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*The **On-line Journal Modelling the New Europe** is opened to PhD students, young researchers, and academic staff interested to promote researches and present different perspectives on the EU. The papers should provide an analysis of economic, social, cultural and political perspectives and developments on subjects concerning the European Union*

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GUEST EDITOR'S INTRODUCTION

On June 18, 2015, a group of bewildered, perplexed and fatigued, but ebullient, inquisitive and full of expectations international intellectuals and university professors from all over the world finally landed at Bradley International Airport, Connecticut, United States of America. For most of them, the next six weeks represented their first relevant experience in the country of the founding fathers who not only established the modern American republic, but also influenced all future exemplary political arrangements worldwide. In the words of one reputed American scholar, the foreign scholars were prepared for their own 'hermeneutics of transcendence', in the sense that they were amenable not only of 'transcending' their own geographical and cultural areas of comfort, but also of confronting and experiencing their own fascination with the New World. An academic program under the patronage of the United States Department of State perfectly presented both the pretext and opportunity for cutting-edge encounters, astonishment and reflections serving the purpose of fostering mutual international cooperation and facilitating cross-cultural open-mindedness and exchanges.

By its acronym SUSI, the *Study of the US Institutes for Scholars* academic program met all the above-mentioned requirements and expectations. Spread over six weeks and structured in six distinct domains, the program was designed to introduce international scholars from various fields and intellectual orientations to the most fundamental tenets and peculiarities that have imprinted on the United States' endurance, uniqueness and enchantment. The aforesaid group of eighteen intellectuals (including me) were selected to participate in the *American Political Thought* section of the program aimed at highlighting the cardinal moments of what the American coordinators of the program considered to have been exponential for the developmental and cumulative essence of American political practices and mentalities. During the first four weeks of the program, in the surrounding tranquility of the Amherst campus location of the prestigious University of Massachusetts, and under the benevolent and careful assistance of staff members from the UMass Donahue Institute for Civic Initiative, all those salient, substantial, and development-guiding issues in American political thought were thoroughly exposed and investigated by a series of reputed American professors and researchers in the field, in an interactive, amicable and enthusiastic atmosphere

of intellectual exchange. The remaining two weeks were devoted to a study tour of some momentous and representative sites for the historical and political evolution of the United States, in an attempt to integrate the visual component within the overall assessment of politics and political thought/ development of the federal republic.

The international scholars invited to participate in the program naturally entered the United States with their own background, intellectual prejudices, apprehensions and expectations. More or less excited and exalted, more or less alienated because of daily routines in their home countries, they all had the chance to meet new people and places, temporarily foregoing their own academic training, testing their most intimate beliefs, confronting concerns and experiencing (dis)illusionment. *Part One* of the present e-journal *Modelling the New Europe* issue exceeds, in a sense, the initial editorial commitment, that of projecting its purpose on meaningful topics in the area of transatlantic studies, somewhat uncritically understood as a privileged field of multifaceted exchanges between Europe and the United States. Accordingly, instead of the envisaged theme, entitled *Crossing the Ocean: Transatlantic Conjunctures and Conjectures*, the editor found it appropriate and insightful to include the imprints, influences and impressions that the above-mentioned US academic program left on the minds and beliefs of some of the participating international scholars, as fresh sediments stemming from direct contact experiences. That is to say that, besides plausible reasons and arguments justifying such an investigation of various transatlantic conjectures, there is essentially the exceptional conjuncture in favor of this approach to the topic. Moreover, it might also stand for the international scholars' gratitude and modest reward for the hosts' kindness, generosity and hospitality. On behalf of all participating scholars in the SUSI 2015 *American Political Thought* academic program, the editor would like to express his deepest gratitude and respect to all the United States Department of State organizers, and especially to the American representatives directly involved in running the program: professor Michael Hannahan (Director of the UMass Donahue Institute of Civic Initiative), professor Lawrence Bailey (academic director of the program) and their staff (Becky Howland, Ben Rosenfield, Andy Carbaugh). Retrospectively, the editor's overall assessment of the program's achievements is commensurable with one of the commonly-shared goals of the program, that of fostering reciprocal understanding and fruitful interactions.

Back to their home countries, the participant scholars in the *American Political Thought* SUSI 2015 program have proceeded to distill their experiences individually, according to their previous academic preoccupations. Consequently, their contributions to the present issue of the journal mirror diverse, heterogeneous and perspectivist approaches in line with their own endeavors.

To start with, Attila Antal critically addresses the shortcomings of Hungarian environmental policies by means of a lucid comparison with the European Union and USA respective provisions and especially with the normative assumptions of the environmental democracy concept.

Arati Rohan Khatu's article attempts to investigate the enlightening influence of Thomas Paine's ideas upon the thinking of one of the most progressive figures in 19th century India, Mahatma Jotirao Phule, and stands for an appraisal of trans-cultural ideatic intersections contributing to the emancipation of humankind.

In turn, Bezen Balamir Coskun investigates the very possibility of a genuine transfer of the American presidential system model in Turkey, suggesting that the implementation of this model would require more profound appropriations pertaining to the understanding of political culture and its positive arrangements in the United States.

Juliana Brito de Souza implicitly presumes that the most recent reforms of the technical higher education system in Brazil have been massively influenced by corresponding policies enforced in the United States, and provisionally assesses both the achievements and failures in the field of Brazilian higher education based on legislative regulations and quantitative data.

Another interesting study is dedicated to the crucial future impact of nanotechnology inventions and legislation upon human rights; two researchers from Bangladesh carefully analyze and signal possible infringements, inconsistencies and dilemmas of nanotechnology-related issues, considering their all-encompassing impact on human life in the near future.

In his harsh critique of political regimes, institutions, mentalities and practices across the entire African continent, Eric Thomas Ogwora identifies one possible practical solution in order to overcome the disastrous present-day situation; what he acknowledges as constitutionalism and constructive democracy might melioristically stand both for restoring human dignity in Africa and relinquishing barbarism, tribalism and authoritarianism in African politics.

As a native of a quite different political culture, currently living in a state characterized by distinct political institutions and mentalities, Salmi Abdesselam revisits the sterling institution of the Supreme Court in the United States by pointing to some of its crucial decisions, the criteria for selecting justices, and some essentials concerning its activity; in the subtext of the article, the author alludes to the preeminent role of this secular institution in the gradual development of American politics, culture and society.

The last study included in part one represents an interesting association of two apparently distinct political systems based on certain suggestions provided by the possibility of comparing their respective electoral systems and behaviors. In fact, Lyubomir Stefanov criticizes Bulgarian electoral mechanisms in the aftermath of 1990, arguing that it is exactly the reminiscences of communist mentalities that have negatively contributed to the shaping of Bulgarian electoral reforms in the period in question. When juxtaposed with the procedures of gerrymandering in the United States, for instance, the electoral procedures might shed a 'grey light' upon the (in)consistencies of democratic practices in both countries, despite notable differences regarding their political traditions and reforms.

Part Two encapsulates some mainstream topics usually associated with the field of transatlantic studies. From problematizations of identity, human rights and communication issues to analyses of transatlantic relations discourses and economic exchanges, the second section of the journal represents a comprehensive coverage of some of the most pressing and controversial issues characteristic for entrenched preoccupations in the field.

Alexandru Balas ingeniously looks back on his own educational and professional trajectory through the exercise of identity discourse, in an attempt to recapture the most significant moments and landmarks along the way. His almost essay-like approach (re)tells the story of a Romanian-born young man, aiming to cope both with the magic and tribulations of the American dream in a back-and-forth journey through the transatlantic geographic space between Eastern Europe and the United States.

By using a thorough analysis of transatlantic discourses in international relations applied to the Yugoslav war, Laura Herța reconfigures the ideological map of the most recent 'Balkan problem' which has generated both diplomatic and belligerent solutions to the ethnic conflict in the former republic. She astutely concludes that the discursive strategies adopted by the most important political figures of the period served as basis for a three-fold shift in the attitudes and perceptions of the Yugoslav problem.

Doina Micu and Oana-Georgiana Hanc-Scherer provide a descriptive and explanatory overview of how the accountable judicial institutions in the transatlantic area (i.e., in the European Union and the United States) respond to certain troublesome human rights issues. The selection of several relevant examples with regard to judicial decisions involving human rights infringements serves their purpose by illustrating procedural differences and similarities, specificities stemming from the peculiar understanding of human rights on both sides of the Atlantic and, ultimately, the plural meanings of the 'language of rights' in the transatlantic world.

Still a controversial work in progress, the Transatlantic Trade and Investment Partnership (TTIP) has been officially defended as a means of eliminating incongruence and unfair competition in the economic relations between the European Union and the United States, and promoting more transparent and freer practices. Radu Nechita argues that mostly the lack of minimal education and reasoning about general economic issues is the root cause of misperceptions and misunderstandings concerning this issue, in addition to a malignant widespread mentality, according to which economic decisionism and regulatory practices are preferred to free trade and deregulatory mechanisms of market exchanges.

The last study in the journal's second part is dedicated to a detailed analysis of communication strategies, especially in limit cases involving confusing crisis contexts. The authors, Cristina Nistor and Rareş Beuran, argue that, although a perfect strategy of crisis management is rather implausible, the role(s) of administrative and political leaders should reveal determination and composure, ability to deal with the crisis in accordance to public expectations, and, probably most importantly, effective communication skills put to work in order to reassure public opinion that the crisis situation gradually evolves towards normalcy.

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PART ONE.
ACROSS THE OCEANS: ENCOUNTERS FACILITATED BY ONE OF THE SUSI 2015 US DEPARTMENT OF STATE ACADEMIC PROGRAMS

OPENING REMARKS

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I am honored to contribute this foreword to the fine collection of essays put together by my friend Dr. Gabriel Gherasim. I suppose it is common to express such an emotion but, in this case, it truly is an honor as it gives me the opportunity to reflect upon our work at the Civic Initiative over the past 14 years. We started the Civic Initiative in 2003 with the idea of discussing issues of democratic governance at the local, federal, and international levels. Our slogan at the time was 'Democracy Education at Home and Abroad'. This was my attempt, more or less successful, at reminding people we were all in it to learn from others. Since 2003 we have managed 47 separate exchange programs and have well over 1000 alumni in 66 different countries.

The articles collected here were written by alumni of our 2015 *Study of the United States Institute on American Political Thought*. This is one of eight programs reserved for groups of scholars. The other programs include American Literature, Journalism, Religious Pluralism, Secondary Education, US Culture and Society, US Foreign Policy, and US National Security. We call our own program *'American Political Development'* and focus on the intersection of thought, policy, and institutions over time. We have managed the program since 2005 and have approximately 200 alumni. The articles collected here represent the eclectic interests represented in each group, but with a common comparative and institutional bent. We see here discussed issues as diverse as environmental democracy, the US Supreme Court, Turkey and the presidential system, international law, and the similarities of Thomas Paine to Indian activist Mahatma Jotirao Phule.

Such diversity is to be expected from a collection originating from scholars hailing from 18 different countries. What they do have in common is they all wrestle with the question of how can diverse human beings live together, work together, and confront common

problems. In short, they are all related to genuine politics. Each year, at our opening ceremony, I give a short talk that tries to capture what we have in common. This year, and probably in other years as well, I suggested that those who teach politics or reflect upon political life are all fighting the alternative to genuine politics which is hatred and violence. At its best, politics allows us to be more than one thing and gives us space to live our lives in multiple spheres. This is a noble profession and if we look at violence and hatred as a plague, and it is, pursuing that profession calls to mind the quote by Rieux in Camus' *The Plague*: "So does every ill that flesh is heir to. What's true of all the evils in the world is true of plague as well. It helps men to rise above themselves. All the same, when you see the misery it brings, you'd need to be a madman, or a coward, or stone blind, to give in tamely to the plague".

Between the time Gabriel asked me to write something up until the time I actually sat down to write (too long of a time), three things happened that brought this home to me. First, I went to Kuala Lumpur, Malaysia, for a Young Southeast Asian Leadership Initiative reunion. This program, known as YSEALI is our newest effort and brings 22 students from the ASEAN nations to Amherst for a five week program on free expression. While in Malaysia I was greeted by all four of our APD alumni, Ahmad Nidzamm Suleiman, Chiok Pak Fern, Azman Ayob, and Santi Sannippan. They drove me around town, took me to events, purchased dinners, and arranged talks at their Universities. They could not have been more kind. In fact, Nidzamm was the first APD participant I ever met. He came to the program in 2005 and arrived a few days early so we got a chance to know one another. The fact that he was one of the first Muslims I have ever met didn't really register, nor did the observation that, ten years later, I was being greeted by two Muslims and a Hindu in a diverse and multi-religious society really register either. We talked about our past meetings, our families, our jobs and the challenges of teaching. All of them, in their own way, teach classes and highlight the many diverse identities available to Malaysians and resist the somewhat natural human urge to be identified as only one thing – a member of one team, so to speak, just a religious denomination, or only a gender. We came together as teachers and spouses and friends and people that followed sports or politics.

At the same time, while I was there, ISIS beheaded its sole Malaysian captive, presumably as a gruesome warning to Malaysia as the host of the ASEAN conference. Meanwhile, in the US Donald Trump continued his cynical campaign to win the Republican nomination on the waves of fear and hatred. Trump and ISIS have in common a deep-seated

desire to make us one thing. They allow no human complexity or depth but, instead, see us as cardboard two-dimensional cartoons with nothing but a single designation.

We are better than that. As long as we talk and compare and learn, we can refuse to be pushed into a single camp. I think we need to remind ourselves of the importance of our work during the endless days of preparation, administration, and departmental debates.

The team of people who has been fighting the plague has been very consistent over the years. I want to thank our original Academic Director, Dr. Jerome Mileur for his continued inspiration and guidance. Dr. Lonce Bailey has been our Academic Director for over a decade and has provided remarkably program continuity. I would also like to thank our Bureau of Educational and Cultural Affairs (ECA) at the Department of State. Britta Bjornlund and Macon Barrow have worked with us on this program for years and their suggestions and support have been invaluable.

The most difficult part of my job is saying goodbye, every summer, to people who have changed my life. In the last few years we have met with our alumni in Croatia, Bulgaria, Argentina, Malaysia, Iraq, and Pakistan. As a result, goodbye does not seem as final as it once did.

Again, my thanks to Dr. Gabriel Gherasim for doing the work to assemble this collection. May we all continue to do what we can do to fight the plague.

THE IMPACT OF U.S.A. AND E.U. ON ENVIRONMENTAL AND ENERGY DEMOCRACY IN HUNGARY[1]

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Abstract. *This study examines the Hungarian environmental and energy democracy from the regime change in 1989 to 2015. The main pillars of environmental democracy (access to information, public participation and access to justice) have been strengthened and the Aarhus regulations have been incorporated to the Hungarian legal system. This study argues that environmental democracy belongs to the normative-empirical theories of democracy. I elaborate on the constitutional and legal bases of environmental democracy and I argue that, since 2010, several restrictions have been carried out about the environmental democracy by the Hungarian governments. Since the projected extension of the Paks Nuclear Power Plant, these restrictions have increased. Despite of the strong legal foundations, the Hungarian environmental policy and environmental democracy have been in continuous regression and under attack. This paper proposes two main hypotheses. According to the first, the Hungarian environmental democracy has been evolved through legal constitutionalism (which is a main constitutional tendency in the United States), and its restrictions have been in conjunction with the constitutionalist era since 2010. The other hypothesis concerns the energy democracy, which means – in the United States and Germany – socializing and democratizing the methods of energy production and consumption without harming or endangering the environment or people. It has been argued that the prevailing of the Aarhus pillars in the field of energy policy (i.e., energy democracy) has a huge impact on the environmental democracy.*

1. Environmental Democracy in the Context of Theories and Models of Democracy.

Environmental democracy belongs to the normative-empirical theories of democracy. According to Buchstein and Jörke (2011: 571), democracy means collective self-determination and the main purpose of democracy is to create political decisions according to

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[1] This paper is a modified and updated version of a lecture prepared for the ECPR General Conference, University of Montréal, August 26-29, 2015.

the will of the citizens. In a simply and very general way, democracy means rule by the people.

There are several types of modern theories of democracy. Buchstein and Jörke (2011: 574) distinguish between three simple and useful types of democratic theory: empirical, positive and normative. The core element of empirical theories of democracy is to try to rank political systems according to a scale of democratic values and institutions. The goal of empirical theories "is to construct reliable and standardized scales in order to obtain a yardstick for comparing different political systems that can then be ranked according to their degree of democracy" (Buchstein and Jörke 2011: 575). Positive theories are focusing on formal models of the democratic processes, especially voting behaviour. In the middle of these theories there are axioms "that are used as a basis for developing the main characteristics of democratic systems" (Buchstein and Jörke 2011: 576). There are two main types of positive theories: the rational choice theories and Niklas Luhmann's systems theory. Normative theories of democracy provide convincing justifications of democratic orders. "The goal of normative approaches is to deliver criteria for praising or criticizing normative and institutional orders" (Coppedge et al. 2011: 253). That is why normative theories do not strive for ethical neutrality and they represent value-based approaches. Normative theories are influenced by political trends and debates.

According to these three types of democratic theory, there is no real consensus on what democracy means. Even though it seems to be, some consensus exists "over the various plausible conceptions of this protean term" (Mason 1999: 63). According to Coppedge and Maldonado (2011), six key models of democracy have been considered in the literature of the field: electoral, liberal, majoritarian, participatory, deliberative, and egalitarian.

Models of Democracy	Notes
1. Electoral (contestation, competition, elite minimal, realist, or Schumpeterian) Democracy	Democracy is achieved through competition among leadership groups during periodic elections.
2. Liberal (consensus or pluralist) Democracy	Democracy stresses on the intrinsic importance of transparency, civil liberty, rule of law, horizontal accountability (effective checks on rulers), and minority rights.
3. Majoritarian Democracy (responsible party government)	The will of the majority should be sovereign.
4. Participatory Democracy	Descendant of the direct model of democracy, distrust about delegating representatives, direct rule by citizens.
5. Deliberative Democracy	This approach focuses on the process and procedures by which decisions are reached in a polity; public reasoning is about the common good.

6. Egalitarian Democracy	The goal is political and social equality (equal participation, representation, protection and resources).
7. Environmental Democracy	Communicate the ecological and social conditions for civic self-determination, as well as individual self-realization.

1. Table *Models of Democracy (Coppedge et al. 2011: 253-255)*

According to Michael Mason (1999), environmental democracy is a new and developing model of democracy, based on liberal, participatory and deliberative democracies, on one hand, and on a fundamental critique of the current models of democracy, on the other. As Mason put it, "[t]he idea of environmental democracy is to communicate the ecological and social conditions for civic self-determination, as well as individual self-realization. One indicator of that linkage becoming central to our democratic self-understanding is that we no longer accept as 'democratic' political systems that deliberately or inadvertently undermine basic social and environmental rights and freedoms" (1999: 47). The environmental democracy represents a right-based approach and tries to create a strong relationship between the environmental and the social side of democracy. Sharp critiques against liberal democracy and its structural asymmetries have been elaborated by defenders of environmental democracy: the elderly, the poor, the unemployed, the ill, the future generations and other categories are grossly under-represented in a liberal system which has been captured by strong interest groups (Dobson 1990: 23).

Nevertheless, environmental democracy is not an eco-centric environmentalist theory. The eco-centric environmentalism is convinced that ecological degradation and social dislocation go hand in hand and affect everybody, so that we all share a common interest in addressing environmental problems. As Ulrich Beck put it very clearly, in a "world-risk society" even the rich and powerful would not be safe from the hazardous side effects of industrial production: "smog is democratic" (Beck 1992). The theory of ecological democracy (Dryzek 1990; 1995) "allows rational communicative interaction with the natural world because nonhuman entities, though short of the self-awareness that constitutes human subjectivity, give off ecological signals" (Mason 1999: 56). Environmental democracy does not take this deep ecological step and postulates that ecological signals are always mediated by human social activity. According to Mason, "rights claims are 'strong' moral entitlements attached to those who can be both addressees and authors of autonomy. This means, again, that the strongest moral claims to ecological sustainability are human rights to a healthy, safe and decent environment coupled with environmental participatory rights" (Mason 1999: 62).

Environmental democracy has both a normative and explanatory aspect. Form a normative perspective, it describes a radical democratic project which extends and radicalizes existing liberal norms in order to include the ecological and social conditions for civic self-determination. From an explanatory perspective, it accounts for existing tendencies and for non-coercive green communication found in various political forms and practices (Mason 1999: 9). Substantially, environmental democracy has four defining characteristics: prioritizing moral judgements based on long-term generalizable interests; centring environmental democracy on communicative political structures and practices promotion; ecologically rational decision-making; extending and radicalizing existing liberal rights (Mason 1999: 48-63).

2. The Institutionalization of Environmental Democracy

The Aarhus Convention

The institutionalization of environmental democracy is an emerging phenomenon of our times: the expansion of international environmental regimes (focusing mainly on procedural environmental rights) and the growing importance of constitutional environmental rights are crucial points of this procedure. In a narrow sense, according to this rights-based approach, environmental democracy means three important procedural environmental rights adopted by the Aarhus Convention.

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was adopted on June 25, 1998, as part of the 'Environment for Europe' process. The Convention entered into force on October 30, 2001, Hungary joining the Aarhus Convention on July 3, 2001 (see Act LXXXI of 2001). As I have pointed out (Antal 2014), the parties to the Convention are required to make the necessary provisions so that public authorities (on national, regional or local level) will contribute to the three main pillars (the so-called Aarhus pillars): (1) access to environmental information (the right of everyone to receive environmental information that is held by public authorities); (2) public participation in environmental decision-making; (3) access to justice (the right to review procedures in order to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general). These are the core elements of

environmental democracy; as Mason argued, these Aarhus procedural rights bring corresponding duties on state parties to the Convention (2010: 10).

The European Union and environmental democracy

The pillars of Aarhus are legally binding in Hungary, not only because of the fact that the country joined the Convention, but also because of the EU integration. The Aarhus provisions have been incorporated to the EU legal system by several legal instruments according to each pillar. In 2003 two Directives were adopted concerning the information and participation pillars: Directive 2003/4/EC of the European Parliament and of the Council (January 28, 2003) on public access to environmental information, and Directive 2003/35/EC of the European Parliament and of the Council (May 26, 2003) providing for public participation in respect of the drawing up of certain plans and programs relating to the environment. In 2003 the Commission presented the 'Aarhus package', which appropriated two elements: ratifying the Convention and applying the provisions of the Convention to Community institutions and bodies. In the end, the latter has been enacted by Regulation (EC) No 1367/2006 of the European Parliament and of the Council.

Developing Institutional Bases of Environmental Democracy in Hungary

After the regime change in 1989-1990, the Hungarian environmental democracy has been based on the new Constitution (adopted in 1989) and the Constitutional Court. As I have pointed out (Antal 2014), under the Constitution, the environmental related constitutional provisions were Article 18[2] and Article 70/D Sections (1)-(2).[3] As May and Daly pointed out, "courts in postcommunist countries in Eastern Europe have also implemented newly minted constitutional environmental rights provisions so as to protect the environment" (2013: 607). The Hungarian Constitutional Court was one of the firsts in Central and Eastern Europe to evolve this type of judicature. The constitutional environmental right's pillar of environmental democracy has been developed by the Constitutional Court. The landmark decision of the Court was Decision 28/1994, when the Court tied the right to a healthy environment to third

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[2] "The Republic of Hungary recognizes and shall implement the individual's right to a healthy environment".

[3] "Everyone living on the territory of the Republic of Hungary has the right to the highest possible level of physical and mental health. The Republic of Hungary shall implement this right… through the protection of the urban and natural environment".

generation rights. The Court stated that it is the state's duty to preserve the status quo in the area of environmental protection. The remarkable reasoning stressed the right to a healthy environment laid down in Article 18, "encompass(ing) the duty of the Republic of Hungary to ensure that the state may not lower the level of environmental protection provided through legal regulations, unless it is unavoidable in the interest of asserting another fundamental right or constitutional principle". The judges argued that even if the latter case would apply, the degree of lowering the level of environmental protection might not be disproportional relative to other constitutional rights and principles. This concept is called the prohibition of the degradation of the environmental protection's level. The judges held that the violation of environmental rights ran into conflict with the Constitution's 'rights to life'. Furthermore, the Court construed the right to a healthy environment as an "independent and autonomous institutional protection".

Besides the constitutional pillars of environmental democracy, a comprehensive and extensive legal basis has been built concerning environmental protection and democracy. At least eleven legal and policy areas ensure and protect environmental democracy in Hungary.

Areas	Laws	Importance
1. Implementation of Aarhus Convention	Act LXXXI of 2001 on Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, Denmark, June 25, 1998)	Incorporation of procedural environmental rights.
2. Direct Democracy Toolbar	Act CCXXXVIII of 2013 on Initiation of Referendum, European Citizen' Initiative, Procedure of Referendum	Fundamental rules of referendum, which is a core institution of direct democracy.
3. Civil Law	Act V of 2013 on the Civil Code	Regulation of secret trade, which is a key barrier of access to information (Section 2:47).
4. Right to Information	Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information	Fundamental rules of access to information (requesting public data, responsibilities of public authorities), especially guarantees of access to justice.
	Act XC of 2005 on Electronic Right of Information	
5. Rules of Association and Assembly	Act CLXXV of 2011 on Right to Association, Operation and Support of Civil Organizations	This regulation is concerning important factors of environmental democracy: NGOs (their constitution, operations, financial management) and rules of assembly.
	Act III of 1989 on Right of Assembly	
6. Public Participation about Law	Act CXXX of 2010 on Law-Making Procedure	General rules of public participation.
	Act CXXXI of 2010 on Public Participation in Preparation of Legislature	
7. Parliamentary Commissioner for Future	Act CXI of 2011 on Commissioner for Fundamental Rights	Regulations about the Deputy Commissioner for Fundamental Rights

Generations (FGO)		responsible for the protection of the interests of future generations (Sections 1-3).
8. Public Property	Act CVI of 2007 on State Property	These acts impose obligation on public authorities and state own companies about access to information.
	Act CXCVI of 2011 on National Property	
9. Environmental Law	Act LIII of 1995 on General Rules of Environmental Protection	The entire environmental protection regulation can be seen as a guarantee of environmental democracy, especially the following rules: public participation in environmental issues (Act LIII of 1995, Section 97), rights of environmental NGOs (Act LIII of 1995, Sections 98-100).
	Government Regulation 14/2005. (XII. 25) on Environmental Impact Assessment and Integrated Environmental Permit Procedures	
	Government Regulation 311/2005. (XII. 25) on Public Access to Information about Environmental Protection	
10. Administrative Procedures	Act CXL of 2004 on General Rules of Public Administration Procedure and Service	These procedural rules create the possibility that citizens and NGOs can participate in administrative procedures, negotiation and public hearings (Sections 62-63).
11. Criminal Law	Act C of 2012 on the Criminal Code	The ultimate guarantee of criminal law prevails on one hand about the regulations of environmental crimes (Offences against the environment and nature, Chapter XXIII), and about the prevention of illegal access to information, on the other hand (Abuse with public data, Section 220).

2. Table *Legal Basis of Environmental Protection and Democracy in Hungary*

Legal and Political Constitutionalism

According to my hypothesis, the Hungarian environmental democracy has been evolved by legal constitutionalism, and its restrictions have been in conjunction with the political constitutionalist era since 2010. This approach can help to understand the nature of Hungarian environmental democracy and the fundamental changes and restrictions that have been made in the past five years. After 1989, legal constitutionalism has been the main paradigm of the Hungarian legal and political thinking. The Constitution of 1989 and the jurisdiction of the Hungarian Constitutional Court were based on this concept. The activism in the field of the Court's environmental jurisdiction can be explained and characterized by legal constitutionalism.

The idea of constitutional rights and the rule of law are in the centre of legal constitutionalism. This concept has been elaborated in the United States and its practice has

been supported by the US Supreme Court. Bellamy states that, "Legal and political constitutionalism have often been identified with the American and British political systems respectively. The tendency to take an idealised version of the US Constitution as a model has been particularly prevalent among the highly influential generation of liberal legal constitutional theorists who grew to intellectual maturity under the Warren Court." (2007: 10). According to this concept, the constitutions secure the rights central to a democratic society. "This approach defines a constitution as a written document, superior to ordinary legislation and entrenched against legislative change, justiciable and constitutive of the legal and political system" (Bellamy 2007: 1). The judicial review and the Constitutional Court are essential for surveying democratic practices. According to Bellamy, legal constitutionalism is founded on two pillars: "The first is that we can come to a rational consensus on the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve. These outcomes are best expressed in terms of human rights and should form the fundamental law of a democratic society. The second is that the judicial process is more reliable than the democratic process at identifying these outcomes" (2007: 4). Consequently, the courts, especially the Constitution Court, can overrule the will of the people incorporated in parliamentary decision-making processes. Under the concept of legal constitutionalism, very strong liberal democratic institutions have been created and the procedural legitimacy of the constitutional system has been relatively strong, while, unfortunately, the political elite has not paid attention to the trust in democracy. The environmental democracy has been built on legal constitutionalist bases, which starting point is a 'basic law' that enshrines certain rights or norms beyond the realm of political disagreement and law-making (Glencross 2014: 1165).

In 2010, in Hungary, the political right gained supermajority in the Parliament. Viktor Orbán's Government has totally redesigned the constitutional system and legal constitutionalism has collapsed. The new Hungarian Constitution (Fundamental Law) was based on political constitutionalism. The foundational premise of political constitutionalism is that a constitution can only exist in "the circumstances of politics… where we disagree about both the right and the good, yet nonetheless require a collective decision on these matters" (Bellamy 2007: 5). Bellamy argues that legal constitutionalism attempts to take certain fundamental constitutional principles outside of politics, viewing them as preconditions for the political system. This means depolitization and creates apolitical politics. Hence, politics

and politization allow for much broader participation in determining core political debates via "party competition and majority rule on the basis of one person one vote" (Bellamy 2007: viii). According to this concept, democracy needs to be defended against judicial review. As Bellamy puts it, "The judicial constraint of democracy weakens its constitutional attributes, putting inferior mechanisms in their place. That is not to say that actually existing democracy is perfect and decisions made by judicial review necessarily imperfect, merely that the imperfections of the first cannot be perfected by the second" (Bellamy 2007: 261).

Political constitutionalism is founded "on a normative claim, namely that only political methods for resolving disagreements can be conducted in a way that respects political equality" (Glencross 2014: 1165). Summarizing, the main elements of current Hungarian political constitutionalism are: the restriction of the Constitutional Court's power, which was the main counterweight institution of Government's power; the reinforcement of Government's power; the stabile majority of Government in the Parliament and the control of parliament by Government; the power of Government to overrule the decisions of the Constitutional Court, raising the dilemma of an unconstitutional constitution; the concentration of power instead of separation of powers.

3. Restricting Environmental Democracy

The current status of environmental democracy is very controversial. On one hand, the legal basis of environmental protection and democracy in Hungary has been built. Even under the political constitutional era (after 2010), environmental democracy has very strong pillars. On the other hand, a process has been started, which aims to restrict the reached quality of environmental democracy. After 2010, there have been at least seven areas where the governing parties (with supermajority in the Parliament) have carried out several restrictions on environmental democracy.

Area	Laws	Restriction of Environmental Democracy
1. Restrictions on Direct Democracy's institutions	Fundamental Law Act CCXXXVIII of 2013 on Initiation of Referendum, European Citizen' Initiative, Procedure of Referendum	Direct democracy has been damaged. Currently, it is more difficult to organize a valid referendum and the popular initiative has been abolished.
2. Liquidation of Parliamentary Commissioner for Future Generations	Fundamental Law Act CXI of 2011 on Commissioner for Fundamental Rights	The position of Parliamentary Commissioner for Future Generations has been abolished and there is a new Deputy Commissioner for Fundamental Rights responsible for the protection of the interests of future generations. This could be

(FGO)		unconstitutional because of lowering the level of environmental protection.
3. Liquidation of Parliamentary Commissioner of Data Protection	Fundamental Law Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information	One of the most important guarantee of access to information, the Parliamentary Commissioner of Data Protection, has been abolished by the Fundamental Law. The new authority (called the National Authority for Data Protection and Freedom of Information) does not have the same independence as the former ombudsman.
4. Restriction of Constitutional Court	Fundamental Law Act CLI of 2011 on Constitutional Court	The Hungarian Constitutional Court has lost its autonomy concerning the interpretation of the Fundamental Law and its other powers have been diminished as well.
5. Restrictions of Access to Information	Act XC of 2010 on Adoption and Amendment of Certain Economic and Financial Acts	The legislator denies that state own companies are public bodies (in this case, these companies could refuse to fulfil the public date request).
	Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information	The legislator diminished the access to information without adequate constitutional grounds.
	Act VII of 2015 on Investment Related to the Maintenance of the Paks Nuclear Power Plant's Capacity and Amendment of Concerning Acts	In the case of extension of Paks Nuclear Power Plant, the legislator excludes the public. This goes against the European Law and the Aarhus Convention.
6. Problems concerning Social Participation	Act CXXXI of 2010 on Public Participation in Preparation of Legislature	Instead of broad social participation, politically selected 'opinion leaders' dominate the legislative process.
	Act XXXV of 2012 on Amendment of Act LIII of 2006 on Speeding up and Simplifying the Realization of Important Investment According to National Perspective Act VIII of 2005 on Amendment of Certain Laws about Transformation of Regional State Administration Bodies	In the case of important investments according to national priorities, the legislator prefers business and political interests instead of environmental protection.
7. Restriction of Access to Justice	Bill T/1492 (Submitted October 29, 2010)	The legislator tried to restrict the NGO's access to justice in administrative procedures.

3. Table *Restriction of Environmental Democracy in Hungary since 2010*

4. The Concept of Energy Democracy

Energy policy has a huge impact on environmental protection and environmental democracy. Originally, the concept of energy democracy arose out of the climate justice movements and meant socializing and democratizing the methods of energy production and consumption, without harming or endangering the environment or people (Kunze and Becker 2014: 8). Before mentioning the Hungarian case, I will briefly analyze energy democracy in Germany and USA, investigating its relationship with trade unions.

Energy Democracy in Germany

According to Gegenstrom[4] (a climate-activist Berlin-based group), energy democracy is a concept capable of integrating energy and climate struggles, being "grounded on the basic understanding that 'the decisions that shape our lives should be established jointly and without regard to the principle of profit'" (Kunze and Becker 2014: 8). The Klimaallianz Osnabrück[5] movement argues that the participatory form of decision-making and "de-centralisation and independence from corporations, distribution grid use of rights and control over municipal energy suppliers" (Kunze and Becker 2014: 8) are core elements of energy democracy. A compact definition has been created by the 2012 Lausitz Climate Camp: "Energy democracy means that everybody is ensured access to sufficient energy. Energy production must thereby neither pollute the environment nor harm people. More concretely, this means that fossil fuel resources must be left in the ground, the means of production need to be socialised and democratised, and that we must rethink our overall attitude towards energy consumption".[6] Kunze and Becker put it very clearly and confirmed by strong examples and best practices[7] (Kunze and Becker 2014: 14-45) that energy democracy rested on four main pillars: democratisation and participation (more people get involved in initiatives and decision-making procedures); property (new forms of municipal or semi-state ownership and collective private ownership); surplus value production (employment in green energy sector); ecology and sufficiency (concept of post-growth: consume less and valuate self-sufficiency) (Kunze and Becker 2014: 9-11).

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[4] http://www.gegenstromberlin.net/

[5] http://www.osnabruecker-klimaallianz.de/

[6] http://www.energie-demokratie.de/

[7] They investigated 12 examples and best practices concerning environmental democracy in Europe.

Energy Democracy in the USA

In the USA, the Center for Social Inclusion (CSI)[8] works to identify and support policy strategies to transform structural inequity and exclusion into structural fairness and inclusion. CSI has a project relating to environmental democracy, which means "that community residents are innovators, planners, and decision-makers on how to use and create energy that is local and renewable. By making our energy solutions more democratic, we can make places environmentally healthier, reduce mounting energy costs so that families can take better care of their needs, and help stem the tide of climate change".[9] According to the CSI's study, there are several social injustices in the US energy sector: the Afro-American, Latino, migrant and low-income people are suffering more from the impacts of climate change and natural disasters than white and rich citizens (Center for Social Inclusion 2013: 3). The CSI's method is very similar to Kunze and Becker, as both present case studies concerning the community, sustainable and neighbourhood energy solutions. CSI has also created a map about energy democracy examples in the United States, called *Energy Democracy for All*.[10]

Energy Democracy and Trade Unions

Trade Unions for Energy Democracy (TUED) is a global, multi-sector, worker initiative. It aims to advance democratic direction and control of energy in a way that promotes solutions to the climate crisis, energy poverty, the degradation of both land and people, and responds to the attacks on workers' rights and protections.[11] TUED is really convinced that we are facing energy and climate emergency, and because of the power of fossil fuel corporations, it is nearly impossible to protect the health and safety of workers and communities. The only solution could be the energy democracy: "the transition to an equitable, sustainable energy system can only occur if there is decisive shift in power towards workers, communities and the public."[12] TUED organized the *Energy Emergency:*

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[8] http://www.centerforsocialinclusion.org/

[9] http://www.centerforsocialinclusion.org/ideas/energy-democracy/

[10] http://energydemocracy.centerforsocialinclusion.org/

[11] http://unionsforenergydemocracy.org/

[12] http://unionsforenergydemocracy.org/about/about-the-initiative/

Developing Trade Union Strategies for a Global Transition trade union roundtable which took place on October 10-12, 2012, in New York. The roundtable's discussion document was prepared by Sean Sweeney, who pointed out the significance of environmental democracy: "An energy transition can only occur if there is a decisive shift in power towards workers, communities and the public-energy democracy. A transfer of resources, capital and infrastructure from private hands to a democratically controlled public sector will need to occur in order to ensure that a truly sustainable energy system is developed in the decades ahead" (Sweeney 2013: ii).

5. How does Energy Democracy affect the Quality of Environmental Democracy?

After all, the relationship between environmental and energy democracy is what has been examined here. According to my second hypothesis, the prevailing of the Aarhus pillars in the field of energy policy (i.e., energy democracy) has a huge impact on the environmental democracy. In my opinion, energy democracy is not a sub-type of democracy theories. As I have pointed out, environmental democracy belongs to the normative-empirical theories of democracy and I am convinced that in the 21st century energy policy and energy democracy will be fundamental factors of environmentalism and environmental democracy. Without democratic energy systems there is no environmental democracy and without democratic relations in the field of environmental protection there is no (political) democracy. A recent Hungarian example concerning nuclear energy might be illustrative in this respect.

As I pointed out (Antal 2014), according to the extension of Paks Nuclear Power Plant (NPP), the former socialist-liberals and, from 2010, the Orbán Governments have been planning an international tender procedure. At least the requested preparatory documents should be indicative for this plan. In January 2014, as a result of secret negotiations between the Hungarian and Russian parties, the Hungarian Government agreed to take out a EUR 10 billion state loan from Russia. There are two international agreements between the two countries: the first elaborates the nuclear power plant construction project (Act II of 2014) and the second concerns the terms of state loan (Act XXIV of 2014). The decisions were taken without any social participation. The situation is serious because the Hungarian Government imposes a huge financial, social and environmental burden not only on the present society, but also on future generations. According to the agreements, the repayment will be covered by the central budget and this is unconstitutional, because the Fundamental Law states that the

Parliament may not pass an act on the central budget in consequence of which the government debt would exceed half of the gross domestic product (Article 36, Section 4). One might notice that the extension project of Paks is a total breakdown not only of the procedural environmental rights declared by the Aarhus Convention, but also of the constitutional environmental rights enacted by the new Fundamental Law. Using the toolbar of political constitutionalism, the Hungarian governing parties restrict environmental democracy. The main cause of this restriction is the extension of Paks Nuclear Power Plant: the Government aims at eliminating every legal and political obstacle. Paks NPP has become a political 'black hole', which seems to absorb (environmental) democracy. The Hungarian MPs are deliberately making laws, which facilitate the nuclear investment on the one hand, and threaten seriously the environment on the other.

Laws	Restriction of Environmental Democracy
Act CCXXVII of 2013 on Amendment of Certain Acts in the Field of Energy	The investor himself got an opportunity to decide how big the impact area would be and who could take part in the authorization procedure. The investor affects the procedural environmental rights.
Act VII of 2015 on The Investment of Maintaining the Paks Nuclear Power Plant's Capacity, Amendment Relating Acts	Data relating to the investment procedure cannot be recognized as public data for 30 years. This regulation damages very seriously the information pillar of the Aarhus Convention.
Government Regulation 71/2015. (III. 30.) on The Designation of Environmental Protection and Natural Conservation Authorities	According to this act the environmental protection and natural conservation authorities have lost their independence and have been integrated to the regional government offices.
Act CXXIX of 2015 on Amendment of Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information	Until now, this has been the most important restriction of access to information. By this law, state authorities practically could refuse or prevent to fulfil the data requests. The public service bodies can argue without restrictions that the requested data are part of decision-making processes.

4. Table *Influence of Energy Democracy on Environmental Democracy*

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PARALLELS BETWEEN THE REVOLUTIONARY LIBERALISMS OF THOMAS PAINE AND MAHATMA JOTIRAO PHULE

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Abstract. *Thomas Paine (1737-1809) and Mahatma Jotirao Phule (1828-1890) were both revolutionary thinkers in their respective times and geographical spaces, concerned about radically altering the unjust foundations on which their respective societies were based. Their thought revolved around creating a just socio-political order that would ensure liberty and safeguard the rights of people. Phule's contemplation of the degeneration of the Indian society brought him to identify the cause of discrimination. Paine's ideas in his Rights of Man proved to be an inspiration that enabled Phule to articulate the dissent against the varna-caste hierarchy propagated by the ideology of Brahminism in the modern terminology of rights. Paine reminded the people in the western world of the need for keeping the spirit of revolution alive by being vigilant about rights. Phule's legacy in India is his scathing attack of the ancient and haloed systems of social organization that actually undermined the rights of people.*

Keywords: Thomas Paine, Mahatma Jotirao Phule, Revolutionary Liberalism, Rights, Social Revolution in India, Shudraatishudras.

1. Introduction

Mahatma Jotirao Phule (1828-1890) has been hailed as the father of the Indian social revolution on account of his work in analyzing the socio-religious roots of slavery related to the toiling *shudraatishudra* (the *shudras* and the *atishudras*, the low and the downtrodden castes, respectively) masses and in reconstructing Indian society on the basis of justice, equality and reason (Keer 1974: vii). The influence of the revolutionary ideas of Thomas Paine on Phule's liberalism has been reported by various scholars (Vora 1986: 107; Keer 1974: 14). The present paper discusses the revolutionary liberalism in Phule's thought in the light of the influence of Paine's *Rights of Man*. It seeks to bring out parallels between their thoughts and indicate the striking similarities of the backgrounds and temperaments between the two.

2. Life and work of Phule

Jotirao Phule was fondly conferred with the title of '*Mahatma*' (a great soul) by the people of Pune in Western India, in present day Maharashtra, in recognition of the impact of his theoretical-instructional and agitational-organizational work. He is regarded as one of the most important political thinkers of the Indian Renaissance (Deshpande 2002: 3). Belonging to the educationally backward *Mali* (Gardener) caste, which is among the so-called lower peasant *Shudra* castes, Phule had an interrupted education up to what could be called secondary school level by 1848. By then, his father had given up the traditional family occupation of growing flowers for temple worship and was running a successful business as a building contractor, which he joined thereafter. In 1840, he married to Savitribai, whom he taught to read and write, inspired by the activities of an American Christian mission school for girls run by one Miss Farrar at Ahmadnagar, near Pune. Miss Farrar lamented on the state of women's education in India and told him that if each educated Indian male took up the task of educating his wife, the latter could help him in the spread of education (Keer 1974: 23-24).

Having understood the significance of education in removing the ignorance of the poor gullible *shudraatishudra*s and women who were at the mercy of the Brahmin priests and the order created and entrenched by their scriptures, Phule started a lifelong crusade for the education of the *shudraatishudra*s and women, by starting the first school for girls in Pune in 1848, with his wife as a teacher. This was the first school for girls in India. Two more schools were started in Pune in 1851. He felt that education would be the key to rational thinking and understanding of the existing inequalities and oppressiveness of the socio-religious order in 19th century India. This work annoyed the conservative Brahmin opinion and they created a lot of hurdles in his way. But determined that his path would lead to the establishment of an egalitarian society, Phule continued at his avowed mission even at the cost of a discord with his father who was opposed to going against tradition.

For the rest of his life, Phule involved himself in the task of awakening - among the *shudraatishudra*s and women - the confidence that had been dampened by the socio-religious system labeling them as impure. He did this not only by spreading education among them, but also by criticizing the Hindu religious beliefs and practices and questioning the various texts that sanctified this inequality. The stimulus to his thinking came initially from an insult that he encountered at a marriage ceremony of a Brahmin friend, where some conservative elders

shooed him off the marriage procession labeling him as low caste (Keer 1974: 17). Infuriated because of the insult, he began to think of the causes regarding the status based on birth in Indian society. He vowed to remove heredity as a basis of assigning social status as he concluded that was the cause of humiliation and lack of human dignity in Indian society. This was the beginning of his crusade against the *varna*[13] – caste system in India.

Phule established the *Satyashodhak Samaj* (The Truth-Seekers' Society) in 1873 that proclaimed the need to save the "lower castes from the hypocritical Brahmins and their opportunistic scriptures" (Sarkar 1983: 57). The *Samaj* was established by Phule in line with other such religious reform initiatives being taken in his times by social reformers who believed that if the degenerate aspects of the religion were removed, it would be restored to its pure and sublime form. Phule, on the other hand, believed that the very basis of Hindu religion was flawed as it was founded on inequality and lack of human dignity. Accordingly, he strongly opposed this religious order and wanted to completely do away with it. He scrutinized the various texts that propagated this hierarchical social organization, i.e. the *Vedas,*[14] the *Smriti* literature or the legal codes as well as the *Puranas*, or the mythological literature. In order to expose the capriciousness of the Brahminical[15] order, he wrote several books, journal articles and some literature in the popular genre that could be presented in popular art forms, such as the play *'Tritiya Ratna'* (1855), the ballad *'Shivajicha Powada'* (1869), the lyrical *'Bramhanache Kasab – Priestcraft Exposed'* (1969), the dialogues *'Gulamgiri – Slavery'* (1873), and the *'Sarvajanik Satyadharma Pustak'*, translated by Deshpande as *The Book of the True Faith* (1891, published posthumously by Phule's adopted son), etc. He used these genres so that the ideas could be propagated in the oral form across the illiterate *shudraatishudra* audience. He also wrote a full-fledged exposition upon the condition of the farmers in India, entitled *'Shetkaryacha Asud - Cultivator's Whipcord'* (1883). Apart from these writings, he also wrote numerous notes, pamphlets, retorts, letters that reflect his active participation in the theoretical discourse of his times (Phadke 1991).

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[13] The four-fold organization of Hindu society comprised Brahmins as priests at the top, the Kshatriyas as soldier- administrators/ kings, the Vaishyas as traders and the Shudras as peasants and artisans at the bottom of the hierarchy.

[14] The four Vedas were believed to be the revealed literature of the Aryan Hindus. They are the Rigveda, the Yajurveda, the Samaveda and the Atharvaveda, held to be sacred.

[15] Brahminism holds that the Brahmins are ritually the purest and hence on the top of the hierarchy of the four varnas.

3. Intellectual influences on Phule

Phule read Thomas Paine's *Rights of Man* in 1847 and contemplated upon the various ideas about rights. He became familiar with the history of the American War of Independence and became a great admirer of George Washington, just as he was of the medieval King Shivaji in Western India. Phule was acquainted with the American developments during his times and tried to connect the question of slavery with the socio-religious slavery of the *shudraatishudra*s and women in India. He dedicated his work *'Gulamgiri – Slavery'*, published in 1873, to "the good people of the United States as a token of admiration for their sublime disinterested and self-sacrificing devotion in the cause of negro slavery; and with an earnest desire, that my countrymen may take their noble example as their guide in the emancipation of their *Shudra* Brethren from the trammels of Brahmin thralldom" (Phadke 1991: 124).

Having studied in a Scottish Mission School and not in one of the schools run by the East India Company opened him up to a different world than merely that of the British history and political development. Additionally, Paine's ideas had an influence on some Scottish thinkers, so that this book might be recommended for reading to the students in the Scottish Mission School.

Through Paine, Phule was introduced to the Lockean school of revolutionary liberalism, while other contemporary Indian social reformers were deeply impressed by the second phase of classical liberalism in the tradition of British reformism, since that tradition was the most accessible to them due to the presence of British rule in India (Vora 1986). "With the exception of Phule, virtually all other social reformers/ revolutionaries stayed constrained by the limits imposed upon them by the rather weak English branch of European liberalism, exemplified most of all by Mill and Spencer" (Deshpande 2002: 3). Thomas Paine's *Rights of Man* influenced Phule especially since it was a strong critique of the British conservatism and a reply to Edmund Burke's *Reflections on the French Revolution*. In his boyhood, Phule had strong nationalistic aspirations of freeing India from the British rule, so that a book that criticized some aspects of colonization might have been attractive to him. However, he went on to read and contemplate deeply about it, providing him with a grounding in the modern discourse on rights, which essentially enabled him to articulate his discontent about the condition of the *shudraatishudra* masses in the language of rights.

The most notable Brahmin social reformers, like Justice Mahadev Govind Ranade (1842-1901), Gopal Ganesh Agarkar (1856-1895) and Gopal Krishna Gokhale (1866-1915), and the Parsee liberals, like Dadabhai Nowrojee (1825-1917) and Pherozeshah Mehta (1845-1915), espoused the ideas of slow progress or evolutionism and elitism (Vora 1986: 92). Phule, however, had a chance of understanding the Lockean revolutionary liberalism because of reading Paine's *Rights of Man*. He therefore had faith in the notion of collective wisdom of the society and looked at education of the masses as a means of manifesting it. Being a pre-University thinker, Phule was largely self-taught. The first batch of graduates passed out of Bombay University in 1858, by which time Phule had already started his work of spreading education among the *shudraatishudra* masses and girls.

In his reading of several books in the Indian tradition along with his friends, he came across a Sanskrit text called *'Vajrasuchi'* that had been rendered or adapted variously in Marathi by several saint poets and scholars during the medieval saint movement. This text attributes the agonies of the Hindus to the pernicious caste system. The other text that Phule and his colleagues seem to have been tremendously inspired by is the *'Beejak Grantha'* by another medieval saint from North India, Kabir. The part *'Bipramati'* (the mind/ intellect of the Brahmin) that describes the nature, selfishness and behaviour of Brahmins made an imprint on Phule's mind and he began to contemplate how to free the masses from the clutches of the Brahminism and from the socio-religious system (Phadke 1985: 42-43). Phule rooted his critique of the Brahminical order in those philosophical traditions in India that questioned Brahminism.

One can notice that the indigenous roots of Phule's critique of the Brahminical socio-religious order are fairly strong. Though the critique of the Hindu religion and social system made by the missionaries gave him his earliest direction, the missionary polemics and discourse was not the only inspiration to his analysis of the Hindu socio-religious system. He was working out his thoughts about the unjust nature of Brahminism on the basis of his own experiences and through acute observation of society around him. Because of this strong rooting in indigenous traditions, conversion to Christianity never posed itself as a viable option for Phule. Nor did he become an Atheist (Phadke 1985: 42-43). Phule's liberalism couched in religious language as socio-religious liberty has been understood as the step towards economic and political freedoms. The task of understanding Phule's liberalism thus

requires a decoding of his religious discourse, which is also true of the other socio-religious reformers of India at that time.

4. *Sarvajanik Satyadharma*, **an alternative to Brahminism**

Phule argued that the *shudraatishudra*s and women were condemned to the status of *Dasas* and *Dasis*, or servants in the Indian society. The Brahminical superiority arrogated to itself ritual purity with which they denied religious rights to these sections. Therefore, in the ritualistic aspects of religion, the *shudraatishudra*s had to depend upon the Brahmin priests and this was a major way in which the former were 'duped' by the latter (Phule 1873/1991). Not only did Phule deny the priest as the go-between in the relationship between the devotee and God, but also challenged the rational basis of the existing rituals in religion. While he attacked the existing religious customs and practices as unjust and irrational, he also made a conscious effort to create new rational rituals to take the place of the old ones. Otherwise, a mere destructive criticism would have been dangerous and make for an incomplete revolution. He wrote and published a booklet towards the end of his life for this purpose. It includes, for example, a rational ceremony for marriage, naming ceremony for a new born child, etc., in tune with the new ethos of an egalitarian and just society that Phule envisages. These rituals are revolutionary in that they don't need a Brahmin priest to carry them out. They imply freedom of the *shudraatishudra*s from the bondage of priest craft or the cheating of the credulous masses by the Brahmins (Phule 1887/1991). Various rituals are still discussed and explained as a part of his philosophical treatise, *Sarvajanik Satyadharma Pustak*, with their true importance and rationale.

The theoretical basis of his philosophy is to be found in the book *Sarvajanik Satyadharma Pustak* (1891), or *The Book of the True Faith*. In this treatise, Phule presents his vision of the ideal society and the principles on which it should be based. He seeks to put forward an alternative liberal framework for the liberation of the *shudraatishudra*s. In the 19th century India, several efforts were made towards religious reformation through the establishment of different societies by different social reformers. Phule found these efforts too slow and inadequate to establish a just socio-religious order. He did not appreciate these efforts for they didn't oppose the scriptures for the fear of public opinion and, as a result, they merely remained revised versions of the same Brahminism. He established the *Satyashodhak Samaj*, or the *Truth Seekers' Society* to propagate the ideas of his new philosophy. It was

based on the philosophy of Deism that completely rejected the theistic basis of Hindu religion, paving the way for a complete transformation of the ethos of religion. Once again, the influence of Paine on Phule is evident. In this book, Phule proposed thirty-three rules for a votary of Truth, which bear an imprint of the influence of Paine's thought on human rights. Phule made untiring mention of all 'men and women in the world' in these rules, never using a common identity 'man' and letting the woman to be present. This shows Phule's attitude of inclusion and paves the way for women to be counted in.

5. Conception of rights in Paine and Phule

The argument for equal rights in Phule's discourse takes a path that strongly resembles the arguments of Paine in his *Rights of Man*. In the present section, I attempt to point out the similarities in the arguments of Phule and Paine. The radical, almost revolutionary content of Phule's liberalism can be attributed to the early influence of Thomas Paine's *Rights of Man*. The following section discusses the way Phule appropriated the insights of Paine's *Rights of Man*, integrated them with his world view and applied them in the task of building his philosophy of total social transformation.

Paine was conscious of living in fluid times, that a new order was about to be established and a new ethos and ethic needed to be conceived for shaping the relationship between the individual, society and state. Having an uncanny premonition of revolution, Paine created a vision for the new order unfolding in the United States as well as in France. He also hoped that the two revolutions might rekindle the revolutionary spirit in his own England. Not only he participated in the American War of Independence as a foot soldier, but also was many a times the central influence in the morale boosting of the soldiers through his messages. His profuse journalistic writings in America set the tone of the thinking about the revolution itself and the kind of order to emerge. A new politics taking shape along participatory democratic lines in America provided the context for Paine to build upon the vision for the *Rights of Man*, which he hailed as republicanism (Hitchens 2007). I will discuss the views of Paine and Phule on the topic of rights with respect to the following themes: origin of rights, end of state, right to revolt and universality of rights, by drawing parallels between their ideas.

5.1. Origin of rights

By grounding himself in the deistic philosophy, Phule posited that the universe and all its creatures have been created by the *'Nirmik'* or *'Nirmankarta'*, with the same meaning in Marathi as Paine's Maker. He argued that all human beings were naturally equal, implying that there were no natural distinctions between human beings. He upheld the principle that all human beings were therefore free and endowed by their *Nirmik* equally with rights and freedoms, including freedom of thought and expression, as well as religious and political freedom. All the bounty of the *Nirmik's* creation was for all the human beings to enjoy, meaning that the resources of the earth belonged to everyone. Paine also posited that all human beings were born free and equally endowed with rights by their Maker (Paine 1791/1995: 462). Paine has been understood to have popularized the natural rights doctrine as his ideas echoed the Lockean premises and made a strong argument for the defense of the same. Rooted firmly in the natural law tradition, Paine talked of inherent rights that were contained in human beings by virtue of being individuals. As a result, rights were also inalienable for Paine. This implies they were imprescriptible as natural rights; governments didn't grant them, nor could they take the rights away (Paine 1791/1995: 462).

Paine concluded that just as everyone was equal at the time of creation in the eyes of the Maker, human beings should also be equal in front of the law. Moreover, people should have the right to a government that is representative for their interests and views. These ideas clearly reflect the theory of natural rights and representative government upheld by Paine. Phule pointed out that the traditional Hindu *Smriti*s or law codes applied differently to different *varna*s and unjustly favoured the Brahmin men. He therefore thanked Providence for the British rule over India as the British imposed the Rule of Law and brought the entire country with its entire population under a single administrative rule. According to Phule, legal equality would be a step towards eventually realizing an egalitarian society.

Paine reiterated the objective of the state as the realization of the common good (Paine 1792/1995: 585). Among the different kinds of government (i.e., monarchy, aristocracy and oligarchy), he argued that there was a tendency to tax the poor and enable the rich to become richer and more powerful. Hence, Paine strongly endorsed the idea of representative democracy, or Republican government. Phule applied the same logic to the Indian social system and argued that it exploited the *shudraatishudra*s and satisfied the interests of the Brahmins through cleverly written scriptures and mythological tales. The lives of the

*shudraatishudra*s and women were meant to fulfill the various needs of the powerful Brahmins in society. According to Phule, the caste system was a brahminical conspiracy to keep the *shudraatishudra*s in perpetual slavery.

Just as Phule found in hereditary social status the root cause of the misery in India, Paine directed against the hereditary monarchy the critique of the problems in the western society, especially in Great Britain. He saluted the French Revolution as the French nation revolted against the despotic principles of government. He lashed out against heredity principle saying that "the idea of hereditary legislators is as inconsistent as that of hereditary judges, or hereditary juries; and as absurd as an hereditary mathematician, or an hereditary wise man; and as ridiculous as an hereditary poet-laureat" (Paine 1791/1995: 479). In a stronger tone, Paine argued that hereditary succession and hereditary rights could make no part of government, because it is impossible to make wisdom hereditary (Paine 1791/1995: 511).

Phule assessed the contemporary Indian society where the Brahmins took advantage of the coming of the British rule, acquired modern education and went on to dominate the scene in higher education, government service as well as social institutions. He argued that the poor peasantry paid the major part of the taxes and the government spent on the facilities for higher education that only the elite classes could take advantage of. In the description Phule formulated for the Hunter Commission on deciding the Education Policy for India, he made it quite clear that even though the farmers were contributing the most to the exchequer in the form of taxes, their education had been ignored. When the Brahmin social reformers demanded the facilities for higher education, he argued that the spread of education among the *shudraatishudra* masses across the country should be the priority. He didn't trust the percolation theory of the social reformers. The connection he made with the paid taxes and facilities received was definitely a modern way of articulating demands and grievances, holding the government accountable.

5.2. The right to revolt

A result of the Glorious Revolution, the creed of Revolutionary Liberalism in England was rekindled through the American War of Independence and the French Revolution. The question whether people have the right to revolt against oppressive government that undermined human dignity and curtailed the rights of the people was answered affirmatively

by Paine in his *Rights of Man*. According to Paine, the right to resist the corrupt government was central to the notion of responsible government. Because Paine rooted himself in the natural law tradition, he accepted the view that morality operated through the conjunction of conscience and reason (Claeys 1989: 93). The conclusion followed that the laws of the State could not run counter to this natural law and, if they did, then the Lockean freedom to revolt would lay very much with the people.

In the context of 19th century India, Phule was witnessing massive transformation, coming face to face with the bureaucratic colonial rule and acquiring the modernity of the West through British education and government. A social as well as a political revolution were in the offing and social reformism came from the elite social reformers introspecting about the reasons for the colonial conquest of India by the British and the political reformers and arguing for waging a movement to win back independence. In this context, Phule faced a dilemma. The question was whether to rally around the forces of the Indian National Congress (established in 1885) and strengthen the cause of national freedom struggle, or carry on the task of social revolution aimed at ending the social inequality sanctified by religion. In his characteristic style, he questioned whether the Indian National Congress was truly 'national', given its largely upper caste and upper class composition. He pertinently questioned about how many *shudraatishudra*s, women and farmers, were members of the Congress. After thinking on the issues at hand, Phule concluded that the British would eventually have to go and then the Brahmins would take over, considering their ability of running the governmental machinery due to their current experience in government under the British rule. As a consequence, he felt that the slavery of his *Shudraatishudra* brethren would continue in the future, as they were ill-equipped with education and experience of running the modern bureaucratic governmental machinery. They needed to be empowered to take their just place in independent India. Consequently, he took a social revolutionary position in order to first rectify the inequitable social and religious situation in India and, therefore, stood for a total social transformation in India towards the values of human freedom and equality. Having taken this position on the colonial question, Phule chose to revolt against the socio-religious system in India that had curtailed the fundamental freedoms of the masses for centuries.

The moderate social reformers believed in the rationality of man as a part of the beliefs they accepted from the ethos of European Enlightenment. But rationality of man as an individual could not convince them about the rationality of the collectivity. They also posited

a chronology in the process of enlightenment. They believed that the individual got enlightened before the society. As a result, the emphasis was laid on the education and orientation of the individual, making their outlook elitist. Phule never took an elitist stand. In fact, his life's mission was to democratize the Indian society. He believed that there was something called collective wisdom. It only needed to be brought out through the process of education. His radicalism lies in the advocacy of education for all. Its monopoly by any society group may prove detrimental to the emergence of an egalitarian social order.[16]

In any case, a major aspect of Phule's social revolutionary activism involved the search for a common identity for all Indians that would be the basis of the establishment of freedom for all and equality of all. Phule contended that Indians could not realize nationhood without becoming one people. In his views, socio-religious equality was the precondition for the realization of modernity and democracy in India.

5.3. Universality of rights

The importance of Thomas Paine's *Rights of Man* lay in expounding upon the rights belonging to the individual as a human being, written with the confidence that the ideas therein apply to the entire humankind. The *Rights of Man* was attractive because of Paine's invocation of the rights of *all*, rather than narrow British liberties (Claeys 1989: 90). It proved to be remarkable for its universalism echoed in the Declaration of Independence and the American Constitution, as well as in the French Declaration of the Rights of Man. It also put forward universal principles and values. Paine broadened the understanding of the notion of rights by emphasizing a deeply Christian – especially Quaker – and cosmopolitan view of rights language. Mankind could now be understood as belonging to one universal fraternal community where all possessed equal rights and duties which upheld the fundamental dignity of each (Claeys 1989: 91). Thus, Paine's conception of rights paved the way for the 1948 United Nations Declaration of Human Rights. The idea of reciprocal rights and duties of individuals is an inference of this notion of universal rights. By way of extending the logic of the natural law tradition, Paine condemned slavery as contrary to the plain dictates of natural rights and conscience.

In Phule's conception, rights become meaningful only when they are universal and freely enjoyed by all. In a hierarchical society, rights belong only to select few elites; they are

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[16] I am grateful to Late Prof. Yashwant Sumant for his remarks on this topic.

merely privileges and instruments of oppression of the weak by the powerful. Hence, Phule criticized the Brahminical socio-religious order and argued for an egalitarian society enthused with the spirit of justice, equality and reason. Therefore, he wanted to extend all the men's rights to women as well. He understood the centrality of women's dual oppression in the context of the *Varna*-caste system and in the gendered context. In his attack on the Brahminical order for condemning the *shudraatishudra*s and the women in slavery for centuries, he identified the need for empowering women as an essential precondition of the emancipation of the entire society. Education was the first step towards achieving this goal. Women should be equipped to play their rightful role in society. In the entire project of starting schools for girls, the focus was on the right to education that would enable women to live a life of dignity. Phule attributed ignorance and servitude of the *shudraatishudra*s to lack of education.

6. Conclusion

Both Paine and Phule were essentially revolutionaries. Both wanted to radically alter the unjust foundations on which their respective societies were based. The historical context was of major transformations and upheavals happening across the world. While Paine was an active witness to two of the world's greatest revolutions against autocratic rule, Phule was involved in the transition to modernity of a traditional society ripped with colonialism. While Paine belonged to a modest non-aristocratic background, Phule came from a lower *Shudra* caste. Their disadvantaged status in their respective societies gave them a vantage point from where they could afford to be radically critical of the existing order. Both wrote for the common people and sought to democratize not only their societies, but also the politics and the discourse about it (Vincent 2005). Both they were more or less self-taught, as they did not get a chance to study in universities. Both were passionate about their respective causes and studied in depth to articulate their ideas. Both were actively involved in the political discourses of their times.

Both grappled with roughly the same issues. They questioned the norms of their societies and rebelled against the established order. They were harbingers of new ideas and values and passionately propagated them through polemical debates. They opposed the conservatives in their respective societies and waged pamphlet wars with them. Both faced denigration from their conservative opponents about the grammatical errors in their writing.

Both they also faced attempts on their lives as well as tremendous adulation. While Paine was tried for sedition in the country of his birth and imprisoned for treason and almost guillotined in France, Phule never got recognition in his own lifetime as a thinker. Only halfway through the 20th century, the recognition of his contribution to Indian renaissance and his radicalism as a social revolutionary thinker have become notorious. Not only is he viewed as the foremost ideologue of the emancipation of the weakest in the socio-religious system of the Hindus, but also he is considered an organic intellectual who could truly conceptualize and lead the movement for the emancipation of the oppressed. In order to understand the contemporary social reality in its entirety, Phule tried to build a system of ideas, taking into account the past and present realities of his time. He identified and theorized the most important questions of his time – religion, the *varna* system, ritualism, language, literature, the British rule, mythology, the gender question, the conditions of production in agriculture, the lot of the peasantry (Deshpande 2002: 18-20). Phule's analysis of the Indian society from the perspectives of *varna*-caste, class and gender is considered to be one of the most holistic understandings of the same (More 2007: 260).

While Paine has been hailed as the propagandist of the revolutionary creed of liberalism in the western world, Phule is considered to be the first social revolutionary in modern India. Dr. B R Ambedkar, the architect of the independent Indian constitution, hailed Phule as one of his preceptors along with Buddha and Kabir (Keer 1974: vii). The Constitution of India with its express guarantee of Fundamental Rights and other human rights is testimony to the enduring impact of the ideas of Phule on the efforts of shaping a modern democratic nation. The Constitution of independent India, drafted by Dr. Ambedkar, was adopted by the Constituent Assembly in 1949.

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NOTES FROM AN AMERICAN POLITICAL THOUGHT PROGRAM FOR TURKEY'S POLITICAL FUTURE

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Abstract. *In 2015, the author attended a six weeks summer school on the American Political Thought in Massachusetts, US.[17] Throughout the program, major currents in US political thought from the colonial period to the present were examined. Participants explored the shaping of American identity and the interplay between that identity and US history and politics. As a political scientist from Turkey, it was a timely introduction to the democratic founding of the US and to the discussions on race, religion, immigration, gender, and civil rights, as essential to understand the development of American political thought. This paper offers insights from a centuries-long tradition of presidential system for Turkish political elite and decision makers who have been debating the nature of a prospective presidential system. Despite the differences in historical, political and social conjunctures, it is noteworthy to review how a system of ordered liberty founded in the eighteenth century has survived through two centuries of social and political change and how that system is functioning today. This review will provide insights for Turkey to engineer its own presidential system. The overall paper consists of topical blog entries designed to offer insights from one particular American political thought program for the development of a presidential system in Turkey.*

Keywords: American political thought, Presidential system, Constitution, Rights and liberties, Turkey.

1. Introduction

> *… of the people, by the people, for the people.*
> *(Abraham Lincoln's Gettysburg Speech)*

According to legend, when Benjamin Franklin left the Constitutional Convention in 1787, a woman asked him: 'What kind of government have you given us?' Franklin responded wisely: 'A republic, madam - if you can keep it' (Morone and Kersh 2014: 5). Since its inception, the United States has always become an inspiration both for individuals and countries in search of their own ideals of equality, liberty and freedom. Beyond the so-

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called 'American Dream' that attracts economic migrants in search of a better life, American political thought and political system have always used as case studies by political elites and decision makers worldwide. The American Revolution (1775-1783) and the Declaration of Independence (1776) were the main inspirations for the French Revolution and the following social and political movements of the time. Currently, almost two hundred years later, the American political system is still considered an example for others. The reason behind this phenomenon lies in the skillful engineering of a system based on the checks and balances principle. To prevent the rule of one person or a small group of individuals over the people, the founding fathers established a complex net of political institutions based on the principles embedded in the Constitution.

One of the main challenges for states without a strong state tradition is the lack of a constitutional approach and functional political institutions. In comparison with other states established during the twentieth century, Turkey had a longer state tradition and institutionalised bureaucracy. In 1923, when the Republican government was established, Turkey had already a founding constitution stating that the Turkish state derived its sovereignty from the nation, not from the Sultan - the absolute monarch of the Ottoman Empire. It was a short text explaining the founding principles of the state. The constitution delegated both the executive and legislative functions to the National Assembly that was to be elected by direct popular vote. After the proclamation of the Republic on October 29, 1923, the executive powers were to be exercised by the President and the Council of Ministers on behalf of the National Assembly. With the introduction of the multi-party system in 1946, democratisation processes have started in Turkey. Since 1921, the constitution of Turkey has changed several times, the military has intervened in politics five times, and 63 governments and 12 presidents have ruled the country. Since 2003, Turkey has been ruled by a one-party majority that brings the country a relative sense of stability. The prospect of stability and economic growth under one-party rule has triggered the debates over the introduction of a presidential system in Turkey. Now, more than ever, the Turkish political agenda is preoccupied with the advantages and disadvantages of the presidential system for a country whose people have divided along ideological and ethnic fault lines.

In the midst of presidential system organization and regime change debates in Turkey, the attendance in a six weeks summer school on the American Political Thought has helped the author to understand the democratic founding of the United States and the general issues

of race, religion, immigration, gender, and civil rights. In spite of the differences in historical, political and social conjunctures, a thorough understanding of how a system of ordered liberty founded in the eighteenth century has survived through two centuries of social and political change might be instructive; moreover, there is also required to understand how that system is functioning today. The aim of this paper is to offer insights from a centuries-long tradition of presidential system for Turkish political elites and decision makers who have been debating the nature of a prospective presidential system. It is imperative to remind that the aim of this article is not to propose a model for the Turkish presidential system. It rather stands as a review of the American experience and ideological background in establishing the government system in the United States, in order to provide a starting point for Turkey in establishing its own presidential system. If one can answer the questions of who governs, how does American politics work, what does government do, and who are the Americans, it would be helpful to reflect on our case.

The following sections are designed as topical blog entries offering insights from American political thought for the development of a presidential system in Turkey. My remarks start with the 'Constitution' which is the main building block of a political system. First, the colonial roots of the American constitution and the issues of representation and equality will be emphasized in order to provide a framework of analysis in the Turkish context. Then, the checks and balances principle preventing the possibility of authoritarian tendencies at the presidential level will be reviewed. Lastly, the article explores the primacy of rights, liberties and freedom as characteristics of the American political system. Sharing the American experience of democracy and liberties might be a guide to Turkish decision makers and political elites to establish an inclusive regime of respect for rights and liberties for all citizens. Maybe not as extensive and ambitious as Alexis de Tocqueville's observations on democracy in America (1835-1840), it is probable that the blog entries based on the author's study and observations on the American political thought would provide insights for regime change and presidential debates in Turkey.

2. First Entry: the Constitution

We the people, in order to form a more perfect union…

The summer program on *American Political Thought* started off with a series of seminars and discussions on the roots of American declaration of independence and the

constitution. Jonathan Beagle's lively accounts of the evolution of colonial America and the context of the declaration of independence provided a rich background on the roots of American political thought. The development of American politics rooted in the rivalry between Loyalists, who remained loyal to British Crown, and Patriots, who supported the revolution. During the Constitution's ratification debates, the actors were the federalists and the anti-federalists. Both of these ideological conflicts took place before and after the revolution; it was not just wars and conflicts, but also intensive political discussions helping the founding fathers to establish the system (see, for instance, Cato's Letters (1720-1723) and the Federalist Papers (1788)).

The revolution resulted in Americans' demand to preserve rights they were fighting for. The colonies considered their assemblies as legitimate representative bodies. Great Britain's imposition of new taxes without the approval of colonial assemblies in the thirteen colonies violated the colonial idea of self-ruling. In his very engaging seminar, Beagle pointed out that the 1700s was a transformational century for American colonies that led to a revolution. This revolution had both savage and civilized elements. In this century, intellectuals like Benjamin Franklin and Thomas Paine appeared as leading figures of the revolution who added civilized elements to the revolution. As stated by Thomas Paine, one of the intellectual forefathers of the American Revolution, "Government by kings … was the most prosperous invention the devil ever set foot for the promotion of idolatry" (1776/1995: 10). Based on the experiences of colonies, Paine observed that the crown had a corrupt influence on the system and the idea of a patriot king[18] was not possible. There is no way that a king could become selfless, above politics and preserver of the best interest of the nation. As a result, a revolution to crash the king rule was essential. Paine modeled a linear, liberal and progressive revolution. Paine's *Common Sense* became the symbol of revolutionary movement and the building block of the Constitution.

George III's perception of protests against the stamp tax, his harsh response against the patriots and the emergence of the conspiratorial Tea Party paved the way to the Declaration of Independence. It is Magna Carta itself which includes the 'security clause'

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[18] Bolingbroke's *The Idea of a Patriot King*, written in 1738, has been described as an eloquent epitaph to the Patriot campaign. This slim treatise on monarchy was written for the private use of Prince Frederick of Wales and his followers, describing in idealized, even visionary terms, the policies and conduct of a Patriot King waiting in the wings, whose accession would end party-political conflicts and bring healing.

argument to overthrow the king (Turner 2003). By using a constitutional right to overthrow the absolute regime of George III, the political elites in the newly independent states decided to prepare a new constitution to replace the Articles of Confederation which had been inadequate for managing the various conflicts among the states. It was argued that a brand new constitution was needed to resolve the issues of stability, efficiency and power. Initially, two plans were drafted for deliberations. The *Virginia Plan* recommended a consolidated national government based on the philosophy of John Locke's consent of the governed, Montesquieu's divided government, and Edward Coke's civil liberties. The Virginia Plan privileged the most populous states, while the *New Jersey Plan* favored the less-populated states. The New Jersey plan was based on Edmund Burke's received procedure and William Blackstone's emphasis on sovereignty of the legislature.

During the deliberation period, the federalists presented their cases under the Federalist papers, written under the pseudonym Publius by Alexander Hamilton, James Madison, and John Jay, between October 1787 and August 1788. Furthermore, a convention was held in Philadelphia to revise the Articles of Confederation. However, the intention of framers, namely James Madison and Alexander Hamilton, was to prepare a new constitution. Only after very intensive debates and discussions throughout the convention, delegates agreed on the text and the constitution was ratified. What was striking in this conventional process was the means and ways to reach a compromise necessary for ratification. At the end, even the dissenting Rhode Island ratified the constitution in 1790.

Morone and Kersh highlighted the significance of the Constitution for American politics. According to them, Americans invested an extraordinary power in the constitutional arrangements more than 225 years ago. "The constitution is the owner's manual and rulebook for American government. It operates setting out what the government may do and how to do it. If you want to learn about any feature of American politics, always check the Constitution first" (Morone and Kersh 2014: 43-44). In brief, The Constitution institutionalises the American ideals.

The first ten amendments to the constitution are called the *Bill of Rights* (ratified in 1791) incorporating some basic rights and freedoms of Americans. Following the Bill of Rights, throughout the American history, 17 more amendments have been ratified to strengthen the citizens' rights and freedoms (Ackerman and Ginsberg 2011). In this regard, the continuation of debates on citizenship and the rights of citizens has played an important

role in the social dynamics of the United States. However, there should be changes in every society from time to time, so that the Constitution has to provide ground rules for those changes. Constitutions organize our political lives, they guide governments. As a result, constitution is an essential element for the openness of a political system.

In the case of Turkey, before discussing the transformation from a parliamentary system to a presidential system, there is a need for a constitutional change. It is not just for changing the name of the regime, but for establishing a strong checks and balances system to control the prospective authoritarian tendencies and one-man rule. By defending citizens, based on the mutual agreement of different sections of society, the constitution should also be prepared to ensure that it is an all-inclusive, rights-based and guarantee for liberties and freedom.

3. Second Entry: on Citizenship and Nationhood

If the Revolution created a new nation, it also invented a new public entity:
the American people (Foner 1998: 37)

As freedom, rights and liberties lie at the heart of the development of American political thought, the SUSI program has covered a series of seminars and lectures on citizenship, migration, minorities, women rights, and civil rights movements. Through those seminars and lectures, the following questions were answered: How citizenship and nationhood were defined in the context of emerging rights and freedoms? How civil rights movements and other social movements have helped the development of the US identified with liberty? What were the challenges? Finding answers to those questions has helped us to think about our societies and what kind of improvements we need in order to advance on the path of democracy and human rights in our countries.

The Revolution created a new collective identity from a colonial population divided by ethnicity, religion and class. Starting the Constitution with the words 'we the people', the text hinted at the citizens. This definition included all the individuals living within the nation's borders. The constitution identified three inhabitant populations: Indians as members of their own tribal sovereignties and thus not part of the American body politics, slaves, and the people who enjoyed the blessings of liberty as defined in the Constitution (Foner 1998). Since the revolution, from slavery to the most recent controversies on Mexican migrants, the debates on who has been entitled to enjoy freedom still continues. The most pressing problem was that of juxtaposing the idea of liberty as a universal human right with the concept of race.

American nationality combined both civic and ethnic definitions of nationalism. As opposed to ethnic nationalism which defines nation based on shared ethnic identity, civic nationalism envisions the nation based on shared political institutions and values. Lacking an ethnic definition, what makes one American was the commitment to the ideal of liberty, equality and democracy (Kohn 1957). In *Letters from an American Farmer* (1782), Crèvecoeur's myth of a "a country created by men which is perfect" reflected upon the American experience of liberty and freedom. However, the language of liberty and citizenship did not apply to Africans, as they were excluded from the imagined community of the new nation. Congress created a uniform system of naturalization. The *Naturalization Act* of 1790 offered a definition of American citizenship which restricted it only to free white persons. This limitation lasted until 1870 when Africans were also included, and, in the 1940s, persons with Asian origins became eligible for citizenship (Foner 1998). With the 14th Amendment, the idea of *jus soli* citizenship was recognized to give African-Americans citizenship rights. The divisions created at the beginning of the republic have repercussions in today's American society. In spite of the abolitionist movement in the first half of the 19th century and the African-American civil rights movements of the 1950s and 1960s, the American society has still been suffering the divisions and discriminations created in the early period.

Lastly, as the US nation has been established by the people, for the people, the right to vote has become the emblem of American citizenship. Moreover, with the emergence of Democratic and Republican political parties in the public sphere, a realm independent of government has aggregated citizens in order to affect politics. The constant interest for political affairs within the public sphere has become one of the indicators of good citizenship in the US.

The American experience has been influential in order to establish a fair and equal nation in which the definition of citizenship became extremely important. Particularly for multi-ethnic and multi-racial societies, it is extremely difficult to apply the idea of nation-state. Given the imperial background originating the Turkish Republic, the nation has been consisting of communities from different ethnic and religious background. The history of nation-state derived from Turkish nationalism has proven that ethnic nationalism was not the best idea for such a multi-ethnic and multi-religious society. To resolve the conflict with Kurds, to protect the rights of other religious and ethnic minorities in Turkey, a new constitution is needed with an all-inclusive definition of nationhood and citizenship.

4. Third Entry: on Rights, Liberties and Freedom

All men are created equal, …
with certain unalienable Rights, that among these are
Life, Liberty and the pursuit of Happiness.–
That to secure these rights,
Governments are instituted among Men,
deriving their just powers from the consent of the governed…
(Declaration of Independence)

American freedom was born in revolution. During the struggle for independence, the ideals of liberty and freedom further developed. The primacy of liberty and freedom was also reflected in the constitution. However, throughout the social and political maturation of the American people, what the constitution called "'the blessings of liberty' was challenged and extended" (Foner 1998: 3). The main philosophical current influencing the American Revolution was composed of the ideas of British liberals, such as Locke and Milton. In the colonial era, liberty stood between the liberal and the republican understanding of government and society. Both liberalism and republicanism of the time inspired a commitment to constitutional government, freedom of speech and religion, and restrained arbitrary power. Security of property was seen as the very foundation of freedom (Foner 1998). Colonial America was a society with a strong democratic potential and the American Revolution was fought in the name of liberty. Hence, the *Declaration of Independence* referred to the natural and unalienable rights of mankind, among which liberty was second to life itself. Since its inception, devotion to freedom has become the essence of American nationalism (Koch 1961). Thomas Jefferson's assertion in the Declaration on equality had naturally linked equality with freedom. The *Bill of Rights* in particular was designed to protect liberty. Still, it is the Bill of Rights where Americans turn to, in order to define their freedoms. As James Madison put it, freedom of speech, freedom of religion and freedom of the press were defined as the most sacred of all rights that no political authority should influence (Wootton 2003).

One of the problematic issues regarding this commitment to freedom and liberty in the aftermath of the Declaration was the issue of slavery. Even though the enlightened opinion among the Atlantic liberals such as David Hume, Adam Smith and Montesquieu considered slavery wrong, the public debates on slavery in America lasted longer than expected. Given that even the leading figures of the revolution were slaveholders, including Madison and Jefferson, the abolition of chattel slavery as a system took some time, and the words 'slave' and 'slavery' were never mentioned in the Constitution (Foner 1998). Starting with the

abolitionists, continuing with feminists fighting for women suffrage and a long series of civil rights movements, American history has become a history of struggle for rights and freedom. During the Civil War, President Lincoln's speech at Gettysburg added the concept of equality as one of the correlatives of freedom. To ensure that, the first statutory definition of American citizenship, the *Civil Rights Act* of 1866, declared that all persons born in the US (except for Indians) were national citizens and they could enjoy certain rights regardless of their race.

In times of warfare, from the Civil War to World War I and more recently to war on terror, the magic words were 'liberty' and 'freedom'. The maintenance of America's free institutions and the protection of the United States have been consistent with defending the beacon of liberty and justice. For example, propaganda posters prepared by Office of War during World War II included freedom of speech, freedom of worship, freedom from want and freedom from fear as American values to fight for.

As Ralph Waldo Emerson stated in his lectures on *Antebellum America*, Americans are "fanatics in freedom" (Bode and Cowley 1981: 594-595). The struggle between liberty and political power continued throughout the nineteenth century. During the Jackson administration, the Democratic Party condemned the federal government as dangerous to liberty. According to Democrats, weak government was essential to public and private freedom. In that sense, the limitation of power was considered the only safeguard of liberty. Even today the tension between positive and negative definitions of government and freedoms has become a persistent feature of American politics. As a result, a strong, well-designed system of checks and balances was established to limit strong presidents and governments and to protect rights and freedoms.

5. Fourth Entry: on Presidency and Separation of Powers

There should be no bitterness or
hate where the sole thought is the welfare
of the United States of America.
No man can occupy the office of President
without realizing that he is
President of all the people (Franklin D. Roosevelt)

The office of the president was established after very long and exhausting debates during the constitutional convention of 1787. Colonial experiences with monarchy reflected in these debates. The founders knew that the English king was too powerful. Warned by James Madison (Federalist Papers no. 47) that "the accumulation of all powers legislative, executive

and judiciary in the same hands, whether of one, a few or many...may justly be pronounced the very definition of tyranny", the convention delegates designed the office accordingly. They established the institution of Presidency in the second article of the constitution. To check the power of the presidency, the system was based on three principles: power shared with other institutions, establishment of a chain of command, and election system. The president's powers are balanced by Congress through a well-defined chain of command. The election of the president became another controversial issue at the convention. According to Morone and Kersh, "delegates … feared that the public did not know enough, that the state legislatures were too self-interested, and that Congress would become too powerful if given the task of appointing the executive" (2014: 464). At the end, a hybrid electoral system called the Electoral College[19] was agreed upon.

The elegant vagueness of Article 2 contrasts Article 1 which defines the power of legislature in a very detailed manner; it might mean that the framers purposely left it vague to allow for changes. The constitution grants the president limited number of expressed powers. These explicit grants of authority are carefully balanced by corresponding congressional powers (Morone and Kersh 2014). The following phrase expressed in the constitution summarizes the executive power: 'take care that the laws be faithfully executed'. Congress votes on legislation and sends it to the executive. In this way, Congress delegates power to the president. Besides these two sources of power, modern presidents claim inherent powers as a third source of authority. This is the most controversial source of authority since it is not defined in the constitution, nor delegated by the legislative. Particularly during the times of crises, presidents tend to seize inherent authority. Crises generally expand the role of presidency and presidents renegotiate the limits of the office (Morone and Kersh 2014). In cases of inherent power claims, the Supreme Court evaluates whether presidents overstep the constitutional boundaries of their authority.

"The modern presidency, as expressed in the policies of the administration of George W. Bush, provides the strongest piece of evidence that we are governed by a fundamentally

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[19] The Electoral College is a process that the founding fathers established in the Constitution as a compromise between election of the President by vote in Congress and election of the President by popular vote of qualified citizens. The Electoral College consists of the selection of electors, the meeting of the electors to vote for President and Vice President, and the counting of the electoral votes by Congress. The Electoral College consists of 538 electors. A majority of 270 electoral votes is required to elect the President.

different Constitution from that of the framers" (Feldman 2006). It is feared that the President's attempts would harm the Constitution's intricate checks and balances system. Arthur Schlesinger (2004) pointed out the danger of an imperial presidency, which was something the founding fathers attempted to prevent through the checks and balances system.

The last check point for the presidency is a civil one. Every week, polls which ask Americans how they view the president performance are conducted. These approval rating polls are considered as a barometer for the president to view the success or failures of his/ her administration. Such public opinion polls are also considered as a good indicator to show the legitimacy of presidential actions in the eyes of the constituents.

The colonial reflex of the fear of powerful presidents has helped Americans to develop a checks and balances system. In spite of periodical hick ups, the checks and balances system has been working to limit authoritarian tendencies. Both Congress and Supreme Court have played their part to ensure that. The logic behind the American presidency is illustrative for the significance of a healthy checks and balances system. The system should leave room to maneuver for the president, but at the same time the power and authority that the president could exert should be checked by legislative and judiciary branches.

6. Conclusion

It is now our generation's task to carry on what those pioneers began. For our journey is not complete until our wives, our mothers and daughters can earn a living equal to their efforts. Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law for if we are truly created equal, then surely the love we commit to one another must be equal as well… Our journey is not complete until we find a better way to welcome the striving, hopeful immigrants who still see America as a land of opportunity until bright young students and engineers are enlisted in our workforce rather than expelled from our country.

(President Obama's *Second Inauguration Speech* 2013)

Today the United States is not the most democratic country in the world, neither the most equal. Social and economic inequalities remain the most cunning issues. From the implications of the right to keep and bear arms to police violence directed at African-Americans and abortion, there are many unresolved issues. In a way, the United States of America is not the ideal model for other states to follow. However, the virtue of American system lies on the fact that it has always been open to critique and challenges. Since the founding fathers, freedom, equality and liberty have become the building blocks of the nation, and each generation of American people have contributed in pushing forward the founding principles. In spite of the harmful effects of systemic structural crisis, the American society has been enjoying rights and freedoms. What is quintessential in the United States points at

the existence of constant debates on the improvement of the state of freedom and liberty for all. The Supreme Court ruling to guarantee same sex marriage and a Rastafarian lady's winning right to wear a colander in her driver's license based on the First Amendment that applies to every person and every religion are among the marginal examples of this approach. The Declaration of Independence, the Constitution, the abolitionist movement and all the other social movements from women's rights to same sex marriages have all developed to challenge the system and contributed to the further advancement of rights and freedoms in the United States. It is in the nature of the American people's devotion for liberty and rights that constitutes a model for countries like Turkey and which are standing on a historical juncture of regime change. If Turkish decision makers and political elites are really committed for the advancement of democracy, rights and freedoms, these blog entries on American political thought would provide blue print for them. The weaknesses and strengths of American political thought and the American people's continuous demand for civil, economic and social rights might constitute an example for Turkey.

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BRAZILIAN POLICY OF EXPANSION IN HIGHER EDUCATION UNDER THE INFLUENCE OF EUROPEAN AND NORTH-AMERICAN MODELS

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Abstract. *This study reviews the setting of the upper courses in technology within the democratization processes of access to higher education and analyses whether the reasons listed in the legal documents for the selection of these courses are actually pointed by the students attending them. The exploratory research has found that the peculiarities of each institution, determined by several variables, be they human or material, are key elements for the understanding of a particular educational policy. The proposal of higher courses in technology cannot be considered good or bad, a priori. The contribution of this study, though modest, is to clarify the new contradictions, tensions, demands and contributions, showing features of one of the protagonists of expansion of higher education in Brazil. From the literature review and reports of graduates and students, the survey concludes that the higher education courses of technology today little resemble the 1960s and 1970s. Furthermore, by affording those who were excluded from the higher level of education, higher wages, greater employability and new perspectives of life, these courses can contribute to overcoming social, cultural and economic limitations. Regarding the profile of students, the study attests the symmetry between the profile listed in legal documents and the profile of dozens of students and technologists who contributed to this research by answering the questionnaires.*

1. Introduction

The need for formation of a new type of worker, required even by the advent of global and national development pattern that has began to take shape from the 1980s, demanded changes in the social roles of education and, consequently, in the nature and the organization of the Brazilian educational system. A wide range of measures consisting of laws, decrees, resolutions and opinions, in addition to a number of government programs, began to regulate and coordinate the implementation of public policies for Brazilian education and for professional and technological education, in particular.

From the 1990s, under the hegemony of neoliberal policies to reduce the functions and role of state policies, the reform of vocational and technological education has started in Brazil. In this context, in order to regulate the Law of Directives and Bases of National Education (Law no. 9394/ 1996), the government published the Decree no. 2208, in April 1997, attributing to technical and vocational education a separate and independent organization of high school. The decree in question signaled the revitalization of higher education technology proposal. It provided that, in addition to basic and technical, vocational education should also include the technological level corresponding to upper-level courses in technology, aimed at the upper-middle and high school graduates. According to article 10, "the higher level courses corresponding to professional education at the technological level should be structured to meet the various sectors of the economy, covering specialized areas and conferring technologist diploma". The higher education technology, albeit with other nomenclature, had its origin in the 1960s. It was born and supported by market needs and promoted by the University Reform of 1968. The first experiences of higher education technology (operations and engineering technologists training three years duration courses) have emerged in the he federal education system and the private and public sector in São Paulo, in the late 1960s and early 1970s. While technologists training courses have gone through a growth phase during the 1970s, the operation of engineering courses was abolished in 1977.

In 1979, the Ministry of Education changed its policy of encouraging the creation of technologists' training courses in federal public institutions. These aimed at creating harmony with the market and technological development. Throughout the 1980s, many of them became extinct in the public sector, and the growth of its offering was made through private institutions in order to increase the number of courses offered and aiming at future transformation into a university program. From the Decree sanction no. 2208 and subsequent legislation, the professional education level of technology has been experiencing substantial growth. In the midst of this process, higher education technology has achieved new dimension and resumed its career in the Brazilian educational scenario. In this sense, these courses represented a strategic effort of the Ministry of Education with a view to the changes occurring in the social system, the national and international economy.

This study discusses precisely the resumption of the valuation policy and expansion of higher education technology starting with the late 1990s and extending to the present day.

If, in the 1960s, 1970s, 1980s and even in the 90s, with the Decree no. 2208, vocational and higher education courses in technology, specifically, have established a two-tier education system, currently, these education approaches could be seen as possibilities of social integration, commitment to training for work and making knowledge not only the production of functionality. Once higher education technology was not recognized by class councils, its graduates gained ground in the labor market and affiliated with some professional bodies, like the Federal Council of Engineering, Architecture and Agronomy.

Because of the low level of worker education, the current setting of the Brazilian educational trajectory causes significant liabilities of school exclusion, which poses higher challenges for the country than in other countries of the world, including Latin America. This reality shows difficult conditions for Brazilian workers to face the challenges of a globalized economy, where the adoption of new technologies and organizational forms is highly exclusive. Within this phenomenon of economic globalization, one might ask: what are the characteristics of the configuration of higher education technology and of the democratization of access to higher level of education in the current Brazilian labor market? To what extent the goals set for these courses in law fail to materialize?

In the analysis of the expansion of higher education technology, I am also investigating how this course strategy has been implemented in different institutions of Belo Horizonte. As Lima Filho (2002: 11) ponders, one must recognize that, despite the strength of macroeconomic decisions and imposed apparatus of public policies, institutions have developed a relative autonomy, or a certain specificity in its actions, so that it is not appropriate to conceive of them as mere passive instruments of the state of service, capital, or any external power. Thus, each institution may reveal peculiarities regarding the implementation of higher education technology. It would be pure determinism to transform real concrete diversity in abstract homogeneity. One should consider the action, the immediate interests and short medium and long term projects of each institution in their social environment. All these factors establish relationships of complementarity and complexity, indicating the necessary caution regarding the conclusive interpretations or generalizations when it comes to investigating social processes. Finally, it is necessary to clarify that this research is exploratory, in view of the small number of works related to its object.

2. Globalization & Remodelling: new scenario for revitalizing the Colleges of Technology

In recent decades, the most extraordinary scenario changes have taken place on the planet, affecting its economic, social, political, cultural, religious and legal dimensions. Such changes have been intense, leading to the conclusive experience concerning a moment of acceleration of history. Starting with the 1980s, the main features of the new global scenario are: economy dominated by the financial system and by investment on a global scale; multi-flexible production processes; low transportation costs; revolution in information and communication technologies; deregulation of national economies; preeminence of multilateral agencies and emergence of major forms of transnational capitalism (Santos 2002: 291). These changes go through the entire global system, albeit with uneven intensity, depending on the position of the countries in the world system. Since it affects all countries, this phenomenon has been termed 'globalization', by "unit(ing) distant localities in such a way that local happenings are shaped by events occurring many miles away and vice-versa" (Santos 2002: 26). Globalization is the set of planetary range of phenomena that tend to add interdependence and interconnection flow of people, goods, services, information, technology, capital, sustained technological revolution, the formation of a world-wide market, increased trade and networked production (Walker 2006: 22).

The world scene in the early twentieth century was a new and qualitatively different reality. It was marked by a multiplicity of actors and wide range of topics. In the post-Cold War world, the antagonism between two world views and two poles of power gave way to a multi-polar economic, political, and even cultural view, but not military. Overcoming the bipolar conflict removed the stiffness in alliances of world power. Metaphorically, it means that, instead of white and black, international relations have been comprising various shades of gray.

In Brazil, as in other countries, globalization has presented itself in a paradoxical way. One of the paradoxes is that, while these countries have experienced broadest and extensive democratic developments, there is a widespread perception regarding the fragility of these democracies. One of the weaknesses appears in access to education, where the exclusion figures show a perverse reality. In Latin America, even much poorer countries that Brazil present enrollment rates higher than the Brazilian ones. The enrollment in higher education in Brazil is below the Latin American average: only 17% of young people in the appropriate age

group (18-24 years) attend college. Also, in relation to complete high school, the Brazilians have achieved lower results than neighboring countries.

Obviously, as Nephew (2010) ponders, much of which is attributed to the higher education crisis is in fact a broader phenomenon that might be called the global economic crisis. Accordingly, important educational problems will not be resolved within the institutions and educational systems. These are problems that make the general crisis of our times consisting, among other things, in the loss of value references, explosion of information and knowledge, rapid obsolescence of products, changes in job profiles, consumerist obsession, individualism, uncertainty about the future and economy as a regulatory principle of society.

It is also necessary to clarify that the 'democratization' of higher education is not limited to expanding opportunities for access and creating more jobs. In addition to the expansion of enrollment and inclusion of socially disadvantaged young people because of their economic conditions, prejudice and other factors, it is essential that they are ensured the right conditions for performing good quality with their studies. Thus, access and permanence are essential aspects of the broader process of 'democratization' from a quantitative standpoint. The various stages of formal schooling, among them higher education, organize the training processes that will be part of the whole life of a person. The school exclusion at any stage is consistent with the deprivation of some cognitive and social skills. Education takes on a strategic role in the economic development of countries in order to combat social inequalities through the reintegration of individuals in new companies set up around information and knowledge. All sectors require investment in education and are affected by its disabilities. In the words of Eliezer Pacheco, secretary of vocational and technological education, "education has become imperative as a fundamental part of a national project".

3. Expansion and Implementation of Colleges of Technology

According to a study of the Ministry of Education which covers the period 1991-2009, it is clear that Decree no. 2208/ 1997 has been a milestone in the history of higher education technology due to its positive consequences. First, it has generated progressive increase in this type of courses, always in ascending indexes. Until 1997, the provision recorded negative rates. In 1997, for example, the closure of higher education technology led to a falling down

(33.8% in comparison with the previous year). Since 1997, the expansion of these courses has resulted in reaching a percentage of annual growth of up to 79.5%.

Second, the recorded growth was mainly in the field of private institutions - a phenomenon that was not specific to higher education courses in technology, but to the whole higher education courses. In 2009, there were 486,730 registrations in 4491 higher education technology schools. Of the total, 217,694 registrations were women and 269,036 were men. Therefore, one could notice the predominance of male students in higher education technology. In the same year, 104,726 students graduated as technologists. As in the case of traditional graduations, the positions offered through CSTs have not been met in full. In 2009, of the 1,156,506 vacancies, 1,038,786 were filled. The registered/ opening ratio, via selection process, was 1.6, since 837,737 candidates competed for 528,647 jobs.

The upper courses in technology, the way they are designed, represent a new type of higher education; considering the number of vacancies offered (528,647), one could easily conclude that, despite all the expansion, the offer is still lower than those of bachelor degrees. However, the difference in the number of undergraduate courses (534,904) is rather small: 6,257. Bachelor has already held the numerical lead in Brazil: 1,989,825 vacancies offered in 2009. However, it was not just the institutions with market profile which have started offering these technology graduate opportunities, as many public institutions have also done the same. In order to sum up this offer by the different educational institutions, as well as the profile and perspectives of students and graduates of these courses, there was a field survey which tested whether the listed reasons in the legal documents for graduate students in technology materialized.

The field research was developed in four institutions in the state capital: one federal, a state, a private, and another private confessional institution, on the assumption that distinct administrative categories could lead to differences in the implementation of the courses. Semi-structured interviews were conducted with people who participated in the implementation process of the courses and questionnaires were addressed to students and graduates of the institutions surveyed. The purpose of the questionnaire was to see if there were changes in the professional life of students after completion of a CST and, especially, if there was symmetry between the reasons why they opted for a degree in technology and those listed in the legislation to justify the existence of the respective courses.

Of the surveyed institutions, the CEFET/ MG was the first to implement the modality of graduation in discussion. Its upper courses in technology, however, have a rather short duration. Besides possessing cutting-edge educational projects, by offering free courses in quality, CEFET/ MG benefited from a selective process that allowed the selection of students committed to their studies. All the variables described above, plus others such as titration teachers, allowed the CEFET/ MG to become a reference institution in the provision of higher education technology. It is considered that the continued provision of these courses by the institution would contribute to greater acceptance of the undergraduate mode in society. However, the Board of Education thought it was more interesting for students to offer more bachelor, rather than a form of technological graduation. Vacancies of the latter were transformed/ redirected by the institution that created the Administration and Literature courses. One should also point out that, of all the graduates contacted during the survey, the CEFET/ MG were the most enthusiastic about the type of technology graduation. It was only in this group who met graduates and who pursued graduate level studies that people declared themselves as successful professionals. During the research, a greater ease of the students of CEFET/ MG was perceived and greater objectivity in the answers provided was observed. Undoubtedly, the support of the institution guaranteed better chances of employment to higher graduates.

In turn, the most contrasting institution with the CEFET/ MG, regarding the material and teaching conditions, was the UEMG. It was noted that, despite the fact that courses have received the 'A' mark in the State Board of Education assessment, the funds transferred by the state government were insufficient even for investment in infrastructure, such as the library. Another problematic issue in UEMG, especially in the School of Public Policy 'Tancredo Neves', was the high turnover of staff. Low investment in UEMG was reflected in the courses quality. As well as the CSTs of the CEFET/ MG, senior technology courses offered by the School of Public Policy at UEMG are free. This is a determining factor for the son of a worker to run or not for a degree. However, the lack of investment in education by the State of Minas Gerais government ends up creating different levels of technological education in the country and in public life. With this, it reinforces the dualism that has characterized the professional and technological education in Brazil and has stigmatized this modality as second-class. Given the low investment of the state government in different areas

of the education sector, many of the goals listed in the PDI of this university become 'dead letter'.

The third research institution was the Estacio de Sá School of Belo Horizonte. Since being installed in Belo Horizonte (2000), the imposition has passed through advances in relation to the infrastructure, the titration teacher and servers. All has been stimulated by the regulatory policy implemented by the Ministry of Education. The investment made by Estácio de Sá, focused on human and material resources, has been beneficial for the entire academic community. It is noticed that Estácio de Sá has just starred in a policy process and domestic investments that have changed its eminently marketing image. Currently, the institution is no longer perceived solely as a company in the education segment, but also as committed to student training. The fees charged by the institution are high, higher than the minimum wage. As already mentioned, there is a high level of satisfaction from students with regard to faculty and infrastructure provided by Estácio. Also, the PUC/ Minas Gerais performs constant investment in technology, libraries, teacher training, ensuring the quality of all courses offered. All this investment ensures the satisfaction of its graduates who can compete for some key positions of the labor market. The faculty of PUC presents a high level of satisfaction with their working conditions.

The survey results show that the strongest reasons for choosing the CSTs are: focus on the labor market, enhancement of technological college diploma, valuing the curriculum specialization features and more practical training. All the main explanations for the choice of CST indicate the respondents' understanding of a positive reading of such training by the labor market. The question of the cost of training was not valued by respondents. The survey indicated that the duration of the courses was the main reason for choosing a CST by students above the age group 18-24 years who were included in the labor market. This research reveals that age is a significant determinant in the process of choosing a college: in nearly all institutions, the age influenced the choice of courses. The research identified small differences in the profile of former students of the institutions surveyed. The subjects seemed to be interested in a diploma in an area in which they already had skills, because of seeking promotion in their jobs or, in some cases, following indications by their employers. By seeking the practical character of training in their specialty, they aimed at expanding and maintaining certain advantages on the labor market. Finally, one sees that the administrative category influences the supply of higher education technology for establishing determinants

such as free costs for students and investment by institutions in teacher training, among other aspects.

4. Final considerations

Investment in technology education enables this method to form not only professionals for the market, but also citizens for the world of work, considering that the labor dimension is an important trait of citizenship. It is a strategic framework for the development of a country focusing mainly on the educational differences that are also a factor of social inequality. Anyway, technological education is still a challenge for the Brazilian reality, given that its courses are stigmatized as inferior and the demand of higher education technology by the labor market is high; additionally, there is low investment by some government bodies. On the other hand, the following reality signals the strengthening of this policy: in comparison with bachelor and other degrees, the possibility of continuing studies in strict graduate sense shows that the courses catalog design of superior technology education aims at consolidating denominations, establishing unit references about them, and enforcing equality in the supervision and regulation in relation to other undergraduate courses.

Indeed, in spite of all these initiatives that have been forming at an increasing rate, the institutions do not have the intensity, the systematic and rigor required for the professional and technological education to be able to cover the population group that could have access to it. It is to emphasize, too, that the increasing expansion policies of higher education technology can have the potential to attract students. In this case, what has happened at the State University of Minas Gerais (UFMG), where graduation has shown a relation candidate/ vacancy higher than other programs, such as Pedagogy, Superior and Biological Sciences, is illustrative. The peculiarities of each institution, determined by several variables, whether material or human, are the key to understanding how a particular educational policy materializes. Therefore, it is not possible to consider the proposal of higher education technology 'a priori' good or bad.

Considering higher education technology only as the rebuilding of the school duality at the college level, where employees have access to streamlined courses of lesser quality, a legitimate conclusion would be that the implementation of this course strategy by educational institutions has identical or very similar characteristics. The reality, of course, is always more complex than theory, and the school, in the broadest sense of the term, is above all a space of

contradictions. Sitting on a school bench is an opportunity to improve the most varied perceptions and skills and, above all, to overcome social, cultural and economic constraints. As a space of ideological contradictions, school can not be guided by ideological conflicts, but should welcome them critically.

Returning to the historical dynamic, the last twenty years hve expanded significantly the access and permanence opportunities in the Brazilian higher education for broad sections of the population, although with all this expansion, Brazil remains at a disadvantage when compared to neighbor countries, such as Argentina and Chile. In addition to meeting the demand for more education, we have fussed over the tension between the right to quality education for large contingents of the population and its negation, which can make democratization of access less effective, either on its differential distribution, or by restricting the quality of privilege niches within the educational system.

The upper courses of technology, the way they are designed today, have evolved and bear little resemblance to the 1960s and 1970s: they are considered graduate courses, conferring the same rights and prerogatives as degrees and bachelor degrees. The labor market has matched its evolution, although one can not deny the complaint of many respondents reporting on the ignorance about the professional 'techie'. If the professional is unknown, unknown are also the courses. Exploratory analysis of data provided by the National Institute of Educational Studies, Teixeira (INEP) allowed for some important observations on the expansion of courses analyzed. This expansion has the merit of increasing the chances of admitting students, who are the first representatives of their families, to have access to higher level education. The large concentration of income in Brazil reveals, among its traits, unequal access of individuals to the formal system of higher education and the great value that is attributed to the higher level of qualification. Thus, the higher education technology can bring significant contribution to the social mobility of citizens. Empirical research pointed out that this policy might contribute to salary increases and promotions granted to its graduates, better wages, greater employability.

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AMERICAN AND EUROPEAN POLICIES IN NANOTECHNOLOGY PATENTS AND HUMAN RIGHTS RELATED ISSUES

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Abstract. *Intellectual Property (IP) has become one of the most important assets of knowledge-based economies in the present world. In this sense Patents can be seen as the outcome indicators of applied research and technological advancement. The nano-world is full of surprise and potential. Like other present technologies, nanotechnology is not merely a part of a distant future, but also a significant technology, and its patenting system is much more complex than any other objects in the area of science. As it is a nascent technology, it may pose problems and opportunities for IP regimes. Nanotechnology patents are not treated differently than other patents, but it is true that more complex technology usually creates more complex problems within the patent system. This article surveys the different application of nanotechnology and human rights issues and tries to address its complex patenting system and future challenges in the European context.*

Keywords: Nanotechnology, Patent, Human rights, EU Policy, European Patent Office, Ethical Issues.

1. Introduction

To a large extent, the world of the future will consist in a knowledge-based society. Intellectual property (IP) will play an important role in generating wealth and employment in society. A general rule is that the more developed a country is the more stricter and secure for IP and strict to uphold the intellectual property rights (IPR). IP assets have been rising to 50-70 percent of the gross domestic products of developed countries (Jolly and Philpott 2004: 8). It can be said that IP has become one of the most important assets of knowledge-based economies (Silva 2009: 300-306) and creativity is essential to economic growth (Shippey 2002: 16). It is feared that the development of new technologies and the progress of societies will be halted without the presence of intellectual property rights. IPRs encourage the

development of new technologies and aim at creating a harmonious relationship among investors, inventors and consumers. Patent rights are one of the important branches of IPR. The ultimate goal of patent rights is to promote invention and encourage further development of that invention for the benefit of society.

Before going into an in-depth discussion on nanotechnology patents, it will be wise to discuss patent rights. The main aim of patent rights is to protect technological inventions (Jolly and Philpott 2004: 9). Patents can be seen as the outcome indicators of applied research and technological advancement. A patent protects novel and non-obvious ideas and not mere the expressions of those ideas (Heinze 2004). The patent system is meant to protect technology, actual machines, devices and new chemical, biotechnological/ nano-technological compositions rather than pure concepts (Zekos 2006: 310). The main aim of the system is to promote the continuation of intellectual community (Nagesh 2007) and industrial and technological development.

Generally, a patent may be defined as the exclusive right granted by statute to a party who conceives or discovers a non-obvious and novel invention, to use and develop that invention, to prevent others from manufacturing, selling or using the invention for a limited time, depending on the inventions and jurisdictions. Patent terms are typically from 14 to 20 years (Shippey 2002: 16). The patent applicant must show that the invention is of eligible subject matter, novel, having industrial application or utility, an inventive step and non-obvious (i.e., that the invention is not obvious to a skilled person with ordinary knowledge in the field) and adequate disclosure. It is not enough that an invention is new for a company or in a definite country. The described invention must be new in the international context (Heinze 2004). Patents are very important in the intellectual and scientific community. In the commercial sector, it creates barriers to entry into the market (Serrato and Douglas 2005: 150-155).

The emergence of a new and pioneer technology creates issues and possibilities in perfecting IPRs (Newberger 2003). Like other present technologies, nanotechnology is not merely a part of a distant future, but also a significant technology today (Matsuura 2006: 9-37). It is obvious that nanotechnology will be one of the essential technologies of the 21st century which have enough potential to create new markets and prosperity (Heinze 2004). Nanotechnologies are treated not as a standalone topic, but as a potential and important approach in developing new materials and accomplishing new properties. Their potential for

characterizing and building up nano-structures will meet future goals in nearly all sectors. Nanotechnologies have the merit of joining together chemists, physicists, biologists, medical doctors, sociologists, etc. It has been held that nanotechnology will be one of the largest sectors of world economic growth in the foreseeable future (Lamley 2005). Such technology will be used in a wide range of products, from military weapons to clothing (Nagesh 2007). Many multinational companies have already invested huge amounts in the field of nanotechnology. The nano-world is full of surprise and potential (Miller, Ruben, Represas-Cardenas and Kundahl 2004: 25). However, one thing is certain: nanotechnology is here to stay and will generate both evolutionary as well as revolutionary products in the future, thereby improving all sectors of our life (Raj-Bawa 2007). The impact of nanotechnology on our way of life is widely believed to reach profound and hitherto unimagined levels in the coming decades (Silva 2009: 300-306). As it is a nascent technology, it may pose problems and opportunities for IP regimes (Simmons 2007).

Nanotechnology patents are not treated differently than other patents, but it is true that more complex technology usually creates more complex problems within the patent system. It may be the next legal challenge in the field of IPR. Although early predictions for nanotechnology commercialization are encouraging, however, there are formidable challenges that include legal, environmental, ethical and regulatory questions, as well as emerging thickets of overlapping patent claims. The rapid technological development of nanotechnology will challenge the traditional regulatory system in patent law (Bowman and Hodge 2007: 8). Another problem is the classification of nanotechnology, because advanced nano-products may suit into different categories simultaneously (Morrison 2008).

Nanotechnology is just passing its early stage in the field of science and very little development has occurred in the legal arena on nanotech. In this study, we will focus on European law of nanotechnology patents. Our overall point of discussion is legal rather than technical. The first part of the article contains a general overview of nanotechnology from a scientific viewpoint, the different governmental and non-governmental organizations' approach, as well as the importance of nanotechnology from other general viewpoints. In the second part, we approach the relationship between nanotechnology and IPR in Europe. The third part of the present study addresses the possibility of patenting nanotechnology inventions. This part also contains a brief description on EU policy towards nanotechnology

patents. Finally, we analyze the future legal challenges for legal experts in the IP field regarding the patenting of nanotechnology products.

2. What is nanotechnology and why is it important?

Technological and theoretical improvements have moved us to the place where our knowledge of atomic construction and behavior has significantly improved. This advancement enables humans to enter the age of nanotechnology (Matsuura 2006: 10). Nanotechnology consists of mainly 'nano- materials' (e.g., carbon nano-tubes, fullerenes, nano-particles, quantum dots, dendrimers, nano-crystalline diamonds, nano-wires etc.) (Rutt and Maebius 2006: 455-465). It is very important to define nanotechnology from a legal point of view. The world of nanotechnology is a world of individual atoms and molecules (Matsuura 2006: 10). It is the science to study and use the unique characteristics of materials at nano-scale (Lamley 2005). A precise definition of 'nanotechnology' in law and science is still uncertain. It encompasses many different concepts and fields simultaneously, making it a difficult task. Even scientists in the field maintain that it "depends on whom you ask" (Miller et al. 2004: 15).

Many experts and different governmental institutions have tried to define the concept of nanotechnology. Generally 'nanotechnology' seems to refer to very small science. 'Technology' derives from the Greek *tekhne*, which means 'skill' or 'discipline', and 'logos', which means 'speech'. 'Nano' comes from the Latin word for 'dwarf', but today the prefix is known to denote one billionth of a metre. Therefore, nanotechnology could mean the discipline of assembling at the nanometer scale, or, in other words, molecular assemblage and mass molecular production (Raj-Bawa 2007).

Nanotechnology is an umbrella term used to define the properties of products and processes at the nano/ micro scale that have resulted from the convergence of the physical, chemical and life science (Bowman and Hodge 2007). The European Patent Office (EPO) defines 'nanotechnology' as follows: "The term nanotechnology covers entities with a controlled geometrical size of at least one functional component below 100 nano-metres in one or more dimensions susceptible of making physical, chemical or biological effects available which are intrinsic to that size. It covers equipment and methods for controlled

analysis, manipulation, processing, fabrication or measurement with a precision below 100 nano-metres.[1]

The U.S. 'National Nanotechnology Initiative' (NNI) predicted in a report issued by the U.S. Department of Energy's Office of Basic Energy Sciences, the near term benefits of the developments in the new technology. The White House Office of Management and Budget devised a broader, more functional definition for nanotechnology: "Research and technology development at the atomic, molecular or macromolecular levels in the length scale of approximately 1-100 nano-meter range, to provide a fundamental understanding of the phenomena and materials properties at the nano-scale and to model, create, characterize, manipulate and use structures, device and systems that have novel properties and functions because of their small or intermediate size" (Bowman and Hodge 2007). Nobel laureate Richard Smalley defines nanotechnology as "the art and science of building stuff that does stuff on the nano-meter scale". Eric Drexler defines nanotechnology as "engineering in the molecular scale" (Matsuura 2006: 10). Some legal experts characterize it "as the skillful management of matter at the scale of one billionth of a meter or smaller" (Matsuura 2006: 9). The US Nanotechnology Act[2] defines 'nanotechnology' as "the science and technology that will enable one to understand measure, manipulate, and manufacture at the atomic, molecular, and supra-molecular levels" (Roe and Winter 2006). Although nanotechnology encompasses many different types of concepts, it can be said generally that it is a science of manipulation of matter or things at the scale nano-meter (Silva 2009: 300-306).

Nanotechnology is important in many senses. Nanotechnology will certainly change the nature of almost every human-made object in the next century and will reshape our interaction with the surrounding world (Silva 2009: 300-306). It covers multiple fields of science and will create vital opportunities in the future world. It enables us to transform the world at a far smaller scale than was ever available to us before (Matsuura 2006: 14). Nanotechnology enables us to change the structure of many different fields by giving opportunity to access a realm where many of the old rules associated with matter apply no more (Matsuura 2006: 11). Nanotechnology attracts a considerable amount of attention because it gives us opportunities to access radically different capabilities with a wide range of materials, even though we have been using those materials for many years. Nanotechnology

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[1] http://www.epo.org/topics/issues/nanotechnology.html (accessed on 03.03.2010).

[2] 15 U.S.C. 7509 (2000).

will give rise to new materials and manufacturing possibilities, generating a great impact on our future economy, environment and society. We will address some fields where the application of nanotechnology will have an important impact.

2.1. Economic Impact

Many economists predict that nanotechnology will be the next economic turning point in global economy. It may have effects in every economic sector as it encompasses a large and diverse field. In important sectors, such as health and medicine, materials, computing and electronics, military weapons, environment, energy, transportation and virtually every other commercial sector, nanotechnology will play a great role in coming decades considering its numerous fields of applications. Nanotechnology has attracted worldwide companies: as of 2004, 1500 companies worldwide have declared their plans on nanotechnology research and development and, of these, 80% were newly startup companies (Raj-Bawa 2007). The U.S. National Science has presumed that the world market for nanotechnology will reach 1 trillion USD or more within 20 years.[3] According to Lux Research, nanotechnology applications will affect nearly every type of manufactured goods within the next ten years (Silva 2009: 300-306). The EU recognizes nanotechnology as an important element for the benefit of its citizens. In 2007 the European Commission allocated EUR 600 million for nanotechnology research and development.[4] The former president of the United States, George W. Bush, signed the 21st Century Nanotechnology Research and Development Act[5] on December 3, 2004, authorizing approximately 3.7 billion USD in federal funding for the development and research of nanotechnology over the next four years. According to Mike Honda, California House Representative and co-drafter of the original Nanotechnology Act, the worldwide market for nanotechnology products and services could reach $ 1 trillion by 2015."[6]

2.2. Human Rights Issues: nanotechnology in food security, environmental and public health

Nanotechnology will have a great impact on food security and environmental issues. In September 2003, the United States Department of Agriculture published its roadmap report

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[3] http://www.indianmba.com/Faculty_Column/FC748/fc748.html (accessed on 22.11.2009).

[4] http://cordis.europa.eu/nanotechnology/src/pe_articles_papers.htm (accessed on 22.11.2009).

[5] 15 U.S.C. 7501-09 (2000).

[6] http://www.eetimes.com/story/OEG20031203S0025 (accessed on 28.11.2009).

predicting that nanotechnology would change the appearance of food industry, changing the way food is produced, processed, packaged, transported and consumed.[7] Nanotechnology is capable of changing the agriculture and food industry with new tools for the molecular treatment of disease, speedy disease detection, raising the ability of plants to absorb nutrients, etc. Intelligent sensors and small delivery systems will help the agricultural industry to combat viruses and other crop disease producing agents. There is strong possibility that in the near future nano-structured catalysts will be available to enhance the competency of pesticides and herbicides, allowing lower doses to be used. In CEA (Controlled Environment Agriculture), nano-technological devices providing 'scouting' capabilities could enormously improve the grower's ability to determine the suitable time of harvest for the crop. Another important role of nanotechnology-enabled devices will be the increased use of automatic sensors linked into a GPS system for real-time monitoring. These nano-sensors could be fixed throughout the field where they can monitor soil conditions and crop growth. Wireless sensors are already being used in specific parts of the US and Australia. Nanotechnology can help us to improve our understanding of the biology of different crops and thus potentially increase yields or nutritional values.

Nanotechnology has also potential to save our environment indirectly through the use of renewable energy supplies and filters or catalysts to control environment pollution and clean-up existing pollutants. Nanotechnology can also be used to clean ground water. The US Company Argonide uses 2nm diameter aluminum oxide nano-fibres as an element of water purifier. This nano-level filtration system helps to remove viruses, bacteria and protozoan cysts from water. Developing countries like India and South Africa are also running similar projects using the same technique. Research at the Centre for Biological and Environmental Nanotechnology (CBEN) has shown that nano-scale iron oxide particles are tremendously effective at binding and removing arsenic from groundwater[8], which will play a great role especially in the developing countries where environmental pollution is an important factor. The development of nano-technological-based remediation techniques can restore and clean-up environmental injury and pollution (e.g., oil in water or soil).[9]

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[7] European Nanotechnology Gateway, www.nanoforum.org (accessed on 27.11.2009).

[8] http://cohesion.rice.edu/centersandinst/cben/research.cfm?doc_id=510 (accessed on 28.11.2009).

[9] http://www.cordis.lu/nanotechology (accessed on 29.11.2009).

Most of the opposition to nanotechnology has been targeted on the long term risks connected with self-replicating nano-robots. Some environmental groups, e.g. the Action Group on Erosion, Technology and Concentration (ETC), predict that nano-materials may cause harm to human health and environment. Moreover, the group urges to ban the production of nano-materials (Millar et al. 2004).

2.3. Nanotechnology in the medical sector

Nanotechnology is a technology which has vast possibilities in health and medical treatment (Freeman 2008). Medical science has made big advances in understanding the structure and functions of living organisms down to the genetic level. Nanotechnology creates the opportunity to apply that knowledge significantly more perfect to the diagnosis and treatment of illness and injuries than in the traditional way (Matsuura 2006: 9-37). Nanotechnology applications in medicine are growing and the new science is called 'nano-medicine'. 'Nano-medicine' can be defined as the medical application of nanotechnology that will have potential to lead to useful research tools, advanced drug delivery systems and new ways to combat disease or repair injured tissues and cells.[10] The advancement of nano-medicine may result in more significant interventions in respect of illnesses. Nano-medicine is capable of prevention, early and accurate diagnosis and treatment of different diseases.[11] The experts on physical science predict that in the future nanotechnology will apply to surgery and to cure different complex diseases in the human body.

2.4. Nanotechnology in military weapons

The first wave of nanotechnology will primarily be used in the military for state security related purposes (Nagesh 2007). Many nanotechnology experts presume that many states have already taken lots of initiatives in their military sectors and given top priority to research in making nanotechnology weapons and its potentiality at time of war and other military uses. It should be remembered that the Internet, computer and other crucial inventions of the last century were also military projects initially. The ultimate question comes down to whether the good outweigh the bad with respect to the utilization of this technology in this domain.

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[10] http://www.nano-biology.net/ (accessed on 02.12.2009).

[11] ftp://ftp.cordis.europa.eu/pub/nanotechnology/docs/nanomedicine_visionpaper.pdf (accessed on 03.03.2010).

2.5. Nanotechnology in Information Technology (IT)

Without doubt nanotechnology will vastly affect the IT sector in the future. Nanotechnology has enough potential for creating faster computers with larger memories than the present transistors and other components permit. Carbon nano-tubes will also be used in IT. These tubes could be either conducting or semiconducting and have the potential for memory and storage as well. By using nanotechnology, computer tools will be cheaper than today and will create a sustainable IT sector.

3. EU policy for nanotechnology

Currently, nanotechnologies strengthen many useful and practical applications and have huge possibilities to improve the quality of life and protection of environment and accelerate industrial competition.[12] The European Commission has taken several steps to take nanotechnology research benefits for the development of the EU.[13] The EU is proceeding toward a collective and correlated strategy for nanotechnology research and development. The Commission has not yet adopted any broad and specific public policy for nanotechnology, but has adopted a strategy plan for the allocation of significant resources for supporting nanotechnology research and development. But this strategy has not yet been turned into any formal legislation and/ or regulation. On June 7, 2005, the European Commission passed an Action Plan for the implementation of a strategy for European nano-science and nanotechnology development.[14] This action plan is not obligatory by law and apparently it is simply a declaration and a step towards regulating nanotechnology further. In this action plan, the importance of research and examining the future impact of nano-science and nanotechnology is emphasised. The Commission has divided the Action Plan into five steps:

3.1. Promotion of R&D in Europe

In this phase, the Commission recognizes that by collaborating with public and private

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[12] Communication from the Commission to the Council, October 2009, http://cordis.europa.eu/nanotechnology/actionplan.htm (accessed on 03.03.2010).

[13] Nevertheless, some European countries have already introduced individual nanotechnology agendas since the late 1980s.

[14] http://cordis.europa.eu/nanotechnology/actionplan.htm (accessed on 27.11.2009).

sectors across Europe for research and development of nanotechnology, an interdisciplinary initiative is necessary. In 2007-2008, the Commission invested EUR 2.5 billion under the 7th Research Framework Programme. As nanotechnologies have multidisciplinary character, the Research and Development (R&D) projects have taken place in different industrial sectors, such as health, food, energy, transport, environment, etc.

3.2. Frame a base of European 'Poles of Excellence'

This phase's main aim is to build up poles of excellence into present structures for establishing highly-presentable world class poles in the area of nanotechnology by providing necessary services to the research community. The Commission is giving support continuously by funding access to present facilities and creating new facilities, which have led to 'durable integration' in the form of new institutes and virtual infrastructures such as the European Theoretical Spectroscopy Facility (ETSF) - a knowledge centre for carrying out the state of the art research.

3.3. Investing in human resources

The purpose of this axis is to conform to the European educational system to the specificities of nanotechnology in higher level studies which also cover legal technical subjects, such as patenting nanotechnology and encouraging young people in the EU to nanotech studies and research. The development of nanotechnology mainly depends upon the skilled manpower and interdisciplinary actions in order to transform the nanotech knowledge from academy to industry.

3.4. Patronizing the transformation of knowledge into Industrial Applications

In this phase the Commission's strategy and its Action Plan points to two issues connected to IP, Patents and Standardization. In respect of patents, the Commission's Action Plan advocates to establish a patent monitoring system for nanotechnology and to harmonize the patent prosecution system - especially 'sufficiency of disclosure' and 'inventive step', which are crucial in the case of nanotechnology patents - with the leading patent offices in the world, such as the EPO, the US Patent and Trademarks Office (USPTO) and the Japan Patent Office. Concerning standardization, the Commission encourages pre-normative research and development in combined actions with the activities of European Standard Bodies.

3.5. Integrate the Social Dimension

The purpose of this phase is to recall an EU strategy about ethical principles in respect of health, safety and environmental aspects in the development of nanotechnology and to make a transparent approach by open dialogues with EU citizens and stakeholders. The Commission has taken several actions to reflect people's expectations and take their views into account. In February 2008, EU passed a recommendation of '*Code of conduct for responsible nano-science and nano-technologies research*' which gives guidelines towards a responsible and open approach. Every proposal considered for funding by the Commission must meet the requirements of ethical issues. The Commission is also making efforts to increase researchers' awareness of the Code of Conduct on nanotechnology research. The Commission seeks the nanotechnology research to reflect and comply with the basic ethical values described in the core European Agreements, such as the European Charter of Fundamental Rights.

4. Patentability of nanotechnology

The recent advancement of industrial research and development in the nanotechnology field is a worldwide phenomenon. In the latest years, national and international governmental authorities, research institutes and industrial companies have increasingly endorsed nanotechnology as a driving force for innovation in different fields, including chemistry, material science, biotechnology and electronics (Esslinger 2007: 495-500). For nanotechnology, patents are the most used and by far the most important form of IP (Dexon 2004: 100-103). Exceptional in attributes and nascent, nanotechnology is incomparably among the most patentable technologies (Raj-Bawa 2007). The main attraction in nanotechnology patenting is not only its size, but also its 'unique cross-industry' pattern. Nanotechnology is exceptional compared with other technologies because it does not originate in a single branch of science like biotechnology, information technology, etc. (Kallinger 2008).

The main characteristic of nanotechnology is its size. Surprisingly, this is the first new field in almost a century in which basic ideas (i.e., 'the basic building block') were patented at the beginning (Lamley 2005). Patent rights give the rights holder an opportunity to gain economic and other related profits for a certain period as a reward for the invention. In the

case of nanotech research and invention, there is a need for enormous long term investments, and thus patent rights play a substantial role to recoup the investment of a company. Without a clear and sound patent regulatory system, large companies will be reluctant to invest in the field of nanotechnology and the development of nanotechnology inventions will be hampered. It is no doubt that the rapid growth of nanotechnology will result in a multiple field of applications and jurisdictions and obviously will create a legal challenge for future IP regimes. The most basic issue is that whether nanotech inventions are patentable or not. In this section, the 'patentability of nanotechnology' is discussed in light of European legal instruments and the WTO TRIPS Agreement.

Not all inventions are patentable. A patentable subject matter might not be (a) contrary to public policy or public order; (b) plant or animal varieties, or essentially biological processes for the production of plants or animals; (c) methods for treatment of the human or animal body, surgery, therapy and diagnostic methods practiced on the human or animal body. The conditions to be satisfied for the patentability of an invention are: i) patent eligible subject matter; ii) utility; iii) novelty; iv) non-obviousness and v) sufficient disclosure. In addition to the already mentioned patentability criteria, the claims have to be clear, brief, and must be supported by the description. The application of the inventions requires disclosing the invention in such a way as a whole that a person skilled in the art should be capable to carry out the invention. There are not separate patentability rules for nanotech inventions. Thus, any patent connected with the nano-field must fulfill the general requirements of patentability (Nagesh 2007).

4.1. Procedures at the European Patent Office

In Europe, an applicant can file a patent application either in the national patent office, or in the EPO in Munich. Before going to the discussion of the nanotechnology aspects of patentability, it is necessary to describe the practice of EPO rules and regulation.

The Search Procedure

To apply for a European patent, an application must consist of the following components: (1) a description of the claimed invention; (2) a set of claims which define the scope of protection; (3) illustration of the features of invention (a set of drawings can be added as a useful supplement of the description) and (4) an abstract.

The patent examiner first performs a search. The search is conducted in both the EPO's in-house database EPODOC and the commercial patent databases. In 'high-tech' related fields like nanotechnology, the examiner also executes some extra-searches. For this work, EPO keeps a broad electronic library including on-line access to a huge collection of scientific journals. After finishing the search, the examiner prepares a European search report which includes all the documents available to the office that are regarded relevant in examining novelty and inventiveness of the particular submission. The search report is generally prepared on the patent claims, the description and any supplementary drawings. The examiner then sends the search report to the applicant along with a copy of any cited documents. The report of the examiner also includes a primary opinion on the patentability of the claimed invention. The EPO generally publishes the application along with the searching report after eighteen months following either the application filing date, or the priority date. After the publication of the EPO report, the applicant has to claim his or her patent rights within six months from the date of publication, by requesting a final examination.

The Examination Procedure

If the applicant requests a final examination, the EPO examines whether the application and the invention satisfy the patentability requirements of the European Patent Convention (EPC). Generally, the patentability of the invention is examined in light of the documents referred to in the search report.

The examining division generally consists of three technically qualified patent examiners who perform the substantive examination of European patent applications. In most cases, the substantive examination is conducted by the same examiner who prepared the initial search report. The examiners are normally highly qualified in the relevant technical fields. For examining of multi-disciplinary inventions like nanotechnology, experts in different technical fields of technology are required. The examination also follows the corresponding rules of the Implementing Regulations of the EPC and the Guidelines for Examination in the EPO.

Opposition and Appeal Procedures

After the examination phase, the applicant may either be granted the European patent or the application may be refused. After grant of a European patent application any third party may oppose the granted patent. The opposition application is examined and handled by the EPO Opposition Divisions which consists of three to four members of which one of the

members have been involved with the original application. The decisions of the EPO Opposition Division are open to appeal before the EPO's Board of Appeal.

4.2. Patentability of nanotechnology inventions in Europe

Nanotechnology covers a multi-disciplinary field; to develop a nanotechnology product, multi-disciplinary teams are needed. In the first stage of a nanotechnology patent, there is a presumption that nanotechnology related inventions face some unique problems. In fact, the same patent rules, regulations and procedures are followed with nanotechnology related inventions (Vorndran 2004: 6-12). The US approach is the same as the European one. In the *Re Kumar Case*,[15] the CAFC (Court of Appeal for the Federal Circuit) stated that 'the standard of review for nanotechnology will not be different than any other patent eligible subject matter' (Nagesh 2007). The EPO has a similar position. The pre-requisites for patentability described in the EPC are:

Novelty

Generally, the requirements of novelty ensure that the invention has not been known or previously used by others. Novelty is examined against the prior art available as national and abroad patents, publications, public exhibition or use of invention. Article 54 of the EPC describes novelty as follows: "(1) an invention shall be considered to be new if it does not form part of the state of the art; (2) the state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing of the European patent application; (3) additionally, the content of European patent applications as filed, the dates of filing of which are prior to the date referred to in paragraph 2 and which were published on or after that date, shall be considered as comprised in the state of the art".[16]

To fulfill the EPC novelty criterion, the size of nano-scale elements must be sufficient to distinguish from elements of the prior art. One of the problems in patenting nanotechnology products is that the most basic ideas in nanotechnology are either already patented, or close to application (Zekos 2006). If an invention is defined by a standard only of its size, there is a possibility of problems in the patenting process of nanotechnology inventions. For example, if the standard of size for patenting nanotechnology inventions is '20-100nm', many inventions at first sight will not be novel because the claimed range '20-

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[15] 418 F. 3d 1361 (Fed. Cir. 2005).

[16] European Patent Convention, 2000.

100nm' is already included in the prior art, although the invention is unique and functionally different from prior art. For this reason, the principle of selection of inventions can be followed in order to establish novelty of nanotechnology inventions over prior art.

To satisfy novelty requirements of a sub-range selection of invention from a broader numerical range of the prior art, the following criteria are needed: a) the claimed range must be narrower than the known range; b) the selected sub-range also has to be sufficiently distant from the disclosed prior art and from the end points of the known range; c) the selected sub-range should not be arbitrarily chosen part of the prior art and must be purposively selected along with having new technical teaching. Even if nanotechnology is a nascent field of science, few cases have been heard in the EPO.

Inventive Step

Obviousness, or inventive step, can be seen as the last hurdle to patentability. The reason behind the inventive step requirement is to ensure that an invention forms a perfect advance in technology to ensure an exclusive right (Zekos 2006). Article 56 of the EPC states about inventive step that, "an invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art. If the state of the art also includes documents within the meaning of Article 54, paragraph 3, these documents shall not be considered in deciding whether there has been an inventive step". The inventive step is a highly complex matter in the field of patents and is usually the main issue in patent litigation. Thus, inventive step or obviousness is too complex to describe in short terms. In the light of novelty requirement, an invention may be obvious due to a combination of publication of the prior art. But taking into account the prior art publications together, the total publications not only have to set forth each element of the invention, as with the novelty requirement above, but also have to show 'teaching and motivation'. When examining the presence of an inventive step of nanotechnology inventions, the question is usually whether merely miniaturization of a known device, which is also known as 'top-down approach', is inventive or not.

However, a 'top-down approach' may be taken into account as inventive, if the invention has technical value; more accurately, an invention may be considered as inventive "if it provides a technical advantage which is new and surprising… and this technical advantage can, convincingly, be related to one or more of the features included in the claim

defining the invention."[17] If, nevertheless, when taking into account the state of the art, the invention "would have been obvious for a skilled person to arrive at something falling within the terms of a claim, the unexpected result (would be considered) merely a bonus effect which would not confer inventiveness on the claimed subject matter."[18] The case of selection inventions would also play a role at the inventiveness assessment. In that case, "the subject matter of a selection invention differs from the closest prior art in that it represents selected sub-sets or sub-ranges."[19] If the selection is related to a definite technical effect and if the prior art holds no directions by which a skilled person can presume the selection, then an inventive step is generally admitted. When the technical effect is to be found within the selected range, a similar effect may be found within a broader known range, but with an unexpected degree. In that case, examiners have to take into account "whether the skilled person would have made the selection or would have chosen the overlapping range in the hope of solving the underlying technical problem or in the expectation of some improvement or advantage. If the answer is negative, then the claimed matter involves an inventive step".[20]

USPTO has suggested that 'miniaturization down to the nano-scale, standing alone, would not claim as patentable invention' (Silva 2009: 300-306). Recently, the U.S. CAFC held that 'when the only difference between the prior art and its claims was a recitation of relative dimensions of the claimed device, and a device having the claimed relative dimensions would not exhibit qualitatively different phenomena from the prior art, the claimed invention was not patentably distinct from the prior art'.[21] It seems that EPO also agrees with the statement of the USPTO.

A number of cases have been decided by EPO and its Board of Appeals regarding the question of whether miniaturization can be taken into account as an inventive step. The *Siemens case*,[22] related to field-effect transitions which consist of an insulating layer having thickness in the range of a 3 to 18 nm, represents a case in point. The Board came to the conclusion that the claimed invention was merely a miniaturization to the thickness range of 3 to 18 nm for a dielectric film. Moreover, the Appellant was not able to describe any special

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[17] EPO Guidelines, C-IV, 11.9.2.

[18] EPO Guidelines, C-IV, 11.9.3.

[19] EPO Guidelines, C-IV, 11.11, "Inventive Step: Selection Inventions".

[20] EPO Guidelines, C-IV, 11.11.

[21] King Ventilating Co. v. St. James Ventilating Co., 26 F.2d 357, 359 (8th Cir. 1928).

[22] T-610/89.

effects for the dielectric film having a thickness in the specified range. The Board regarded the claim as arbitrary and hence a non-inventive selection. There is also a similar decision regarding inventive step and miniaturization. In the *Kabushi case*[23], which related to a semiconductor device consisting of logic and memory components, the Board of Appeal stated that only miniaturization as such was not inventive. In spite of not being strictly about nanotechnology, in the *Effymetrix Inc. case*[24], the Board used the same reasoning. The Board held that 'top-down approach' and miniaturization is a general tendency in the field of biological research tools, and inventive step can be characterized to smaller dimensions only when a non-expected advantage or technical effects are found from the selected scopes.

In short, the application of the inventive step criterion varies from case to case and the Board does not acknowledge an inventive step when the shortening of dimensions is a part of the skilled person's routine procedure. Moreover, an inventive step can exist if an additional or unexpected effect is achieved.

Industrial Application

The EPC requires that, in order to be patentable, an invention must be industrially applicable. Article 57 of the EPC provides that "an invention shall be considered as susceptible of industrial application if it can be made or used by any kind of industry, including agriculture".[25] The industrial application must be specific, substantial and credible, otherwise general industrial applications alone are not enough (Raj-Bawa 2007). The invention must be real, and not only supposition or science fiction. In the case of nanotechnology related inventions, there are no separate provisions and thus general EPC provisions have to be followed.

Sufficiency of Disclosure

The applicant for a patent or a patent practitioner should provide adequate description and claims, so that a skilled person in the art can understand and practice the invention. Actually, claims determine the boundary of patent rights. Every patent application needs a sound written description, specific and comprehensive claims, history of background information, prior art and technology, and instances of where the inventions will have specific industrial application (Nagesh 2007). One of the reasons behind the sufficiency of disclosure

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[23] T-1056/96, Kabushi Kaisha Toshiba *ex parte* (2001).

[24] T-70/99, Affymetrix, Inc. v. Trustees of University of Pennsylvania, 2003.

[25] T 144/83.

requirement policy is the patent system *quid pro quo* (Paredes 2006). The purpose is that of preventing the inventors from a broader claim of the invention which was not envisioned at the time when the patent was described first (Silva 2009). Article 83-85 of the EPC also requires a written description; specific, clear and concise claim and abstracts of the technical information of any inventions at the time of patent application might be decisive. In the case of nanotechnology, the task of defining a skilled person is also difficult because nanotechnology is more cross-disciplinary (nano-physics, nano-biotechnology, nano-chemistry, etc.) than any other technology. Moreover, in the nano-scale, the materials' behavior is unpredictable and not always constant. For this reason, the description of nanotech inventions is sometimes too difficult. Sufficiency of disclosure of the invention is also needed to avoid patent thickets. In nanotechnology, there is more possibility of patent thickets than in any other technology, because it covers multiple fields of technology (Schwaller 2006: 145-157). Other commentators express that most of the issued nanotechnology patents are of low quality, both because of its interdisciplinary nature and the lack of broad multidisciplinary technical expertise (Diana et al. 2006: 41-49). According to the *Lux Research Report*, a large number of patents have been filed relating to nanotechnology with overlapping claims. In nanotechnology, the written description is an important policy because it narrows the scope of that kind of inventions in order to prevent overreaching claims.

For the fulfillment of the requirement of sufficient disclosure and written description in chemical and biotechnological inventions, claiming of genus of materials is allowed. The requirement of some of the species in the genus is usually the basis, and the descriptions normally reveal common characteristics between species of the claimed genus. However, when the species are closely related to each other, it is not allowed to claim the genus. In these areas of technology, the patentees are also allowed to do generic claims if the functional behavior of the claimed invention is connected with a bare correlation between that function and a known biological or chemical structure. Hence, patents can follow the similar approach for satisfying the written description requirement in patent applications.

5. Future challenges towards nanotechnology patents and human rights issues

In comparison to other fields of science, nanotechnology is passing its early and nascent stages. It is too early to predict how nanotech inventions will face patenting problems and how IPRs deal with nanotech inventions accurately. But it is probable that more of basic

building blocks of nanotechnology will be patented than in any other branches of science and technology (Lamley 2005). Huge numbers of cross-licensing agreements by starts-up and large numbers of IP for specific application have already been licensed by groups of large companies (Serrato and Douglas 2005: 150-155). Nano-related inventions may create dead-lock situations. In fact, high costs of nanotech IP and restrictive licensing systems are creating new legal challenges in the field of nanotechnology. The experts will face different types of legal problems for patenting nanotechnology inventions. Nanotechnology also challenges the present patent regulatory system and blurs the interface between discoveries and inventions. Some possible future legal challenges for nanotechnology patents are given below:

5.1. Overlapping and classification

Some experts fear that nanotechnology will create complicated broad patent thickets generating difficulties in clarifying the patent ownership (Lamley 2005). According to Lux Research, 'there may be multiple nano-thickets, covering different platform of technologies such as dendrimers, quantum dots and carbon nano-tubes' (Silva 2009). Most companies are interested in fundamental building blocks inventions of nanotechnology. When any other company on the market wants to use the protected nanotechnology, the production may take a lot of license negotiations because nanotechnology covers a multidisciplinary field of science with a wide area of application. Different companies may own different patents in nanotech and there is a huge possibility for patent thickets and patent infringement litigation. This may hamper further development of nano-related inventions (Lamley 2005). According to NanoBusiness Alliance, 'several early nanotech patents are given such broad coverage; the industry is potentially in real danger of experiencing unnecessary legal slowdowns' (Wasson 2004). In the view of economists, the requirements of acquiring rights from different players will also create 'double marginalization' or 'hold-up' problems (Lamley 2005).

Some experts think that imposing a strict utility requirement like in chemistry and biotechnology may stop the overlapping of nanotechnology patents. On the other hand, while a large portion of nanotechnology patent rights is owned by universities, to stop patenting basic building blocks by imposing exclusive licenses may encourage downstream innovation in nanotechnology. Another possible way to stop overlapping litigations is to create patent pool agreements (Lee 2006), as in the software and biotechnology fields. The Lux Report suggested that nanotech firms could pool their patents and start licensing schemes (Lamley

2005). But many patent experts criticised the patent pool idea as being against the main spirit of IPR and a free market economy. Basically, IPR encourage competition and innovation in the market, but the patent pool system is anti-competitive and encourages collisions and price fixing.

5.2. Enforcement

The massive economic possibilities connected with nanotechnology will not only result in a huge number of patents applications to the patent office, but the courts will also face enormous challenges regarding nanotech patent infringement actions (Troilo 2005: 36-46). Nanotechnology patents may be very difficult to enforce because it will be tough to detect infringement of nanotech products. If the court applies the doctrine of equivalent infringement, the plaintiff must prove that the accused product or process elements are identical or technically equivalent to the patented invention and hence enters within the scope of the claim. The court needs to interpret the language of the claims of the patent and other real evidence which include the specification and the prosecution history. But, in nanotechnology, the confined bordered written description is too difficult, and thus, in many cases, the court finds difficulties to take on any infringement actions. For example, the accused infringer of macro-scale carbon fibers can avoid the court action by claiming that a patent characterizing traditional materials would not meet the disclosure requirement for a nanotechnology invention. At the nano-scale level, the behavior of materials is unpredictable and the law enforcing authority will face some problems to take infringement actions.

5.3. Ethical issues

The ethical issues are mainly concerns about the question of fairness, equity, justice, non-discriminatory license practice and social relationships (Schummer and Baird 2006). It also includes the possible clash of interests arising from dealings among government, industry and universities, and IP ownership (Zhou 2003: 481). The advancement of nanotechnology is progressing on a daily basis and its outstanding inventions attract great public interest, but critical voices are also rising (Beyerlein 2006: 539-549). These voices assume that the products of nanotechnology will be harmful for public health and environment and that the risk assessment in nanotechnology research is insufficient. Some environmental experts express concern that the nano-manufacturing process will cause bad effects on the

environment. Although no researchers are yet able to show the specific impact on the environment, it is true that human safety issues are one of the burning ethical issues towards nanotechnology development. Some nano-particles can easily enter into the human body, but the human health implications have not been thoroughly investigated.

Another important issue refers to privacy. Nanotechnology leads are highly efficient and consist of smaller electronics and IT chips, by which one can easily monitor a person, retrieve one's personal or confidential data and information, medical records, etc. Without consent and lawful authority, it is a threat for civil rights and privacy rights.

5.4. Regulatory Challenges

Quick technological progress and businesses in the area of nanotechnology will challenge the traditional regulatory systems. This new technology raises more questions than answers. As nanotechnology is an extension of traditional technology within the area of engineering, biology, chemistry and physics, its unique character lies in the meaningful and accurate manipulation of atoms and molecules for exploiting the unique properties of materials that emerge at the nano-scale. Nanotechnology may severely challenge the current regulatory competency to respond quickly and maintain the tough balance between risk and profit. Nanotechnology evolves in a number of separate phases; each of its advancements is depending on its own legal, regulatory, societal and political issues. The multidimensional uses and convergence of domains of nanotechnology, such as the food sector, medicine, environment, military uses, IT, energy, etc., make it a challenge for regulation and also require greater transparency between the regulatory agencies and governments. Each individual sector need nano-regulation or 'one size fit for all' (i.e., one regulation for all provable sectors of nanotechnology). There is also a question whether the regulation assesses each nano-product basis or process basis. In this respect, EU opted for the process basis assessment and regulation. To regulate and adopt a sound regulation system for nanotechnology, priority must be given to human safety, environmental risk, privacy, intellectual property and international law. In a low regulatory system, the advancement of nanotechnology is a great threat and also a danger for the global economy. Moreover, the transitional NGOs can play an important role in future nano-regulatory policy and in debates related to societal, democratic and jurisdictional legitimacy in the coming nano-age (Bowman and Hodge 2007).

6. Concluding remarks

In the knowledge-based society, IPRs are the engine of socio-economic developments. Nanotechnology is a newly and expanding technology sector consisting in several different branches of science and has an enormous amount of potentiality to be used in various products, from biologics, automobiles, IT, polymers, healthcare and electronics, to energy. The diversity of nanotechnology is one of its great strengths, implying a huge possibility of application in many different areas, such as nano-biotechnology and nano-materials, and increasing the possibility to produce more commercial products. In the foreseeable future, it is certain that nanotechnology will be the largest sector of economic growth due to its application in a variety of fields, from military projects to the clothing sector. The European Commission also considers nanotechnology as one of the proliferating areas of technology and has significantly invested in the R&D of the nanotechnology sector. The Commission also took several steps to develop and create new nano-related inventions. To get the proper benefit of research in any field of technology, including nanotechnology, patents are one of the vital means to secure inventors' rights.

Although patenting nanotechnology is salient for the future economies and societies, many experts in the field express their reservations about its potentially bad impact in different areas of society. Many environment specialists claim that the wastage of nano-products will seriously harm human health and environment and the risk assessment researches regarding nano-particles is too poor. Moreover, some human rights NGOs claim that some nano-particles can easily enter into human body and there is a great possibility of violating one's privacy.

In the case of patents, regulation and procedures are followed in the nanotechnology related inventions, but it is true that new technologies create new patentability problems. Nanotechnology covers multiple fields of technology. If nobody could be expected to have a complete expertise in multiple fields of technology at the same time, at time of patentability examination, it would be very difficult for the examiner to asses the different criteria and steps of patentability. Especially, the tasks of examining the novelty and the inventive steps are crucial for the examiner. Other problems of patent offices are overlapping and classification. While start-up companies grant broad coverage patent claims, demand high prices and adopt too restricted licensing policy, these problems will create deadlock of patent

litigations in the patent office and potential danger for innovation in the field of a nascent technology like nanotechnology. Some patent experts say that the strict utility requirement may stop the overlapping of nanotechnology patent claim, like chemistry and biotechnology. Some other experts endorse patent pools to avoid patent infringement litigation, but there is a major risk of price monopoly which is contrary to the open market system. The enforcement issue is also a vital factor in the case of nanotechnology. Week patent rights create the possibility of patent litigation which is dangerous both for new innovation because investors generally avoid the confrontation of patent infringement liability, and also for countries because of wealth stagnation. Finally, although there are many obstacles and challenges for patenting nanotechnology related inventions, it is good that many giant research companies are interested to invest in the field of nanotechnology. In this respect, the lesson learned from biotechnology and business method could apply in the field of nanotechnology as well.

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CONSTITUTIONALISM AND CONSTRUCTIVE DEMOCRACY: A SOLUTION TO POLITICAL CRISIS IN AFRICA AND THE IMPACT OF THE AMERICAN DEMOCRATIC MODEL

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Abstract. *There is ample evidence that the gap between proper leadership and respect for the rule of law on one side, and poor leadership and non-constitution in Africa on the other is growing thinner and thinner. The challenge that this concrete situation has posed to Africa is enormously negative. Sometimes it has become very hard to specify how the situation emerged and what should be done. From Cape Town to Cairo, or from Nairobi to Abidjan, there is a simmering political crisis in every country. The honest observation and assessment of the political atmosphere and progression of African countries is worrying. Today, there is no tension in a particular African country, but this does not mean that issues of social, economic and political turbulence could not emerge. Perennial political instability has existed in countries like Somalia, DRC Congo, Sudan and others. This discursive paper exposes what the authors have referred to as the African political crisis. It endeavours to elaborate the various causes of political instability in Africa and explain how two paramount concepts can be used to free Africa from the imbedded crisis. These conceptions are constitutionalism and democracy. This paper disabuses the common notion that political issues in Africa are one-dimensional and provides a critique of the African political crisis.*

Keywords: Africa, Political crisis, Democracy, Constitutionalism.

1. Introduction

Democracy is a system of government where the people rule. Governance is usually done through elected representatives. In this case, the control of the state is done by the majority of its members. In democracies, the supreme power is vested in the people. Etymologically, democracy would mean a system of governance where people (*demos*) have the power to rule and the supreme power is vested in the people. Constitutionalism is a theory in governance which tries to explain that the power of governing must emanate from the

constitution or the fundamental law. In regard to this, the government must be allowed to act only in respect to the rule of law or to the constitution that brought that government into power. The authority of Government derives from, and is limited by, a body of fundamental laws (Fehrenbacher 1989: 1).

The most effectively genuine and fundamental characteristics of good governance or responsive political leadership are accountability, respect for the rule of law and responsiveness. All of these are not only requirements for any good leader, but also necessary for the political development of any state. The question that keeps many scholars awake in Africa is where to get fair and good leaders to help the African states. Functional answers have failed to be reflected in Africa in any way. Africans have improvised their own norms and rules which have set the criteria for selection of their leadership.

2. The African political crisis and its causes

Many African countries have experienced severe political crisis after independence, because of the failures of democracy and economic development. To a large extent, political crisis in Africa is caused by the leaders' scramble for wealth and power. The problem is lack of inconsistency between democratic ideals and low public participation in politics (Macionis 1999). In fact, the African political crisis does not mean that its nations are poor; it is rather a conditional product of history. Therefore, there is need for further historical change. If change is not needed, the state of things could be described as a failure. Crisis itself is any event that is expected to lead to unstable and dangerous situations affecting individuals, groups, communities, or nations (Wanyande et al. 2007). Though, apart from natural crises that are certainly unpredictable, most of the crises are created by man. Hence, it depends upon man failing to note the inception of crisis conditions (Anap 2011) and can be caused by denial and other psychological responses, the complexity of African history, economy and culture.

2.1. Cultural causes

Some of the causes of political crisis are cultural in the sense that they are related to cherished practices inherited from indigenous cultures. These practices are related to the African capacity to struggle with the changing situations of life, especially the task to integrate ethnic identities into the structures of nation-states. In the process, there are several factors generating political crisis.

Ethnic rivalry and violence generate political crisis by killings, destroying of property and burning of houses. For example, Kenya's post-election violence erupted because of the lack of peaceful means to address grievances. The condition has been aggravated by maladministration of the rule of law and lack of constitutional reform. These phenomena reveal the lack of strong structural organization that is unable to provide values in society, and to channel the relationship between demand and participation in politics (Wanyande et al. 2007). For many African people, ethnic identity is a symbol of communal solidarity and security. African politicians use *ethnic competition* for the scarce economic resources and political power. Each ethnic group tends to fight to have a president from their group. For them, the president will loot the state for his ethnic group. In other words, the president is not for the state, but for his ethnic group. This is the root cause of the struggle to control the state (Kipchumba 2008). Thus, ethnic strategies are often connected with resources of modern economy, such as employment, education, secured loans, and appointments for lucrative offices. To a certain extent, today's competition for the limited economic resources has changed the meaning of ethnic identities (Shively 2001). The differences promote unhealthy competition. The situation does not become explosive until such a climate of social relationships is extended to encompass the economic and political spheres (Wanyande et al. 2007).

Most of the political crisis in Africa involve *ethnic groups* struggling for the control of their region (for example Sudan, Somalia, Rwanda and Burundi), or even struggling to control the entire country (Kley 2009). It has been argued that ethnic groups engage themselves in a struggle for political power with other ethnic groups. In this battle, each ethnic group advocates its interests in different ways. This phenomenon is not characteristic solely to traditionalism; rather, ethnic groups are also interest groups whose members share some common economic and political interests. People do not kill one another merely because of ethnic differences (Wanyande et al. 2007).

2.2. Organizational causes

In an organization, crisis is the process of transformation resulting from the fact that the old system can no longer be maintained. The main organizational causes of political crisis could be poor strategic decisions, failure of internal controls at all levels from the top downwards and ineffective boards, bad distribution of resources or state aids, political

incompetence of both leaders and citizens, greed and the desire for power, and/ or short term economic gains and the neglect of broader social values of the organization (Hamilton et al. 2006).

In Africa, the state of uneven values is rooted in the business belief that focuses on the interests of stakeholders and tends to disregard the interest of other stakeholders such as customers, employees and the community (Lerbinger 1997). For example, major stockholders make the company's agendas for creating jobs, or throwing women and men out of work (Macinonis 1999). This is an expression of failure of the organization's management of emergent political crisis because of disregarding the workers' needs.

2.3. Economic causes

Emile Durkheim's theory of economic suicide might be explanatory concerning economic crises in Africa. This theory states that, during an economic crisis, the rise in the suicide rate does not happen because of poverty causing unhappiness, but because of rapid change that prevents us from developing new rules to cap our expectations (Schaefer 2005). Much of the economic resources end up in the pockets of a few elite who do not follow the democratic rules. It is the start of economic depressions suggesting that governments have not provided financial security for the population. Continuing economic decline and material insecurity are accompanied by increase in political instability and conflicts. The following are some economic causes of political crisis.

Food crisis is visible in East Africa, Ethiopia and Somalia. The situation has been criticized as avoidable and man-made. Both the international community and governments in the region have been accused of doing very little to curb this crisis. High food prices have forced food out of reach for many people, while local conflicts excavate the situation (Anap 2011). According to the international organization *Oxfam*, 12 million people are in dire need of food, clean water and basic sanitation (Anap 2011).

In the context of *authoritarian leadership*, pro-democracy protest has been spreading throughout the region. The rising cost of living, high unemployment and frustrations of decades of living under authoritarian and corrupt regimes have led to this situation (Shively 2001). This is a clear indicator for leaders who chose not to follow democratic ways of governance as stipulated in the constitution. The few wealthy people or families who own

most of the nation's wealth have a great deal of influence on national political agendas, as in the case of Zimbabwe.

In Africa, *struggle to control resources and territories* by elites was specific for countries such as Angola, Kenya, Mali, Nigeria, DR Congo and Sudan (Shah 2011). The central role of the states in determining resource distribution makes it a major target and when power is over-centralized, the crisis is imminent. Resource scarcity and control in Africa arise from the conflicts for natural resources and population pressures.

2.4. Social causes

The social causes of political crisis can be categorized into human rights violation, poverty and unemployment. Violations of political and economic rights are the root cause of many crises. When rights to adequate food, housing, employment, and cultural life are denied, and large groups of people are excluded from the society's decision-making processes, there is likely to be great social unrest (Anap 2011). These can also be results of political oppression which may take the form of discrimination. When it occurs, basic rights may be denied on the basis of religion, ethnicity, race, or gender. Apartheid, which denies political rights on the basis of race, is perhaps one of the most severe forms of discrimination. The system of apartheid in South Africa institutionalized extreme racial segregation that involved laws against interracial marriage or sexual relations and requirements for the races to live in different territorial areas. Certain individuals were held to be inferior by definition and not regarded as full human beings under the law. The laws aimed at social control, and brought about a society divided along racial lines and characterized by a systematic disregard for human rights (Mischelle 2012). In addition, women were uniquely vulnerable to certain types of human rights abuses. Entrenched discrimination against women is still prevalent in many parts of the world and leads to various forms of political and social oppression. In some African regions, women suffer greater poverty than men and are denied political influence, education, and job training (Shah 2011). Poverty and conflict are reciprocally related. Poverty can cause conflict, while conflict can lead to poverty based on the state of insecurity and bad governance (Draman 2003). Many communities in Africa, situated especially in the conflict areas, are suffering from hunger and starvation.

2.5. Historical causes

The history of all previously existing societies is the history of class struggle. Marxists have asserted that society is composed of two major classes, the ruling class and the oppressed one. Marxists have used the term 'class conflict' to point at the antagonism between the classes over the distribution of society's wealth and power. They have also described capitalism as motivated by desire for personal gain.

The failure of democracy and economic development in Africa are largely due to the *scramble for wealth* by leaders who have dominated African politics since the era of independence (Anap 2011). They see the state as a source of personal wealth accumulation. The people in power and those who seek power use all possible means to attain their goals. This includes fostering ethnic distinctiveness and political domination. Many of the apparently senseless civil conflicts in Africa are battles for the spoils of power. Thus, the psychology of the national bourgeoisie is that of a businessman, not that of a captain of industry. The description remains accurate for today's elites who have infiltrated in civilian politics, military governments, businesses and the civil service. The African states are weakened as instruments of development because the ruling classes, including people in and outside government, are motivated by intentions that have little to do with the common good.

The *artificial boundaries created by colonial rulers* had the effect of bringing together many different ethnic people within a nation that did not reflect, nor have (in such a short period of time) the ability to accommodate or provide for, cultural and ethnic diversity. The freedom from imperial powers has been, and still is, not a smooth transition (Anap 2011).

African slaves acted out of their own desire and for their self-interest. They took advantage of the opportunity provided by Europe to consume the products of its civilization. The triangular slave trade was a major part in the early stages of the emergence of the international market. The role of *slave trade and corrupt African ruling classes* in this market is not radically different from the position of the African elites in today's global economy. They both traded the resources of their people for their own gratification and prosperity (Anup 2009). In the process, they helped to weaken their nations and dim their prospects for economic and social development. The slave trade had a profound economic, social, cultural and psychological impact on African societies and peoples. It did more to undermine the African development than the colonialism that followed it. Through slave trade, the continent lost a large proportion of its young population.

2.6. Globalization

In Africa, many transnational corporations (TNCs) have acted as economic predators, guzzling up national resources, distorting national economic policies, exploiting and changing labour relations, violating sovereignties, and manipulating governments and the media. In order to ensure uninterrupted access to resources, TNCs have also supported repressive African leaders, warlords and guerrilla fighters, and impeded prospects for development and peace.

First and foremost, the above-mentioned disastrous description has to do with the *rich natural resources* of Africa. Timber, oil, diamond and copper, to mention but a few, compounded in many cases by the foreign extractive industries presence, generated practices of unreported payment to the government and government's unreported use of money (e.g., the case of southern Sudan). The *long-term structural inability* of the African states to promote development strategies from local resources and savings, within democratic decision-making procedures, is also characteristic. There has been economic growth in Africa after World War II, but this seems to have been erased from history, since it has been based on a developmental model. As Arrighi (2002) remarked, Africa's tragedy is broadly linked to a pre-colonial and colonial heritage which has gravely handicapped the region in the intensely competitive global environment. The crisis has become so uncompromising because of continued poor gross domestic savings and investment, despite the globalization's pretence to the contrary, not to mention the impact of the predicted deaths from HIV/AIDS between 2010 and 2015.

The United Nations (2009) observes that many of the main causes of the crisis are linked to *global instabilities and imbalances* that contributed to the inadequate functioning of global economy. Major underlying factors in the current situation include inconsistently and insufficiently coordinated macroeconomic policies and inadequate structural reforms, which led to unsustainable macroeconomic policies. These factors were augmented by major failures in financial regulation, supervision and monitoring of the financial sector, and inadequate investigation and early warning. These regulatory failures, compounded by over-reliance on market self-regulation, overall lack of transparency, financial integrity and irresponsible behaviour, have led to excessive risk-taking, unsustainable high asset prices, irresponsible leveraging and high levels of consumption fuelled by easy credits and inflated asset prices.

Insufficient emphasis on equitable human development has contributed to significant inequalities among countries and peoples.

2.7. Religious Conflicts

Religion is the greatest and the most valued dimension of human life. To a certain extent, every human being is given freedom to express his or her religious beliefs without any limitation. Kenya, Tanzania, Uganda, Ghana, Zambia, Zimbabwe, just to mention but a few, have not only given freedom of worship to their citizens, but they have also provided it in the constitution among the bill of rights. Such rights cannot be denied to anybody. They spring from inalienable rights and they ensure natural justice. In the western world, the American Constitution, in the second amendment, sought to provide unrestricted opportunity for worship and belief, in particular for plural religious practices.

Contrary to this form of inclusion and provision, religious related conflicts have been witnessed across Africa. These conflicts have led to insecurity, underdevelopment and poor distribution of resources, disagreements and ungovernable states. In Kenya, for instance, the Muslims are the majority in southern, north-eastern and northern region. They have gained dominance there against Christians. They are advancing a religious obligation and condition that all those living there should change to Islam. This being the case, the Al Shabaab who claim to fight for the Muslim religion killed many people in the recent past (Garissa University, Nairobi), forcing them, in some instances, to learn Muslim and radicalizing them with unique, untenable, inhuman, brutal practices. These practices have caused a lot of threats and unacceptable human living conditions.

In Nigeria, the situation is worse. The Christians and the Muslims are nearly equal in number. The Muslims are located in the Northern part of the country, while the majority of Christians are in the Southern part. The Islamic insurgence to bring Sharia laws has costed Nigeria a long litany of wars. Especially, Boko Haram advanced war against other religions, despite the granted right for freedom of worship in the Nigerian constitution.

In the Central African Republic, recent experiences of extreme religious conflict also involved Muslims and Christians. Violence and even genocide occurred because of religion intolerance. The government experienced crisis and had been weakened by such violence. According to *Washington Times*, the conflict alleged to be religious when members of the Seleba rebel coalition looted, raped and killed Christians upon seizing control of the capital

city of Bangui. Later, armed Christians fought back and pushed them out of the capital. With such kind of violence, there is no proper political organisation and structure of governance to be achieved. The overthrow of the Nigerian government in March 2013 was as the very result of protracted violence occasioned by the two religious groups, political instability and polarized state.

Sudan has experienced prolonged state of insecurity and cold war amongst the civilians. Sudan gained independence in 1998, but only ten years were peaceful. Deep-seated violence stems from the opposition between the Northern part dominated by Islamic Religion and the Southern part dominated by Christians and partly by traditional religion. The war between 1955 and 1972 was occasioned by the religious intolerance between Muslims and Christians, and about 500,000 people died. Many were not-combatant. The second cold war, between 1983 and 2005, killed about two million people through famine, bloodshed and diseases. One researcher has found out that there is no correlation between religion and terrorism. Religion is not particularly prone to conflict; what is labelled religious terrorism has more to do with nationalisation than with religion (Moller 2006).

3. Constitutionalism and the African states

In theory, constitutionalism states that, in a properly governed state, there must be limitations upon those who exercise the power of government and limitations should not be merely written, but spelled out in a body of higher law which is enforceable in a variety of ways, political and judicial. According to constitutionalism, the urge is for the rule of law and not the rule of arbitrary. In the modern times, this theory has found strong support especially in strong democracies insisting that government officials are not free to do anything they choose. They are not above the law and should act bound by limitation of power and procedures set out in the supreme, constitutional law of particular states.

The constitutionalist theory is a strong reaction to Thomas Hobbes' absolutism claiming that the leader has an absolute authority and is always above the law. Starting from a critique of Hobbes, John Locke created the constitutional theory (Gordon 1999: 484). Generally speaking, a constitution ought to guide all of us. Some articles and chapters may not be applicable to all of us, but it should guide, regulate, control and limit all people in a state. The constitution consists of norms which create structures and define the limits of the

power of citizenry, as well as the governmental power or authority. Without a constitution that is well stipulated, a country could not be called a sovereign state.

The continent of Africa is made up of states that are autonomous and self-governing. They are distinct, but yet correlated and sharing a number of things in common. They have modern and dynamic narrative rules, principles and values that have been organized into a constitution. What I have previously discussed as political crisis emerging from tribal, cultural, economic, religious, psychological and organizational factors is reducible to the lack of proper understanding and misapplication of the theory of constitutionalism and constructive democracy. Some African states have already put forward mechanisms of ensuring that constitutionalism and democracy would prevail, but unwillingness of those in power has made Africa to continue singing the songs of fights, violence, warfare, etc. Until recently, the conception of those in power to act within the confines of the law was not acceptable. Partly, it happened because African citizens recognized those in power and even allowed them to decide for them. Whatever they decided was final, even when it did not conform to the constitution. Therefore, constitution is not supreme, but the leaders; the rule of men is highly regarded and desired than the rule of law.

Secondly, in Africa, the constitution is created without people's informed participation. This is the reason why, even in the campaigns, to pass a constitution, people are persuaded not by the rightfulness and correctness of the document, but by the incentives that they receive in order to pass the constitution. Thus, lack of knowledge of the norms that create the legislative, judicial and executive powers leads to lack of knowledge that the same norms impose significant limits on those powers. Consequently, people only think of what the lines of the constitution spell out, but fail to see the assumptions that these lines carry. The unspoken limitation that the norms create have not been realized, respected, reinforced and adhered to.

In contrast with the constitutional theory, the African leaders resume unlimited power and authority and, because censorship is inadequate, power ends up in corrupting leaders absolutely. Many leaders in Africa have defended John Austin's thought that the very notion of limited sovereignty is incoherent. For them, all law is the command of a sovereign person or body of persons, and so the notion that the sovereign could be limited by law requires a sovereign who is self-binding and who commands himself/ herself or itself… So the notion of limited sovereignty is as incoherent as the idea of a square circle.

3.1. Authority of governments

Where is the origin of governmental power and what are its limits? The government derives its authority from the constitution. The same constitution is the living document that guides the life of people in the state. As Aristotle put it, it is the soul of the state. According to Gordon Wood (1969: 268), "a constitution is a set of fundamental rules by which even the supreme power of the state shall be governed". In other words, the constitution is the one from where all the power, even the supreme power of the state is derived. The idea of constitutionalism is not only descriptive of the idea of governance, but also prescriptive. It defines what grants and guides the legitimate exercise of governmental authority (Fritz 2008: 1). Consequently, the authority of constitution as a prescriptive entity will always prescribe and assess normatively the legitimacy of the authority of government. In brief, the theory of constitution postulates "the idea that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations" (Waluchow 2007).

Sovereignty and government are intrinsically related in the sense that one cannot exist without the other. Sovereignty stands for the possession of supreme authority or power over some domain. Generally, 'sovereign' indicates some level of control and unlimited power. Government is composed of people and institutions through which sovereignty is exercised. In modern theory, Government exercises sovereignty/ power/ control on behalf of the people who are governed. Whether sovereignty and government mean and can be applied to mean the same thing is a point of contention to many scholars. However, it is also important to explain how constitutionalism should help proper governance.

To start with, John Locke held that unlimited sovereignty must always remain with the people who have the normative power to void the authority of their government, especially if the latter exceeds constitutional limitations. Earlier, Thomas Hobbes insisted on the identification of sovereign and government, where people give out all their rights to an absolute authority or government. In this case, he granted a supreme government or assembly of members who enjoy unlimited power and authority to rule the people. If sovereignty is left to the people, they would destroy the very possibility of being governed. This is the apex of the African psychology, philosophy and sociology in terms of leadership. People cannot have sovereignty and government could not be limited. This raises the issue of constitutionalism in Africa. It is arguable that, in Africa, governments have more authority and assume that the very people who they repress are the ones who have unlimited sovereignty. One feature that

should be kept close to constitutionalism is that sovereignty should be vested in the people and not in the government.

3.2. Salient issues about constitutionalism

There are two issues of concern when it comes to constitutionalism. They all pertain to the fundamental aspects of how to make the rule of law effective without falling to the use of excessive governmental force in governance and leadership. These issues include entrenchment and writeness.

The first feature that is linked to constitutionalism and which is significantly and highly applicable to the African situation is entrenchment. The term 'entrenchment' means to establish something from, to make something be unmovable. In terms of political philosophy and legal understanding, entrenchment could mean that the norms imposing limits upon government power must in some way be entrenched either by law, higher law, or constitutional convention. Ideally, this is to say that the body of rules and regulations must be hold firmly and institutionally protected. Institutions must not be legally entitled to arbitrarily change laws and nobody should be allowed to expunge such limits by will or pleasure. In other words, governments must not be allowed to change especially those articles and sections of the constitution that limit their institutions. Apart from the normal procedures amending such sections, people participation should be vital and inevitable. In such a case, not a simple majority, but majority through referendum is necessary. Through dubious, illegal and illegitimate ways, some governments have managed to amend the above-mentioned provisions. Such moves have created loopholes in the constitution which they use to defend themselves when involved with issues of high handedness, corruption and misappropriation.

According to Aristotle, a constitution is not merely a written document but an innocent principle which organizes the state. He equates it to the soul of an organization. This means that no state can exist, operate and live without a constitution, as there is no organism that could live without a soul. The idea of writeness comes as a factor that promotes constitutionalism. Any law which is not written and enforceable through the constitution or other dispensation is deemed not to be a fundamental law. In this case, it is reasonable and agreeable to argue that constitutional norms can only exist if they are encapsulated in written documents. Rubenfeld defended this position vehemently because of the fear of denial. Such norms and rules are not based just on conventions or social rules. This is because unwritten

rules and conventions are open to interpretation, gradual change, and ultimately vagueness and ambiguity. When it is not written, leaders use various interpretations to go beyond the rule of law.

3.3. Constitutionalism in the African context

In Africa, the level of constitutionalism is minimal. In fact, the reason behind this assertion is that African leaders do not have a regard for the rule of law which makes them to act in contravention to the constitution without fear and shame. The emphasis has been put to democratize the African leadership, but Africa cannot achieve it without respect for institutions. While democracy demands respect for the people's will and consent regarding the law system and institutions, the African democratic processes emphasize on the role of leaders and not the rule of law. It means that African leaders will always act against the constitution, use excessive and imperial force to govern without the people's consensus. Even when they are conscious, the few efforts in this respect will be rendered helpless. Leaders, because of disregard for the law, have got accustomed to forcing their way even when they know they are breaching/ contracting the law. The leadership in Africa is based on minimum democracy and maximum authoritarianism and tyrannical conduct. Leaders think and act without regard to the people who elected them and the law that brought them to power. Consequently, African leaders have used this scenario to change the rules and restrict them in their daily operation. For instance, the electoral clauses have been changed and tailored to protect the individual leader's interest and ambitions. This is paramount and offensive because constructive and developmental democracy based on reason, patriotism, rightfulness and progress cannot exist in Africa if there is no respect for constitutionalism.

4. Democracy and the African states

Democracy is the government exercised either directly by the people, or through elected representatives. In some cases, it has been termed as the rule of majority. This acceptation has grown in its usage and today the term democracy has various meanings. The easiest definition is government by the people, for the people, of the people. A more complex meaning is derived from the Greek term *demokratia* which meant rule by the people. According to this form of governance, any matter which required consultation had to be

deliberated by everybody. In fact, it is said that this was the most pure form of democracy. It was practiced only in Greece, especially in the cities of Athens, Sparta, and Colophon.

Today, there is a sense in which this term has changed its early meaning. Scholars and folks tend to understand democracy as government of the masses. The authority of this government is derived from mass meetings or any other form of direct expression. The power to rule comes from the consent of the people. This is either exercised individually or through representatives. On constitutional matters, the attitude toward law is that the will of the majority shall regulate whether it is based upon deliberation or governed by simply rhetoric ploys and gimmicks.

4.1. Democracy in the African context

It is not clear whether there existed the concept or the practice of democratic processes in Africa or not. Perhaps, it would be more appropriate if we approach this issue by way of simple questions. First, were the African peoples aware of free expression regarding their thoughts and wishes? Here, the answer is yes. The African traditions accepted free expression of one's mind in issues pertaining to their social, moral, and political lives. Second, how was this done? In Africa, despite the real existence of the concept of democratic expression and participation, it was not experienced by everybody. Africans paid attention to a number of things. Their free participation was an oriented and gender based issue. In traditional Africa, there existed a noticeable peculiarity in the way democratic decisions were made. One should note that men and women were not free to participate and talk about every issue that affected their lives. Some issues were handled by men without consulting women and the youth. For instance, the question about what to plant, agricultural and household issues, concerns about child rearing and, in some communities, issues of building - all were reserved for women. The youth, particularly ladies, helped in such chores and had limited exercise of their will. Men were not allowed to participate freely on such matters. Men were left with freedom to decide on behalf of women and children in issues pertaining to political organization, structure of governance, policies and rules governing the community. The matters of diplomatic relations with other communities, both internal and external, were left to men's decision. Women did not participate in the elections of traditional chiefs and elders. All they were allowed was to come and adore the chiefs, wash them, feed them, and care for them after they had been elected.

Third, participation was gender-oriented. Men were not allowed to participate in businesses which were regarded as feminine, as women were not allowed to participate in matters which were considered to be masculine. For example, issues about boundaries, payment of dowry and circumcision of boys were left to men. Issues pertaining to child rearing, giving birth, discipline of other women who go against the traditions were left to women and no man could participate in them. This essentially portrays traditional Africa as a well structured, albeit very compacted society. It never allowed for freedom of expression and participation in all matters of human life. Moreover, in some issues, nobody was allowed to say what he/ she felt. For example, in matters regarding the observance of some moral values, nobody could be allowed to stand for the contrary. The dos and don'ts were supposed to be respected and adhered to. Nobody was allowed to alter religious beliefs and observances.

Worth noting is the fact that today's Africa is many miles away from achieving a full realization of democracy where each will be accorded the opportunity to express himself/ herself. Women participation in politics and governance is low and, in some countries, women have taken a backside on such matters. They are regarded as incapable of leadership because the institution of leadership and governance has been turned to brutal use of naked force. Instead of reason and persuasion, stamina is the order of the day.

4.2. The American model of democracy

One of the outstanding books written about the American democracy was the masterpiece authored by Alexis de Tocqueville. In this outstanding work, he described what and how he thought about the nascent American democracy. Despite the fact that it was written in the first half of the 19th century, one should note its perennial significance, and the illustrative, stimulating, massively elucidatory and comprehensive features which have made it an unavoidable and necessary prerequisite to comprehend and internalize the exponentially American conception of democracy. In his opening remarks, Tocqueville wisely stated that "the will of the nation is one of those phrases most widely abused by schemers and tyrants of all ages". Tocqueville's *Democracy in America* (1835 and 1840) was more a historical analysis which exposed the improved living standards and social conditions of individuals, as well as their relationship to the market and state in Western societies. He wanted to help the French people to understand democracy in the New World and compare it with the tottering

of the aristocratic order in France. In fact, as it has been said, the book was more useful to the American rather than the French people (Kaplan 2005).

Tocqueville understood democracy as an equation that would balance liberty and equality, concern for the individual as well as for the community. As a great supporter of liberty, freedom of expression and emancipated society, he aimed at an ideal situation characterized by full realization of equality and liberty. He contended that, "I have a passionate love for liberty, law, and respect for rights. I am neither of the revolutionary party nor of the conservative... Liberty is my foremost passion… But one also finds in the human heart a depraved taste for equality, which impels the weak to want to bring the strong down to their level, and which reduces men to preferring equality in servitude to inequality in freedom" (Tocqueville 2000: 30). He advocated that any form of government should inculcate a sense or a level of liberty and the need of individuals to be able to act freely while respecting others' rights. This is the cornerstone of any good democracy. The people must be respected and treated as free agents who are capable of knowing what is good and act accordingly. He linked the need for liberty to equality. When people in a state are equal, there are evils that cannot emerge simply because being equal suppresses the urge for power to dominate and intimidate others: "Furthermore, when citizens are all almost equal, it becomes difficult for them to defend their independence against the aggressions of power. As none of them is strong enough to fight alone with advantage, the only guarantee of liberty is for everyone to combine forces. But such a combination is not always in evidence" (Tocqueville 2000: 31).

Interestingly, one striking feature about democracy in America was equality of conditions. This was imperative for the rapid progression of the democratic mindset. The inhabitants of the New World ensured that social affairs were smooth and aspects of law and public life had a favourable direction. The influence of equality was vital in that it not only touched political life, but also formed their opinions, dictated their feelings, promoted habits, and altered things in the totality of life.

4.3. The evils of democracy
Even though I have alluded somewhat vaguely to the merits of democracy, it is irrevocable that democracy, especially in the modern times, has done more harm. The reason for such a strong assertion is not far to seek. It is based upon propositions that are palpably

not true, and what is not true is always immensely more fascinating and satisfying to the vast majority of men than what is true. To start with, democracy has created an individualist ethos. The tendency of current democracy is letting everybody enjoy his/ her liberty and do all that he/ she finds good and enjoyable. Liberty and equality is the spirit. This freedom makes one to engage more in private life, to be self-centred and disengage from societal issues that are not admirable. Observing the spirit of the American people, Tocqueville contends that "an excess of individualism would cause Americans to withdraw from civic life, concerning themselves primarily with family and close friends" (Tocqueville 2000: 29). This situation has made people in the modern world to regard themselves as private. They engage in what is called privatization.

Secondly, democracy brings about democratic envy. In democracy, there is an insistence to create an egalitarian society made of people who are competitive. However, it should be realized that the pursuit for such equality leads people to materialism - a principle that material gain is the measure of one's life and level of happiness. Thirdly, democracy is not always a provision of liberty and equality in social, economic and political spheres. This happens because democracy advocates for free markets and free movement of factors of production. The haves and the haves-not should be left to interact freely without stringent rules to monitor them. This situation can expose the 'haves' to acquire more industrial and commercial property. In this way, resources will be over concentrated in the hands of the few. As Tocqueville observed, this would diminish democracy and eventually led to timocracy and oligarchic tendencies. Fourthly, according to George Bernard Shaw, democracy substitutes election of the incompetent many for appointment of the corrupt few. The people who participate in democratic processes are not necessarily qualified in terms of character, intelligence, performance, talent, or even any art at all. All that democracies care about is that all citizens participate equally even when they have unequal capacities and faculties. Tocqueville captures this by saying that, ideally, democracy would not produce 'great men' (i.e., great leaders). In other words, in democracy, anybody can emerge as a leader. It doesn't matter what he/ she is capable of (Tocqueville 2000: 29).

Moreover, democracy encourages mob actions. People follow the euphoria and never engage the power of their reasoning at all. With this absence, democracy gives any decision a certain appearance of objective and demonstrable truth. In the words of Henrik Ibsen, "The majority is never right. Never, I tell you! That's one of these lies in society that no free and

intelligent man can ever help rebelling against. Who are the people that make up the biggest proportion of the population - the intelligent ones or the fools? I think we can agree it's the fools, no matter where you go in this world, it's the fools that form the overwhelming majority".

Democracy, especially in Africa, is headed to the worst. In fact, every vice associated with poor leadership and governance has been brewed and concocted by the spirit of destructive democracy. This form of governance is generally presented as an ineffectual form of government highly prone to corruption, demagoguery and takeovers by radicals and, in some portrayals, as a form of mob rule which tramples on individual rights to appeal to public sentiment. This has made leaders to attend majority or lobby groups and abandoned the interest of the individual. They do not forge common objectives and interests, they are not political visionaries. The common good has been poorly designed and coordinated.

Furthermore, in the ancient times, Plato rejected the Athenian democracy on the basis that such democracies were anarchic societies. He realised that the form of democracy that was advocated by the Greeks, particularly the Athenians, existed without internal unity. That model was so individualist that those who participated followed citizens' impulses rather than pursuing the common good. It did not only limit the freedom to participate, but also limited the choices of the one majority had chosen, without regard to what one exactly desired. Because of this, Plato attacked the Athenian democracy for mistaking anarchy for freedom.

4.4. Empowering democracy in Africa

Virtues are ideals which are cherished in the society. Democracy can work only if it promotes, revitalizes and reinforces the virtues of that particular community, society or people. The African societies must incorporate these values in every democratic process. Without virtues, democracy in Africa will fail and will be merely a foreign concept. In the words of Tocqueville, "To instruct democracy, if possible to revive its beliefs, purify its moral, regulate its movements, gradually to substitute experience for inexperience, knowledge of true interests for blind instincts; adapt government to time and place and modify it according to the circumstances of the people: of all the tasks required of the leaders of our day who govern society, these are foremost" (Tocqueville 2000: 38). In other words, the enculturation of democracy is possible while paying attention to its basic tenets and principles which are foundational in modern democratic processes.

As far as the *creation of institutions* is concerned, Africa has scored very low on democratic leadership and governance because of poor institutions. While, in the western states, institutions are able to work autonomously, it is true that, in Africa, individuals determine the performance of the state function and organization. Because the political systems are weak, the operational procedures are not set and rules are not adhered to. To a large extent, the individual personnel play a significant role in the management of the systems.

The *constitutional participation* is the right of every individual to participate in how he or she should be governed. Not only is this true in the political realm, but also in economy, society and morals. This is what one refers to when denominating a political right. One of the areas demanding everybody's participation is the area of constitutional arrangements where laws which govern a particular country are brought forth. This process must not only be transparent and open, but also inclusive and peaceful. Democracy can grow to its fruition level in Africa, if this aspect is considered. Fully participatory, coordinated and informative democratic processes could remove the embedded vices which are likely to grow alongside sane democratic practices.

The *rule of law* in democracy simply means that a democratic government must follow the fundamental law that gives it legitimacy and through which it enforces its operation. However, a deeper relationship exists between these two variables. The rule of law is the fundamental agreement to respect the rules, the regulations, the acts and provisions of the constitution that has been created through a democratic process which is inclusive and participatory. In Africa, this is lacking and the misuse of the poor and uniformed folk has made the creation of rules and laws a privilege of the few. The lobby groups highjack the process and dictate the entire exercise without involving people in an acceptable manner. If these rules are created without the consent of the people, it will be absolutely wrong for people to be forced to follow those laws.

Essentially, Africa needs social empowerment, peace initiative, information empowerment and participatory leadership in order to enjoy the fruits of a positive democracy. This will make them enjoy constructive democracy which aims at positive progress, upward transcendence and value addition, revitalization of life and betterment of the people. As long as politics is dominated by predator elites, it is difficult to see how meaningful democracy or economic development can be sustained. The challenge for those

who want better social, economic and political stability is to find out effective mechanisms to make leaders accountable and ultimately rescue the state from their greed and transform it into positive change.

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THE SUPREME COURT OF THE UNITED STATES: THE HIGHEST COURT IN THE LAND

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Abstract. *The Supreme Court in the United States of America is one of the most important institutions of the country. Indeed, it has always been in the heart of issues giving rise to high and difficult debates within the American society and political institutions. This article is an attempt to highlight the activities of this court, its history, its particularity and efficiency, and the role the Court plays not only as a judicial institution, but also as a decision making one. The paper also points at some salient issues characteristic for the structure and activity of the Supreme Court, such as the nomination of justices, the Congress battles concerning the confirmation of a Justice in the Supreme Court, and the background on which those nominee are selected, especially academic background, professional experience, ideology, religion and race.*

1. Introduction

As one of the most recent countries in the world in its birth, The United States of America offered the world a Constitution that established out many new legal and political decisions. Settled in that new constitution, the judicial branch of government was characterized by the establishment of the institution of the Supreme Court in the United States of America. In fact, as some critics argued, the United States began its history with a constitution that posed more questions than answers and with a Supreme Court whose birthright was mostly uncertain (McClosky 1960). Like most successes, in politics and elsewhere, this one had a price. The failure to resolve the conflict between popular sovereignty and fundamental law perhaps saved the latter principle, but by the same token it left the former intact. In addition, this meant that the fundamental law could be enforced only within defined boundaries. The most important one of these boundaries is perhaps that the Supreme Court should not only consider what is right and

what is wrong in the eye of the law, but also keep an eye to what popular opinion wants and would accept or not. In this article, we are going to focus on this unique court, its justices, how they are nominated and confirmed, how the Court works, the major issues that the Court has previously examined and the ways the United States Supreme Court has treated them.

Constitutional interpretation in the Supreme Court of the United States is a method of governing through appellate adjudication. All appellate courts perform a dual function: they resolve disputes and regulate in the field of possible future similar cases. But there seems to be a tension between the two functions, as the decision makers' perspectives in some crucial historical cases were markedly different (Wellington 1991).

2. The beginnings: Marbury v. Madison

Marbury v. Madison was a suit brought against James Madison, Thomas Jefferson's secretary of state at that time, by one of the so-called 'midnight judges' created by the federal Congress on the eve of Jefferson's inauguration, in 1801. When taking the office, Madison found that the respective commission could not be delivered. He shared the same viewpoint as Jefferson: those new judgeships were unnecessary and were also a federalist political maneuver to embarrass the republicans. Therefore, Madison refused to deliver it. The outgoing secretary of state who had failed to deliver the commission was John Marshall, serving also as a Chief Justice in the last days of Adams' administration. Marshall sat with the Court to hear the case.

The dilemma Marshall faced was of decisive political significance in that if the Court gave Madison (and, therefore, president Jefferson) the right to deliver the commission, he would probably refuse claiming that each branch should have authority over its acts and no other branch could have the right to order it to act in another way. The power of the Supreme Court and its capacity to protect the federal interests would then appear greatly reduced; the claims made by Hamilton for this court in *Federalist no. 78* would seem to be undermined. The problem was that if the Court refused to order Madison to deliver the commission, it would have been unable to defend legitimate Federalist claims against the Jeffersonian republicans. Marshall declared that Marbury had the right to his commission and then found that the congressional decision

authorizing the Court to grant orders in a case of this type was unconstitutional (Cummings 2015: 198).

The Court understood the Judiciary Act as rather grating original jurisdiction, but it read the Constitution in a way that denied Congress the authority to make such a grant. John Marshall stated here that it was, emphatically, the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, should necessarily expound and interpret that rule. If two laws conflict with each other, the Court must decide on the operation of each. Accordingly, if a law is in opposition to the constitution, if both the law and the constitution apply to a particular case so that the Court must either decide that case conformable to the law and disregarding the constitution, or non-conformable to the constitution and disregarding the law, the Court must determine which of these conflicting rules governs the case; this is the very essence of the judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any other ordinary act of the legislature, the Constitution, and not such ordinary acts, must govern the case to which they both apply. The Constitution did not spell out that the courts had to consider it superior to ordinary law while treating it in the same fashion as ordinary law (Wellington 1991). Returning to the Constitution, one finds that article III establishes the judicial branch by stating that "the Judicial Power shall extend to all Cases …arising under this Constitution, the Laws of the United States, and Treaties made". Article VI states that "this Constitution …shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".

3. Some landmark cases in front of the Supreme Court

During its history, the Supreme Court has decided a lot of cases that gave rise to many debates. Here, we will select some of the most important and controversial ones.

3.1. McCulloch v. Maryland

The case *McCulloch v. Maryland* involved an effort by the state of Maryland to tax the National Bank in a very heavy way in order to prohibit its operation in that state (Cummings 2015: 198). The case presented an issue concerning whether the nature of the union was national or federal. Justice Marshall found that the union was of national

nature; that is to say, it concerned all the people of the United Sates, not only the sovereign states. Another issue of this case was the scope of national power under the 'necessary and proper' clause (Article I, section 8). Marshall voided Maryland's tax on the basis of national supremacy.

3.2. Bush v. Gore

The 2000 presidential election produced over two dozen different lawsuits, including two separate decisions of the U.S. Supreme Court (Webster 2009). Opinions about the decision of the United States Supreme Court in *Bush v. Gore* are as diverse and divided as the Court's decision itself, which included not only a *per curiam* opinion, but additionally one concurrence and four dissents.

The Florida election debacle produced over two dozen different suits filed in federal and state courts, including two separate decisions by the U.S. Supreme Court. The first of the Court's ruling, *George W. Bush v. Palm Beach County Canvassing Board* ('Bush I') was released on December 4, 2000, and was in reaction to a decision by the Florida Supreme Court on November 21, 2000. The Florida statute provides for hand recounts of ballots, but also requires that ballots be certified on the seventh day after the election. While it is possible for hand recounts to be completed in counties with small populations before the seventh day, the Florida Supreme Court concluded that it was largely impossible to do so in some heavily populated counties (e.g., Miami/ Dade). It therefore extended the time period for manual ballot recounts to be completed until November 26th. While some argued the Florida Supreme Court was illegally 'writing new law' after the election, others believed the state Court was simply unraveling contradictory state statutes. Regardless, on December 4, 2000, the US Supreme Court set aside the Florida Supreme Court's ruling, and sent it back for further clarification. The second decision, *George W. Bush v. Albert Gore Jr.* ('Bush II') pertained to the Florida Supreme Court's December 8 order that a statewide manual recount of all undervotes be performed. Bush attorneys immediately appealed this ruling to the U.S. Supreme Court. As the recount began on December 9, it was stopped by the Court in a 5 to 4 decision. The Court held oral arguments on Monday, December 11 and released its decision on Tuesday evening, December 12, over three full days

after it had halted the statewide manual recount. The controversial 5 to 4 decision ended all legal appeals and Gore conceded the election the following day (Webster 2009: 100).

3.3. Medicinal marijuana

On June 6, 2005, the US Supreme Court decided that medicinal use of marijuana was illegal under the federal law, despite the fact that ten states had previously passed legislation allowing the use of medicinal marijuana in treating certain diseases. Some patients with cancer use the drug to improve appetite, reduce nausea and vomiting, and alleviate moderate neuropathic pain. Two seriously ill Californian women, one of whom had several diseases including a brain tumor, brought the case in the court. After a raid of one of the women's crop of six marijuana plants, both women sued the then US Attorney General John Ashcroft. They asked for a permanent injunction allowing them to possess, obtain, or manufacture marijuana for personal medical use without fear of arrest or home raids. The Supreme Court's ruling could damage other state's efforts to pass laws allowing the use of medical marijuana (Barton 2005: 448).

4. How cases get to the Supreme Court

It is very important here to have a clear idea about how the Supreme Court gets involved in treating cases, considering that the American judicial system is a little bit complicated. First, it is necessary to understand the difference between cases that arise in the federal court system and those arising from the state courts.

In general, there are only two methods to reach the Supreme Court with a case: by appeal and by *writ of certiorari*. Therefore, appeal to the Supreme Court is considered a matter of right under well-defined circumstances, like other appeals in the legal practice. However, the circumstances under which the appeal can be open to a party are extremely restricted. During the 1960s, the Supreme Court tended to refuse to entertain many legitimate appeals from the states because of the lack of a substantial federal question (Beth 1962). Appeal can be achieved in the following circumstances: 1) when any United States court holds an act of Congress unconstitutional, in a case in which the United States or one of its officers is a party, the United States may appeal to the Supreme Court; 2) when a circuit court holds a state law unconstitutional or holds that a state law violates a treaty or a federal statute, either party may appeal 3) when a

state court has declared a federal statute or treaty unconstitutional, either party may appeal; and 4) when a state court upholds a state law in a case involving its validity under the federal constitution, law or treaty, either party may appeal to the Supreme Court. Apart from the four possibilities listed above, no other cases may be appealed to the Supreme Court (Beth 1962).

5. Requirements for selecting cases in the Supreme Court

First, the lawyers have to set their arguments in order to justify why the Supreme Court has to hear the case. The petitions are split up among the justices and their clerks. The justices meet on Fridays to choose the cases they will hear. In this case, what is referred to as 'the rule of four' does apply. It means that at least four justices out of the nine members of the Supreme Court have to agree to hear the case. Then, the Supreme Court issues a *writ of certiorari* (that is 'to be informed', or to 'make more certain') demanding the official record from the lower court that heard the case first. One may ask a question about the criteria that the Supreme Court uses to grant a *writ of certiorari* to a given case.

Yet, there are other informal factors in selecting a case in front of the Supreme Court (Beth 1962). The most eminent are: 1) the Supreme Court is more inclined to hear a case when two lower courts (two federal courts, or a federal and a state court) decide the legal questions differently; 2) the Supreme Court is inclined to hear a case when a lower court makes a decision that conflicts with an existing Supreme Court ruling; and 3) the Supreme Court often hears cases of significance beyond the two parties concerned. For instance, the Supreme Court rarely hears a sexual harassment case because such cases are relatively settled. When Paula Jones claimed she was sexually harassed by President Clinton, the Court heard that case because it involved an important national issue - whether a sitting President had to defend himself against a lawsuit while in office.

The Supreme Court is in session for approximately nine months each year. The traditional opening – according to the American tradition - is on the first Monday in October. People generally do not see the justices in public, except when the Court meets to hear the oral arguments in the presentation of a case that the Supreme Court has agreed to review. Arguments are usually scheduled on Monday, Tuesday and

Wednesday mornings. Any case that the Supreme Court agrees to hear has been at least aired by a lower court. Cases are in general heard in a period of about one hour and each side's lawyer is given half an hour to present his/ her arguments. The justices usually interrupt the presenting lawyer with questions. They can also give their own speeches. An important matter rises regarding the importance of oral arguments (Morone and Kersh 2014). Justice Clarence Thomas stated that, generally, oral arguments would influence justices in five or ten percent of the cases. Chief Justice John Roberts added in a lecture that justices are debating among themselves in order to reach a decision; they are using lawyers as a blackboard.

It is of vital importance to notify that clerks play a big role on the Courts' decisions (Miller 2014). Those graduates from the best law schools of the country, who have already spent a year clerking, usually on one of the US Courts of Appeals, help the justices in their work. Justice Horace Gray hired the first law clerk at the Supreme Court when he began his service in the Court in 1882. He chose a Harvard Law School student who had just graduated. He even paid him from his own money. Since then, clerks have been funded through congressional appropriations. Each Associate Justice can hire four law clerks, retired justices one, and the Chief Justice five.

6. Other influential factors on the Supreme Courts' activities

6.1. The role of ideology on the Court's decisions

Political scientists have concluded that ideology plays a vital role on the Court's work as it influences the Justices' beliefs, and therefore affects the way they will vote especially in most sophisticated cases that give rise to social as well as political debates. Abortion, for instance, represents a perfect example in that sense. Studies dealing with the Justices' behavior look to their party identification, while other consider their ideological preferences before nomination to the Court. Other viewpoints in that matter go further: they take into consideration the views of the presidents who nominated them. Yet, there is a fact that the Justice's ideology affects the way he/ she votes.

6.2. Sophisticated voting in the Supreme Court: which strategy to follow?

It is very important to study the way Justices vote in the Supreme Court (Johnson, Spriggs and Wahlbeck 2005). Here, one could notice a strategy that is often referred to as 'sophisticated voting'. It has a vital importance in the process of decision making in the Supreme Court. Sophisticated voting takes place when decision makers vote against their most preferred alternative at one stage of a decision-making process, in order to produce outcomes at later stages that are more preferred. It can be sincere or not. A sophisticated sincere vote happens when a decision maker realizes that choosing the most preferred opinion at one stage is the best way to get his/ her goals at a later stage, whereas a sophisticated insincere vote happens when a decision maker votes against the most preferred alternative in order to reach outcomes at a later stage that are more preferred. Sophisticated voting usually points at 'insincere sophisticated voting'.

6.3. Nominating Supreme Court justices and the confirmation battles

Scholars overwhelmingly reveal that the Supreme Court decision-making process is deeply political. If the judicial decision-making is political, then a democratic system should seek to discipline that decision-making through democratic means. Indeed, the issue of nominating justices to the Supreme Court has always been problematic. Whom to choose and why to choose that person in particular? What are the criteria upon which a nominee to the Court is chosen? And, most importantly, what are the difficulties those nominees have to face when in process of confirmation?

The appointment of a new justice in the Supreme Court of the United States of America is a very important moment in the American political calendar. As far as the present structure of the Supreme Court is concerned, it is important to notify that the nomination of the two most senior justices of the Court (Justices Scalia and Kennedy) was proceeded unanimously (Hodder-Williams 1988). However, in 1987, when President Ronald Reagan nominated Robert Bork to the Court, the justice was apparently qualified for the job since he had served as solicitor general under the Nixon administration. Still, he was a conservative who was supposed to replace moderate Justice Lewis Powell. Robert Bork's curriculum vitae appeared to be perfect for a Justice of the Supreme Court of the United States. He graduated from the University of Chicago and got a doctorate degree from the same university. After finishing his studies, he worked in private practice between 1955 and 1962, until joining the Yale

Law School, from where he was appointed by President Nixon to become Solicitor-General. During that period, even if he was a quite active Attorney-General, he returned to private practice. He was nominated by President Reagan to the Court of Appeals for the District of Columbia in 1982. Learned in the law field, experienced as an advocate before the Supreme Court, familiar to some degree with government itself, Bork was ideally prepared to be a Justice. There were two issues that might have given chance to hesitation. The first one was an echo of the 1974 Watergate scandal. The matter was that Solicitor-General Bork dismissed Special Prosecutor Archibald Cox after Attorney-General Elliot L. Richardson and Deputy Attorney-General William D. Ruckelshaus had chosen to resign rather than carry out the presidential requirement. Some liberal groups mobilized to lobby against his nomination (Morone and Kersh 2014). Democratic senators, led by Ted Kennedy, worked in the Senate to defeat his candidature. They reached this goal after twelve days of hearings. It was for the first time that judicial philosophy prevailed over high qualifications and conservatives coined a new term, 'borking', to describe this phenomenon. Therefore, 'to bork' is to turn down a competent nominee for political reasons.

Current Court Justices

Justice	Date and place of birth	Academic degrees	Precedent occupation(s)
John G. Roberts Jr.	January 27, 1955, Buffalo, New York	- A. B. from Harvard College in 1976 - J. D. from Harvard Law School in 1979	- Law clerk for Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit, 1979–1980 - Law clerk for Associate Justice William H. Rehnquist of the Supreme Court during the 1980 term - Special Assistant to the Attorney General, U.S. Department of Justice, 1981–1982 - Associate Counsel to President Ronald Reagan, 1982–1986 - Principal Deputy Solicitor General, U.S. Department of Justice, 1989–1993 - Appointed to the United States Court of Appeals for the District of Columbia Circuit in 2003
Antonin Scalia	March 11, 1936, Trenton, New Jersey	- A. B. from Georgetown University and the University of Fribourg, Switzerland	- Private practice in Cleveland, Ohio, 1961–1967 - Professor of Law at the University of Virginia, 1967–1971 - Professor of Law at the University

		- L. L. B. from Harvard Law School	of Chicago, 1977–1982 - Assistant Attorney General for the Office of Legal Counsel, 1974–1977 - Judge of the United States Court of Appeals for the District of Columbia Circuit in 1982
Anthony M. Kennedy	July 23, 1936, Sacramento, California	- B. A. from Stanford University and the London School of Economics – L. L. B. from Harvard Law School	- Private practice in California, 1961–1975 - Professor of Constitutional Law at McGeorge School of Law, University of the Pacific, 1965-1988 - Appointed to the United States Court of Appeals for the Ninth Circuit in 1975
Clarence Thomas	June 23, 1948, Savannah, Georgia	- A. B., cum laude, from Holy Cross College in 1971 - J. D. from Yale Law School in 1974	- Assistant Attorney General of Missouri, 1974-1977 - Judge of the United States Court of Appeals for the District of Columbia Circuit, 1990-1991
Ruth Bader Ginsburg	March 15, 1933, New York City	- B. A. from Cornell University - Attended Harvard Law School, and received her L. L. B. from Columbia Law School	- Law clerk to the Honorable Edmund L. Palmieri, Judge of the United States District Court for the Southern District of New York, 1959–1961 - Professor of Law at Rutgers University School of Law, 1963–1972, and Columbia Law School, 1972–1980 - Judge of the United States Court of Appeals for the District of Columbia Circuit in 1980.
Stephen G. Breyer	August 15, 1938, San Francisco, California	- A. B. from Stanford University - B. A. from Magdalen College, Oxford - L. L. B. from Harvard Law School	- Law clerk to Justice Arthur Goldberg of the Supreme Court during the 1964 term - Professor at Harvard Law School, 1967–1994 - Judge of the United States Court of Appeals for the First Circuit, and as its Chief Judge, 1990–1994
Samuel Anthony Alito	April 1, 1950, Trenton, New Jersey		- Law clerk for Leonard I. Garth of the United States Court of Appeals for the Third Circuit, 1976–1977 - Assistant U.S. Attorney, District of New Jersey, 1977–1981 - Deputy Assistant Attorney General, U.S. Department of Justice, 1985–1987 - U.S. Attorney, District of New Jersey, 1987–1990 - Appointed to the United States Court of Appeals for the Third Circuit in 1990
Sonia Sotomayor	June 25, 1954, New York City	- B. A. from Princeton University in 1976 - J. D. from Yale Law School in 1979	- Assistant District Attorney in the New York County District Attorney's Office, 1979–1984 - Judge of the United States Court of Appeals for the Second Circuit,

			1998–2009
Elena Kagan	April 28, 1960, New York City	- A. B. from Princeton in 1981 - M. Phil. from Oxford in 1983 - J. D. from Harvard Law School in 1986	- Clerk for Judge Abner Mikva of the U.S. Court of Appeals for the D.C. Circuit, 1986-1987 and for Justice Thurgood Marshall of the U.S. Supreme Court, 1987 - Law professor at the University of Chicago Law School and Harvard Law School - Dean of Harvard Law School, 2009

Source: www.thesupremecourt.gov

7. Conclusion

After having a look to one of the most important institutions in the United States of America, one could easily observe that this highest Court of the land was the product of the particular history and circumstances of the country. It has its points of strength, as well as weaknesses. Yet, there are still salient issues generating important debates. They include the lifetime tenure of justices, the way they are chosen, the criteria upon which they are chosen and the difficulties rising when going through the process of confirmation in Congress. Some of these questions may be tackled in the near future; others may take much more time. And perhaps there are some that will take decades and decades to be solved.

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REFLECTIONS ON THE US AND BULGARIAN POLITICAL SYSTEMS - SOME (IM)POSSIBLE IMPLICATIONS

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Abstract. *The debate about representation is quintessential for the modern understanding of democracy. However, it varies significantly both in terms of logic and mechanics throughout the democratic states. The present paper addresses a comparative perspective between two democratic political systems, Bulgaria and the USA. Though a strange couple for such a complicated and sophisticated exercise, the cases demonstrate some peculiarities which often remain not quite elaborated and explained, given the assumption that they do not share enough similarities in order to be compared. Approaching the quality of democracy by looking upon their electoral practices and methods stands for a provocative viewpoint of their political systems and modes of governance. Some major implications on contemporary democratic developments are also presented, as voters' participation and interest is equally important to the overall quality of governance than the abilities of politicians and political parties.*

Keywords: Politics, Electoral system, Electoral formula, Political parties.

1. In lieu of introduction

Though it may look from the onset as an enterprise in the well-known researched and explored matter of comparison between the majority and plurality electoral systems, this article aims at something more. Its logic is derived both from empirical and theoretical sources, but still not the convenient usual ones. Its range, scope and conclusions will not end up in familiar limitations imposed or willingly adopted by many scholars in their research of electoral systems – merely summing up electoral data and wrapping up generalizations for the very nature of the polity in focus, its character and functioning. Instead, this article analyzes some more intimate issues, like the specifics behind the processed data and what is the actual story that they tell. Based on precious personal experience, which is the key behind plausible and viable story-telling, this paper draws

attention to some visible aspects of two seemingly distant political systems, of USA and Bulgaria. The accent will be on the nature of their electoral systems and the mechanism which make them running. Special attention will be drawn upon how procedures for candidate selection and nomination shape the whole electoral process and its outcomes. In turn, the results of these observations are deployed for the explanation of the state of democracy, the format of the party system - its ideological stances and organizational features, and the public attitudes towards their functioning.

However strange it may look today to compare two types of electoral systems and two variations of democracy, there is plenty of reason underneath such an exercise. In order to demonstrate at least that no matter of its universal nature, democracy applied nationally produces quite essential differences - a well-known fact *per se*, though often omitted during the glorious days of 'transitology'. Regardless of the fact that democracy is overloaded nowadays with meanings, understandings and interpretations ranging from theoretical discourses on its ideological merits to practical critique of its overwhelming bureaucratization that makes decision-making process almost impossible, different cases present plenty of common features.

In fact, the central hypothesis of this article sheds a light, through a very different perspective, to the differences of two seemingly well-researched types of electoral systems and formulas concerning the process of candidate nomination and the nature of competition that follows accordingly. The argument is that exactly these details, often overlooked, determine the quality of democracy and the amount of public support and trust within the societies in focus. When comparing the American and Bulgarian systems, why the latter lacks significant democratic experience to be analyzed and juxtaposed to the first one? The Bulgarian party system applies in fact both electoral principles, which makes it, if not unique, then rather interesting for approaching, even though the country has a short record of practicing democracy. Still, the experience gathered allows for some provocative conclusions that the paper attempts to present in short. Just to give the reader a brief notion regarding the complexity of the Bulgarian electoral system, it is worth pointing out that, when voting for parliament, Bulgarians use proportional representation allocating electoral support via the largest remainder method (also known as the *Hare-Niemeyer* method),

while, when picking up the president or local mayors, they use single-winner national district or the first-past-the-post method.

In order to lay the environment for the upcoming conclusions, some brief information of the applied electoral systems and their specifics is needed in advance. Electoral competitions are generally based on the single-winner and multiple-winner systems, although there are some hybrid or mixed systems as well (e.g., elections for *Bundestag* in Germany). Single-winner systems select a single person for an elected office, whereas multiple-winner systems produce elections that generate multiple winners. These systems are also known as majoritarian and proportional in regard to the principle of mandates' allocation. Since Maurice Duverger (1954) and Douglas Rae (1971) have identified the issue as important for the understanding of democracy and politics in general, the specialized literature in the field has classified the main types of electoral systems and sought to analyze and understand their consequences for the overall political processes (Lijphart 1994; Lijphart and Grofman 1984; Taagepera and Shugart 1989; Norris 1997). According to them, political systems vary mainly around some key dimensions including district magnitude, ballot structures, effective thresholds, mal apportionment, assembly size, and open/ closed lists. The most important variation of the systems in action is their preference for the electoral formula for vote's allocation. There are four main types: plurality/ majority, proportional representation (PR), semi-proportional representation and mixed systems.

Plurality voting, or 'first past the post' known as the most widespread method for single-winner systems, is most commonly used in the United States, Canada, India, and the United Kingdom. This voting form specifies that the proclaimed winner is the candidate who wins the most votes, regardless of whether the vote is a majority of the votes. Unlike the majoritarian person-focused campaign in multiple-winner systems, what prevails is not the personality of the candidate, but the profile of the political party that nominates them. Thus, elections are not only and predominantly for individuals, but rather point at how many seats the political party is able to secure. The electoral formula employed in the respective electoral systems is another component of elections. It determines the allocation of popular vote into parliamentary seats for political parties, given their score in an

election. There are two major families of electoral formulas, each labeled after the applied method for calculation of the actual transformation of votes into mandates: highest-average and largest-remainder. Under the highest-average method, the first step is to calculate a quotient for each party with the numerator equaling the number of votes received by that party.

However, the formula for the denominator varies across specific methods. For example, in the case of the D'Hondt formula (i.e., the highest-average method used in most European systems), the denominator for each party is the number of seats already allocated to that party, plus one. Initially, all parties start with zero seats allocated and a denominator equal to one. The first seat is assigned to the party with the highest quotient; then its quotient is recalculated using the new denominator (two). The second seat is assigned to the party that now has the highest quotient, which could be the party with the first seat if it received more than twice as many votes as its nearest competitor. Otherwise, it would be the party with the second-highest vote in total. The quotient is again recalculated, and the process is repeated until all seats are allocated. An alternative to D'Hondt is the Sainte-Laguë formula, in which the denominator equals two times the number of seats already allocated, plus one. This variation makes Sainte-Laguë more favorable to smaller parties than D'Hondt. The key element of the largest-remainder method is the quota. The Droop and the Hare (or simple) quota are largely used. Under these methods, each party receives, at a minimum, the number of seats equal to the whole-number quotient. Unallocated seats are then awarded sequentially to the party with the largest remainder. As for the denominator of the highest-average method, the choice of a specific quota in a largest-remainder method can alter the seat allocation.

There are two frequent types of PR systems: party list and single transferable vote. I will concentrate on the former, as it is the one in action in Bulgaria. The major difference is that in the proportional list system, the votes are counted not within single-mandate districts, but within multi-member, or multi-electoral district (MED). That's why, in this type of systems, the parties determine the candidates' lists which compete for the electorate's votes. Still, as the PR system functions in multi-member districts, the party nominates not just a single candidate, but a list of candidates and their number depends on

the number of mandates allocated for the district. In this regard, there are three main possible variations for apportionment of mandates depending on the nature of the lists: *closed, free/ semi-open and open list systems*.

In the closed lists, the allocation goes in accordance with the influence and position of the candidate within the party. In this type of allocation, the voter votes for the party and cannot change the places of the candidates on the lists and express preferences for a certain individual. The seats won are distributed in accordance with the order of priority within the list. In the free or semi-open list, the voter picking a party's list points out the candidate and the seat belongs to the candidate with the highest number of preferences. In the open list system, the voting is not only for the list, but the voter has also the opportunity to re-organize the list, thereby indicating the sequence in which the election of candidates is in accordance with one's personal preferences. In Bulgaria both systems have been applied so far, as the open list system has been introduced for the first time during the elections for the EU Parliament in 2014, and then for the parliamentary elections later that year.

2. What about Bulgaria?

In the first decades after the downfall of communism, Bulgaria entered a process of transition, which supposedly should end with the achievement of fully functioning modern liberal type of democracy. However, this was what the 'transitologists' promised. In the due course, the electoral system was designed according to the character of the initial stage of transition - it was aimed at preserving the status quo, rather than really making room for the democratization of the state. For the reason of guaranteeing that there would be no repressions against the nomenclature of the former totalitarian regime, the successor of the Bulgarian Communist party – the Bulgarian Socialist party (BSP) - carefully imposed such electoral and party mechanisms that in practice prevented the actual transfer of power to the newly emerging democratic parties.

BSP rushed the newly formed opposition to agree on many compromises framed as nationally responsible decisions that guaranteed the peaceful character of transition. Among many, it forced elections for a Grand Assembly to adopt a new Constitution. Relying on its enormous apparatus built over decades of communist tyranny, BSP actually tricked out the opposition that was also willing to start immediate democratization by

carrying out founding elections to establish a new political order. Negotiating and bargaining each and every step along the path for the preparation of the elections, BSP managed to slow down the consolidation of the opposition and won the founding elections, thus securing its dominant position in the Constitution drafting parliament. Having much better knowledge of the political reality in Bulgaria and control over the economic resources allowed BSP to draw such electoral regulations in the benefit of the former communists. Foreseeing how the disappointed opposition would fall and disintegrate over time, not with the help from insiders nominally proclaimed democrats and devoted communist agents and associates of the former Secret services, BSP installed the proportional representation system based on the D'Hondt method, with 4,0% electoral threshold in multi-membered election districts. Last, but not least, the communist-successor party facilitated the establishment of a Turkish minority party in Bulgaria to be used as a political scarecrow any time the opposition went too radical in its reform proposals, which were portrayed as threatening the national stability and infringing the ethnic peace in Bulgaria.

The most serious argument of BSP for the newly established electoral system was that, in closed party lists, they would have the upper hand over the new opposition parties for the very fact that their leaders were unknown outside the capital and some bigger cities. Thus, despite the rising moods for change, in the mixed electoral system of 50% single and 50% multi-party districts, BSP won the founding elections. Preserving its leading political position allowed BSP to orchestrate the nature of the Bulgarian transition, managing to transform it into liberalization, rather than the democratization of the former regime. The party was able to install new political and economic elites that preserved its dominant position throughout the state for many years. However, the party leadership was clever enough to foresee that it would not be able to control the parliament for a long time and, for reasons already mentioned above, it opted for a completely different formula at the elections for local authorities. The majoritarian principle became the standard for mayor elections, while city councils were to be elected by closed party lists under the rules and principles of the proportional representation system established for the general national elections. Thus, while slowly losing control over the big cities at the national level, BSP

remained in near total domination over the local authorities for the first decade after the start of the transition.

Applying this hybrid formula at the local level elections allowed BSP to construct a unique perception of democracy in Bulgaria. The mayor and the president of the state, elected in single-member district with first past the post method, became imposed to the public opinion as guardians of the national unity and interests, unlike the parliament and city councils, which - because of their partisan nature - were depicted as evil and egoistic. This portrait was pretty much in line with the observation of David Hume for whom they would not serve the national interest, but weakened the state for profit-seeking. That image was accepted by the Bulgarians pretty much because of the specifics of their political culture. According to Kitschelt at al. (1999), the nature of the communist regime in Bulgaria was relying on the dominant parochial character of the social relations existing among the local population. Given the lack of any significant democratic experience prior to the communist dictatorship, the proximity to Russia and the exposure to imperialism, Bulgaria became the perfect ground for patrimonial communism. The authority of the elder was substituted violently with that of the party leadership and the communism lacked any significant opposition for five decades. These kinds of stereotypes were targeted and addressed by BSP when they launched the majoritarian element in the national electoral system. Moreover, they used it over the years as disguise for attacking democracy in its very core by claiming that it lacked legitimacy because citizens did not choose their representatives, but it was the parties doing that for them on general elections. From the very beginning of transition towards democracy in Bulgaria, the irony of BSP attacking its own offspring is not surprising given their efforts to obstruct and manipulate the process quite often and under the influence of Russia. Still, arguing that the electoral system, proposed and approved by its own MPs in the new post-communist Constitution, has not facilitated national unity and participation, but rather disintegrated the society and destabilized the government, BSP aimed at strengthening its national position through various means, on ideological grounds.

As a result of the above-mentioned specifics, the first decade of transition in Bulgaria was marked by strong polarization and radical partisanship. BSP and the

umbrella-type opposition gathered under the acronym UDF (Union of Democratic Forces, encompassing political parties from the whole political spectrum and ranging from alternative socialist parties to ultra-nationalist and monarchist organizations) were stuck in a stalemate over the necessary reforms for the establishment of full-scale democracy in Bulgaria. They were mirror-reflection enemies which radicalized the society through contrasting legislative platforms and visions for the economic and political development of the state. As a result, participation in general elections started to decline gradually, falling from almost 90% in the founding election from 1990, to 66% in 2001. In addition, after a decade of pursuit for political and economic prosperity, the citizens of Bulgaria began to believe that democracy was not so attractive and, above all, they started to doubt it as a political formula. The disillusionment with democracy among Bulgarians has started to take shape in the support for popular new political projects since 2001, when the former king entered politics and became prime minister following his electoral victory. Given the fact that after the fiscal crisis during the government of BSP in the late 1996, the opposition UDF - which launched full-scale top-down reforms and even initiated negotiations for accession to both EU and NATO - governed the country satisfactorily, the success of the king's political project was very surprising at the time. Despite the progress registered by the UDF government, it was the king's movement that won the elections by almost absolute majority.

The fact that Bulgarians were ready to punish parties became the norm in the electoral cycles to follow. It became a kind of political pattern for individuals who had nothing in common with politics to enter the system and challenge the status quo with personal ambitions and political experiments. Political parties became mere projections of their leaders as transporting vehicles for their aspirations. The vicious circle was explained by using memories of the communist past when, regardless of the oppressions, the strong hand policy brought enough security for the citizens, who appeared once again willing to 'give up their essential liberty to obtain temporary safety'. But - as Benjamin Franklin promptly continued - those people willing to enter such bargain "deserve neither liberty, nor safety".

The rise of populism in Bulgaria continued to be explained by the compromised nature of transition to democracy and the attempt to build viable liberal representative governments and market economy through mass privatization and competition. The third dimension of transition (i.e., the post-communist national identity construction - Offe 1991) also played its role as the Turkish ethnic minority party became in time a symbol of corruption, nepotism and clientele. The ascend of GERB (Citizens for European Development of Bulgaria), launched by the former secretary of the Ministry of Inferior under the king's government and mayor of the capital city of Sofia, Boyko Borisov, took place mainly on the back of nationalist and ideological appeals. The party established itself as a factor because its leader made politics look like a one-man show (a very familiar scenario), if not even preferred by most Bulgarians. His popularity stemmed from some back street jargon, macho gestures and reactions, underground connections and robust popular image. The anti-establishment behavior of Borisov allowed him to become extremely recognizable and popular; each and every Bulgarian familiarly addressed to him by 'bate Boyko' (i.e., big boy Boyko or bigger brother Boyko). His denouncement of mainstream politics earned his party huge success on the elections of 2009 and 2014. He brought to another level the rhetoric of his political tutors (i.e., the ex-king Simeon II and the last secretary general of the Bulgarian communist party) to whom he served as bodyguard. Acting deliberately on populist grounds, he openly stated that, especially during his first term in office and the election campaign prior to it, it was exactly the politicization and extreme partisanship that had failed Bulgaria so far on the road to democracy. He was not afraid to offer even some trade-offs between political rights and freedom and strong-hand governance. His main point was that political parties became burdensome for the working citizens by living on their back, without taking care of their demands and interests, and reproducing the status quo over electoral cycles because of their monopoly over electoral system and rules.

It is interesting noting at this point that in order to prevent Borisov from winning the elections in 2009, BSP introduced a new election legislature according to which a hybrid electoral system should allocate the election of 31 MPs via the majoritarian method in single-member districts, next to the remaining 209 MPs elected as usual in multi-

membered electoral districts with closed party lists. This attempt for electoral *coup d'état* ended in absolute disaster as BSP and the other parties of the governing coalition (i.e., Movement for Rights and Freedoms and the party of the ex-king NDSV (2005-2009)) dramatically underestimated the potential of Borisov and probably overestimated their own positions. Despite of the change in the electoral process *per se*, GEBR managed to win 26 out of the 31 single districts and 90 of the MEDs, receiving almost absolute majority in the 240-seated parliament. Elaborating further on the broken linkage between citizens and parties, Borisov initiated a procedure for the adoption of an entirely new electoral code. A leading point in the new rules was the chance for the citizens to have a preference option at their disposal when voting for party lists; this measure was supposed to bring people back to politics. The suggestion was operationalized in practice with the limitation of a person to receive at least 5,0% of the overall vote for the list in order to be able to change places within the closed party list. Another major change, also announced as a step towards making the elections more transparent and fair, was the introduction of a new electoral principle for distribution of votes, the quota of Hare-Niemeyer. Next to this, the new electoral code brought together all prior existing regulations into one place, tuning up the whole election process and practices, thus partially eliminating the inconsistency and chaos in the elections.

All these changes could sound quite optimistic, if there were not some serious obstacles in their actual realization. First of all, the change of votes allocation from D'Hondt with 4,0% threshold to the quota of Hare-Niemeyer would have been a real success if there was a relevant re-mapping of the electoral districts in Bulgaria in order to consider the new demographic realities of the country. Soon after its launch, it became clear that skipping this step would in fact preserve the status quo which the new formula was aiming to overthrow - the domination of the big parties. While speaking of breaking through the cartelization of politics and allowing for new players to challenge and enter the government, GERB actually failed to do so in practice and decided to stop halfway of the required reforms preserving many of the flaws of the prior system, like the budget subsidy for parliamentary parties and parties with support over 1,0% in general elections. But, what really undermined the efforts of GEBR for electoral reform was their failure to get rid

of the controlled corporate vote, the ethnic controlled vote and the practice of votes' purchase. Before the last parliamentary (October 2014) and especially before the local elections (October 2015), certain amendments to the existing Electoral Code were deemed necessary for several reasons in Bulgaria. They were pretty much reflections of the ongoing debate in society about the character of the electoral system as major factors of the quality of the political process and the general condition of the party system. Many believed that changing the principle and, above all, introducing mandatory voting would produce real representation and ignore or minimize the influence of ethnic or corporate factors.

The attraction of the majoritarian vote emerged once again as a solution to the general crisis of trust in the political agents, especially on the back of the mass political protests from 2013 against the 'state capture' and institutional block-out by a weird coalition government of BSP and MRF, supported by the ultranationalist party. After the pre-term general elections in 2014, the president of Bulgaria proposed to the parliament the holding of a referendum about mandatory voting, plurality formula and internet vote. All of these were aimed as solutions for the rising anti-party and anti-democratic sentiments among Bulgarians. In result, the parliament refused to address the voters on all presidential proposals, excepting the e-vote, which in turn raised doubts about the willingness of the incumbent government for real change. Because the suggestions of the president, especially the revival of the majoritarian electoral system, were in accord with the sentiments of most Bulgarians, it would be appropriate to mention just some of the problems of its realization, which is partially a critique to the plurality system *per se*. First of all, introducing the 'first past the post' principle requires the electoral re-mapping in order to guarantee that the mandate allocation is corresponding to the census data (i.e., the mandate of MPs are not equal in terms of popular vote). Assuming that even if this lengthy and complicate process of drawing the districts would have been achieved, the question of how Bulgarians would react to the change that only 50 % + 1 one of them will be

represented in those boroughs remained unclear.[1] Selling their multiple choice freedom for some sort of illusionary control over their representatives still nominated by the very same political parties, their hate will not just marginalize half of the national vote, but will cement more likely the positions of exactly those parties the citizens would like to punish.

Even worse, those always present under the PR formula for their extensive mobilization skills and the large party apparatus agents will reinstall themselves most likely as the only option just because the plurality method naturally stimulates two or three relevant political parties. So, it is far more appropriate to stick to the current system of semi-closed party list and individual preference because if its threshold of 5,0% remains, it will continue to allow for far more transparency and control over the parties that nominate candidates vis-à-vis a plurality formula where party leadership designs unanimously who will get which district. Thus, instead of gaining more control over the MPs, the electorate will grant even greater role to party members in order to determine the outcome of elections.

The pros for mandatory voting rely on the assumption that increasing the turnout will neglect the controlled vote factor, which is far from reality. There is no guarantee that voters will pick up candidates or parties from the bulletin instead of just showing up at the poling station for the sake of avoiding some fines or administrative penalty. The preference for a name from the party list is again a far more appropriate democratic mechanism that is actually working in the direction of increasing the confidence and legitimacy of party lists and the overall representation. E-voting over the internet and/ or the machine vote is also a measure that could increase participation and support.

3. What about the US?

As far as the topic of the present article is concerned, the US political system differs probably the most from all others deploying the plurality method in their electoral

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[1] Disproportionality is the last and probably the most crucial argument against PR; still, the results of the plurality system in this regard are at least arguable, as the principle of 'first past the post' naturally underrepresents the majority of the citizens.

systems. The very nature of the United States of America is based on the principle of the American dream and the motto 'you can'. The impact of this belief on politics comes along with the reduced influence of political parties over the pre-election candidate selection mechanism. This is illustrated by a simple, albeit quintessential fact that Americans use the verb 'run' instead of 'stand for' elections. It denotes that individuals, and not the party machinery, decide whether to test their abilities in the political contest. The perfect example, of course, is the post of the leader of the free world, which does not necessarily require even party membership along the way to the White House. Assuming party allegiance is present, but a candidate for presidency in the United States of America does not have to be the leader of the party supporting him because this is not a *sine qua non* condition for entering the presidential contest. Anyone meeting the Constitutional requirements for the post can run for the office. This is not valid in the case Bulgaria because no matter what your personal skills or qualities, you must receive the support of a (major) party in order to enter the contest at all. On the other hand, it is hard for non-American voters to imagine that Washington, Jefferson, Madison, Lincoln, Roosevelt, Nixon, Kennedy, Reagan and George Bush were not leaders of either the Republican or the Democratic Party. Nonetheless, since 1960, all of the elected US presidents were senators, vice-presidents or governors prior to their election.

The understanding of politics in the United States and the division of the federal branches of power has been greatly influenced by Montesquieu and Locke's ideas asking for a system of checks and balances. The very nature of the American Revolution framed by Thomas Paine as an act of revolt against the tyranny of Great Britain presupposed a government where partisanship was understood similarly to Hume's notion of anti-national, egoistic and profit-oriented groups of individuals and that was unconceivable for the new Republic. Nowadays, however, Americans and the world witness a phenomenon pretty close to that nightmare, as the most likely runner-ups for president on the upcoming elections, Jeb Bush and Hillary Clinton, make US politics look like family business of republican aristocrats! It is not that the candidates do not need the support of party apparatuses. On the contrary, but in the beginnings, it was more of their own charisma and rhetorical skills, rather than the approval of the parties and their leadership. The very belief

that the president of the United States is the president of all Americans in practice and not just on paper influenced significantly the understanding of a competition in which competitors are first Americans, and then Democrats or Republicans. Still, each and every candidate had in mind the idea that if/ when elected, (s)he must cooperate with the Senate and the House in order to transform the election promises in reality via the legislative processes. The American uniqueness has its price. Parties in the United States do not matter that much in regard to candidates' selection for running into the presidential primaries, but it still does matter a lot whether the Democrats or the Republicans will back up a runner on his/ her quest for public office, or along the rocky way to the House or the Senate. Consequently, one might notice that the United States political parties are also electoral machines and transportation means to power.

Both Democrats and Republicans find their ways to secure their candidates' party allegiance through various and more or less subtle mechanisms. First of all, there is the borough distribution between the Democrats and the Republicans at the Congressional level. Every ten years since the 1940's, a committee comprising prominent members of the two parties has been formed in order to draw and agree on the boundaries of the electoral districts for the House of Representatives. Partially because of this inter-party collaboration aimed initially at preventing the House from being threatened by the communist menace, if one non-Democratic candidate wants to run for Congress in a district 'belonging' to the Democrats, the chances of becoming congressman equal zero especially in contemporary polarized America. In time, this tendency of party dependence has dramatically increased its role as political norm, as the ongoing presidential nomination primaries demonstrate. Now, the competition is severely partisan due to the raging ideologization of the American politics. Instead of channels that bring more support to presidential candidates, the parties have become increasingly controlling of those willing to become the next president of the United States. It is now more important for a candidate to be recognized and labeled as the official party candidate than appealing to the general public, and this is a consequence of the process of geographical electoral engineering which started in the 1940's. In order to prevent any communist-like political organization becoming a factor on the American soil at the time, the Democrats and

Republicans gerrymandered the electoral map of the states and their caucuses respectively. Redrawing the map of electoral districts through an act of patriotic valor proved surprisingly beneficial for both parties overtime. The parties discovered that by dividing the boroughs in a seemingly neutral way, they could actually negotiate behind the curtains the new areas in favor of their political aspirations. As a result, the polarization of American society has started to rise gradually, reaching its current peak mainly after the last two acts of political master art in electoral geography of 2000 and 2010.

The influence of party leadership is visible not only in the legislative process, but also in shaping the meanings of representative democracy. Who gets the 'secure' boroughs and who will have to run in contested districts is also dependent on the will of party seniors. Who will get more money and expertise and who will have to do it all on his/ herself is also part of the deal with the party leadership. Not to mention that despite of the PAC (political action committee) and super-PAC phenomenon pumping millions of dollars into campaign to make it successful, the access to those funds is still going around the lines of party identification. Being the majority leader means now more than power holder of the highest rank in US politics. It is not because party leadership did not matter at the time of Lincoln for example, as its functions or procedural rights were limited or different; it is that nowadays the very same prerogatives are more influential among the US voting citizens. Even in the time of Roosevelt, party membership was not a primary issue for the Americans rather than a life-style choice. Nowadays, partisan commitment is a matter of both pride and prejudice, a form of social self-identification.

On the overall, these changes produced quite predictive figures during elections in the United States. Because of the huge number of elected officials - over 520,000 (Morone and Kersh 2014: 320) and the proximity of election campaigns which makes the states look like a permanent electoral campaign battlefield, the electoral cycles made Americans lazy and bored in terms of participation. According to data, the US voters are relatively less active than other citizens of western-type liberal democracies, scoring turnouts of 58,0% and 37,0% at the presidential and congressional elections in 2012 and 2014 respectively, compared to some 88,9% in Italy, 83,2% in France, and 73,2% in Germany (Morone and Kersh 2014: 233). All these numbers signal for some doubt about the

democratic character of the United States federal republic, especially when mentioning one major critique that it is not the people who elect their president, but the Electoral College. However, at the time when it was launched, the Electoral College mattered a lot for the specific political environment in which the new state emerged: favoring and fostering competition, though fearing mass involvement in politics and demand for equal rights.

4. In lieu of conclusion

According to a legendary anecdote, upon leaving the Constitutional Convention in 1787, Benjamin Franklin was asked by a lady what kind of government the Congress had been given to them. The brilliant political man wisely replied: 'A Republic, madam - if you can keep it!'. In a governance model where institutions derive their legitimacy from the authority given to them by the people, it is up to those people to remain vigilant, demanding and pro-active in order to maintain their control over those democratic institutions. Are the elections enough as mechanism to keep the citizens in control over their representatives? Despite the concentration of more and more power and influence in the hands of some political circles and lobbies, the United States citizens remain perfectly in control of their political system. Not going to polling stations and boots in many numbers as others does not mean that they do not care. They are not so much interested in politics save the group of elder people, but when time comes for crucial decision (i.e., gay rights, control of guns, 'Medicare' or 'Obamacare'), they do have an opinion and are ready and more than willing to stand and, if necessary, fight for it.

Elections are quintessential for the overall outlook of the political and party system. Their formulas and mechanisms for votes' allocation and distribution may produce stable patterns of political communication and good governance, as well as disproportional representation, party cartelization and even 'state-capture' by political elites. The outcome of elections, especially in democracies, depends much on the political culture, the nature and frequency of communication between the represented and representatives, as well as on the nature, character and quality of democracy in society. Though being attacked as non-changing and instead re-affirming the political status quo, elections remain the major mechanism for control and accountability in democracy. As Acemoglu and Robinson

(2012) and Ferguson (2013) put it, if a democratic policy does not respond to voters' demands or expectations, it is more likely that the problem could be found in the politicians' abilities and merits, rather than the institutional setup or the system of checks and balances.

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PART TWO.
SOME SALIENT TRANSATLANTIC CONJECTURES

CROSSING THE OCEAN: IDENTITY, TEACHING, AND
RESEARCH CHALLENGES FOR AN EUROPEAN SCHOLAR
IN U.S. UNIVERSITIES

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Abstract. *Crossing the Ocean to 'play' in the 'first' academic league in the world can have a powerful impact on a foreign academic's personal identity, teaching styles and approaches, writing in a non-native language, and ability to conduct research on topics that are not directly linked to ethnic/national background. In this paper I explore some of these issues from three personal perspectives: that of a Romanian undergraduate student who studied abroad for one year in the U.S.; that of a PhD candidate at the University of Illinois, Urbana-Champaign, and finally, that of a professor of inter-disciplinary International Studies at a small liberal arts college in rural New York State. The paper will also tackle identity shifts as well as teaching and research challenges as an international scholar in U.S. universities. These are merely my reflections about a Romanian scholar's (self)-discovery journey through U.S. academia.*

Keywords: Identity, Academic life/ work balance, U.S. university research, International teaching, Promotion/ tenure in American higher education.

1. Introduction

Crossing the ocean as a young academic, from an European university to an American university, can have a powerful impact on one's identity, teaching approaches, research orientation and writing. This paper serves as an exploratory study, a self-reflection of the changes experienced by a young academic while studying and working in the U.S. higher education environment since 2002. I will tackle issues that are missing in

the international education literature such as the impact of studying and working in a different cultural environment on a person's identity; but, I will also compare teaching, writing, and researching in an European higher education environment with an American higher education environment.

When asked by colleagues from universities overseas, how is life in U.S. academia, I always say: 'There are good parts, and not so good parts, like everywhere else'. As a Romanian citizen I always thought of the U.S. as a perfect system and U.S. universities as 'la crème de la crème', the equivalent of the English Premier League or the Spanish La Liga, to use sports terminology. I wanted to 'play' in the 'first' academic league, to experience American higher education since I was in high-school, and my goal came to fruition during the 2002-2003 academic year when I studied abroad for my junior (3rd) year at the University of Vermont. Then, after graduating from the Political Science Department at the University of Bucharest in 2004, I went to study abroad at a Turkish university, Sabanci University, in Istanbul, for a MA degree in Conflict Analysis and Resolution, only to make another crossing of the ocean in 2006 to start my PhD at the University of Illinois at Urbana-Champaign. Since 2011, I've been 'on the other side of the (academic) fence', as a professor, and since 2013, as a director of a center for international education at three different U.S. universities. These are my reflections about the struggles and challenges that foreign academics experience with their personal identity, their teaching styles and approaches, their writing in a non-native language, and conducting research on topics that are not directly linked to their ethnic/national background. The aim of these reflections is to spur further research about the international identity of scholars and the connections between their identity and teaching styles/ research agendas.

The academic studies analyzing the connections between identity and international undergraduate/ graduate students/ faculty members focus mostly on two different identity aspects: race and gender. There are only a handful of studies which focus on the international identity of faculty members and the way working abroad impacts identity, or teaching and research style, effectiveness, and agendas (Manrique and Manrique 1999; Theobald 2007; Hutchison 2015). Two researchers conducted such studies looking at foreign women professors in U.S. higher education and their focus on research

(Mamiseishvili 2010), or the way foreign women professors are seen as "outsiders" when they teach American undergraduate students (Skachkova 2007). A large number of international scholars prefer research in the form of writing, because it may be more rewarding than teaching in a foreign language in front of native speakers who may not understood one's foreign accent. To support the idea that foreign graduate students/ professors may be better at research than teaching in U.S. universities, another study argues that international teaching assistants have a negative impact on the class performance of undergraduate students (Borjas 2000: 355-359). On the other hand, one researcher argues that "graduate international students benefit faculty by helping them to establish international ties and by bringing diverse perspectives to their departments" (Trice 2003: 380). In addition to a small number of studies on foreign faculty and on international graduate students, there are also a few studies looking at the identity shifts for undergraduates studying abroad and how these individuals either 'discover' their American identity (Dolby 2004), or develop an European identity through the Erasmus program (King and Ruiz-Gelices 2003). Other studies analyze different groups (undergraduates, graduates, faculty). But, what is missing are studies tracing identity shifts due to working in an international environment, and the impact of the identity of a foreign national on their studying/ teaching/ research through their undergraduate study abroad semester/ year, graduate degrees abroad, and professorial work in a foreign university. We are also missing more studies that link a student's/ scholar's international identity to their teaching and research approaches. This paper is an exploratory attempt to trace identity/ teaching/ research through an European undergraduate/ graduate/ professor's academic life.

2. The first crossing of the ocean as an undergraduate student

In 2002, when I went to study abroad for my junior (3rd) year at the University of Vermont, I realized a few things about myself and about higher education in Romania and U.S.: 1) for the first time I felt European, not Romanian or Vrancean (from Vrancea county); 2) for the first time I was truly home-sick; 3) I was proud of the education I received during my first two academic years at the University of Bucharest from my

Political Science professors and 4) I was shocked by how fast everything moved in U.S. academia. In the next paragraphs I will expand on each of these points.

1) Trying to explain to an American undergraduate student (18-22 years old) at the University of Vermont where Romania is can be a challenge. Maybe they have heard of Dracula and Transylvania and they are shocked that Dracula is based on a real person, Vlad the Impaler, and that Transylvania is a real place. Maybe older people (faculty and staff) can say three more names: Nadia Comăneci, Ilie Năstase, and Ceauşescu, with their stereotypical inability to pronounce correctly Romanian names. So, when I was asked where I was from, I would say Europe, Eastern Europe. But my identification as an European went beyond that. I realized things are different in U.S. compared to Europe writ-large. I experienced culture shock as an international student in U.S. For example, we have sidewalks in Europe and walking is a normal part of life in European cities, but not in American cities. Car drivers would look strangely at me and some of my Austrian friends, when we walked to the supermarket, at the end of the town, close to the highway. Paying for anything in the U.S. is also different than in Europe: for instance, the VAT (Value Added Tax) is not included in the price in U.S., so you never really know how much you have to pay. I learned this when a colleague bought the *New York Times* for me, and I gave him a dollar as it was written on the newspaper (back then, in 2002, the *New York Times* was only $1) and he asked me for the difference, the tax that he paid (7 cents). Watching sports is another example. Americans watch only four sports: American football, baseball, basketball, and ice hockey. I learned to appreciate American football and I kept reading about Champions League on the Romanian websites, but never really understood baseball. Finally, and this is related to the third point I want to make, I realized that in Europe, my colleagues, students at the university, were truly aware of the world and what was going on. In Vermont, most students, even political science students, had no idea of the wider world and the political/ social debates of the time. Were there a few students who knew what was going on in the world? Certainly. They were my colleagues in the Debate Club I joined - one of the best worldwide actually - and in the Model United Nations Club I founded. But you would count them on the fingers of one hand.

2) Feeling home-sick about Romania, when I got a chance in a million to study in the U.S. for one year? Some of you may think I was crazy, but home-sickness is for real. When you go study abroad, you realize what you miss from your daily routines. Small things, like reading *Dilema Veche*, listening to Romanian radio, drinking good Vrancea wine (age limit to drink alcohol in U.S. is 21 years old and I was not allowed to buy alcohol for quite a few months in 2002; after my 21st birthday I was able to buy alcohol only based on passport certification of age), watching Champions League at 9:45 pm (21:45 according to the European style of writing time), going to a terrace to talk politics with friends, playing chess and backgammon with my grandfather on a Saturday morning, my grandma's cooking – I missed all of these small things. Yes, home-sickness hit me after about 6 months in the U.S., and by the time my stay was coming to an end in August 2013, I couldn't wait to go home to my family, my friends, my 'real' life.

Once I arrived in Romania, after 12 months away, I realized that I was suffering from reverse culture shock and that I yearned for everything I got used to in the U.S. – reading *New York Times*, *Financial Times*, and listening to BBC Radio World Service daily; watching American sports – football and ice hockey; the clear understanding of dealing with forms and bureaucracy in the university, at banks, in society in general, and, more importantly, the financial freedom that my twenty hours of work in the university allowed me to have in U.S. What happened? I restarted my Romanian daily routines and incorporated the newly acquired American daily routines into my life (reading U.S. and British newspapers/ magazines online and listening to BBC Radio online). I found a job to keep me busy and also to have that financial freedom, and got lost in my studies as much as possible. I used my headphones while walking through Bucharest and refused to engage with a city and with people, Romanians, whom I did not understand and felt estranged from. My reverse culture shock got so bad that I refused to speak Romanian on the streets, and pretended I could speak English only. I would mostly hang out with friends who also studied abroad and who had been changed in a similar fashion by overseas experiences. I wanted to leave Romania after my university graduation as I felt I didn't belong anymore

to a society penalizing me for studying in the U.S. for one year.[1] Culture shock, home-sickness and reverse culture shock are real and they impact most, if not all, students who study abroad. There is a large literature studying the psychological and social implications of these 'little talked about' negative byproducts of studying abroad (Abe, Talbot and Geelhoed 1998: 539-547; Bochner, McLeod and Lin 1977; Zhou, Jindal-Snape, Topping and Todman 2008; Westwood and Baker 1990; Zimmerman 1995). U.S. universities provide a large number of activities, programs and counseling for international students to cope with the effects of culture shock and homesickness while studying in the U.S., and also for returning American students who studied abroad, dealing with reverse culture shock. European universities, in general, lack such services for students.

   3) The level of political science classes at the University of Bucharest was on par, if not better, with those I attended at the University of Vermont. Most professors I worked with at the University of Bucharest were excellent in terms of assigning readings at the cutting edge of political science and social sciences in general. The syllabi were better than what I got at the University of Vermont. My classmates in Bucharest were much more aware of the world and more willing to participate in discussions and debates. But, at the University of Vermont, if you were truly interested, the professors could easily teach at one or two notches above the average teaching level, so that they made the courses challenging for me. I was able to take courses that I would never have been able to take in Romania: Introduction to Middle Eastern Politics or Introduction to South Asian Politics are two such examples. I was able to take a course with a former American Ambassador on U.S. Foreign Policy in which I wrote policy papers for the first time in my life, and pretended to act as a foreign policy consultant. I attended Indian film screenings and talks with American scholars whom I would have never meet in Romania. I also took advantage of a library that was purely amazing for a young scholar like me - the type of library that only the efforts of the National Library of Romania and its recent leadership could

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[1] I was asked to do an extra semester of penalty (6 extra courses), because, in the words of one political science administrator at the University of Bucharest: "I know how bad courses are in U.S. universities".

emulate. I was exposed to a different type of learning, beyond the usual class-seminar-readings model.

But, then again, even in Romania, a young student has opportunities like in the U.S. system. You just have to search a bit more and show initiative. In Romanian academia, there are many talks organized by departments, research centers, and other organizations with overseas professors and scholars. I have spent many afternoons and week-ends at events at the New Europe College in Bucharest listening to amazing speakers like G. M. Tamas, Tony Judt, Giovanni Sartori, Joshua Muravchik, or Andrei Cioroianu, to name just a few. Maybe the teaching style of some professors in Romania is old-fashioned, but debates and interesting assignments that truly make you think instead of just regurgitating what you have studied are available. They are available even more now than they were in the past, as more and more Romanians who own graduate degrees overseas come back to teach in English, French, Hungarian, German or Romanian, at Romanian universities. Education is underfunded in Romania, with only 3.5% of the budget for 2015 going to education.[2] But, there are dedicated, excellent professors in the Romanian system that inspire and challenge students. I feel I was lucky with my professors and the level of education I received in Romania, when compared to the University of Vermont.

4) I was shocked by how much information came to my student email account and how many things were happening at the University of Vermont. There was an interesting talk or film screening every single day. There were at least 10 student organizations I would have loved to join. There were awards and fellowships, with monetary compensation for student papers and involvement in student organizations. There were gatherings of international students and 'all-paid-for' outings/ trips to maple syrup orchards, or to NBA games (another thing I learned the hard way with games was that the host and the visitor's order is reversed in US – for example, if you see San Antonio v. Boston, the game is played in Boston, not in San Antonio, as an European might expect).

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[2] In a meeting with colleagues at a neighboring New York State University, I was shocked to find out that even the Dominican Republic government gives more to education, with 4% of its Gross National Product for 2015.

For the first time, I started using a planner to schedule all the interesting events and activities I wanted to attend, organize and participate in. I made it maybe to 25% of what I wanted, but I still had an 8am-midnight schedule. Somehow, I dove straight into the stereotypical American 'rat race', even as a junior student in university. Now, I can see why, as working adults, Americans are constantly on the run and easily 'adapt' to the 'rat race'.

3. The second crossing of the ocean as a graduate student

In 2006, I crossed the ocean again. This time, I was going as a PhD (doctoral) candidate in the Department of Political Science at the University of Illinois, Urbana-Champaign. I knew what to expect. I have been to the U.S. before, but maybe because of this, it was harder to adapt. The 'image' of U.S. as a land of opportunity has eroded, after I have seen poverty in Vermont and some problems of the U.S. system (health, infrastructure and education at the primary and secondary levels, to name just a few). Still, I was looking forward to be a PhD candidate in the 1st academic league worldwide, and make more money per month than I have ever dreamt of. In the 5 years of doctoral studies, I have learned a few things: 1) research methods and how to approach research ideas; 2) writing in academic English; 3) the importance of networking; 4) universities in U.S. are very U.S.-centric; and 5) a PhD is for the mentally strong who either don't know what else to do with their lives, or are very much interested in the academic profession. In the next paragraphs I will expand on each of these points.

1) American universities put a lot, if not most, of the emphasis on the research side, rather than the teaching side. PhD programs create researchers, not mentors/ teachers/ instructors. As a matter of fact, professors, with some exceptions, and fellow colleagues in the PhD programs look down upon PhD candidates who want to teach and have a higher passion for teaching rather than research. Instructor is a very low academic rank in U.S. academia and it usually means that the individual is an adjunct professor who barely makes minimum wage on the salaries paid for adjuncts and usually has to teach at two or three different institutions. Not to mention that usually there is no health insurance, dental

insurance, eye care coverage, or retirement funds available for adjuncts (Kendzior 2014; McKenna 2015).

The research emphasized in American universities is the quantitative research, regardless of field. Social sciences and even humanities fields are becoming more and more quantitative in terms of research. This means that the substance gets lost in translation, in the academic papers, books, or presentations, and what becomes more important are the number of stars one gets out of a regression analysis or how fancy the spatial analysis model is. This emphasis on quantitative research distorts research puzzles and creates weird research outputs in which the researchers do not fully understand the 'substance' of their research, or the research outputs have no serious impact on life, beyond adding another line on an aspiring tenure-track professor's resume/ curriculum vitae. It is research for research's sake only, just because one scholar has mastered one or two 'fancy' quantitative research tools. One example of this problem which is endemic in American academia and unfortunately seems to spread to European academia as well, with a demand for more and more quantitative research, is an example from one of my peers: this person is an expert on quantitative methods applied to European politics, but when asked about his thoughts on Berlusconi's latest declarations (in 2008-2009), his answer was: "Who is Berlusconi?"

The 'publish or perish'[3] approach practiced at American universities, mostly at the research centers, but more and more at the liberal arts colleges, creates such scholars, like my peer, who will run statistical models, trying to explain a tiny aspect of European politics, but lose sight of the substance of research and of the larger picture. This type of research gets read and cited by another 10-20 scholars around the world and never gets 'translated' into proper language for people who do not 'read' statistics. Most of the time this lack of 'translating" occurs because no one outside academia cares about such tiny findings, that do not have any 'real life' implications.

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[3] 'Publish or perish' refers to the request for junior faculty members to publish as many academic journal articles and books as possible in order to get promotions to tenure positions in U.S. academia.

But the research methods I learned during my graduate years structured my thinking and the way I approach problems. A good research question, a hypothesis (an answer) at the beginning of the research project or the academic journal paper, a literature review, and a sound methodology are all components of good scientific work. These aspects of how to think scientifically about puzzles and questions of interest have shaped my way of thinking. I remember that in 2008 I gave a presentation at the Catholic University of Leuven (KUL) in Belgium and the professors and PhD candidates highly praised the sound research methods component of my presentation. For helping me think in a scientific way, I am thankful for the research approach in U.S. academia, despite the heavy influence of quantitative methods permeating all social sciences and humanities nowadays.

2) Writing in academic English is a different endeavor than writing in English. I thought I knew English because I spoke it fluently and I studied political science in English at the University of Bucharest. But, I realized soon, and not after thinking for about two years during my PhD program, that I would not need help to write good papers in English and that academic English is different. You can write flawlessly in English without any grammar mistakes, but that doesn't mean you understand the right use of topic sentences, excellent paragraph writing, or how to structure academic papers. This is something that I was never truly taught during the PhD years, but was a 'stolen' skill, as one reads more and more academic journal articles and tries to publish articles and puts the chapters/ pieces together for the PhD dissertation. Also, the feedback received from one's faculty advisor and dissertation committee members on all written pieces is invaluable and very useful to start thinking and writing in proper academic English. My advice for other foreign academics who want to work in U.S. academia is to seek and accept all the help they can get in order to improve their academic English writing, regardless how fluent they think they are in English.

3) The importance of networking is a major component for finding a job in higher education after a graduate program. Making sure that your PhD advisor has the right connections and introduces you to the right people and advises you to publish your work in the right academic journals is quintessential. Your PhD advisor will write the letters of

recommendation that will make a hiring committee take a closer look at your application file. In my first semester in the PhD program I realized that academia was very much a feudal system. You choose a 'master' who protects you and promotes you in exchange for the work you do for him/ her and for the collaborations on future projects with him/ her. It is not a cynical view, but rather an understanding that this relationship is very much that between a master and a disciple. I am not saying that this is similar to the familiar nepotism in other parts of the world. The 'master' cannot get a job for you. All they can do is ask a friend/ colleague at another university to take a closer look at your job application file. It is all, or mostly all, based on merit. Some, like myself, get lucky having found excellent 'masters/ mentors' who want to promote their students. Other PhD candidates have to suffer the 'moods' of their PhD advisors.

But, it is important as a PhD student to attend events on campus, make yourself noticed by asking smart questions (unfortunately, quite often, these questions end up being about how many stars the regression analysis coefficients have), attending conferences and presenting at conferences, having business cards and 'selling' yourself as much as possible in front of professors visiting from other universities. Why? Because you will need a job afterwards and you want your name to be noticed by professors of other universities who may hire when you are on the job market, desperately searching for a job. Why not stay at the same university where you got your PhD? Because this approach is frowned upon in the U.S. academic system. Your peers and even your professors would see you as a failure if you dare to take an administrative job, or a professor job, at the same university where you graduated from. It doesn't matter to them that maybe you really love that town, or that you have family living there and you do not want to move. For most academics, pursuing better academic jobs and changing at least 2-3 jobs in their lives is the goal. Not the location, not the community, not the people you work with, not spending time with your family members living nearby. It doesn't matter to them that they may move from California to New York and to rural Arkansas in search of a better academic job and a higher position in the 'pecking order' that is academia.

4) It is well-known outside the United States, that average Americans are, generally speaking, ignorant about the rest of the world. I realized that in my first experience in U.S.,

in Vermont. I realized that once again in my second experience in U.S., in Illinois. There are caveats to this statement though. Outside academia, I would be curious to find out how much average Romanians know about the current events in Burundi, or, closer to home, the political system in Turkey. In academia, there are many Americans that know more and understand the nuances about events in specific countries, than people in those countries. But, U.S. universities are still very much U.S.-centric.

The fact that U.S. universities are U.S.-centric is a reflection of how the American society is. In spring 2003 I was interviewed by the Vermont Public Television as an international student studying at the University of Vermont. They asked me what I thought about the worldly knowledge and lack of foreign languages/ cultural knowledge many Americans have, even on that campus. I told them, that there is a clear difference, especially when looking at my peers' knowledge, but U.S. is a huge country, the size of a continent, so maybe this lack of worldly knowledge and of foreign languages/ cultures is explainable. Not excusable, but explainable. We tend to build images of other countries' sizes based on the image of our country's size. I remember having family members visiting me in Chicago, and friends of theirs telling them they should visit too, because it is close. It is an approximately 18 hour-drive from Chicago to New York City. Europeans do not understand how large the United States is. Just like Americans may not understand the nuances between different ethnic/ religious groups in Afghanistan or Syria, nor do Europeans and others understand the differences between Southern U.S., New England, Midwest, or the West Coast.

Specifically, during my PhD years, I realized that American politics has the largest contingent in our cohort of PhD candidates (1/2 of the PhD students being 'Americanists'). Jobs for American politics professors/ specialists are many times more the number of jobs for comparative politics or international relations professors. It probably does make sense that U.S. public and private universities would try to satisfy their constituencies' needs, first and foremost. Criticism of the U.S. government, policies and politicians is widely accepted in academia without any repercussions. However, when you teach American students, everything has to be brought back to how it impacts their daily lives, to make it interesting and real for them. Even in courses on International Relations, there is a large

'Americanization' of the course to make the examples relevant and understandable to students in the class. In terms of research, one can do research about anything. But, what would be funded by funding agencies in U.S., quite often, has to have a clear U.S. angle. The topics of talks have to be relevant for the American audience (a.k.a., in the news in the last two weeks), otherwise only a handful of people will show to listen to a talk.

5) Finally, a PhD is for the mentally strong, who either don't know what else to do with their lives, or are very much interested in the academic profession. A PhD in a U.S. university can take from 3-9 years easily, with an average of 6-7 years for PhDs in social sciences. The first two years or two years and a half are basically courses. After that, there are qualifying exams usually (one or two, depending on the discipline). If those are successfully passed, a student becomes a PhD candidate (ABD – All But Dissertation). This is a lukewarm status, because one is somewhere in-between a student and a professor, making, usually, a decent salary, without any real responsibilities except a maximum of 20 hours of work per week, as either a teaching or research assistant. The drop-out rate is very high usually in the first two years, but even after that many PhD candidates never finish their PhDs. Some cling on to this ABD status; others get jobs in the real world, outside academia. Thus, one needs to be mentally strong to go through a PhD program that drains you physically and mentally. Based on anecdotal evidence, I would also argue that a PhD candidate needs a life outside the PhD. It could be hobbies – sports, playing guitar, acting, singing, knitting etc.; a significant other – girlfriend, boyfriend; a social network – otherwise they would end up talking about the same 'three stars of the regression analysis results' even at a barbeque; and finally, having a good connection to 'life outside academia'. These are anchors to reality that can help a PhD candidate escape every now and then from the solitude of doing PhD research. Depression and anxiety, through the ranks of PhD candidates, are widespread, but never spoken about within the departments, nor do PhD candidates get training on how to deal with these. Depression and anxiety is something these PhD candidates will carry with them to their first years as professors,[4]

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[4] An interesting finding while writing this article is the scarcity of scientific research about depression and anxiety levels amongst PhD students and junior faculty members.

especially as the job opportunities in U.S. universities are significantly less than in the past and one could easily get tens of letters of rejection. More and more jobs tend to be adjunct positions and professors barely make ends meet, if at all, on adjunct salaries without any health or retirement benefits.

The second part of my statement is about the purpose of individuals joining PhD programs. I have seen a lot of individuals who were brilliant students. They could not easily adapt to a PhD program, where they have a large amount of freedom to decide the professor to work with for the dissertation, which topic to tackle for the dissertation and how to have a plan when there is no specific timeframe in which they have to finish their PhD. Some of these people leave to find their real vocation. Others cling on and try to enjoy academia, even though they admit they do not like teaching, nor interacting with students who, in their opinion, do not know much, and, more important, do not care about science. A lot of international PhD candidates remain in academia, if possible in the U.S., because the salaries are significantly higher than most jobs they could do back in their home countries. A small percentage of the people who join a PhD fully understand what being a professor entails and what that lifestyle and workstyle include. Unfortunately, true vocation as a mentor is a 'rara avis' in academia.

4. As a professor: physically across the ocean, mentally in-between native Vrancea and rural New York

Currently, I am an assistant professor on a tenure-track job at a good liberal arts college in rural central New York. I coordinate an inter-disciplinary International Studies program and I am the director of a Center for International Education. But, more important, I work in a community of like-minded people. The colleagues make it worth to give 110% at work. One of the four priorities of the university is well-being - a good balance between work and life. Prioritizing well-being is very rare in U.S. academia. Colleagues and friends from work are there to support you when you need it. This summer my wife gave birth to two lovely little girls and other professors were bringing food to our home daily, because we didn't have time to cook. The students are interested and willing to work hard. And finally, the community: I describe my community as being the size of

Panciu in my native Vrancea, at an altitude like Naruja, in the Vrancea Mountains. People know each other and support each other. Physically, I am across the ocean, in central New York, about 5 hours driving distance away from New York City. I get to walk to work for 20 minutes through a beautiful neighborhood, or drive for 3 minutes. I do not wait in traffic and I have a community of friends who can get together at short notice without much preparation, as one would need in larger cities. Some may envy me for this situation, others will look down upon the place where I live and the university where I work, because it is not a Research-One (R-1) institution.[5] I know I have found a good balance in my life, a place where I fit in, and I enjoy working with my colleagues. Everyone works really hard at this institution, but unlike my PhD years or other institutions where I worked before, people also know how to socialize.

Again, as a professor this time, I have learned a few things about being an European professor in an American higher education institution: 1) coming to terms with my identity, stepping out of the 'rat race' and coping with the research-related tenure requirements for a junior faculty member; 2) infusing courses with my international perspective can be mutually beneficial for students and for faculty; and 3) organizing events and projects on themes which serve a higher purpose than my tenure file – educating students, colleagues, staff, and the larger community – can be very satisfactory.

1) One aspect I really enjoy at my current institution is that no one makes you feel guilty if you are not working on your research project over the week-end, and instead decide to go clear your mind by skiing at the nearby resort, or by taking a walk in the forest. Because of this, I feel that the work done by my colleagues is truly valuable – people actually have time to think, reflect, get of out of the 'rat race' and get ideas about meaningful projects, not just produce another publication no one cares about, except your tenure/ promotion committee. What really strikes me when I meet with some colleagues from different universities, at professional conferences, is the constant desire to make one

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[5] Research-One (R-1) institutions are large research universities from the top tier of universities in the United States, such as the University of Illinois at Urbana-Champaign, Indiana University, or the University of Missouri – Columbia, to name just a few.

feel guilty if they are not working on their research project 24 hours for 7 days a week. Every junior faculty member in U.S. academia is stressed about getting tenure at a university, preferably of their own choice. Some parts of U.S. academia are becoming more and more corporate and the expectation is to work non-stop towards these tenure goals. Even though professors have holidays – winter and summer breaks, the occasional spring break and fall days off – some people expect a professor to reply to emails at all times. Students send emails at 2am and expect you to have read it and replied to it before your 8am class. When people talk about summer and winter holidays, they do not understand that professors generally work during those months too, but preparing new classes and syllabi, doing research, writing, attending conferences, etc. There is flexibility and there is not a rigid work schedule. But, for some professors, this actually means that they work constantly, like in the corporate world, but are not paid nearly as much for their work. Being busy is a sign of pride in the modern world. The standard answer in academia to the question 'How are you?' is a variation of 'Very Busy!' and then the conversation partner proceeds to tell you why they are so busy – working on several research projects, advising students what courses to register for, grading papers, serving on so many faculty/ college/ university committees about everything imaginable, etc. One scholar is asking for a 'banishing of busyness', especially in higher education, in order to allow for focused attention on a few important projects (Vaillancourt 2014). Taking the time to think and reflect by yourself in a busy-free, rushed-free approach, can be a scary thing, even for professors.

But, for me it was exactly the stepping out of the 'rat race' following the advice of some scholars (Nagpal 2013) and taking the time to think about important life questions: what do I want my impact on the world to be?; what do I value?; what do I want to do?; what do I want to research? Answers to these questions push me to do a better job. This is how I ended up doing research on a Romanian topic for the first time ever. Slowly, getting out of the 'rat race' and leaving aside the whole idea of 'succeeding in America' – whatever that means - made me re-discover my Romanian roots. I started reading again *Dilema Veche* and discovered a magazine that could compete against any other in the world, *Sinteza*. I started listening to Radio Romania Actualități rather than BBC World

Radio and found out that 'Agenda Globală' (Global Agenda) is a better international politics show than BBC's best. Naturally, I started reading more books on history and social sciences written by Romanian authors and discovered a new research topic that combines my conflict resolution/ international negotiation interests with Romanian historical events. For the first time, I wrote a paper applying my peacekeeping scholarly expertise to Central and Eastern Europe and presented it at a global conference on International Studies. The slowing down and re-discovery of my Romanian identity, after so many years living like an expat, has been a very nice change in my life.

2) Teaching courses in English as a foreign professor who is not a native speaker of English can be quite frightening and challenging. American students have privileges and power that European students only dream of. Student evaluations weigh heavily in professors' tenure files. Students can now evaluate professors on all kinds of websites, where, as anonymous users, they can provide feedback – sometimes good, most of the time nasty complaints, and only a fraction of the time – fair complaints. A foreign professor, who may speak English with an accent, may be hard to understand by American students and may face a different level of maturity in the study body. There may also be many cultural misunderstandings emerging in the classroom.

Personally, I teach international courses and I have learned that there is a higher chance of creating a good learning environment if I am willing to make fun of my foreign identity every now and then and if I am willing to share stories from my international perspective with the students. These activities create a bond with the predominant American student body who may not know much about the wider world. 'Hiding' behind my 'ignorant foreigner' identity also allows me to tackle 'sensitive' topics in American society (guns, race, freedom of speech, fear of terrorism, American foreign policy, use of drugs, healthcare system, women's rights, etc.) without appearing critical or a snobbish foreigner.

In terms of teaching, as a foreign scholar, I can also assign different reading material than colleagues who were not exposed to French, British, or German scholarly work as much as I have been. A few semesters ago I assigned a book by a French historian (Braudel 1992) to a sophomore-junior class, because I remembered what an impact this

book had on me when I had to read it in my 1ˢᵗ semester at the University of Bucharest. The students loved the book and came to appreciate a non-American perspective on the world. Quite a lot of students seek different non-American, non-Western perspectives to challenge them.

3) Being a foreign scholar at an American university can be quite lonely and difficult: away from your country, your culture, your people, your newspapers and magazines, your sports teams and friends. American colleagues are, generally speaking, very welcoming and interested in learning from their foreign colleagues. One mechanism to cope with being a foreign scholar away from your 'home culture' can be to get involved in projects that educate about your part of the world and establish partnerships with higher education institutions in your country/ region of the world. You may well get a higher sense of purpose. Teaching about Uruguayan history and religion through a public lecture, or trying to explain what has happened in Central and Eastern Europe since 1989 can be very enriching and allow one to self-reflect about events that may have affected them directly while growing up. Sometimes, these non-scholarly stories and self-reflections can lead to the development of scholarly research interests and the development of partnerships with universities in one's country. Organizing events about your country (public lectures, panels, discussions, film screenings), applying for teaching and research grants, raising awareness about one's country or culture on an American campus, establishing study abroad programs and higher education partnerships help all the stakeholders involved: the students who become better and more well-informed 'global citizens', colleagues and staff who become more aware of their diverse and internationalized campus, community members who learn about best practices in other parts of the world or are educated about current events from a non-American perspective, foreign professors who can intertwine their identity with teaching, research and service, and the institutions as a whole – as internationalization is becoming a goal for all higher education institutions worldwide.

I live in Central New York, in the wine region of New York State – appropriate for someone from the wine region of Vrancea, and I feel at home. I have also managed to create a small 'corner of Romania' in my office and in my living room, where I can feel

Romanian. I am not caught in-between two worlds anymore, identity-wise, as I have felt over the last 13 years. I can live with my multiple identities, because identity is like an onion – it has multiple layers, to paraphrase Shrek! It took me more than a decade to re-discover my Romanianness and to actively include it in my daily life. But identity is something personal. I have Romanian-born friends who immigrated to U.S. at age 30+ and think that everything Romanian is bad and everything American is good. I also have Romanian friends in the U.S. who think everything Romanian is good and criticize every single issue in the U.S. These are the extremes. One can go in-between these extremes and find a middle ground, an identity they feel comfortable with, which combines their birth place and cultural upbringing with the culture of the place where they live.

5. Conclusion

As a Romanian academic crossing the ocean to U.S., I undertook a journey of (self)-discovery. I discovered my identity from European to Vrâncean, from Midwesterner to Romanian and a combination of these layers, from city boy to a man who loves 'life in the countryside' ('viaţa la ţară', in Romanian), from the wine country of Vrancea to the wine country of New York State. I have discovered differences in lifestyles and academic settings between Europe and United States, differences in teaching and differences in research approaches. But all of these are just differences. Maybe if we slowdown from our daily 'rat races', or stop thinking that the 'grass is always greener on the other side' and appreciate what we have, we won't be judging other academics for their identity shifts, mental challenges, or we will stop placing value judgements on different academic systems. Maybe we would appreciate the differences and learn from them, incorporate what is good, disregard what is not so good, and become more 'well rounded' global academics.

This paper aimed at exploring the links between identity, teaching and research for international undergraduate and graduate students, as well as foreign professors in U.S. higher education system, through the lenses of my personal experience. In lieu of concluding remarks, I would like to put forward a few questions to be further explored by the international education field: 1) what are the identity shifts experienced by individuals

who studied/ worked abroad during their undergraduate, graduate, and professorial years, and how do these impact their work and interactions with others?; 2) what is the impact of identity on an international professor's teaching approaches and research agenda?; 3) how different are teaching and research approaches in European and American higher education institutions? These are just a starting point, based on my personal journey of (self)-discovery.

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THE VIOLENT CONFLICTS IN FORMER YUGOSLAVIA AND THE VACILLATIONS OF THE WEST: TRANSATLANTIC DISCOURSE CONSTRUCTIONS OF THE YUGOSLAV WARS

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Abstract. *The chief purpose of this article is to present and analyze the shift within the transatlantic portrayals of the wars in Bosnia and Kosovo. This analysis will indicate the shift from a hesitant and ambivalent attitude with respect to the war in Bosnia towards a rather pro-active, military response to the war in Kosovo, built on the criteria of a just war and on the need to use force in order to pursue humanitarian outcomes. A second pivotal goal is to identify factors which shaped the shift in the transatlantic perceptions on the wars in Former Yugoslavia and examine them as developments within the transatlantic discursive constructions. The examination of such developments will focus on: from war occurring in an age-old ethnic conflict trapped territory (Bosnia) towards a war and humanitarian catastrophe at the "heart of Europe" (Clinton's term); from the equivalence of guilt (as explained by Tom Gallagher), in the case of Bosnia, towards the imperative of identifying and targeting aggressors, in the case of Kosovo; from deployment of ground troops and neutral peace-keeping towards air-strikes and peace enforcement.*

Keywords: Ethnic conflict, Bosnia-Herzegovina, Kosovo, EU, Transatlantic perspectives, Discourse.

1. Introduction

The present article focuses on European and American perceptions of the violent break-up of Yugoslavia, and explores some inconsistencies within the European and American political discourses. Its first purpose is to present and analyze the vacillations of the West regarding the perceptions of the conflict as endemic to the Balkans, on the one hand, and the plight of innocent civilians generated by genocide-type actions of extremists,

on the other. I intend to formulate arguments based on constructivist assumptions and on Lene Hansen's discourse analysis (2006), in order to show two competing views regarding the portrayal of the intra-state violence in Bosnia: 1) as overwhelmingly and inescapably loaded with inter-ethnic age-long hatred (and hence the derivative Western response of 'no solution from outside') and 2) as the plight of innocent civilians caught among brutal nationalisms which required clear-cut actions from the West. The second purpose is to observe and analyze how the mixed reactions of the EU and USA regarding the war in Bosnia were modified in the case of Kosovo. Basically, I investigate how the discourse centred on the 'inescapable violence' between Bosnian Serbs, Bosnian Croats and Bosnian Muslims was marked by a shift toward arguments built on the responsibility of the West to stop ethnic cleansing in Kosovo. The shift entailed a discourse centred on just war criteria and on the responsibility of NATO to lead a military operation for humanitarian outcomes.

The main research question aims at identifying and explaining the factors which triggered this shift in American and European attitudes and reactions to the violence in Kosovo. Basically, the article will examine the shift from a hesitant and ambivalent attitude of the transatlantic world with respect to the war in Bosnia towards a rather pro-active, military response to the war in Kosovo, built on the criteria of a just war and on the need to use force in order to pursue humanitarian outcomes. A second research question will concentrate on the ideational factors which play a crucial role in designing foreign policies according to constructivist scholars in international relations and shaped the transatlantic *commitment to* and *immediate engagement in* the Kosovo crisis.

2. The war in Bosnia: the idea of 'inescapable ancient hatred' and the transatlantic inconsistencies and divergent reactions

In a previous article (Herţa 2014: 23-38), I presented and analyzed the mixed reactions of the international community with respect to the dissolution of Yugoslavia (and to the ensuing violent conflict in Bosnia-Herzegovina) and the inconsistencies of the transatlantic world in portraying the nature and development of the conflict. This article continues the examination of the transatlantic relationship with respect to the break-up of Yugoslavia (by stressing consistencies and discontinuities) from the Bosnian war to the the

war in Kosovo in 1999. On the one hand, one major construction on the break-up of Yugoslavia was intimately intertwined with the ideas of bloody, inevitable Balkan wars, of an inescapable inter-ethnic age-long hatred (which is such a strong specificity to the Balkans that no solution from outside could put an end to it). Such a construction was shaped through political discourses and media portrayals of a 'Bosnian/ Balkan war' (Hansen 2006: 5, 27, 94, 96) waged among three equally intransigent ethnic groups. The latter replaced the more accurate description of the violence as one perpetrated by local extremist groups against the civilian population (Kaldor 2001: 58-59). On the other hand, another construction of the war in Bosnia indicated the nature and dynamic of the violence as the plight of innocent civilians caught among brutal nationalisms which required clear-cut actions from the West. The second portrayal of the armed conflict and humanitarian crisis in Bosnia was also shaped by certain media accounts and certain political speeches. The prevailing discursive construction was based upon the perception that the violence in Bosnia is inherently framed within the historical Balkan predisposition to ethnic strife and therefore cannot easily be solved from outside.

Basically, the international community's perceptions of the war in Bosnia indicated an archetypal example of ethnic violence, characterized by rivalries among three ethnic groups fighting against each other, and not as deliberate ethnic cleansing or genocide committed against civilians belonging to specific communities. Mary Kaldor emphasized the misunderstanding of the nature of violence within the international community, which 'fell into the nationalist trap' and explained that all peace plans for Bosnia-Herzegovina were centred on the partition along ethnic lines (as if the three groups could no longer live together), which had in fact been the chief aim of the nationalists and the outcome of ethnic cleansing (Kaldor 2001: 58-59). Negotiating peace for Bosnia meant separating the three communities according to some sort of *fait accompli* in 1992, but, in fact, "most of the Serbs' territorial gains were made within the first months of the war" (Hansen 2006: 104). This meant on-going *de facto* partition with the use of ethnic cleansing and atrocities against civilians, and engagement in peace negotiations based on this *fait accompli*.

Therefore, from that point on, the external solutions[6] for ending the conflict accommodated the new *status quo* which was brought about by force.

The reaction of the international community to the outburst of violence in Bosnia-Herzegovina was intertwined with the portrayal of the nature of the conflict. One major perception regarding the type of conflict was linked to what could be called 'the inescapable ancient hatred', meaning that the conflict was seen as merely a continuation of previous bloody episodes in the history of the Balkans and, more specifically, in the history of Bosnia. Hence, this perception was centred on the idea that the three communities were predestined to confrontation and cannot escape self-perpetuating ethnic rivalries (Herța 2014: 31). This interpretation of the Bosnian war was included in political discourses and media accounts. American president George H. Bush argued that "the collapse of communism has thrown open a Pandora's Box of ancient ethnic hatreds, resentment, and even revenge" (Gerstenzang 1991), while senator John McCain described Bosnian violence in terms of "a conflict which has been going on in the Balkans for hundreds of years" (Hansen 2006: 94). According to Lene Hansen, these explanations amounted to a 'Balkan discourse' which articulated the nature and dynamic of the conflict in Bosnia "as 'a Balkan war' driven by violence, barbarism, and ancient intra-Balkan hatred stretching back hundreds of years" (Hansen 2006: 94).

Numerous speeches, accounts, and discursive representations of events in Bosnia-Herzegovina stand as testimony for such a geographic construction predisposed to endemic violence. Robert D. Kaplan stated that "the Balkans were the original Third World, long before the Western media coined the term [and that] whatever has happened in Beirut or elsewhere happened first, long ago, in the Balkans"; he also believed that "twentieth-century history came from the Balkans. Here men have been isolated by poverty and ethnic rivalry, dooming them to hate" (Kaplan 2002: 18). Warren Zimmerman, the last American ambassador to Yugoslavia, believed that the bloody conflicts accompanying the break-up

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[6] The term 'external solutions' indicates the efforts of the international community to design peace plans. The outcome of those efforts were the Vance-Owen and Stoltenberg-Owen peace plans (more precisely the plans resulting from the UN/ EC mediation by Cyrus Vance and Lord Owen in September-June 1993 and by Thorvald Stoltenberg and Lord Owen in July-December 1993).

of Yugoslavia were "a throwback to the ancient bandit traditions of the Balkans" (Hansen 2006: 94), while David Anderson, another former US ambassador to Yugoslavia, said that "the problem, I fear, is the Yugoslavs themselves. They are a perverse group of folks, near tribal in their behaviour, suspicious of each other (with usually sound reasons), [...] proud of their warrior history, and completely incapable of coming to grips with the modern world" (Netherlands Institute for War Documentation 94-95).

Therefore, the proclivity towards violence was considered a local, Balkan feature and was attributed to all three parties of the conflict equally, as if they were inherently and irreversibly consumed by nationalism. Tom Gallagher coined this 'the equivalence of the guilt' and proved that "on both sides of the Atlantic, there were often frantic searches for corroborating evidence to suggest that the doctrine of equivalence was the most useful approach to the Bosnian problem" (Gallagher 2003: 93-94). This was illustrated in Lord Carrington's statement in 1992 when referring to the three communities in Bosnia as "all impossible people ... all as bad as each other" (Gallagher 2003: 93). Also, Senator McCain mentioned that the primary American responsibility targets US troops whose lives would be jeopardized in such an area of violence, hence the nature of the 'Balkan warfare' was linked with previous traumatic episodes that revealed bloodshed on the American side, like Vietnam, Beirut and Mogadishu. Therefore, by articulating the 'ancient roots' of the conflict, this discourse tried to prove that there was not much that the 'West' could do (Hansen 2006: 96-97). Alongside this portrayal of an exclusively ethnic and difficult to solve armed conflict in the Balkans, another discourse was shaped indicating the Bosnian Serbs as responsible for the plight of Muslim civilians, for the concentration camps and the siege of Sarajevo. Therefore, this construction of violence in Bosnia argued in favour of the West's responsibility to stop atrocities (Herţa 2014: 33). This interventionist discourse was constituted by media representations of the nature of violence in Bosnia and was congruent to certain political speeches.

In 1992, *The Independent* wrote that "the Muslims have [...] suffered far the worst from the brutal policy of ethnic 'cleansing' practiced most ruthlessly by the Serbs" and critically called the Western policy "as hopelessly indecisive and reactive". *The Guardian* concluded an editorial in April 1993 by asking "How, why, have we failed so dismally to

save Bosnia?", while *The Times* argued in 1993 that "Bosnians are paying a terrible price for Europe's vacillation more than a year ago, when preventive action could have stopped the fighting from breaking out." Also, *The Independent* indicated a "deep sense of collective shame that is building up among the people of this country as they watch the atrocities in Bosnia unfold" (Hansen 2006: 114).

Another journalist critique of the 'ancient ethnic hatred' idea came from Paul Harris who, in a Scottish newspaper in 1992, pointed to the fact that "just as in Bosnia, Scotland [...] could be consumed with violence in just a few weeks. All this would happen not because the Scots actually hate the English but because the situation had been engineered by a relatively small group of people with access to media and weapons" (Gallagher 2003: 97). Senator Joseph Lieberman referred to the "failure of the civilized world to take action to stop the aggression", while Joseph Biden argued that 'the West' had "orchestrated its institutions in a symphony of evasion, [... have been] accomplices in a calculated act of negligence" and that by-standing atrocities "represents a historic abdication of responsibility" (Hansen 2006: 124). The most convincing and consistent account came from Roy Gutman's investigative reports for the New York's *Newsday*, subsequently collected and published in the book *A Witness to Genocide*, which revealed the existence of camps in northern Bosnia in the summer of 1992 (Gallagher 2003: 85-86; Hansen 2006: 12, 159-160; Gutman 1993).

The result was international outrage, but the reports were also precise in proving the existence of concentration camps, the plight of the Muslims and the deliberate and systematic Bosnian Serb strategy in this respect. Therefore, this discursive construction of the violence in Bosnia was centred on the aggressors resorting to atrocities against civilians, but, most importantly, was rejecting the equal blame of three ethnic communities and was indicating the Bosnian Serbs as perpetrators. The solution for intervention stressed by this discourse aimed at correcting the military imbalances among combatants (by lifting the arms' embargo and providing support for the Bosnian Muslims), but did not envisage a consistent transatlantic response with respect to deployment of troops.

In conclusion, I discuss the Bosnian war in association with transatlantic inconsistencies and ambivalences. First of all, one point of divergence is based on

identifying the aggressors and the victims of the Bosnian war: the United States leaned towards the Muslims as victims and Serb and Croat actions as indicative for recurrent violent nationalism. After atrocities of the war captured media spotlight and triggered concern in the international community, the United States became preoccupied with the plight of Bosnian Muslims and distinguished between the virulent nationalism of Serbs and Croats, on the one hand, and the benign nationalism of Muslims, on the other hand. This view contrasted with the Europeans who perceived the three types as equally blameful (Kaldor 2001: 58). French president François Mitterrand stated that there is difficulty in specifying who are the victims and who are the aggressors: "What I know is that for a long time Serbia and Croatia have been the scene of many such dramas [...] After Tito's death, the latent conflict between Serbs and Croatians was bound to erupt" (Gallagher 2003: 47). British Foreign Secretary Douglas Hurd also "amalgamated the victims of violence with its perpetrators" by saying "when there is no will for peace, we cannot supply it" (Gallagher 2003: 87).

Second, another point of divergence was corroborated by the lack of cohesion within the transatlantic world with respect to the forms of intervention. The Clinton Administration was marked by ambivalence, since it first treated the war as emblematic for the Balkans and then shifted towards the responsibility to save the innocent while at the same being not eager to deploy American ground troops. According to DiPrizio, "indecision plagued Clinton's Bosnia policy" (2002: 119) and other observers expressed this in a sharp manner: "Clinton's indecisiveness and inconsistency confused the world and his statements promised much that his policies could not deliver" (Wayne Burt quoted in DiPrizio 2002). What followed were two different perspectives pertaining to the means of intervention with the Americans favouring lifting the arms embargo and air-strikes, and the Europeans arguing that this would endanger British and French ground troops already deployed in Bosnia. Secretary of State Warren Christopher advanced the American strategy 'Lift and Strike' which basically identified the Serbs as aggressors, emphasized the need to lift the UN arms' embargo which had weakened the Bosnian Muslims in their efforts to counteract the YNA-supported Bosnian Serbs, and intended to use NATO air strikes to defeat Bosnian Serbs (Hansen 2006: 117-118, 122-125; Finlan 2004: 65). On the

other hand, Britain and France who had contributed with peacekeeping troops (comprising a large part of the UNPROFOR[7] mission in Bosnia-Herzegovina) were adamant against the 'Lift and Strike' solution because it would have left their troops exposed to side-effects of air-strikes.

3. The war in Kosovo: the idea of humanitarian catastrophe and the transatlantic consensus for a 'just war'

The strategic concept of 'democratic enlargement' or 'democratic expansion' was launched by Clinton in 1993 and "incorporated a few very important ideas: the consolidation of democracy in the new Europe freed from communist domination, the support, and encouragement of democracy wherever this objective seemed possible and realistic; containment (and suppression) of reactionary regimes that opposed expansion of democracy and which seriously violated human rights; expansion of the range of humanitarian actions" (Țuțuianu 2013: 200). According to Alexei Fenenko (2011), "the wars in Bosnia and Kosovo consolidated" this concept and its chief pillars: (1) strengthening transatlantic unity, (2) the inclusion of the former European socialist countries in the common institutions and (3) carrying out 'humanitarian actions'.

In an ample work centred on *Peace Operations and Peacebuilding in the Transatlantic Dialogue*, Winrich Kuehne analyses converging efforts concerning political, military, police and civilian issues and examines doctrines and strategies on both sides of the Atlantic. Referring to the international community's involvement during the break-up of Yugoslavia, Kuehne argued that "NATO was quick to learn from the severe problems UNPROFOR (UN Protection Force in Bosnia and Herzegovina) had experienced in implementing its mandate due to weak capabilities. Its credibility was totally undermined due to this weakness, culminating in the Srebrenica tragedy. *Credibility* was therefore incorporated in NATO's doctrine as a key term [...]" (Kuehne 2009: 7).

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[7] UNPROFOR, the United Nations Protection Force, was initially deployed in Croatia to ensure demilitarization, but when war broke out in Bosnia-Herzegovina, its mandate was extended to ensure the delivery of humanitarian relief, to monitor 'no fly zones' and 'safe areas'.

In what follows, I analyze the involvement of European states and of USA in the Kosovo war and I structure the pro-interventionist discursive construction based on the following ideas or points of convergence: humanitarian imperatives in Kosovo (and the need to promote human rights); transatlantic security; the Just War legitimacy for use of force; overcoming misachievements in Bosnia and compensating with intervention in Kosovo.

3.1. Humanitarian imperatives in Kosovo (and the need to promote human rights)

The American pro-interventionist discourse was constructed on the idea of 'humanitarian war' in Kosovo. The justifications for this military engagement were presented by the Clinton administration and were centred on three main ideas: 1) humanitarian motivations; 2) national interest; 3) credibility concerns (Redd 2005: 131). President Clinton expressed this in his address to the nation on March 24, 1999: "We act to protect thousands of innocent people in Kosovo from a mounting military offensive. We act to prevent a wider war; to diffuse a powder keg at the heart of Europe that has exploded twice before in this century with catastrophic results. And we act to stand united with our allies for peace. By acting now we are upholding our values, protecting our interests and advancing the cause of peace" (Redd 2005: 131). This speech entailed the idea of national security since "the action was also justified to the American people on the grounds that a failure by the USA to act in defence of European security would jeopardize US national interests" (Wheeler 2003: 266). Secondly, the moral duty and humanitarian imperatives were emphasized since "the West had a moral responsibility to stop the terrible atrocities taking place in Kosovo" (Wheeler 2003: 266).

There was one major point of convergence within the transatlantic dialogue with respect to use of force against Milošević and it was built on humanitarian grounds and the shocking plight of Kosovo Albanians. Both American and European discursive constructions of the Kosovo war reflected the preoccupation for human rights and provided incentives for ending atrocities. Immediately after the Račak massacre from January, 15 1999, Ambassador William Walker, an American diplomat heading the Kosovo Verification Mission of the OSCE, investigated the dramatic incident (the

discovery of more than 40 mutilated bodies of Albanian) and declared: "Here's what I saw. It was obviously a crime against humanity" (Smith 2009: 10-11). Moreover, the United States warned the perpetrators of atrocities that "[...] those responsible for the actions of the Yugoslav Army and the Ministry of Internal Affairs in Kosovo that attacks directed against the civilian population, the summary execution of detained persons and wanton destruction or devastation not justified by military necessity are war crimes under international law. War crimes, along with genocide and crimes against humanity that may be committed in Kosovo are within the jurisdiction of the International Tribunal for the Former Yugoslavia. Such crimes have no statute of limitations" (Smith 2009: 19). The same firmness with respect to pinpointing to those responsible for atrocities in the case of Kosovo (as opposed to the international neutrality in Bosnia) was visible in the speech of James Rubin, Madeleine Albright's spokesman: "Milošević has been at the center of every crisis in the former Yugoslavia over the last decade. He is not simply part of the problem; Milošević is the problem …. We have no interest in propping up President Milošević. We do have an interest in preventing humanitarian catastrophe" (Smith 2009: 9).

Confronted with yet another tragedy in the Balkans, the USA built their entire pro-interventionist speech on humanitarian incentives. According to Brent Steele, "because it possessed the greatest material capabilities of any NATO member, the United States faced a special sense of responsibility and purpose regarding the plight of the ethnic Albanians" (2008: 131). According to Jonathan Steele, the images of 100,000 Albanian refugees leaving Decani (in Kosovo) shocked the Blair Government; Prime Minister Tony Blair and Foreign Minister Robin Cook were the key actors who argued that "Britain and the Alliance had to be prepared to use force to stop Serbian ethnic cleansing in Kosovo" (Wheeler 2003: 259).

As far as the French reaction is concerned, in an address on French television, French President Jacques Chirac declared that France's participation in NATO airstrikes is humanitarian-driven, in the sense that Serbia has demonstrated "unacceptable behaviour for too long with regard to the Kosovo Albanians" (CNN 1999). Also, in the aftermath of the failed *Rambouillet Conference* co-organized by France in February 1998, Hubert Védrine (France's Minister of Foreign Affairs under Lionel Jospin's coalition government

during Chirac's Presidency) indicated that negotiation was no longer an option to stop atrocities. Moreover, Védrine stated that the priority for France was then to stop Milošević' army. France's full engagement in NATO's Operation Allied Force was corroborated by the fact that it was the second contributor to the intervention after the United State (Couture and Morina 2014).

The most interesting shift in foreign policy came from Germany. Until NATO's Operation Allied Force, German involvement had been reduced to peace-building activities and post-conflict humanitarian assistance projects. Germany had contributed with peacekeeping troops in Bosnia, but this was different to the massive engagement in NATO's peace enforcement operation from 1999: "the German Bundeswehr contributed fourteen Tornado fighters which engaged in around 500 missions, some for reconnaissance and some against Yugoslav anti-aircraft stations" (Hamilton 2014). According to commentators, "Kosovo [...] marks the first time since World War II that the Bundeswehr used offensive tactics, in the context of the NATO bombings, to end the atrocities that Serbian forces were committing against Albanians in Kosovo. Germany's role in the Kosovo War laid the foundation for a new age of German military policy" (Hamilton 2014: 14). This shift is also noteworthy because it proceeded from decisions taken by the coalition government of the centre-left Social Democratic Party (SPD) and the Green Party. Both SPD's Gerhard Schröder and the Greens' Joschka Fischer (who served as Foreign Minister and Vice Chancellor of Germany) came from a long tradition of pacifism and, according to Brent Steele, this alliance was "constituted by traditional pacifist elements which stemmed from German guilt over World War II" (Steele 2008: 136).

According to the memoires of Gerhard Schröder, "it was fully clear to me [...] that for many in the (Social Democratic) party – and in society in general – the idea that German soldiers, in this case fighter pilots, would intervene once again in a region that had suffered so much under German occupation during World War II was unbearable" (Spiegel Online International 2006). During an interview with the crew from *Der Spiegel*, Schröder was asked whether "one can send German troops in regions, in which Germans in the Second World War raged cruelly?" and the Chancellor replied: "our past, in which we intervened for the wrong political goals, orders for me that we do not stand apart, if

others occur for the correct goals" (Steele 2008: 137). Therefore, the main justification for this shift and for the use of force was built on humanitarian grounds and on a needed response to atrocities. Schröder stated that "especially we Germans, who have brought guilt onto ourselves in our history and suffered under murderous dictatorial regimes, we must never again allow murder, expulsions, and deportations to be tolerated by politicians" (Steele 2008: 137). In 2006, Schröder still emphasized the German determination towards active involvement in the NATO's operation ("I was convinced of the need for an active German contribution") and explained the intervention in Kosovo in terms of humanitarian considerations: "the real challenge seemed to me not just to douse the most recent fire in the Balkans, but to bring peace to the region [...] The goal was exclusively humanitarian" (Spiegel Online International 2006).

3.2. Transatlantic security

President Clinton's remarks to the American Federation of State, County and Municipal Employees Convention, on March 23, 1999, included the idea of transatlantic security, since "he stressed that Europe's and America's security were indivisible and that, if the USA did not act now, it would have to act later when 'more people will die, and it will cost more money', since the USA had a long-term strategic interest in a stable and democratically ordered Europe" (Wheeler 2003: 266). British Prime Minister Tony Blair also emphasized the correlation between domestic or intra-state turmoil and threats to international security, by arguing that globalization has fortified the idea of an international community and by linking 'national interest' with 'international collaboration'. In Tony Blair's speech delivered on April 22, 1999, when speaking before the Chicago Economic Club, the *Blair Doctrine* was outlined. One idea embedded here is similar to the one formulated by Clinton with respect to national interests pursued through transatlantic cooperation. According to Blair, "[...] the world has changed in a more fundamental way. Globalisation has transformed our economies and our working practices. But globalisation is not just economic. It is also a political and security phenomenon. We live in a world where isolationism has ceased to have a reason to exist. By necessity we have to co-operate with each other across nations. [...] Conflict in the Balkans causes more

refugees in Germany and here in the US. These problems can only be addressed by international co-operation" (*The Blair Doctrine* 1999).

The main idea defended by Blair is that intra-state armed conflicts (or atrocities against civilians, as was the case in Kosovo) pose a threat to international peace and security and hence the separation between (the rational) national interests and (moral) humanitarian engagement to end human suffering is no longer a valid feature of global politics: "acts of genocide can never be a purely internal matter" and "when oppression produces massive flows of refugees which unsettle neighbouring countries then they can properly be described as 'threats to international peace and security'" (*The Blair Doctrine* 1999). Moreover, Blair merged democratic values with national interests: "if we can establish and spread the values of liberty, the rule of law, human rights and an open society then that is in our national interests too. The spread of our values makes us safer" (*The Blair Doctrine* 1999). Also, the idea of NATO's credibility was tackled by Blair, since he stated that "if NATO fails in Kosovo, the next dictator to be threatened with military force may well not believe our resolve to carry the threat through" (*The Blair Doctrine* 1999). Finally, in analyzing past British foreign policy, Blair emphasizes the importance of transatlantic security and the transatlantic relationship: "For far too long, British ambivalence to Europe has made us irrelevant in Europe, and, consequently, of less importance to the United States. We have finally done away with the false proposition that we must choose between two diverging paths – the Transatlantic relationship or Europe. For the first time in the last three decades we have a government that is both pro-Europe and pro-American. I firmly believe that it is in Britain's interest, but it is also in the interests of the US and of Europe" (*The Blair Doctrine* 1999).

The idea of transatlantic partnership and transatlantic security was also stressed by Chancellor of Germany Gerhard Schröder when he declared that the involvement in the Kosovo war "taught Europe the lesson that without the help of the United States, it was not in a position to solve these kinds of conflicts" (Spiegel Online International 2006).

3.3. The Just War legitimacy for use of force

The just war tradition is centred on the idea that use of military force is justified when there is a just cause for intervention, when use of force is the last resort, when the recourse to military action is saving the innocent or corrects a wrong that has been perpetrated against them. The most prominent advocate for the idea that the use of force in Operation Allied Force was in fact a just war was Tony Blair. According to him, "No one in the West who has seen what is happening in Kosovo can doubt that NATO's military action is justified [...] this is a just war, based not on any territorial ambitions but on values. We cannot let the evil of ethnic cleansing stand. We must not rest until it is reversed. We have learned twice before in this century that appeasement does not work. If we let an evil dictator range unchallenged, we will have to spill infinitely more blood and treasure to stop him later" (*The Blair Doctrine* 1999).

Blair's just war arguments in the case of Kosovo had already been supported by other European (especially French) and American intellectuals during the Bosnian war, when it was believed by some that military engagement, air-strikes, and lifting the arms' embargo represented the only just and successful way of protecting the innocent civilians and the Muslims in Bosnia (Kaldor 2010: 75). Tony Blair went further to explain that use of force against Milošević respected the just war criteria: "First, are we sure of our case? War is an imperfect instrument for righting humanitarian distress; but armed force is sometimes the only means of dealing with dictators. Second, have we exhausted all diplomatic options? We should always give peace every chance, as we have in the case of Kosovo. Third, on the basis of a practical assessment of the situation, are there military operations we can sensibly and prudently undertake? Fourth, are we prepared for the long term? In the past we talked too much of exit strategies. But having made a commitment we cannot simply walk away once the fight is over; better to stay with moderate numbers of troops than return for repeat performances with large numbers" (*The Blair Doctrine* 1999).

In this interpretation, the use of force in Operation Allied Force was justified in moral terms and the entire just war tradition is based upon moral sources which support recourse to war. Besides British, American, and German motivations within the just war framework, French Prime Minister Lionel Jospin, "when asked in a television interview [...] whether Kosovo was a 'moral war'", declared that French involvement was based on

"a conception of morality, [...] on one of civilization, on a vision of Europe" (Steele 2008: 141). British Foreign Secretary Robin Cook formulated the need to resort to military action in just war terms by underlining the idea that war is the last resort and all other means have been used, exhausted, and have proven inefficient: "We have tried repeatedly, right up to the last minute, to find a way to halt the repression of Kosovar Albanians through negotiation. It was not possible, and the person who made it impossible was President Milošević. We were left with no other way of preventing the present humanitarian crisis from becoming a catastrophe than by taking military action to limit the capacity of Milošević's army to repress the Kosovar Albanians" (Wheeler 2003: 265).

3.4. *Overcoming misachievements in Bosnia and compensating with intervention in Kosovo*

One major explanation for the use of force against Milošević and immediate military reaction in the Kosovo war (in contrast to delayed and hesitant reaction to the Bosnian war) was the need to right the wrongs and shortcomings in Bosnia, and to prevent another failure to stop violence (which in Bosnia was achieved only after three years of human suffering). Therefore, the point I want to stress here is the transatlantic consensus over the following ideas: first of all, the international community (represented by USA, Great Britain, Germany, and France) was adamant to not by-stand another genocidal episode in the Balkans, to not tolerate another humanitarian crisis, and to undertake immediate and unwavering action. Second of all, in contrast to the reaction towards the Bosnian war, in the case of Kosovo there was another point of transatlantic convergence: neutrality was no longer the adequate attitude, and pinpointing the aggressors (Milošević and the Serb Security Forces) and separating them from the victims were needed in order to not repeat past mistakes.

The term 'ethnic cleansing' was used to reflect the type of violence occurring in Bosnia in 1992-1995 and, in 1999, it "provided the lens through which Western viewers interpreted the images of renewed Serb barbarism in Kosovo" (Smith 2009: 21). Smith argued that "[...] after Bosnia, the readiness of Westerners to think the worst of Milošević and the Serbs was already established, and the images coming out of Kosovo would only

reinforce it. Once the West saw hundreds of thousands of Albanians being driven from their homes and their homeland, Milošević had lost the media war" (2009: 21).

The idea of coping with past failures in Bosnia and compensating them with unflinching action in Kosovo was echoed in both American and European discursive constructions. For example, speaking to the American Federation of State, County, and Municipal, President Clinton "argued that the world had stood aside as Milošević had committed 'genocide in the heart of Europe' against the Bosnian Muslims and that this could not be allowed to happen in Kosovo, since 'it's about our values'" (Wheeler 2003: 266). Already on March 8, 1998, Secretary of State Madeleine Albright declared that "we are not going to stand by and watch the Serbian authorities do in Kosovo what they can no longer get away with doing in Bosnia" (Smith 2009: 4; Redd 2005: 142). According to Ivo Daalder and Michael O'Hanlon, Albright's chief objective "was to push the European allies, American public opinion, and even her own government toward concerted action designed to avert the kind of human tragedy that had happened in Bosnia" (Smith 2009: 4). Senator Trent Lott warned in 1998 that "what we're seeing happen once again is slaughter, people being left dead in the streets and ethnic cleansing. If we don't do something pretty quickly, stronger than we've done so far, we're going to have the same sort of disaster occurring in Kosovo that you had in Bosnia" (Redd 2005: 135).

Blaming the international community for failure in Bosnia, Secretary of State Madeleine Albright said that "we believe that in 1991 the international community stood by and watched ethnic cleansing [...]. We don't want that to happen again this time" (Wheeler 2003: 258). The USA underlined the moral responsibility of the West to stop atrocities in Kosovo and Clinton and Albright stressed this several times. According to Brent Steele, the USA acted as a 'haunted hegemon' trying to overcome past failures and shameful memories; the sources of "shame" for American inaction or inefficiency were the Rwandan genocide and the delayed concerted actions in Bosnia (Steele 2008: 131-132). This is precisely why, in a speech delivered at the White House, Clinton stated: ''My intention would be to do whatever is possible . . . to weaken his ability to massacre them, [not] to have another Bosnia" and later said that "'[w]e learned that in the Balkans inaction in the face of brutality simply invites more brutality, but firmness can stop armies and save

lives. We must apply that lesson in Kosovo, before what happened in Bosnia happens there too" (Steele 2008: 134).

The same theme (built on the moral responsibility to not allow violence in Bosnia to be repeated in Kosovo) was embedded in European discursive constructions. British Foreign Secretary Robin Cook emphasized the need to pinpoint to the aggressors in order to not repeat past mistakes: "In the mid '90s, President (Milošević) was the prime player in the war in Bosnia which gave our language the hideous phrase 'ethnic cleansing'. Only after three years of fighting in which a quarter of a million people were killed, did NATO find the resolve to use force. Now we are seeing exactly the same pattern of ethnic violence being replayed again in Kosovo… We cannot allow the same tragedy to be repeated again in Kosovo" (Wheeler 2003: 266).

Tony Blair explained the need for immediate action in Kosovo by showing that "we know from bitter experience throughout this century, most recently in Bosnia" that inaction or delayed response endangers European security. Robin Cook provided the most straightforward argument that the failure in Bosnia was caused by the Western refusal to acknowledge who the aggressors were and warned that this would not be a recurrent mistake: "The reports of ethnic cleansing, rape of young women and massacre of young men are chillingly familiar from the behaviour of the same Serb forces during the civil war in Bosnia. At that time, it took the international community three years to muster the resolve to launch an air campaign. This time, the Governments of NATO are agreed that Milošević must be faced down now. If we do not want to see another installment of the same brutality visited on Montenegro, Sandjak or Vojvodina, we must demonstrate that aggression does not pay by forcing Milošević to reverse the ethnic cleansing in Kosovo" (Steele 2008: 130). By the end of Operation Allied Force, Clinton also underlined one major mistake in Bosnia: when ethnic cleaning was unveiled in Croatia and Bosnia "[t]he international community responded at first with a studied neutrality that equated victims with aggressors" (Clinton 1999).

Many scholars analyzed the German involvement in the Kosovo war in terms of 'German shame, German guilt' (Steele 2008), or in terms of 'Balkan wars as German trauma' (Weber 2011: 16). According to Brent Steele, the German involvement in the

Kosovo war should be understood in terms of 'shame' (which is produced by "actions which contradict self-identity of states"), because it was an "encompassing force in the German decision, although, [...] the 'decision' by Germany to deploy forces in Kosovo looked more like a process rather than a simple 'event', as Gerhard Schroeder [...] and fellow Cabinet members had to make the case that Germany had a responsibility to act." Reconciling with the German traumatic past entailed full commitment to ending human suffering in Kosovo; also, it triggered Germany's immediate and active participation in NATO's efforts towards this goal.

The theme of coping with misachievements in Bosnia and compensating with intervention in Kosovo was also embedded in the German pro-interventionist discourse. As noted by Bodo Weber, "it was Joschka Fischer who compared Srebrenica to Auschwitz in 1995 [...] and four years later [...] he again made use of Germany's historical baggage to justify intervention [in Kosovo]" (2011: 16). It was also Joschka Fischer who, on the eve of NATO's air campaign against Belgrade, underlined that this time the humanitarian intervention aimed straight at the perpetrator since he referred to the following: "Milošević gazed at me the whole time with an expression seemingly meant to say that he was prepared to walk over corpses (something he had proven all too often), and the West, but above all Europe, was not" (Smith 2009: 4).

Finally, France's approach on the intervention in Kosovo also echoed past mistakes in Bosnia and the need to not repeat them. For example, Prime Minister Lionel Jospin stated in an address to the French General Assembly on March 26, 1999: "After the tragic events of Bosnia, the same confrontations, the same mindless action, the same fanaticism, the same hatred were being unleashed [...] We could not just watch, resignedly, those terrible pictures – the violence against civilians, the villages wiped off the map, the floods of refugees. We could not consent to being stunned witnesses of the preparation of fresh massacres. Vukovar, Srebrenica, and Sarajevo: to that list of martyred cities, we could not stand idly by and watch the addition of Pristina, Klina, Srbica" (Steele 2008: 140).

In contrast to the case of Bosnian war, the transatlantic discourse on intervention in the Kosovo war entailed one point of divergence (with UK considering the deployment of ground troops and the US favouring air-strikes), but was mainly marked by consensus

between USA and major European states. The consensus was chiefly built upon the duty to promote human rights in Kosovo and to alleviate the human suffering, on the idea of a just military action driven by humanitarian concerns, on the need to strengthen transatlantic security, and on the need to do more for Kosovo than was achieved in Bosnia.

4. Conclusion

In this article I tried to examine the shift from a hesitant and ambivalent attitude of the transatlantic world with respect to the war in Bosnia towards a rather pro-active, military response to the war in Kosovo, built on the criteria of a just war and on the need to use force in order to pursue humanitarian outcomes. Also, I stressed the fact that a great part of the transatlantic discursive construction (aimed at justifying use of military force against Milošević in order to stop atrocities in Kosovo) was built on the idea of failure in Bosnia and the derivative need to not repeat past mistakes in the Balkans. Returning to the research questions outlined in the introductory part, the purpose now is to show what this shift actually entailed. Basically, I identify three main factors that shaped the shift in the transatlantic perceptions on the wars in Former Yugoslavia and examine them as developments within the transatlantic discursive constructions: 1) from war occurring in an age-old ethnic conflict trapped territory (Bosnia) towards a war and humanitarian catastrophe at the 'heart of Europe' (Clinton's term); 2) from the equivalence of guilt, in the case of Bosnia, towards the imperative of identifying and targeting aggressors (Milošević and Serb Security Forces), in the case of Kosovo; and 3) from deployment of ground troops and neutral peace-keeping towards air-strikes and peace enforcement.

The second question is *what ideational factors shaped this shift*? It is my claim and conclusion that the idea of 'Balkan violence' (in the case of Bosnia) was changed and another shared understanding within the transatlantic dialogue ensued (in the case of Kosovo) centred on atrocities against civilians. Also, the idea of UN impartiality among three similar warring parties to the conflict was replaced by the idea of perpetrators resorting to genocidal acts against victims and creating a humanitarian crisis with massive spill-over effects. The idea of UN neutrality and peace-keeping was replaced by the idea of identifying the aggressors and mounting a strong peace enforcement operation to stop their

brutality. Finally, in contrast to Bosnia which was portrayed (by some) as part of an age-old violent territory, Kosovo was described as part of the 'heart of Europe'.

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TRANSATLANTIC MODELS OF HUMAN RIGHTS PROTECTION.
REGIONAL PARADIGMS OF SPECIFICITY

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Abstract. *The protection of the individuals in their legal relationships with the Government is realized by laws which provide the fundamental rights of the citizens, internally and the human rights, internationally. The international protection is realized by those norms which exist at the universal and regional level. The regionalization of the protection of human rights is, in our opinion, the process realized based on the paradigm of specificity which socially expresses the cultural relativity in a multicultural world.*

Keywords: Human rights protection, Multiculturalism, Regionalization, Paradigm.

The idea of human rights, civil rights or individual or fundamental rights is embodied in one of the most known doctrines of our times, which has evolved with the evolution of the entire society (Rivero 1984: 23; Szabo et al. 1966: 62-64). This legal terminology refers to human rights in international law and to fundamental rights in the municipal law/national or state law. The multilevel protection of human rights is realized by different legal norms that secure and guarantee them at the universal, regional and local/state level. At the mentioned levels there are, respectively, treaties, pacts, covenants with a general recognized value, signed or ratified by the majority of the party states and the constitutions of the states within which fundamental rights are provided, protected and guaranteed by the most important law existing in a state. The fundamental rights are in fact

individual rights provided by the constitution to the citizens as subjects of law and ultimately determined by the economic conditions that are reflected and protected by the laws of the country (Rivero 1984: 20; Szabo et al. 1966: 27). In our modern conception about human rights, starting with the development and interplay of the societies and cultures at the world scale, the international protection of human rights is conceived[1] according to three categories of actors/subjects of law: states, people and individuals. In its classical version, the international law is conceived to protect individuals by the diplomatic process and groups by the preventing procedures.

Cultures and civilizations are diverse and influenced by geographical, spiritual characteristics of the area and traditions, mores and legal heritage. These local and regional characteristics are part of the historical evolution and manifestation of the legal system and jurisprudence. The diversity and specificity of cultures (cultural relativism) coexist with multiculturalism in a global world. Human rights are evolving at different levels based on universal standards, regional and local specificities that are part of the legal harmony created due to the constitutionality of the laws and the paradigm of specificity.

Individuals are protected by the constitutional norms in the states where they reside (Robertson and Merrills 1989: 51). The legal procedure that is meant to protect human rights at the international level consists of basic instruments, institutions and remedies. At the universal or global level, The Charter of the United Nations (CUN), The Universal Declaration of Human Rights (UDHR), The International Covenant on Civil and Political Rights (ICCPR), The International Covenant of Economic Social and Cultural Rights (ICESCR), and specific area conventions have been adopted. At the regional level there are different legal instruments and bodies according to the geographic area's protection.

In Europe, inside the Council of Europe, there are The European Convention of Human Rights (ECHR), The European Court of Human Rights (ECtHR) in Strasbourg, and The European Union. The E.U. human rights are protected by The Charter of Fundamental Rights and Freedoms (ECFRF) which is applied by the European Justice Court (EJC) in Luxembourg.

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[1] *The Universal Declaration of Human Rights,* Preamble.

In the Americas there is The American Convention on Human Rights, applied by the Inter-American Court of Human Rights in San *José* Costa Rica; in the U.S.A. there is a system of protection at the federal level and at each state level, where the legislation has to be in accordance with the federal constitution. This specific protection of fundamental rights, provided in the U.S. Constitution as privileges and immunities, takes precedent over the universal human rights legislation, ICCPR, to which U.S.A. is a party state from 1992. Our study analyses the causes and the effects of this particular situation. In Africa the specific instrument is The African Charter on Human and Peoples Rights and the African Court, created in 2006. In Asia, there is no legal system of human rights' protection and, in the Arab countries, the Arab League adopted The Arab Charter of Human Rights in 1997, which was ratified by a small number of countries. Muslim countries have the Sharia and the Cairo Declaration on Human Rights in Islam, after 1990. In 2006, Russia ratified The Declaration of Human Rights and Dignity adopted by the World Council of Russian People.

These are the basic instruments that provide the fundamental rights and protect all the people everywhere from severe political, legal or social abuses. There are also instruments of human rights protection at the global/universal or regional level on specific issues, but we will refer only to the ECHR and US Bill of Rights, as applied in Europe and the U.S.A. Our purpose is to emphasize the similarities and differences that exist among these two systems. In order to fulfill this aim, we will present the jurisprudence of the ECtHR and of the U.S. Supreme Court (USSC) and their interpretation of the legal norms which are contained in the decisions that establish a new jurisprudence regarding human rights or civil rights. We will refer implicitly or explicitly to the application of the margin of appreciation doctrine by the ECtHR or to the decision making policy specific to the activity of the USSC. The application of the other principles like the legality, the proportionality or the necessity in a democratic society, alongside with the interpretation of these legal norms according to the general mentality of the people and the competence of the court to shape the standards of individual rights, are part of the mechanism known as the court activism (Wasby 1993: 32; Sudre 2006: 159). It is meant to contribute to the evolvement of society and to the development of legal standards.

In our opinion, jurisprudence has interpretative value and it has to be followed - as a standard of interpretation - by other courts at the domestic level when adjudicating similar cases (Raz 1979: 35; Lehman and Phelps 2005). The independence of the judges is not harmed by these interpretative *stare decisis* because every judge is making his/her own interpretation of laws according to the standard and in connection with facts. This is the way to establish and apply the judicial precedent. It is also a method of maintaining the right balance between the treaty or the federal constitution (in USA) and the municipal/national legislation; it is in fact the mechanism of the complementarities of laws and the path to reconcile the categories of the universal, regional and municipal legal standards of human rights. The universal human rights' legal norms set up a minimum standard of protection while the regional norms go further. The role of the municipal norms is to protect the fundamental rights at least similar with the standards of other level protection norms, or more and deeper. At the state level, the municipal jurisdiction is applied primarily and according to the subsidiarity principle. When an abuse, unconstitutionality or disregard of regional and universal norms occur, it is applied based on the complementarity principle, the ECHR or the US constitution, as standard norms that protect human rights. The implementation and enforcement of the regional norms (ECHR and US Constitution) is effective and establishes a public order, a constitutional one (Henkin, Neuman, Orentlicher and Leebron 1999: 523, 599). The ECtHR and the USSC act as constitutional courts when they decide in judicial review, the conformity or the constitutionality of the municipal laws with the ECHR or with the US Bill of Rights (Lillich 1991: 217).

In the municipal legal systems there are etalons or legal standards that other legal norms have to be in accordance with. The constitution, which is the fundamental law or the supreme law of the land, contains those standards and is on the top of the hierarchy that exists between the laws of each municipal legal system. The constitution reflects the basic relationship that is established between the Government and the People, and the constitutionality principle guarantees the rule of law and democracy. Human rights protection assures the balance among the sovereign power of a state that protects its fundamental rights according to the constitution and the regional system of human rights

protection (ECHR or The Bill of Rights of US Constitution). The legal method to realize this equilibrium is for a state to adopt, apply and enforce the international covenants that protect human rights, like ECHR, applied by the ECtHR (Orakhelashvili 2003).

In the USA, the balance between the Government and the People is realized among the statutes, other laws, the constitutions of each state and the federal laws, US Constitution being not only the supreme law of the land, but the top standard to be compared with, when the courts decide the constitutionality of laws in this legal system.

The decision in the ECtHR has several reasons: a) the ECHR is considered to be one of the oldest and developed regional systems of human rights protection, an effective, trusted one with a great jurisprudence which evolved in more than 60 years; it has been the etalon, the model to be followed by other states in different regions of the world; b) the ECtHR is a specialized court, a constitutional one that assesses the compatibility of the laws of Member States of The Council of Europe with the ECHR standards and has the aim to put them in accordance (Petersmann 2008; Greer 2003); c) the individuals who are on the territories of the Member States Parties to the ECHR prefer the mechanism of this protection because the remedy they are entitled to is a final decision which has to be enforced in the domestic legal order; d) the analysis of jurisprudence as a constitutional model is conceived as the final step in establishing the rule of law and a post-national legal and public order which will set up the conditions for the stability and success of a pluralist structure (Krish 2008); e) the case studies are meant to emphasize not only the supremacy of regional human rights law and its direct effect as legal doctrines, but also the growth in power and influence of the ECtHR and its aim to contribute to the loyalty to the ECHR and to a deeper, advanced legal harmony and integration (Enchelmaier 2003).

The next part of our study refers to the European legal order (Orakhelashvili 2003: 530) created by the ECHR as a unique act for all Member States, Parties to the convention and to the interpretation of the convention as a standardized way to understand the regional norms that protect human rights (Krish 2008: 182). These norms are also interpreted and applied by the domestic courts in an autonomous way. When a national/domestic law conflicts the regional legal order, the national law becomes inapplicable due to the fact that the results are irreconcilable (Enchelmaier 2003: 281). The obligations that have to be

respected by every Party State to the ECHR in their relationships with an international body like the ECtHR are the international obligations and undertakings that have their legal source in international treaties, international custom or general principles of law; these obligations have to be fulfilled similar to the legal obligations that have their source in the domestic laws, the constitution included. The States have the power to decide on the protection of fundamental rights in the domestic legal order, and to secure and guarantee them (Micu 1998: 197). The individual rights are limited in their exercise, in exceptional circumstances, when measures to derogate from the ECHR are permitted as necessary in a democratic society in order to protect primarily the entire population instead of an individual right.[2] The respect for these legal norms and the fulfillment of the above-mentioned obligations will create a convergence of the domestic and regional legal order of human rights. When the accordance does not exist, there is in fact a conflict of law; the subsidiary application of the domestic laws will be replaced by the complementarily application of the ECHR as the regional legal order that takes precedent over (Micu 1998: 269). The application of the convention's standards in the process of the realization of constitutional justice will contribute to the development of an integrative society where cultural relativism can exist (Greer 2003: 406). Our assumption is that the regional protection of human rights in a multicultural world has been shaped by the specificity of the region's culture, mentality, mores and particular ways to interpret, apply and implement the law of the land at the level of the state. The legal obligation according to the global or regional standard is possible to be realized by combining it with the paradigm of specificity (or cultural relativity) intertwined with the need for legal harmony. In order to maintain the region's multicultural characteristics and traditions, complementarity is the principal method to realize the harmonic legislation that protects human rights, while the paradigm of specificity is the means to coexist individually/nationally, regionally/universally in a global world.

We will consider two cases that are meant to demonstrate the paradigm of specificity in approaching the protection of human rights and creating at the same time

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[2] *The European Convention on Human Rights*, art. 15.

regional standards as particular ways to harmonize the national legislation and jurisprudence with the etalons of the law of the land. A case study of the ECtHR and its jurisprudence will emphasize the European states practice on one side of the Atlantic that contributes to the harmonization of the domestic standards of human rights with the regional ones.

In the case *Montoya v. France*[3]*,* the petition no. 62170/10 addressed to the ECtHR in 03.10.2010 alleged a violation of art. 1, al. 1, Protocol 1 and art. 14, ECHR. The applicant, Francisco Montoya, is a French national who was born in 1942 and lives in Sansan, France. Mr. Francisco Montoya was born in Algeria, at a time when it was still a French department. Being of European origin, he had had ordinary civil status as opposed to local-law civil status applicable to the indigenous population. During the Algerian war he joined one of the civilian irregular units in the French army. He left Algeria when it became independent and settled in France. On an unspecified date Mr. Montoya applied to the French authorities for the 'recognition allowance' (*allocation de reconnaissance*) which was payable to repatriated former members of civilian irregular units and comparable groups. His claim was dismissed in 2004 on the ground that he was 'a repatriated person of European origin'. That decision was upheld by a second decision of the authorities in 2005 against which Mr. Montoya lodged an application for judicial review with the French courts. That application was dismissed in 2007. An appeal by Mr. Montoya was dismissed in 2009, whereupon he lodged an appeal on points of law with the Conseil d'Etat. That appeal was declared inadmissible in 2010, under the laws in force at that time in the domestic jurisdiction. Those laws have been: a) order no.62-825/21.07.1962, in force until 21.03.1967, according to which the persons from Algeria with a local civil status lost automatically the French nationality in 01.01.1963 and those who established their residence in France had the possibility to have their French nationality recognized by declaration; b) the law of 1987 which instituted in art. 9 an allowance of repatriation, of 60,000 FRF in the benefit of mogaznis, harchis and persons from different units that served in Algeria as civilian irregular units but retained their

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[3] http://hudoc.echr.coe.int/ (accessed on 02.02.2014).

French nationality, and have been residents of France; c) in 1994 was introduced a complementary allowance of 110,000 FRF for those who have been repatriated as former civilian irregular units' members and have had been victims of captivity during the Algerian war; d) decree no. 2003-167 from 1999, which established in art. 47 a lifetime allowance of 9,000 FRF (renamed in 2002 recognition allowance) for those over 60 years of age; e) the finance law, rectified in 2002, that contains the decree provisions. In the domestic jurisprudence, the decision of 2005 and that of 2007 have been annulled by the Constitutional Council when they have been declared unconstitutional by the decision no. 2010-93 QPC of 04.02.2011.

In 2011, after being declared unconstitutional by the Constitutional Council in another set of legal proceedings, the statutory provisions which had hitherto limited awards of the "recognition allowance" to former members of civilian irregular units and comparable groups who had had local-law civil status and had kept their French nationality by virtue of Article 2 of Order no. 62-825 of July 21, 1962, were repealed. As those provisions were also the only ones which reserved the benefit of the allowance to former auxiliaries who had had local-law civil status, the French courts held that the allowance could no longer be refused on that ground to former auxiliaries who had had ordinary civil status. That conclusion was upheld by the Conseil d'État in 2013. What is very important to be underlined is the fact that the Constitutional Council did not refer to the difference in treatment between those with a local civil status and those with European origin. This is the reason for which the petitioner emphasizes the fact that if his case would be assessed after 2011 when the unconstitutionality was established, he would be receiving the recognition allowance.

The Court observed that as a former member of a civilian irregular unit, who had served in Algeria, the petitioner was over 60 years old, was domiciled in France and was of French nationality; Mr. Montoya would have been eligible for the "recognition allowance" if, prior to being repatriated, he had had local-law civil status rather than ordinary civil status. The Government did not dispute that the facts fell within the scope of Article 1 of Protocol No. 1 or that the Conseil d'État had held in an earlier case that the allowance qualified as a possession within the meaning of that provision. Accordingly, Mr.

Montoya's interests fell within the scope of Article 1 of Protocol No. 1, which was sufficient to render Article 14 of the Convention applicable. However, the Court reiterated that in order for an issue to arise under Article 14 there had to be a difference in the treatment of persons in comparable situations. Such a difference was discriminatory if it lacked objective and reasonable justification, that is, if it did not pursue a legitimate aim or if there was no reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Furthermore, the Contracting State had room for margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justified different treatment.

The difference in treatment, Mr. Montoya complained of, disclosed a distinction between former auxiliaries of Arab or Berber origin, who had had local-law civil status, and those of European origin, who had had ordinary civil status. That distinction was applied in respect of persons who had in common the fact that they were all former members of irregular units to whom the French authorities had had recourse during the Algerian war, and had been repatriated to France at the end of the war. Irrespective of their origins, they were in a comparable situation regarding demands for recognition by France, for their self-sacrifice for the country and the suffering they had endured. The Government stated that all the repatriated auxiliaries had received financial assistance to help them settle in France and had then been awarded, without distinction, the status of war veterans. The legislature had considered it necessary, however, to make provision for a special allowance for former auxiliaries of Arab or Berber origin, having regard to the particular difficulties and suffering they had endured. Moreover, The Conseil d'État had given a ruling to that effect in 2007, finding that those auxiliaries had been uprooted and had experienced specific and long-term difficulties in integrating when arriving and settling in France. Accordingly, the Court held that France had been justified in considering it legitimate to specifically recognize the devotion and suffering of former auxiliaries of Arab or Berber origin. Noting that the recognition allowance was but one of the means by which France had recognized the self-sacrifice of former auxiliaries and the suffering they had endured, and taking account of the margin of appreciation available to the French authorities in that connection, the Court did not see any reason to conclude that it was

disproportionate to provide for an allowance reserved for former auxiliaries of Arab or Berber origin for the purposes of achieving that aim. Therefore, the difference of treatment did not lack objective and reasonable justification. Lastly, although the provisions limiting awards of the allowance to former auxiliaries who had had local-law civil status had been repealed following the decision of the Constitutional Council of 2011, the consequences of that for the future did not in any way alter the Court's conclusion regarding Mr. Montoya's situation, which had been assessed prior to that decision. Accordingly, the ECtHR ruled, there had been no violation of Article 14 taken in conjunction with Article 1 of Protocol no. 1.

We stress on the fact that the principles of proportionality, margin of appreciation, territoriality and legality had been taken into consideration when assessing this case. The fact that the French law made some distinctions and differences when creating the legal conditions for those considered being the beneficiaries of the allowance is not a legal discrimination. It is only a legal condition to be achieved by the subject of law. This is why the decision of the ECtHR found no violation of a human right; this means that the French law is in accordance with the ECHR. The purpose of the convention to harmonize the national legislations has been achieved, according to the standards provided in the convention itself. In this way national cultural relativism is combined with regional standards that protect human rights. The paradigm of specificity helps to integrate regionally in a harmonious legislative standard.

On the other side of the Atlantic, in the U.S.A., international relations have often raised challenges for the American system of federalism, which divides sovereignty between the federal and state governments. Under the U.S. Constitution the power to enter into treaties with foreign governments is reserved exclusively to the federal government and federalism operates as a shield for the state law, in order not to be overridden by treaties, but the collision between international treaties and state governments' autonomy has continued to manifest itself in contemporary treaty practice (Sloss 2011: 467).

The United States has ratified four of the most important international human rights treaties: the Genocide Convention in 1988, the International Covenant on Civil and Political Rights (ICCPR) in 1992, and both the Torture Convention (CAT) and the

Convention to Eliminate All Forms of Racial Discrimination (CERD) in 1994, but it has also attached conditions to these treaty ratifications, in the form of reservations,[4] understandings,[5] and declarations[6] (RUDs) (Goldsmith 2005: 312, 318). Reservations are designed to reject any obligation rising above the existing law. The U.S. RUDs practice is similar to the one of other liberal democracies, including European liberal democracies, which take reservations to important human rights treaties, decline to make these treaties domestically enforceable, and show a preference for local and regional human rights norms and institutions over international ones. For example, in the case of the most important and complete human rights treaty, the ICCPR, the U.S. consented to almost all of its provisions, but took reservations to four of them: the limitations on capital punishment, the prohibition on hate speech and war propaganda, the rule that a convicted criminal can take advantage of post-conviction sentence reductions, and the prohibition on treating juveniles as adults. The United States made clear its understanding that certain provisions were not more serious than similar rules under the U.S. Constitution.

Even though several rights contained in the ICCPR (the right of self determination, the rights of aliens against expulsion, and the right of ethnic and other minorities to enjoy their own culture, religion, and language) have no counterpart in the European Convention on Human Rights and its Protocols, the EU and EU Member States have adopted reservations and declarations to the ICCPR, which result in an under-enforcement of ICCPR norms when they conflict with EU norms or with Member State laws. In this way, European States engage in practices similar to the U.S. and reject full incorporation of ICCPR norms, but the EU established a supranational human rights system through regional international law mechanisms rather than through domestic constitutional reform.

The United States has also attached declarations to all of the major human rights treaties except the Genocide Convention. The declaration which makes human rights

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[4] Reservations are defined as "acts of non-consent to particular treaty terms".

[5] Understandings are defined as "interpretive statements that clarify or elaborate the meaning of particular treaty terms as understood by the consenting State".

[6] Declarations are defined as "statements of purpose, policy, or position related to matters raised by the treaty in question but not altering or limiting any of its provisions".

treaties non-self-executing sustains that human rights treaties are not enforceable by domestic courts unless and until the political branches act to make them so, by implementing international human rights obligations into domestic law whenever domestic law fails to satisfy these obligations. Liberal democracies have mature, organic legal protections of human rights under domestic and regional systems that would be jeopardized by the incorporation of international law which would require reinterpretation of every domestic civil and political right; on the other hand, without accommodations of international norms to local conditions and traditions, there is little reason to believe that the people in liberal democracies – at least in the United States - would accept such norms as legitimate. In the past years, the U.S. legal and political culture has become more and more aware of the limitations of judicial control of human rights progress, and of the importance to resolve fundamental moral issues such as the death penalty, abortion, homosexual rights and discrimination. The U.S. human rights system developed within domestic law. Its details reflect unique American historical and legal traditions and experiences, including the tradition of a written Constitution and judicial review, the centrality of slavery and its redress in the Civil War, the post-war Amendments, the civil rights revolutions of the twentieth century, and the continuing importance of federalism.

Europe's approach to human rights law is based on entirely different historical and cultural traditions. The European system has been influenced by the catastrophes of World Wars I and II, culminating in the horrors of the Holocaust. The desire for human rights improvement, combined with an absence of confidence in domestic institutions to achieve this aim and a positive attitude toward transnational institutions, led Europeans to establish a human rights system at the regional level in combination with other elements of regional integration (Goldsmith 2005: 311-327).

The U.S. government has invoked constitutional concerns when considering the depth of its relations with international organizations and tribunals. Rather than arising from federalism, these concerns are grounded in the U.S. Constitution's principle of separation of powers. U.S. courts have long held that the powers of federal government cannot be delegated in ways different from those required by the U.S. Constitution unless certain conditions are met. This 'no delegation' principle has restrained U.S. participation

in international organizations to prevent delegating excessive power (Sloss 2011: 470). As regarding the International Court of Justice[7] (ICJ), the United States has invoked the so-called self-judging reservation, or the Connally Reservation. This reservation allows states to avoid the court's jurisdiction previously accepted under the Optional Clause if they decide not to respond to a particular suit. It is commonly exercised when a state determines that a particular dispute is of domestic rather than international character, and thus domestic jurisdiction applies (*West's Encyclopedia of American Law* 2005).

In *Medellin v. Texas*[8] 552 U.S. 491, in 2008, the U.S. Supreme Court declined to order Texas to comply with a judgment of the International Court of Justice. Thus, the Court confirmed that its doubts about the enforcement of treaties to limit government action extended not only to actions of the federal government but also to those of the States (Sloss 2011: 594). The past decade has brought further retreat from the direct application of treaties (Sloss 2011: 605).

The judicial power of the United States is vested in one Supreme Court, which sits at the top of the federal court system. The Constitution, in Article VI, established itself to be "the Supreme law of the land" and the Supreme Court, functioning as a legal body, was to be its most important interpreter. The Supreme Court defines the authority and powers of the national government, states and cities, and the nature of individual rights.[9] It leads the Judicial branch of the Federal government, interprets the Constitution, interprets law, evaluates the constitutionality of challenged laws, settles disputes between the states, and

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[7] ICJ is the main judicial tribunal of the United Nations, of which all member states are parties. It is often informally referred to as the World Court. The ICJ was established in 1946 by the United Nations. Many states have accepted the court's jurisdiction under the Optional Clause.

[8] *552 U.S. 491*, 128 *S. Ct.* 1346, 170 L. *Ed.* 2d 190 (*2008*).

[9] Examples of individual rights are freedom of speech and the right to privacy, which protect citizens from the abuses of government authority. They are provided in the Bill of Rights, US Constitution and extended by the decision making power of the US Supreme Court when establishing a judicial precedent.

hears cases involving the constitution and federal laws on appeal.[10] If a party loses in the circuit court of appeals, the last place to go is to the Supreme Court of the United States, often called the court of last resort. As with the courts of appeals, the Supreme Court's job is to make sure the courts below did not make any major errors in a case. The U.S. Supreme Court does not only hear appeals from the federal courts, but also hears appeals from the state judicial systems. If a case that reaches a state supreme court involves federal laws or rights, the losing party can ask the U.S. Supreme Court to review the decision of the state supreme court (Brannen 2005: 371). Therefore, the Supreme Court of the United States has become a powerful institution over the years and America's ongoing Constitutional Convention (Brannen 2005: 370).

The first ten amendments to the U.S. Constitution contain the Constitution's statement of civil liberties in the Bill of Rights. These amendments were conceived to protect the individual against the government. At first they were applied only to the federal government (Hall 2004: 94), then to the local level based on the incorporation doctrine. When constitutional law experts refer to 'incorporation', they are referring to the process by which the Supreme Court extended the Bill of Rights to state and local governments and thereby gave individuals true rights against the government. The Fourteenth Amendment, ratified in 1868, declares that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States". Based on it, the Court ruled that these 'privileges' were distinctly national rights. In the twentieth century, the fundamental rights set out in the Bill of Rights were said to be 'incorporated' in or embodied by the notion of "due process of law." In time, nearly all the rights mentioned in the Bill of Rights were applied to the states, with few exceptions: the Third Amendment's guarantee against having soldiers "quartered in any house"; the Fifth Amendment's statement that persons can be held to answer for a serious crime only on "indictment of a Grand Jury"; the Seventh Amendment's assertion that the "right to trial by jury shall be preserved" in civil suits. In 2008, the Second Amendment's right to "keep and bear arms"

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[10]   http://wiki.answers.com/Q/What_are_the_responsibilities_and_duties_of_the_US_Supreme_Court (accessed on 30.01.2014).

was interpreted for the first time as giving individuals the right to have a gun at home (Savage 2010).

The Supreme Court jurisprudence shows how the Supreme Court interprets the law in ways that conform to the U.S. Constitution and decides whether the federal and state laws uphold it.[11] It is also known as the process to decide the constitutionality of laws. It has the power of judicial review – the right to review and, if necessary, set aside acts of Congress, the President, and those of state governments, including state courts and legislatures, when they are inconsistent with the constitution. This power is exercised through judicial independence – the concept that the Court is free and that its actions are controlled by principles of law rather than politics and judicial sovereignty – the idea that what the justices say about the Constitution is final and has to be respected and obeyed (Hall 2003), which is also an independent legal principle. The most notable of its characteristics is its power of judicial review, the power to review and nullify state and federal laws that collide with the Constitution (Savage 2010: 5). The implicit justification for this judicial role lies in the Supremacy Clause, Article VI, section 2, in the U.S. Constitution (Savage 2010: 93). Judicial review is also its most controversial power, because justices can nullify the decisions of government bodies that are democratically elected.

The great majority of legal disputes in American courts are addressed in the separate state courts system established in each of the 50 states. Most state courts, like the federal judiciary, have trial courts of general jurisdiction, intermediate appellate courts, and a state supreme court. State supreme courts have also the power to review the constitutionality of their own legislation.

The Supreme Court has a role of policy maker which derives from the fact that it interprets the law. Public policy issues come before the Court in the form of legal disputes that must be resolved. An excellent example may be found in the area of racial equality. In the late 1880s many states enacted laws requiring the separation of African-Americans and whites in public facilities. In 1890, for instance, Louisiana enacted a law requiring separate

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[11] http://www.wisegeek.com/what-is-supreme-court-jurisprudence.htm (accessed on 30.01.2014).

but equal railroad accommodations for African-Americans and whites. A challenge came two years later. Homer Plessy, who was one-eighth black, protested against the Louisiana law by refusing to move from a seat in the white car of a train traveling from New Orleans to Covington, Louisiana. Arrested and charged with violating the statute, Plessy claimed that the law was unconstitutional. The U.S. Supreme Court, in *Plessy v. Ferguson*[12] 163 U.S. 537 (1896), upheld the Louisiana statute. Thus, the Court established the "separate-but equal" policy that reigned for about 60 years. During this period many states required that the races sit in different areas of buses, trains, terminals, and theaters, use different restrooms, and drink from different water fountains. African-Americans were sometimes excluded from restaurants and public libraries. Perhaps most important, African-American students often had to attend inferior schools. Separation of races in public schools was contested in the famous case *Brown v. Board of Education* 347 U.S. 483 in 1954. Parents of African-American school children claimed that state laws requiring or permitting segregation deprived them of equal protection of laws under the Fourteenth Amendment. The Supreme Court ruled that separate educational facilities were unequal and, therefore, segregation would constitute a denial of equal protection. In the Brown decision, the Court established a policy of desegregated public schools (*Outline of the U.S. Legal System* 2004: 27). These two policies have been established when the Supreme Court decided the constitutionality of the laws adopted at the state level. It made use of standards of the time and referred implicitly to the mentality of people at the time when the decisions have been adopted, according to the U.S. Bill of Rights.

The Equal Protection Clause is a provision of the Fourteenth Amendment to the U.S. Constitution that prohibits certain forms of discrimination (Lewis 2007: 395). One of the philosophical foundations of American democracy is the idea that all individuals are equal before the law. The Equal Protection Clause, as a constitutional and federal standard, prohibits states from denying any person or class of persons the same protection and rights that the law extends to other persons or classes of persons. In the modern era, the Equal Protection Clause has been invoked successfully to challenge discrimination against racial

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[12] 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (*1896*).

and ethnic minorities, as well as discrimination against women, the poor, illegitimate children, the mentally retarded/feeble minded, illegal aliens, and, most recently, gay men and lesbians. The Supreme Court has used the Equal Protection Clause to examine carefully any state law or practice that discriminates among groups in their enjoyment of fundamental rights (Stephens Jr. 2008: 453).

The decisions of the Supreme Court have dramatically changed life in the United States (Wagner 2007: 91). In *Santa Clara Pueblo v. Martinez*[13] 436 U.S. 49 (1978), the U.S. Supreme Court ruled that tribal councils had the power to make and enforce rules governing tribal membership. Moreover, the Supreme Court ruled in 1978 that tribes are self-governing nations and not racial groups. Membership was determined not by race, but by identity and allegiance. Many tribal councils realized the case gave them almost unlimited power to restrict membership, and they could use their power to force people to leave for a variety of political, personal and financial reasons. Tribal expulsions may seem unfair, but those affected are barred from getting help from the legal system outside the reservation and the federal government has been hesitant to get involved in tribal internal affairs (Stark 2013). Therefore, determining its own membership is a characteristic of a tribe's sovereignty.

Sonia Lomeli et. al. v. Robert Kelly et. al. (No. 2013-CI-APL-002) is a recent case concerning the Nooksack Tribal Council which voted to expel 306 members because they did not meet membership requirements.[14] The Nooksack Indian Tribe, based in Deming, Whatcom County (U.S.A.), has about 2,000 members. The expulsion of its 306 members might have got a legal stimulus from the Santa Clara Pueblo case.[15] As separate sovereigns

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[13] 436 U.S. 49, 72, 98 S. Ct. 1670, 56 L.Ed.2d 106 (1978).

[14] Enrolled members must have appeared on the 1942 tribal census, received an original 1942 tribal land allotment, or be descendants of someone who met either of those conditions.

[15] In the 1978 Santa Clara Pueblo case, two women challenged a tribal rule that accepted the membership of children of male tribe members who married outside the tribe. Children of female members who did the same were not eligible. Despite the obvious sex discrimination of such a rule, the majority opinion held that the tribe had the authority to make that rule. The court's ruling denied tribal members equal protection under the laws.

pre-existing the Constitution, tribes have been regarded as unconstrained by those constitutional provisions limiting federal or state authority and their members were blocked from making civil rights claims against their own governments in federal courts. On December 20, 2012, Tribal Council Chairman Robert Kelly called a "special meeting" pursuant to Article II, Section 3, of the Bylaws of the Nooksack Indian Tribe. The topic to be discussed at this special meeting was the enrollment application for Terry St. Germain's children. Enrollment Officer Roy Bailey attended this special meeting and testified that Mr. St. Germain's children were ineligible for enrollment - according to the Nooksack Tribal Enrollment Office - having "incomplete files" and "missing documents". Not only did they lack any documents or files that would support the St. Germain children, but supporting documents and files were "missing" from over three hundred currently enrolled Nooksack's files.

The 306 members designated for disenrollment are all descendants of Annie George, who was a full-blooded Nooksack. Her children married Filipinos and moved to migrant-worker communities in Washington. Tensions within the tribe have existed for decades. The 306 members of the Rabang, Rapada and Narte-Gladstone families said they were enrolled in the 1980s, about a decade after the tribe became federally recognized. The group alleged its disenrollment was racially motivated because of their Filipino ancestry. The tribe has a long history of intermarriage with Filipinos. Members of the tribal council denied that the disenrollment process was because of race or politics; they said it was unfair to their community to allow these people to remain members in the absence of any proof (Cornwell 2013). The plaintiffs filed suit in the Nooksack Tribal Court on March 13, 2013. They requested the Tribal Court to stop members of the Nooksack Tribal Council from conducting disenrollment proceedings against them. The court had to decide whether the disenrollment process violates the Nooksack Constitution. Attorney Gabriel Galanda, representing the 2,000-member Nooksack Indian Tribe, raised a variety of arguments challenging the legality of the expulsion by Tribal Chairman Bob Kelly and his supporters on the tribal council. But the tribe's attorneys argued that the tribe, as a sovereign government, was legally immune from lawsuits in the case. Galanda argued that his clients were not getting their constitutional right to due process before they would face loss of

tribal membership including valuable medical and housing benefits, as well as hunting and fishing rights.

Tribal officials presented evidence that the 306 did not descend from anyone listed on a 1942 tribal census that was the key factor for valid tribal ancestry under Nooksack membership rules (Kelly 2013). Also, the tribal council took additional steps that could make it more difficult for disenrolled people to get back into the tribe. In June, tribal members voted on a council-proposed amendment to the tribal constitution, striking a provision that gave enrollment eligibility to anyone with one-fourth Indian blood and any degree of Nooksack tribal ancestry. Some of the 306 Nooksacks facing loss of membership relied upon that provision to some degree (Stark 2013). The tribal council also took the decision to deny payment of annual back-to-school stipends of $275 to children who faced expulsion from the tribe (Stark 2013). On August 6, the court dismissed the group's suit. In her ruling dismissing the case, Nooksack Tribal Court Chief Judge Raquel Montoya-Lewis cited the 1978 U.S. Supreme Court ruling in *Santa Clara Pueblo v. Martinez*. Upon close analysis of the facts and the Nooksack law, the Court found that the defendants acted within the authority granted to them by the Nooksack Constitution. Therefore, the sovereign immunity of the tribe extends to them as tribal officials and the court lacks jurisdiction over them and the actions that have given rise to the suit. The defendants have not violated Nooksack law. Rather, the Tribal Council has fulfilled its responsibility to enforce Nooksack enrollment and Constitutional law in the best interest of the Tribe. The disenrollment process facing the 306 is not yet complete. Tribal law gives each one the right to a hearing before the tribal council that earlier passed the resolution proposing to disenroll them. They will have a chance to present the council with evidence that they qualify for membership. But no such hearings have yet been scheduled.

On August 12, 2013, the plaintiffs filed suit in the Nooksack tribal Court of Appeals because the decision of the Trial Court should be reversed on the grounds that the Trial Court erred by holding that appellees did not violate the Nooksack Constitution. Appellees refused to hold constitutionally mandated meetings of the Nooksack Tribal Council and the Nooksack People, initiated disenrollment proceedings in violation of Nooksack law, deprived appellants of the due process of law, and violated the Equal

Protection clause of the Indian Civil Rights Act (1968) as incorporated into the Nooksack Constitution. The expulsion process is now on hold pending review by the tribal court of appeals. If finalized, the Nooksack action will be the largest tribal disenrollment in Washington state history.[16] If tribal leaders use sovereign powers against their own people, the principle of tribal sovereignty should be attenuated and changed by new court rulings or acts of Congress. However, courts seem content to point to the 1978 Supreme Court ruling and stay out of tribal membership disputes.

Legal immunity of sovereign states and tribes, extended to their officials, does not necessarily mean the lack of responsibility in cases of legal abuses. The judicial review power of the courts has the task to assess the legality, constitutionality of the laws and the enactments of it, when abuses have been committed by the officials of different branches of government. They are legally responsible for the performance of their duties and this responsibility is not just political or moral in its nature. It is a legal responsibility to fulfill the duty according to the legal provision and not to abuse the power entrusted in you. If responsibility does not exist *de facto*, the whole reason of the judicial review to establish the constitutionality of the laws and their consistency with the supreme law of the land is futile. If, on any ground, like the legal immunity of the government and native tribes, or as a matter of fact, the legal conditions prescribed as mandatory to be fulfilled in order for the subject of law to enjoy a certain legal status and its benefits that are prescribed in the law are de *facto* discrimination, that kind of abuses should be eliminated by the court. If the Supreme Court or the ECHR decide as final arbiters and the abuse has not been confirmed, it does not necessarily mean that the abuse is not there. It might mean that the court does not want to address the problem for some political reasons. The cases presented, even if they are decided in accordance with the general mentality of the people at the time of the decision, contain some judicial methods to exclude certain categories of persons (Bender and Braveman 1995: 138-140). The legal grounds of those decisions are lawful and have just motivations as long as exclusion, discrimination and inequalities are sanctioned and justice is served. Have these goals been achieved by the courts in the above-mentioned

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[16] http://www.buffalopost.net (accessed on 20.02.2014).

cases? Have the executive and the judiciary applied the legal provisions in the benefit of the individuals by sanctioning the abuses or they performed their duties as branches of government without checking and penalizing the pair?

To conclude with, we can make this assessment referring to constitutional courts: some cases that go before them (Supreme Court of the U.S., ECtHR) include injustices that seem to have affected the defendant's constitutional rights. It is expected that they would give justice to the defendant. However, they cannot administer justice to individuals because their exclusive responsibility is to interpret the U.S. Constitution or ECHR and decide whether the state and federal laws uphold it. Constitutional interpretation involves a complex process because a constitutional case presents not only legal issues but also issues of public policy. Sometimes courts interpret the law differently or the law differs depending where in the country a case arises. This situation requires a balance between law and politics. The likelihood of constitutional conflicts increases as the European countries and United States face invitations to join more elaborate and intrusive international treaties.

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HOW THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP IS 'SOLD' TO THE GENERAL PUBLIC

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Abstract. *Free trade has stronger support from economists than form general public. In order to increase public support for free trade agreements, politicians have the incentive to take in account the level of economic education of the median elector. In this process, politicians influence general public's level of education. Defending good policies with flawed arguments and concession to popular economic prejudices can have results on the short run, but increases on the long run the difficulty to adopt sound policies. It appears that the debate concerning Transatlantic Trade and Investment Partnership represents a case study for this storyline.*

Keywords: Free trade, Economic education, Economic integration, TTIP.

1. Introduction

Economists have been defending free trade at least since Adam Smith's *Wealth of Nations*, if not since the French physiocrats (Quesnay and Turgot). Free trade is considered preferable to protectionism by economists as diverse and ideologically opposed, as Marx, Keynes and Hayek, even if their approaches, explanations and justifications are different. This consensus (or at least a convergence of views) has been attained after centuries of debates, after dismantling protectionist theories, arguments or exceptions to the general rule. However, economists did a relatively poor job in convincing people outside their profession that free trade would be preferable to protectionism for society, consumers and all producers, excepting those with vested interests in the 'protected sector'. Indeed, the consensus is significantly higher among economists than among 'the general public' to which protectionism means to privilege some sectors, some companies, or some individuals at the expense of everybody else. Over and over again, when the 'general

public' acts as the median voter, they fall in the same old trap denounced almost two centuries ago by Frédéric Bastiat, by deciding according to 'what is seen', while ignoring 'what is not seen' (Bastiat 1850/2001: 187-239). Countless policies are adopted because their benefits are 'seen' (on short term and applicable to a specific group), even if they are lower than their total costs, mostly 'unseen' (on long term and spread across the entire society).

Therefore, it is not surprising that any project of free trade agreement generates opposition from heterogenic and surprising coalitions: from representatives of protected industries (employers and employees who want to reduce competition) to consumers' associations convinced that, somehow, a larger diversity of products is against consumers' interests. This was the case of several free trade agreements, such as the treaty between the British and French empires (1860),[17] NAFTA (1994), or, more recently, TPP (2015) and the Transatlantic Trade and Investment Partnership (TTIP) debates.

Economists have their responsibility in the lack of popular support for free trade agreements, but political deciders have their own as well. Indeed, for reasons explained by economists,[18] politicians are not always considering themselves constrained by economic theories, but rather by electoral realities. Policies with concentrated benefits and dispersed costs have a higher chance to be promoted and enforced. Afterwards, it is easier to organize an opposition against the abolition of privileges generated by a specific policy than the support in favor of a process that could be beneficial to the rest of the population. In democratic societies, the quality (efficiency, fairness, sustainability) of economic policies depends highly of the economic education of the median voter. Politicians take into account electors' understanding of economics when they elaborate their political platforms. At the same time, the quality of the political debates influences the way the

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[17] The treaty was not actually a free trade one: it merely caped tariffs at 30%. It was signed almost a century after the publication of Smith's work and after more than two decades of economic education efforts by Cobden and his Anti-Corn Laws League (founded in 1838). It is worth mentioning that, in Britain, the process took place through public and parliamentary debates and, in France, by government decree.

[18] Especially followers of the 'Public School' approach of politics, resumed by one of its founders as 'politics without romance' (Buchanan 1979).

general public understands social, political and economic problems. In other words, politicians (and mass media) have a contribution to the economic (or, to the anti-economic) education of the general public, with consequences on the adoption of future policies. Therefore, it is relevant to reflect upon how a certain policy is presented and defended by its promoters and how it is criticized by its opponents.

Following a brief presentation of the TTIP current state and background (section 2) and of one of the most important initiative against it (section 3), the remaining of the present study analyzes the EU 'official' arguments in favor of the TTIP, as they are synthesized in a document elaborated for the general public (section 4).

2. Background and current state of TTIP

On February 13, 2013, President Obama announced his intention to negotiate the TTIP.[19] There were some reasons to expect an easier process than similar trade talks.[20] Among them, the optimist could mention that the USA and the EU were already important trade partners, with negligible level of tariffs in many sectors, with similar (high) level of development (income) and, therefore, a similar (high) level of concern for health, security and environmental issues. Some even dared to hope for a clear-cut deal in about one year. Almost three years and eleven negotiation rounds later, the expected deadline for the TTIP signatures is still one year ahead. Former pessimists – who pose today as realists – remind the reasons of their doubts. First of all, as it happens too often, free trade talks and treaties are not as much about free trade as about exemptions to free trade. Second, although

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[19] "To boost American exports, support American jobs, and level the playing field in the growing markets of Asia, we intend to complete negotiations on a Trans-Pacific Partnership. And tonight, I am announcing that we will launch talks on a comprehensive Transatlantic Trade and Investment Partnership with the European Union – because trade that is free and fair across the Atlantic supports millions of good-paying American jobs" (Obama 2013).

[20] For example, the Trans-Pacific Partnership, a trade agreement concluded on October 5th, 2015 between twelve countries, took seven years of negotiations. The North-American Free Trade Agreement came into force less than four years after the start of the tripartite negotiations, and in about eight years after the start of the US-Canada talks on this subject.

allowing for exemptions seems to be a good (political) strategy to reduce opposition to a free trade deal, it is an open invitation for all the privileged groups of interest to lobby for the status-quo. The result is often either an empty agreement, or a failure to conclude it at all.

The European authorities are opposed to GMO and ISDS and are favoring a strong protection of geographic indications and privacy of personal data. Surprisingly, they are also in favor of the liberalization of financial services beyond what is accepted by the US authorities. The EU would also prefer a liberalization of the US energy exports. USA and EU have a different approach on the regulatory process, which raises doubts about any significant progress towards harmonization. Also, it is worth mentioning that agriculture is left outside the TTIP. It means that billions of dollars (about 20 in USA) and Euros (about 50 in EU) will be spent every year in order to keep higher prices, completely disconnected from the world market in a sector representing less than 3% of the GDP and less than 5% of the population or employment in these two economic areas.

3. Critics of TTIP

According to the most recent *Eurobarometer* (no. 83, Spring 2015), EU public opinion is favorable to a free trade agreement between EU and USA (56% for, 28% against), but the support is slightly lower than half a year before (56% for, 25% against, in Autumn 2014) (European Commission 2015). Despite the significant support suggested by the poll, when an initiative against the TTIP and CETA[21] collects over three million signatures, it deserves attention. According to the organizers, these treaties should not be signed and not even negotiated "because they include several critical issues such as investor-state dispute settlement and rules on regulatory cooperation that pose a threat to democracy and the rule of law. We want to prevent lowering of standards concerning employment, social, environmental, privacy and consumers and the deregulation of public

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[21] Comprehensive Economic and Trade Agreement, a trade agreement currently negotiated between Canada and EU.

services (such as water) and cultural assets in non-transparent negotiations" (Stop TTIP 2014).

It is not clear why the fact that the states (governments) should be submitted to some general rules is against the rule of law. It is not clear why governments' unlimited power to regulate does not represent a threat to the rule of law. The topic belongs mostly to the field of political philosophy, but it concerns also economists who have acknowledged the importance of institutions since the beginnings of their discipline until today (North 1990 and 1993). This is true regardless of the starting point: Aristotle and Adam Smith mentioned property rights and other 'rules of the game' as determinant factors in explaining economic phenomena. Economists and historians underline the importance of institutional stability (or predictability) and the undesirable consequences of 'regime uncertainty' (Higgs 1997). An implicit assumption is that higher standards are always preferable, which means that there is no tradeoff in increasing or keeping high standards. Usually, the absence of tradeoffs is a sign of a flawed (incomplete) economic reasoning.

Another opponents' assumption is that deregulation of public services and cultural assets represents an undesirable outcome.[22] This idea is not generally accepted by economic professionals. For example, air transportation and telecommunication used to be considered – even by some 'mainstream' economists – as a 'natural monopoly', a 'strategic sector', etc. (i.e., a special case which made it a 'public service' in need of special protection or regulation). A couple of decades after their deregulation and privatization, it turned out that this process was tremendously beneficial to consumers, to the economies in general and to the respective sectors in special, and even to public finances (e.g., income for privatization and licenses auctions replaced former subsidies). With rare exemptions (Pan Am), the process benefited even to the former monopolies, which became efficient and profitable, in sharp contrast with previous years of subsidies addiction. A fundamental question in economic analysis is 'as compared to what?'. Therefore, the economists' professional curiosity is stimulated but not satisfied by the final remark that "the European

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[22] The fact that this process takes place in a non-transparent way is an aggravating circumstance, not the cause of their opposition.

Initiative supports an alternative trade and investment policy in the EU". Would this alternative be more, or less free? More, or less regulated? More favorable to individual initiative, or more collectively controlled?

The Directorate-General for Trade (GDT) of the European Commission defends its position in favor of the TTIP (GTD 2015). The structure of the booklet follows that of the future treaty: 24 chapters, regrouped in 3 parts (Market access, Regulatory cooperation, and Rules). What are the economic theories that are justificatory for the official position? Are these theories consensual or controversial among economists? Are there some relevant economic theories ignored by the official argumentation?

4. The EU official defense of the TTIP economics

The most important economic TTIP controversies concern the centuries old debate free trade vs. protectionism (4.1.) and regulation's source and role in economic activities (4.2.).

4.1. Free trade v. Protectionism

Economics and economists consider free trade a preferable alternative to protectionism. Few are the topics where the consensus among economists is higher (Coughlin 2002). And few are the topics where the gap between economists and the general public is higher (Blendon et al. 1997). For example, according to a recent poll, 63% of the U.S. public believes that "trade restrictions are necessary to protect domestic industries", while only 30% think that "free trade must be allowed, even if domestic industries are hurt by foreign competition" (*New York Times* & *CBS News*, cited by Public Citizens 2015). The GDT explains repeatedly that TTIP is necessary "to make it easier and fairer to export, import and invest" (GDT 2015: 6). For an economist, it is important to mention that a free (or 'freer') trade is the optimal policy for a society, both in exports and imports. By doing so, GDT takes position against a widely accepted 'economic superstition' by the general public, political deciders, mass media and, unfortunately, by some economists.

This superstition has a long history, which goes back to the 15th century and beyond. It was shared and promoted by many thinkers concerned about economics, conventionally regrouped in a heterogeneous category labeled 'the mercantilists'. Indeed, 'the mercantile system' denounced by Adam Smith privileged exports over imports, considering that the main objective of foreign trade should always be a trade balance surplus, at least globally, if not with each individual country. The source of the error – confusing gold/money with wealth – is the same in contemporary mercantilist positions: from policies that 'stimulate' export industries (i.e., export subsidies, currency depreciations, Exim banks, etc.) to hidden protectionist measures, all are accompanied by mass-media complaints about 'deteriorating trade balance' when referring to increased deficits. Economists are not explaining convincingly enough that, actually, imports are preferable – goods and services needed by importing country's citizens, who prefer them instead of exported goods – and exports are mere the price paid for those imports. Economists are not taking every opportunity to clarify that a trade balance surplus is not necessarily good for 'their' economy because exporting forever, without asking foreign goods in exchange for exports, is equivalent to sending gifts abroad. Similarly, when a foreign country subsidizes its exports (directly or indirectly, via currency manipulations), it is the equivalent of a partial gift from abroad. Economists could more often explain that it is confusing to name these policies 'aggressive' and assimilate them to acts of war. They could even show the logical contradiction of those who ask simultaneously for surplus in trade balance and net capital inflows.[23] Therefore, GDT is contributing to a much needed economic education each time it mentions in the same sentence imports and exports, without suggesting any (economic) superiority of one over the other.

This neutral treatment of exports and imports is found, for example, in the body text of Chapter 1.3. (Public procurements), which mentions TTIP's advantages for companies in general (not only for European ones). However, the opening paragraph

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[23] These are not extreme or marginal ideas, shared by 'free market fundamentalists' or 'libertarian ideologues'. They are explained in detail and simple language by Paul Krugman (1996), a Nobel laureate and mainstream economist rather favorable to governments' interventionism.

mentions only the objective of enabling "EU firms to: bid for a larger share of the products and services that US public authorities buy; compete with US firms on the same terms" (GDT 2015: 15). A similar neutral approach is adopted in chapter 1.4. (Rules of origins), Chapter 2.12. (Vehicles), and Chapter 3.3. (Customs and trade facilitation). Chapter 2.9. (Pesticides) starts in a balanced way ("with TTIP, we want to […] make EU-US trade easier"), but three examples illustrate only how this treaty would help the EU exporting companies, without any explicit mention of imports' advantages. Chapter 3.4. (Small and medium enterprises) alternates the neutral approach ("sell to or import from the US", "export, import and invest") with references to exports, but not to imports. It mentions an existing initiative – a free online helpdesk for firms wanting to export to Europe – and the intention to create a similar one for the European SME, and help them "to find all the information they need to export to, import from, or invest in the USA". Other chapters present an obvious bias in favor of exports. TTIP is presented as advantageous for EU firms - who will have an easier access to the US market - at least three times more frequently than the benefits for European consumers.

GDT's defense of free trade is weakened even more by allowing explicitly a long list of exemptions from the general rule. By doing so, GDT underestimates the fact that exemptions are 'contagious' (i.e., an open invitation to lobby for keeping and extending them). According to Chapter 1.1. (Market access), the goal is to remove as fast as possible custom duties and other barriers to trade, but it admits potential exemptions. "Most tariffs will be gone on day one of the agreement because doing so will have few negative effects. Where removing EU customs duties could immediately pose difficulties for EU firms, we want to agree on a longer phase-out period to allow firms to adapt. Where they would still face problems, even with longer phase-out periods, we would only partially open our market". Chapter 1.2. (Services) adds a non-exhaustive list of 'sensitive sectors' to be protected: TV, radio and films, public health and education, social services, water distribution (GDT 2015: 14).

This approach presents some risks because it allows an unknown number of exemptions and unknown period of transition. Some companies in protected sectors are therefore offered the choice between adapting to the more intense competition and making

efforts to be on the list of exempted sectors, to be allowed a longer adapting period. In other words, at least in some sectors, resources will be diverted from enhancing competitiveness and customer satisfaction to lobbying in order to keep privileges as long and intact as possible. This is not a general problem because the average tariff between US and EU is already at a very low level (less than 2%), which means that it will not get the attention of consumers or many industries. Obviously, the incentive to lobby for maintaining a 1-5% tariff protection is not very strong, but it is not negligible in sectors with low margins, like raw materials. The highest the privilege, the highest is the incentive to 'fight' for keeping it. If we take the same example as GDT (e.g., clothes and shoes), it is easy to anticipate that a tariff of 30% constitutes a strong incentive to lobby for maintaining this special treatment. It is also easy to anticipate that the same old protectionist arguments will be used in order to convince experts, political deciders and public opinion that the 'general interest' is well defended by keeping a privilege for a specific sector. The privilege accorded by EU negotiators to one sector can be used by their US homologues as a reason to distribute privileges to American industries, multiplying inefficiencies and even jeopardizing the TTIP.

4.2. Regulation: Harmonization or Competition?

Answering to a widespread and legitimate concern, GDT wants to reinsure the general public that TTIP will not result in lower standards for goods, services, health, environment, jobs, data protection, etc. It expresses at least nine times its intention to keep high or strict standards or level of protections.[24] GDT makes it clear at least ten times that it will not change (lower) the level of protection (security) in TTIP, or in any other trade agreement.[25] This means that security standards are mentioned on average once in every two pages of the document.

This approach could be a good way to respond to one of the aforementioned criticism of the TTIP, as formulated by the European Initiative against it. However, the

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[24] GDT 2015. It is mentioned at least once, on pages 6, 8, 13, 21, 25, 26, 31 and 36.

[25] GDT 2015. This is mentioned at least once, on pages 18, 20, 22, 23, 24, 26, 27, 30, 33 and 46.

GDT document is perfectible in at least four areas. First, it does not challenge in any way the idea that higher standards are always and undoubtedly better (4.2.1.). Second, the document does not explain in a convincingly way why European standards are preferable (stricter?) than American ones (4.2.2.). Third, the mutual recognition of norms as a potential solution to non-tariff barriers of trade is virtually absent from the document (4.2.3.). Fourth, positive effects of regulatory competition are not even mentioned (4.2.4.).

4.2.1. Higher standards are always better?

GDT considers it a postulate. However, economic analysis cannot accept it because this would be equivalent to the absence of tradeoffs (costs), an unconceivable situation in the real world. Tradeoffs are present in any human decision, even when we do not acknowledge or accept it, and even when decisions concern the most valuable or invaluable 'goods', like human life. The tradeoff can involve the risk of losing our life any time we take the plane, when we decide to buy a more or less secure car, a second hand or a new one, or in regard to the quality of the tires and the frequency we change them. If we do not (always) buy the most expansive (secure) tires, if we do not change them every day, we make a tradeoff: we accept a higher risk (lower standards) in exchange of lower costs (money). In democracies, the ignorance concerning the inevitability of tradeoffs and their consequences increases the demand for policies that are more costly than expected and accepted by the very electorate who voted for them.

4.2.2. Are European standards better?

A not very careful reader could think that GDT's answer to that question is affirmative because it reminds over twenty times that the EU high standards will not be lowered, abandoned, modified, or even negotiated. A more careful reader would remark that the document mentions (only once) that "it is not true that EU rules are always stricter" (GDT 2015: 22) and that "both [EU and USA] provide a high level of consumer safety" (28). Therefore, he could wonder why not accepting each other's products and norms.

4.2.3. What about mutual recognition of norms?

The development of a European 'common market' was facilitated by the mutual recognition of norms. It is surprising that mutual recognition of norms is virtually ignored by the GDT document. Actually, the expression 'mutual recognition' appears only once and concerns not EU and US norms in general, but a very specific topic: the care instruction symbols for clothes (GDT 2015: 33). There is no mention of the EU-US Mutual Recognition Agreement of 1998. It concerned six industrial sectors and the intention was – like TTIP - to reduce non-tariff trade barriers. Almost twenty years later, the results appear to be lower than initial expectations. Despite their rather pessimistic tone, according to Pelkmans and Correia de Brito (2015), there are some useful lessons for TTIP negotiations.

4.2.4. Regulatory competition

Regulatory competition exists when individuals (companies, consumers, citizens) can chose between alternative regulatory regimes without facing excessive costs. In a globalised world, there is a choice between jurisdictions (companies can delocalize at least partially, and citizens can emigrate), but this choice is often limited by high costs (monetary and non-monetary, like adaptation costs associated with emigration). A stronger regulatory competition occurs in a system where companies, customers, citizens, etc. can choose between alternative regulatory regimes in the same economic area. This occurs, as an example of vertical competition, in the USA banking system, where banks can be chartered by Federal or local (state) authorities. The horizontal regulatory competition takes place between jurisdictions situated at the same political and administrative levels: between US or EU states, between regions or cantons, and, to a lesser extent, even between municipalities, if they have real possibilities to differentiate themselves through regulations and taxes. Regulatory competition is higher in federal states (or in decentralized free trade areas) compared to the centralized ones and it is positively correlated with cultural homogeneity.

The European Union faces a relatively high diversity of regulations at the national level and this situation has been considered, since its beginnings, incompatible with the path towards 'an ever closer union'. The privileged strategy was regulatory harmonization,

by Treaties, Recommendations, Directives and Regulations, all transposed in national legislation. Only when this process conflicted with other objectives (like the creation of a common market), the solution of regulatory competition was accepted (via the mutual recognition of norms), as a transitory agreement in limited areas.

Many economists tend to favor regulatory competition (with some caveats) over regulatory harmonization (monopoly). The reasoning is the following. Prosperity crucially depends on institutions, understood as a set of rules followed by the members of society (North 1990). Because of the complexity of social interactions and knowledge fragmentation (Hayek 1945), it is difficult to anticipate in detail all the consequences of a specific rule, although economics – as the science of unintended consequences – can help to make 'pattern predictions'. The availability of alternative set of rules allow for (limited) experiments, followed by a selection of 'good' rules, or by 'exit, voice or loyalty' (Hirschman 1970). Competition is a discovery procedure (Hayek 1968) that operates in the field of institutions. Political and religious fragmentation in Europe after the fall of the Roman Empire[26] – the absence of the monopoly of political and religious power – helped people from this continent to discover difficultly, almost by accident, the virtues of a limited government and individual liberty as political values and, as a consequence and economic counterpart, the prosperity brought by capitalism. Undoubtedly, there are costs associated with regulatory competition, but they are high only when compared with an ideal regulatory monopoly. A realistic approach of the political and regulatory process (Buchanan and Tullock 1962; Buchanan and Brennan 1980) will suggest that competition is preferable for consumers and citizens, especially when considering the fact that regulatory authorities can be 'captured' by the industry they are supposed to control (Stigler 1971).

The US Constitution tried to prevent power concentration at the federal level (especially through Amendments IX and X). Despite that, most of public spending and regulation is originated at the federal level, contrary to the situation that prevailed less than a century ago. Not only the EU founding treaties do not have similar 'anti-concentration'

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[26] Contrasting with more centralized societies, like the Chinese Empire (Landes 1998).

provisions, but they explicitly aim at more centralized decision processes. This means that the European (political) integration process could jeopardize the very source of the continent's prosperity: institutional innovation through regulatory competition.

The choice between EU and US norms can be left to politicians, experts, lobbies, or to the general public. In many fields, this could be achieved easily, by an appropriate labeling, which would indicate clearly (for example, with the corresponding flag) if the product respects EU or US norms (or both). Those who fear that TTIP will bring below standard products, from the 'wrong' side of the Atlantic, will be able to avoid them easily. More important, they will be able to protect (or over-protect) themselves, without limiting the choice of the people who believe that if something is good enough for 326 million Americans, it can be at least tested by any volunteer from the 508 million Europeans (and vice-versa).

5. Conclusion

By promoting TTIP, GDT is undoubtedly a partisan of free (or freer) trade policy, but not as a matter of principle. When defending its position, it does not expose protectionist flaws and contradictions. Up to a certain point, it is understandable because this is mere a document defending an economic treaty and not a treatise of economics. More disturbing is the recurrent bias in favor of exports, mentioned as TTIP's most important gain for companies. This bias is not compensated by the presence of some neutral presentations of easier exports *and* imports, as benefits for companies and consumers. It is likely that, to a non-economist, free trade in general and TTIP in particular will be perceived as a concession to foreigners (US) and as a favor to companies rather than an opportunity to consumers.

By allowing for exemptions and longer transition periods, GDT reduces potential opposition to the TTIP from some economic sectors. Maybe it considers that this is a small price that must be paid in order to reach the deal. Maybe some economists will consider that it is important to make any step forward towards a freer trade across the Atlantic (and in the world in general). In this cost-benefit analysis, it is worth mentioning a specific cost that can be easily underestimated. From the economic education of the general public

standpoint, admitting exemptions to the free trade general rule represents a validation of protectionist superstitions. Enforcing the protectionist bias in the general public will increase the difficulty to adopt sound (free) trade policies in the future.

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CRISIS COMMUNICATION. A TRANSATLANTIC PERSPECTIVE

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Abstract. *An integrative framework for any crisis management strategy includes a crisis communication plan since the role of communication during a crisis is vital. Effective crisis communication management is structured on several stages (that must be strongly linked with the specific needs of the citizens) that will be developed in the present study, alongside with a practical approach of the most common institutional procedures. The theoretical background will be continued with a short analysis on the crisis communication of two of the most dramatic and challenging crisis – the "9/11" terrorist attacks from US and the 'Charlie Hebdo' case, also known as 'the French 9/11'.*

Keywords: Crisis communication, Crisis management, 9/11, Charlie Hebdo.

1. Introduction

Any efficient managerial approach includes a comprehensive communication strategy, both internal (addressing the institution) and external (the media communication plan targeting stake holders, media institutions and the community at large). The present study begins with a theoretical background presenting the management of communication within the public administration sector, and then reviews some main features of media industry; finally, it addresses the issue of effective crisis management with a highlight on the crisis communication strategies and techniques. The case study investigates the crisis communication management of the terrorist attacks from New York City, known as the

'9/11 crisis' - perhaps the most dramatic media spectacle in history (Kellner 2007) - and the 2015 terrorist attack from Charlie Hebdo in Paris, France.

The present study starts with a theoretical frame regarding certain perspectives on media communication and crisis communication. Further, the present research will use *the case study method*. We have gathered data from different sources (media, scientific literature, and official reports, that we have linked to the contextual conditions) related to the dramatic terrorist attacks from September 2001 in the United States of America, and in 2015 in Paris, at Charlie Hebdo newsroom.

2. Crisis Communication. Specific Techniques and Strategies

As explained by Timothy Coombs in his volume *Ongoing Crisis Communication: Planning, Managing and Responding*, crisis management is a challenge any organization may face and one that many fail. Public expectations during a crisis have become more and more demanding. First, citizens need accurate and complete information regarding the causes, damages and possible effects of the crisis; second, they definitely expect functioning systems within very short time. Therefore, for an efficient management plan for crisis situations, each public institution must include the detailed strategy for media communication. Coombs even considers that "crisis communication is the life blood of crisis management; when crisis communication is ineffective, so is the crisis management effort" (2015). Other authors highlight that all crises involve effective communication (Ulmer, Sellnow and Seeger 2015: 32).

But, what is a crisis in terms of public communication? Definitions and explanations provided by authors like Timothy Coombs, Ian Mitroff, Cristina Coman, Dorin Graber, David Zerman, Hans Peter Peters, Robert Ulmer, Timothy Sellnow and Matthew Seeger are referential when it comes to sketching a brief theoretical perspective. "Crises and disasters are, by definition, abnormal, dynamic, and unpredictable events", as Seeger puts it (Cmeciu; Coman; Pătruţ and Teodoraşcu 2015: 42-56). According to Coombs, "a crisis can violate the expectations that stakeholders hold about how organizations should act" and "news media should be included within the external

stakeholder network of the organizations' crisis knowledge map" (Cmeciu, Coman, Pătruţ and Teodoraşcu 2015: 42-56).

Crisis can be defined as an unexpected situation, which calls into question the organization's responsibility towards the public and which threatens its ability to continue the usual operations (Coman 2004). Crises may include natural disasters (like the Nepal earthquake, or the New Orleans floods), terrorist attacks (like the 9/11 events in the United States of America in 2001, or the recent attack at Charlie Hebdo in France, 2015), political scandals (the Monica Lewinsky case, for example) and other situations. As for the crisis typologies, Cristina Coman (2004) mentions that they are structured according to different *causes* (internal or external; structural or contextual), the *time element* (slow or sudden), their *dimension* (profound or superficial), the level they operate (strategic crisis or identity crisis) and their *consequences* (they could have an impact on the personnel, on the stakeholders, and/ or on the public opinion).

Regarding the media coverage of crisis, Doris Graber explains that in these cases media function as instruments of "selection, modeling and transmission" of information to the public, often and especially in the first moments of crisis, and also including the messages of official representatives of political and administrative institutions. The audiences (citizens) depend almost entirely on media in terms of information or messages transmitted by the authorities. In many instances, these messages may be of vital importance. Being able to collect and transmit large amounts of information, media is the only institution adequately equipped from a technical standpoint (Graber 1997). During crisis, audience is massive and loyal, since people need to find quick, accurate and complete answers that could somehow provide the initial explanations and interpretations of the situation. According to Graber, media coverage of crisis usually follows a standard frame that includes several stages. In the *first stage*, the crisis is being announced; this phase is characterized by abundance of information, confirmed and unconfirmed, often without an official attribution. Breaking news programs and special editions in radio and television programs occur as well. This first stage is characterized by an extraordinary speed in transmitting the information and the immediate reaction of the audience is to

focus exclusively on the covered crisis. In the *second stage*, media try to explain the crisis; in this context, many details and impressive amounts of information are being transmitted to the audiences. The *third stage* (that usually overlaps over the first two stages) is consistent with the timeframe when media put the crisis into a larger background, presenting different perspectives and possible consequences.

As mentioned by Herrero and Pratt (Coman 2004), managers may apply three possible crisis communication strategies: one possible strategy includes a rapid reaction in order to prevent the crisis (i.e., *the crisis killing strategy*). A second one may be *the crisis control strategy*, in which efforts are focused on preventing the acceleration of the crisis and controlling the communication between the institution and its audiences. *The crisis laissez-faire strategy* is consistent with the non-intervention strategy when managers consider that time will solve things out. Ian Mitroff divides crisis management into five phases: 1) "Signal detection: new crisis warning signs should be identified and acted upon to prevent a crisis; 2) Probing and prevention: organization members search known crisis risk factors and work to reduce their potential for harm; 3) Damage containment: a crisis hits and organization members try to prevent the damage from spreading into uncontaminated parts of the organization or its environment; 4) Recovery: organization members work to return to normal business operations as soon as possible; 5) Learning: organization members review and critique their crisis management efforts, thereby adding to the organization's memory" (Coombs 2015: 8). Together with Paul Shrivastava and Firdaus Udwadia, Ian Mitroff described the essential phases of crisis management in the following basic model:

A Model of Crisis Management
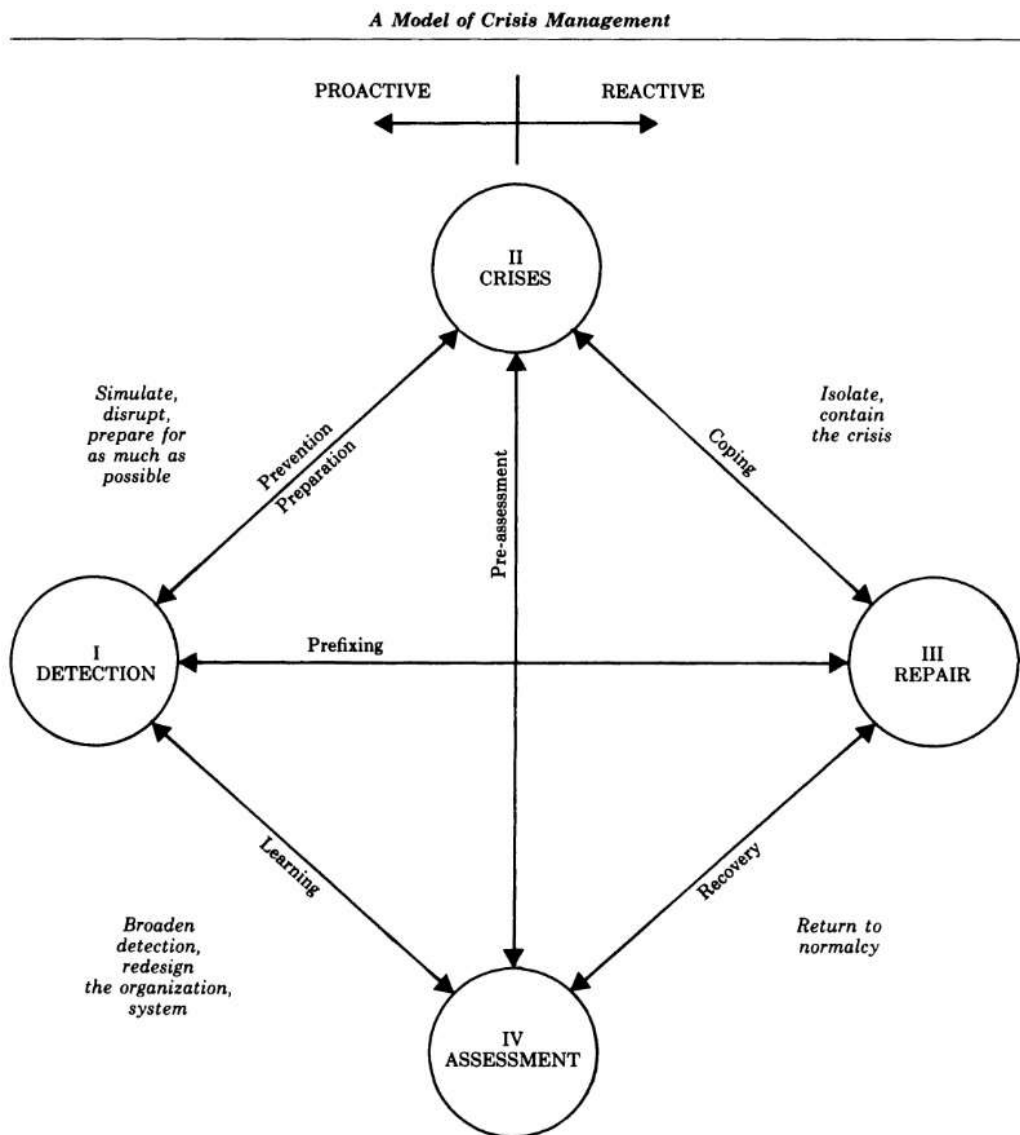
(Mitroff, Shrivastava and Udwadia 1987: 283-292)

Finally, in their work *Effective Crisis Communication: Moving From Crisis to Opportunity,* Robert Ulmer, Timothy Sellnow and Matthew Seeger explain that, for the past twenty years, communication researchers have developed theoretical approaches for responding to organizational crises and further elaborated a synthesis of the main relevant theories of crisis communication as indicated in the following table:

| Table 2.3 | Theories of Crisis Communication |

Theory	Characteristics
Corporate Apologia	<u>Emphasizes</u> managing the threat created by a persuasive attack against an organization <u>Focuses</u> on an apology for wrongdoing <u>Features</u> communication strategies for the apology
Image Repair Theory	<u>Emphasizes</u> repairing the threat to the image of the accused <u>Focuses</u> on accounting for organizational actions that caused the crisis <u>Features</u> communication strategies for managing the account
Situational Crisis Communication Theory	<u>Emphasizes</u> lowering crisis attributions of responsibility for the crisis <u>Focuses</u> on determining communication based on the type of crisis and the organization's reputational assets <u>Features</u> flow-chart decision-making process for using crisis response strategies to influence stakeholder perceptions or attributions of responsibility
Organizational Renewal Theory	<u>Emphasizes</u> opportunities to learn and grow from the crisis <u>Focuses</u> on creating opportunities inherent to crisis events <u>Features</u> broad leadership and organizational communication guidelines, emphasizing strong positive values, an optimistic forward-looking perspective, and learning to overcome the crisis

(Ulmer, Sellnow and Seeger 2014: 27)

3. Transatlantic Perspectives on Crisis Communication: '*9/11*' and '*Charlie Hebdo*'

3.1. '9/11': „It was the day when the unreal became the unimaginable" (The New York Times)

According to the 9/11 Commission Report, the US Congress and media called little attention to terrorism in 2000 and in the first eight months previous to the attack. Bin Ladin and al Qaeda, or even terrorism were not an important topic in the 2000 presidential campaign (The 9/11 Commission Report 2004: 341). On September 11, 2001, United States of America was attacked by terrorists that caused the death of over 3,000 people

during the attacks in New York City and Washington, D.C. In the *Opening Remarks to the United Nations General Assembly, Special Session on Terrorism*, delivered on October 1, 2001, in New York, Rudy Giuliani stated that „it was an attack on the very idea of a free, inclusive, and civil society. It was a direct assault on the founding principles of the United Nations itself".

From the chronology of 9/11, we mention the most important elements from the New York public administration scene. At 8:45 a.m.: a hijacked passenger jet, American Airlines Flight 11, out of Boston, Massachusetts, crashes into the north tower of the World Trade Center, tearing a gaping hole in the building and setting it afire; 9:03 a.m.: a second hijacked airliner, United Airlines Flight 175 from Boston, crashes into the south tower of the World Trade Center and explodes. Both buildings are burning; 11:02 a.m.: New York City Mayor Rudolph Giuliani urges New Yorkers to stay at home and orders an evacuation of the area south of Canal Street; 2:49 p.m.: at a news conference, Giuliani says that subway and bus service are partially restored in New York City. Asked about the number of people killed, Giuliani says, "I don't think we want to speculate about that - more than any of us can bear."; 3:55 p.m.: Giuliani says the number of critically injured in New York City is up to 200 with 2,100 total injuries reported; 6:10 p.m.: Giuliani urges New Yorkers to stay home on Wednesday if they can; 9:57 p.m.: Giuliani says New York City schools will be closed on Wednesday and no more volunteers are needed for Tuesday evening's rescue efforts. He says there is hope that there are still people alive in rubble. He also says that power is out on the westside of Manhattan and that health department tests show there are no airborne chemical agents about which to worry (www.cnn.com, "September 11: Chronology of Terror").

As stated before, media coverage of crisis is often reaching enormous audiences. Later media studies have indicated that the images of the dramatic events from 2001 in the United States have been watched over and over again all over the world. In his study *American Journalism, on, before, and after September 11* (2003), James Carey mentions that at 8:51 a.m., at the usual morning news program *Good Morning America* at ABC, anchor Diane Sawyer said: „we just got a report that some sort of explosion has occurred at

World Trade Center... that a plane may have hit one of the towers"; starting with that moment, the television was on air, commercial-free, covering the story for 91 consecutive hours. Media coverage of 9/11 was considered to be objective taking into consideration the dimension of the dramatic events. However, "the ethic of objectivity has long been seen, at least within the United States, as the single best ideal for the operation of media in modern democracy" (Stuart 2010: 26). Other researchers consider that "the performance of ABC was typical of the major American television outlets – calm, poised, systematic, without panic or speculation, thorough and factual, the general coverage being done in a tone of calm assurance that checked any incipient panic" (Carey 2003: 73).

The 9/11 events were "perhaps the most dramatic media spectacle in history; the 9/11 spectacle of terror was a global media event", because "attacking the heart of U.S. symbolic power in the World Trade Center in the New York financial district and the symbol of U.S. military power the Pentagon, the terror spectacle took over live global media for days to come, becoming an emblematic event in media history, whereby McLuhan's 'global village' became a site of horror, death, and destruction" (Kellner 2007). On the other hand, the "fact that the disaster occurred in New York, where the resource of the nation's communication system are concentrated, contributed to the success of the coverage" (Carey 2003: 73).

During the crisis communication of 9/11, the public administrator of New York City, Rudolph Giuliani, became *the hero* that the city, the media institutions and the country at large were looking for: "in the first days of the crisis, the mayor of the New York City, Rudolph Giuliani, arose as a city and national hero – he acted with dignity, calm, tireless, energy and deep humanity" (Schudson 2003: 36). In a *Times* news analysis from September 2001, Mayor Giuliani was described as "acting at once as chief operating officer of the city and city psychologist, the mayor has almost unilaterally managed to create the sense that the city and by its proxy, the nation, are scratching their way back to normality" (Schudson 2003: 37).

What does it take to become a successful public administrator? As for the answer, we looked at the skills of an effective administrator as described by Robert Katz - the so

called 'three-skill approach' - from where we selected the definitions considered appropriate for the present case study: 1)"Technical skill implies an understanding of, and proficiency in, a specific kind of activity, particularly one involving methods, processes, procedures, or techniques; it also involves specialized knowledge in the use of the tools and techniques of the specific discipline; 2) Human skill is the executive's ability to work effectively as a group member and to build cooperative effort within the team he leads. This skill is primarily concerned with working with people; 3) Conceptual skill involves the ability to see the enterprise as a whole and recognizing how the various functions of the organization depend on one another; and it extends to visualizing the relationship of the individual business to the industry, the community, and the political, social, and economic forces of the nation as a whole" (Katz 1974).

Regarding the issue of shaping the leadership environment, the capability of chief executives to respond to crisis situations is considered to be a source of strength (Milakovich and Gordon 2013: 235). That capacity is reinforced by public expectations that a chief executive will effectively coordinate and direct governmental actions during crises including serious outbreaks of violence. Again, the very example is the New York City Mayor Rudolph Giuliani who "attempted to lead a coordinated intergovernmental response to the horrors of the terrorist attacks" from 9/11 (Milakovich and Gordon 2013: 235). Crisis is often the situation where leaders are formed (Bennis 2009: 146). And the example provided by Bennis is Mayor Giuliani from the New York City Hall in New York: the tragedy of 9/11 showed Giuliani to be a genuine leader, one who was able to communicate his vision of a brave, resilient New York in ways that comforted and inspired the devastated city. Furthermore, Warren Bennis considers that the New York City Mayor was a constant and tireless presence, and that the chaos of that crisis allowed him to become, in the words of the media, 'Churchill in a baseball cap'. New York City Mayor Giuliani so resurrected his career as spokesman for the public good that even his enemies praised him (Carey 2003: 76).

According to an article dedicated to crisis communications, published in *Harvard Business Review*, New York City Mayor Rudolph Giuliani's behavior during the rescue

operation from 9/11, starting with the very first minutes after the attack, has soon reached 'legendary status'. He conducted many press conferences in the vicinity of the destroyed towers, had press declarations from all media, broadcasted interviews, attended many funerals and memorial services and succeeded to maintain what seemed like an ubiquitous presence in the city. Finally, "his visibility, combined with his decisiveness, candor, and compassion, lifted the spirits of all New Yorkers - indeed, of all Americans" (Argenti 2002). On many occasions, Mayor Giuliani referred to the main principles of leadership in numerous public conferences organized in university auditoriums, strategies that he largely explained in his 2002 book *Leadership*. Briefly, Giuliani considers that there are several main principles of leadership: having a set of beliefs; courage, as the firefighters who went into the World Trade Center had; being relentlessly prepared; teamwork (i.e., work with effective people) and being a good communicator which means to be able to talk to people.

3.2. Charlie Hebdo, 'The French 9/11'

In January 2015, Paris, in France, was the scene of another dramatic attacks. First, there was the Islamist attack on Charlie Hebdo magazine newsroom; others occured during the following days. In the end, 17 people died in Paris, during the January attacks. From the timeline of the days of the attack, according to *The Guardian*, we mention the most important details: on Wednesday, the 7th of January, at 11.30 a.m., Paris local time, two gunmen - Chérif Kouachi and his brother Saïd - storm the offices of the Charlie Hebdo magazine in Paris. They shoot dead several people including the magazine's editor and some of its cartoonists. Five minutes later, they emerge on to the street and get into their car to escape. In total 12 people are killed in the attacks. At midday, the gunmen hijack another vehicle, calmly forcing the driver out, telling him: "If the media ask you anything, tell them it's al-Qaida in Yemen". They drive off from Paris's 19th arrondissement in a grey Clio, while Paris is put on the highest state of alert. In the following morning, a policewoman is being shot dead in a suburb of Paris, in a series of coordinated attacks. On Friday 9, January, the French Police is haunting the running gunmen, as they are trying to escape. At 1.30 p.m., there are the first reports that an armed man has taken a hostage in a

Jewish grocery store at Porte de Vincennes in Paris. Just before 5 p.m., shots and explosions are heard at the siege at Dammartin-en-Goële, and heavily-armed counter-terror officers are seen moving in. The Charlie Hebdo gunmen are reported to have been killed and the hostage freed. At 5.15 p.m., loud bangs are heard at the site of the supermarket siege, with pictures showing some hostages being led out by police. Shortly afterwards, reports say the hostage takers at Dammartin-en-Goële, Chérif and Saïd Kouachi, were killed in the assault, as was the supermarket hostage taker, named in reports as Amedy Coulibaly. Finally, at 7 p.m., the French President, François Hollande, confirms that four hostages were killed and four wounded in a supermarket in Paris (http://www.theguardian.com/world/2015/jan/09/-sp-charlie-hebdo-timeline-events).

Why the Charlie Hebdo newsroom? Because the magazine published a series of satirical (some would consider them controversial) cartoons of the prophet Muhammad. Charlie Hebdo is considered to be somewhat unique in France, with an *absurd* type of humor; the magazine employs rather brutal satire against dogma, hypocrisy and hysteria, regardless of its source (http://www.understandingcharliehebdo.com/). And why was this tragedy called the French '9/11'? A French professor at L'Institut d'Etudes Politiques de Paris, Dominique Moisi, considers that, despite the major differences distancing the two attacks (regarding the number of victims and the nature of the attackers), the attacks in Paris and in New York share the same essence: both cities incarnate a similar universal dream; both are metaphors for light and for freedom and they both belong to the world not only to their respective countries (http://www.project-syndicate.org). Immediately after the attacks at Charlie Hebdo newsroom, a symbolic slogan, created by the French art director Joachim Roncin, was disseminated rapidly around the world – the '*Je suis Charlie*' logo. In essence, it represented freedom of speech and freedom of the press and people embraced it in order to express their solidarity for the most important freedom, i.e., the freedom of expression. The slogan, firstly spread via Twitter, has become one of the most popular news hashtags during the first days after the attack. Some have even noticed the similarity to the phrase 'Tonight, we are all Americans' ('Ce soir, nous sommes tous Américains'),

produced by the French media during the US 9/11 terrorist attacks (see the declaration of the French newspaper *Le Monde*).

When it comes to the crisis communication related to the January attacks from Paris, the distinguished political figure in this case was the President of France, François Hollande. During his speeches, he first expressed his sympathy with the victims ('First, I would like to express my wholehearted solidarity with the families, the victims, and the injured'), and later he insisted on solidarity and mobilization "for the values of democracy, freedom and pluralism that are so important to us all, and which Europe, in a way, represents" (Hollande 2015). In the first statement, in front of the offices of Charlie Hebdo, the French President declared that "no one should think that he can act in France in a way that is contrary to the principles of the Republic, and attack the very spirit of the Republic: a newspaper. My thoughts today are with the victims" (Hollande 2015). During the first days after the attack, President François Hollande delivered a very categorical, powerful and motivating speech for a nation in crisis: "Finally, we must mobilize our efforts. We must be able to respond to attacks by force, when we have no choice, but also through solidarity). We must show just how effective solidarity is. We are a free nation that does not give in to pressure, that is not afraid, because we have an ideal that is greater than we are and we are able to defend it wherever peace is threatened. I promise you that we will emerge even stronger from this ordeal" (Hollande 2015).

Media around the world appreciated that the French President Francois Hollande managed with 'no mistake' the dramatic week during the January attacks in Paris. He was present, at the scene, from the very beginning of the events and comforted the French people. It has been considered that, during the attacks, Hollande has transformed himself from the most unpopular leader of modern France into the 'father of the nation' and a statesman who brought world leaders together to link arms and march through Paris to defy extremism (http://www.financialexpress.com). In the outlook of international media, he was a President that comforted and united the French nation, personally directing the management of crisis and triggering an outpouring of international support, which culminated in a mass rally in Paris attended by close to two million people, including the

leaders of more than 40 countries (http://www.france24.com). Furthermore, in a survey released on January 19, IFOP Polling Institute (The French Institute of Public Opinion) indicated that French voters' approval of their president has jumped by a staggering 21% (from 19% to 40%), in the highest leap in polling history (http://www.france24.com). With measured aplomb, he incarnated the traditional figure of the 'father of the nation', said Jerome Fourquet, director of opinion and corporate strategies at the IFOP Polling Institute (http://www.financialexpress.com). Therefore, from a crisis communication perspective, the French President Francois Hollande knew which were the right words, which was the right time and which were the right actions.

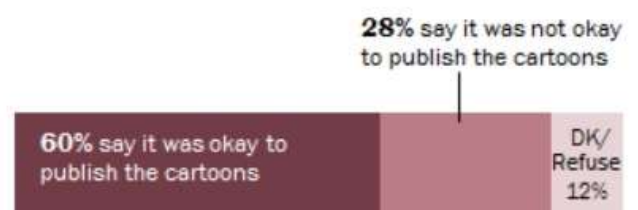## 4. The Opinion of Americans on the Charlie Hebdo Case

In a recent poll, conducted in January 2015, among a national sample of 1,003 adults living in the United States, Pew Research Center investigated what Americans believed regarding the Charlie Hebdo attack. We consider the opinion poll relevant, as it measures the beliefs of American people almost 14 years after the 9/11 terrorist attacks from New York and Washington. The main findings of the report show that a majority (60%) says that it was okay for Charlie Hebdo to have published cartoons that depict the Prophet Muhammad, but nearly three-in-ten (28%) do not support the magazine's decision to publish this material – saying it was not okay. The reasons Americans give for their views on the subject highlight an ongoing tension in the U.S. between the values of free expression and religious

Majority Has Heard of Hebdo Attack, Says Publishing Cartoons Depicting Prophet Muhammad Was Okay

76% of U.S. adults have heard about the attack

44% Heard a lot

32% Heard a little
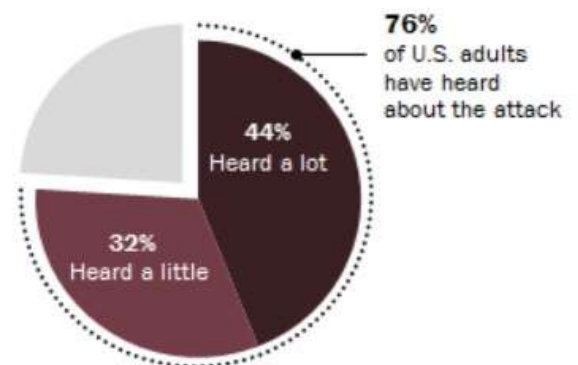
Of the 76% of U.S. adults who have heard about the attack...

28% say it was not okay to publish the cartoons

60% say it was okay to publish the cartoons

DK/ Refuse 12%

Survey conducted Jan. 22-25, 2015.

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tolerance, the researchers consider. When asked to explain their position on whether or not it was okay to publish these cartoons, a majority of those who heard about the attack and say it was okay to publish cite freedom of speech and of the press (70%) (http://www.journalism.org/2015/01/28/after-charlie-hebdo-balancing-press-freedom-and-respect-for-religion/). The above-mentioned opinion poll also checked if, in the opinion of Americans, the attack might have any kind of impact on the religious content U.S. news organizations are willing to publish. According to the results of the survey, overall, about half (48%) of those who have heard about the attack say that there will be no effect on U.S. news organizations in their willingness to publish or air things that may offend some people's religious beliefs. On the other hand, about a quarter (24%) feels U.S. news organizations will be less willing to publish this type of content.

4. Conclusions and further research

The public's expectations during a crisis have become more and more demanding in terms of access to accurate information and a functioning administration, according to the cited literature review. Media coverage of crisis and the news consumption during these situations are reaching very high rates, since in spite of the new digital technology that allows almost everyone to communicate at a global scale in real time, media institutions are still the only ones that have all the necessary logistics, trained human resources and skills to gather, select, verify, produce, contextualize, comment and broadcast correct and complete information. Public administration institutions have always proved to be flexible in terms of adapting and shaping their communication strategies to the new needs and formats imposed by changes in the media industry and public communication. As for the management of crisis communication during the 9/11 crisis, the New York City Mayor Rudolph Giuliani has proved to be a genuine leader for his community and has turned into the hero that an entire nation has been looking for within very short time. Besides other principles in crisis management, Giuliani understood very well the necessity to communicate publicly since the entire world was tuned in and watching. During the Charlie Hebdo events, President of France, François Hollande, has

immediately assumed the role of a firm leader and managed the crisis in an exemplary manner, according to most international media, eventually gathering the support of the most important world leaders in the fight against terrorism. And, even if the two cases reveal many significant differences, the attacks in Paris, New York and Washington share the same essence: they were planned against the powerful symbolism of these cities embedded in the occidental values.

Future studies may verify the existence of common frames in the media coverage or measure the impact of crisis on media agendas. Another possible research track could refer to the use of social media in covering the crisis. However, the management of communication during a crisis is crucial. As suggested by this study, different crises may hit anytime, most of the times unexpectedly, therefore leaders must take quick and resilient decisions.

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