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## DECLINE OF DEMOCRACY IN EAST-CENTRAL EUROPE: THE LAST DECADE AS THE LOST DECADE IN DEMOCRATIZATION

Attila ÁGH<sup>1</sup>

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*The last decade of the EU membership has been a lost decade in East-Central Europe in many ways, first of all for the young generation, which has become a lost generation to a great extent, but also for the new twin paradigm of EU as the performance democracy and the sustainable social progress. The Ten Years' Anniversary of the EU membership gives a good occasion to analyse and evaluate the performance of ECE in the EU. However, it does not give too much reason for the celebration, since it has been very controversial in the terms of economic, social and political developments. This period has to be discussed in the larger framework of systemic change (the Quarter-Century perspective), but with special regard to the EU membership period (the Ten Years perspective). This paper conceptually follows my recent paper (Ágh 2014), dealing with the general framework on NMS developments both in the Quarter-Century and Ten Years perspectives. This new paper concentrates, however, on the socio-political aspect of the Europeanization and Democratization in East-Central Europe (V4+ as Poland, Czech Republic, Slovakia, Hungary, Slovenia and Croatia). The contributors to the Bertelsmann country reports (BTI, Bertelsmann Transformation Index and SGI, Sustainable Governance Indicators) have discussed the topic of ECE democratization with its general-regional and nation-specific features within the CEPSA (Central European Political Science Association) several times. Moreover, the big international ranking institutions like the Economist Intelligence Unit and the Freedom House (and many others) have also evaluated and documented these democratic developments. They have also concluded that the ECE democracy has been in decline, especially in the last years. Thus, this analysis of Europeanization and Democratization in ECE*

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*can be based on the large documentation of these databases, and also on the cooperation of the ECE experts within the CEPISA and elsewhere.*

**Key words:** East-Central Europe; triple crisis; decline of democracy; good governance; global competitiveness.

## 1 SUCCESSES AND FAILURES OF THE ECE COUNTRIES IN THE EU

### 1.1 The European landscape and the “forgotten crisis in the East”

The EU in 2004, at the accession of the ECE countries, was rather different from the EU in 2014, when they commemorate their Ten Years’ membership. Therefore a short overview as an introduction is needed about both the new European landscape in general and the “forgotten crisis” in the East in particular, to be completed in the last part of this paper with the larger overview of the present situation in ECE. The EU has gone through several development stages that have necessitated its permanent redefinition. Under the pressure of global crisis, it has become common sense that the EU is in “crisis” or even in some extreme views, in its “final crisis”. Thus, the word “crisis” has been so inflated that there is now a fashionable saying: “crisis is just a period between two other crises”. In fact, the EU has always been in “crisis”, it comes from its “sui generis” nature of being always “in the making”, therefore the EU needs the analytical-descriptive and the normative-strategic approaches at the same time. There have recently been obviously three markedly different periods of crisis: (1) the “immobility crisis” in the nineties and early 2000s, (2) the global crisis in the late 2000s and early 2010s and (3) the “transformation crisis” in the mid-2010s. In this respect, the “crises” are the natural ways of development for the EU, especially the present transformation crisis, which demands new solutions for both institutions and policies. Therefore, the EU needs visions for further development and these visions have to be formulated in the concrete terms and programs of Strategies like the EU2020 Strategy.<sup>2</sup>

In the transformation crisis period the EU28 has become more than a “Multi-Speed” Europe, it is already a “Multi-Floor” Europe, since the different member states’ positions have become institutionalized, i.e. rather strictly arranged and somewhat even legally regulated. In the EU’s operating system there are Four “Floors” of more or less institutionalized membership positions, by taking into account the result of differentiated integration (DI) both by policy memberships and regional memberships in the EU. So, in the present stage of transformation crisis it is not enough to refer to the deep divide between the Core and Periphery in general, but it is necessary to specify them in a more detailed way as Core-1 and Core-2 as well as Periphery-1 and Periphery-2 in particular. Consequently, it is important nowadays to distinguish between the Southern and the Eastern Periphery. In the global crisis period an increasing differentiation took place both between Core-1 and Core-2 (West and North),

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<sup>2</sup> I have written a Progress Report (Ágh 2013a) on the NMS developments with a very large dataset from the leading ranking institutions. This paper continues my analysis in my latest ECPR paper (Ágh 2014) and my chapters in the latest edited volumes (Ágh 2011a; Ágh and Vass 2013; Ágh, Kaiser and Koller 2014), focusing only on the ECE countries. I rely especially on my papers about the Hungarian developments (Ágh 2011b, 2012a,b and 2013b,d). Since the democracy decline in ECE is very large topic, I have tried to give a closer analysis through the Hungarian case study as the worst-case scenario.



and between Periphery-1 and Periphery-2 (South and East). The South has in fact fallen out of Core-1 because the formal attachment to it has only generated a pseudo-convergence that has turned from an asset to a liability for the Core-1 due to the serious burden of their huge sovereign debts (see Magone 2011 and 2013).

The East has become the internal semi-periphery of Germany and Austria, so it has been closely integrated to the Core-1 by their modern production structures, but it has only produced dependent development, since these ECE countries have become internally deeply divided between the modernised and the declining parts. Thus, the crucial issue for the ECE countries is the domestic, internal social cohesion, i.e. to be closely integrated not only with the EU, but also uniting the modernised and declining parts within their own country as a whole. There has been a very uneven territorial development in ECE, so these countries have lost the territorial cohesion and have been splitting into two parts: the modernised, quickly developing part around the capital integrated with the West and the backward countryside lagging behind the EU average more and more within the EU: "Warsaw, Bratislava and Prague now have a higher GDP per capita than Vienna. (...) However, regional differences within countries widened. The rapid rise of capitals and a few other regions characterised by an efficient concentration of economic activities was not mirrored in most other regions. (...) Such divergence raises major questions about the goals and efficiency of Europe's cohesion policy as well as on regional strategies of the anniversary EU member states" (Darvas 2014, 1-2).

The deep crisis in the South is very painful for the Core, but the "forgotten crisis" of the East has just been marginally mentioned from time to time in the academic circles and international media, moreover, it has not yet been discussed properly at the EU official forums. For the previous neglect the EU is now paying the high price in the South, and the price for the neglect may be equally high later in the East. This controversial situation of the strengthening Core Europe can create a "Euro-Fortress" with some strong bastions but with long and weak walls. Therefore, the transformation crisis period demands the extension of cohesion policy serving the new Competitive-Cohesive Europe for the restoration of Integrated Europe versus Fragmented Europe. Cohesive Europe has a new meaning as a complex system of cohesive economic, political, social and cultural units in a holistic approach with complexity management. The EU needs a well-organized structure for the upward efforts in the "*policy memberships*" that enable the transitions between the levels of the policy and institutional integration in the Multi-Floor Europe in order to create a dynamic unity of diversity in the EU28. The dynamic reproduction of convergence needs some "elevators" as effective facilitating devices between the different "Floors" of the European institutional architecture to promote also the "European Social Union": "The pan-European notion of solidarity refers to upward economic convergence and cohesion on a European scale" (Vandenbroucke 2014, 5).<sup>3</sup>

In the 2000s the new twin paradigm of the "quality democracy" and "social progress" was elaborated in the EU and since then they have figured high on the EU agenda. The "Going beyond the GDP" was a programme of More Europe already in the late 2000s, with the more Competitive Europe based on the human investment as well as with more Cohesive Europe based on social progress as a "Convergence Machine" (Gill and Raiser 2011). The "widening" to

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<sup>3</sup> The Handelsblatt (2013) has pointed out that there has been a general crisis in the "East", which has been in fact a "forgotten crisis" in the EU because the EU has marginalized the ECE crisis management, focusing on many other crises.

the qualitatively new policies of the innovation triangle between the higher education, research and production has been considered the new driver of economic growth. The social progress has been a genuine European idea that can lead to the European Renewal as the ambitious vision of the EU2020 Strategy indicates that can be called Competitive-Cohesive Europe. The complex indicators of sustainable social progress have proven that the proper policy mix of the economic and social policy generates high social productivity. In the transformation crisis it has become evident that the EU can start the sustainable socio-economic growth only by embarking upon a qualitatively new way of development. The EU “must continue to develop so that it can combine successful short-term consolidation and the enhanced long-term Europe 2020 goals of inclusive growth, social cohesion and social inclusion. Or, to put it another way, what is needed is a model for the future Economic and Social Governance of the EU” (Fischer and Hoffman 2011, 8). The “quality of democracy” and “social progress” has given the new twin criteria for differentiated integration, i.e. for the new convergence versus the old divergence in both “widening” and “deepening”. Thus, the analysis of ECE in the Ten Years should be elaborated in these new terms of sustainable social progress and “quality of democracy”, contrasted with the decline in democracy, good governance and sustainability.<sup>4</sup>

The re-conceptualization of the ECE declining democracies in the *Ten Years* perspective relies on this twin conceptual device of the differentiated integration (DI), since these are the magic words or the basic terms for the analysis of the ECE countries as declining democracies with their negative-regressive differentiation. The switch from the old paradigm of the evolutionary development to this new paradigm of the controversial development leads us to a new research agenda. The main conceptual problem is that the differentiated integration has been considered from the very beginning in the mainstream academic literature in the West only as a vehicle of dealing with the “neutral” heterogeneity in the EU in the “policy” dimension (the management of socio-economic processes), and marginalising its “polity” dimension (the democratic system of institutions as the embodiment of the European values). Supposedly, DI would be just aiming at facilitating the socio-economic development (“catching up process”) by other *policy* means in ECE than in the old member states. Thus, the whole DI debate has been restricted to the “technical” policy side by neglecting the value-oriented “polity” side. In such a way, it has remained evident that the DI in ECE would not hurt the structure of the democratic European *polity* as the embodiment of the European values. However, it was a fatal mistake, even before the global crisis, not distinguishing between the *positive* and the *negative* “polity DI” (democracy dimension), and between the *progressive* and *regressive* “policy DI” (social progress dimension). After a long delay, the “polity” dimension has been just recently criticised in the top EU circles as the violation of the EU basic values in the declining ECE democracies. But the “policy” dimension even until now has not been considered properly as the missing sustainable social progress in the ECE countries, although by now it has produced a sharp decrease of human and social capacity that has been responsible for lowering the global competitiveness both for the South and the East in the EU.<sup>5</sup>

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<sup>4</sup> I will return to the twin paradigm of quality democracy and social progress when discussing the third democracy debate. Following the third debate, see the current comprehensive definition of democracy in Coppedge and Gerring (2011). I have participated in this V-Dem (Varieties of Democracy) global program by coding Hungary since 1918, see <https://vdem.net/DemoComp/en/data/analysis> (June 2014).

<sup>5</sup> I have analysed this process in a full paper (see “Differentiated Membership and Core-Periphery Divide in the EU: Negative-regressive Divergence in the New Member States”, in press, José

## 1.2 The differentiated integration and the Core-Periphery Divide in ECE

Actually, in the case of “polity DI” already the Rome Treaty stipulates that only the *democratic* European states can be members of the EU. Of course, there can be various national models in the European democracy and this variety of democracies can be taken as *positive* divergence. In this spirit, in the Copenhagen criteria before the Eastern enlargement the EU had elaborated the polity conditionality for the accession as the stable and sustainable democratic system. It had been considered evident that after the accession the ECE countries would become already democratic and would stay democratic. The issue of the *negative* divergence from the democratic system has only been raised very recently, although not only the Eastern, but – much earlier – some Southern states would also have deserved some closer inquiry in this matter. The EU has acted very restrictedly even nowadays when tackling the “polity” issues because it has “over-respected” the sovereignty of member states. It has also neglected the harmful consequences of “de-democratization” in some member states for the given member states as well as for the Union as a whole. In fact, all member states seem to have supported this low profile approach, since all of them have wanted to avoid making precedents of interfering into the internal affairs of other member states. Nevertheless, the *negative* divergence occurred already much before the global crisis and, moreover, it has become a widespread practice in ECE following the global crisis. The backsliding of democracy in the institutional structure of these member states has produced an increasing democracy gap within the EU. Still, the regular violations of the democratic European values has been so dangerous by now for the EU that this has to be stopped by all means, since the EU has to pay a high price for neglecting the negative divergence in ECE by over-respecting the principle of non-interference.

No surprise that these failures have lately been the chief motive of their assessment, since “the countries like Poland, Slovakia, Hungary and Czech Republic appeared to take a ‘populist turn’, suddenly calling into question the hitherto linear reading of democratisation: which presumed a cumulative and irreversible progression of the CEE democracies from transition to consolidation. Fast-forwarding to the present day, against the backdrop of the crisis, the incidence of threats to the EU’s democratic principles and values has increased” (Balfour and Stratulat 2012, 2). This statement means also a confrontation with the general view in EU, which considers the euro-crisis as actually the only problem for the EU. As a reflection to the recent academic literature, the EPC conclusion suggests that “Facing creeping shortcomings in the functioning of democracy in Europe is just as important as resolving the euro/economic crisis” (Stratulat and Ivan 2012, 2; see also Boulín-Ghica 2013). In general, there has been recently a very large debate on the anti-democratic tendencies or democratic regression in ECE. It has concluded that “democracy should not be taken granted” in the ECE countries, as it will be discussed later at length in this paper.<sup>6</sup>

On the other side, no doubt that because of the (increasing) heterogeneity of the EU, the “policy DI” has been necessary in the case of socio-economic

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Magone, ed.). On the current debate see Leuffen et al (2013), Ondarza (2013a and 2013b), Tekin (2012). The increasing danger of the Core-Periphery gap in the EU27 has also been discussed at length in the recently edited volumes, Ágh (2011a) and Ágh and Vass (2013). The Southern member states may be even in a worse position nowadays in social progress, see Magone (2011 and 2013).

<sup>6</sup> See first of all Demos (2013), and Scheppele (2013a, 2013b and 2014), see also the comments in Markovic (2013 and 2014), since the democracy in ECE should not be taken granted, indeed.



development. In this policy aspect there has been a *progressive* divergence for the optimal use of the specific creative human and social capacity in the given country. But more often in ECE there has also been a *regressive* divergence from the EU mainstream “social progress” as an incomplete reproduction of human capital in the ECE education systems, although an increasing level of education would have been needed for the accommodation both to the proper workings within the EU and to the ever changing external conditions. Even the *progressive* divergence of specific national developments, as a necessary vehicle or policy instrument for catching up with the mainstream development in the optimal way, has also generated a lot of problems and complications for an EU level coordination. But in the last analysis the *progressive* divergence can be helpful for the EU’s common future, given that through the transitory stages and forms it may lead to the more convergent EU. Quite to the contrary, the *regressive* divergence means in fact refusing or avoiding the necessary - institutional as well as policy - adaptation to the mainstream development in the EU and to the changing external conditions. It is poor EU structural adjustment as well as non-compliance with the EU “practical-technical” or policy-oriented membership rules. Regressive divergence results in the socio-economic backsliding with an increasing competitive gap in the given member states, since the EU as a whole moves more and more from the GDP based growth model to the social progress or the human capital and/or well-being based growth model.<sup>7</sup>

Thus, the regressive divergence is a serious violation of the EU’s competitive model as the mainstream policy development; hence it is harmful for the effective EU membership. The Copenhagen criteria stipulate not only the “democratic polity” but also the “competitive policy”, since they prescribe the capacity of the member states to withstand the competitive pressure within the EU. Obviously, these two types of the negative polity and regressive policy divergences have closely been interrelated. It is easy to point out that negative divergence produces regressive divergence and vice versa, since they are different sides of the same coin. The “half-democratic” member states are not just lagging behind quantitatively in the socio-economic development, but sliding back also qualitatively to some kind of “low performing” and poorly competitive way of development, since in ECE “the public and private spending on R&D ratio to GDP is the weakest in the EU” (Lepesant 2014, 5). So, in the spirit of Copenhagen criteria the well-performing thick democracies and the low-performing thin democracies can easily be contrasted. The Commission as the *Guardian of Treaties* has acted in many individual cases against the *regressive* policy divergence where direct EU regulations exist, but it could not go beyond this very narrow understanding of *acquis* because the strategic direction of socio-economic developments has remained in the member states’ competences to a great extent. The European Parliament as the *Guardian of Democracy* has begun to act in some cases against the *negative* polity divergence, although so far only with very small success. Altogether, the tendency of negative-regressive DI has produced the increasing peripheralization of the ECE region in both ways with the sharply decreasing weight of the ECE countries in the EU decision-making process as the DI political dimension (Vida 2010 and 2012).

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<sup>7</sup> As Gerda Falkner has pointed out, non-compliance and non-convergence have been connected in general, but the non-democratic and non-competitive models have also been connected in the Hungarian and Romanian cases in particular (Falkner 2013, 20–21; referring to my analysis in Ágh 2012a). I argue later in this paper that the ECE countries are lagging behind more in the EU2020 terms than in the traditional terms of development.

Thus, the twin approach of negative and regressive DI is vital to evaluate the ECE case in the Ten Years' perspective within the EU. Instead of simply arguing with the widespread discontent with the "democratic mess", this paper tries to go deeper to discover the long process of the socio-economic crisis that has provoked the protracted political crisis in the 2010s. The cumulative effects of this crisis have led to the present deep "rupture" of democracy in ECE. The often-analysed political history of parties and governments does not and cannot give in itself an explanation for the reasons of the present anomaly. Instead, the complex history of the ECE society has to be investigated in its socio-economic and socio-political dimensions to find an answer. For sure, the "political" history is much more attractive for the analysts than the "social" history because the political history, unlike the social history, has always been a well-researched and documented topic with easy references. Nonetheless, these routine political descriptions have proved to be insufficient - and even misleading - to discover the deeper roots of the recent deep crisis. Only a change of paradigms based on the recent democracy debates can help in switching from the narrow party-political history to the complex socio-political history. Accordingly, the main message of this paper is that the long-term process of social exclusion has led to political demobilization and later to the populist remobilization, and the missing participative democracy has opened the way to the declining democracies with low performance in the global competition. No doubt, however, that the individual national models of "pseudo-convergence" have also generated a deep divergence within the ECE region, since they have taken place in different ways country by country.

However, the main issue is that the first Ten Years of the EU membership have been so far a very Bumpy Road for the ECE with very controversial results in the catching up process in the GDP terms and with even poorer results in the EU2020 terms, although since 2009 the EU is has been developing "a European Sustainable Development Scoreboard" with Sustainable Development Indicators. Obviously, without a breakthrough in ECE towards the social progress based economic development the EU2020 as a genuine Strategy may become a failure in this region, given the fact that in ECE the social pact, decentralization and network society have been replaced more and more by state corporatism, recentralization and populist mobilization regimes. In the last years there have been many "critical elections" in ECE with the collapse of the party systems that have produced big turmoil in all walks of life, due to the high corruption and state-run mafia-type organizations with unpopular, delegitimized political elites.<sup>8</sup>

During the global crisis the ECE countries have gone through a couple of volatile, turbulent years that can be characterized by the poor crisis management due to the low capacity of governments and public institutions. Their places have been lowered in the rankings of international competitiveness, since they have lost the strategic visions. There has also been serious public dissatisfaction due to the rampant corruption in ECE and therefore the trust in the institutions and the political elite has declined rapidly in the last years, close to the last places of the country rankings globally. Altogether, the ECE countries have suffered from the structural disease in the EU because of the failure in the implementation of both the institutional-MLG "quality democracy"-based paradigm and the social progress-based

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<sup>8</sup> The assessments on the socio-economic developments of the EU membership have usually pointed out the controversial results in ECE (see GKI 2013), although there have also been optimistic analyses focusing on the quantitative GDP growth in Poland and Slovakia (CEPI 2014), neglecting the negative data in the EU2020 terms on qualitative growth (Zuleeg, 2010).

development paradigm. This failure has increased the Core – Periphery divide to a great extent from the ECE side (see appendix).<sup>9</sup>

Despite these systemic failures above, the EU documents - e.g. the Report of the European Commission on the first five years of the ECE membership (EC 2009) - have often presented the history of democratization and Europeanization in ECE overwhelmingly as a success story, or a sunny side narrative. In a similar way, the mainstream Western theories have often described the ECE transformations as basically an evolutionary process, i.e. without special regard to the increasing contrast between the formal democratization and the missing social consolidation. They have usually not given up the formalistic approach on democratization and they have not discovered either that the increasing social disintegration and fragmentation has been the main driver behind these subsequent political crises. No doubt that it is rather difficult to balance between the positive and negative features in the “democratization with social disintegration” process, but the marked socio-economic and political crisis phenomena in the latest developments require also the presentation of the shadowy side narrative.

In this paper the emphasis has been put on this negative side of the ECE membership in the EU, focusing on the socio-political history that has been less known so far, or at least it has not yet been systematically elaborated in the academic literature. It is true that there has recently been a growing literature on the “Golden Age of Populism” or the upsurge of Euroscepticism, since the analysis of the widespread populism has become a growth industry. The “populist turn” in the European political science however has also produced some exaggerations or lamentations about the “eternal East” in ECE. This paper tries to strike a balance between these two kinds of approaches, but necessarily focuses more on the emerging new tensions that have come to the surface as the cumulated deformations in the entire Quarter-Century period of controversial democratization. This is not to deny the big achievements of Democratization and Europeanization, but the main intention of this paper is to point out the controversial character of this process, in order to be able to explain the present deep malaise resulting in the increasing Euroscepticism in ECE.<sup>10</sup>

### 1.3 Three crises in ECE and three democracy debates in the EU

In 2014, after *Ten Years* of membership it is high time to evaluate the performance of the East Central European (ECE) new member states in the EU. No doubt that all ECE countries have performed “rubato”, i.e. in a rather

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<sup>9</sup> The summary of the Ten Years of ECE in the EU indicates that the transformation power of the EU was bigger in the economic terms than in political terms, since there has been a backsliding of democracy (Epstein and Jacoby 2014, 1–2, 8, 10). This topic has been analysed by Sedelmeier (2014, 106, 114–119) at length from the side of the over-concentration of power and lack of decentralization. On the usurpation of powers and the electoral manipulations, see Mudde (2014) and Scheppele (2014).

<sup>10</sup> In my recent publications I have given a large overview of the academic literature on the political history of parties and governments in ECE that I do not reproduce here. In this medical report on the infantile disease of the ECE countries I rely also on the “growth industry” in political science on the populism in ECE, see e.g. Bugaric (2008), Meseznikov et al (2008), Bútorá et al (2009), Deegan-Krause and Haughton (2009), Pappas (2012) and Plattner (2010). The academic literature on populism has focused usually on the parties, but there is no space here for the detailed analysis of parties. I have dealt with this topic in some other papers (see e.g. Ágh 2012b, 2013a and 2013c). On the complex socio-economic and political history see also Bertelsmann Reports in great details (recently Bertelsmann 2014b), including reference to the “political earthquake” in 2010 (Bertelsmann 2012b, 61).

different way. But they have shared the same historical experiences because the punctuated or dotted development of these countries has been common with the same historical turning points. Thus, it is now a good occasion to point out their common features with their common history. Against the usual conceptual stretching, as the great simplification of analysing all post-communist countries of Central and Eastern Europe (CEE) together, in the ECE analysis the “region matters” and “the common history matters” are the basic principles. The *Ten Years* of the EU membership in ECE have brought a lot of successes in the catching-up process - although mostly before the global crisis - and many failures in Europeanization and Democratization.

The common regional features have shown that the ECE countries have had their own specific political and economic cycles as well as their different political and policy learning processes in the EU, but they have also had the same features of declining democracy. Nowadays, the creative crisis in the EU has opened again the window of opportunity for ECE to “re-enter” the EU through the radical, qualitative change of their catching-up strategy. This “re-entry” demands, however, the re-conceptualization of the *Ten Years*, and even more so that of the last *Quarter-Century*, of Europeanization and Democratization. Therefore, this paper offers a holistic approach of analysing the socio-political system for the assessment of the Europeanization and Democratization in the ECE countries in the *Ten Years* period. The key issue is that that the ECE countries have gone through three subsequent crises (the triple crisis) in a very short period of time. The triple crisis has produced a heavy social price that has been responsible for the drastic “backsliding of the new democracies”. These countries underwent a transformation recession in the early nineties, and they fell in the 2000s into the post-accession crisis with the EU entry that was soon followed in the late 2000s by the global crisis. Originally, their populations reacted to the collapse of the authoritarian rule with a “revolution of high expectations”, so under the label of democracy they expected a Western welfare state “overnight”, therefore after the Quarter-Century the disappointment has been tragic.

The three democracy debates in the international political science have taken place parallel with the triple crisis in ECE. These debates are very helpful to understand the ECE developments as well, since the redefinitions of democracy mirror the radical shift of attention from the “political” to the “social” history of democratizations. Denk and Silander (2012, 26) have described these three democracy debates as organized subsequently around three “main themes” of transition, consolidation and quality of government. The *first* democracy debate took place in the nineties by describing the sharp regional differentiations in the democratization process in a rather optimistic mood. The *transition* period in the dynamic ECE democratization supposedly leads to democratic *consolidation* and brings about the homogenization of the new social system as a whole, while in the controversial Eastern democratization only semi-democratic systems emerge. Thus, the main divide was between the ECE democracies “in the making” on one side, where the present stage was only transitory and the special regional-local forms of half-democracy on the other, where “the reverse wave” produced new, semi-authoritarian regimes as in Eastern Europe (EE).<sup>11</sup>

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<sup>11</sup> There has recently been a very large literature on the stages of democracy debate (see e.g. Charron and Lapuente 2009; Linde 2009 and 2012; Merkel 2004; Moeller and Skaaning 2010). During the three debates both the number of countries and the socio-political indicators have been very much extended. The evaluation of ECE by the international ranking institutions would also need a separate analysis, this paper relies on Bertelsmann (BTI 2006, 2008, 2010, 2011, 2012a and 2012b), Economist Intelligence Unit (EIU 2010, 2011 and 2013), Freedom

The main focus in the first debate was still on the legal-formal institutionalization of democracy, in the second debate however the focus shifted to a more complex analysis of democracies with many social and political indicators. In the 2000s the evolutionary development in ECE was questioned, since consolidation was delayed. Hybrid democracy as an analytical device was used to explain this situation, since the heterogeneity of social and political transformations served as the best analytical concept in ECE for the 2000s. The famous Dahrendorf paradox applies here that the polity, economy and society of the new democracies have not been transformed in parallel or synchronous way, but they have been asynchronous transformations that have been following, and even disturbing, each other. Thus, after the deep political and economic transformations the social systemic change was first delayed in the 1990s and later failed in the 2000s. This failure generated a widespread public discontent, and its repercussions undermined the popular support for democracy to a great extent. The second-generation theories still made a vital distinction between the embedded or “deficit” democracies in ECE and the semi-authoritarian regimes or “defect” democracies in EE (Merkel 2004). Nonetheless, in a more pessimistic mood the weakening of the ECE democracy was discussed already in the larger context of the “backsliding” of the democracy in ECE (see e.g. Rupnik 2007).

The *third* democracy debate since the late 2000s has usually embraced all states in the world, and it has been basically about the “quality democracy” and social progress with a high complexity of indicators by many international ranking institutions. Sustainability with quality democracy and social progress has represented the new twin paradigm for the EU, as mentioned above. This new approach has been combined with the evaluation of global competitiveness in the individual member states. This larger debate has expressed in some ways the shared negative experiences of the ECE countries, too and it has at the same time discovered their basic weaknesses. *First*, it has become more manifest after the global crisis than ever before that the tremendous changes in ECE have not come organically from inside but arrived from outside as a tsunami or “imported crisis”. The transformation crisis originated from the collapse of the East-West confrontation in the bipolar world, the post-accession adjustment crisis was generated by the EU entry process, and finally the competitiveness crisis broke out due to the global fiscal crisis. *Second*, it is also true that there have been only half-made, controversial reactions of the ECE countries to these external challenges. The democratic transition was not properly completed, first the “anticipatory” Europeanization and later the “adaptive” Europeanization remained unfinished, so the global crisis explored the vulnerability of the ECE countries. The EU has only exerted a limited effect on these new member states because there has been a large capacity of the national administrations to modify, accommodate and neutralize the Europeanization pressure. Above all, the tradition of “far-reaching politicization” of the core executives as the main tendency has still prevailed in ECE (Bale 2008, 83–84; see this argument first in Goetz 2001). *Third*, it is not by chance that the ECE countries have produced a poor global crisis management, since in the system of the political patronage or the “new nomenclatura” (see NISPAcee) the protracted political crisis has recently produced no crisis “resilience” due to the poor governance and the fragile governments in ECE.<sup>12</sup>

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House (FH 2011a, 2011b and 2013), OECD (2011a, 2011b and 2013), Transparency International (TI 2012a and 2012b) and the World Economic Forum (WEF 2012 and 2013).

<sup>12</sup> It is clear that the political patronage has culminated in the ECE governments and it has largely contributed to the erosion of the middle class as it has been analysed by NISPAcee (Gellén 2013;



Finally, the EU has realized that the policy difficulties that have appeared on the surface in ECE have just been the signs of the much deeper political failures of democracy decline with its systemic features. In 2013, due to cumulated problems and difficulties, the EU discovered and announced that some member states regularly violated the rules and values of the EU. In July 2013 the European Parliament acting as the “Guardian of Democracy” accepted the Tavares Report (2013), which pointed out that these violations were of systemic character, i.e. they pointed to a coherent anti-democratic system created by the Hungarian government on design. This led to the idea of “Copenhagen Revisited” and to the launching of the Rule of Law Initiative. The European Commission has established a New Framework to strengthen the Rule of Law in the EU, since the “recent events in some Member States demonstrated that a lack of respect for the rule of law and, as a consequence, also for the fundamental values which the rule of law aims to protect, can become a matter of serious concern. (...) there is a systemic threat to the rule of law and, hence, to the functioning of the EU”. Whereas the infringement procedures are triggered “by individual breaches of fundamental rights”, the New Framework has been designed to address “threats to the rule of law (...) of a systemic nature” (EC 2014, 2, 5, 7).

This long overdue decision of the Commission has rightly insisted on the vital issue that not only the purely formal and procedural requirements, but also the “substantive components” of the EU regulations have to be met. In the speeches of José Barroso and Viviane Reding in the European Parliament the systemic failure and systemic threat have been the basic terms. These terms indicate that nowadays there is already a new thinking in the EU, in which “systemic” means also “strategic” as a holistic approach to the member states’ developments. It is obvious that this new “polity-paradigm” of the coherent democratic system involves also the implementation of the new “policy-paradigm” of social progress, according to which there is a need for the systemic-level convergence in the EU not only in political-judicial dimensions, but also in the economic-competitiveness and social-sustainability dimensions.

## 2 “THE HUNGARIAN RHAPSODIES”: HUNGARY AS THE WORST CASE SCENARIO IN ECE

### 2.1 Hungary turning from consolidated democracy to defective democracy

The Freedom House (FH) and the Economist Intelligence Unit (EIU) Reports have described the situation of the backsliding of democracy in ECE in general, and its worst case in Hungary in particular. No doubt that the international ranking institutions have shown similar worrying tendencies in all new democracies due to the global crisis, since the “Global backsliding in democracy has been evident for some time” (EIU 2011, 2). The titles of the Freedom House Reports and the Democracy Index of the Economist Intelligence Unit have also indicated this negative trend of declining democracies (see FH 2011a,b and FH 2013; as well as EIU 2010, 2011 and 2013). The Democracy Index 2010 of *The Economist* has pointed out that this negative trend appeared in ECE right after

the start of global crisis and caused “the largest decline in its average score” inter-regionally in democracy terms (EIU 2010, 22). The 2011 Report has described “the setbacks to democracy” in ECE in depth, and it has concluded, “Democracy is also eroded across east-central Europe. (...) the underlying fragility of east-central European political system was exposed.” This Report has emphasized that the global crisis has “reinforced a pre-existing mood of disappointment with the experience and results of the 20 year transition (...) A number of post-crisis surveys and reports point to a further decline in life satisfaction, support for markets and democracy and trust in institutions (...) it seems to reflect the exhaustion of contemporary political systems and a general unfocused disillusion, apathy and disengagement” (EIU 2011, 20).

It is not by chance that *The Economist* in a theoretical analysis of *What's gone wrong with democracy* has pointed out that the present general decline of electoral democracies has been caused by the lack of checks and balances system. The ECE countries have also experienced this democracy deficit, but first of all the Hungarians have perceived it as the “de te fabula narratur” (this story is about us): “Democracy is going through a difficult time. (...) Many nominal democracies have slid towards autocracy, maintaining the outward appearance of democracy through elections, but without the rights and institutions that are equally important aspects of a functioning democratic system. (...) Mature democracies, just the nascent ones, require appropriate checks and balances on the power of elected government” (The Economist 2014a, 2, 4, 20). In Hungary the crisis of the democracy has taken place most markedly in both aspects of democracy, i.e. in the formal democratic institutions (violating the procedural democracy with rule of law, and the checks and balances system) and in their public performance (backsliding in the country-management by 2014 to the 65<sup>th</sup> place according to the BTI 2014b, 50). Therefore, Hungary may offer itself as a worst-case scenario, even when looking back until 2010, but it is much more so, if the period the Orbán governments has also been taken into account.

The *Democracy Index 2011* has put it clearly: “Some negative trends have recently got worse. Hungary perhaps the prime example among the EU’s new member states in the region” (EIU 2011, 21). In a closer view, “In the April 2010 election, an extreme nationalist party, Jobbik, gathered almost as many votes as the former ruling Socialists. Since winning a two thirds parliamentary majority in the election, the centre-right Fidesz party has systematically been taking over the country’s previously independent institutions: the presidency, the state audit office and the media council are now all run by party placemen” (EIU 2011, 21). Accordingly, the Democracy Index in Hungary has recently fallen from year to year: 7.21 (2010) – 7.04 (2011) – 6.96 (2012) (see EIU 2013, 11).<sup>13</sup>

In the 2011 *Nations in Transit* Report (FH 2011a, 21) Hungary became already the last one from among the eight “Consolidated Democracies”. For Hungary in the seven indicators out of the eight indicators the evaluation was worse than it was in 2002, 2004 and 2009: “Hungary, however, experienced a score decline due to policies adopted by newly elected Prime Minister Viktor Orbán, leader of the right-leaning Fidesz party. He was widely criticized for pushing through legislation that will enhance state control of the press and threaten journalistic

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<sup>13</sup> Hungary fell back from the 40<sup>th</sup> place in 2008 to the 43<sup>rd</sup> place in 2010 and to the 49<sup>th</sup> place in 2011 and 2012 in the Democracy Index (EIU 2010, 2011 and 2013). The satisfaction with democracy in Hungary in 2009 was 23 per cent (well below the EU27 average of 53 per cent), and the trust in parties, government and parliament was 9,14,15 per cent respectively (EIU 2010, 20). See the entire development between 2006 and 2012 in Bertelsmann (2006, 2008, 2010, 2011, 2012a and 2012b).

freedoms" (FH 2011b, 7). Altogether, "Events in Hungary in 2010 demonstrated that the positive trajectory of democratic development cannot be taken for granted, within the new member states in particular. Prime Minister Viktor Orbán's Fidesz party used the two-thirds parliamentary majority it won in April 2010 elections to push through a number of measures that were viewed as clear challenges to the country's system of democratic accountability" (FH 2011a, 7). The Freedom House (FH) Report, *Nations in Transit (NIT) 2013* has evaluated the backsliding of democracy in the ECE states: "the most prominent example of this phenomenon may be Hungary, whose Nation in Transit rates have weakened more since EU accession than any other member state, with the largest decline in 2010 and 2011. Under the leadership of Prime Minister Viktor Orbán the conservative Fidesz party has used its parliamentary supermajority to increase political control over a number of key political institutions, most notably the judiciary and the media regulator" (FH 2013, 6).

Actually, by 2014 Hungary has become the only "defective democracy" in ECE with a long list of the "abuse of power" by the Fidesz party and its governments (Bertelsmann 2014a, 50, 52). Thus, this paper asks also about the special reasons for this Hungarian worst-case scenario, i.e. how Hungary has become from the trendsetter in the late eighties the latecomer, the worst performer from among the ECE countries by the early 2010s. The most intriguing issue in this paper is why and how a deep change took place at the 2010 elections producing the two-thirds, constitution-making majority of Fidesz that has led to the radical regression of democracy during the second Orbán government (2010–2014). The main problem in the Hungarian case is not the "parliamentary supermajority" in itself but the abuse of this majority by violating the checks and balances system, i.e. seeking "political control over a number of key political institutions". The 2011 Democracy Index Report has declared unambiguously "rule by the majority is not necessarily democratic. In a democracy majority rule must be combined with guarantees of individual human rights and the right of minorities" (EIU 2011, 29). So, there have been many political analyses about the decline of the Hungarian democracy in this Orbán government. But the main issue has remained unanswered so far: why did the voters give such a mass support in 2010 to a national-social populist party in Hungary after Quarter-Century of democratization. Why millions of Hungarians were so disillusioned, so exhausted and so desperate that they abstained at the elections or supported this "constitutional coup d'état" producing the abuse of "parliamentary supermajority" against the young democracy.

What is more, this government was re-elected in 2014, again with the two-thirds majority, although this time the electoral result was already "crafted" by the antidemocratic government. The Orbán government has concocted an illegitimate electoral system that has given to the 24 per cent of electorate a constitution-making majority with the 67 per cent of seats. It has been achieved by silencing the democratic opposition with the full control of the public media and by putting together many pieces of legal tricks into a coherent antidemocratic system favouring the Fidesz (see Mudde, 2014 and Scheppele, 2014). This paradox has also been widely raised in the international media about the Hungarian "median" voters supporting the antidemocratic tendencies in the latest elections: "Hungarians resoundingly endorsed Mr Orbán's mix of nationalist populism, state-centred economic policies and conflict with the European Union and foreign business interests" (The Economist 2014b, 1).

## 2.2 The first stage of crisis: Social disintegration and political demobilization

As it has been discussed above, there have been three subsequent socio-economic crises in ECE as the transformation, post-accession and global crises. This triple crisis can be described from both socio-economic and socio-political sides. The subsequent socio-economic crises have appeared in the political dimension as the participation crisis, the EU adjustment crisis and the global competitiveness crisis. The first crisis is the ECE transformation crisis in the nineties with social disintegration that generated widespread demobilization and missing political participation (see Tang 2000). The second is the post-accession crisis in the 2000s with deep socio-political polarization leading to the weak EU adjustment in ECE. Finally, the third is the global economic-fiscal crisis after 2008 with the decomposition of middle class and the emergence of an intergenerational underclass that has produced poor competitiveness in the global arena (GKI 2013). The triple crisis structures the historical process and, therefore, also gives the structure of this paper, dealing in the following three parts with the three stages of the Hungarian crisis in an ECE context. However, the third part analyses the *Ten Years'* general evaluations of the leading ranking institutions about the ECE region as well, although still focusing on the particular Hungarian case.<sup>14</sup>

The systemic change in Hungary was a well-elaborated political and economic project as to the formal democratization and the privatization-marketization with clear "imported" perspectives from the very beginning. But the corresponding social project was largely missing, or hardly elaborated as a long-term strategy. In fact, it was replaced with the age-old "Hungarian Dream" that was based on two vague assumptions. First, these economic and political processes would generate a strong middle class that could become a powerful chief actor of all further transformations. Second, if and when the above radical transformations will produce losers, this is just a transitory issue, since the economic recovery would almost automatically solve all social problems and reintegrate the Hungarian society. From the mid-19<sup>th</sup> century Reform Age the reintegration of society and the emergence of a Western-type middle class have been the "Leitbilder", the leading social ideas of democratization in Hungary. The Hungarian Dream failed to come true several times in history and it has not come true so far in the recent systemic change either.

In the last centuries there was a fatal split within the country between the "pre-modern" and "modern" Hungary, and each wave of modernization reproduced this split on a higher level. This social integration deficit originated from the half-modernization of the Hungarian economy in the 19<sup>th</sup>-20<sup>th</sup> centuries. As Karl Mannheim termed it in the early 20<sup>th</sup> century, Hungary, his native country represented "the synchrony of the asynchrony", i.e. the coexistence of socio-economic structures belonging to the different – "pre-modern" and "modern" - historical periods. The modernization drives were not strong enough to embrace and transform the whole country in order to "synchronize" or "homogenize" it, so the marginalized groups were not fully integrated economically and socially. The state socialism had an enforced social integration, but this artificial cohesion blew up in the privatization-

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<sup>14</sup> The Hungarian social history has been well researched and documented. It is enough to mention that the TÁRKI (Társadalomkutatási Intézet, Social Research Institute, [www.tarki.hu](http://www.tarki.hu)) since 1990 has edited its Social Report biannually (see recently Kolosi and Tóth 2008, 2010 and 2012) and most recently TÁRKI (2013). This paper relies also on the data of the Central Statistical Office (KSH) and the OECD.

marketization process. The Hungarian society became seriously disintegrated because a large part of society was low skilled and could not get a job in the competitive market economy. In addition, the weak democratic state did not develop a strategic thinking or vision to (re)integrate them. In Hungary it is still vivid historical memory that the rapid development in the late nineteenth century took place by producing a huge gap between the pre-modern and modern Hungary. The naive hope was that this time it would be different because social consolidation would come from the economic and political transformations with the assistance of the EU. The lesson of the Quarter-Century is that both assumptions have failed: the “negative” assumption about the removal of the underclass with the reintegration of society, and the “positive” assumption about the emergence of the strong new middle class.

In the *first stage*, the transformation recession resulted already in large-scale impoverishment and increasing social inequality. The *first generation of losers* was composed of those affected by the mass unemployment in the early nineties due to the privatization combined with the collapse of the old fashioned industrial society. This early process can be discussed in terms of exclusion, disempowerment, fragmentation and disintegration that were general phenomena in the new democracies in the nineties (Cox and Mason 1999; Tang 2000). Simply said, as a result of economic exclusion (large unemployment) and social fragmentation (marginalization of social strata), there was a huge contrast already in the first decade between the disempowerment of the losers and the empowerment of the winners. The *absolute* losers in the early 1990s were those who lost their jobs in the early nineties and could not come back to the world of labour because those low skilled working places, they had been employed in, disappeared forever. They stayed on the margin of the labour market, and were usually compensated by the early retirement schemes. In Hungary from about five million economically active citizens less than four million continued to work in the nineties, and in this system of structural unemployment their number nowadays is about the same.

This deep social change in the early nineties has proven to be “final” in that respect that in major outlines it has determined the social structure of Hungary for decades, although at that time it was considered to be transitory. Therefore, its catastrophic consequences did not alarm the political class, and the awareness of the danger was also very low in the public at large, since so many other vital issues came up to deal with. In the nineties the public awareness focused on the formal-procedural democratization and on the restart of economic growth. However, when both formal democratization and privatization-marketization were accomplished in the late nineties, the full realization of this “original sin” of social disintegration did not take place either. The underclass issue was “downgraded” or at least shifted to the narrow field of social policy. With the constant budget cuts the outcomes of social policy were dismal, remained on the surface as a “poverty policy” instead of a full-scale strategy of social reintegration.

Altogether, the social reintegration was just a hidden agenda, a shadow project, whereas the emergence of middle class was a more articulated political project, although both failed manifestly when the global crisis broke out. In the late 2000s the realization came that the drastic changes in the early nineties were in fact the decisive factors that determined the social structure for a long time. It turned out that, although the income gap increased very much in the nineties and decreased slightly in the 2000s, this underclass did not disappear but it still grew in size, therefore the social gap increased more and more. As a result, in



this system of structural unemployment a large part of Hungarian society fell into an intergenerational trap of missing skills in the emerging service economy. In general, the human capital was the main driver in the winner-loser dichotomy of the social structure from the very beginning, and its importance was more and more strengthened in the 2000s (Kolosi and Tóth 2008, 21, 27, 31; see also Kolosi and Tóth 2010 and 2012).

A “new poverty” emerged with many urban and rural poverty islands where the multigenerational unemployment became the rule, since the next generation inherited a socio-cultural deficit under these family circumstances and the young were brought up as virtual unemployed people. The multifaceted process of the marginalization of low skilled people produced a big social underclass below the “normal” society embracing altogether one third of population. This was a new kind of the social exclusion, not cyclical as mostly in the Western societies where the transition from the industrial society to the service society took place in a much longer period. In Hungary this process of the emergence of internationally competitive economy was fast, leaving behind a large marginalized crowd, excluded not only from the results of economic growth but also from the decent living conditions. The economic recovery began in 1997 but it was not followed with an economic and socio-political reintegration. In general, the average standard of living returned to the 1989 level only in the early 2000s, although with a big social polarization. In addition to the high percentage of economic inactivity, people also suffered to a great extent from the destabilizing effect of decreasing social security and poor public services in education and healthcare. All in all, the basic democratization and marketization were rather successful processes in Hungary, but they also produced deep negative social changes, and the economically active population stagnated at around 55 per cent. By the early 2000s the disintegration, segmentation, or fragmentation and social exclusion created an obstacle to the multiculturalism, social integration and political recognition, all in all, to the meaningful political participation. Thus, the social construction of democracy in the nineties was not only delayed but it was deeply disturbed and distorted by these counterproductive socio-economic transformations.<sup>15</sup>

In fact, Hungary still experienced a decade of “social patience” with “empowered winners” and disempowered, “patient losers”. The long march through the “vale of tears” (with the term of Ralf Dahrendorf) did not result in significant social upheavals and disorder. Nonetheless, during the first, difficult decade of democratic transition, the social discontent loomed large and this disillusionment in the social construction of democracy turned out to be a very important political factor. The Hungarian population in the nineties fell back into the trap of materialist needs, and the post-materialist agenda was postponed to a remote future. Throughout this decade it was obvious that the new system would be incapable of meeting even the most justified demands for the acceptable living standards and for the job security of large social groups.

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<sup>15</sup> In Hungary there have been three periods of economic development: first the recession between 1989 and 1996, second, the economic growth between 1997 and 2006, and third, the recession again between 2007 and 2013. The number of employed or retired in thousands was respectively in 1989 (5.216 – 2.422), in 1997 (4.251 – 3.104), 2002 (4.296 – 3.103) and in 2011 (4.279 – 2.980). The percentage of unemployed was respectively 1.8 – 9.7 – 5.8 – 10.9, the highest figure was in 1993 (11.5), thus in 2011–2013 has reached the same level after Quarter-Century in the new recession period. In the economic growth period between 1997 and 2006 the unemployment for educated youth with secondary education (from 21.8 to 11.7 per cent) decreased, but increased for unskilled youth (only with the general or basic education, 8 classes or less) from 20.2 to 38.2 per cent, so their inactivity rate in the 2000s moved around 70 per cent. Altogether, the economic activity rate increased only slightly between 1997 and 2011 from 52.8 to 55.4 per cent (data from the Central Statistical Office, KSH 2012).

Formulated in a simplified way, the removal of the *economic* deficit by privatization created a serious *social* deficit through its “social shock” effect (see Berend 2007; Greskovits 2007). These issues have also been discussed as the “social costs of transition” and the “political costs of transition”. This early economic transformation as marketization-privatization led to the collapse of “the premature welfare state” in Hungary as well as to the *political* demobilization of the masses. Democratic *transition* in Hungary created some new contradictions that presented the major obstacle to democratic *consolidation*.

Thus, given the above analysed widespread economic and social exclusion processes with a large demobilization, this *first* stage may be called in political dimension as *participation crisis*, since the most shocking feature of the new democracy was that the new institutions emerged but the population had no “house warming parties”, they did not “move in” and “settle down” in these new democratic institutions. In such a way, the proper socialization process of the large masses for the democratic behaviour was missing; therefore the socio-economic transformation could not create the democratic patterns of behaviour either. Altogether, democracy was an “unfinished project” in Hungary regarding the progressive inclusion of a large variety of groups into the political life or as a demand for an “inclusive state” or “actively inclusive representation”. According to John Dryzek, various minority groups “should be represented qua group, rather than merely electing individual representatives with the characteristics of the group. Now, the idea that representation of groups rather than individuals should be the locus of democratic politics is not unique to contemporary difference democrats” (Dryzek 1996, 476–477). Hence, the satisfaction with representative democracy was very low, and it is better to term it dissatisfaction and frustration as an infantile disease of new democracy, which has usually been conceptualized as a weakness of civil society. The mass dissatisfaction with the new democratic order and market economy triggered more and more a demand for populist sloganeering and provided a fertile ground for national and social populisms. After a decade of *social destabilization* the next decade arrived with an increasing *political deconsolidation* caused by the populist remobilization of the relative and absolute losers.

### 2.3 The second stage of crisis: The Golden Age of Populism

In the *second stage* the adaptation to, and the performance within, the EU was in the frontline in Hungary. This new situation generated the post-accession crisis as an EU adjustment crisis with a populist remobilization. Analysing the EU accession I have made a distinction between the general democratization with an anticipative Europeanization and the specific democratization with an adaptive Europeanization. The general democratization was more or less successful in the nineties, although produced a big contrast between the procedural democratization and the performance democratization. This contrast increased further in the adaptive Europeanization, since the EU membership demanded more performance democratization, but it did hardly take place. As a result, in the 2000s most people accepted that at formal-legal level there was a democratic order in Hungary but they considered that it worked with a low performance (see e.g. Pew Foundation 2009).

The key issue in the second stage was how to cross the road from democratic *transition* to *consolidation*, which presupposed both the performance democracy and the social consolidation as the two sides of the same coin. Accordingly, the contrast between transition and consolidation was in the

centre of the academic debate. There was an easy answer that consolidation arrived with the accession process, since it was already some kind of “health check” in the EU compatibility. The basic institutions were democratic at formal-legal level, indeed. The specific, EU-type of democratization, however, presupposed not only the domestication, but also the proper application and full implementation of the EU rules. But the democratization process did not go much deeper; since the territorial and functional interest representations as the institutions for a representative democracy with an autonomous civil society and democratic civic political culture were largely missing. The Hungarian political system was “compatible” with the EU but not yet “competitive” within the EU, since the membership was just “formal” and not yet “effective”.<sup>16</sup>

Two paradoxes have to be discovered behind these weaknesses. First, externally, there has been a sharp contradiction in the Europeanization process between the EU pressure demanding strong centralization for the effective actions in basic transformations on one side, and the EU formal request for the decentralization of the political system as a whole on the other. Thus, although the EU demanded the MLG structures in a long-term perspective, it still delayed them in practice by some urgent, short-term actions. Second, internally, the age-old ECE tradition of power concentration in Hungary was kept even after the entry against any kind of the MLG type reforms, despite some decentralization in the formal-legal terms. Moreover, the recurring serious fiscal disturbances in the 2000s even strengthened the recentralization efforts. In general, it has to be taken into consideration that the EU after the entry was very helpful in the catching up exercise of the ECE countries with a large resource transfer, but the economic integration between the well-developed and low-developed countries in the EU also had an inherent competitive disadvantage for the backward partners that generated a deepening social polarization between winners and losers. After the hopeless *absolute* losers in the nineties, the second generation of *relative* losers emerged *en mass* in Hungary in the 2000s from those who were not able to compete under the new circumstances or to meet the challenges of the open European economic space. The employment level in Hungary in various categories of the skilled work was the same as in the developed member states, but since the percentage of less skilled/educated people was much higher in Hungary than in the West, so this situation resulted in a high structural unemployment and in an increasing Euroscepticism.

However, the population of Hungary did not formulate its Eurosceptic feeling like their Western counterparts in the terms of the EU democratic deficit. The Hungarians perceived the democratic deficit not in the EU but at home, within their own new democratic polity (Johnson 2005). A *democracy paradox* emerged, since the Hungarians were much less satisfied with the democratic performance of their national institutions than with those of the EU. As a cognitive dissonance, however, there was an increasing disappointment with the EU membership as well because the high expectations failed concerning the EU membership. The first years of membership dissipated the illusion of the incoming Western-type of welfare state, so the Euroscepticism increased significantly in Hungary. As a result, also an *EU representation paradox* appeared in the sense that the Hungarian political elite at that time supported EU integration more assertively than the population as a whole (see Lengyel and Göncz 2010). The main issue was that people mostly saw the benefits of EU

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<sup>16</sup> For a close analysis of the effective implementation the distinction has to be made between the structural reforms for the adaptation to the EU and the compliance within the EU. The first is concerned about the radical changes in the basic institutional structures and the second one is only about the everyday “technical” adjustment to the rule at the EU level.

membership for the country in the general economic and political “macro” terms but they could hardly see these benefits for themselves in socio-economic or welfare “micro” terms. Anyway, well before the global crisis Social Europe was an empty word for the population of Hungary because they did not get closer to the European social model through their own Social Construction of Democracy.<sup>17</sup>

Thus, the post-accession social crisis in the 2000s created a solid base for the various populisms that can be best captured in the term of the Golden Age of Populism. After the defeat of the first Orbán government in the 2002 elections, Fidesz organized a country-wide non-violent remobilization, but after the second defeat in 2006 it arranged already a violent remobilization, as a prelude of the total political takeover after the 2010 elections: “Refusing to accept the socialist victory in the 2006 parliamentary elections, FIDESZ tried to oust the Gyurcsány government by mobilizing a protest movement. (...) Orbán’s aggressive mobilization campaigns encouraged right-wing extremists and hooligans to stir up violent protests against the government in Budapest. (...) FIDESZ leader Orbán repeatedly demonstrated his disrespect for democratic institutions (...) FIDESZ has sought to split society, deepen sociocultural divisions and contribute to the escalation of political conflicts” (BTI 2008, 8, 17). Hence, in 2006 there was an important negative turning point in Hungary. Jobbik as a violent, aggressive extreme right party was born in 2003 but became active only from 2006 onwards and organized its paramilitary organization, the Hungarian Guard: “These extremist movements emerged during the 2007-2009 period (...) The violent street demonstrations have had serious consequences for future political developments and societal attitudes, since they have undermined the role of police and called the constitutional order into question” (BTI 2010, 7). In such a way, the tragic anti-democratic events in 2006 and the subsequent institutionalization of street riots in the following years, mostly on the national holiday of 23 October with a reference to the 1956 revolution, eroded the democratic stability in Hungary and prepared its quasi collapse after the 2010 elections.

All in all, the trust in the institutions as the necessary social capital for the effective and efficient workings of representative democracy did not emerge in the second stage either. After the legal-formal “constitutional consolidation” Hungary did not reach the “representative consolidation” through the completion of functional and territorial organizations. There was still no social “integrative consolidation” through the reintegration of losers either, so the “attitudinal consolidation” of the citizens taking part in political life with firm democratic values was still missing. Democratic consolidation cannot be successful without “inviting back” a large part of this passive one-third of population to the national and local politics for a meaningful participation. There was a real danger that in Hungary nothing remained for the absolute and relative losers, giving a rather large and increasing segment of the population, but to join the “anomic” movements and to support the extreme right-wing “anti-political” or populist parties. This revenge came in 2010, and it turned out that the brutal populist street attack on democracy in 2006 in Hungary was just a dressed rehearsal of the much deeper socio-political deconsolidation from 2010 onwards. After its victory in 2010 Fidesz has rewritten the history of the

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<sup>17</sup> Beyond the split between high and low skilled people there was a widening gap also between men and women in the labour market, parallel with the generation gap, since those below 25 and above 55 could find a job with a great difficulty (see e.g. Kolosi and Keller 2010). This produced a situation in which Hungary had one of the lowest rates of economic activity in the EU27.

2006 events turning the extreme right mob into a group of heroic fighters for democracy and punishing those police officers who had a role in countering these extremists. Fidesz and Jobbik were in fact twin parties with many supporters moving in-between, so Fidesz had a big difficulty to distinguish itself from Jobbik, and at the same time it tried to attract the extreme right voters with its slogans and actions.

## 2.4 The third stage of crisis: Peripheralization of Hungary by the global crisis

In the *third stage* of the triple crisis the global crisis has activated and intensified the socio-economic tensions cumulated in the first two stages. The global crisis broke out when the ECE countries were still fighting with the EU adjustment crisis. Thus they had a minimal shock absorbing capacity or “resilience” using the term of Dennis Meadows, in such a way, the global crisis has aggravated the long-term EU adjustment crisis in ECE. This cruel stress test has demonstrated the weakness of ECE countries in competitiveness as well as their vulnerability to the radical changes within the EU and in the world system. The global crisis has shaken the EU in general, but even more the ECE region in particular, since the ECE countries have still been without a meaningful social consolidation. This missing “social sustainability” has seriously damaged their global competitiveness. There has been a common understanding that the ECE countries have been seriously hit by the several waves of global crisis, since its negative impact has been worst on the weaker member states: “The crisis disproportionately hit the ‘peripheral’ countries of eastern and southern Europe” (Watt 2012, 55) or “Central Europe is the sick man of the emerging markets” (Roubini in Lepesant 2014, 1). This damage has been due to their special development model, since “Within the European integration, the convergence models of old and new cohesion countries have common characteristics - namely modernisation built on bringing in foreign capital parallel to low levels of domestic savings and resulting external and/or internal indebtedness – they have made this region particularly vulnerable during the crisis” (Farkas 2012, 67). The cumulated social problems have become more and more the main obstacle to the economic competitiveness and the democratic performance. Hence “For the countries of Central Europe and the Baltic states, the principal challenge remains the growing pressure on living standards and economic stability stemming from the global economic downturn” (FH 2011b, 7). The ruling political elites and their experts in ECE have usually denied the simple fact that after the financial, economic and social crisis the country has also reached the level of the open political crisis. Instead, they have mostly referred to the global crisis as a pretext by saying that “we are OK, just the world is in crisis around us”.<sup>18</sup>

Thus, in the third stage of the triple crisis both the socio-economic and socio-political crisis dimensions have deepened: “When the government led by Fidesz took office in May 2010, the most painful part of the management of the economic crisis was over. The general economic situation of Hungary was not bad, although the social crisis was looming large” (BTI 2012a, 2). However, the incoming second Orbán government pushed the country to a new recession, reaching its deepest point in 2012, and no effective recovery was felt in the

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<sup>18</sup> The new Democratic Challenge in the global crisis has been formulated in the academic literature from both political and policy sides as the “Challenges to future democratization in democratic states” (Denk and Silander 2012) and the „Governance Matters” in the global crisis (Kenny 2012). Obviously, the ECE countries are more vulnerable in both ways than the developed member states. On the competitiveness in ECE see GKI (2013).



period between 2010 and 2014. The Hungarian economists have described this vicious circle of the recession spiral as the “Hungarian disease”, since “The crisis made it very clear that Hungary has fallen behind the Visegrád countries” (Farkas 2012, 67). Thus, due to the Orbán government the global crisis as a *competitiveness crisis* was much deeper in Hungary than within the ECE region. The second Orbán government developed a deep conflict with the EU that was widely reported in the international press. Nonetheless, blaming the EU for the painful Hungarian crisis became the mantra of the Orbán government. This was the deepest point, the nadir of the crisis during the history of the Hungarian society in the Quarter-Century, in which the process from the destabilization of society to the deconsolidation of democracy was completed.

The social impact of global crisis has arrived in the following itinerary: “In the first wave of the crisis, the most heavily affected groups in our societies were the lower middle classes. (...) The second phase of the crisis, however, is affecting the traditionally poor because government-led austerity programs typically mean sharp reduction in social, educational, and healthcare schemes. (...) The third negatively affected social group is young people who are fresh out of school and without a chance to get a job” (Bajnai 2012, 77–78). Altogether, in the third stage all former losers have been joined by a new *generation of losers*, who have been composed of both *relative* and *absolute* losers. The absolute losers, the poor strata have also been further victimised by the serious budget cuts, since the social price of crisis has also been paid in the form of increasingly poor public services in education, health care and social policy. However, the most tragic negative effect of *social* crisis is the high unemployment of the youngsters, aggravated also by the deep cuts of the Orbán government at all levels of education, including the universities. As to the relative losers, there has been erosion of middle class, reaching first the less educated lower middle class, but later the more educated middle class layers as well. Hence, the most marked sign of the recent social crisis is the decomposition and declassification of the emerging middle classes. The economic recovery since 1997 gave a base to the dream on the new Hungarian middle class as a process of Western type social transformation producing the main social actor for the all roles in democratization and Europeanization. About one million Hungarian households became indebted in the 2000s for housing investments, mostly in foreign currency (euro and Swiss Franc). The instalments have grown by 20 to 40 per cent because of the drastically weakening Hungarian currency, which has ruined the budget of these families and has brought an end to the Hungarian Dream of the emerging middle class. The failure of this dream has become true by the fragmentation and erosion of middle classes due to the global crisis, parallel with the increasing gap between the winners and losers.<sup>19</sup>

All in all, there have been many skilled *relative* losers of global recession losing their former advantages. At the same time, there have also been many low skilled and unskilled *absolute* losers, including the young virtual losers without future perspectives as a *lost generation in the last decade*. These negative social effects have appeared more markedly in Hungary than elsewhere, and the political crisis has also been deeper than in the other ECE countries (Kolosi and Tóth 2010, 109, 125). The social crisis in the third generation of losers has produced a widespread, but double faced remobilization of people. On one side

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<sup>19</sup> In the Hungarian progressive tradition the word “polgár” has been central, since in some ways it combines the features of “bourgeois” and “citizen”. It had originally a very strong cultural annotation (e.g. with education), so the process of “polgárosodás” – as the main slogan in the mid-19<sup>th</sup> century democratic revolution in Hungary cannot be translated as embourgeoisement. This is still one of the most attractive terms in the Hungarian public life, thus the idea of emerging middle class has a very progressive content in culture, politics and economy.

there has been a recent upsurge of the aggressive social and national populisms. The hard core of this anti-democratic and anti-EU social resistance can mostly be found among the absolute losers in the younger generations. The absolute losers have reacted to the social exclusion with anger and violence that has led to the decrease of "law and order" situation in Hungary and to the several types of hard Euroscepticism in the extreme right populist movements. The new political turn has culminated in the "populism from above" by Fidesz. Thus, after a long period of the demobilization and partial remobilization, this new period of the large scale social and national populist remobilization has proved to be even more damaging for the democratization in Hungary than ever before. On the other side, there has been a democratic remobilization from among the strata of middle class positions. Although many relative losers have fallen in a deep apathy, a large part of relative losers has still become more active in the public life. They have a much bigger mobilization and representation capacity than the absolute losers, so in the third period the civic organizations have reappeared as active players on the political scene, and democratic mass movements have also been organized.<sup>20</sup>

### 3 CONCLUSION: THE "RE-ENTRY" TO THE EU AS A NEW START IN THE CATCHING-UP STORY

After the *Quarter-Century* of the systemic change and after *Ten Years* of the EU membership it is necessary to launch a serious investigation about the reasons of the triple crisis as a "health check" by reconstructing its entire controversial history in this "medical report". It has not been emphasized enough in the academic literature that the entire process of systemic change in ECE has been overloaded by a deep contradiction between the formal democratization and social disintegration. In a word, there has been no social consolidation even after the *Quarter-Century* of systemic change. The whole controversial nature of democratization originates from the fact that the ECE region has gone through these major socio-political crises and the social price paid for this triple crisis has been tremendous. After the first patient-passive and the second aggressive-active decade, the backsliding of democracy has reached its peak at the beginning of the third decade. As a result of the deepening global socio-economic crisis there has been a declining trust in the political institutions and in the political elite, since most people consider that nowadays "things are going into wrong direction". This kind of system without the meaningful political participation and the proper MLG structures has been termed by Crouch (2004) as "post-democracy".

Thus, after the *Ten Years* of the EU membership a new start is needed in Europeanization and Democratization. The main issue is now to re-conquer the public in ECE to establish a participative democracy as well as to build up a genuine European architecture with MLG for good governance or performance democracy. The strategy of "bringing the people back in" may be the only way out of the present deep socio-economic, political and ideological crisis. After the failure of the top-down approach it is high time to discover the bottom-up approach as the social reorganization of the public by the civil society movements and organized interests. Since the political and economic systemic

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<sup>20</sup> In the survey of DEREK (Demand for Right-Wing Extremism) Index in 20 states, "Hungary is in the lead in respect of prejudice and far-right value orientation", since in the autumn of 2010 48 per cent of population was extremely prejudiced and 32 per cent expressed strong right-wing values (Political Capital Institute 2012, 4). As a result, the extreme-right Jobbik received 20 per cent vote in the 2014 elections.

changes have been seriously damaged by the missing social consolidation, the ECE countries have to restart the whole exercise by focusing on the social systemic change leading to the sustainable social progress. Most probably in the post-crisis situation there will be a post-Rokkanian world in ECE with three main cleavages: (1) relationship to the EU as the main divide in politics, (2) winner-loser in socio-economic politics and (3) materialist-postmaterialist in cultural-symbolical politics.

This paper has tried to describe the triple crisis systematically, concluding with the case of the recent long-lasting political crisis in Hungary, since Hungary represents indeed the worst-case scenario in ECE with the largest gap and deepest split between winners and losers, and accordingly it has the worst backsliding of democracy. The 2012 Bertelsmann Report concludes already on ECE that “democratic consolidation remains elusive”, with the “strongest decline” in Hungary, not only in the economic and political transformation, but first of all in the “transformation management” by the Orbán government (Bertelsmann 2012b, 58–61).

Hungary has been deeply polarized along the political and cultural lines as the recent TÁRKI Report (2013) has pointed out. However, the present, protracted crisis has terribly simplified the political and cultural camps in Hungary along the EU relationship with an increasing tension between the pro-EU democratic opposition and the Eurosceptic government. At the opposition demonstrations the citizens are waving EU flags and chanting pro-EU slogans, while at the pro-government demonstrations the first row carries the Molino that “Hungary will not be a colony of the EU”. There are no EU flags at the official government performances and some leading government officials have also been echoing anti-EU declarations. Jobbik, the twin party of Fidesz has burnt the EU flag at a demonstration and has removed it from one of the official parliamentary buildings. The “re-unification” of the country has to be seen as a two-sided process of integration combined from both inside and outside, as an internal reintegration of the Hungarian society assisted by the external reintegration (“re-entry”) within the EU, instead of the “freedom fight” against the EU waged by the Orbán government. Thus, Europeanization and Democratization have become more inseparable in the Hungarian politics than ever before.<sup>21</sup>

Altogether, for all ECE countries facing “populism and polarization” the slogan “Return to Europe”, Europeanization and Democratization, with new catching-up strategy, is again high on the agenda: “This state of affairs is closely linked to the crisis within the EU that followed on from the global crisis. Membership in the EU has not led to across-the-board gains in prosperity, nor has it closed the economic gap between old and new member states as quickly as many had hoped” (Bertelsmann 2014a, 50). However, the next decade in the EU opens the window of opportunity again for the catching-up exercise of the ECE countries.<sup>22</sup>

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<sup>21</sup> In a public lecture Dworkin (2011 and 2013) has questioned the democratic character of the present Hungarian government. Moreover, Kim Scheppele has criticized the present Constitution and called the Hungarian state as a Frankenstein-State or “Frankenstate” (Scheppele 2013a and 2013b).

<sup>22</sup> No doubt that there is a need to “rethinking” of the ECE developments in Europeanization and Democratization as Nicolaidis and Kleinfeld (2012) have suggested in the OECD Report. I know that the crisis-awareness differs a lot in the ECE countries and even within these countries, but the correct, radically critical analysis of this on-going crisis is the only way to overcome the protracted crisis.

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## APPENDIX

### DEMOCRACY INDICATORS (DI)

TABLE 1: EIU – COUNTRY RANKINGS AND OVERALL DEMOCRACY SCORES ON 1-10 SCALE (10-BEST) 2006–2012, 167 COUNTRIES

	2006	2006	2008	2008	2010	2010	2012	2012
BG	49	7.10	52	7.02	51	6.84	54	6.72
CZ	18	8.17	19	8.19	16	8.19	17	8.19
HR	51	7.04	51	7.04	53	6.81	50	6.93
HU	38	7.53	40	7.44	43	7.25	49	6.96
PL	46	7.30	45	7.30	48	7.05	44	7.12
RO	50	7.06	50	7.06	56	6.60	59	6.54
SI	27	7.96	30	7.96	32	7.69	29	7.88
SK	41	7.40	44	7.33	38	7.35	40	7.35

TABLE 2: BTI– OVERALL RANKINGS IN STATUS INDEX (SI) 2008–2014, 129 COUNTRIES

	2008 S	2010 S	2012P	2012E	2014P	2014E
BG	15	14	13	17	16	17
CZ	1	1	2	1	4	2
HR	14	15	16	14	14	18
HU	5	8	17	11	21	14
PL	9	11	8	6	5	4
RO	17	16	14	19	24	18
SI	2	2	2	3	7	5
SK	7	6	10	7	10	11

In 2012 and 2014 there are separate indicators in SI for political (P) and economic (E) transformations.

TABLE 3: WEF - COUNTRY RANKINGS IN PUBLIC TRUST IN THE INSTITUTIONS AND POLITICIANS 2008–2013, RANKINGS IN 134-144 COUNTRIES

	2008	2008	2011	2011	2013	2013
	institutions	politicians	institutions	politicians	institutions	politicians
BG	111	112	110	95	108	85
CZ	72	117	84	134	82	139
HR	74	79	90	104	96	115
HU	64	94	73	130	80	128
PL	88	113	52	76	55	90
RO	89	106	99	119	116	133
SI	49	47	55	96	58	116
SK	73	115	101	132	104	136

*GOVERNANCE (PERFORMANCE) INDICATORS (GI)*

TABLE 4: BTI- OVERALL RANKINGS IN MANAGEMENT INDEX (MI) 2008–2014, 129 COUNTRIES

	2008	2010	2012	2014
BG	13	14	20	21
CZ	20	9	18	17
HR	9	16	22	18
HU	18	20	48	65
PL	53	19	13	6
RO	22	25	23	40
SI	12	18	18	22
SK	5	8	12	7

TABLE 5: WORLD ECONOMIC FORUM - GLOBAL COMPETITIVENESS INDEX (GCI) 2005–2013, RANKINGS IN 122-144 COUNTRIES

	2005	2006	2007	2008	2009	2010	2011	2013
BG	61	72	79	76	76	71	74	62
CZ	29	29	33	33	31	36	38	39
HR	64	51	57	60	61	76	80	81
HU	35	41	47	62	58	52	48	60
PL	43	46	51	53	46	39	41	41
RO	67	68	74	68	64	67	77	78
SI	30	33	39	42	37	45	57	56
SK	36	37	41	46	47	60	69	71

TABLE 6: WEF – EU2020 RANKINGS AND SCORES OF MEMBER STATES (7-BEST) 2010 AND 2012, 27 (+1) COUNTRIES

	Rank 2010	Score 2010	Rank 2012	Score 2012
BG	27	3.79	27	3.76
CZ	14	4.64	16	4.49
HR	--	4.01	--	4.01
HU	24	4.04	24	4.06
PL	23	4.06	23	4.08
RO	26	3.84	26	3.79
SI	12	4.69	13	4.59
SK	22	4.17	22	4.13
EU	--	4.94	--	4.88

(Sweden is best, 5.77).



## RETHINKING UTOPIANISM, INTERNATIONAL RELATIONS THEORY, AND MARGINALISATION OF AFRICA IN GLOBAL POLITICS

Kwame Badu ANTWI-BOASIAKO<sup>1</sup>

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*Many studies on utopianism tend to critique known political models such as capitalism, democracy, socialism, and dictatorship. While none of these models provide a perfect political environment, utopianism seems to be the answer to prevent all political abuses. From public administration point of view, the harmonious co-existence of all political models without any interference may help to conceptualise a potential change in our current hostile global political environment and limit the marginalisation of other societies as presented in the international relations literature. Modernisation theories, debatably, have assumed that the principles of modern political administration will become more important than other traditional institutions yet these theories, which are ascribed nonrepresentational do not consider the practical realities of the consumers of those theories. Utopianism therefore is a myth, which can only be inspirational but not pragmatically achievable because of its intangible proposed theories. This paper focuses on international relations theory and the marginalisation of Africa in the context of the utopian debate. It concludes that in the absence of clear acceptable universal respect for all nations, cultures, and religions the quest for utopianism will continue to be a mere academic discourse.*

**Key words:** international relations; theory; utopianism; public administration; Africa; marginalisation.

### 1 INTRODUCTION

In every discipline a wide range of theories are generated by scholars whose research interests focus in their particular areas of study. As a sub-discipline of political science, international relations (IR) have numerous theories in an attempt to “solve the problems and puzzles of state behaviour” (Slaughter 1995,

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718). Basically, according to Slaughter, there are three schools of thought in IR theory: realism, institutionalism and liberalism. Given the focus of this paper, Realism and Institutionalism are not discussed here. Liberalism as an ideological concept comes in many forms including-sociological, interdependence, republican, and institutional with the assumption that people “generally take a positive view of human nature” (Jackson and Sorensen 1999, 109). Thus, there is faith in human reasoning where rational principles need to be applied in IR. Understanding liberalism plays into many fields of IR including economics and politics. Liberal IR theory accepts the centrality of amicable approaches to conflicts or the “view that peace is a quality achieved by civil societies” (Buchan 2002, 407). According to Goldstein (2003), liberalism as an ideology tends to shape state policies. Given the normative nature of liberal IR theory, Slaughter categorises liberalism as Wilsonia, -liberal internationalism-which is “understood as a program for world democracy” (Slaughter 1995, 727).

Though there have been efforts to minimize liberalism, Slaughter notes that liberal ideas “begin with individuals and groups operation in both domestic and transnational civil society” (Slaughter 1995, 728). The international system through its numerous alliances and organizations seek to accomplish peace by reducing conflicts. This idea, Buchan (2002), Jackson and Sorensen (2005), and Slaughter (1995) argue is one of the liberal assumptions, which seeks a peaceful co-existence of all states. The authors further maintain that it is the “best way to resolve conflicts and to promote cooperation in the service of common ends is to find ways to align these underlying state interest, either by changing individual and group preferences or by ensuring that they are accurately represented” (Slaughter 1995, 729). So the basic understanding of liberalism, which is by no means exhaustively discussed here, is that Africa’s interest should be part of the IR theory and the Wilsonian school of thought. It is through the incorporation of all states behaviours- political, social, religious, governance, and cultures that a global utopian theory could be achieve and acceptable.

Academically, politics is presumed to be the process through which individuals, groups, and nations reach agreement on a common or collective action despite their differences with the hope that the said action will achieve an intended *agreeable* goal. Throughout history there has been an endless number of institutions at various (community, regional, national, and global) levels in an attempt to achieve a peaceful, liveable environment for all to be in harmony but religion, politics, administrative practices, and ideological beliefs continue to divide and defeat the very existence of humanity. The greatest enemy of the human race is the human race itself as it refuses to accept diversity in its original form per creation but rather self selected few individuals, societies, and nations (the supper powers, the colonisers, slave masters, and their leaders) tend to impose or dictate what life and governance ought to be through their understanding of administration, religion, politics, and ideological beliefs. Such imposition of the few on the majority has seen the impasse of competing interest among individuals, groups, societies, and most importantly, nations. Utopianism presents a challenge for comparative political analysts as the concept questions any analytical reasoning to justify one form of government over the other. As a result, relations among nations seem to focus more on the interests and demands of powerful nations (Gavshon 1981). For example, the continent of Africa has “been both constructed and deconstructed by external forces and powers for economic and political interest, especially as the continent became a fertile battle ground for the superpowers” during the scramble for African and the Cold War after 1945 (Antwi-Boasiako 2014, 116).

There have been several IR theories, which tend to argue for a worldview where all would live under common rules, democratic principles, in harmony, though no one is advocating for world government. Nations have the right to organize and participate in any form of government since the freedom for a country to decide its political path affirms its national sovereignty. But the global political process is not free from competing ideological (the East/West conundrum), religions, and administrative interest. There is a dominant liberal theory, which seems to augment these international relations theories including utopianism. But one has to be very cautious when those democratic, religious, and administrative principles are used to provide “ideological justifications...to cloak what are otherwise seen as narrow self-interest”<sup>2</sup> of the few: The proponents. Utopianism is defined here as an idealist concept, which maintains the possibility of a “moment of openness and the promise of futurity in the uncontrollable adventure of modern democratic life” (Keohane 2002, 40). Others, including Charles (2012, 472–503), have also defined utopianism as: *A place that is impossible to arrive at by any known route, in that it is not really a place at all. It is therefore essential that, in order to reach utopia, one takes an unknown and unknowable route, a path determined by its indeterminacy, a passage that deconstructs its own rationalistic epistemological foundations.*

The philosophical narratives, which may imaginary lead to a harmonious liberal principles, utopianism, are buried in “philosophical origins in Enlightenment thought” (Heinze 2008, 105). Unfortunately, the literature on the utopian ideology stems from normative precepts of liberalism as the template for international relations. Heinze (2008, 106), for example, did explore the evolution of Lockean liberal theory of the state “to identify the fundamental normative postulates of liberal theory as it pertains to international relations.” But the question is what is Enlightenment? And under whose definition should Enlightenment be acceptable? How are these theories universally applicable to the utopian conundrum? In fact, the so-called classical philosophical theories have their limitations and could not be universally accepted as Morgenthau had noted that these narratives must be seen as myopic ideological justifications. In affirming Morgenthau’s suspicion of the few, Heinze argues that international liberalism, using the Iraq War and the George W. Bush Doctrine<sup>3</sup> as examples, is “deeply suspicious of the balance of power politics (ibid., 110).” Thus, dominant groups and powerful nations such as the United Kingdom, France, Russia, China, and the United States are quick to justify their actions (atrocities) regardless of the outcome on weaker nations. For example, the invasion of Iraq by the United States under the George W. Bush Administration was for America to remake its foreign policy through its imperial ambitions. Ivan Kenneally noted that such an invasion was “an expression of their (the Bush Administration) dismissal of non-Western cultures (Kenneally 2007, 142).” Such justifications, Morgenthau would argue, tend to marginalise individuals, groups, societies, and nations that do not fit the normative categorisations as presented in the IR literature, hence the enigma with utopianism.

<sup>2</sup> To Morgenthau, the conflicts around the world are about the interests and ideologies of individual nations and not what is necessarily good for the rest of the world. See Morgenthau (1993).

<sup>3</sup> See the origins of the George W. Bush’s doctrine, available at <https://www.pbs.org/wgbh/pages/frontline/shows/iraq/etc/cron.html>.

## 2 AFRICA: POLITICAL, RELIGIOUS, AND GEOPOLITICAL DIVERSITY

This article limits its discussion on utopianism to the marginalisation of the African continent as it is treated in the broader IR narratives. It uses historical events, slavery and colonization, in particular, and contemporary political events on the continent to argue that despite the classical philosophical political theories and political science as an academic discipline in its contemporary context, “political knowledge as a whole, consists of the observation of data and hypothetical explanation of these data” (ibid., 141). The understanding of law of nature through scientific methodological explanation of data, for example, is “purely theoretical, detached knowledge of things physical” (ibid., 142) and pragmatic (realistic). In fact, historical events are prone to interpretations therefore justification of what ought to be is only good for the presenter given the presenter’s position, ideological, and political worldview.

While modern political theory tends to derive its roots from political philosophy, the marginalised African is quick to question the objectiveness of the philosophical narratives since, as Kenneally puts it, “Political philosophy is not concrete enough to provide genuine guidance for human affairs.” He went on further to argue, “The very term philosophy implies that we do not possess the truth” since there is no wisdom in politics but “only the quest for wisdom” (ibid., 143) hence no one truly knows the perfect pragmatic utopian world. The narratives are only to support an idealist abstract harmonious worldview of dominant societies rejecting the rich cultures of weaker nations. If utopianism is looking for a common religion, language or culture then, in Africa, this is pragmatically impossible given the geographical differences of its countries, languages, religions, forms of administration, and other rich cultural practices. Africa, unfortunately, is not a monolithic geographical entity as it has been portrayed in the literature. Differences will, and do, exist in parts on the continent so therefore arguing for a common language or religion in the name of utopian world is highly impossible. Similarly, the quest to fight for a common political ideology, either democracy or communism, has faced endless and, in most cases, senseless military confrontations.

The diverse geo-socio-political composition of Africa draws scholars into a maelstrom of vivid living histories, political debates, cultural, and social dynamics that defy simple explanations of the complexities of the continent, hence the utopian conundrum in Africa. In fact, the classical philosophical narratives fail to comprehend Africa’s cultural, political, and religious complexities. Any intellectual discourse about the continent must also reflect the socio-political realities to provide a framework for grappling with the “vast regional diversities and contradictions”<sup>4</sup> in relation to African history. Hence the focus on slavery and colonialism is an attempt to chronicle how the oppressed (Africans) have interacted with the oppressors (slave/colonial masters) to maintain their own culture, religion, and way of life. Using the two variables as benchmarks in the context of IR analysis as it has been for centuries, the concept of utopianism means the worldview of dominant societies becomes superior and countries that do not conform to the so-called moral values of dominant societies are marginalised as noted by Ivan Kenneally and H. J. Morgenthau. While there is plethora of African studies in other disciplines, the IR narratives in the academia tend to marginalise Africa since post-colonial IR critical theory continues to reference traditional IR literature,

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<sup>4</sup> Reviewers often force those who write on Africa to use the so-called classical literature in Africa, which were written by non-Africans. See Soyinka-Airewele and Edozie (2010).

which unfortunately has become the template for any intellectual discourse.<sup>5</sup> As Hernandez and Mancuso (1989) noted “International relations theorists take what they know about the world and create theories that rationalise the phenomenon known as world politics” (Hernandez and Mancuso 1989). IR critical theory by default is about power nations and their relations with others. IR politics, therefore, is not the production of justice and fairness but how powerful nations justify themselves and actions to weaker nations.

There is lack of interest in Africa in the IR discourse but this trend, arguably, appears to be reversing in the academia because studying Africa according to Soyinka-Airewele and Edozie (2010, 7) seems to refine “Hobbesian impulse-short lived, self-centred, impatient with collaboration, and certainly somewhat brutish.” Unfortunately, the continent is seen as a laboratory with pliable theory-supporting subjects. For centuries, Europeans whose narratives are based on their concept of how the world out to be, have written on African politics, insisting on how Africans ought to behave to be accepted in the international community. Some African political leaders such as Nelson Mandela (South Africa) and Kwame Nkrumah (Ghana) who refused to conform to Western political demands were initially labelled as terrorists but their people (Africans) hailed them as heroes. Thus, Africa has been referred to as the *other* in the literature and such *othering* of the continent has undeniably “inscribe [d] Africa as the zone of ‘dark backwardness,’ irrespective of all social, political, and economic evidence to the contrary” (ibid.). Using *Heart of Darkness* by Joseph Conrad as an example, Chinua Achebe noted that the Conrad’s book “projects the image of Africa as the other world the antithesis of Europe and therefore of civilization, a place where man’s vaunted intelligence and refinement are finally mocked by triumphant bestiality” (Achebe 2006, 336) despite the economic, educational, social progress by certain countries on the continent including South Africa, Nigeria, and Ghana. Despite the plethora of scholarly IR discussions on Africa in the literature,<sup>6</sup> Soyinka-Airewele and Edozie opine that the politics of Africa has uphill battle in deconstructing the already negative image of Africa.

It is the image of non-conformity of Africa, as portrayed in the IR narratives, which tends to marginalise Africa as the other. For utopianism to be considered under any condition, the historical misrepresentation of African politics – traditional administrative system<sup>7</sup> – culture, and religion must not only be understood by outsiders but have to be respected instead of forcing Africans to behave or conform to the demands and values of other cultures. This change in perspective will not be easy to accomplish because some studies, including Wyatt-Nichol and Gibson (2014), D’Souza (2002), and Maxi Schoeman (2003), formulated from afar, have linked the lack of political and economic development on the continent to corruption, lack of education, and other vices. The next section discusses how Africa has been marginalised in the IR theory and advocates for a more comprehensive and inclusive global theory if utopianism has any imaginable practical implementation. If the framework of this theoretical concept- utopianism- has any chance of becoming a reality then the theory must be all-inclusive otherwise the concept will forever remain just an academic conundrum.

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<sup>5</sup> Traditional IR theories and literature have become template for any critical academic work in modern IR therefore it is highly impossible for any post-colonial work. See for example the works of Sudeshna (2014) and Csanyi (2014).

<sup>6</sup> See the works of Adekeye Adebajo, Adebayo Adedeji and Chris Landsberg (2007).

<sup>7</sup> See Kwame Badu, Antwi-Boasiako and Bonna (2009). See also Tamene (2013, 15).



### 3 THEORIZING UTOPIANISM FROM AN AFRICAN PRISM

While it is not within the scope of this article to offer any rigid theories of IR, the paper discusses how theories of international political behaviour<sup>8</sup> have marginalised the continent of Africa. IR theories as established in the literature are power-driven as the narratives, arguably, tend to discuss and follow what powerful (military and economic) nations do. Power for example, is an elusive term whose theoretical basis is interconnected with various scholarly efforts in understanding conflicts and cooperative interactions in world politics. International power theory, therefore, predicates on the notion of political realism, which views powerful nations as the only actors in IR. With such an assumption powerful nations are unwilling to surrender their national sovereignty to the regulations and rules of international institutions yet those powerful nations expect weaker African nations to bow to the dictates of powerful nations and global institutions.

For example, the United States under the George W. Bush's Administration (2000–2008) accused Iraq, Saddam Hussein, of harbouring weapons of mass destruction (WMD), the United Nations (UN), an international institution, sent its inspectors to Iraq to verify the authenticity of the claim by the Bush Administration and cautioned the US to put off any possible invasion till the work of the UN inspectors was done to ensure if such accusation has any iota of truth. But the US because of its military power ignored the request from the UN, ordered the international inspectors out of Iraq, and started its bombing campaign on a sovereign nation, which lasted for ten years (2003–2013) and tens of thousands of Iraqis, civilians, were slaughtered<sup>9</sup> including Americans, Britons, and other nationals who were part of Bush's so-called "*coalition of the willing*." In the decision to invade Iraq in 2003 by the United States of America, James Pfiffner<sup>10</sup> found out that it was an attempt for the Bush Administration to impose its political *will* on a weaker sovereign nation. Despite the well crafted presentation by the then Secretary of State of the United States, Colin Powell,<sup>11</sup> to the UN to convince other nations to support the US's claim against Saddam Hussein of Iraq, it came to bare that the assertion by the US, supported mainly by other powerful nations such as France and Great Britain, was unfounded. In fact, no WMD were found after ten years of the US occupation of Iraq. The question then is how do weaker nations who are at the military mercy of stronger nations solve this utopia conundrum?

It is against this background that the concept of utopianism, to the realist, is just a myth since powerful nations can behave anyway they see fit as long as their actions are in their self proclaimed national interests. For example, dependency theorists, like IR theorists, view the world as comprising major and small nations or "*centres and peripheries*" (Anda 2000, 42) respectively with the former exercising tremendous influence over the latter. With such a realistic and pragmatic worldview, African countries fall into the peripheries where their influences in world politics have little or no effect on the centres unless

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<sup>8</sup> Anda, Michael O. 2000. *International Relations in Contemporary Africa*. New York, University Press of America Inc. p. 34.

<sup>9</sup> Though no one really knows the exact number of people who died in the Iraq War, there have been attempts by various groups to count the number of people killed as a result of the invasion. See <http://www.iraqbodycount.org/analysis/numbers/ten-years/>.

<sup>10</sup> Critics see Collin Powell's presentation as falsifying facts to initiate war. Jonathan Schwarz on the speech [http://www.huffingtonpost.com/jonathan-schwarz/colin-powell-wmd-iraq-war\\_b\\_2624620.html](http://www.huffingtonpost.com/jonathan-schwarz/colin-powell-wmd-iraq-war_b_2624620.html). See also Pfiffner (2005).

<sup>11</sup> See the full speech of Collin Power to the UN Security Council at <http://web.archive.org/web/20050204130309/http://www.state.gov/secretary/former/powell/remarks/2003/17300.htm>.

the political or economic behaviour of a periphery state is of a particular interest to the centre. As a result, utopianism as universal political concept is seen as one-sided political prescription by dominant societies whose influences affect the political behaviour of African countries (ibid., 199–219). So why look for a theory or theories for utopianism which marginalises Africa in IR?

The term theory is not only limited to its scientific formulation but also provides platforms for possible explanations on events in global politics. While theories in the hard or pure sciences such as chemistry, physics, and biology may have universal acceptability, the same cannot be said, or argued for, in the social sciences where theory construction often originates from a researcher's belief system, geographical location, political ideology, or one's worldview. Consequently, many IR theories are idiosyncratic and personal rather than neutral and generalisable. Thus, the prism through which political scientists analyse world affairs is based on the interests of the analysts. This situation, unfortunately, limits the ability of scholars to identify a theory appropriate for universal acceptability. So, what is the role of theory in the search for building utopian all-inclusive global environment?

#### 4 UTOPIANISM: THE ROLE OF THEORY

IR theory by definition seeks to answer many questions including the objectivity of understanding a concept- utopianism, for example- to reflect a global acceptance. There must be sets of reasoning behind a theory: 1. It must serve as guidance to any study, 2. It must be an excellent apparatus to challenge global prejudices, 3. It must help to grasp the contemporary world political view, and 4. IR as a discipline is defined by its theories therefore its imperative to have a better understanding of the theories that guides the discipline and other political behaviours of nations and their actors. To understand and make sense of a theory, there is the need to relate the applicability of that theory to one's political, and daily activity. In fact, a theory should be implementable where it provides not only tangible or measurable outcomes, but also it must not be seen as an end in itself (Babbie 2001).

Political theorists have often departed from these basic standards in a clear effort to vindicate intolerable behaviour of dominant nations. Slavery and colonisation, for example, have been justified from a Biblical perspective. D'Souza (2002, B9), for example, theorises that colonisation was beneficial for Africans since it *opened* native Africans to what he calls civilisation. Here, D'Souza may be arguing that outright cruelty- slavery and colonisation- should be supported as a necessary condition in promoting economic development. The question is if the slave masters were enslaved would the authors make the same argument to justify the action of the slave/colonial masters? In recent times there have been strings of apologies from the West though it took centuries for some individuals from the West to realise the need to render sincere unconditional apologies to Africans for the atrocities of slavery and colonisation. For example, in 1985, the Head of the Roman Catholic Church, Pope John Paul II, rendered an apology on behalf of the church while Bill Clinton (US-President, 1992–2000) and the Prime Minister of Great Britain, Tony Blair, condemned the trade in 1998 and 2006 respectively but not on behalf of their respective countries (Reif et al. 2013). So how does the concept of utopianism become universally acceptable when the centres find it necessary to justify their atrocities? It is the lack of concrete evidence to show the path to utopianism in the literature that makes the utopian theoretical argument a myth.

## 5 BUILDING UTOPIAN THEORY

Theories, as Babbie opines, “are systematic sets of interrelated statements intended to explain some aspect of social life” (Babbie, 2001, 51). Thus, the logical starting point is formulating, a series of linked propositions derived from a chronological collection of observations on a particular aspect of life. It must be kept in mind, however, that no one theory will ever be sufficient to yield a complete explanation to a phenomenon in the social sciences. The formulation of theory, as Dubin (1978, 6) sees it, “lies in the human behaviour of wanting to impose order and unordered experience, which is not ordered by nature hence the experiences may be...theorized about, in very different ways.” Put differently, the amalgamation of different variables must be incorporated in theory construction hence the need for a theory, which incorporates Africa in the utopian theory formulation is more desirable.

Thus, building utopian theory must identify the contributions of all nations (both the centres and peripheries). In developing such a theory, one should consider the aspects of the true realities (religion, politics, and culture) in their complex and interconnected form by conceptualizing them for better understanding rather than ignoring those variables in the narratives of utopian theory building. The existing utopian theory clearly excludes Africa from its formulation, which means the theory lacks global data for the concept to be authentic. Utopian theory must therefore be revisited but as Schmid and Jongman (2006, 62–64) noted it is difficult to rewrite a theory in the absence of solid data, which means the inclusion of data from Africa gives a global dimension to the utopian narratives. The data missing from the conceptualisation of utopianism as established in the current narratives in the literature are short of the administrative, political, religious, and cultural practices in Africa. The utopian concept has been developed on the basis of political and cultural understandings of mostly Western (*centre*) ideological beliefs rather than on pragmatic experiences of other (*periphery*) cultures and political practises. Oxymoronically, this approach distorts data collection and theory formulation. There is a need for a collaborative effort among proponents of utopianism to find common variables, which might help “to begin ...theory constructions” that are applicable and implementable globally (ibid., 129).

The challenge in utopian theory building is the intentional, though debatable, neglect of African political activities in IR narratives (Vale, Swatuk and Oden 2001). This approach has marginalised the continent in the global IR discourse on the “assumption that it [Africa] lacks meaningful politics” and culture (Dunn and Shaw 2001, 63; Chomsky 2006). IR theorists use political and cultural activities of powerful nations (*centres*) as template or framework for theory construction and depict weaker nations (*peripheries*) that may deviate from the *so-called* norm as failed states (Schoeman 2003, 801–804) as the mainstream IR theorists continuously exclude data from the developing world. Thus, the genesis of IR theory is skewed toward the great powers while the concept of state in Africa is both constructed and deconstructed by the great powers for economic and political interest, especially as the continent became a fertile battleground<sup>12</sup> for powerful nations. While this statement recalls the duel between the West and East during the Cold War, the scramble for oil and other natural resources on the continent by the developed world continues.

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<sup>12</sup> Africa was an ideological battleground during the cold war; see Gavshon (1981).

For example, the Bond of 1844 or the partitioning of Africa was a scramble for wealth by the West, which left Africans with nothing in terms of economic development. During this period nearing the end of the nineteenth century, European powers claimed virtually the entire continent by bargaining for separate spheres of interest that ignored the plight of the African natives. Since the European idea of Africa was mainly limited to coastal areas, inaccurate maps were used to divide the continent in a clear manifestation that only wealth, not people, their cultures or politics, mattered (Meredith 2005, 1–16). Given the contemporary discourse of globalisation (Teune 2010, 4–19) and the concept of utopianism, theorists must understand the role of each state, including African countries since out-dated premises skew conclusions that tend to undermine theory formulation. Therefore, Africa must no longer be looked at as a continent comprising colonised countries as each state can significantly influence outcomes in global affairs (Mansbach and Ferguson 2007, 529). Consequently, theory construction involving utopianism must be adapted by shedding theoretical traditions that reduce world politics to a “simple yet compelling account” (Kegley and Wittkopf 2004, 49).

## 6 SEARCHING FOR UTOPIAN HARMONY: REFLECTING ON THE PAST FOR A BETTER FUTURE

A new theoretical approach to Africa’s importance in world affairs must not be ignored in building utopian theory. Real differences among the various countries in Africa must be factored into a more authentic understanding of the continent. Historical events must not only focus on the achievements of powerful nations but also the suffering of the conquered. Contemporary progress in political, economic, and social changes on the continent must be incorporated into the formulation of any relevant global utopian theory. Unfortunately, the old prescriptions of IR theories continue to be used to solve or predict twenty-first century international conflicts, governance, and public administration with respect to Africa’s role in global politics. Those theoretical prescriptions argue that for Africa to be part of the international community, it must follow a path to economic and political modernization roughly parallel to the one the Western industrial democracies had travelled (Apter 1960, 45–65).

The quest to establish utopian world tends to ignore the past. Unfortunately, African political history as cemented in the Western literature makes it almost impossible to obtain a legitimate understanding of the continent. Yet studies show that until the arrival of Europeans, the *so-called* primitive societies of Africa had well-established, decentralised government with “astonishing degree of functionality; participatory forms of democracy, rule of customary law, and accountability” and that “no modern country, even the United States, can boast of such an open government” (Ayittey 2005, 21). The slave trade, apartheid, and colonialism changed the political, economic, language, and social dynamics of the continent. The importance of using slavery, apartheid, and colonisation to reflect the atrocities meted out on defenceless African natives is that despite the abolishment of the trade centuries ago, the scars of such inhuman supervised, legalised or legislative evils were constitutionally backed by powerful nations make it almost impossible for the oppressed to trust the oppressors who are now proponents of utopian community. The administrative system of

capitalism, for example, celebrates selfishness, which does not confirm to the traditional<sup>13</sup> cooperative administration of native Africans.

## 7 THEORY FORMULATION AND PUBLIC ADMINISTRATION IN AFRICA

The plethora of lens used to scrutinize political administration in Africa tends to ignore the role of traditional administrative practices. The administrative practices on the continent would better be understood with a deepened appreciation if the various perspectives were looked at together and synthesised. For example, any solitary approach to examining a phenomenon tends to miss critical aspects of what is to be studied. So is administration on the continent as it is measured through Westerners lens, tends to either reject or ignore the traditional and chieftaincy administrative systems on the continent (Antwi-Boasiako and Bonna 2012). The theoretical understanding of administration does not usually translate to the practice of administration in Africa. For example, pre-colonial traditional African administrative practices do not separate religion from administration. Any in-depth understanding of administration needs epistemic pluralism (Farmer 1995, 4–10), which is the amalgamation of different perspectives of the multiplicity for administrative data analyses. For instance, would administrative theory even consider traditional African administrative practices? This, and many other related questions not asked here, is what must be considered as the theoretical framework of global utopianism. Since the 1960s, most African countries have been steadily increasing their proportion of the limelight in world affairs. However, governance and political administration in Africa, George Ayittey and Kwaku Danso affirmed, have been on the decline since independence. Political instability, using the Western political administrative structures, is not uncommon but traditional African administrative institutions have persisted though not much attention has been given to traditional administration in African political literature.

It is often easier to document and discuss the collapse of public administration and governance in postcolonial Africa. Media coverage, critics, and political commentators often assist this collapse. There is a “complex notion of subalternity pertinent[ing] to any academic enterprise, which concerns itself with historically determined relationships of dominance and subordinations” (Gandhi 1998, 2). Postcolonial African studies have become a battleground for variety of disciplines and theories. Ayee (2000) refers to such phenomenon as proclivity for experimentation or laboratories for investigation. However, scholars of democratic governance and IR theorists including political analysts often discuss theoretical shortcomings and lack of development in Africa with very little understanding of the effect of the continent’s post colonial past on development. Conversely, attempting to identify solutions to the lack of development and political instability in Africa should be a welcome challenge for those interested not only in the politics of Africa but administration at all levels on the continent since administrative decisions at the various levels affect the utopian discourse.

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<sup>13</sup> Traditional administration as presented in this article refers to the consensus administrative systems of native Africans before the arrival of the Europeans and subsequent colonisation and slavery. This administration system does not refer to the colonial and post-colonial administrative systems in Africa.



It is good to question or challenge assumptions or theories to effect change as noted by Farmer who insists, “radical change is needed in the way that we conceptualize the role and nature of *political/administrative* theory” (Farmer 1995, 4). To expand on Farmer’s claim, one could argue that Africa as a political bloc has not been incorporated in a global utopian theory formulation. Therefore, those interested forwarding this utopian discourse are tasked with laying new foundations for the study of public administration and governance to strengthen Africa’s global relationship with other countries; hence the importance of utopian theory, which considers the globe in its totality instead of using, selected geographical regions in global theory formulation. These foundations must include theories that would be implementable and meaningful to the various countries.

Though many studies have criticised<sup>14</sup> the failures of public administration, leadership, and governance in Africa (Ayittey 2005; Danso 2005), very little has been done to the radicalisation of deconstruction and constructing of theories to advance in the global political narratives. Given a postmodernist approach of reinventing government for effective performance and efficiency there is every reason to re-examine the pitfalls of postcolonial political administration in Africa from a critical theoretical and pragmatic perspective. That is, in an attempt to develop a blue print for Africa to address Africa’s political structure, which encourages development, Africa must develop its IR theory with better understanding of the interests of other nations. Tactlessly, such an attempt is more likely to lead to the formulation of informal theories, which also draw constant criticisms. For example, the political thoughts of some African leaders (Schoolman 1988) faced sharp criticisms, which led to series of military coups as a result of external Western interference.

Kwame Nkrumah of Ghana, Ahmed Sekou Toure of Guinea, and others like Julius Nyerere of Tanzania believed in Pan Africanism where their political thoughts, *Nkrumahism-Toureism*, were to focus on the development of the continent as one political unit with a common military power but the West saw *Nkrumahism-Toureism* in the 1960s as an extension of communism. The premise *Nkrumahism-Toureism* was to reject foreign domination followed by the trans-Atlantic slave trade and colonialism, which culminated in the European partition of Africa agreed upon by the colonial powers at the Berlin Conference of 1884–1885. To Nkrumah and other leaders on the continent, the artificially imposed colonial borders were to be rejected as they believe in the concept of continental African unity as the source of strength and the key to African liberation. As Nkrumah puts it, “African Unity gives an indispensable continental dimension to the concept of the African nation...Unity is the first prerequisite for destroying neo-colonialism. Primary and basic is the need for a union government on the much divided continent of Africa” (Nkrumah 1965, 253).<sup>15</sup> Though three world views- Conservative, Liberal, and Revolutionary worldviews (Goldstein 2003, 3–51) – are presented in the IR literature none of these squarely fits the pre-colonial traditional political thought of the African. It is therefore imperative to develop new ideological theory by deconstructing the old West/African political thought and launch the continent into a 21<sup>st</sup> century pragmatic global political theory, which must incorporate the political activities of all nations and not selected activities that please only the powerful nations.

<sup>14</sup> See the writings of George Ayittey (1992, 1998 and 2005).

<sup>15</sup> Toure and Nkrumah were very pragmatic and of the view that the African has been dehumanized by the West. To read more on *Nkrumahism-Toureism* see <http://www.aaprp-intl.org/pdfs/N-TIdeologyOfAAPRP.pdf>.

## 8 UTOPIANISM: DECONSTRUCTING AND RE-CONSTRUCTING THE STATUS QUO

According to J. D. Farmer, deconstruction is not the complete rejection of the status quo but a significant resource for rethinking and reframing known practices (Farmer 1997, 12). While he acknowledges the difficulties in deconstruction, he maintains that it facilitates and improves public administration and governance. The discussion on utopianism is not a new phenomenon: The concept has been looked through different prisms including socialist and democratic governance. This political ideological worldview has gone through radical thinking. For example, Ruth Kinna (2011, 279–294) did examine the concept of utopianism and argues that the new narratives of utopianism wrongfully treat the concept as socialism. In fact, in the literature different types of utopianism are discussed but that is not the focus of this paper. Kinna sees the concept of utopianism in an environment where different groups and individuals live together and are able to express their differences and interests without a dominant ideological hegemony (Alperovitz and Dubb 2012, 380–386). Her article revises the question whether there is a realistic future for utopian world? In answering that question, George Lawson (2008, 881) argues utopianism has become a political conundrum for academics, policy makers, and political commentators. He maintains that the political shift from ideology to utopia presents challenges, which are outside the known historical political experience. The utopian concept tends to question the past but distorts the analytical reasoning of present global politics but “cannot hope to tell us much about the future possibilities” (ibid., 886) of global political stability hence the importance of deconstructing the known to build the future.

Deconstruction of these political thoughts became important resources for African IR theorists but rebuilding these fading theories is diminutive in the literature. The various levels of theories already exist in the literature but there is limited discussion on theoretical collapse in postcolonial Africa. These theoretical levels may include individual, groups, organizational, institutional, governmental, and international. Each level can contribute significantly in the utopian narratives in addition to what transpires at the governmental levels. Regrettably, postcolonial political leaders in Africa often become easy targets of condemnation from theorists and academicians for their failure to adopt Western political thought to solving African problems. Deconstructionists provide interpretations that focus on the non-transparency in the complexities of established IR theories to addressing Africa’s political problems. Even though traditional African societies and institutions continue to play very significant role in postcolonial politics of Africa little or no attention is accorded them. There is also the fear that utopianism might lead to world government where international integration might lead to an “ultimately into a single world government” (Goldstein 2003, 379). The search for utopian theory may lead to integration theory – a process through, which supranational institutions replace national ones. Another interpretation could be a situation where weaker nations are swallowed by the so-called *values* of powerful nations. So there is the fear that with the concept of utopianism weaker nations might lose their national sovereignty where African nations, the *peripheries*, are more likely to be victims of this idealistic imaginable abstract harmonious concept. So how do we develop utopian theory that recognises Africa as part of the international system with its traditional administrative system?

## 9 AFRICA'S PLACE IN THE UTOPIAN-IR THEORY

There is an irony surrounding Africa's place within the study of IR theory let alone utopianism. However, Africa occupies a precarious position in the field of IR as an academic discipline, which has been pushed to the margins of the mainstream approaches of defining IR theory by focusing on stronger nations. Critics of IR who argued about the divide between IR theory and Africa denounce this marginalisation. A study by Said (2003) maintains that Western political origins only focus on traditional IR theory indicating that African politics does not conform to the norms of IR as Africa is seen as the *other*. Despite the marginalisation, Africa is undeniably present within IR in many ways. Africa's political involvement in world affairs cannot be ignored in either world history or international politics. Given its colonial past, Africa has seen social changes and constellation of different forms of governance (traditional chieftaincy system, monarchs, military rule, union government, and democratic rule). These areas do not only present rich data for analyses to be included in the IR narratives but it also provides justification for IR theorists to take critical look at Africa in this discipline for theory building.

While the political thoughts of some African leaders have falling into the hands of critics such as George Ayittey, D'Souza, and Kwaku Danso, their analyses fail to admit the role of foreign and perpetual international interferences in the political administration and governance of Africa. So how should Africa present itself to be incorporated in the development of utopian theory? There are inter-subjective meanings, which shape individuals, groups, or societies worldview at the basic or fundamental level. One view is the idea of how historically and politically the world is made. Then there is the idea of how the world is held or controlled by certain societies (*the centres*). While critical theory in IR is difficult to be neatly placed as a self-contained theory because its scope and methods transcend many of the other IR theories, developing an IR or utopian theory for Africa becomes a conundrum. But providing a postcolonial IR theory to include Africa presents "new ways for thinking about techniques of power that constrain self-determination, whether they emanate from within or without" (Grovogui 2007, 231).

As already established in this article, postcolonial African IR theory explores the power relations, which governs the status quo of representing the West but Africa as the *other*. It should be noted that postcolonial Africa in IR, like colonialism, has given rise to exploitation, alienation, and repression by supposedly rational, enlightened Western imperialist order. Such an order, according to E. Said, has established a binary world structure where all relationships between Western and non-Western countries are set up in the narratives of the former (*the centre*) to frame the characteristics of the other (periphery) using "Europe" and the "Orient" (Said 2003, 40) as an example. The characteristics of Western nations are considered rational, virtuous, mature, and normal whereas that of non-Western countries are irrational, depraved, childlike, and different. This observation by Said makes it difficult for African nations to penetrate through the establishment as non-aligned entities. Africa must explore its comparative advantage in labour, raw materials, and natural resources to fill the gaps created by IR theorists. To solidify the utopian concept, Westerners must understand that the interest of African countries may be different therefore Africa must NOT be discussed as one political unit since each country on the continent may have different foreign policy (FP) interest at any given period. However, the human needs of the African are the same as their Western colleagues. The basic human rights are necessary for all humanity.

## 10 UTOPIANISM AND FOREIGN POLICY (FP)

The main driving force of FP and IR is national interest. All international diplomatic discussions are cantered on the core interest of parties involved and more often than not the interest of the powerful nations dominate any diplomatic negotiations regarding world affairs. Theories of public policy tend to examine long-term policy change, which are initiated by national institutions and policy makers. National institutions operate and interact with each other including interest groups to produce, sustain, and change public policies to enhance the interest of governments. Similarly, FP is meant to extent the interest of nations and how they may interact with other countries. The basic definition of FP in the literature, in part, refers to actions governments take regarding their interest abroad to ensure both security and well being of their nationals. These may include, but not limited to, the protection of national boundaries, strong economy, stability, and an orderly society. Such is the realist approach to understanding FP.

To make the interest of a nation known to others comes the importance of diplomatic relations. But first we need to understand FP and diplomacy to see how these two variables can enhance the utopian narratives. FP is defined here as the amalgamation of the decisions made on behalf of a given political unit (a country), which details the implementation of goals with direct references to its external political cohorts. Foreign policy outputs therefore determine the behaviour of a political unit within the international system. Proponents of utopianism have one time or the other seen the concept as those who believe in social equity and human freedom. This mind set is to reject the status quo but no alternatives or remedies have been found. For example, the escalation of unfavourable balance of power tends to cripple any pragmatic thought of utopianism. As African nations are been schooled to give up their weapons as sovereign nations, the preachers continue to stockpile their weaponry and strength their military institutions.

For example, "In December 2003, following nine months of secret talks between Libyan, U.S., and British officials, Libya announced that it would destroy all of its biological, chemical and nuclear weapons."<sup>16</sup> In the case of South Africa, there are two schools of thought regarding the so-called "*voluntarily*" destruction of South Africa's nuclear program. To President F. W. de Klerk (the South African Apartheid leader at the time) it was not only the most sensible thing to do but with the end of the Cold War and threats against South Africa considerably reduced, the country had to dismantle its nuclear capabilities by joining the Non-Proliferation Treaty (NPT). President de Klerk maintains that with the withdrawal of over 50,000 Cuban forces from Angola and the persistence isolation of South Africa by the rest of the world, the way forward to join the world community was through negotiations and not through military force with nuclear power. But critics see the dismantling of the nuclear weapons as the fear of the all white minority Apartheid regime losing power to the oppressed majority South African blacks. As Koutonin noted the speed at which South Africa voluntarily gave up its weapons was suspicious. He "saw this speedy destruction of all the country's main military infrastructures as a sign that the

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<sup>16</sup> Africa is now a nuclear free continent despite attempts by some countries on the continent, to acquire nukes, which was prevented by Western powers. See An introduction to issues of Nuclear Weapons in Africa, available at <http://nwp.ilpi.org/?p=1489>.

racist apartheid regime and many western countries didn't want the upcoming or possible Black leaders to inherit such a powerful arsenal."<sup>17</sup>

MacIntyre is of the view that the only plausible "response to global inequalities of power and privilege is to support attempts by its victims to escape their worst effects" (Friedman 2012, 2). A claim he acknowledges is not possible by arguing that the problem is not to reform the dominant order, but to find ways for local communities to survive by sustaining life of the common good against the disintegrating forces of the nation state and the market. Clearly, MacIntyre is arguing along the lines of functionalism and neo-functionalism (see Haas 1958, 1964 and 2001) and to further his view of state integration as result of governance, the international system needs to provide platforms to entertain national interests without nations losing their sovereignty. As one of the theories of IR puts it, functionalism as an ideological concept avails itself through a process of international integration limiting state sovereignty, which can be traced back to the works of Emmanuel Kant and Woodrow Wilson (See Wilson's 14-point political speech on January 8<sup>th</sup>, 1918).<sup>18</sup> Here the assumption is that globalisation should be built on knowledge, territorial, and authoritative structures. Neo-functionalism tends to build or reintroduces territorial sovereignty and minimises the role of globalisation (Risse 2005). In an attempt to place Africa in these theoretical puzzles rather relegating the continent to the margins, as it has not been able to authoritatively and conspicuously define itself in the international relations narratives.

## 11 CONCLUSION

The quest for utopianism has a number of affinities with international relations theories and liberalism. The perpetual peaceful world concept envisioned by proponents of utopianism tends to ignore the impact of African history. This paper looked at the literature on Africa and IR theory regarding how the former is marginalised in global politics. There is certainly lack of consensus in the literature as critical debates continue to flourish claiming a mismatch between Africa, IR theories, and the utopian concept. Slavery and colonisation are permanent scars of global politics and any attempt to rewrite global international relations to predict the future must give credence to the importance of history. Though the West cannot escape from its historical brutalities, social, and racial injustices meted out to people of African descent, the concept of utopianism establishes the hope that there is room for equal recognition of Africa in global affairs.

Despite all the efforts of the West to eradicate some of the not too proud historical periods such as slavery and colonisation, those eras are still fresh and seem to undermine any utopian debate. Nevertheless, an attempt to re-establish effective and coherent co-existence of free nations should be the focus of proponents of the utopian debate. Powerful nations are obviously central to shaping the direction of international relations given their superior military,

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<sup>17</sup> Many critics of the Apartheid Regime argue that the regime collaborated with the West and there was the fear of a black leader having such a weapon. The scepticism was not about the dismantling of the weapons but the speed at which it was done: See Koutonin's "The dark truth about why South Africa destroyed its nuclear weapon in 1990," available at <http://www.siliconafrika.com/the-dark-truth-about-why-south-africa-destroyed-its-nuclear-weapons-in-1990/>.

<sup>18</sup> In this speech Wilson provides world integration through openness. See the entire speech at [http://avalon.law.yale.edu/20th\\_century/wilson14.asp](http://avalon.law.yale.edu/20th_century/wilson14.asp) Access May 22, 2014.



economic, and financial resources, which is the dominant argument underlining liberal IR theory. The centres use these tools as weapons to punish weaker countries that do not kowtow to their demands in the international system. One could also argue that their foreign policies, which Morgenthau insists are policies of self-interest make it difficult to establish any foundation for utopianism.

At the diplomatic level the coexistence of all nations provides hopeful future, mutual understanding, and possible reduction in conflicts. Nevertheless, this relationship is always seen by the *peripheries* as a system of divide-and-rule where the *centre* sets the tone of every diplomatic deliberations rejecting the political views of the weak. This divide-and-rule concept of the *centre* continues to confirm the scepticism and uncertainties in world affairs. Utopianism is an abstract ideological futuristic worldview, which is logically pragmatically impossible to achieve because of national sovereignty and interests. However, diplomacy must be seen as a path to entertain some of the characteristics of utopianism: A peaceful political environment. That is, the international system must embrace the ideas of all nations to develop a common approach in ensuring a peaceful world. The arguments forwarded by proponents of functionalism and neo-functionalism in the long run to ensure a peaceful environment in world affairs.

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# THE QUALITY OF SOUTH AFRICA'S ELECTORAL ACCOUNTABILITY 1994–2014: FREEDOM, FLAWS AND FOOD PARCELS

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*South Africa has consolidated its democracy with five national and provincial elections, all of which have been labelled by international and domestic observers as 'free and fair'. However, this label does not reveal the quality of electoral accountability in South Africa over its twenty years as a democracy. Therefore, this article examines the quality of electoral accountability through examining two criteria: the extent to which elections are free and fair and the democratic role of political parties. Findings reveal that while logistical and other problems continue to persist, the election process is well managed and violence relatively minimal. The real challenges seem to exist around the continued dominance of the ANC party, the lack of disclosure of private party funding and the lack of accountability that results from the closed list aspect of the proportionality system.*

**Key words:** free and fair elections, electoral accountability, democracy, political parties, Independent Electoral Commission.

## 1 INTRODUCTION

In April 1994 South Africa's first non-racial multiparty election took place. It marked an official end to the country's segregationist and authoritarian past and ushered in a new democracy, delivering not only the universal franchise but also formal equality before the law, avenues for citizen participation in governance and statutory institutions buttressing democracy (Muthien, Khosa and Magubane 2000). Twenty years later, on the 7<sup>th</sup> May 2014, South Africa fully consolidated its status as a young democracy when it witnessed its fifth national and provincial elections. All elections thus far have been declared 'free and fair' by a host of international and national election observers,<sup>2</sup> but does

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<sup>2</sup> The Commonwealth; Electoral Institute for Sustainable Democracy in Africa (EISA); the African Union (AU); the Southern African Development Community (SADC) Parliamentary Forum; the

this label necessarily reflect substantive electoral accountability in the country? In other words, to what degree have elections been free and fair and to what extent has the electoral system supported the deepening of democracy in South Africa over the past twenty years?

Electoral accountability, expressed through the act of free and fair elections and the contribution of political parties to the electoral process, is innate in a representative democracy.<sup>3</sup> So important are elections that, as Lindberg (2006, 1) notes, "Every modern definition of representative democracy includes participatory and contested elections perceived as the legitimate procedure for translation of rule by the people into workable executive and legislative power." After all, "it is through the ability of citizens, at regular elections, to retain or dismiss their elected representatives ... that the principle of popular control is made flesh" (Beetham, Byrne, Ngan and Weir 2002, 85). Through elections, citizens can make demands on their leaders which in turn implies the obligation that elected political leaders have to behave properly and lawfully or answer to the voters for their political decisions (Diamond and Morlino 2005). Political parties simplify the choices the public has to make by offering broad policies and different sets of politicians to choose between and in this way strengthen electoral accountability (Beetham et al. 2002).

However, it has also been noted that the holding of elections does not necessarily translate into good quality democracy. That is, while electoral democracies might be classified as democratic by virtue of the existence of elections, this does not guarantee that all traditional attributes of democracy are being adhered to (Bratton and van de Walle 1997). They may, in truth, be lacking in respect of a number of societal freedoms, such as poor civil liberties regimes, limited societal toleration, corruption, crime and violence.

In light of this scholars have increasingly turned their attention to ascertaining how well countries are sustaining their democracies by assessing the *quality* of their democracy (see, for example, Altman and Perez-Linan 2002, 85-100; Morlino 2011). Questions of degree are asked as to the various strengths and weaknesses that exist with the goal of determining how democracies can be improved and deepened (Beetham 2004; Beetham, Carvalho, Landman and Weir 2008). That is, to what degree are state democratic procedures experienced and the essential democratic principles realised? (Baker 1999, 273-274). For example, *to what degree* is the government committed to democratic values or *to what extent* do women and minorities participate in the politics of the state? This element of 'degree' helps to capture the overall quality of democracy within a state.

## 2 THE QUALITY OF SOUTH AFRICA'S ELECTORAL ACCOUNTABILITY

In examining the quality of South Africa's electoral accountability, this article examines the *extent* to which elections are held in a regular, universal, free and fair manner as well as the *extent* to which the existing party system is able to

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SADC Electoral Commission; the SADC Electoral Support Network; the African Alliance for Peace; the Association of African Electoral Authorities; the National Democratic Institute; the European Union; the South African Civil Society Election Coalition; and the Election Monitoring Network. See, for example, the EISA Election Observer Mission Report (2004); the South African Civil Society Election Coalition (2009), Business Unity South Africa (2009) and the AU Observer Mission (2009).

<sup>3</sup> See O'Donnell (2005); Diamond and Morlino (2005); and Diamond and Gunther (2001).

assist in the working of democracy. The criteria for assessment are derived from the International Institute for Democracy and Electoral Assistance's State of Democracy Framework (International IDEA 2010) and Leonardo Morlino's Tool for Empirical Research on Democratic Qualities (Morlino 2011). In pursuit of the first consideration the following indicators are examined: A comprehensive and constitutional legal framework as a foundation for free and fair elections; the efficiency, accountability, transparency and impartiality of the electoral management body (EMB); the degree to which the electoral climate is free from political violence and intimidation; electoral participation and the transparency and timeliness of registration and voting procedures; voting day issues; the degree of acceptance of the result by the government and the electorate; and media coverage of elections throughout the election phase. With regard to the second consideration, the democratic role of political parties, three aspects are discussed: the transparency of party financing and regulations that govern such financing; the prevalence of a stable and competitive multi-party system and the degree of alternation in government; and the proportionality of the electoral system.

### 2.1 A comprehensive and constitutional legal framework as a foundation for free and fair elections

Over the decades few have been able to agree on what constitutes standardised assessment criteria for a 'free and fair' election for several reasons not least of which is the difficulty of distinguishing between the concepts 'freedom' and 'fairness' (see Elklit and Reynolds 2005, 147-162). Nevertheless, this label is still used widely as an overall description and/or evaluation of elections to determine whether the playing field is level (Fakir and Holland 2010). Moreover, to address this 'vagueness' the Principles for Election Management, Monitoring, and Observation (PEMMO) in the Southern African Development Community (SADC) region were introduced in 2003 as guidelines for election observers (EISA 2004).

As a member of the SADC, South Africa is committed to upholding these electoral principles as well as those of the SADC Electoral Commissions Forum (ECF), African Union (AU), the EISA, the SADC Electoral Support Network, and the SADC Parliamentary Forum, namely:

- The need for a comprehensive and constitutional legal framework;
- The importance of transparent and accessible pre-election procedures (including the delimitation process, voter registration and candidate nomination);
- The equitable use of the media and public resources and issues of political party finance;
- The organisation and management of the election phase, including the location of polling stations, their layout, and access to them; the secrecy of the ballot, and the counting process;
- The post-election phase, including the settlement of election disputes and ways of ensuring that results are acceptable; and
- The requirements for unhindered, credible, professional and impartial monitoring and observation of the electoral process.

As per the guidelines, it is essential that the necessary legal and institutional frameworks are in place to serve as the "basis for the conduct and delivery of free, fair, credible and legitimate elections" (EISA 2004, 7). In South Africa, three Acts came into being prior to the first elections to govern the conduct and implementation of the national and provincial elections: the 1993 Electoral Act



(amended in the Electoral Act No. 73 of 1998), the 1993 Independent Electoral Commission Act and the Constitution of the Republic of South Africa Act of 1993. In accordance with the Constitution, elections are held every five years using the proportional representation electoral model. The Municipal Electoral Act No. 27 of 2000 defines the legal framework for local or municipal government elections.

## 2.2 The efficiency, accountability, transparency and impartiality of the electoral management body

The Electoral Commission, more commonly known as the Independent Electoral Commission (IEC), was established through the aforementioned IEC Act of 1993. The IEC is South Africa's EMB responsible for facilitating and overseeing the entire voting process and ensuring that the elections are free and fair. Mandated to be "impartial" and to "exercise its powers and perform its functions without fear, favour or prejudice" in Chapter 2 of the Electoral Commission Act No. 51 of 1996, the IEC is accountable to the National Assembly and must report on its activities and performance annually (section 181(5) of the Constitution). Apart from the duties prescribed in the Constitution and noted above, section 5(1) of the Electoral Commission Act lists numerous additional responsibilities for the IEC including the compilation and maintenance of a voters' roll, the promotion of voter education and the adjudication of administrative disputes that may arise from the organisation, administration or conducting of elections.

The IEC only came into being in December 1993, giving it just four months to confront the extremely challenging task of establishing itself and organising the April 1994 national and provincial elections (Commonwealth Observer Group 1994). The tight time limit, together with the lack of experienced staff, none of which had ever run an election for the whole country before, meant that the IEC was ill prepared for the 1994 elections (Friedman 1994). Since then, however, the IEC has become widely regarded as independent, impartial, consultative and transparent in its decision-making processes (see, for example, SADC Parliamentary Forum 2009). Moreover, since the 1994 elections, it has been consistently very well respected in for its efficiency, professionalism and perceived integrity (AU Observer Mission 2009). A survey conducted by the Human Sciences Research Council (HSRC) in 2011 found that 73% of respondents 'trusted' or 'strongly trusted' the IEC,<sup>4</sup> although 56% indicated that their amount of knowledge about the IEC remained limited and 17% responded that they did not know about the IEC at all (HSRC 2011).

A few months prior to the 2014 election, the integrity of the IEC came under intense pressure when a report published by the Public Protector found that the IEC's chairperson, Pansy Tlakula, had acted unfairly and in a non-transparent way over the procurement of an IEC office building. Four opposition parties took her to the Electoral Court calling for her resignation and contending that "the level of integrity and ethics in the IEC had evaporated, placing oversight of the elections at risk, and calling the whole organisation into doubt" (City Press, March 27, 2014).<sup>5</sup> The Court postponed the matter citing a lack of time to make a recommendation before the elections were held. It is yet to be seen whether or not this event has damaged the public's trust in the IEC. In the 2014 election the IEC received an unprecedented 400 complaints from opposition parties about alleged irregularities on or before election day, including an accusation of

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<sup>4</sup> This is a 19% improvement from the 54% who said they trusted the IEC in 1999.

<sup>5</sup> See also Venter (2014).

IEC officials “looking the other way” when African National Congress (ANC) members allegedly breached electoral rules forbidding campaigning near voting stations. Most of the complaints, however, were explained quickly away and international observer missions commended the IEC for its handling of a credible, fair, free and transparent election (African Union 2014). AU mission leader and former Ghana president John Kufuor was quoted as saying that the IEC deserved a B++ for the “overall professionalism and efficiency” of its 218000 staffers deployed in its 22 000 polling stations (Mbanjwa 2014).

### 2.3 The degree to which the electoral climate is free from political violence and intimidation

Since the first democratic elections in 1994, there have been four national and provincial elections (in 1999, 2004, 2009 and 2014) and four local or municipal elections (1995, 2000, 2006, and 2011). During these election times violence has cast a shadow over their success. Historically, the KwaZulu-Natal region has been the most volatile related to election violence particularly in 1994. During the six months prior to the 1994 elections, an average of 300 people died per month in Inkatha Freedom Party (IFP)-ANC clashes in this province contributing to a voting environment characterised by intimidation and fear (Daniel and Southall 2009).

Although incidents of violence in this and other provinces have marred every election since, it is nevertheless also evident that the levels of violence have declined with each consecutive election. According to official IEC statistics, conflict cases in the national and provincial elections in 1994 (in which over 1000 people were killed) dropped from 3 594 in 1994 to 1114 in 1999 (with the number of people killed less than 100) to 253<sup>6</sup> in 2004 (Piper 2005). Importantly, no election-related deaths were reported in the 2004 elections with only 34 of the 253 cases related to harassment, violence or intimidation.<sup>7</sup> Relatively few cases of violence were recorded in the 2009 election period and 2011 municipal elections. Although several incidents of intolerance<sup>8</sup> and violent clashes between the IFP and ANC in KwaZulu-Natal were reported in the 2009 elections, these were at times exaggerated (most likely for political gain) and were, in fact, isolated incidents that did not “amount to a crisis” when compared to the region’s previous historical record.<sup>9</sup> In the 2014 election two people in Kwazulu Natal were involved in shooting incidents related to election violence and one of the two was killed. On the night before the elections, voting tents were set on fire in Bekkersdal township (South-West Johannesburg) as disillusioned residents protested over the ANC’s inability to provide enough employment. One person was killed and more than 100 arrested when EFF and IFP supporters took to the streets of Alexandra township (North Gauteng) demanding a re-vote, with some claiming that the poll was rigged. IEC offices were also set alight (Chauke 2014). The tensions in Alexandra could be attributed to antagonism between the EFF, IFP and the ANC.

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<sup>6</sup> Of these, 31 needed conflict management panellists to intervene directly (24 related to inter-party disputes and seven to disputes with the IEC) (Booyesen and Masterson 2009, 420).

<sup>7</sup> The majority of complaints concerned posters, faulty station procedures and alleged IEC bias (Booyesen and Masterson 2009, 420).

<sup>8</sup> Examples of such incidences included disruptions of party meetings, the removal or defacing of election posters and supporters denied access to venues by members of other contesting parties.

<sup>9</sup> Examples of ‘crises’ of politically motivated violent clashes between the IFP and ANC occurred in KwaZulu-Natal between the late 1970s and early 1990s, when more than 25 000 people died (South African Institute of Race Relations, quoted in Mbanjwa, 2009).

Notwithstanding the above-mentioned township protests in the 2014 elections, the consistent reduction in election violence generally has been significant enough to prompt some political academics to refer to a change in the nation's political culture as "shift[ing] away from the bullet to the ballot as the preferred and accepted means of settling disputes" (Daniel and Southall 2009, 242). It is attributed largely to the IEC's conflict management programmes which have developed with each consecutive election and through which the IEC attempts to resolve any disputes between parties using mediation and delivering rulings. Central to the programmes are the conflict management panels; the Multiparty Liaison Committees and Electoral Court all created to promote conflict-free elections (Fakir, Ngidi and Letsholo 2009).

In the interest of ensuring non-violence, all registered parties are required by the IEC to sign the Electoral Code of Conduct, which, *inter alia*, prohibits them (as well as their candidates, representatives, members and supporters) from using violence, intimidation and defamation in their campaigning and other election activities. Moreover, a 2003 amendment<sup>10</sup> to the Electoral Act No. 73 of 1998 gave the IEC formal and legal rights to enforce the Code, thus, contravention carries serious legal penalties and sanctions including the barring of a political party's candidate from participating in an election.<sup>11</sup>

## 2.4 Electoral participation and the transparency and timeliness of registration and voting procedures

The election procedure during the first election period in 1994 was considered shambolic in many ways. There was no voters' roll and areas that had been particularly neglected by apartheid proved almost inaccessible with no infrastructure to facilitate the carrying out of elections (Friedman 2014). Officials had to guess the number of people that would turn up to vote, often miscalculating and falling far short of required election materials. A voters' roll has been used in all subsequent elections. The Electoral Commission Act sets out the relevant provisions for voter registration. In terms of this legislation, the IEC is wholly responsible for compiling and maintaining voters' rolls. The IEC is also mandated to promote voter education (section 5(1)(k)).

Every adult citizen over the age of 18 has the right to vote, in secret, as guaranteed by section 19(3) of the Bill of Rights in the Constitution. Non-citizens and people who have been declared by the High Court to be of unsound mind or mentally disordered are not allowed to register as voters (section 8 of the Electoral Act No. 73 of 1998). Also, prior to the 2004 elections, only those prisoners with an option of a fine were allowed to register and vote in terms of the Electoral Act. This has since changed with the result that all prisoners can now register to vote. In the 1994 and 1999 elections, South Africans living abroad were able to vote, however the Electoral Laws Amendment Act, passed before the 2004 elections, disenfranchised these South Africans. Following a Constitutional Court ruling just prior to the 2009 national elections, the right to vote was returned to all South Africans living overseas. In 2014, over 18 000 overseas voters cast their vote a week prior the election.

<sup>10</sup> Section 103A states that the IEC may "attempt to resolve through conciliation any electoral dispute or complaint about an infringement of the Code brought to its notice by anyone involved in a dispute or complaint" (section 103A of the Electoral Laws Amendment Act No. 34 of 2003).

<sup>11</sup> Tlukula, Pansy (IEC Chairperson). 2009. "Parties Commit to Electoral Code of Conduct," *Mail & Guardian Online*, March 11. Available at <http://www.mg.co.za/article/2009-03-11-parties-commit-to-electoral-code-of-conduct>.

Section 33 of the Electoral Act provides an opportunity for certain categories of voters, including pregnant women and people with physical infirmities or disabilities, to cast 'special votes' typically two days prior to the election date. In its 2009 Observer Mission report, the SADC Parliamentary Forum highly commended these measures for intending to ensure that "all persons who are qualified and willing to vote are afforded the opportunity" (SADC Parliamentary Forum 2009, 6).

Despite not being very highly publicised,<sup>12</sup> voter registration is a continuous process (that is, registration takes place throughout the year not just during election periods) and has resulted in a regularly updated, more accurate and comprehensive register. The IEC has provincial electoral offices in each of South Africa's provinces and 237 municipal electoral offices in municipalities across the country with the result that there is considerable access for citizens to register.

In the months preceding each election the IEC holds 'registration drives' over weekends to enable new registrations or amendments to existing registrations (Wall 2010). As part of these drives, the IEC undertakes special 'targeted' campaigns, which are put in place to motivate certain groups in society to register, such as the youth and indigenous communities. Historically, there has been a disparity between the youth population and those registered to vote. However the bulk of new registrations in 2008 and 2009 came from the youth (aged 20-29) with 78% of newly registered voters under the age of 30 (February 2009). This prominent increase in young voters was attributed mainly to party drives by the participating political parties; a vigorous advertising campaign by the IEC urging people to vote; and, with the inclusion of the break-away party – Congress of the People (COPE), a generally more dynamic election landscape than in the 2004 elections (Ajulu 2010). Additionally, it is possible that it could be an indication of a newly aware youth population or it could be as a result of the IEC's use of technology to reach potential young voters who tend to use this means of communication the most. For example, in the 2009 national elections, voters could check their registration status via short message service (sms) and helpful registration and voting information was readily available online (February 2009, 60). Prior to the 2014 elections, only 32% of the two million so-called 'born-free' generation (the first group of 18-19 year olds born into democracy in 1994) registered to vote (IEC 2014b). This was despite IEC efforts to run television and radio campaigns featuring musicians and other celebrities in a bid to appeal to young voters (Du Plessis 2014).

The IEC's efforts to increase registration over the years has proved successful, with numbers increasing for each consecutive election and a total of over 25 million for the 2014 election (see Table 1). However, despite the fact that South Africa's voting age population (VAP)<sup>13</sup> has grown by approximately seven million people since 1994; the number of actual registered voters has declined. Therefore, while 73.5% of all eligible voters who were registered in 2014 cast their vote at the polls (a favourable turnout in international terms), this also meant that 7 million potential voters (of the VAP) remained unregistered.

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<sup>12</sup> Barring an actual visit to the IEC website to be made aware of their continuous voter registration procedure, this fact is not generally well publicised.

<sup>13</sup> The VAP refers to those citizens who are 18 years and older who are eligible to vote.

TABLE 1: REPUBLIC OF SOUTH AFRICA GENERAL ELECTION RESULTS, 1994–2014

Election year	1994	1999	2004	2009	2014
Registered voters	No voters' roll	18,172,751	20,674,926	23,181,997	25,388,082
Voter turnout	19,726,610 (86.7%)	16,228,462 (89.3%)	15,863,558 (76.7%)	17,919,966 (77.3%)	18,654,771 (73.5%)
Valid votes cast	19,533,498	15,977,142	15,612,671	17,680,729	18,402,497

Information obtained from the IEC (2014c) website and compiled by the author.

In South Africa, voter turnout (the percentages of the registered VAP that turned out to vote in elections) for national and provincial elections traditionally has been quite high (see Table 1) with 86.7% in 1994, 89% in 1999, 76.7% in 2004, 77% in 2009 and a slightly lower 73.5% in 2014. Conversely, voter turnout in local government elections has been traditionally quite poor; although lower rates of participation in local government elections is a global phenomenon. In any event, voter turnout increased considerably in the 2011 (57.6%) local elections from 48.5% in 2000 and 48.4% in 2006 (Stolley and Marrian 2011).

As noted above, voter education is one of the duties assigned to the IEC. Mostly, however, voter education is regarded as a collaborative effort between the IEC, government departments, the SABC and civil society (Wall 2010). The IEC undertakes civic education 'interventions' leading up to elections in the form of presentations, workshops, seminars, conferences, roundtables, symposiums and preparatory briefings. It also works with the SABC to produce television advertising and to incorporate election themes in popular television dramas and sitcoms in South Africa's major languages (often with subtitles). In addition, the IEC uses SABC radio and community radio to a certain extent although the IEC acknowledges that more effective use could be made of this local information delivery opportunity. An HSRC survey in 2011 found similar results with 96% of respondents expressing very high satisfaction with the content of television and radio voter education programmes (HSRC 2011).

Other strategies for education the people on voting include the use of the print media, where newspapers provide full-page diagrams on voting procedure, as well as electronic resources. For example, the IEC (2014a) website contains significant information about the process of voter registration and voting procedures themselves, including mobile apps, cartoon booklets, guides on election procedures in the country's 11 official languages and a specially devised online game where the public is invited to test their election knowledge against others. This website, together with a text messaging service, provides uncomplicated facilities for people to check their registration, although this facility is in English only (Wall 2010). Some information booklets have also been made available in Braille and sign language is also used in voter education programmes to accommodate those with hearing impairments.

## 2.5 Voting day issues

As noted above, every adult citizen has a right to vote in secret. Since 1999 most citizens surveyed about election processes have indicated that they believe their vote is done in secret,<sup>14</sup> which appears to indicate that the IEC has been successful in ensuring this right for the most part. A minor issue surrounding secrecy has emerged in that the majority of ballot boxes are not transparent. It has been recommended that translucent and colour-coded ballot boxes to

<sup>14</sup> For example, in a survey on the 1999 elections 85% of respondents believed their vote was secret (O'Donovan 1999).



match the different ballot sheets (for example, national and provincial) be introduced to make the process user-friendlier and to guide voters in the casting of their ballots (SADC Parliamentary Forum 2009). This can also prevent a possible mix-up of ballots, which further prolongs the process of sorting the ballots during the counting process (Chauke 2014).

Generally, the management of elections by the IEC, especially on voting day, has been of a very high standard across the elections. By 2014 there were 22 000 polling stations clearly marked and situated in neutral and accessible areas situated throughout South Africa, although, EISA observed that this number was insufficient to cater for the increasing number of voters (as a result of the 9.5% increase in registered voters) (Chauke 2014). A number of logistical problems have arisen in past elections (notably those in 2009 and 2014) including a shortage of ballot papers and ballot boxes in some areas, long queues and lengthy waiting times, late delivery of voting materials leading to delays in the opening of some polling stations, and some election personnel seeming to lack training in the counting of the ballots (Chauke 2014). Additional problems have included the display of party political material within the perimeters of polling stations on voting day. This practice has been criticised by election observers because although it is not against electoral law, it “runs counter to international standards for credible elections as it is tantamount to campaigning” (see the AU Observer Mission 2009; EISA Observer Mission 2009). On a positive note, there has been little evidence of electoral fraud over the years with only one election officer being convicted of such an act (Tlukula 2009).

The counting of the ballots takes place at each polling station in the presence of party agents and observers, which is consistent with regional norms and standards. Moreover, the transparency of the counting process has been enhanced by the establishment of a well-equipped National Results Centre in Pretoria where access is granted to representatives from political parties, the media, and election observers (EISA Observer Mission 2009). Notably the IEC’s use of information communication technologies to expedite the public broadcasting of election results, particularly in the 2009 and 2014 elections, has also been commended (SADC Parliamentary Forum 2009), as has the high level of inclusion of women deployed as presiding officers in the electoral process (Bothma 2014).

## 2.6 The degree of acceptance of the result by the government and the electorate

Processes do exist for the public to challenge electoral outcomes (Section 55 of the Electoral Act makes provision for objections). However, the extremely low number of objections to election results over the years<sup>15</sup> would appear to suggest that the overwhelming majority of South Africans consistently have accepted the results of the elections.

In terms of the 1998 Electoral Act, all political parties are responsible for ensuring that their candidates and supporters abide by the Electoral Code of Conduct by “accept[ing] the result of an election or challeng[ing] the result in a court” (schedule 2(4)(2)). A few incidences of IFP related post-election violence have been recorded, especially in Kwa-Zulu Natal (a traditional IFP stronghold). In addition, the IFP leader, Mangosuthu Buthelezi, has consistently claimed

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<sup>15</sup> Following the 2004 national elections, the IEC received, considered and decided eight formal objections. In 2009, a total of 25 formal objections were received all of which were resolved (IEC 2004; IEC 2009).



electoral fraud and IEC bias after every election except the 2014 election (in which the IFP received only 2.4% of the total vote, down from 4.5% in the previous election), but these claims have never threatened public acceptance of the results (see, for example Mdletshe 2008). Following the 2011 municipal elections, 63 objections were raised by various political parties, but these were all resolved by the IEC. Moreover, all parties accepted the outcome of the elections (Stolley and Marrian 2011).

## 2.7 Media coverage of elections throughout the election phase

How the way the media constitutes part of the 'level playing field' in South African elections – especially with regard to state media perhaps favouring one party over another is of particular importance. The state-owned SABC has come under particular scrutiny for its election coverage since democratisation. The SABC is regulated by the Independent Communications Authority of South Africa (ICASA)<sup>16</sup> to ensure that broadcasting is in the public interest, is fair and represents a diversity of views broadly reflecting South African society (section 192 of the Constitution). However, over the years, complaints have arisen from opposition parties regarding the disproportionate amounts of time the SABC has dedicated to the coverage of the ANC during both national and municipal elections over the years and to the ANC and COPE especially during the 2009 national elections (Schreiner and Mattes 2011).<sup>17</sup> In another example, in 2014 the SABC was accused of being biased toward the ANC when it refused to air two opposition party adverts from the Democratic Alliance (DA) and the Economic Freedom Fighters (EFF). The broadcaster stood by its decisions arguing that the adverts promoted a potential incitement to violence. It was supported by ICASA (Morkel 2014).<sup>18</sup>

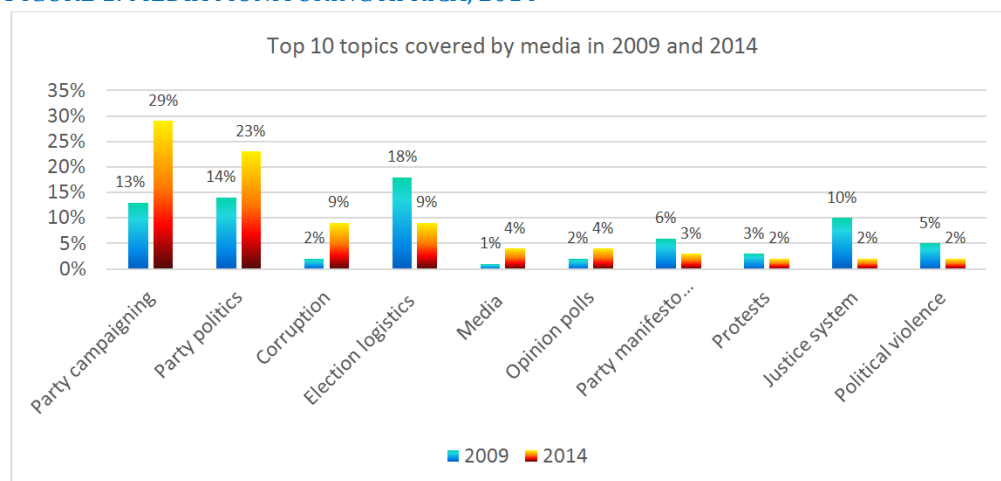
During the 1999 and 2004 elections, Media Monitoring Africa (MMA) found that election coverage by the media was mostly fair but that the media had tended to report on events rather than issues leaving voters without sufficient information on party policies (Media Monitoring Project 1999; Bird 2010). Again, during the 2009 election cycle, the media's coverage was found to be predominantly balanced with no party received substantially more or less positive or negative reporting (Schreiner and Mattes 2011). In 2014, the MMA found 85% of all election coverage pertained to five top parties only (ANC, DA, EFF, Agang SA and COPE) leaving the other 22 registered parties to share the remaining 15% (Media Monitoring Africa 2014). Of the coverage though, 85% was found to be fair and only 15% biased.

<sup>16</sup> Section 58(1) of the Independent Broadcasting Authority Act No. 153 of 1993 lays down the rules for election coverage by the electronic media in order to ensure the freedom and fairness of the process. It also establishes ICASA to enforce the legislation.

<sup>17</sup> In the 2009 election coverage, Media Tenor found that the ANC did receive a substantially larger share of all coverage (52%) followed by COPE (18%), DA (12%) and IFP (6%).

<sup>18</sup> In its advert, the EFF openly encouraged its followers to destroy the gantries in place on Gauteng highways as part of the new and much despised tolling system, while the DA's advert accused the police of "killing our people".

FIGURE 1: MEDIA MONITORING AFRICA, 2014



While balance in terms of media coverage has improved, what has been consistently lacking is depth of coverage with the media largely failing to cover issues of concern to the electorate. For example, in the 2009 and 2014 campaigns most of the coverage focused on party campaigning and party politics (electioneering) (see Figure 1). This is unsurprising given that they were election periods, however, in both years the media did not adopt a citizen's agenda. Issues of poverty, service delivery, health, race, education, child abuse, HIV/AIDS, crime and women all fared poorly with less than 2% of the overall coverage (Media Monitoring Africa 2009). Therefore, it seems apparent that election coverage in South Africa remains largely not about public policy, but rather about people and personality (Schreiner and Mattes 2011). Moreover, during the 2004 and 2009 election periods, the media did not pay sufficient attention to how well political parties kept their electoral promises. Given that monitoring a party's delivery record is essential to developing a truly responsible democracy, this lack of oversight by the media has not helped voters to evaluate political parties or hold them accountable.

Television advertising was prohibited in South Africa during the 1994 and 1999 elections. However, prior to the 2004 elections, new ICASA regulations allotted airtime (*de facto* very short public election broadcasts) on the basis of the number of elected MPs that parties had in the national and provincial Parliaments. Predictably, this benefitted the larger parties with significant parliamentary representation while other much smaller parties, which also did not have the financial means to sustain their advertising campaigns on radio or in print either, were virtually lost (Duncan 2009, 224). Although new regulations issued by ICASA in late 2008 required television networks to provide parties with free airtime<sup>19</sup> allocated proportionally based on the current number of candidates fielded by a party (as opposed to the number of elected legislative representatives as noted above), this potential was not fully realised. According to the SABC, only 46 of the 84 allocated free two minute spots were used, possibly because most of the smaller parties "were either unfamiliar with the process of finding adequately skilled people to produce these spots and, or were unable to afford them" (Schreiner and Mattes 2011, 15). As noted by Booysen and Masterson, this new opportunity merely acted to "[widen] the gulf between the party-political *haves* and *have nots*" (Booyesen and Masterson 2009, 414).

<sup>19</sup> New ICASA regulations required that "television and radio broadcasting license holders make available four two-minute time slots every day for election broadcasts during the designated campaign period" (Schreiner and Mattes 2011, 15).

## 2.8 The transparency of party financing and regulations that govern such financing

In order to carry out their many responsibilities, including the need to set up and maintain party offices, parties need funding. Parties wishing to contest the national and provincial elections are also required to pay a deposit. For the 2014 elections, parties had to pay R200 000 to compete nationally and R45 000 more per province. During the 1994 elections, a state electoral fund (amounting to about R69 million) was established to provide equitable financial assistance to parties campaigning in the election (Sadie 2006, 11). For the 1999 elections, and all elections since then, new regulations were formulated including Section 236 of the 1996 Constitution which provided that: “to enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis”. Provision is also made through the Public Funding of Represented Political Parties Act No. 103 of 1997.

South Africa is one of the few African countries in which political parties receive funding from government (EISA 2011). In South Africa this funding is based on proportionality and is administered by the IEC. More specifically, 90% of funds are distributed proportionally to each party based on its share of seats in the National Assembly. The remaining 10% is shared equally among the parties in each provincial legislature. Smaller parties have complained that the formula used is unfair given that the largest portions of the funding are given to the large parties and nothing is given to those that are not represented in Parliament (Steytler 2004, 59–66).

Section 5(3) of the Public Funding of Represented Political Parties Act sets out several prohibitions for the use of this public money including a ban on paying any direct or indirect remuneration or other benefit of any kind to any elected representative of the party or to any public servant at any level of government. The use of government resources for political campaigns is also prohibited, specifically under schedule 2, 9(2e) of the Electoral Act No. 73 of 1998 which prevents the “abuse of a position of power, privilege or influence, including ... employment authority to influence the conduct or outcome of an election”.

The amount of public money that parties currently receive is not enough to finance the many activities that are required of them. This, coupled with the truism that the more money a party has the better able they are to convey their message to potential voters, means that political parties in South Africa, as in many other countries, must obtain private funds from other sources such as local and foreign business (Tshitereke 2002). Essentially, therefore, the majority of election funding comes from private funders; however, there is no way to know exactly how much is funded this way as no law exists to regulate the flow or disclosure of private funding of political parties (Korte and Weissenbach 2010, 149).

The lack of regulation on private funding has several implications for the quality of electoral accountability in South Africa. Firstly, it can be assumed that since private individuals or groups (other than the electorate) are able to influence the political process through funding to parties and politicians, then this means that “decisions are taken not in response to the will of the electorate but to the wishes of the wealthy” (Friedman 2010, 162). As such, February argues that “secret donations ... have the potential to exert undue influence on the political system, secretly drowning out the voices of the poor and further excluding the

marginalised from political influence” (February 2012). Secondly, private donations can have a corrupting effect on government in that parties are expected to provide, in return, special favours. The lack of transparency has contributed to allegations of corruption reinforced by reports of donations having influenced government action in the awarding of contract and development permits. One such example includes testimony of David Malatsi, a former Provincial Planning Minister, having pushed through approval for a golf estate after donating, in secret, a series of sizeable donations to the New National Party (February and Calland 2005).

Thirdly, another example of potentially “insidious” uses of party funding, argues Friedman, is encapsulated in the possibility of better-resourced parties using money to literally buy votes (Friedman 2010, 161). For example, in the 2009 national elections particularly, the ANC was accused of attempting to ‘buy votes’ through the dissemination of food parcels (EMN 2009). Two days prior to the 2009 election, the Electoral Monitoring Network reported receiving complaints from people that food parcels were being used to persuade the poor to vote for those who provided the parcels and that voters were told that they would only receive social grants and public services to which they were entitled if they voted for particular parties (EMN 2009; Naidoo 2009). This issue rose again in 2013 when food parcels were handed out two days before crucial by-elections. The ANC was accused of using the food distribution to sweeten voters in their favour in municipalities in which they were in danger of losing support. Du Plessis and Groenewald 2014). Also, in early April 2014 (one month prior to the national elections) the Kwazul-Natal MEC Meshack Radebe stated that those who received social welfare grants but voted for opposition political parties were “stealing from government” (TimesLive, April 9, 2014). The ANC was accused of spreading misinformation about South Africa’s social grant policy and generating fear in order to prevent people from voting for opposition parties.

Finally, if public policy decisions are perceived to be made on the basis of political contributions, then not only are the policies suspect but government will also not be seen to be accountable to the people. Therefore, undisclosed funding has wider implications for trust in the principles of legitimacy, participation and democracy (IDASA 2003). It appears that the South African people agree. In a survey conducted by IDASA in 2004, an overwhelming majority of respondents (87%) demanded transparency in private donations to political parties, whereas 81% supported the regulation of private funding to political parties (Ashiagbor 2004).

At the heart of the private funding debate is that as political parties strive to protect the identity of their benefactors, they are “nurturing the danger posed to South Africa’s democracy by the corrupting influence of undisclosed funding” (Robinson 2007). IDASA, the IEC, EISA and several other NGOs are in favour of some form of disclosure or registration of private funding (Friedman 2010, 157). However, despite several attempts by civil society to urge reform in this regard, these have largely failed. For example, an attempt by the civil society organisation, Institute for Democracy in Africa (IDASA), to lodge an application in the Cape High Court in 2005 demanding that the four major political parties (ANC, DA, IFP and African Christian Democratic Party (ACDP)) open their books to public scrutiny was dismissed after political parties agreed to legislate on the matter (February and Calland 2005). In spite of this declaration as well as a 2007 ANC resolution committing itself to promoting transparency in party funding (ANC 2007), to date, no progress had been made in developing legislation to regulate private funding (February 2014).

## 2.9 The prevalence of a stable and competitive multi-party system and the degree of alternation in government

Since 1994, 26 parties, on average, have contested the general elections.<sup>20</sup> Despite this extensive number, there has been no alternation in government since 1994. The ANC has remained the dominant party following every election, winning 63% of the votes in 1994, 66.35% in 1999; 69.68% in 2004; 65.90% in 2009, and 62.1% in 2014 (see Table 2). Because of the system of proportional representation, these votes have translated into the highest number of seats in Parliament (IEC 2004; IEC 2009). Given the above, there is little doubt that South Africa's party system is characterised by single-party dominance.

**TABLE 2: TOP FIVE PARTIES AND CORRESPONDING PERCENTAGE OF THE VOTE, 1994–2014**

1994	1999	2004	2009	2014
(1) ANC 62.6%	(1) ANC 66.4%	(1) ANC 69.7%	(1) ANC 65.9%	(1) ANC 62.1%
(2) NP 20.4%	(2) DP 9.6%	(2) DA 12.4%	(2) DA 16.7%	(2) DA 22.2%
(3) IFP 10.5%	(3) IFP 8.6%	(3) IFP 7.0%	(3) COPE 7.4%	(3) EFF 6.4%
(4) FF 2.2%	(4) NNP 6.9%	(4) UDM 2.3%	(4) IFP 4.5%	(4) IFP 2.4%
(5) DP 1.7%	(5) UDM 3.4%	(5) ID 1.7%	(5) ID 0.9%	(5) NFP 1.6%

Information obtained from the IEC (2014c) website and compiled by the author.

Some scholars who have reservations about the dominance of one party over others argue that the continuous return to power of the same political party following consecutive elections is not good for accountability and that democracy is better served through alternations of power.<sup>21</sup> Proponents of this view argue that “the existence of political opposition within a competitive party system presents alternatives to the governing party and, therefore, stimulates debate within society over ideas and policies; and allows society to question the actions and choices of government” (Brooks 2004, 2).

Opponents of the dominant party system further argue that it is inimical to democracy for several reasons, including the following:

- Without rotation in office, a blurring of the boundaries between party interests and state interests is inevitable (Giliomee and Simkins 1999);
- Dominant parties may be tempted to concentrate political power in the executive and their own party structures (Welsh 1994, 203). This growing preponderance of political power may lead to “arbitrary decision-making that undermines the integrity of democratic institutions, particularly that of the legislature and its ability to check the executive” (Giliomee and Simkins 1999, 340);
- Without the key threat of being voted out of power, this may engender complacency and arrogance in the dominant party and lead to abuses of office and corruption (Giliomee and Simkins 1999). By the same token, predictable re-election may result in increased political apathy and resulting potential deterioration of responsive and accountable government.

The ANC's dominance, coupled with the fact that it is unlikely to lose an election in the near future, has raised concerns that democracy and governance are more likely to be compromised (see Jeffery 2010; Giliomee and Simkins 2005; and Southall 2005). However, in its first ten years of dominance there was very little if any evidence to suggest that the ANC had deployed this dominance towards undermining democratic institutions (Ajulu 2010, 13). Despite this, the

<sup>20</sup> In 1994 27 parties contested the election, 26 in 1999, 21 in 2004, 28 in 2009 and 33 in 2014.

<sup>21</sup> See, for example, Huntington (1991); Welsh (1994); Przeworski and Limongi (1997, 155-183), and Giliomee and Simkins (1999).

potentially negative effects of continued dominance have been the subject of widespread debate over the years. Moreover, the ANC's deployment of party functionaries to state office, evident through its cadre programme has been criticised by civil society and monitoring groups as "blur[ring] an essential separation between party and state", undermining institutions, contradicting core principles in the Constitution and compromising governance (Jeffery 2010, 404).

An attempt by the opposition and smaller parties to erode the dominance of the ANC through floor-crossing<sup>22</sup> (legalised by Acts 18, 20, 21 and 22 of 2002<sup>23</sup>), had the reverse effect. The ANC benefitted the most by attaining a two-thirds majority in the National Assembly thereby further undermining the representation of the already smaller parties and weakening the opposition (Ajulu 2010). Floor-crossing was later abolished in January 2009.<sup>24</sup>

Despite the disappointment of this mechanism to impact ANC dominance, there have been other elements of dynamism within the party system which have served to revitalise opposition politics. The two significant of these was the establishment of COPE in 2008 and the EFF in 2013. In the absence of a strong group of opposition parties that could act as agents of restraint to the ANC's dominance, COPE was seen as the first potentially viable black alternative to the ANC. However, despite the hype, COPE did not become the official opposition following the 2009 elections, garnering only 7.42% of the votes as opposed to the DA's 16.66%. Moreover, in the years prior to the 2014 election, party infighting resulted in a massive loss of support for COPE so that it received only 0.7% of the total vote. The EFF was formed and headed by former ANC Youth League President Julius Malema who had been expelled from the ANC due to indiscipline. Campaigning for nationalisation of land and mines and appealing to the majority poor disillusioned by the perceived lack of service delivery under the ANC government paid off. The EFF became the second biggest opposition behind the DA with 6.4% of the vote.

## 2.10 The proportionality of the electoral system

The main benefit of the closed list proportional model is that it allows all votes cast to have equal weight and every vote counts so that even smaller parties can find their way into Parliament. Moreover, the positioning of people on the closed party lists - ranked according to preference as a result of internal party politics, means that parties are able to engineer their lists to take into consideration issues such as gender, ethnicity, geography, and economic expertise (Sylvester and Eshetu 2010, 172). As a result, if the parties wish it, this system promotes inclusivity, which, in turn, contributes to the credibility, and representative nature, of the legislature. This has been most successful with regards to enhancing gender representation. Through the ANC's implementation of a 'zebra stripe' system on its party lists (every male candidate is followed by a female candidate) and with the ANC consistently

<sup>22</sup> Floor-crossing is the ability of public representatives to 'cross' the floor to join another party or to form a new party without losing their seats.

<sup>23</sup> The Constitution of the Republic of South Africa Amendment Act 18 of 2002; the Local Government: Municipal Structures Amendment Act 20 of 2002; the Constitution of the Republic of South Africa Second Amendment Act 21 of 2002 and the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

<sup>24</sup> Floor-crossing was originally forbidden by an anti-defection clause embedded in the 1996 Constitution, on the basis that permitting representatives to change parties would disturb the electoral balance chosen by the electorate.



securing a large majority of votes, women's representation has concurrently "rocketed up" as a result (Hicks 2012).

However, this system has also been criticised for its lack of accountability. As it is a 'closed' system, voters do not have direct influence over the compilation and ranking of lists, although party members have some say through the process of internal party selection.<sup>25</sup> Considering that the Constitution insists on accountability by representatives to the voters, this lack of full transparency is problematic. Because the electoral system does not provide for constituencies, a gap is created in that MPs are not elected by a particular constituency. Therefore the voters do not have explicit knowledge of whom they are voting into power. This closed party list system has been criticised heavily with several practicing politicians and leading academics arguing that it entrenches fealty by MPs to political parties and not to voters, thereby minimising the link between the electorate and public representatives and weakening accountability (see Chiroro 2008; APRM Monitoring Project 2011). The system has been the subject of several investigations and reports, all of which have recommended reforms that would ensure greater accountability between constituents and their representatives.<sup>26</sup> However, as yet nothing has transpired from these suggestions and it seems that with the results of the 2014 elections assuring this continued dominant status, the *status quo* will prevail for the foreseeable future.

### 3 CONCLUSION

In assessing the quality of South Africa's electoral accountability, two criteria were examined: the extent to which elections are held in a regular, universal, free and fair manner as well as the *extent* to which the existing party system is able to assist in the working of democracy.

The Constitution provides for the existence of the IEC, which despite experiencing some problems during elections over the years is a trustworthy and publicly respected institution, which has administered elections efficiently, responsibly and transparently. While the presence of violence and intimidation during election phases since 1994 has been a matter of concern in the past, the prevalence and intensity of election-related violence has declined substantially over the years. Moreover, in terms of electoral participation and the transparency and timeliness of registration and voting procedures, South Africa also fares well. Voter registration is a continuous and transparent process; a constitutionally protected right and is legislated for in the Electoral Act. While the number of actual registered voters relative to the voting age population has declined, voter participation at national level is consistently high and although traditionally low at local level increased in the last local government elections. Voter education is extensive and caters to all official languages. The secrecy of the ballot is constitutionally guaranteed and backed by legislation.

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<sup>25</sup> For example, within the ANC, its 3000 branches countrywide nominate candidates and following a lengthy selection and compilation process candidates are voted on at national level after which the NEC composes the final list.

<sup>26</sup> The 2003 Van Zyl Slabbert Commission Report by the government appointed Electoral Task Team recommended that "a larger measure of constituency representation ... be built into the system" Electoral Task Team, *Report of the Electoral Task Team* (Electoral Task Team 2003, 12). A report by the Independent Panel Assessment of Parliament in 2009 also advised, that "the current electoral system ... be replaced by a mixed system which attempts to capture the benefits of both the constituency-based and proportional representation electoral systems" (Report of the Independent Panel of Assessment of Parliament 2009, 37).

A few 'voting day' logistical problems remain which need to be addressed in future elections. However, these incidents are isolated. Procedures are in place to contest election results. The degree of acceptance of election results by the government and the electorate is almost total barring a few complaints recorded over the years. In terms of media coverage of elections throughout the election phase, South Africa has performed less well in the past but is improving. Both the Constitution and legislation provides that public broadcasting be fair and representative, although, in practice this has not always been the case - notably with regard to the public broadcaster. Generally, however, the media's provision of an equitable level playing field has improved although it is also evident that thus far the media has failed in its duty to adopt a comprehensive citizen's agenda in its shallow policy coverage in the run up to elections. Finally, South Africa adheres to most, if not all, of the SADC, AU and PEMMO electoral guidelines.

The democratic role of political parties was the focus of the second dimension. Public funding of political parties is prescribed by the Constitution and legislation, however private funding is not regulated at all, raising concerns over the lack of transparency. There has not been alternation in government since democratisation with the ANC maintaining dominance. While the party has not used its dominance to enact legislation that undermines the state's constitutionality, concerns persist over threats to the continued competitiveness of the party system and the potential undermining of the constitutional order in South Africa. Cadre deployment has also been criticized. In terms of the electoral system, the Constitution prescribes proportional representation and much has been achieved through this system especially for women's representation in government. The closed party list system has been criticised for minimising the link between the electorate and public representatives and thereby compromising accountability.

From the above a case can be made that with regard to free and fair elections in particular there is a high degree of substantive application of procedural frameworks, suggesting good quality electoral accountability. Where there are challenges to electoral accountability, these centre on the democratic role of political parties in the young democracy, specifically with regard to private party funding, the closed list proportional system and continued ANC dominance - something that the 2014 elections results suggest is unlikely to change any time soon.

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## THE LEVEL OF POLITICAL KNOWLEDGE IN SLOVENIA: WHO IS (NOT) POLITICALLY INFORMED?

Meta NOVAK<sup>1</sup>

*Delli Carpini and Keeter showed that political knowledge is more or less general, meaning that informed citizens are usually informed in all aspects of political knowledge. Unfortunately, political knowledge is not evenly distributed. This is even more problematic when we keep in mind that the politically informed are also more politically active. The aim of this paper is to find out how informed Slovenians are as citizens of a young post-socialist democracy and who is informed. We used data from the European Election Study 2009 and performed a simple comparison of mean values and a linear regression model. Slovenians turned out to be moderately knowledgeable, with higher levels of EU political knowledge in comparison to national political knowledge. Slovenians were also among the most knowledgeable citizens in the EU member states. Differences in the level of knowledge are present between males and females, education groups and classes, based on the level of news attention and political interest.*

**Key words:** political knowledge, knowledge inequality, Slovenia, European Union, European Election Study.

### 1 INTRODUCTION

Democracy as a form of government is based upon the presumption that citizens are active in political participation, informed and engaged in political activity (Delli Carpini and Keeter 1996). Furthermore, a supposition of democracy is 'that decision making of the public is based on well-informed and sophisticated political reasoning (Scheufele et al 2002, 427)'. The ideal citizen in a democratic system is thus informed, doubtful, partial to public affairs, attentive towards positions of his or her nation and the quality of its leaders (Iyengar and Kinder 1987, 119) but also always concerned about issues that have an impact and take place in his community (Lippman 1961, 269). However, the research shows that the average citizen is poorly informed, with scarce knowledge of political institutions, public policies, socio-economic circumstances and political actors, while this level of information – or to be more precise, the lack of information – is stable over time (Delli Carpini 2000, 129; Lupia and McCubbins 2003, 17). Despite scarce knowledge of

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governmental affairs and politics, the average citizen is regularly confronted with the need to form an opinion towards public issues. Ultimately, citizens have to decide to whom they give their vote to and how they will make decisions about programmes and candidates (Stokes 1962, 690). Notwithstanding the high level of political ignorance, Delli Carpini and Keeter (1996, 289) claim that voters do not need all the information that is out there to make reasonable decisions (see also Lupia and McCubbins 2003). Iyengar (1990, 182) also argues that we should abolish the model of an informed voter, which is completely unrealistic. After all, a low level of information does not mean complete ignorance, and at least it does not mean general ignorance (Delli Carpini and Keeter 1994, 19). With the acquisition of new information, voters can at least familiarize themselves about current political events (Popkin 1994). The question thus no longer is whether the public is politically informed, but rather who is informed and what he is informed about (Delli Carpini and Keeter 1994, 19). Therefore we are setting the following three research questions:

1. Who in Slovenia is politically informed?
2. Who is knowledgeable about national issues compared to EU issues?
3. How knowledgeable are Slovenians in comparison to citizens in other EU member states?

While surveys of political behaviour, attitudes and opinions in Slovenia are regularly conducted, measures of political knowledge, although present, are not that uniform. This article, by use of data collected from the European Election Study 2009, examines sources of variation in political knowledge of Slovenian citizens, comparing also the level of knowledge in Slovenia to other EU-member states. Due to the recent elections for the European parliament (May 2014), the question of who possesses political knowledge about national and EU issues is very topical. Results can offer us an insight into which groups are information poor and calls the attention towards which groups information campaigns should be directed to in future.

## 2 WHAT IS POLITICAL KNOWLEDGE

Political knowledge<sup>2</sup> is the best measure for political intellectuality, sophistication and awareness (Mondak 1999, 58). Delli Carpini and Keeter (1996, 10), as the authors who might have studied political knowledge the most, systematically defined it as a set of factual information on politics stored in long-term memory. They understand political knowledge as a competence, as a resource that can be upgraded. The political knowledge, that a voter needs in order to be a good citizen, can thus be acquired also by an individual with average competence (Delli Carpini and Keeter 1993, 1186). And factual knowledge is that fundamental knowledge necessary for building voters competence (Delli Carpini and Keeter 1994, 21). It includes knowledge of political systems and institutions, knowledge of the functioning of political systems and tasks of government, knowledge of political actors and their

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<sup>2</sup> In literature, we come across different terminological variations that denote similar concepts. From 'political sophistication' (Luskin 1990, 331–361), which is wider concept and also includes motivation and competence, similarly to 'political awareness' (Zaller 1990, 125–153) and 'political expertise' (Fiske et al 1990, 31–48), which also includes the organisation of concepts as well as factual knowledge, exposure to media and information, experiences, inclusion and interest towards 'political information' (Grönlund and Milner 2006, 389), which denotes only information without cognitive dimension and, last but not least, 'political knowledge' (see e.g. Delli Carpini and Keeter 1993, 1179–1206; Eveland and Hively 2009, 205–224; Fraile 2013, 119–143), which includes factual knowledge and will be used in this paper as a synonym for all of the above-mentioned concepts.

jurisdictions, knowledge of current economic and social conditions, and the main daily issues and positions of political leaders towards these issues (Delli Carpini and Keeter 1996). This knowledge can be divided in three categories of political knowledge: (1) “what government is”, which includes knowledge of the rules of the game; (2) “what government does”, which includes the content of politics and (3) “who government is?”, which includes knowledge of the actors, politicians and parties. The more that a voter knows about these categories (breadth) and the more in detail he or she knows these areas (depth), more capable he or she will be to take political action (Delli Carpini and Keeter 1996, 65). Similarly, Luskin understands the political knowledge of an individual as a union of the extent of political knowledge (how much information someone knows), how wide-ranging it is (e.g. whether this includes knowledge of both national and international politics) and how organised this knowledge is (Luskin 1990, 332). With this definition of political knowledge, Delli Carpini and Keeter (1996, 10–11) distinguish knowledge from other voter characteristics, such as electoral behaviour, values, opinion and belief, but also from judgments, verdicts, and decisions and from participation, education and the use of media;<sup>3</sup> at the same time, they define factual knowledge as the best indicator of political knowledge (Delli Carpini and Keeter 1993, 1180) and as a necessary condition of a working democracy (Delli Carpini and Keeter 1994, 21).

Zaller, similarly to Delli Carpini and Keeter, argues that political knowledge is best to be measured with variables of political information, with simple factual questions about politics (Zaller 1989, 186). According to these authors, factual knowledge helps voters when they want to enforce their own interests, connect their interest with the general interests of society and when they want to express their interest in political participation (Delli Carpini and Keeter 1996, 1). Even though factual knowledge will be analysed in our article, we should point out that all scholars are not in favour of this definition of political knowledge. Scholars who define knowledge as subjective, contextually specific and consistent in terms of different opinions do not agree that knowledge could be measured as objective and universal, regardless of how the knowledge is perceived from an individual’s point of view (Hindman 2009, 792). Political knowledge can thus be differentiated based on depth, structure and understanding and general in contrast to specific knowledge. Jeffres and colleagues differentiate political knowledge between: (1) ‘confirmatory knowledge’, which is knowledge of political and social systems and includes knowledge of executive power, current political actors, and legislative content; (2) ‘domain-specific knowledge’, which is knowledge of position towards different issues (such as knowledge of current events that usually have high media coverage); (3) ‘relational knowledge’, where individuals compare their own positions with positions of political actors and (4) ‘piecewise knowledge’, where an individual does not possess complete knowledge but only some information (Jeffres et al 2011, 33). Similarly, Eveland and Hively (2009, 212) distinguish between ‘issue stance knowledge’—which is a concept similar to Jeffres’ relational knowledge—‘general political knowledge’ and ‘knowledge structure density’, which includes knowledge and an understanding of the connections and relationships between gained concepts and an understanding of the connections between individuals, political questions and institutions. Most political knowledge typologies are formed based on two dimensions, depth of knowledge and extent of knowledge. Most authors undertake Park’s distinction between ‘knowledge of acquaintance’ as knowledge that we gain without systematic learning (Park 1940, 669–686); Genova and Greenberg

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<sup>3</sup> We will dedicate the next chapter to how political knowledge can be intertwined with other characteristics of voter.

(1979, 79–91) name this ‘factual knowledge’, and ‘knowledge about’ or ‘structural knowledge’ as a consequence of the analytical process, observation and judgment of information. Extent of knowledge is distinguished between ‘general knowledge’ and ‘domain specific knowledge’ (Zaller 2003).

For an individual to gain new knowledge, he or she needs to be exposed to new information through some communication medium and accept this information, which means understanding and storage of information in memory (Zaller 1989, 186). Besides understanding of new information, an individual also has to be motivated to find new information (Luskin 1990, 331–361). Luskin (1990, 331–361) thus defines political knowledge as a factor of three dimensions: (1) motivation, or the readiness to accept new knowledge; (2) the information to which an individual is exposed to; and (3) the capability to organise and retain information. Luskin suggests that individuals who have been completely isolated from political information since birth cannot acquire political knowledge regardless of their capability and motivation. Also, individuals who are motivated and exposed to information cannot acquire political knowledge without the right amount of capability. As well, capability and exposure to information are not enough if an individual does not have the right motivation (Luskin 1990, 338).

### 3 WHY DO WE CARE ABOUT POLITICAL KNOWLEDGE? POLITICAL KNOWLEDGE, PARTICIPATION AND POWER

Political knowledge is of collective benefit to the entire society. A more knowledgeable society is more democratic and tolerant; what is more, broader participation increases the legitimacy of the government and puts limits on the abilities of decision makers to manipulate public interests (Delli Carpini and Keeter 1996, 219–220). Political knowledge is not an independent characteristic of each citizen. As stressed by Delli Carpini and Keeter (1996, 218–267), there are five dimensions on which political knowledge contributes to good citizenship, which should be of more importance for young democracies like Slovenia. Political knowledge (1) promotes civic virtues; (2) promotes active participation; (3) helps construct stable, consistent opinions; (4) helps identify political interests and connect them to political attitudes and (5) helps link citizen’s attitudes with participation.

Special interest in political knowledge is present above all due to the correlation of political knowledge, political participation and political behaviour (Mondak 1999, 72–73; Grönlund and Milner 2006, 386; Eveland and Hively 2009, 205). Research shows that political knowledge itself is highly correlated with political motivation, political interest, political activity and political participation (Jennings 1996, 228–252), though it is not particularly clear what has an effect on what; it appears that they have an inter-correlation affect. Horstmann showed that motivation is higher when there is an increased level of political knowledge; at the same time, motivation contributes to a higher level of political knowledge (Horstmann 1991, 83). Unequal interest in political issues also has an effect on unequal exposure towards political content in media (Zaller 2003, 1). Those who show less interest in political issues will search for content that addresses current political activity to a lesser degree. However, higher levels of interest and activity should contribute to higher levels of political information (Jennings 1996, 228–252).

Political knowledge also has an effect on political participation and not just political interest. Citizens will more likely participate in political activity if they know when and where they take place. They will also protest, take part in demonstrations and vote for a particular candidate with more confidence when they have knowledge and opinions about the political background (Cho and McLeod 2007, 224). Consequently, more informed citizens are more effective in politics, more interested in political issues, and more likely to follow politics and discuss it and to form consistent, meaningful and stable opinions that do not change with every new piece of relevant information. Even with misleading information, it is easier for them to make political decision, and they are more likely to act in line with their interests and vote for candidates that support their position. They are less likely to vote based on a candidate's personal characteristics and are more likely to support democratic norms and values and show a higher level of political participation in various ways by taking part in elections, participating in the activities of their political party and attending community meetings (Zaller 1989, 222; Luskin 1990, 332–333; Delli Carpini and Keeter 1996, 218–226; Delli Carpini 2000, 142–143; Grönlund and Milner 2006, 393).

However, political knowledge is not evenly distributed. Research shows that more knowledgeable citizens are more educated, with a higher socio-economic position, and they are typically male and older (Delli Carpini and Keeter 1999, 135–177; Jennings 1996, 228–252). And 'the unequal distribution of knowledge is as troubling as the low average levels of political literacy' (Fraile 2013, 119), even more so if we keep in mind that unequal distribution of knowledge is connected with socioeconomic position (Gaziano 2012, 17), translates into unequal possession of power and maintains the current social structure. After all, information and control over information are the foundations of social power (Tichenor et al 1980, 22). Access and gained knowledge enable individuals and groups to restore, maintain and increase their positions of social power (Gaziano 1988, 351–352), which furthermore obstructs class mobility and changes of social structure (Hwang and Jeong 2009, 523). Therefore, a relevant question is: "Who is politically informed?"

## 4 METHODS AND DATA

### 4.1 Data

When assessing the level of political knowledge in Slovenia, especially from a comparative perspective, we face a scarce availability of comparative data. This is why we are using the European Election Study 2009, Voter Study (EES) (Egmond et al 2013), which provides us with a knowledge test that consists of seven questions about the functioning of EU institutions and national political actors with varying levels of difficulty. Despite the fact that some questions measure national issues, they are designed in a way to imply the same level of difficulty for interviewers, which allows us to also compare cross-country levels of political knowledge (Fraile 2013, 119–143). The data were collected between 5 June 2009 and 9 July 2009, while the European Elections were taking place between 4 June and 7 June 2009. The survey took place in all the 27 countries that were member of the European Union at that time, with a total sample of 27069 units, of which 1000 Slovenians were interviewed. Data was collected by CATI phone interviews.



## 4.2 Dependent variable: Political knowledge

The dependent variable in our analyses is the level of political knowledge. We operationalised political knowledge as accurate information about politics. To measure political knowledge, we used seven knowledge test questions and formed an additive index of political knowledge. We used a similar approach to the one that Marta Fraile (2013, 119–143) used in her article. Several variables that measure political knowledge were computed. Wrong or missing answers<sup>4</sup> were coded as value = 0, representing absence of knowledge. Correct answers were coded as value = 1, representing the presence of knowledge. Afterwards, we added values for all variables into one index ranging from value 0 = absence of knowledge to value 7 = high knowledge. As most people are generalist in what they know about politics (Delli Carpini and Keeter 1996), adding all variables of political knowledge into one dependent variable is acceptable. The seven questions included in our index of political knowledge are the following true/false statements:

1. Switzerland is a member of the EU.
2. The European Union has 25 member states.
3. Every country in the EU elects the same number of representatives to the European parliament.
4. Every six months, a different member state becomes president of the Council of the European Union.
5. The [Specific Minister] is [Correct name].<sup>5</sup>
6. Individuals must be 25 or older to stand as candidates in [COUNTRY] elections.
7. There are [150 percent of real number] members of the [COUNTRY Parliament].

General political knowledge in Slovenia will be examined and compared in terms of EU political knowledge and national political knowledge. An index of national political knowledge was formed in a similar way as the index of political knowledge, this time by adding up the correct answers to the three questions about national political actors (question 5, 6 and 7). The index for national knowledge ranged from value 0 to value 3. In a similar way, we added up the correct answers to four questions that measure knowledge about EU institutions (questions 1, 2, 3 and 4). The index for EU knowledge ranged from value 0 to value 4. In order to be able to compare both indexes as well as the index of general political knowledge, we standardised the indexes to range from value 0 to value 1 with the following formula:

$$K = \frac{X - X_{\min}}{X_{\max} - X_{\min}}$$

<sup>4</sup> When analysing political knowledge, we can come across: (1) correct answers, (2) incorrect or semi-correct answers and (3) absence of answers (Don't know answers) (Mondak 1999, 57–82). While the absence of answers implies also the absence of knowledge and receiving information, wrong answers imply there has been some information present, but not received or wrongly understood (Mondak 1999, 57–82). Mondak thus argues that “don't know answers” should be treated differently than wrong answers. We decided to treat both values as absence of knowledge, since research also shows that wrong answers can also be an attempt to guess and are not always evidence of partial knowledge (Luskin and Bullock 2011, 547–557). Furthermore, some other surveys also treated “don't know answers” as incorrect answers (see e.g. Jennings 1996, 228–252; Fraile 2013, 119–143).

<sup>5</sup> For the case of Slovenia, the statement was: “The Slovenian Minister for education and sport is dr. Igor Lukšič.”



### 4.3 Independent variables: Country, level of education, age group, gender, political interest, self exposure to news media and self assessment of class

Previous research has shown that political knowledge is not the same in every country, and context plays a vital role (Fraile 2013, 119–143). In this respect, we will compare levels of political knowledge among EU members after we take a closer look at who is informed in Slovenia by analysing political knowledge in connection to level of education (3-point scale), class (dichotomy), age (4-point scale) and gender (dichotomy) and also political interest (4-point scale) and news attention (dichotomy). Previous research has shown that there is an existing knowledge gap between more and less educated citizens and among socioeconomic groups (Delli Carpini and Keeter 1996; Holbrook 2006, 343–352; Fraile 2011; Fraile 2013, 119–143) that is even wider in periods of infusion of media information (Tichenor et al 1970, 159–170). Some researches stress the importance of individual characteristics, such as media attention (Iyengar and Kinder 1987), political interest and motivation (Ettema and Kline 1977, 179–202) when explaining the level of political knowledge. More knowledgeable citizens also tend to be older (Delli Carpini and Keeter 1996). Research also shows a gender gap in political knowledge (Fraile 2014).

## 5 ANALYSIS

The analyses will be done in two steps. In the first step, we will analyse political knowledge in Slovenia. We will be interested in who is knowledgeable. To examine the impact of each independent (demographical and structural) variable on political knowledge, we performed a simple t-test analysis for dummy independent variables: gender, news attention and socioeconomic position, and we conducted an analysis of variance with a post-hoc Bonferroni test for interval independent variables: level of education, age group and political interest in relation to political knowledge. We will conclude the analyses of general political knowledge in Slovenia with a simple linear regression model, where our independent variables will be included in the regression model as predictors of political knowledge. Last but not least, we will also determine if the same groups are the most knowledgeable about national issues and on factual questions on European Union. Paired sample t-test will be performed to check if the mean value of EU political knowledge is different than the mean value of national political knowledge, and a bivariate correlation test will examine if the values of both indexes are correlated. In the second step, we will examine how knowledgeable Slovenians are compared to citizens of other EU member states. To observe the level of political knowledge in Slovenia and other member states, we compared the mean values of the index of general political knowledge, national political knowledge and EU political knowledge. In this step, predesigned sample weights per country will be used.

### 5.1 Who is informed in Slovenia?

Before we look into who is informed in Slovenia, we present the frequency distribution of political knowledge for Slovenia in Figure 1. Each asterisk represents one percent of respondents. Along with the distribution of political knowledge in Slovenia in Figure 1, three hypothetical models of political knowledge are also represented as introduced by Delli Carpini and Keeter (1996, 152). Their model of managerial democracy presumes a high level of knowledge for the few and a low level of knowledge for the majority. The exact

This distribution /.../ would be the product of a political culture in which the acquisition of political information was a civic norm, political information was reasonably accessible through the schools and the mass media, and most citizens had enough motivation and cognitive skill to gather and retain at least a moderate amount of factual knowledge (Delli Carpini and Keeter 1996, 153).

FIGURE 1: HYPOTHETICAL AND REAL DISTRIBUTION OF POLITICAL KNOWLEDGE

	Managerial Democracy	Pragmatic Democracy	Strong Democracy	Political Knowledge Slovenia
High knowledge	<p>*</p> <p>***</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p>	<p>***</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p>	<p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p>	<p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p> <p>*****</p>
Low knowledge	<p>*****</p> <p>*****</p> <p>*****</p>	<p>*****</p> <p>*****</p> <p>*****</p>	<p>*****</p> <p>*****</p> <p>*****</p>	<p>*****</p> <p>*****</p> <p>*****</p>

Source: Delli Carpini and Keeter (1996, 152).

Though the majority of voters in Slovenia turned out to be moderately informed, a difference in the amount of knowledge that different groups possess still remained (Table 1). The level of political knowledge is not different between age groups but similar to other research results (Fraile 2014) men have a higher level of political knowledge. While on average, women answered three and a half questions correctly (out of seven), men answered more than four and a half questions correctly (out of seven). The difference is also present among different socioeconomic classes, where the voters who identified themselves as middle, upper middle or upper class answered more questions correctly than those who identified themselves as working or lower class. Similarly, the level of political knowledge is also different among groups with different educational levels. Post-hoc Bonferroni tests showed that the mean values of political knowledge are different between all three educational groups. Voters with an elementary school education or less have a lower level of political knowledge than voters graduating from a vocational school, who answered fewer questions correctly than voters with a high school degree or more. Those who show a higher level of political interest are also more knowledgeable. A post-hoc Bonferroni test revealed a statistically significant difference in the level of political knowledge among all groups with a different political interest, except between the group that is very interested and somewhat interested and between the group that is somewhat interested and a little interested. There the differences are too small to talk about real differences in the level of political knowledge. Last but not least, the group that follows the news every day answered more questions correctly than the group who follows the news less often.

TABLE 1: LEVEL OF POLITICAL KNOWLEDGE AMONG DIFFERENT GROUPS OF VOTERS IN SLOVENIA

Age groups	<30 years	30-45 years	46-60 years	>60 years	TOTAL	ANOVA
Political knowledge	0,56	0,58	0,62	0,60	0,59	p = 0,097
Political interest	Very	Somewhat	A little	Not at all	TOTAL	ANOVA
Political knowledge	0,71	0,64	0,58	0,38	0,59	p = 0,000; F = 45,074
Class	Working and lower middle class		Middle, upper middle and upper class		TOTAL	T-test
Political knowledge	0,56		0,63		0,60	p = 0,000; t = -4,291
News attention	News attention less than every day		News attention every day		TOTAL	T-test
Political knowledge	0,55		0,61		0,59	p = 0,001; t = -3,358
Gender	Male		Female		TOTAL	T-test
Political knowledge	0,68		0,51		0,59	p = 0,000; t = 11,185
Education	Elementary school or less		Vocational school	High school or more	TOTAL	ANOVA
Political knowledge	0,47		0,63	0,74	0,59	p = 0,000; F = 72,478

Source: The authors' own calculations based on the European Election Study 2009, Voter Study (EES) data.

To find out how much the above factors predict the level of political knowledge, we also conducted a simple linear regression model and entered the following independent variables in the model: political interest, news attention, level of education and gender. We left out age group (because the previous analyses showed us that the level of political knowledge does not differ between age groups) and class (because the question did not offer real diversification). The variables political interest (4-point scales), news attention (7-point scale) and education (8-point scale) were all treated as interval variables, while gender was treated as a dummy variable (0 = female, 1 = male). Our model explained 28,5% of the variance in political knowledge.<sup>6</sup> Although all the predictors in our model explain the level of political knowledge, there is still room to improve the explanatory power of the model. Evidently, some other factors should be taken in consideration. Among the predictors that we entered in the model, the strongest one was level of education, followed by gender, political interest and news attention (the least powerful factor but still significant). A voter who is male, follows the news more often, has a higher level of political knowledge and education should also have a higher level of political knowledge.

TABLE 2: PREDICTORS OF POLITICAL KNOWLEDGE<sup>7</sup> IN SLOVENIA – LINEAR REGRESSION WITH REGRESSION COEFFICIENTS (B) AND STANDARDISED REGRESSION COEFFICIENTS (BETA)

Model of political knowledge			
	B	Std. Error	Beta
(Constant)	0,074	0,032	
Political interest	0,016	0,004	**0,202
News attention	0,060	0,005	**0,118
Education	0,134	0,015	**0,303
Gender (1 = male)	0,063	0,009	**0,254
		R <sup>2</sup> = 0.285 F = 97,616** N = 983 ** p<0.01	

Source: The authors' own calculations based on the European Election Study 2009, Voter Study (EES) data.

<sup>6</sup> Multicollinearity was not a problem.

<sup>7</sup> Standardised values of political knowledge from 0 to 1.

## 5.2 Political knowledge of national system compared to EU system

Delli Carpini and Keeter (1996) showed that groups that tend to have political knowledge from one field also tend to have political knowledge in other fields (e.g. individuals who are knowledgeable about national political system also have political knowledge about current international affairs), proving that voters are generalists in terms of what they know about politics. We examined this for Slovenia by comparing the level of national political knowledge with the level of EU political knowledge among different groups. We can reasonably suspect that the knowledge about EU issues would be scarcer. The reason for this would be Slovenia's relative short period of membership in the EU.<sup>8</sup> Furthermore, the elections for the European parliament are still seen as second-level elections (Kropivnik 2010, 28–29), with less than 29% of voters turning out in 2009 and 2004 and with 24,09% voters turnout in 2014.<sup>9</sup> The survey results showed quite the opposite; the whole sample of Slovenian voters is more knowledgeable about EU issues, with a mean value 0,65 of EU political knowledge index, while the mean value of national political knowledge index was 0,51.<sup>10</sup> The higher level of EU political knowledge compared to national political knowledge could be attributed to the European elections that were taking place at the time of the survey. The informational effect of the election campaign might have contributed to the higher EU political knowledge of respondents (Holbrook 2006, 343–352). In order to check whether the level of EU political knowledge is related to the level of national political knowledge, we calculated the Pearson correlation coefficient value. The coefficient (Pearson correlation = 0,487,  $p < 0,05$ ) value indicates a relatively strong correlation between levels of national and EU-level political knowledge. Higher levels of national knowledge correlate with higher levels of EU political knowledge.

A comparison of the level of EU and national political knowledge in relation to different independent variables showed us some differences. For general political knowledge as well as for EU and national political knowledge, there are no statistical differences between age groups in what people know. Though the ones who are more politically interested are more knowledgeable about EU and national affairs, the differences are bigger when we observe national political knowledge. The post-hoc Bonferroni test revealed that all the groups with different levels of political interest significantly differ among themselves with the exception of the difference between the group that is somewhat interested and the group that is a little interested. The difference between these two groups is too small. On the other hand, the difference in the level of EU political knowledge is statistically significant only between the group that is not at all interested and other groups based on their interest levels. Political interest apparently plays a more vital role when it comes to gaining knowledge about national issues than EU issues. There could be various reasons for this. Due to the election campaign for the European parliament, the environment might have been information rich, which made it easier for respondents to gain EU-related knowledge (Fraile 2013, 119–143). It is also possible that the effort to inform Slovenian citizens about the EU – as part of the whole association process to the EU – may have been very successful in educating Slovenians. It

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<sup>8</sup> On 1 May 2014, Slovenia with nine others countries celebrated its 10-year anniversary of membership.

<sup>9</sup> National Electoral Commission.

<sup>10</sup> We performed pair-sample t-tests that examine the difference in mean values for two different variables on the whole sample. The difference between mean values of national political knowledge and EU political knowledge was significant ( $t = 13,995$ ,  $p = 0,000$ ).

might also be that knowledge about the EU is not associated to a large extent to political interests, while it might be associated with other kinds of interest.

For general knowledge and for EU political knowledge and national knowledge, male and voters from the middle, upper middle and upper class answered more question correctly than women and voters from the working and lower middle class. Higher EU and national political knowledge is also present for the groups that finished high school than for voters with vocational school or voters with elementary school or less. Post-hoc Bonferroni tests revealed that there are statistically significant differences between all pairs of educational groups for EU and national knowledge. While voters that follow the news every day tend to have a higher level of national knowledge, there is no difference between voters who follow the news every day and those who don't in terms of EU knowledge. Apparently, knowledge about national issues is introduced in the media, while other channels may be used for gaining EU knowledge. Again, this could also be a consequence of the European election campaign. During the campaign, information and messages are clear, concentrated and simplified so that any voter can understand them. Furthermore, during an election campaign, information is more accessible, while voters need to invest less effort to get new information (Franklin 1991, 1193–1214).

**TABLE 3: LEVEL OF NATIONAL AND EU POLITICAL KNOWLEDGE AMONG DIFFERENT GROUPS OF VOTERS IN SLOVENIA**

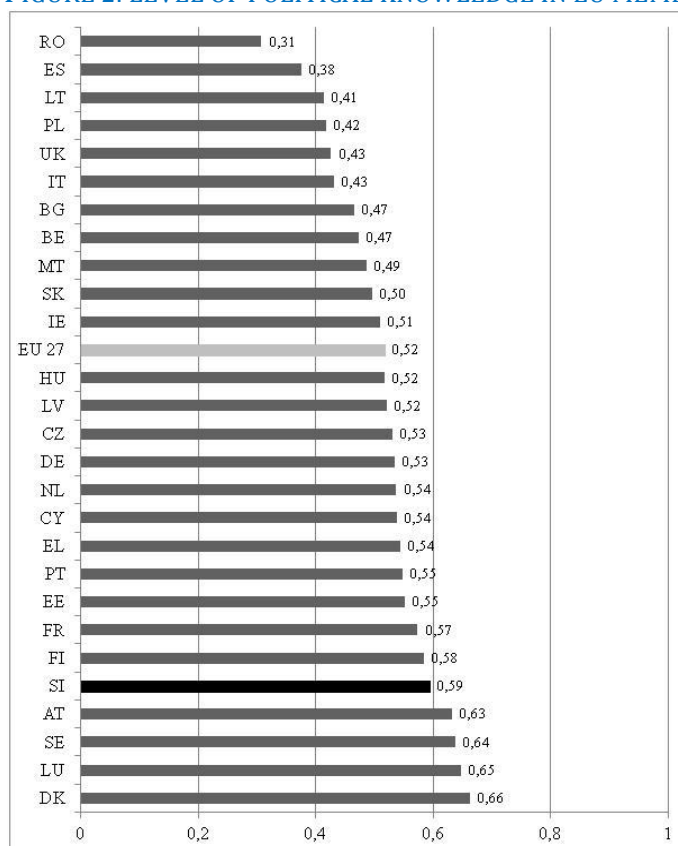
<i>Age groups</i>	<b>&lt;30 years</b>	<b>30–45 years</b>	<b>46–60 years</b>	<b>&gt;60 years</b>	<b>TOTAL</b>	<b>ANOVA</b>
<i>National political knowledge</i>	0,49	0,49	0,53	0,54	0,51	p = 0,153
<i>EU political knowledge</i>	0,61	0,66	0,68	0,65	0,65	p = 0,075
<i>Political interest</i>	<b>Very</b>	<b>Somewhat</b>	<b>A little</b>	<b>Not at all</b>	<b>TOTAL</b>	<b>ANOVA</b>
<i>National political knowledge</i>	0,68	0,55	0,50	0,29	0,51	p = 0,000; F = 36,392
<i>EU political knowledge</i>	0,73	0,70	0,65	0,46	0,65	p = 0,000; F = 30,373
<i>Class</i>	<b>Working and lower middle class</b>		<b>Middle, upper middle and upper class</b>		<b>TOTAL</b>	<b>T-test</b>
<i>National political knowledge</i>	0,48		0,56		0,52	p = 0,000; t = -3,630
<i>EU political knowledge</i>	0,63		0,69		0,66	p = 0,000; t = -3,696
<i>News attention</i>	<b>News attention less than every day</b>		<b>News attention every day</b>		<b>TOTAL</b>	<b>T-test</b>
<i>National political knowledge</i>	0,45		0,54		0,52	p = 0,000; t = -4,338
<i>EU political knowledge</i>	0,63		0,66		0,65	p = 0,075
<i>Gender</i>	<b>Male</b>		<b>Female</b>		<b>TOTAL</b>	<b>T-test</b>
<i>National political knowledge</i>	0,60		0,43		0,51	p = 0,000; t = 8,537
<i>EU political knowledge</i>	0,75		0,57		0,65	p = 0,000; t = 10,346
<i>Education</i>	<b>Elementary school or less</b>		<b>Vocational school</b>	<b>High school or more</b>	<b>TOTAL</b>	<b>ANOVA</b>
<i>National political knowledge</i>	0,42		0,54	0,66	0,51	p = 0,000; F = 29,463
<i>EU political knowledge</i>	0,51		0,71	0,81	0,65	P = 0,000; F = 80,150

Source: The authors' own calculations based on the European Election Study 2009, Voter Study (EES) data.

### 5.3 Political knowledge in Slovenia compared to other EU member states

Now that we have an idea who possesses information in Slovenia, we should also look into how knowledgeable Slovenians are in comparison to other citizens from EU member states. The figure below represents mean values of the index of political knowledge. Countries are distributed in increasing order of political knowledge. ANOVA test shows that differences in political knowledge of EU member states are statistically significant ( $F$ - statistic = 108.933 and  $p < 0,001$ ). Post-hoc Bonferroni test revealed that the level of political knowledge in Slovenia is different from all EU members ( $p < 0,05$ ) except for those from Estonia, France, Austria and Finland, where the differences in political knowledge are too small to talk about real differences.

FIGURE 2: LEVEL OF POLITICAL KNOWLEDGE IN EU MEMBER STATES:



Source: The authors' own calculations based on the European Election Study 2009, Voter Study (EES) data.

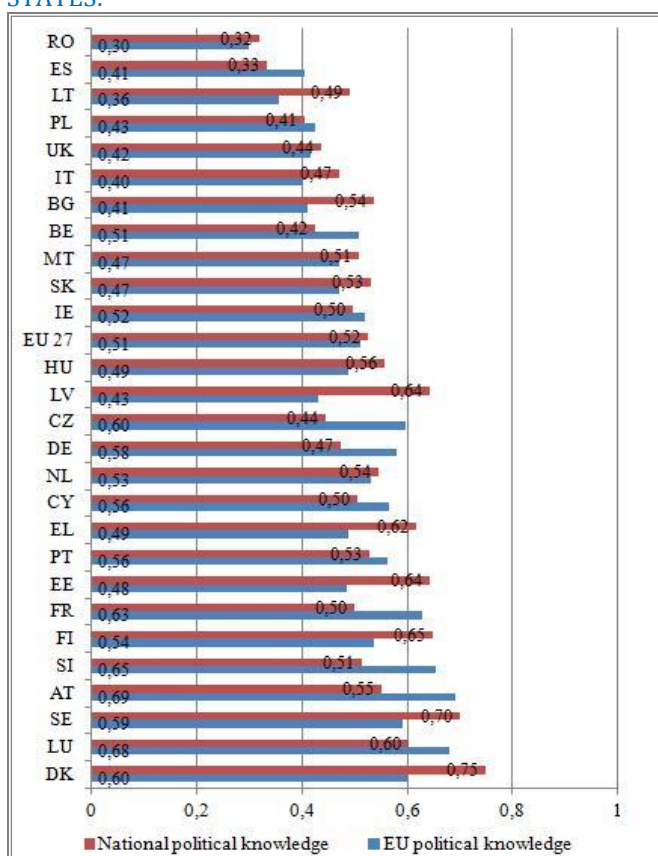
As we can see from Figure 2, the differences in the level of political knowledge between the country with the highest level, Denmark (Denmark joined EU in 1973), and the country with the lowest level, Romania (Romania joined EU in 2007), is substantial. On average, the voters from Denmark replied correctly to almost two and a half questions more in comparison to voters from Romania. We can say that the level of political knowledge among the EU member states is far from equal. Slovenia has a mean value of political knowledge of 0,59, which place it among the five most knowledgeable EU member states. Along with Denmark, Luxembourg, Sweden, Austria, Finland and France, Slovenia is one of seven countries that answered correctly on more than 4 questions out of seven on average and is also the only country in this group that was not one of the old EU members, EU15. On the other side of the continuum, we have the citizens of Ukraine, Poland, Lithuania, Spain and Romania, who answered less than 3 questions correctly on average. Except for Spain, the rest of the countries from this group joined the EU in 2004 or 2007 and are treated as new member states.



Besides the year of accession to the EU, other contextual factors could also contribute to the different levels of political knowledge, such as the level of support for the EU and characteristics of the election campaign. Since our index of political knowledge also includes questions about national political actors we should consider also socioeconomic, political and communicational contexts (Fraile 2013, 119–143).

Since national level factors can contribute to different levels of political knowledge, we also decided to compare Slovenia to other EU member states based on national political knowledge and EU political knowledge separately. Figure 3 represents the results (countries in Figure 3 are distributed in the same order as in Figure 2). The ANOVA test shows that while the differences in national and EU political knowledge of member states are statistically significant (F- statistic for national political knowledge = 107.520;  $p < 0,001$  and F- statistic for EU political knowledge = 108.161;  $p < 0,001$ ), a post-hoc Bonferroni test revealed that the level of EU political knowledge in Slovenia is different from almost all other EU members<sup>11</sup> ( $p < 0,05$ ), but the level of national political knowledge in Slovenia is different only from half of the EU member states<sup>12</sup> ( $p < 0,05$ ). The level of national political knowledge in Slovenia is just below the EU average and similar to 12 other member states, but Slovenia ranks near the top for the level of EU political knowledge along with Austria and Luxemburg.

FIGURE 3: LEVEL OF NATIONAL AND EU POLITICAL KNOWLEDGE IN EU MEMBER STATES:



Source: The authors' own calculations based on the European Election Study 2009, Voter Study (EES) data.

<sup>11</sup> The level of EU political knowledge in Slovenia is similar to the level of EU political knowledge in France, Austria and Luxemburg.

<sup>12</sup> The level of national political knowledge in Slovenia is different from the level of national political knowledge in Belgium, the Czech Republic, Denmark, Estonia, Greece, Spain, Latvia, Luxemburg, Poland, Finland, Sweden, the United Kingdom and Romania.

EU political knowledge is higher in comparison to national political knowledge not just in Slovenia, as previously noted, but noticeably also in the Czech Republic, Austria, France, Germany, Luxembourg, Spain and Cyprus. Here there is no difference between old, new and founding member states. Support for the EU could play a role when explaining why EU political knowledge is higher in comparison to national political knowledge.<sup>13</sup> With the exceptions of Austria and the Czech Republic, the rest of these countries are also among the top six countries that support EU membership. There also seems to be a connection between the level of EU political knowledge and new and old member states. Besides Cyprus, the Czech Republic and Slovenia, the rest of the new member states (accession in 2004 or 2007) have below average levels of EU political knowledge but not necessarily also below average levels of national political knowledge: Estonia, Latvia, Hungary, Bulgaria and Slovakia show above average levels of national political knowledge.

Although the same socio-demographic variables explain the level of national and EU political knowledge in Slovenia, the member state countries represent a different context when explaining national versus EU political knowledge. While citizens can be generalist in political knowledge (Delli Carpini and Keeter 1996), differences between EU and national political knowledge are clearly present at the national level. Some member states are disposed to have similar levels of EU and national political knowledge, but others have better knowledge in one domain.

## 6 CONCLUSION

The aim of this article was to identify information-poor groups in Slovenia. While the level of political knowledge turned out to be higher in Slovenia in comparison to new EU member states and also to many of older member states, especially when we look at EU political knowledge, the majority of Slovenian voters tend to have moderate political knowledge. Some groups, nevertheless, are better politically informed than others. As the more informed citizens turned out to be those who are very interested in politics, follow the news every day and have a better socioeconomic position. While education turned out to be the most powerful predictor of political knowledge, a difference in political knowledge is also present among both genders, where males turn out to be more informed in comparison with women. We can conclude that the most vulnerable groups are women, the less educated and those with less interest. Although we have not checked for the impact of the interaction of these three variables on political knowledge, a reasonable doubt exists that the least knowledgeable citizen groups are where the effect of inequality in political knowledge is intersectional. Information campaigns during periods of election should thus be directed towards these groups above all.

The same socio-demographic groups that are well informed about general political issues also have high levels of EU and national political knowledge. There is also a relatively strong positive correlation between EU knowledge and national political knowledge. Surprisingly, the level of EU knowledge is higher in comparison to national political knowledge and less dependent on news attention and political interest. This could be the result of the European parliament election campaign that took place around the time of the survey.

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<sup>13</sup> The respondents were asked the following: Generally speaking, do you think that [COUNTRY'S] membership of the European Union is a good thing, a bad thing, or neither good nor bad?

Thus, there is undoubtedly potential for further research on the effects of election campaigns on the levels of political knowledge. Besides the individual factors that explain political knowledge, researchers should in future dedicate some attention to country level contextual explanatory factors, such as how the level of nation and EU political knowledge differs between EU member states. While old member states seem to be disposed to higher levels of EU political knowledge, it appears that a positive attitude towards EU membership is connected with higher levels of EU political knowledge in comparison to the level of national political knowledge.

Even though this article offers us an interesting insight into the level of political knowledge in Slovenia, the analysis however was limited due to the available data. Above all, we have to point out the positions of critics in terms of the measures of political knowledge and the knowledge gap hypothesis. Even though the survey knowledge questions are comparable between countries, they are at the same time factual questions that present an advantage for middle class respondents (Bonfadelli 2002, 65–84) and do not offer an insight into deep knowledge or so-called structural knowledge (Genova and Greenberg 1979, 79–91). In future research on the political knowledge of Slovenians, this has to be taken into account.

Last but not least, let us point out that in last few years, the European Union has invested in the EU knowledge of their citizens, especially throughout the European Year of Citizens in 2013. These activities continued in 2014 through the election campaign for the European parliament. We can reasonably suspect that the level of political knowledge about the EU has improved in the last year and will continue to improve and may also diminish the knowledge gaps between the knowledge-rich and knowledge-poor groups, at least in terms of EU political knowledge.

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# RECONCILING PHYSICAL CONTACT AND BODILY INTEGRITY WITHIN THE WESTERN LEGAL PARADIGM<sup>1</sup>

Julie D. LANE<sup>2</sup>

*I conduct a textual analysis of U.S. Supreme Court opinions on searches of the physical person. Using specific case examples, I construct an argument that constitutional issues involving confrontations between citizens and agents of the state with respect to physical contact are awkwardly dealt with when placed within the liberal legal framework of U.S. constitutional jurisprudence. In particular, I highlight: 1) tendencies of the Court to universalize the experiences of subjective persons through the process of objectifying "reasonable persons"; 2) tendencies of the Court to distance actual and physical violation from concrete experience by framing the nature of the claimed injury into abstract harms; and, 3) tendencies of the Court to construct a narrow framework of what constitutes "consent" in the context of searches of the embodied person. I conclude that these tendencies provide insufficient recognition of legal personhood and suggest that bodily integrity, or personal physical security, be concretized as a specific liberty interest under the Fifth and Fourteenth Amendments of the U.S. Constitution.*

**Key words:** bodily integrity; physical security; liberal constitutionalism.

## 1 INTRODUCTION

Issues related to bodily integrity, or the security of the concrete, physical person from harm by the state, are crucial components of constitutions (Vogler 2012). The security of the physical person is important for preserving democratic legitimacy by ensuring the prevention of abuse of executive power (Kreimer 2007, 423). As a legal concept, the human dignity that is associated

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with bodily integrity implicates basic premises underlying liberal constitutions, including the value of self-determination and the belief that human beings are or equal moral worth (Mahlmann 2012, 377–378). In addition, the preservation of bodily security raises important questions about dignity as a human right. Abstract rights such as freedom of expression, of religious conscience, and procedural fairness in the criminal justice process tend to be prominent features of liberal constitutionalism. In addition, constitutional protections preventing the use of torture are at the forefront of constitutional law and human rights conventions. In this article, I explore an area of constitutional law that implicates the concrete human body as the site of constitutional analysis rather than abstract liberty interests. It is an area that does not neatly fit into the category of “torture”, but nonetheless implicates the preservation of bodily integrity. Here, I take up issues related to the constitutional boundaries created by the United States Supreme Court in limiting the extent to which executive authority can interact with the physical bodies of suspects in the context of searches conducted by police and correctional officers.

The extent to which executive authorities can conduct searches involving the physical person is derived from the common law approach utilized by the U.S. Supreme Court through a complex body of case law. In contrast to some civil law systems, “bodily integrity” and other human rights concerns related to “human dignity” are not expressly stated and defined in the United States Constitution (Mahlmann 2012, 379). Constitutional concerns related to bodily integrity have, however, emerged in U.S. Supreme Court case law by drawing from a variety of other provisions in the document. The Court has, for example, interpreted the Fifth Amendment’s provision that no person “shall be compelled in any criminal case to be a witness against himself” to mean, at a minimum, that the U.S. Constitution prohibits the use of physical torture to elicit a confession (*Brown v. State of Mississippi* 297 U.S. 278 (1936)). The Court has also interpreted the Eighth Amendment’s prohibition of “cruel and unusual punishments” as being applicable to punishments that are corporal in nature (*Ingraham v. Wright* 430 U.S. 651 (1977)) and to methods of execution that involve excess brutality upon the physical body (*in re Kemmler* 136 U.S. 436 (1980)). In prohibiting slavery, the Thirteenth Amendment also conveys a basic meaning that the human body cannot be subjected to total authority by the state or by any private party (*Plessy v. Ferguson* 163 U.S. 436 (1890)). Additionally, the Fourth Amendment guarantees the right of persons to be “secure in their persons, houses, papers and effects against unreasonable searches and seizures”. Lastly, the U.S. Supreme Court has drawn from the Fifth (applicable to the federal government) and Fourteenth (applicable to the states) Amendment guarantees that “no person....shall be deprived of life, liberty or property without due process of law”. The due process clause has been applied in two different analytical frameworks. First, the clause has been analyzed as a process, where, for example, evidence obtained from an “unreasonable” physical search may not be admitted as evidence (*Mapp v. Ohio* 367 U.S. 643 (1961)). Second, the Court has added a substantive dimension to the word “liberty” in the clause, or what is known as a “right to privacy” as an implicit but un-enumerated liberty interest that most notably encompasses reproductive rights and freedom of intimate association.<sup>3</sup>

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<sup>3</sup> The extent to which an independent interest in bodily integrity can be inferred from reproductive rights cases is questionable. In its initial decisions creating the right to privacy, the Court did not firmly root the liberty interest in terms of bodily integrity. In *Griswold v. Connecticut*, for example, the right to use contraceptives was not connected to a physical dimension of controlling one’s own reproductive process, but instead to more abstracted “notions of privacy surrounding the marriage relationship” 381 U.S. 479, 486 (1965). In *Roe v. Wade*, the Court framed the issue in terms of a “choice”, explicitly rejecting the claim that “one

The protection of the physical body with respect to searches conducted by agents of the state, however, rests upon uncertain Constitutional grounding. While Supreme Court case law pertaining to searches of the physical person does create parameters around what is constitutionally permissible with respect to conducting searches, none of the modes of analysis that the Court uses explicitly sets out a definitive liberty interest in protecting the body from physical abuse on the part of the state. In this article, I first provide an overview of the various approaches that have been adopted by the Court in developing standards for constitutionally-permissible physical searches. These modes of analysis include: 1) the balancing of state interests against the interests of the person being searched; 2) questioning whether or not searches are “reasonable”; 3) assessing whether or not the suspect has a “legitimate expectation of privacy”, 4) assessing whether or not a suspect “consented” to a search; 5) analyzing the issue in terms of un-enumerated constitutional procedural limitations on police behavior, and 6) suggesting the presence of a liberty interest that protects individuals from physical harm by law enforcement and corrections authorities.

In the second section, I provide an analysis of the limitations of these approaches. I argue that these frameworks do not do enough to recognize and address the specific bodily interests at stake, or the nature of the potential harms that can occur in the context of searches by agents of the state. In particular, I highlight the doctrinal invisibility of individual interests due to displacement by more easily-recognizable state interests, by the invisibility of individual interests created by deference to police and correctional authority, by the invisibility of individual interests created by a disembodied conceptualization of legal personhood, and by the invisibility of individual interests created by the exclusion of subjective experiences. In the third section, I provide a partial explanation for the apparent difficulties of the Court in making visible an interest in bodily integrity. I draw from feminist theoretical critiques of a liberal constitutional paradigm that presumes a disembodied conception of legal personhood, that renders subjective experience insignificant by a presumption of rationally-minded legal subjects, and that presumes the possibility of analyzing subjective experience through universalization of the legal subject. I conclude with the presentation of an argument that grounding a constitutional right to bodily integrity potentially involves a linguistic shift in Court doctrine by bringing to the forefront the actual and concrete bodily harms at stake and by acknowledging the subjective experiences of those subjected to searches by state officials. Further, I argue that, given the limitations of the common-law approach of U.S. constitutional jurisprudence, firmly grounding bodily integrity as an independent substantive liberty interest provides the best avenue for recognizing the legal personhood of persons subjected to bodily searches.

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has an unlimited right to do with one's body as one pleases" 410 U.S. 113 (1973), 154. Similarly in *Planned Parenthood v. Casey*, the Court reaffirmed *Roe* in very abstracted terms, rather than in terms of the human body: "Our law affords Constitutional protection to personal decisions relating to marriage, procreation, contraception, family, relationships, child rearing, and education...These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." 505 U.S. 833 (1992), 851.

## 2 COURT APPROACHES

A right of “bodily integrity” as such is not explicitly noted in any part of the U.S. Constitution or throughout Supreme Court doctrine in cases involving searches of the physical, corporeal person. Concerns related to bodily integrity have instead emerged in the text of opinions handed down by the Court, where members of the Court connect the interest to other constitutional guarantees and frequently draw upon U.S. culture and tradition as the basis for their conclusions regarding these connections. The Court primarily situates the issue of physical searches in Fourth Amendment analysis, drawing upon that part of the amendment that ensures “the right of the people to be secure *in their persons, houses, papers, and effects, against unreasonable searches and seizures...*” (emphasis added). Discourse among members of the Court regarding protecting individuals from abuse by the state in the context of physical searches takes place in several analytical contexts (not necessarily mutually exclusive), including: the balancing of governmental interests against private interests in dignity and personal security; an assessment of the “reasonableness” of the search; a determination of whether or not an “expectation of privacy” exists in a given set of circumstances; and, whether or not “consent” authorized a search. Additionally, the Court has drawn upon both procedural and substantive dimensions of the Due Process Clause of the Fifth and Fourteenth Amendments, which guarantee that no person “shall be deprived of life, liberty, or property, without due process of law”.

### 2.1 The “Balancing Approach” and the Reasonableness of Searches

When questioning whether a particular type of search violates the Fourth Amendment’s guarantee of the right of individuals to “be secure in their persons”, the Court will, as a general rule, apply a balancing test whereby the particular individual interest at stake is measured against the governmental interest - most notably, an interest in crime control and public safety, and, at times, a more generalized constitutional interest in restraining executive power. The governmental interest in combating crime and ensuring public safety is one that is clearly acknowledged and articulated in cases involving physical searches (*Terry v. Ohio* 392 U.S. 1 (1968)). Among others, the Court has recognized legitimate governmental interests in preventing drug trafficking and keeping drugs out of schools, ensuring the safety of the public from potential criminal harm, ensuring traffic safety, and preventing the possibility of the destruction of evidence.<sup>4</sup>

In *Terry v. Ohio*, for example, the Court upheld a limited pat-down search of a suspect’s outer clothing (and limited specifically to a search for weapons) based on the officer’s “reasonable suspicion” that “criminal activity may be afoot” (1968, 10). The Court reasoned that the officer’s heightened suspicion after an initial questioning of the suspects was “reasonable” given a concern for the officer’s personal safety and the safety of bystanders in the vicinity. A limited pat-down search therefore did not require a warrant or probable cause and could instead be based on the less rigorous standard of “reasonable suspicion”. Although concluding that the governmental interest outweighed the individual interest in the circumstances at issue, *Terry* represents somewhat of an

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<sup>4</sup> *U.S. v. Sokolow*, 490 U.S. 1 (1989) (acknowledging a state interest in preventing drug trafficking), *Schmerber v. California*, 384 U.S. 757 (1966) (acknowledging a state interest in preventing the destruction of evidence and ensuring public safety on roadways), and *Safford Unified School District #1 v. Redding*, 557 U.S. 364 (2009) (acknowledging the interest of schools in preventing drug use).

exception to the argument that follows in that the Court identified the potential harm that could be suffered in such instances, highlighting an individual's interest in a "right to personal security". Against the concern for public safety, the Court acknowledged an individual interest that partially included an acknowledgement of the corporeal, physical dimension of this security, particularly with respect to "human dignity": *...it is simply fantastic to urge that such a procedure performed in public by a policeman, while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity'. It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly (emphasis added) (Terry 1968, 17–18).*

In addition, the Court in *Terry* gives some attention to the subjective experience of the individual, arguing that "even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon a cherished personal security, and it must surely be an *annoying, frightening, and perhaps humiliating experience*" (1968, 25).

Often in conjunction with the balancing approach, the Court will analyze the constitutionality of a physical search by emphasizing the question of "reasonableness", drawing from the Fourth Amendment's protection "against unreasonable searches and seizures". Using this form of analysis, the underlying consideration involves the structural purpose of the Bill of Rights in restraining the use of executive power by ensuring that warrantless searches have a reasonable basis. In *Schmerber v. California*, for example, the Court took up the issue of whether or not the forcible drawing of a blood sample over the suspect's objections constituted an "unreasonable" search in violation of the Fourth Amendment (384 U.S. 757 (1966)). The Court concluded in this instance (the blood sample was taken after a traffic accident where driving under the influence was suspected) that the search was, indeed, "reasonable". The reasonableness of the search rested on unquestionable probable cause, the fact that the blood draw took place in a hospital, and the potential for the rapid depletion of alcohol within the bloodstream that could potentially disappear as evidence were time taken to obtain a warrant. According to the Court, these considerations constituted legitimate governmental interests that outweighed the interests of the suspect. Unlike *Terry*, however, the Court in *Schmerber* gives very little attention to the subjective interest at stake for the suspect, noting only that "the integrity of an individual's person is a cherished value of our society" and that the intrusion was "minimal" since it involved "virtually no risk of trauma or pain" (1966, 771–772). In the context of *Schmerber*, the primary emphasis in the Court's analysis is on the reasonableness of the police officer's actions. The experience of the suspect, by contrast, does not find its way into the Court's analysis. In other words, one side of the "balancing" equation – the interest of the individual in not being subjected to a medical procedure – is notably absent or couched in abstract terms that do not identify the concrete experience.

## 2.2 Expectation of Privacy

While subjective experience is disconnected from an assessment of "reasonableness" in the context of *Schmerber*, the Court did, at times, begin to connect the "reasonableness" of warrantless searches to the subjective experiences of suspects beginning in the 1960's and 1970's.<sup>5</sup> In analyzing the

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<sup>5</sup> *Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, the Court overturned the conclusion in *Olmstead v. United States*, 277 U.S. 438 (1928) that the sphere of Fourth Amendment protection

constitutionality of searches of tangible items, places, communications, and physical bodies, the Court created a definition of “reasonableness” that was contingent upon whether or not a “reasonable expectation of privacy” on the part of the suspect was present (*Katz v. United States* 389 U.S. 347 (1967)). The expectation of privacy contains both subjective and objective components: *the subjective element involves whether or not an individual in the circumstances at issue expected his items, space, communications, or body, to be private from public view or access; the objective component involved whether or not it was an expectation that society would recognize as “reasonable”*. In the context of *Katz*, for example, it was the closing of the door to the phone booth that signified that a) *Katz expected his communications not to be heard, and b) that the physical act of closing a phone booth door is something that society recognizes as signifying that a person desires privacy* (1967, 352).

Not all cases since *Katz*, however, have presented such a clear example (the closing the door) of a symbolic expectation of privacy, nor does *Katz* implicate physical contact with executive authority. *Vernonia School District 47J v. Acton* provides one example of how the Court has applied the “expectation of privacy” mode of analysis to searches of the physical person (515 U.S. 646 (1995)). In *Vernonia*, the Court took up the issue of whether or not the school district’s mandatory drug-testing program for student athletes (conducted through random urinalysis testing) constituted an unreasonable search. The Court concluded that the procedure did not violate the Fourth Amendment, grounding its decision on a diminished expectation of privacy: *Legitimate privacy expectations are... less with regard to student athletes. School sports are not for the bashful. They require “suining up” before each practice or event, and showering and changing afterwards. Public school locker rooms...are not notable for the privacy they afford* (*Vernonia* 1995, 657).

The Court further argued that students voluntarily subject themselves to a higher degree of regulation since they must submit to a pre-season physical exam when they choose to go out for the team. In addition to basing the decision on an expectation of privacy analysis, the Court also gave substantial attention to the severity of the state interest in deterring drug use by school children and the relative “unobtrusiveness” of the search (*Vernonia* 1995, 577–578).

As with *Schmerber*, a sense of the individual’s interest in bodily security and an articulation of the particular nature of the intrusion are not apparent in the Court’s analysis in *Vernonia*. The Court quickly acknowledges and then dismisses bodily interests and associated subjective feelings, arguing simply that “the privacy interests compromised by the process of obtaining the urine sample are...negligible” (*Vernonia* 1995, 577–578). In addition, the subjective component (how the individual being tested potentially feels in such a situation) is dismissed at the outset at the beginning of the Court’s opinion: *the first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes. The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as “legitimate”* (*Vernonia* 1995, 654).

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extends only to the physical boundaries explicitly identified in the Fourth Amendment. In doing so, the Court in *Katz* extended the boundaries of Fourth Amendment protection beyond objective, physical boundaries and instead replaced it with a formula based on a subjective experience where one expects personal communications to be private and therefore not accessible through government wiretapping.

The Court does not, however, expound on the first factor that it notes should be considered. The “legitimacy” here also minimizes the potential for an actual and concrete subjective experience of expecting privacy by being displaced by the more “objective” criteria of social recognition. Bodily security therefore appears only in the background of an analysis that is devoted primarily to the “severity” of the school’s interest in deterring drug use.

### 2.3 Consent

In assessing the constitutionality of searches, the Court at times relies on the presence or absence of a suspect’s “consent” as the determining factor of whether or not a warrantless search is “reasonable”. With respect to searches of the physical person, this involves a determination of when and under what circumstances a person is technically “seized”. According to the Court in *Terry v. Ohio*, a seizure takes place “whenever a police officer accosts an individual and restrains his freedom to walk away (1968, 17). An unconstitutional “seizure” and any associated searching, in other words, does not take place if a person has agreed. The assessment of “consent” is contingent upon the extent to which an individual feels free leave or to refuse a request for a search. In *Florida v. Bostick*, for example, Bostick challenged the constitutionality of a consent search that took place on a bus that was scheduled to depart in Broward County, Florida, where officers routinely conducted random questioning of passengers and searches of luggage (501 U.S. 429 (1991)). Police officers approached Bostick and asked for permission to search his luggage. Bostick claimed that, given the intimidating atmosphere in which the search took place (where police officers tower over a seated passenger with little room to move around), he did not feel free to leave the bus or to refuse the request for a search of his luggage. The Court nonetheless upheld the constitutionality of the search, concluding that in this type of circumstance “a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter” (Bostick 1991, 435).

*United States v. Mendenhall* provides an additional example of the “consent” mode of analysis (446 U.S. 544 (1980)). *Mendenhall* involved an assessment of “seizure” and “consent” in circumstances involving a multi-staged event. First, when Mendenhall disembarked from a flight in Detroit, Drug Enforcement Administration (DEA) agents, acting on suspicion that her conduct was characteristic of a narcotics carrier, approached Mendenhall and asked her for identification and her ticket. Second, when her responses raised further suspicion, the officers then asked her to accompany them to their airport office. In the office, she then consented to a search of her personal belongings. Lastly, upon the discovery of evidence as a result of the search of her belongings, a female officer then conducted a full body search (1980).

The Court determined that Mendenhall voluntarily consented to the initial questioning, to accompanying the officers to the airport office, to the search of her belongings, and to the full body search. Responding to the argument that Mendenhall was acting under coercion, the court argued: ... *a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave...On the facts of this case, no “seizure” of the respondent occurred. In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way...Because the search of the respondent’s*



*person was not preceded by an impermissible seizure of her person, it cannot be contended that her apparent consent to the subsequent search was infected by an unlawful detention (emphasis added) (Mendenhall 1980, 554–558).*

As with Fourth Amendment assessments using the “expectation of privacy” mode of analysis, consent in this context involves both a subjective and an objective component. The subjective component asks whether the suspect *feels* free to leave or to refuse a search. The objective component is whether or not a “reasonable” person would have interpreted the circumstances to mean a restraint on the freedom to walk away or to refuse a search. As the Court argues above, no such objective reason was present throughout this event. The decision rests upon the logic that because a “seizure” had not taken place during the initial stages of the event, the suspect therefore subsequently acted freely and voluntarily, even at the later stages when she was in the office and was strip-searched. The question of the extent of the intrusion upon Mendenhall’s corporeal body during the search, and whether or not the search was intrusive enough to be “reasonable” was left unaddressed by the Court. In a concurring opinion, however, Justice Powell argued that “the public interest in preventing drug traffic is great, and the intrusion upon the respondent’s privacy was minimal (Mendenhall 1980, 565). Powell does not, however, articulate why the intrusions should be considered “minimal” – most notably the strip search.

## 2.4 Procedural Due Process

The analytical frameworks for assessing the constitutionality of physical searches discussed thus far use the Fourth Amendment as a starting point. The question of bodily integrity, or the preserving of one’s physical security against intrusion by the state was, however, addressed much earlier by the Court outside of the Fourth Amendment context. In particular, the Court addressed the issue in earlier cases by drawing upon procedural aspects of the Due Process Clause of the Fifth and Fourteenth Amendments, which require that no person shall “be deprived of life, liberty, or property, without due process of law”. Connecting a right of individuals not to be tortured or brutalized to a more generalized interest in physical security as a part of “due process” is grounded in *Brown v. State of Mississippi*, where the Court rejected the state’s use of torture to elicit confessions (297 U.S. 278 (1936)). The Court argued that the due process clause requires “that state action...be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions” (1936, 286). Since the Fifth Amendment protection against self-incrimination had not been made applicable to the states at the time the case was decided, the Court based its holding on the due process clause of the Fourteenth Amendment, finding that the amendment contained fundamental principles of liberty and justice to which states were bound. The Court asserted: *it would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction was a clear denial of due process (Brown v. State of Mississippi 1936, 286.)*

An additional example is *Rochin v. California*, where the Court applied the due process clause to physical intrusions in considering a case involving forced vomiting (342 U.S. 165 (1952)). When Los Angeles deputy sheriffs, forcibly and without a warrant, entered Rochin’s apartment, Rochin quickly swallowed two morphine capsules that were on his nightstand. The deputies tried to induce vomiting by forcing their fingers down his throat; when this failed, they rushed him to a hospital where a doctor inserted a tube to induce vomiting. As in

*Brown*, the Court in *Rochin* drew upon broad notions of due process that are not explicitly set out in the text of the U.S. Constitution. The Court reasoned that this clause informs the behavioral standards by which agents acting on the part of the state are obligated to abide: Regard for the requirements of the Due Process Clause “inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings...in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses” *Malinski v. New York* 324 U.S. 401, 416-417. These standards of justice are not authoritatively formulated anywhere, as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Justice Cardozo wrote for the Court, are “so rooted in the tradition and conscience of our people as to be ranked as fundamental” *Snyder v. Massachusetts* 291 U.S. 97, 105, or are “implicit in the concept of ordered liberty” *Palko v. State of Connecticut* 302 U.S. 319 (1937) (1952, 169).

The Court supported this broad interpretation of what procedural due process requires by highlighting understandings rooted in common law and by contemporary social standards. The Court in *Rochin* was specifically concerned with the specificity of the events that took place: *applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents – this course of proceeding by agents of government to obtain evidence is bound to offend even the most hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation (emphasis added)* (1952, 172).

This mode of analysis is quite different from the later cases previously addressed in that the corporeal nature of what is at stake for the individual is placed at the forefront.

## 2.5 Substantive Liberty

The articulation of boundaries of police behavior under procedural aspects of the due process clause (i.e. how police officers should conduct themselves) under broader “standards of justice” presented a mode of analysis that identified interests in bodily integrity that underlie, rather than are found within, the explicit text of the U.S. Constitution. An additional non-textually-based alternative for locating constitutional protection for bodily security lies in the application of a substantive dimension of the due process clause, or the right to privacy. In this line of reasoning, the Court draws from *Palko v. Connecticut* in maintaining that some personal rights, although not explicitly enumerated in the Constitution, can be deemed “fundamental” or “implicit in the concept of ordered liberty” (302 U.S. 319, 325 (1937)). Most notably, in *Griswold v. Connecticut*, the Court applied a constitutional right to “notions of privacy surrounding the marriage relationship” (381 U.S. 479 (1965)). In extending the right to privacy in *Roe v. Wade* to a constitutional right to choose to terminate one’s pregnancy, the Court adds to liberty interests associated with privacy, such as the potential for distress and psychological harm that fall under a more generalized right to privacy (410 U.S. 113 (1973)). And in *Lawrence v.*

*Texas*, the Court asserts a specific liberty interest as it pertains to intimate association (539 U.S. 558 (2003)).

Although the Court has not explicitly identified a fundamental liberty interest in bodily integrity, particularly as it pertains to physical searches, it has been noted in some separate opinions. In *Schmerber*, for example, Justice Douglas argues in his dissenting opinion that the Fifth Amendment marks a “zone of privacy” which the Government may not force a person to surrender...No clearer invasion of this right of privacy can be imagined than the forcible bloodletting of the kind involved here (1966, 749).

Justice O'Connor also notes a liberty interest in her dissenting opinion in *Vernonia*. Here, she takes issue with how the Court's emphasis on state interests allowed it to “side-step powerful, countervailing privacy concerns” (1995, 667). She further disagreed with the Court's rationale on the extent of the obtrusiveness of drug-testing, arguing that “the millions of these students who participate in interscholastic sports, an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school, are open to an intrusive body search” (*Vernonia* 1995, 667).

### 3 UNRECOGNIZABLE HARMS

An interest in one's corporeal security from abuse by the state is arguably the most basic right that one would expect within a constitutional democracy. Indeed, actual and potential threats against one's personal security instigate a fear among the citizenry that can interfere with ideals of democratic rule and limited government (Kreimer 2007, 446). The protection of bodily security as a constitutional right in the U.S., however, lacks clear and consistent recognition with respect to bodily searches conducted by agents of the state. This is illustrated by the lack of direct language in the U.S. Constitution as well as by the variety and inconsistency of the analytical approaches that have been used by the Court in its attempts to identify the specific nature of the right that is to be balanced against state interests in crime control and ensuring public safety. The absence of a clear vision of what, exactly, is at stake for individuals who are searched is also illustrated by the lack of visibility of the concrete nature of the harm, by the silencing of these interests through deference to police and administrative processes, by the detachment of the individual interest from the corporeal person, and by a lack of attention to embodied and subjective differences.

#### 3.1 Prominence of State Interest and the Invisibility of the Harm

At some moments, the Court follows through with a complete “weighing” of the interests of the state against the personal interests at stake. In *Terry*, for example, the Court acknowledged the seriousness of a search where a citizen stands “helpless” as an officer touches the outer parameters of his body, noting that it is an intrusion that is “not to be undertaken lightly” (1968, 16–17). The Court elaborated in detail the nature of the personal security interest and associated subjective feelings: *...it is nothing less than sheer torture to the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his body in an attempt to find weapons is not a “search”.* *Moreover, it is simply fantastic to urge that such a procedure performed by a policeman while a citizen stands helpless, perhaps facing a wall with his hands raised is a “petty indignity”.* *It is a serious intrusion upon the sanctity of the*

*person, which may inflict great indignity and arouse strong resentment... (emphasis added) (ibid.).*

*Safford Unified School District #1 v. Redding* provides an additional example of a clear acknowledgement of privacy interests (557 U.S. 364 (2009)). In this case, the Court considered the constitutionality of a strip search of a student conducted by an administrative assistant and a school nurse. In addition to identifying the school's interest in preventing drug use, the Court fully elaborated on the "humiliating" aspects of search, highlighting the fact that the student was directed to remove her clothes down to her underwear and "pull out" her bra and elastic band on her underpants, thereby exposing her breasts and pelvic area (2009, 8). The Court asserted that "the meaning of such a search, and *the degradation its subject may reasonably feel*, place a search that intrusive in a category of its own as demanding its own specific suspicions" (emphasis added) (2009, 11).

In other cases, however, very little attention is given to privacy interests within the text of the Court's opinions. Indeed, in most of the cases explored in this analysis, as well as many others related to the searches of physical persons, the specific nature of the harm is invisible. In other words, in the "balancing approach" often taken by the Court, one can clearly identify what, precisely, the state interest is. However, the interest against which this is to be weighed is couched in brief, abstract language or is absent altogether. In these instances, the nature of the harm is unrecognized and subsumed under state interest. In *Schmerber*, for example, the Court elaborates at length on how and why the drawing of the blood sample was "reasonable" with respect to the parameters of constitutionally-appropriate police behavior: *probable cause was apparent, the importance of ensuring public safety on the roadways, and the lack of time available to obtain a warrant due to rapidly-diminishing blood alcohol content* (1966). However, the only attention given to the interest at stake for the suspect is one statement indicating that "the integrity of an individual's person is a cherished value of our society" (1966, 772). The Court, however, gives no attention to what it means as a constitutional right. The Court notes that the physical intrusion was "minor", yet provides no rationale as why it should be viewed as a minimal intrusion, and thus not subject to constitutional protection in the form of personal security (1966, 771).

Similarly, in *Vernonia*, the Court gives its primary attention to how and why a student has a diminished expectation of privacy in the context of school athletics, yet the majority opinion contains no discussion on why mandatory drug testing is a privacy concern in the first place (1995). In *Mendenhall*, as well, the Court focuses primarily on the reasonableness of the search due to the lack of force or coercion that would compel Mendenhall to consent (1980). Indeed, in these two instances, the interest at stake appears so insignificant that the Court does not discuss what, exactly, happened in analyzing the circumstances of the case. *Vernonia*, for example, contains only cursory discussion on how the drug tests were administered and what this might mean as a subjective experience (1995). And in *Mendenhall*, nothing is known about the strip search other than that the suspect was asked to "disrobe" (1980).

### 3.2 Deference to Law Enforcement and Corrections

When drawing upon the Fourth Amendment as a mode of analysis in physical search cases, the Court is frequently deferential to law enforcement expertise and emphasizes the need for judicial restraint. In *Terry*, for example, the Court

relied heavily on Officer McFadden's judgment regarding the suspicious behavior that legitimized the initial contact and subsequent pat down search of the suspects. The Court here made a substantial effort to acknowledge the practical considerations that legitimized McFadden's actions, arguing: *American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives. In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest* (1968, 23–24).

In *Mendenhall*, as well, the Court exercised a high degree of deference to the expertise of Drug Enforcement Administration (DEA) agents: *in reviewing the factors that led the agents to stop and question the respondent, it is important to recall that a trained law enforcement agent may be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer."* *Brown v. Texas*, 433 U.S. 47 (1979) at 52, n.2. *Among the circumstances that can give rise to reasonable suspicion are the agent's knowledge of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices. Law enforcement officers may rely on the "characteristics of the area" and the behavior of a suspect who appears to be evading police contact* (1980, 563–564).

The Court is also often deferential to corrections institutions in instances of pre-trial detention. In *Florence v. Board of Chosen Freeholders of the County of Burlington*, Florence challenged the constitutionality of a strip search conducted at the Burlington County Jail (566 U.S., 2 (2012)). Florence was required to disrobe and was checked for scars, marks, gang tattoos, and contraband. He was then instructed to open his mouth, lift his tongue, and hold out his arms. A corrections officer looked at his ears, nose, mouth, hair, scalp, fingers, hands, arms, armpits, and other body openings. He was further required to "lift his genitals, turn around and cough in a squatting position" (2012, 3). Over objections that persons arrested for a minor offence should not be required to go through this invasive intake process unless officials had reason to suspect a particular inmate of concealing a weapon, drugs, or other contraband, the Court deferred to the expertise of the correctional institution. Justice Kennedy asserts at the outset of the majority opinion: *correctional officials have a legitimate interest, indeed, a responsibility, to ensure that jails are not made less secure by reason of what new detainees may carry in on their bodies. Facility personnel, other inmates, and the new detainee himself or herself may be in danger if these threats are introduced into the jail population.... in addressing this type of constitutional claim courts must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security....The difficulties of operating a detention center must not be underestimated by the courts....Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face* (Florence 2012, 1–5).

Although the Court explicitly describes what happened during the search, they provide little discussion on the invasion of personal rights by proceeding from merely noting the existence of personal rights to extensive discussion on the necessity for such searches in jails. What attention the Court does give to personal security is only to briefly note the possible existence of legitimate



concerns if the invasiveness had involved the touching of the detainees (2012, 19).

Judicial deference to the expertise of law enforcement and correctional institutions is arguably appropriate in most instances. With respect to law enforcement, the particular circumstances of an event potentially necessitate the need of an officer to respond quickly and exercise reasoned judgment as to how to handle the situation. In addition, it is often argued by the Court that the management of a correctional facility is “best left in the hands of experts”. However, as noted by the court in *Florence*, this must be weighed against personal rights. Excessive deference to law enforcement and correctional authority can be very problematic if the nature of the personal rights at issue are not fully explored or too easily dismissed. If this does not occur, the deferential approach renders a competing interest in personal security or bodily integrity unnecessary. As explained by Kreimer: *a modern bureaucracy’s mission tends to dwarf competing values; the police officer sees herself as charged with suppressing crime, a jailer with keeping order in prison, the auditor with maximizing health care delivery. None is trained or encouraged to attend too closely to the demands of human dignity; that is viewed as someone else’s job or as a secondary concern* (2007, 451).

With judicial deference, and particularly when the Court leaves a competing personal security interest undefined, the existence of such a right can become invisible.

### 3.3 Disembodied Personhood

Whether considered within the framework of a right to “personal security” in the context of the Fourth Amendment, within the framework of a due process interest, or within the framework of a privacy interest, the Court gives surprisingly little attention to concrete and embodied persons, despite the fact that many searches are inherently very physical. An individual’s interest in personal security is often left undefined or applied in the context of very abstract language. The Court tends to acknowledge that such right does exist, but often without clarification or by quickly dismissing the meaning or relevance of such a right to the case at issue.

In *Mendenhall*, for example, the Court begins its opinion with the assertion that there is “no question that respondent possessed a constitutional right to personal security” (1980, 550). The Court does not, however, elaborate on what personal security consists of – generally, or in this particular instance. The Court instead immediately proceeds to give a comprehensive assessment of “consent” (1980, 550). In *Vernonia*, the Court similarly begins its analysis with an assertion that “the first factor to be considered is the nature of the privacy interest upon which the search here intrudes” (1995, 654). However, the Court does not subsequently proceed to discuss the privacy interest at stake; rather, the statement continues with the claim that “the Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as ‘legitimate’” (1995, 654). In *Schmerber*, as well, the Court simply notes that “the integrity of an individual’s person is a cherished value of our society”, without further clarification (1966, 771).

At some moments, although these tend to be comparatively infrequent, members of the Court will connect the interest at stake to a concrete physical experience. In *Rochin*, for example, the court creates parameters around



constitutionally-permissible police behavior by identifying a specific embodied experience that “shocks the conscience”: “breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents—this course of proceeding by agents of government to obtain evidence is bound to offend even the most hardened sensibilities” (1952, 209). *Safford Unified School District #1 v. Redding* provides an additional example (557 U.S. 364 (2009)). In *Safford*, the court held that the privacy interests outweighed governmental interests in the strip search at issue. Here, the Court did provide a bit more of a detailed account of the specific privacy interest: *the very fact of Savana’s pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings. Savana’s subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating (Safford 2009, 374–375).*

Justice Breyer’s dissenting opinion in *Florence* also gives direct attention to the specific concrete occurrences that constitute a “serious invasion of privacy”: *....the kind of strip search in question involves more than undressing and taking a shower...the searches here involve close observation of the private areas of a person’s body...A strip search that involves a stranger peering without consent at a naked individual, and in particular at the most private portions of that person’s body, is a serious invasion of privacy (2012).*

Breyer also references *Mary Beth G. v. Chicago*, which asserted that the practices of forcing young women to strip and have their body cavities visually inspected are “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing... repulsive, signifying degradation and submission” (723 F. 2d 1263, 1272 (CA7 1984)). As discussed further below, the analytical move of placing corporeality at the forefront lends a reality to the right at stake and the potential for an audience to empathetically access the subjective experience.

### 3.4 Subjectivity

An additional feature that tends to characterize the Court’s approach to physical searches is a presumption that the subjective experience of a searched individual is amenable to an objective, fact-based analysis. Two particular analytical frameworks used by the Court in the context of physical searches – whether or not a search is “reasonable” based upon the existence or non-existence of a “reasonable expectation of privacy”, and whether or not consent is present – often displace subjective experience with an “objective” account of balancing state against individual interests.

In *Vernonia*, for example, the Court emphasized the rule that not all subjective expectations of privacy are protected by the Fourth Amendment, “but only those that society recognizes as legitimate” (1995, 654). This second component of the expectation of privacy test asserts that social standards can be applied as a form of objective determination of whether or not an expectation of privacy truly exists. That this is a form of objective “fact” that the Court can weigh and consider is questionable due to vague parameters surrounding the privacy interest and its amenability to differing conclusions. This is illustrated by the internal debate that often occurs among members of

the Court as to whether or not a particular event or circumstance is one that society generally recognizes as within a “zone of privacy”. The Court’s holding in *Vernonia*, for example, rested on its conclusion that once students “go out for the team”, their expectations of privacy are substantially diminished due to the lack of privacy that school locker rooms provide (1995, 657). O’Connor, however, dissents from this line of reasoning in arguing that the more intrusive form search at issue (urinalysis) is not a dimension of privacy that students generally expect to give up when they participate in school sports (1995, 666-67).

In the context of “voluntary consent”, as well, the Court’s mode of analysis tends to rest upon the presumption of an autonomous subject capable of making a rational determination of whether or not he or she is free to walk away from an encounter with police officers. As discussed further below, the Court often sets aside or dismisses social differences such as race, ethnicity, gender, or age that, because of different life experiences, could potentially reflect subjective interpretations of a particular event that differ from the rationally-minded, autonomous subject conceptualized by the Court. Members of the Court have even gone so far as to claim that some feelings are not reasonable. In *Mendenhall*, for example, Powell argued: *...the respondent was not physically restrained. The agents did not display weapons. The questioning was brief. In these circumstances, the respondent could not reasonably have felt frightened or isolated from assistance (emphasis added) (1980, 563).*

In many cases, the opinions themselves contain no information regarding socially-situated and embodied individuals. In *Terry*, for example, the opinion itself contains no information on the race of the suspects, which could potentially be relevant if Officer McFadden’s suspicions were, perhaps, raised because of their race (1968). With the exception of *Brown* and *Mendenhall*, all of the cases highlighted in this analysis do not identify race or any other social characteristic that could potentially impact the extent to which an individual expects privacy or feels free to leave an encounter with police officers.

In instances where embodied differences are noted, these differences are at times not considered as having any relevance to an assessment of the constitutionality of the search. For example, in considering whether or not *Mendenhall* felt free to leave at the various stages of the police encounter, the Court briefly acknowledges the potential relevance of embodied difference: *... it is argued that the incident would reasonably have appeared coercive to the respondent, who was 22 years old and had not been graduated from high school. It is additionally suggested that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males. While these factors were not irrelevant, neither were they decisive, and the totality of the evidence in this case was plainly adequate to support the District Court’s finding that the respondent voluntarily consented to accompany the officers to the DEA office (1980, 558).*

The Court, however, gives little attention to the extent to which these features of *Mendenhall*’s personhood could have diminished her subjective sense of feeling free to leave. The Court instead emphasizes those features that highlight her rational capacity: “the respondent, who was 22 years old and had an 11<sup>th</sup> grade education, was plainly capable of knowing consent” (1980, 558). These features allow the Court to presume voluntary consent.

#### 4 LIMITATIONS OF THE U.S. LIBERAL CONSTITUTIONAL PARADIGM

While the Court has employed various approaches that attempt to identify and protect bodily integrity in the context of physical searches, it is apparent that this has been a challenging endeavor for the Court in the absence of specific constitutional text. This can partially be explained through structural and paradigmatic limitations of western constitutionalism. In this section, I analyze some of these potential limitations in the context of physical searches. I integrate ideas from a body of feminist legal scholarship that has identified and critiqued underlying problems of the liberal paradigm that results in an inability of the law to fully see and recognize concrete, embodied persons. Primary themes from these critiques include a tendency to abstract and universalize, a presumption of the possibility of objectivity in the law, and a presumption that rationality characterizes legal personhood.

As discussed above, one of the approaches that the Court has applied in assessing physical searches is that of weighing an interest in the “personal security” acknowledged in the Fourth Amendment against the interests of the state in promoting public safety. The exact nature of this “personal security” interest remains very loosely defined and has therefore been easily amenable to being subsumed by state interests. In its discourse, the Court can easily define the “weighty” nature of state interests in ensuring the safety of police officers and the public and in deterring crime. However, “personal security” is rarely given a “weight” to counter-balance state interests. The Court has not, for example, attributed to this interest a “heightened scrutiny” that is employed in other contexts such as First Amendment protections of political expression or the prohibition of racial discrimination under the Equal Protection Clause of the Fourteenth Amendment.<sup>6</sup>

This could, in part, be due to limitations in liberal constitutionalism itself in that it is structurally limited to dealing with abstractions that tend to universalize legal personhood. In her classic piece on “Race and Essentialism in Feminist Legal Theory”, Harris highlights the problematic voice of “We the People” that identifies legal subjects under the U.S. Constitution. According to Harris, this authoritative voice claims to speak on behalf of everyone. The voice subsumes all concrete and embodied persons under an abstract unitary voice that refers to no one in particular (1990, 583). She references White in arguing that the universal voice claims to speak for an entire and united nation and to do so directly and personally, not in the third person or by merely delegated authority. The instrument thus appears to issue from a single imaginary author, consisting of all the people of the United States, including the reader, merged into a single identity in this act of self-constitution. “The People” are at once the author and the audience of this instrument (1990, 582).

Yet the voice is incredibly powerful in its claim to speak on behalf of everyone. In doing so, it silences persons who not neatly fit into the idea of the “person” as conceptualized in this universal form (Harris 1990, 583). Harris argues that “this voice does not speak for everyone, but for a political faction trying to constitute itself as a unit of many disparate voices; its power last only as long as the contradictory voices remain silenced” (1990, 583). Harris’ insights can provide some guidance as to why the concrete nature of the harms involved in physical searches is so often subsumed by the “reasonable person”.

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<sup>6</sup> See *Texas v. Johnson*, 491 U.S. 397 (1989) and *Korematsu v. United States*, 323 U.S. 214 (1944).

In the context of the analysis I have presented here, the Court is structurally situated in a position where it weighs the collective, unified interest of the “public” against the concrete interests of particularized individuals. This presents the difficulty of articulating the nature of the potential constitutional injury in universal terms. Thornton, for example, argues that “while the representation of constitutional law as abstract, decorporealised and neutral accords with the idealized and universal norms of justice, such rhetoric serves to disguise the injustice at the root of the case – that is, the particularity of the harm that led to the search for a remedy” (1999, 756). The consequence of this tendency is that one not only loses sight of the nature of the injury<sup>7</sup> experienced by an individual who is physically searched, but also loses sight of the actual and concrete persons who have potentially been subjected to physical abuses on the part of the state. In essence, it is difficult for the Court to universalize the particularities of the situated experiences of actual searched persons. This can be the result of limitations within a legal discourse that “functions by fixing meaning, by creating uniform categories out of a multiplicity of possibilities” (Menon 2004, 7). Constitutional jurisprudence in the United States can, for example, more easily universalize a “state interest” such as ensuring public safety.

An additional critique of the Court’s Fourth Amendment approach to analyzing physical searches is that it is working within a framework of liberal constitutionalism that seeks to make objective what is inherently a subjective experience. Thornton, for example, argues that “‘constitutionalisation’ typically involves the treatment of issues at a very high level of abstraction so that distinctive private or subjective features are sloughed off” (1999, 754). The most apparent examples of this are analytical frameworks centering on an “expectation of privacy” and “consent”. As highlighted in this analysis, the Court frequently insists that expectations of privacy must be “reasonable”, implying the existence of an objective and uniform social standard. The questions for the Court reside not with whether the person *actually* expects privacy, but how a non-existent, disembodied, abstracted, and universalized person would interpret the circumstances from an objective point of view. Similarly, the Court, in speaking for the universalized voice of the Constitution, is unable to conceptualize a concrete person in a reality that has felt the physical and psychological pains of searches, but instead renders such pains invisible due to the *capacity* of a legal subject to rationally assess the situation. A rationally-minded student athlete in Vernonia School District, for example, has the potential to rationally infer that by accepting diminished expectations of privacy of the locker room, a logical conclusion follows that one should feel no differently when it comes to testing for drugs. In sum, the Court is limited to dealing with a realm of rational choices and what is to be expected of a rational legal subject rather than *feelings* associated with privacy. Indeed, the Court appears to even go so far as reaching a seemingly paradoxical conclusion that some feelings are not rational, as is implied in *Vernonia*.

Similarly, in the context of “consent”, the Court enters a realm where objective and subjective elements do not fit neatly into legal analysis. According to Young, the premise of impartial reason and objectivity “aims to adopt...a transcendental ‘view from nowhere’ that carries the perspective, attributes, character, and interests of no particular subject or set of subjects” (Young 1990, 100). This critique could be applied to liberal constitutionalism generally in that it provides too much faith in western rationalism by producing a false view of an atomistic person (Thio 2012, 135). The legal subject again bears the

expectation of creating a rational determination based upon an objectively-defined "societal expectation" of whether or not she or he is, *in fact*, free to leave in a particular set of circumstances involving encounters with police officers. Yet the Court simultaneously sets the rule that consent occurs when one *feels* free to leave. This can result in an awkward paradox such as that presented in *Mendenhall*: *We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave....On the facts of this case, no 'seizure' of the respondent occurred. In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way" (emphasis added) (1980, 558).*

The Court further implies that the logic applies to subsequent stages of the search, including the full body search. At any point of the various stages of this event, the rationally-minded legal subject would have known that she was free to leave. Again, it would seem that the Court is creating an argument that some feelings are and are not reasonable. A subjective feeling of intimidation or a need to acquiesce to authority is displaced by the lack of an objective reason for feeling this way. As argued by Thornton, "constitutionalization" has the tendency to "slough off affectivity" (1999, 754).

An additional awkwardness that often appears in the court's assessment of physical searches is the impulse toward neutrality and objectivity, most notably through a color-blind approach that makes embodied differences invisible. Williams, for example, argues: *Law and legal writing aspire to formalized, color-blind, liberal ideals. Neutrality is the standard for assuring theses ideals; yet the adherence to it is often determined by reference to an aesthetic of uniformity, in which difference is simply omitted* (1991, 48).

Despite the concrete realities of embodied persons that potentially experience physical and dignitary harms during the course of physical searches, and the potential feelings that could lead one to acquiesce to a search (despite the view that these feelings may not be reasonable or rational), the Court tends to conceptualize disembodied persons. Within the context of liberal constitutionalism, human autonomy is ranked as a central, causing doubt because it seems to "presuppose the idea of a reasonable, self-determining human subject that is for many since its inception profoundly and disdainfully biased by particularistic perspectives such as gender, ethnic background, cultural origin, or social status" (Mahlmann 2012, 372). Universalizing the person through the mechanism of presuming an unidentified "reasonable person" has the consequence of rendering invisible embodied differences that could very well influence how an individual experiences the physical search, the parameters around which one expects privacy, or how an individual interprets circumstances that impact how she or he feels with respect to being able to refuse a search. The experiences of being touched, being displayed without clothing, or of having genital areas being probed could, for example, be much more severe, and even potentially traumatic, for one who has experienced sexual violence. Under this analytical tool, the Court can easily be led to conclude that various forms of searching are "minor". Young, for example, argues: *...the ideal of impartiality...expresses a logic of identity that seeks to reduce differences to unity. The stances of detachment and dispassion that supposedly produce impartiality are attained only by abstracting from the particularities of a situation, feeling, affiliation, and point of view* (1990, 97).

Feeling free to leave a police encounter could, for example, be impacted by the extent to which individuals' life experiences have influenced how they might be potentially inclined to respond to authority. The objective, rationally-minded "person" that western constitutionalism presumes could very well interpret the circumstances of a situation and feel empowered to refuse a search. For some, however, this experiential feeling of empowerment could be lacking, and is instead characterized by feelings of submission when encountering authority.

## 5 CONCLUSION

The issue of how and how well the U.S. Supreme Court interprets the Constitution creates a right of personal security and bodily integrity in the context of physical searches is a serious one. It is a perplexing aspect of constitutional doctrine that protecting individuals from physical and psychological harms associated with police contact with the physical body is so ambiguously defined and is, at times, even rendered invisible. The touching of one's body, making a nude body visible for display, and searches that penetrate into the body are all experiences that can range from awkward and uncomfortable to humiliating and traumatic. When the U.S. Supreme Court is unable to recognize the potential injuries that are stake, this, in turn, signifies an inability to recognize the legal personhood of those are vulnerable to these injuries.

As Kreimer argues, the issue of bodily integrity has serious implications for democratic legitimacy as well: *Protections against cruel and unusual punishment, compelled confessions, kangaroo courts, and abridgement of free expression are central to the continued operation of a regime of ordered liberty. In their absence, the structures of democratic self rule can succumb all too easily to creeping despotism....Ordered liberty requires...that government officials be denied unchecked discretion to impose extrajudicial violence, physical brutality, and degradation" Modern states have both a burgeoning capacity to enforce physical brutality, and an increasing range of plausible excuses for doing so. They suffer, therefore, from an ever-expanding temptation to exercise those capacities in ways that ease the burden of governance, a temptation that requires continued constraint" (2007, 446–447).*

While body integrity is at the forefront of Constitutional interpretation in the contexts of being protected from self-incrimination, not being subjected to cruel and unusual punishment, and, to an extent, reproductive privacy, it has not found a coherent form in the context of the Fourth Amendment and bodily searches. The modes of analysis used by the Court vary widely, physical security often tends to be subsumed under the more easily-identifiable state interest, bodily interests so corporeal in nature are channeled into abstract representations of a "reasonable expectations of privacy" and voluntary consent, and subjective experiences are displaced by the expectation of objectivity and rationality on the part of those confronted by state officials and made vulnerable to a search. This could, in part, be due to inherent structures in the liberal paradigm that provide an impelling force to universalize and disembodify the conception of legal personhood. As Young argues, "the ideal of impartiality reduces particularity to unity...in reducing the plurality of moral subjects to one subjectivity" (1990, 100).

Within constitutional frameworks, it is, however, a challenge to precisely delineate the parameters of a human dignity right such as that of bodily



integrity. This is primarily due to the abstract nature of concepts such as “human dignity” and “bodily integrity”. Mahlmann observes two constitutional frameworks that have been used in articulating rights related to human dignity. The first is to put forth an abstract definition. The German Federal Constitutional Court, for example, has emphasized human dignity as the highest purpose of the law by emphasizing entitlements to respect. The second framework, which has been used by the United States Supreme Court, is to identify the content of human dignity through actual cases where a “violation of human dignity is *assumed* without an abstract definition of what it is about” (emphasis added) (2012, 379–380). This could partially explain the brief acknowledgement but subsequent avoidance of an in-depth exploration of “bodily integrity” in the cases taken up in this analysis.

The concretization of a bodily integrity right is also inhibited by the unique and abstract way in which “due process” plays into U.S. constitutional jurisprudence. The shifting, case-by-case approach does not make the procedural aspect of this clause amenable to clear boundaries on what is and is not constitutional permissible in terms of police behavior. Vogler argues that the concept is uniquely North American and more complicated in comparison to other parts of the world (2012, 931–933). By contrast, the 2000 Charter of Fundamental Rights of the European Union specifically sets out a range of due process provisions (2012, 933).

Due to the embedded nature of the case law orientation of U.S. constitutional jurisprudence, it is unlikely that an explicit right of personal security or bodily integrity will appear in any express form (Von Bogdandy 2012, 29). However, legal certainty and systematic coherence is arguably desirable for an issue that deals with such an important dimension of one’s personhood (Von Bogdandy 2012, 29). Of the analytical approaches explored in this article, the constitutional mode of analysis that is most amenable to securing bodily integrity in the context of physical searches is the approach that was applied earlier, rather than later, in the Court’s jurisprudence in this area. Specifically, drawing upon the procedural and substantive due process elements of the Fifth and Fourteenth Amendments appears to be the strategy that is most amenable to concretizing the experience of suffering dignitary harms through violations of bodily integrity. The Court’s rationale in *Brown v. Mississippi*, and later in *Rochin*, were effective to the extent that they set parameters around police behavior, prioritizing the prevention of physical brutality. More attention to this approach could provide the Court with an avenue to place bodily integrity in a “preferred position”. As with the assertion of unenumerated reproductive and intimate association rights, the substantive dimension of due process would also provide an avenue for identifying a distinctive “zone of liberty” that explicitly identifies the protection of bodily integrity as a constitutional right deserving of heightened scrutiny on the part of Court. Indeed, in *Lawrence*, the Court departed from an exclusivist view that constitutional interpretation must necessarily rely on the unique historical values and ideals of the U.S. particularly, and instead relied on the more progressive jurisprudence of the European Court of human rights (Rosenfeld 2012, 47–48). The heightened scrutiny that could potentially be applied in cases involving physical searches would provide a much-needed “weight” that can be measured against state interests by placing a greater burden on the state to demonstrate the necessity of, and a compelling interest in, carrying out the kind of physical search at issue.

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