to gain more support, Your Majesty would have to be prepared to see those command, who otherwise obey and to see those obey who otherwise command." To compare that with later development:

While 19th century Europe had an almost patrimonial character and public opinion was a synonym of opinions expressed by the political representatives of the electorate, by the newspapers and by prominent members or organizations of the middle class. So clearly there was a decisive importance of the class distinctions in limiting participation in forming the public opinion. Lord Bryce pointed out for Britain, "Public opinion was substantially the opinion of the class which wears black coats and live in good houses." I wonder if this might be over 150 years later applicable in a different form for some of the countries here at the conference. For some European countries I can clearly answer in the affirmative.

And with reference to John Locke's remark about the above quoted "law of opinion" one might say, that the King was clearly warned of the phenomenon of public opinion, because the people who expressed and formed it, had suddenly enough authority to make a law. As a typical example, Thomas Paine remarked in view of the French Revolution that the mind of the nation had changed beforehand and the new order of things has had naturally followed the new order of thoughts. "This observation that the general habits of the public Frenchmen had become republican while their institutions were still royal and monarchical is well sustained by modern research, although it should be borne in mind that it was a relatively small class by numbers, which had slowly changed its habits and its general opinion." There is by the way – to mention this shortly – a connection between public opinion and public debt/public finance. Finance Minister Necker's great contribution was an important innovation, namely the publishing of fiscal statements – so that the

merits and defaults of government policies could be praised or condemned in public. This was primarily – as Mme de Stael, Necker’s daughter, said - an important means to pacify public opinion, because the government was forced by its needs for public credit. Necker himself insisted that the will of the public should not take the place of government. Therefore, we have a kind of transitional phase between pre-democratic-republican and revolutionary-democratic views of public opinion.

IV.

So we can state that under a historical viewpoint, the public opinion serves the democratic development as well as revolutionary movements.

The further institutional changes in European society led to the emergence of public opinion as a prominent factor in politics. The process and progress were made much more rapidly during the 19th century than in the 18th. The elimination of prejudice, ignorance, and arbitrary government, which the advocates of the movement of enlightenment proclaimed to base the commonwealth, instead upon reason and civic virtue is frequently regarded as a rationalistic program. The “irrational factors” of human nature were disregarded and seen as propaganda. This propaganda has often been presented as the counterpart to the process of public opinion. It was believed that man guided by reason would reduce politics to a calculation in happiness and do away with war. We know that this is philosophical dreamland. In this context falls the opposite view, what William Pitt called the “armed opinion” and others writers spoke of as a “war of opinion.” In the framework of the French Revolution, William Pitt remarked in *Heloise*, We are at war with armed opinion, we are at war with those opinions which the thought of audacious, unprincipled, and impious innovations seeks to propagate amidst the ruins of empires, the demolition of altars of all religions: In short, a war against the ideas and opinions of the French Revelation.” And that it was not a war only in theory as history shows.

To go on in history and watch the development of public opinion we notice that after the famous Congress of Vienna in 1815 the unitization of public opinion in international affairs became respectable also among statesmen. So the British diplomat in Vienna, Cannings, noted the public opinion now as “a power more tremendous than was perhaps ever yet brought into action in the history of mankind.” You can imagine that a diplomat of the old school like Metternich was appalled by this enthusiasm and could only see folly and naiveté in this remark. Nevertheless the art of arousing and using public support became a valued skill during the 19th century, including statesmen like Bismarck even if he failed to respect public opinion and remained indifferent to its moral claim. In general Bismarck condemned policies inspired by sentiments and moods, because he regarded public opinion as dependent to a large extent on mood and sentiment, incapable of calm calculation. This calm calculation had to precede political decisions and furthermore he did not believe in the political insight of public opinion. When he regarded it as necessary, Bismarck made foreign policy that went against public opinion, as long as he had the confidence and trust of his monarch. Two examples: in 1866 he waged war against France against the clear will of almost all Prussian citizens and won this war. But he also refused the risk of war against Russia with interfering in Bulgaria – against a clear majority in the public opinion.

In the early phase, public opinion showed a clear pre-occupation with domestic affairs – with issues of immediate concern to the life of the citizens. Foreign policy issues appeared less relevant. But that has totally changed. Woodrow Wilson stated the gospel of public opinion as a purifying force in world politics. Already since the end of WWII the trust in the power of public opinion to render world politics reasonable has been pretty much shaken. Many events contributed to this demoralization: The failure of the League of Nations, the general distrust of propaganda, which spread between the two world wars, the rise of fascism and national socialism in countries of old civilizations. In addition the quick transition of wartime – coalitions into intense hostility between its former partners before peace was formally established. So the hope that public opinion would be able to solve the

problems of international policy has more or less vanished. Nevertheless, in democratic countries of our times, foreign policy makers especially continue to address public opinion in order to obtain ultimate approval for their action and, on a deeper level, to get absolution from the moral uncertainty, which public opinion demands of them until they do so. See classical examples: The US entry into WWII, the acceptance or non-acceptance of the Vietnam War, the dispute around the legality or non-legality of the Crimean occupation etc.

As we have seen, the importance of public opinion has been identified at a very early stage in history, as primarily a communication from the citizen to the government and only secondly as a communication among the citizens. It has to be noted, that if a government effectively denies the claim that the opinions of the citizens on public matters be relevant in one form or another for policy making or if it prevents the free flow of such opinions, the result is totally clear: a public opinion does not exist. For public opinion to exist and to function there must be free access to information in matters with which public opinion is concerned.

V.

Back to modern times: Today contemporary quantitative approaches to the study of public opinion are numerous and difficult to overview. The rapid spread of public opinion measurement systems around the world is a reflection of the number of uses to which it can be put. Public opinion can be accurately obtained through survey sampling. Both private firms and governments use surveys to inform about public policies and public relations. It would be a special subject to analyze the quality and interpretation of such surveys.

The German social theoretical thinker Jürgen Habermas contributed the idea of the “public sphere” to the discussion around public opinion. This public sphere is, according to

Habermas, an area where something approaching public opinion can be formed: This means universal access, rational debate, and disregard for ranks and hierarchies. But these three features for how public opinions are best formed are no longer in place in western liberal democratic countries. Public opinion in western democracies – and I would dare say, in others as well – is highly susceptible to elite manipulation. The sociologist has proposed a different conception of the “public”: In his view public opinion is discussed as a form of collective behavior, which is made up of those who are discussing a given public issue at any time. Given this definition there are in fact many “publics;” each of them comes into being when an issue arises and ends its existence when the issue is resolved. Therefore, people participate in public in different capacities and to different degrees. That has consequences insofar as the public opinion polling cannot really measure the public as such.

No doubt, public opinion plays an important role in the political sphere. Even if not existing: before it may develop within a small timeframe with the force of an explosion – if you only think of the uprisings in the Arab countries and the now forgotten Arab spring, cutting across aspects of the relationship between government and public opinion, for example the voting behavior of citizens. It is not astonishing that we find a multitude of researches, theories, articles in nearly every country with different highlights and chosen central points.

The formations in dynamics of individual opinions are subject to numerous theories and explanations as well. I will not go into details, because many of you may be much deeper informed and more qualified in these questions. So let’s have some remarks about the mass media effects on public opinion and the role of the so-called “influential” in public opinion. This is a subject of hot and controversial debates over the years. There is no doubt about the fact that, in the framework of mass media, there are effects on the way formation of public will start: With agenda setting by major media outlets throughout the world. This kind of agenda decision dictates what is net- & newsworthy and how and when it will be reported. A second decisive factor in the formation of public opinion is framing. Framing occurs when a story or piece of news is portrayed in a particular way and is meant to sway

the consumers' or the voters' attitude in one way or another. It is obvious that most political issues are heavily framed in order to persuade voters/consumers to vote for a particular candidate.

Another key component to the formation of public opinion is social desirability. What does this word mean? Social desirability is the idea that people in general will form their opinion based on what they believe is the prevalent opinion of the social group they identify with. Based on media agenda setting and media framing a particular story rather often gets repeated throughout various news mediums and social networking sites, until it creates a possibly false vision where the perceived truth can actually be very far away from the actual truth.

In short: public opinion can, of course, be influenced by public relations and the political media. In addition, mass media utilize a vast variety of advertising techniques to get their message out and change the minds and opinions of the people (lobbyism). One can say that since the 1950s, television has been the most important medium for molding public opinion. If you look back in history, we can state that at the end of the 19th century, a single book could still motivate the public opinion in national affairs, like the book of Emile Zola ("J'accuse" in the French, the so-called Dreyfus affair in 1898). Rarely would a single book be able to have such an influence today. One last remark to explain the formation and dynamics of individuals' opinion: an opinion in connection with it we find aspects of psychological research on attitudes as well as communication studies and political science theories. We have, for example, a really large number of academic studies and theories investigating whether or not public opinion is influenced by the so-called influential, which means persons, who have a significant effect on influencing the opinion of the general public. And I am perhaps not mistaken, when I have the impression we have quite a majority of these so-called influential in this audience. Of course the influential may be influenced themselves.

VI.

Some authors have described the transfer of information from mass media sources to the general public as a “two-step-process:” In the course of this process, information from mass media influence influential and then influence the general public as opposed to the way mass media directly influence the public. More recently, some authors suggest that while the influential play some role in influencing public opinion, also non-influential individuals, who make up the general public, are also just as likely to influence public opinion, provided that the general public is composed of citizens who are easily influenced. That means, influencers interact with each other as well as with the general public. This means, in consequence, that there seems to be a rather complex flow of different sort of influences among the most important three institutions involved in influencing public opinion:

1. The Media,
2. The Influencers, and
3. The General Public.

You may further interpret or differentiate and deduct individual, group, and official actions as parts of a single system and reduce politics and government policies to a result of three basic analytical terms:

1. Society,
2. Culture, and
3. Personality

Public Opinion has a strange psychological background: It does not permit the enjoyment of power, because it suspects that its enjoyment already indicates its abuses. Public opinion, which appropriates to itself the moral standards to be applied to power, wants power to really be a burden which it alone can lighten. That this sometimes may turn even the most legitimate power upside down on a moral scale – only due to the fact that power is power – may lead to less convincing judgments. That also today accrual events

play an important role in the international arena can be seen in the case of the occupation or recovery – depending on where you stand – of the Crimean territory – there is indeed a war of public opinions evidently not leading to a peaceful result. There are a number of other world conflicts, which give little hope in the context of public opinion.

Our short historical excursion and the overview on the ambivalent and complex and sometimes contradicting development of public opinion show the manifold character of this phenomenon. Some British authors draw the attention in the last century to a neighboring institution of public opinion, and said that of similar importance is democratic participation and in his view the existence of public opinion meant participation. We already stressed that the emergence of public opinion was and is an important and significant force in the political realm. If we try to see that under the heading participation and constitutional law, it is of paramount importance in state functioning. Participation is an Anglo-American term and critical European scholars have categorized it as a trendy fashion word, which is not justified.

While public opinion can exist without or outside or in addition to constitutional law, the principle of the participation in the functioning of the state or in the influence on political decisions has close connection to constitutional law because it has to have its fundament, its legitimation or admissibility in general or specific norm of the constitution or at least in underlying principles. This does not mean that it has to be stated in the precise wording of the constitution but at least in the constitutional fundament of ideas. Insofar as you may identify public opinion as an extra-constitutional phenomenon, you will – as far as my knowledge goes – not find the wording “public opinion” in any written constitution. But without any doubt, public opinion and participation range in the selection of democratic tools in the category of what I would call “increased modern democracy” or even in the sector of a certain political kind of “power-sharing.” Both institutions reflect a common psychological dynamic: an impetus to postulated dynamics as under them or with them a change of the status quo may be possible or desired. This may result in the fact that more freedom is demanded sometimes even in line for the overturn of the establishment –

events that may lead in an unconstitutional situation or into action to be judged as unconstitutional. The interplay between public opinion and participation may then sometimes be difficult to divide.

But of course, this is an over-ambitious political dimension and much more than power sharing, more like power taking, but we know how easily developments get out of hand. Therefore, we have to distinguish “participation” from “democratization,” although both concepts are similar in their common aspiration for what we call a “change in our society.” So we have to make another distinction between institutionalized and non-institutionalized forms of citizen participation. This is the case for example between referenda and mere expression of opinion and citizens’ spontaneous movements and actions. Second, also direct and indirect forms of participation should be distinguished. The 1st allows the citizen a degree of direct influence upon state functioning, through elections and voting. The 2nd merely permits actions influencing the forming of the political will of the people, and usually that is through the legitimate political parties.

Finally, the forms of participation in indirect and direct democracy must be differentiated. Under the constitutional umbrella of the democratic principle we find a wide variety of procedures being left to the political arena. This may concern the themes, subjects, time frames, and participants. As to the participants: Educated individuals participation is clearly more important than that of a drinking person. “The mass,” in which people independently make decisions like which brand of soft drink to buy, is a form of collective behavior, totally different from any kind of “public” quality and nature. So let us start from the beginning: The basic rule in constitutional law is usual equal in all constitutions spelt out in the German, French, and Italian constitutions:

“All state authority emanates from the people.” This classic formulation of democracy embodies the underlying scheme, which legitimizes this form of government. There is also a sarcastic version of this paramount declaration of democracy: All state authority comes from the people – But where does it go? Anyway: The people are the

source of state authority and thereby lead and implement the idea of “sovereignty of the people.” But in any case, an identity of the rulers with the ruled in a modern, industrial, large size states remain unattainable.

If you argue, “But with direct democracy, what about that?” Also a direct democracy – as Switzerland in a certain way – would not be identical – to absolute self-government by the people, since in this case the opinions of the minorities and non-voters would be passed over.

VII.

In today’s extremely complex societies the people as such are definitely not capable of responding to and answering by referenda the enormous intricacies of national life and international policies. In consequence, in the majority of existing constitutions, it is determined that the state authority is executed by the people by means of election and voting and by special legislative, executive, and judicial organs. This permits the selection and legitimation/legitimization of representations. There is no alleged identity between the rulers and the ruled – the granting of a mandate by the people and the accountability – I come back to that notion in minute – of the mandatories constitute the decisive center of the democratic principle.

As we are in Thailand and being a foreign guest, a “farang,” I hesitate somewhat to touch even a general question: What about a new or reformed constitution: The eternal question in objective and neutral constitutional thinking is clearly the question of legitimation and the legitimation by whom? And how? Usually that is not a big or complicated thing in almost all member states of the EU, because we almost only deal with amendments letting the original constitution live on as long as possible. There are regularly amendments – in the German constitution there have been 45 in the last 70 Years.

(Amendments were, for example, the incorporation of handicapped persons in the fundamental principle of equality, the protection of personal data, etc., like the change in the original fundamental law of asylum). All this had to be decided after lengthy discussion in the public sphere by/with the classical two-thirds majority in Parliament. But, what to do when a country wants to deal and discuss a completely new draft of a constitution? You all know how extremely rare the amendments, for example, to the US-Constitution are, and in Germany we had 45 during 70 years.

We know: Thailand has another tradition: After 20 constitutions we are now watching the 21st being born – which would be something, with all due respect, for the Guinness Book of Constitutional Records – compared with European nations. We cannot foresee or judge how the constitutional development and procedure will be, but in the European tradition of constitutional law, the draft has to be voted upon by the nation and the citizens themselves. I am sure you are aware of the French terms “assemblée constituante,” that’s the assembly that forms and accepts the new constitution’s draft and *assemblée constituée* – that is the assembly which has been formed on the fundament of the new constitution. It is finally, in all countries, always a question of legitimation and we must state that a constitution may lose this legitimation at least to a part if the constitution – makers do not pay attention. You see different procedures in several examples of the new democracies in Central and Eastern Europe after the breakdown of the iron curtain – so in East Germany. Every nation has to decide for itself how to realize this legitimation. That may be, for example, by way of a referendum. We in Germany violated this principle at the occasion of re-unification: The eastern part had to accept our western basic law as their new constitution without having the chance to vote for or against it. One of the problems would have been: Should there also be a referendum for the “old” western part, the Federal Republic? And imagine the constitutional national nightmare if the vote would not have been clearly positive. At least this has given the opportunity for numerous dissertations in constitutional law. The majority of scholars are of the opinion it would have been better to let our eastern German people vote upon it, in the form of a referendum.

The nations in Western and Central Europe have made different and ambivalent experiences with referenda. In our German historical experience they were clearly extremely negative. The Weimar constitution of 1919 – after the fall of the monarchy – saw the introduction of numerous plebiscitary elements: So the direct election of the President, which gave him a direct democratic legitimation and quality. Referenda on the national level – except military and finance- and even legislation could be the object of referenda. But the experience with referenda during that time – the 20s and the 30s of last century – was clearly discouraging:

Events during the National Socialist era discredited this form of direct democracy manipulated to a large extent at that time. On three occasions the people were called to a referendum and in all three cases, no open questions were presented, but rather – as the French say – faits accomplis, already existing facts – were to be acclaimed: 1. The withdrawal of Germany from the League of Nations. 2. The renewal of Hitler's mandate as Head of State, 3. The unification with Austria.

In light of these experiences, our distrust in referenda is understandable and you know certainly from your professional experience how you can influence the outcome of a referendum, depending on how you ask the question. An actual classical example is the recent referendum organized by the Russian Federation after the occupation of the Krim/Crimea, formerly a part of Ukrainian territory. The outcome was certain: There was nearly no chance of a negative outcome against the clear tendency to become part of Neo-Russia.

There is of course in principle no public opinion in autocratic regimes; there can only be a suppressed, clandestine opinion – no matter how ingenious or careful the government may be in permitting an organized semblance of its true nature for the sake of democratic appearances. (The elections of candidates in the former East German Parliament usually came to 99% results). To give two examples from German History:

1) There was no public opinion in occupied Germany after WWII under the Military Government despite the speedy liberation of the press and the radio. That was because the

citizens were not free to act politically or able to criticize the acts of the Military Control Council.

2) There was no real public opinion in the former GDR/East Germany. Newspapers, radio and TV were completely controlled and streamlined. The public opinion was an artificial praising of the close eternal friendship with the former Soviet Union. Public opinion was only born at the end of the end of the GDR when in 1989 the masses of peaceful demonstrators shouted: "We are the people." Public opinion was made visible the end of the legitimacy of the government; the breakdown followed.

It is quite another question, if you have referenda on a lower level, e.g., on a regional or community level. They are admissible without restriction and they are mostly effective as well. In the EU they are realized on a broad scale on the basis of an ever increasing number of citizen initiatives. To give you a recent example from Germany: Although with the consent of the Federal Government and the State government, the National German Olympic committee applied for the Olympic Winter Games in a region near Munich. But there was a certain opposition in the mountainous region where the game should be realized – destruction of nature and the environment, investment of huge amounts of public money, useless stadiums afterwards, etc. So they gathered the necessary votes for a referendum in the area concerning the mountains, and the question was simple: Do you agree with the application for the Olympic Games: YES/NO. The referendum afterwards came to a clear negative result: 60% of votes said NO: The project was dead. Here you see public opinion and participation at the same time. But one has to remark that only 55% of possible voters took part in voting. So you see the ambivalence.

But on the Federal or state level, I am skeptical in view of referenda. So the question of if the population, if the citizens of a country, should vote on a new draft of a constitution has been widely discussed in the former countries of the Soviet Union in Central and Eastern Europe – the answer is ambivalent. Yes, if the draft of the new constitution has already a certain legitimation in view of who has made this draft: Is there a minimum

legitimation in the political and academic arena, has the draft been widely distributed and discussed, and is, therefore, the nation well informed about the structure and the fundamental principles? But that takes time and investment of finance and engagement. If all this is not the case, a credendum is not worth the paper, because later there will be critical doubts regarding the legitimation, the information, the acceptance, etc. So in the long run, the investment precautions are worth the trouble. These are experiences in Central and Eastern Europe after the breakdown of the Iron Curtain and the end of the USSR. And these are general remarks, not made for regional or other national examples.

But we have an astonishing amount of effective participation in other fields as to constitutional law. That means that that the chapter participation and the constitution is not simply denied and closed. On the contrary, it is the participation in another field: It is the administrative law which recognizes in many member states of the EU a multitude of possibilities for citizens' participation in state functioning, especially in the area of planning a large number of legal rights of the citizen are secured, from the simple right to be heard to the imposing right of co-determination. No new nuclear plant can be planned, no new motorway be designed, no new airport discussed without the manifestation of the citizens' will and opinion in detailed procedural hearings taking account of environmental, financial, health and historical aspects. Administrative law offers citizens ever-increasing opportunities to participate in state functioning so to say at a ground level. Not constitutional law, but administrative law therefore forms the nucleus of citizens' participation in state functioning.

VIII.

The more the citizens participate, the easier it is for the state administration to stand up against another public duty: That is accountability. This word seems to be as trendy and a

fashion word like participation and you may find many political situations and projects – especially in the sector of development of institutions – which announce they “promote accountability.” Usually it has to do with social accountability and demand for good government. It is in the same framework as our last subject participation, “direct democracy through referenda;” it is here that citizens have the ability to directly hold their government accountable. The demand for accountability very often is a demand for social change as well and may very well condensate into a public opinion. But the publics may also very often not look coherent and competent enough to be a source of such genuine demands. The question is: What counts as evidence for public will and citizens “activism?” In our contemporary industrialized societies, the technologies of marketing consumption and surveying political preferences have developed to a point where maybe scholarly and practical responses to the question: “What does the public want?” or “What is the Public willing to fight for?” start and end with an opinion poll. There are numerous reasons to be cautious, if not extremely critical of the reliability of a randomly sampled but putatively representative public. May I quote again Winston Churchill, who said with sarcasm: “I only believe in statistics which I have falsified myself.”

Across the multiple modes of public political expression, each counts as evidence of the public will in varying degrees conditioned on who the “public” is and how much “will” is in evidence. There may be forms of participation again or at least participatory parts.

A willingness to listen to the public and hear their demands and be held accountable to them is one thing, but sharing power with them or even ceding it is altogether an entirely different matter.

One may remark that many social accountability mechanisms such as citizens’ score cards and rights – to information, legislation – are information – based and geared to mobilize an already authorized public to voice their political viewpoints – but they are not designed to transform or activate other parts of the public that are engaged in a “culture of silence.”

How do you organize a political community in such a way that citizens are truly able to hold their government responsible or accountable? This implies both mechanisms for the active monitoring of public officials and in addition the means of enforcing public expectations. The classical constitutional tradition offers two broad approaches. The first one says the solution is to have regular free periodic elections, separation of powers, and a system of checks and balances, so what Montesquieu calls the sure power check, that means power separated by the arrangement of institutions.

As James Madison said in his famous Federalist Papers, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny” (1788). All these traditional devices of our traditional modern liberal western constitutional democracies with the separation of powers of law making, law executing, and law adjudicating, special majorities for special decisions, checks and balances, bicameral legislatures are in the tradition of political thoughts widely accepted. But meanwhile there seems to be a growing consensus that these constitutional devices are well and good, but they are not enough. We find a lot of representatives of the people in all constitutional democracies, but the crucial question is: Are they truly accountable to the people? Clearly the most effective accountability mechanism is elections; they are of paramount importance but again: They are not enough!

1st argument: In most representative systems accountability is mediated: Rulers are formally accountable to legislatures, not directly to the people. Once the elected rulers survive an election, they can forget about the body of electors, of voters, until another election comes around.

2nd argument: Elections may be a fuzzy and unreliable accountability mechanism. An election involves a vast, complicated package of issues. Of course, it may occasionally stimulate the citizen to – as the British say – “to throw the bastards out.” But it is certainly not a reliable means of making the election lead to accountability on specific issues.

And do not forget: The voting citizen has a short memory; he easily forgets. So the discussion goes to the question to organize a political community in such a manner that the citizens can hold the government directly accountable. This means that one has to find procedures of making sure that the people themselves are able to control the government and that means in consequence that the people have the possibility to sanction misrule. As this problem could be the subject of its own conference, I will not go further.

In the famous paper the “Federalist” (No. 51) James Madison, whom I already quoted, makes the key point that “a dependence on the people is, no doubt, the primary control on the government.” That means ultimately holding the government accountable is the responsibility of the citizens. To quote Jeremy Bentham: “Of everything that is thus done or endeavored at, the success depends on the spirit, the intelligence, the alertness, the intelligence, the vigilance, the alertness, the integrity, the energy, the perseverance of those of whose opinions Public Opinion is composed.” But the story, the misruling has to come out into the open. Officials cannot be held accountable by the citizens if the latter do not know what happened. Once the matter is in the public sphere – what the Greek called the “agora” and the Romans “forum,” – various processes take place simultaneously: The media run the story; more details come out. Debates and discussions ensue not only in the media but also in the conversations that citizens have with other citizens at home, at work, in clubs, in places of religious worship like churches, etc. A majority view begins to develop: That could be public opinion.

The point is, once it crystallizes like that, it can be a critical force in politics and in the end, it demands accountability. Finally public opinion has enforcement mechanisms, as even totalitarian or authoritarian regimes know very well: petitions, sit-ins, demonstrations, protests, strikes, and – if pushed – the withdrawal of obedience and open rebellion. To draw a line: Accountability as a goal cannot be separated from public opinion as a defining input. And it may end in an unconstitutional situation, even drama overriding law and order.

If we ask where these social accountability mechanisms may get support from, we will have a simple answer: Theoretically the most powerful support lies in principle in a country's constitution, which lays out the "ultimate" rules of the game for conducting public business. For constitutional authority to function, however, the government of the day must be committed to enforcing it. Nearly all constitutions guarantee human rights and free speech, but by far not all these states are consequently upholding these declarations (the difference between constitutional text and constitutional reality!). In particular, constitutional assurances of free speech are also frequently restricted – as one could observe in the last election in Turkey. And although guarantees of free elections are probably more consistently honored than those of free speech, even these are regularly violated.

IX.

In the end there are two possibilities: The political will at the top – the will to resist the temptation to harass minorities and to suppress dissent – is all that is needed to make constitutions function properly. Or, and this is the case in many countries in Western as well as in SEA countries, you install a so-called "guardian of the constitution," namely a Constitutional Court. But not any court, but one with an accepted jurisdiction by neutral, competent, and courageous judges – able to judge against a government (as the German FCC regularly does). This is the adequate moment – before I come to the end – to have a look at the connection of public opinion and constitutional jurisdiction and the constitution itself. The field of the constitution and especially constitutional interpretation is quite narrowly connected with public opinion. And of course the influence of public opinion on the Constitutional Courts and Supreme Courts cannot be denied, without saying that this is not legitimate. In a very sophisticated paper by Epstein and Marten ("The Will of the People") the authors ask: "Does public opinion influence the Supreme Court?" And they

answer: “Possibly Yes, but we don’t know why!”

This is an intelligent answer, because it is nearly impossible to validate or research claims about the effect of public opinion on the courts or the judiciary in general. All evidence remains vague. Of course, judges and justices do not respond to public opinion directly, but as the famous US Supreme Court Judge Cardoso said, “The great tides and currents which engulf the rest of men, do not turn aside in their course and pass the judges by.”

What is true for the judges is also true for the interpretation of the constitution. But if you take very different nations like South Africa and the Federal Republic of Germany, it shows that their stability and unity was shaped by their constitutions and their constitutional court decisions, which had a pacifying effect even in hot political battles when their decisions were accepted. So the highest-ranking law – the constitution of a nation – has a paramount importance and should be held in high esteem and respect and not easily damaged in the normal political arena of disputes. Due to my time limit I will not go deeper into it, although it would be worthwhile.

X.

But some constitutions are really rigid and do not any longer correspond to constitutional reality. This is the case when in some countries – especially in two US states – where passing amendments has been made as difficult as possible. The assumption of former constitution makers sometimes seems to have been that eternal wisdom was possessed by the generation entrusted with the making of the constitution, and that the results of their drafts should be crystallized in a permanent, eternal, unchanging form. This indeed is the contrary of a “living constitution” which – especially when it is not too detailed – gives way to new developments without the need of a change. Is it possible to formulate principles for

the framing of new constitutions? Is it possible to lay down axioms of politics like Adam Smith did for Taxation and Tax Laws? And are public opinion and participation compelled to play a role? Until today at least, it would be justified to state that public opinion and participation are formally not mentioned in constitutions and therefore are formally unconstitutional phenomena, or least non-constitutional ones, because neither word appears in any constitutional text, although they are without any doubt part of the constructional reality. As pointed out, we cannot deny that public opinion is an important power through the centuries – in different ways – even without a direct constitutional legitimation. It has often been debated to what extent opinion polls, mass media and public opinion are closely intertwined and if they may either be reflecting or in reality shaping public opinion: But public opinion is clearly not – perhaps not yet – the 4th pillar in Montesquieu’s theory of the separation of the three powers as long as it is not clearly defined but left out of the written constitutional framework. And although – I repeat – they are part of constitutional reality.

To come back to the question of guiding principles for drafting constitutions. I am really reluctant to name constitutional framing principles, although I had the honor to assist as an unimportant Sherpa in drafting the constitutions of South Africa and Georgia and two states in former East Germany. This is because of a simple experience: Each country, each nation, is so completely different that national history and national character are sometimes more important than any fundamental legal theories, although there are certain international or even supranational traditions (dignity of men) which have to be upheld for a civilized nation. So I would at the end of my paper name only two points – and not highly theoretical ones:

1st: The constitution should be as short as possible, maybe a little more than an enumeration of the powers of the various branches of the government, the creation and composition of the parliament, to which should be added a bill of fundamental rights;

2nd: The constitution should be an evolving instrument, not an inflexible finished

text, complete in all details for a generation or more. It should leave leeway for new developments within its frame; the constitution should nevertheless mirror and reflect social condition and changing needs.

With all due respect to the members of this international audience, I dare say, that not all constitutions in SEA live up to both these principles.

XI.

Now at the end of my lecture, you may ask the classical question: What is the outcome? If you have the impression that there is none, at least not in small coins – but a field of wild political flowers, some of them colorful and fragrant, some of them poisonous and toxic: Then you are totally right! But that is the sense of a conference like this one, to go on with a broad and fundamental research on an international level, in our case in Asia. My paper has been short, but the list of scientific, practical, and political questions in connection with public opinion is still long and unfinished. And the question concerning the 4th pillar in the Montesquieu doctrine? The answer has to remain open or with a classical jurist's remark: In principle yes, but it depends. So let me close with two quotations:

One for those, who still battle in the world of public opinion, one for those who are already experienced and skeptical at the same time:

The first is by Mahatma Gandhi (1869-1948) and may design the development of a public opinion: "First they ignore you, then they laugh at you, then they fight you, then you win."

The 2nd is by philosopher Jeremy Bentham: (1748-1832) "The more strictly we are watched, the better we behave," which was changed by philosopher Hannah Arendt (1906-1975) into: "The more strictly they are watched, the better they behave," and those points

at the close relation between public opinion and politics.

Thank you for your patience and your attention.

Kop khun mak kap

XII.

Bibliography

For further reading, a selected bibliography, also used as sources for this paper, in English, German and French. See also Wikipedia (Public Opinion, Opinion Publique, Oeffentliche Meinung):

A. English

- Bianco, William T. and Canon, David T., "Public Opinion". In: American Politics Today. 3rd ed. New York, 2013;
- Théry, Julien, "*Fama : l'opinion publique comme preuve judiciaire. Aperçu sur la révolution médiévale de l'inquisitoire (XIIe-XIVe s.)*", in B. Lemesle (ed.), *La preuve en justice de l'Antiquité à nos jours*, Rennes, PUR, 2003, p. 119-147, and Daniel Smail, Thelma Fernster (ed), "*Fama. The Politics of Talk and Reputation*, Ithaca, Cornell University Press, 2003;
- Speier, Hans, (1950) "Historical Development of Public Opinion". *American Journal of Sociology*. University of Chicago Press. **55** (4) 376-388;
- Fechner Rolf / Clausen Lars / Bammé Arno (eds.), *Öffentliche Meinung zwischen neuer Religion und neuer Wissenschaft. Ferdinand Tönnies' „Kritik der öffentlichen Meinung“*, Munich/Vienna Profil 2005;
- Watts, D.J. and Dodds, P.S. (2007), "Influentials, Networks and Public Opinion Formation" (PDF). *Journal of Consumer Research*. **34** (4),441-458;
- Bernays, Edward L., *Crystallizing Public Opinion*, New York 1923, New York 2004;
- Lippmann, Walter: *The Phantom Public. A Sequel to "Public Opinion"*. London 1925;

- Harwood Childs (1965): *Public Opinion: Nature, Formation, and Role*. Princeton, New Jersey u. a. S. 16 ff.;
- Habermas, Jürgen. *The Structural Transformation of the Public Sphere*, 1989; (*Strukturwandel der Öffentlichkeit*, Neuwied 1962);
- Shamir, Jacob / Shamir, Michal, *The Anatomy of Public Opinion*, Ann Arbor: University of Michigan Press, 2000;
- Lippmann Walter, *Public Opinion*, 1922;
- Powell, Norman John, *Anatomy of Public Opinion*, New York, Prentice-Hall, 1951;
- **(French)** Théry Julien, "Fama : l'opinion publique comme preuve. Aperçu sur la révolution médiévale de l'inquisitoire (XIIe-XIVe siècles)", in B. Lemesle (ed.), *La preuve en justice de l'Antiquité à nos jours*, Rennes, Presses universitaires de Rennes, 2003, pp. 119-147 ; Tönnies, Ferdinand , *On Public Opinion*, 1970 (*Kritik der öffentlichen Meinung*, 1922), critical edition by Alexander Deichsel, Rolf Fechner, and Rainer Waßner, Berlin/New York: 2003);
- Bianco, William T., and Canon David T., "Public Opinion". In *American Politics Today*. 3rd ed. New York, 2013;

B. German

- Merz-Benz, Peter-Ulrich (Hrsg.): *Öffentliche Meinung und soziologische Theorie*, Wiesbaden 2015;
- Fechner, Rolf, Clausen Lars, Bammé Arno (Hrsg.): *Öffentliche Meinung zwischen neuer Religion und neuer Wissenschaft, Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*. München/Wien 2005;
- Hennis, Wilhelm: *Meinungsforschung und repräsentative Demokratie*, Tübingen 1957;
- Kleinsteuber, Hans J. : *USA. Medien und öffentliche Meinung*, Bonn 2008;
- Lippmann, Walter: *Die öffentliche Meinung*;
- Luhmann Niklas : *Öffentliche Meinung*. In: Wolfgang R. Langenbucher (Hrsg.): *Zur Theorie der politischen Kommunikation*. München 1974;
- Noelle-Neumann Elisabeth: *Öffentliche Meinung*. 3. Aufl., Frankfurt 1991;
- Tönnies Ferdinand: *Kritik der öffentlichen Meinung*. [1922]. Berlin 2002;

- Friedländer, Ernst: *Die öffentliche Meinung* (<http://www.zeit.de/1949/30/die-oeffentliche-meinung>) in *Die Zeit*, 28. Juli 1949 Nr. 30;
- Tönnies, Ferdinand: *Kritik der öffentlichen Meinung*. [1922]. Berlin/New York 2002, Hennis Wilhelm (1957) : *Meinungsforschung und repräsentative Demokratie*. Tübingen. S. 27;
- Noelle-Neumann, Elisabeth (1996): *Öffentliche Meinung*. Frankfurt am Main, S. 343 f.; zur Kritik Richard Albrecht: Die Schweigespirale. In: *Publizistik*. 29, 1984, Nr. 3–4, S. 617–621; Demoskopie als Demagogie. SDR 2 Hörfunk, 7. Januar 1987; gedruckt in: *Medien Journal*. 12, 1988, Nr. 1, S. 41–48; Demoskopie als Demagogie: Kritisches aus den achtziger Jahren. Shaker, Aachen 2007;
- Roessing, Thomas: *Öffentliche Meinung – die Erforschung der Schweigespirale.*, Baden-Baden 2009;

C. **French**

- Antoine, Jacques , *Histoire des sondages*, 2005;
- Berger, Gaston , *L'opinion publique*, éditions PUF, 1957;
- Champagne, Patrick , *Faire l'opinion. Le nouveau jeu politique*, Paris, Éditions de Minuit, 1990;
- Desabie, Jacques , *Théorie et pratique des sondages*, 1966;
- Domenach, Jean-Marie , *La propagande politique*, éditions PUF, 1950;
- Farge, Arlette , *Dire et mal dire, l'opinion publique au XVIIIe siècle*, Paris, 1992;
- Girard Alain , Jean Stoetzel, *Les sondages d'opinion publique*, PUF, 1979;
- Huyghe, François-Bernard, "Maîtres du faire croire. De la propagande à l'influence", Vuibert 2008;
- Lafrance, Yvon , *La théorie platonicienne de la Doxa*, éditions Les Belles lettres, 1981;
- Lenglet Roger, *La Doxa, ancêtre de l'opinion publique*, éditions Anousia, 1987;
- Sauvy, Alfred , *L'opinion publique*, , éditions PUF, 1957;
- Volkoff, Vladimir , *Petite histoire de la désinformation*, Paris 1999;
- Zask, Joëlle , *L'opinion publique et son double; Livre I: L'opinion sondée; "La philosophie en commun"*, 2000;

- Bourdieu Pierre , « L'opinion publique n'existe pas », *Les Temps modernes*, 29 (318),: 1292-1309;
- « Une opinion publique internationale ? », dossier de *Raisons politiques*, n° 19 2005/3;
- Kaufmann, Laurence, « L'opinion publique : oxymoron ou pleonasme ? », *Réseaux*, n° 117 2003/1, p. 257 à 288;
- Kaufmann Laurence, « L'opinion publique ou la sémantique de la normalité », *Langage et société*, n° 100 2002/2, p. 49 à 79;
- Théry, Julien « *fama* : L'opinion publique comme preuve. Rennes, Presses Universitaires de Rennes, 2003, p. 119-147

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