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Disraeli's Orientalism Reconsidered[2]

Abstract

In his influential Orientalism Edward Said placed British statesman and writer Benjamin Disraeli (1804-1881) in the long line of the Western writers who cultivated particular stereotypes about the Muslim East, with the hidden intention of imperial subjugation. On the other side, Said's critics Patrick Brantlinger and Mark Proudman asserted that Disraeli was not an Orientalist, but rather an admirer of the Arabic and Ottoman civilizations and determined defender of the Ottoman Empire.

However, Disraeli's novels, correspondence and his policy in the Great Eastern Crisis give more complex evidence, which does not support any of these views. This paper emphasises the point that during his long career Disraeli was changing his views of the Turks and the Ottoman Empire, which even Patrick Brantlinger's balanced approach to the issue of Disraeli's Orientalism misses.

Key words: Benjamin Disraeli, Edward Said, Orientalism, Balkanism, Islam, Arabs, Turks, The Ottoman Empire, The Eastern Question.

I

Benjamin Disraeli (1804-1881), the British Prime Minister, one of the most prominent Western statesmen of the XIX century, and very well known novelist of his time, had very special relationship with the South-Eastern Europe. As a young adventurer, only a year

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after the peace of Adrianople, he traveled through the Balkans and the Ottoman Empire. At the time of the Crimean War he was the leader of the Tories in the House of Commons. During his long career, Disraeli frequently came into direct contact with the Ottoman Empire and the states of the Balkan Peninsula, he wrote about them in his novels, and observed events there from a distance. In the end, as Prime Minister, during the Great Eastern Crisis and Congress of Berlin (1875-1878), he played a key role in the negotiations and drawing of South-Eastern European state borders, and made decisions which influenced millions of human Balkan destinies (Ković 2011).

In the Balkan historiography and collective memory Disraeli is remembered as a devoted turcophile, who protected the Ottoman Empire throughout the Great Eastern Crisis, even making jokes in the House of Commons about the Ottoman Atrocities in Bulgaria. He saved the Ottoman Empire and extended its life when, as the Russian armies were approaching the walls of Constantinople, he dispatched Indian Muslim troops to Malta and sent British ships sailing towards the Bosporus.

This is why, looking from the South-Eastern Europe, it is very curious that Edward Said in his influential Orientalism (1978) placed Disraeli in the long line of the Western writers who cultivated and spread particular, negative stereotypes about the Muslim East, with the more or less open intention of its imperial subjugation. Moreover, Said chose the sentence from Disraeli's novel Tancred – "The East is a career" – for the motto of whole Orientalism. Thus, in this groundwork of the flourishing academical field of "post-colonial studies", Disraeli earned special place, as one of the most important Western "Orientalists" (Said 2003).

This is how Said encapsulates Disraeli's image of the Oriental peoples: "An Oriental lives in the Orient, he lives a life or Oriental ease, in a state of Oriental despotism and sensuality, imbued with the feeling of Oriental fatalism" (Ibid: 102). The construction of this kind of stereotype is, according to Said, only first step to the imposition of the Western political, imperial and colonial rule:

"To write about Egypt, Syria, or Turkey, as much as traveling in them, was a matter of touring the realm of political will, political management, political definition. The territorial imperative was extremely compelling, even for so unrestrained a writer as Disraeli, whose Tancred is not merely an oriental lark but an exercise in the astute political management of actual forces on actual territories" (Ibid: 169).

II

Said's *Orientalism* was published in 1978, and in the next three decades it became one of the most important and cited texts in the 20th century humanities. But treating the huge amounts of the Western modern intellectual production simply as imperialist discourse, it still provokes mixed responses and polemical answers.

Two of these were entirely devoted to the topic of Disraeli's 'Orientalism'. Patrick Brantlinger, in his discussion *Disraeli and Orientalism* (1998), asserts that Disraeli's orientalism was:

"…first, a less unified ideology then a mixture of hybrid, changing, often contradictory ideas, attitudes and poses, second, it was mainly positive rather then negative (that is, that it celebrated rather than denigrated things eastern); and third, that Disraeli was himself (as he insisted throughout his career) a hybrid character – both British and Jewish, and perhaps as much oriental as orientalist" (Brantlinger 1998: 91).

Less balanced and informed, but more interesting is Mark Proudman's article *Disraeli as an "Orientalist"*, published in 2005. Its subtitle is very direct: *The Polemical Errors of Edward Said*. In contrast to Brantinger, Proudman's severe criticism is directed not only towards Said's interpretation of Disraeli's orientalism; he also challenges basic ideas of the Said's book, and contests method of discourse analyses, including whole area of 'post-colonial studies'.

Considering Disraeli's imperial designs in *Tancred*, Mark Proudman insists that this novel "is no more a program for the conquest of the Levant than it is for the annexation of Attica" (Proudman 2005: 16). But Proudman's main evidence for the Disraeli's pro-Islamic stance instead of his 'Orientalism', comes from Disraeli's policy towards the Ottoman Empire during the Great Eastern Crisis:

"The problem with using Disraeli as an archetypal Orientalist is that, far from seeing 'Islam as militant hostility to European Christianity,' he had a positive view of Islam, and for all his imperialism in other areas of the world, wished above all to preserve the independent power of the primary Islamic empire, Ottoman Turkey, against, among others, the French and the Russians. Though in Said's view Disraeli is doubly damned as both a literary Orientalist and a political imperialist, as Prime Minister he followed a policy that consistently favored Islamic Turkey over Christian Russia, and he did so against significant domestic opposition. In the

1870s, atrocities committed by the Turks in Bulgaria became what a later age would have called the human rights question of the day. Liberals, led by Gladstone, held what they called—without irony—"indignation meetings" about the fate of the Eastern Christians, and it was the Liberals rather than Disraeli's Tories who produced copious amounts of anti-Islamic invective" (Ibid: 558-559).

Patrick Brantlinger and Mark Proudman are right when they insist that Disraeli was not the Orientalist of the kind that Edward Said suggests. Indeed, Disraeli's perception of the Muslim, Arab East was affirmative, leaving almost no space for the negative stereotypes. Brantlinger also gives very good evidence for the assertion that Disraeli considered himself to be an Oriental, as a result of his own search for his Jewish roots, and of his refashioning of his Jewish and Eastern identity. Indeed, in Disraeli's case, it was perfectly feasible to be an Oriental and British, and 'Oriental' (considering one's identity) and 'Orientalist' (imperialist in politics) at the same time. Proudman fails to take into account Disraeli's Oriental identity, maybe because he constantly avoids Disraeli's controversial racial theories.

But my main point is that none of these three writers, Said, Brantlinger and Proudman, notices that Disraeli's attitude towards Muslim Arabs is not the same as his image of the Muslim Turks. Said and Brantlinger are much more focused on his perception of the Arabs, understanding that there are no essential differences in his attitude towards the Turks. Proudman looks at Disraeli's perceptions of both Arabs and Turks, but he does not see these important differences. Needless to say, the closer scrutiny of the Disraeli's attitude towards the Turks and Ottomans is of special importance for the understanding of the history of South-Eastern Europe and the Great Eastern Crisis.

III

Among the different types of the historical sources left by Disraeli to the historian's curiosity about his strange personality and complex identity, his novels are, as Isaiah Berlin was first to notice, the most important. This is where his racial theories and his ideas about racial hierarchy were most elaborately exposed.

There is no dispute among historians about the existence of Disraeli's Jewish identity. In fact, in the last few decades the topic

of Disraeli's Jewishness became very fashionable (Kirsch 2008; Glassman 2003; Endelman and Kushner (eds.) 2002; Endelman 1998; Wohl 1995; Weintraub 1993: xi-xiv, 17–32; Rather 1986; Arendt 1994: 68-79; Endelman 1985; Berlin 1981). The only question is whether Disraeli developed his Jewish identity already during his Grand Tour, while visiting Holy Land and Jerusalem, as Robert Blake and Patrick Brantlinger think, or was it only the beginning of the transition, which took its full form in his novels, a decade later, as Tod Endelman asserts (Blake 1982: 109-110, 128–129; Berlin 1981: 268–275. See: Ridley 1995: 96; Sultana 1976: 63, 68; Endelman 1998: 119). With this transition his Jewish roots were transformed from a source of social insecurity, to the source of pride and self-confidence.

At the same time, he developed a split English and Jewish identity. His English identity was always combined with his imperialist ideas. He would remain faithful to the ideas from his early novel *Alroy*, so that, as a forerunner of future Zionism, he would entertain ideas of the creation of a Jewish national state in the Middle-East, with the assistance of Great Britain (Disraeli 1927a; Ković 2011: 35-36, 51-53). British imperialist and Jewish nationalist, in the future, he would be a determined opponent of nationalist ideas of 'other peoples', including Balkan nations.

In his novels *Coningsby* (1844) and *Tancred* (1847), and in his biography of his friend, Tory politician *Lord George Bentinck* (1851), Disraeli fully developed his racial theories. On the top of his hierarchy of races were Semitic peoples, "Arabian race", or "Arabian tribes" as he calls them. It consisted mostly of Jews and Arabs - "Mosaic and the Mohammedan Arabs". Because of the isolation of their desert life during the centuries, they are "unmixed race" of "pure blood". "An unmixed race of a first-rate organisation is the aristocracy of Nature" - Disraeli concludes. Because it is "unmixed", "Arabian race" is the best stock of the broader, also noble, but mainly mixed "Caucasian race". This is where Indo-Europeans belong, including English (Disraeli 1904: 193-199).

This is how Disraeli constructed his newly invented racial, aristocratic identity, quite possibly as defence against anti-Semitism that he had to deal with for whole of his life. However, for the topic of this article it is important to stress that he never draw precise line between "Mosaic and the Mohammedan Arabs". Thus, affiliation to the Muslim Arabs was almost as important to him as affiliation to

Jews. After all, as he says, "the Arabs are the Jews on horses" (Disraeli 1927c: 261). Edward Said notices cynism in these words (Said 2003: 102), but it does not look like that at all. This is how Disraeli became Oriental, or how he re-Orientalised himself.

IV

But the Turks were different matter. During his Grand Tour (1830-1831), this young conservative was amazed by the self-confidence with which the Turks ruled over their possessions, while their brutal repression of any rebels inspired his romanticist imagination. With the respect for the Ottoman masters of the Balkans came a loathing for their lowly and disloyal Christian subjects. Along with a sense of class solidarity with the Turks, on his travels he also developed a sense of imperial solidarity with them. He believed that a nation whose empire was just dawning had a lot to learn from the example an empire which was at its dusk (Ković 2011: 14-28). In this sense, according to Maria Todorova scrutiny of Balkanism (Todorova 1997: 3–20. See also: Skopetea 1991; Bakić-Hayden and Hayden 1992; Goldsworthy 1998; Fleming 2000; Hammond 2004; Šijaković 2004), and especially of the English aristocratic sort of Balkanism, Disraeli was much more Balkanist than Orientalist.

However, from the time of his 'Grand Tour' to the beginning of the Great Eastern Crisis, Disraeli changed his opinion of the Ottoman Empire and the Turks. Having evolved his racial theories to their ends, in *Tancred* he placed the Turks within the despotic, 'Tatar' race, 'lower' than the 'Caucasian' race. British, Russians and Americans are of Caucasian blood, and Disraeli predicts bright future for their empires. But the Turkish "Tataric system" is something different, and the Arabian races of the Middle East have to "sweep away" its rule (Disraeli 1927c: 440-441). In *Tancred*, Disraeli was already toying with the idea of the partition of the Ottoman empire, while in *Lothair* (1870) he showed that he had lost his old faith in the future of the Turks (Ibid: 439-440, 443; Disraeli 1927d: 407). It seems that even Disraeli was influenced by the general disappointment of the British, especially liberal public opinion with its Crimean war ally, who proved himself incapable for the serious structural reforms.

From the beginning to the end of the Great Eastern crisis, Disraeli did not officially retreat from the proclaimed policy of protecting

the 'integrity and independence' of the Ottoman Empire. He made little effort, however, to hide the fact that in Turkey he saw merely a means for preventing the expansion of Russia into the Balkans as well as for maintaining the existing balance of power in Europe. In Parliament, he openly proclaimed that the goal of his government was not the defence of the Ottoman Empire but rather of the British Empire. At the beginning of September 1876, he wrote to Derby that the whole 'agitation' was based on the mistaken assumption that Britain was protecting Turkey, and that, as far as he was concerned, "all the Turks may be in the Propontis" (Disraeli Papers, Lord Beaconsfield – Lord Derby, Hughenden, 6 September 1876; Monypenny and Buckle 1929b: 925).

Disraeli still believed that the preservation of the Ottoman Empire was the best means of defending the British Empire, about which he spoke so often and which he tirelessly praised. If need be however, he was, judging from his correspondence, prepared to accept the partition of the Ottoman Empire. Should such a situation arise, he demanded a strategically important location for Britain, from which its fleet could threaten and halt a Russian advance to the south – he made reference to Varna, Batum, Aleksandretta, Lesbos, Crete, before taking Cyprus in the end. On the subject of the location of a strategic base, Disraeli constantly changed his mind, but he was consistent in his claim that, in the event of the partition of the Ottoman Empire, Britain should occupy Constantinople (Ibid., 4 September 1876; Ibid., 29 September 1876; Ibid., 30 September 1876; Monypenny and Buckle 1929b: 924-925, 946-947; Ković 2011: 246, 263).

After Congress of Berlin, where some of the most precious sultan's possessions were portioned between "Caucasian" Great Powers, the most important ally of Disraeli's government in the Balkans was not the Ottoman Empire anymore, but the Austro-Hungarian Empire. In Berlin Disraeli proposed its military occupation of Bosnia and Herzegovina, against the will and with the active resistance of the Turks (Ibid., 275-276. 292-293).

***

To conclude, Disraeli was indeed more Oriental than Orientalist, though he had his own imperialist designs for the East. He identified himself not with the "Muslim East", but with the "Muslim

Arabs". Disraeli's perception of the Turks, was much more in tune with the Orientalist discourse. His positive political and cultural inclinations towards the Ottoman empire weakened with time. But this cannot be said of the disregard in which he held the Balkan nations. From that point of view, Disraeli was rather Balkanist than Orientalist.

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How Can Contemporary Political Philosophy Become Applied Philosophy?[2]

Abstract

In this article the author reflects on the idea of "double responsibility" of political philosophy – as responsibility towards reason and towards practice. Such analysis is presented with the challenge of neoliberalism as dominant world-view and therefore addresses the question of meaning of political philosophy as applied philosophy today. In the second part of the essay, key issues of contemporary political philosophy are articulated: political subjectivity, democracy, the future of the international law, the question of state sovereignty and the relation between ethics and politics. In conclusion, a critical examination of both contextualism and universalism is presented.

Key words: political philosophy, responsibility, reason, liberalism, political subjectivity, democracy, international law, state sovereignty, ethics.

The Role of Political Philosophy: Double Responsibility Challenge

On the one hand, when we say that political philosophy is distinct from both political science, as well as from other areas of philosophy, it is as if we have marked a common place and declared

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a statement that hardly anyone will seriously argue against. The *autonomy of political philosophy*, however, as well as its *extraordinariness* – to paraphrase Kalyvas's account of "extraordinary potential" of democracy (See: Kalyvas 2008) – has been either challenged or misunderstood in recent times in numerous ways, up to the point that it is far from plausible today to say what political philosophy is, let alone what its greatest concerns are and how it can be legitimized as applied philosophy.[3]

Let us begin with the idea that the task of political philosopher implies what I name as "double responsibility" challenge. Political philosopher answers to the strictest demands of reason – which includes responding not only to decisive formal principles as that of non-contradiction, for example, but no less significantly also argumentation as the leading trace of and for justification and legitimization. This is to say that there is no - and no potentiality for - previous acceptance of any political "content", let alone political ideology of any sort that would precede a political-philosophical investigation – inasmuch as it is *philosophy* and not politics.

The other responsibility of the political philosopher lies in his perplexed relation towards political practice in local and global contexts. The mentioned "reason responsibility" would certainly seem empty and completely formalistic, and uninteresting in terms of its political "non-interest" - it would a somewhat radicalized form of the famous Mary McCarty's question posed to Hanna Arendt, namely, "What the political and political philosophy is then about?" (See: Hinchman & Hinchman 1994: 319) – if it were not for *the responsibility of political philosophy for political practice*.

This does not mean to say that philosophers shape the world or that theory entirely governs and directs politics, rather, on contrary, it means to say that – if politics is to be considered as more then a blind sequence of contingent events or more then a mere implementation of techniques of governing[4] – then the *reasonability* of its happening is what is a matter of political philosophy *par excellence*.[5]

3 This is the paradoxical result of simultaneous "specialization of knowledge" and "expert division" that took place in the Academia in last decades, the outcome of an all-encompassing process (which by default included philosophy), and which implied either the loss or politization of its internal potential and sense.

4 These attempts can be found in very different theories, all the way from postmodernism to utilitarianism.

5 To recognize such "reasonability" does not *ipso facto* mean to neglect or exclude, say, the role of "political emotions" in politics.

Here we come close to what I would call both a position of an *objective spectator*, a *legitimate witness*, and a *creator* and *participant* of the *political discourse*, as the *extraordinary potentiality of the political philosopher* – as a *simultaneously irreplaceable and a "double responsible" position*. To take an example, let me turn to liberalism[6], as it has been articulated in theory and applied in politics in the last two decades. *Liberalism*, and what was named as *Western political liberal democracy*,[7] in recent decades, has been the exclusive non-negotiable idea, the "final inflexible truth" that can not be brought into question. That is why it was often accompanied and followed by the idea about the "end of history", which meant something as "freezing liberalism in time", and indeed, in a way, freezing time.

In the first decade of the 21st century it has turned out that the belief in liberalism *per se* has been a huge mistake. What has been a mistake was precisely its *sacralization*, that led to simultaneous subsumption and production of concepts, ideas and their application in accordance with the (neo)liberal world-view. The result of this was, on the one hand, a forgetting of the role and double-responsibility challenge of political philosophy and the dissolution of its extraordinary potentiality, on the other.

This is precisely why we are faced today with a missing framework for political-philosophical analysis. Instead of the objective spectator and legitimate witness, and a creator of the political discourse, we are for the most time confronted either with "outdated", almost *passé*, uncompromising defenders of liberalism (which certainly remembers much better days) or perhaps with equally non-negotiable representatives of other and different ideologies. Moreover, political philosophy as *applied philosophy* encounters these challenges in an intensified way and with multiple implications, for theory and even for world politics of present and future. Simultaneously, this is a challenge for what I name as *three fields of political philosophy as applied philosophy*, and as engaged philosophy: (1) state politics and

6 Some have accepted the term "neoliberalism" in such sense. From the 1990-tis the term "neoliberalism" has been mostly associated with global market economy and free trade, and related to institutions such as the World Bank, the WTO and MMF. Neoliberalism, however, does not appear in exclusively economic setting, but attempts to articulate itself as political, social and moral philosophy and, moreover, as a synthesis between the economical and the political.

7 Anne Marie Slaugter, for example, has made the differentiation between "liberal" and "illiberal" democracies, a discourse where the exclusivity and "truth" of democracies belongs to the first.

the government (2) NGOs and (3) the Academia. It is in these fields that the responsibility of political philosophy today emerges in a clear way and where the political philosopher as applied philosopher can reintroduce the sense and contribution of political philosophy.

Such discourse, a new discourse of and on political philosophy, would be, beyond all, a discourse that places forward major contemporary issues, argues and questions without ideological constraints - while at the same time staying on the other side of relativism. If it is to be led by something, then it would be the very value of human and political freedom – value which no serious political theory ever brought into question. Such discourse on politics would be, in a way, *on the political without being political proper.*

What are par excellence Issues and Extraordinary Challenges of Contemporary Political Philosophy – Five Questions?

In a sense, there are something like *par excellence* matters of and for political philosophy, partly coming forth as matters that appear in every time and each context and partly emerging from the political urgency surrounding contemporary political practices. To recognize such matters, in and by taking a critical, open and non-ideological stance, would be similar to bringing political philosophy back to itself, and possibly at the same time would mean creating an environment in which political philosophy as applied philosophy would have a more visible and significant impact in world events.

The Question of Political Subjectivity and Political Identity

This is the first question of and for political philosophy *en general* and in contemporary sense as well. This is to say that the consideration of *who is the political subject*, to whom it is that the political movement, creation and participation belongs to - who is, if you want, the *author of the political* – has always been a matter beyond all matters of and for political philosophy, and says something about its extraordinariness, potential and responsibility of an exclusive kind. Linked to it is the very issue of "political identity", or rather of multiple political identities through which the subjectivity of the political – in the sense of autonomous practice – presents and manifests itself.

However, the issue of political subjectivity and political identity – although conceived as "always already" and ever present riddle - appears as especially important in contemporary transforming world where the multiplicity and multipolar character of political power states, political representatives and political actors emerges in a clear way. Post-globalized world is beyond all a world of multitude, a world of "many" – and precisely as such can be understood as a potentiality for democracy. But for that purpose the very irreducible character of political subjectivity and forms of political identities needs to be explored.

If *political subjectivity* is the name for *autonomous*, *independent* and *legitimate political agency*, what are *political identities* that *can be called subjectivities*? Can civil society still maintain the idea of multiple identities in a movement toward postglobalized cosmopolitism or do local and singular identities always emerge as "politics of difference" and in that sense in a leading role of biopolitics? How can *multitude* and *democracy* be *present* and *representable* in *political subjectivity*, without the risk of difference becoming the key political category? And *vice versa*, would it not be the case that abandoning the idea about multiple political identities is what precisely enables totalitarianism to enter the scene?

The question of political subjectivities, therefore, simultaneously arises as the question of both national and supranational identities and political communities in contemporary world and as such presents a major challenge to be encountered.

The Question of Democracy and Publicity

The idea here is to say that the question of democracy and publicity can be considered and analyzed regardless of any ideology. In such sense, democracy can perhaps appear exactly as the "proper name", around which it is possible to gather the multiplicity and diversity of political subjects, a name for a lacking consensus - and of and for a consensus - regardless of other existing political differences, ideas and images. The crisis of liberal democracy, recently often *substituted for crisis of democracy per se*, has revealed that the concept of democracy is something that lacks clarity and requires more intensive exploration. At the same time, this has been the reason and argument for some authors, such as Žižek and Badiou, to claim that democracy has been abused to the point that we should take the risk of abandoning the name of democracy altogether.

Democracy in a significant sense can be comprehended as the question of *political participation* and *political creation*. Simultaneously, this is the reason why I tie the question of democracy and publicity as one single issue. If, as Jeffrey Edward Green articulates it, contemporary democracy "in the age of spectatorship" (See: Green 2010) faces multiple obstacles, then - if it is to be counted as democracy with future and of future – a rebirth of its potential is what is the need in contemporary societies. The question of democracy, this way, appears as both a question of advancing "*democratic institutions*" and a question of sustaining and developing the growth of "*democratic publicity*" and "*democratic participation*".

The concept of "publicity" should be differentiated from its common pair, namely, "public sphere", precisely in reference to the issue of forms of expression and manifestation, and especially considering the role of media worldwide and the fact that in previous decades it has not contributed much to enchantment for democracy. The *desire* for democracy, human expression and creation is what constitutes not only the concept of democracy but its very much present condition in societies as well (the example of European societies is paradigmatic here, although this goes for other both Western and non-Western societies). In that sense, it emerges against "control" and "power" – against every life-form of contemporary biopolitics – and expresses itself, in Foucauldian terms, as the moment that "society needs to be defended".[8]

In a sense, such a task would be a rethinking of democracy, of the "will of the people" – and doing so precisely in terms and consideration with the ideas that "*liberty and justice consist of giving back all what belongs to others to the ones who are entitled to it*" (French Declaration of 1789, article 4).

The Question of Future of International Law and the Issue of "The International Community" of the Future

Today the very sense, structure, purpose and the role of international law is seriously disturbed. In a certain sense, never was law, and precisely as international law – the international order established after World War II – brought into question, relativized, marginalized and exceptionalized as it has been the case in

8 In a similar fashion, one can remember Foucault's statement that "he is a pluralist moved by the passion for the system…" (See: Lotringer 1996: 237).

our recent human history. Without in advance normatively judging such an outcome and its following implications – and with all due respect towards multiple attempts to theorize and rethink how contemporary framework of international law can be supplemented and advanced – one must admit that the meaning of international law, and the concept of "international community" is very much at stake in present politics. This makes it an unavoidable and, moreover, an urgent issue that demands a response. This is why the question about the future of international law and international community - if these concepts are to be preserved in any way at all - is a *par excellence* issue of contemporary political philosophy, and in a way that it has not been before.

The Question of State Sovereignty

This issue is partly interrelated with the question of international law but cannot entirely be reduced to it. Political practice in recent years, followed by debates on sovereignty, suprasovereignty and post-sovereignty, has confirmed that these issues are very much alive and, moreover, that the entire political landscape of states as major representatives of sovereignty is still far from being clear and defined. It is not only the matter of the future and structure of the European Union, for example, but rather a question that transcends its borders and reaches far beyond in the specter of contemporary politics.

It is the question about *the role of the state today.* As such, it appears in many forms and ways but, above all, and in most proper way, I believe, it emerges as an issue and a strategic matter of responding to the question h*ow and in what political forms can "democratic sovereignty" be best expressed and articulated*. It means, therefore, rethinking whether supranational and "beyond-state" conceptions of sovereignty - such as, for example, presented in the idea of the EU – are sustainable and most appropriate on the long run, and what forms of democratic potential, participation and creation are achievable in it? In other words, it is the question about what are the implications of the idea that democracy is primordial in respect to sovereignty, both for theory and for emerging dilemmas in practice and future of international relations? Are the states to be regarded as ultimate carriers of political sovereignty and what other forms of sovereign expression are both available and desirable for strengthening the democratic moment in and of

the political? Moreover, it is the question who is the sovereign in contemporary reflections and in politics?

The Question of the Relation between Politics and Ethics (and the Extraordinariness of the Contemporary Context)

Where do politics and ethics meet and why they are both irreducible and non-exchangeable fields? On the one hand, this has been a dilemma for centuries, explicated throughout the entire history of political philosophy, from Aristotle's unity of politics and ethics, to Machiavelli's conception of autonomy of politics, and then to multiple modern and postmodern turns. In contemporary context, however, the relation between politics and ethics has become ambivalent in numerous ways. One flip of the coin reveals an exemplary trend of *reduction of politics to ethics* – and this can be recognized in different theoretical versions of the so-called "humanitarian approach"[9] – while the other sheds light on an exactly opposite movement i.e. on a thinking that perhaps, and the other way around, "*the ethical" has no place in Realpolitik*, where the relation of forces as power relations are what politics entirely consists of.

Doubtlessly, this course of contemporary theoretical and practical events has led to many confusions and misunderstandings, and, in a certain way, to radicalization of the issue, again, often accompanied by ideologization of "the place" of the ethical in politics. Leaving aside for the moment the debates and disagreements about what the political is, the relation between the political and the ethical articulates itself, first and foremost, as the relation between politics and reason, which is to say that it arises, or rather, is the implication of the moment of "acting in accordance to reason", and the same goes for world political practice as well. That is the case if one does not think that "war is politics continued by other means".[10] War is a human activity that violates almost every human right and

9 Concerning the issue of human rights in this context see, for example, Douzinas 2007 or Mutua 2002. Mutua, in a radical way, writes that "international human rights fall within the historical continuum of the European colonial project.(...) Salvation in the modern world is presented as only possible through the holy trinity of human rights, political democracy, and free market" (Mutua 2002: 2).

10 In this sense Amartya Sen was right in reminding that the G-8 states are the biggest producer and dealer of weapons on the world market. With such foreign policy of "double-morality" they clearly undermine "freedom and individual rights" in other, non-western countries (See Sen 2007: 109).

disturbs the very potentiality of the ethical. And this is pretty much the case with every war.[11]

Taken together, all of these issues - articulated as our "five questions" - disclose that what is at stake with *contemporary political philosophy as applied philosophy* is the very sense of what the political in 21st century is. And if these are *par excellence* issues of contemporary political philosophy – and about the political in our time - then responses to such extraordinary challenges are a matter for a new theory and a matter of the possibility of its implementation.

Two Paradigms and Beyond: Between Contextualism and Universalism

If, therefore, the "double-responsibility" challenge of political philosophy today – which signifies a rethinking of its role and articulation – comes forth in rethinking of its major issues, and hence the methodology arises as deeply involved with the "content", the "how" with the "what", it becomes more convincing to comprehend that a response to such a situation has a *en general* potentiality, meaning that precisely due to interrelatedness of fundamental questions of contemporary political philosophy, as applied philosophy, we can attempt to search for a leading trace.

The leading trace of such an undertaking unfolds, and can be articulated, between the idea of application of general principles, on the one hand, and contextualism in politics, on the other, which is to say *between universalism and contextualism,* as two radical paradigms that shape our thinking most of the time. It seems that a radical defense of exclusivity and ultimate superiority of either paradigm faces multiple obstacles in both theory and practice – that is, remaining either empty of the *sense of practice and creation in politics* or reducing political action to *political technique and/or contingency*. What is wrong with contextualism is its missing on the reasonable character of political practice and action and on the very moment of "the common". What is wrong with radical universalism is its lack of understanding otherness and differences, at the cost of disabling the recognition of political events and specificities of local contexts.

11 And that is where the pseudo-universal "just war" theories simply fail the test of legitimacy.

However, the idea here is to say that both the concept of "contextualism" and the concept of "universalism" can be conceived in different terms, and still without either of them losing the power of their meaning and the strength of their arguments. To think, therefore, "in between the context and universal principles", would not be, as it may sound at first, a way of weakening of their positions, in order to open up a *third* stance, but rather articulating and unraveling their *own internal potentialities and the point where they meet* – a point that emerges precisely from the *responsibility of the response*, where the political and the ethical come together. *Contextualism* does not *per se* imply *exceptionalism*. Moreover, contextualism does not *per definitionem* and by its concept imply in any way that "there is no objective truth" in theory and the political. But what *contextualism* does imply is the concept of *pluralism*.

What is, therefore, a task for rethinking is how the idea of *pluralism* – that remains sensitive to the implications of potential abandoning of the universalistic appeal in its entirety – can respond to, or rather, preserves in itself, the very moment of political and ethical responsibility. For a case for "exeptionalism" and "relativism", to turn thing around, would, beyond all, present a movement towards global scale anarchy, destruction and self-destruction of politics. That would be, in final implication, the decision whether we want to have politics as a world dialogue or politics of anarchy, for which I am convinced it would lead literary nowhere.

On the other hand, the concept of *universalism* does not *per definitionem* imply *absolutism*, that is, the very search for principles and the tendency to reach a consensus about these principles is not in itself "absolutistic". Moreover, one could claim precisely the opposite, that "politics of absolutism" lays in disagreement with a search for consensus, which is often also a matter of compromise and – in last implication deals precisely with how *pluralism is encountered.* If, therefore, it is not sensible to claim that the concept of "universalism" *per se* is, as it were, "always already" hegemonic, that both theoretically and practically it cannot appear otherwise then as such – on the other hand, what the concept of "universalism" does imply lies in its "other name", an idea of *objectivism*.

It is in this way that the idea "in between", beyond and yet in the very heart of both "contextualism" and "universalism" grows. The very potentiality of opposing what is named as "hegemonic universalism" on the one hand, and

"fundamentalistic pluralism" on the other - *and doing these coming from their own structure* – is the potentiality of the emergence of *moderate and deliberative forms of universalism and pluralism.* In other words, such an undertaking would present a way of embracing a rich and unexplored potential of a *pluralistic universalism*, as an objective and legitimate - as non-ideological and yet deeply and radically political - way of responding to growing challenges.

A *pluralistic universalism*, in such way, would be structurally differentiated from both an uncritical manner of implementing and reinforcing, for example, the premises of postmodern constructivism and any attempt to posit fundamental uncompromising universalistic tendencies. The response to both hegemonial universalism and fundamentalistic pluralism present itself, therefore, coming from the idea that there is on truth which does not need empirical verification, that is, that there is no rupture between the conceptual and the empirical, such that would entail a schizophrenic gap on either side. It is precisely the empirical verification, and the link between the empirical and the conceptual that enables an articulation of an objective and *par excellence* political approach[12], and a potentiality for consensus and agreement. Types and forms of arguments and the entire methodology of such political-philosophical investigations – and of political philosophy as applied philosophy - are to follow up to the empirical cases and examples and to attempt to articulate *the conceptual link between particular empirical events* in order to construct a sustainable framework. That would simultaneously be a way for re-legitimizing *the very idea of legitimation* and of unleashing the potentialities how answers given to the decisive questions of political philosophy today can and do significantly impact *world political practices*.

In conclusion, let us turn once again to the most recent example of a form of hegemonic universalism – its liberal form and to the form of contemporary postmodern constructivism, on the other hand. What is a characteristic of the first is, beyond all, *ahistoricity*, exemplified in the theoretical belief (and consequently, practices), in the "eternality" of certain ideas, which are found as

12 In terms of what such idea would mean applied to concrete cases, a moderate version of universalism/pluralism would begin with descriptions of the actual situation, of "what is" the present state of things, following causational explanations (bio/phycho/social/cultural), including theoretical and moral interpretations and values of their representatives. Such examination would be critical and self-critical, open to revision in light of new empirical evidence.

binding and unquestionable. From this, it was possible for a "*quasi-Schmittianism*"[13] to emerge and for a division between the "uncivilized" and the "barbarian", the "friend" and "the enemy" to take place. Such a moment produced not only uncritical and deeply problematic absolutism (See: Bernstein 2005) in the West, as a theoretical "mainstream" thinking, but, more significantly, often emerged as contrary to its own claim, namely, not as proclaimed universalism often but rather as a form in defense of particular interests.

In such a way, both postmodern constructivism and liberal globalism appear as self-contradictory in their own attempts - when theorized and applied in a radical way, or rather, when instrumentalized for different and external purposes. In encountering the challenges that emerge, by a creation of politics of "pluralistic universalism", the role of permanent critique and self-critique is indispensable. Critical examinations here go hand in hand with two other ideas of which one can be referred to as *politics of dialogue* and the other as *politics of compromise*. Perhaps someone will be inclined to call it a "politics of third way for the 21st century". I would prefer to call it a "*politics of open concept*". As such, politics of "pluralistic universalism" represents an "unfrozen" politics, that is, politics of movement and politics in permanent state of self-creation.

Rethinking new politics, beyond and on the other side of still existing divisions, would at the same time mean rethinking a new common universal reference point, a consensus on principles coming forth in new pluralistic universalism. This would require paradigmatic and structural openness – a chance for political philosophy to engage with very specific and constantly changing historical and political contexts, while at the same time striving for a degree of universality, professional autonomy and moral accountability. In a certain sense, I would argue, paraphrasing and building on the idea about "the return of history" (Kagan 2008) that *time has returned to politics*. Let me conclude then in saying that it is on engaged intellectuals, as applied philosophers, to present its flow and recognize its potentialities. That would exemplify the role of political philosophy today.

13 I borrow the term "quasi-Schmittianism" from Simon Critchley (See: Critchley 2006).

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Ethnic Minority Policies as an Ethnic Cleavage Dimension Within Post-Communist Party Systems: Case Studies of Vojvodina Hungarians and Estonian Russians[2]

Abstract

Focusing on the case studies of Vojvodina Hungarians and Estonian Russians, the article aims to explain the persistence of ethnic cleavage in post-communist party systems. Ethnic cleavage is expressed in terms of ethnic minority policies pursued by political parties. The article relates the degree of stability of the ethnic cleavage within the party system to the persistence of party policy attitudes and policy practices in ethnic minority policy. The long-term impact of the salience of ethnopolitical issues at the outset of multi-party system on policy attitudes and policy practices of political parties is summarized in a two-decade-long perspective. A proneness of political party attitudes and practices to path dependence is related to reversal prospects of state minority policies. The article names the limitations of party policy-making in the sphere of ethnic minority policies.

Key words: ethnic minority policies, post-communist party systems, Vojvodina Hungarians, Estonia's Russians, cultural autonomy, language policies, citizenship policies

Introduction

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2 This article draws on the doctoral research conducted by the author for his dissertation "Political Parties and Ethnic Minority Policies, 1991-2011: A Comparative Study of Serbia's Hungarians and Estonia's Russians". Vytautas Magnus University, Kaunas, 2012.

At the outset of multi-party system in post-communist European states, ethnicity was found to be the only cleavage salient enough to be immediately transformed into party platforms (Crawford 1996: 117-156). The salience of ethnicity raises a number of questions with regard to the ethnic dimension in the structure of party systems of post-communist European states and its implications for ethnic minority policies. What impact has the redefinition of ethnopolitical settings in the states that emerged from multiethnic socialist federations left on the attitudes of crucial political actors and policy makers toward ethnic policies and on their actual policy practices, and what long-term implications could it have for ethnic minority integration patterns and social cohesion in these states? To what extent has this kind of ethnicized transition toward a multi-party system structured ethnic minority policies in these states along ethnic or civic lines?

The dimension of ethnic cleavage within a party system could imply different answers to these questions, reflected in political parties' divergent policy attitudes toward ethnicity-related issues, and, respectively, different policy practices in ethnic minority-related policy areas (language, citizenship, education, etc.).

A related question concerns the peculiarities of policy making by political parties in the area of ethnic policies in terms of durability or proneness to change of party policies over time. Does the ethnic dimension of the nation-wide political cleavage structure, expressed in the said difference in party policy attitudes and practices, persist over time, and what factors could condition its change?

An important set of theories dealing with the role of political parties in policy making attributes a series of features to them, which are believed to determine policy outcomes in relevant ways. These features are: a relative immutability of party policy stances, path-dependency, resistance to change and perpetuation of existing policy paths over time. Thus, historical institutionalist theoretical tradition assumes that political parties are particularly path-dependent in their policies: once set along a particular path, their policies are difficult to reverse (Panebianco 1988: 270-273; Pierson 2000: 251-267). In contrast, theories stressing the office-seeking nature of political parties (particularly rational choice theory) argue that party policies are instrumental in their quest for power. Parties are thus expected to adjust their policies to the goal of getting or remaining in power (Downs 1957: 28; Schlesinger 1988: 266-293; Seiler 1998: 227).

These contrasting interpretations of party policies suggest different implications for any policy field. If party policies are path-dependent, their policies will heavily depend on their history, or previously chosen policy path. If parties are primarily guided by a rational power-seeking calculus, a dynamic political environment can be expected to impart more mutability to party policies over the course of time. In any case, the peculiarity of the relationship between the two phenomena – (1) the political party with its peculiar role in shaping policies and (2) ethnicity as a factor of political cleavage – still remains an underresearched area when it comes to ethnic minority policies. The two-decade-long period that has passed since the introduction of multi-party systems in European post-communist states allows us not only to evaluate the legacy of the processes of ethnic mobilization in ethnic minority policies pursued by political parties, but also to test the proneness of parties' ethnic policies to path-dependence and reversibility over time.

Although seemingly different in a number of aspects that make up the general ethnopolitical contexts of the two states, the two states chosen for the present research – Serbia and Estonia – satisfy the key validity requirement: the origins of the both states' contemporary party systems date back to periods of strong ethnicity politicization that could not but affect the policy attitudes and practices of the major political parties.

Of all the states that (re-)emerged on the map of Europe in the early 1990s, Estonia is perhaps the most eloquent example of a nation-state that defined its identity in explicit ethnic primordialist terms, with resulting implications for all ethnicity-related policy areas. This development is the outcome of a powerful popular movement for national independence which in the long run gave rise to the country's major political parties. The practical implementation of the conception of political membership had clear ethnopolitical implications, resulting in socioeconomic stratification overlapping with ethnic divisions.

The emergence of a multi-party system in Yugoslavia was accompanied by ethnicity-related conflicts that gradually escalated into the wars of Yugoslav disintegration. The present research is concerned with the case of Serbia, focusing on the policy practices of the country's political parties with regard to the specific issue of the autonomy of Vojvodina and its peculiar regime of minority rights protection, with its relevant implications for the province's biggest Hungarian minority.

Ethnic Cleavage in Serbia's Party System and Hungarian Cultural Autonomy in Vojvodina

In order to identify ethnic policy-related cleavages within the party system and to measure changes in political parties' ethnic minority policy attitudes and practices in a quantitative manner, Peter Hall's categorization of first-order, second-order and third-order policy changes is applied (Hall 1993: 278-279). In analyzing strategic party policy agendas and legislation initiated by various parties, party policy changes are labeled with the following codes. First-order changes denote changes in policy tool settings, prompted by new knowledge and experience, whereas general policy goals and tools remain unaltered. Second-order changes indicate changes in both policy settings and tools, based on past experience, while general policy goals and strategies do not alter. Third-order reforms are particularly important for studying cases of policy reversal, since in addition to changing policy tools and settings, they also imply changes in policy goals.

The 1974 Constitution of Vojvodina, by establishing a full-fledged system of nationality rights protection, institutionalized a particular track of developing official policies toward minorities. Considering four processes inherent to any political environment (collective action, institutional development, the exercise of authority, and social interpretation) (Pierson 2011: 40), the subsequent reduction of autonomy in 1989 proved to be a critical juncture marked by an "exogenous shock" to the current path, as the ruling party exercised its political authority so as to reverse the existing track of institutional development. Nevertheless, during the years of its existence (1974-1989), the Vojvodinian regime of nationality rights protection had generated the potential for collective action and social interpretation aimed at reinstitutionalizing the abandoned path. By producing Hungarian leaders who were able to speak for the group, the system of de-facto cultural autonomy provided them with the resources and skills to mobilize politically (Tolvaišis 2012: 63-83). The continuation of policy standards became possible due to program documents of both ethnic Hungarian and regionalist Vojvodinian parties, inspired by the 1974 constitution, speaking in favor of historical institutionalist theoretical assumptions about a considerable degree of stability of party policy agendas over time.

Throughout the 1990s, ethnic minority policy standards of the 1974 provincial constitution, albeit abandoned in practice, were preserved as a normative orientation in the policy agendas of ethnic

Hungarian parties and the League of Social Democrats of Vojvodina (LSV), with an ally embodied by the Democratic Party (DS) as the major opposition party. The alliance structure of Vojvodina Hungarian parties was based on a long-standing division characterizing Serbian political parties in the form of "autonomism" versus "centralism", which overlapped both with the ethnicity-related cleavage ("civic" versus "ethnic" approach to statehood) and the "pro-European" versus "anti-European" foreign policy orientations (Tolvaišis 2011: 53-70).

After the critical juncture of October 2000 (the overthrow of Slobodan Milošević), national minority rights protection was gradually institutionalized on the republican and provincial levels. Convergence between the DS and the Alliance of Vojvodina Hungarians (VMSZ) resulted in the creation of post-electoral coalitions. With a vice-prime minister in the government, the VMSZ got the opportunity to participate in the ruling majority on the republican, provincial and local levels, as well as producing third-order policy changes on the provincial level.

The redefinition of Vojvodina's competences within Serbia was a prominent goal for the VMSZ. The reform initiated by the Democratic Opposition of Serbia (DOS) resulted in passage of the Law on Local Self-Government and the Law on Establishing the Jurisdiction of the Autonomous Province of Vojvodina (Omnibus Law) in February, 2002 (Službeni glasnik 2002). Over 200 competencies, including the spheres of culture, education, official use of languages and alphabets, and public media, were transferred to Vojvodina. In May, 2002, the Provincial Secretariat of Regulations, Education and National Minorities took over control of the official use of languages. The Provincial Council of National Communities founded by the Executive Council on August 30, 2006, became an advisory institution monitoring the work of national councils, in line with the LSV's program guidelines. The Provincial Ombudsman became the most important independent institution dealing with the promotion of human rights in provincial and municipal institutions. On the local level, the Law on Local Self-Government foresaw the right of ethnically heterogeneous municipalities to establish advisory councils for interethnic relations (Službeni glasnik 2007, art. 98). Still, since the law did not specify procedures for electing council members, local municipalities arbitrarily appointed them, and the councils' structure reflected the party structure of the local authorities.

The experience of the first decade of the 21st century showed that the provincial institutions proved to be more sensitive and effective at promoting the rights of national minorities, adopting numerous acts and taking on activities and measures. Throughout the said period, the VMSZ was coalition partner in the provincial government for several mandates. Their representatives in republican legislative institutions contributed importantly to the elaboration of minority legislation.

Consolidation of power on the provincial level provided the VMSZ with an important framework for articulating minority interests. In turn, by pursuing the above-described policies, the DS recognized the leading role of Vojvodina as an institutional framework for promoting national minorities. Moreover, Serbia's European integration appeared as an additional incentive to the DS to improve minority-related legislation and its enhancement. Hence, the "pro-European", civic and autonomist orientations appeared to be a supreme legitimizing motive. Likewise, the basis for the VMSZ's convergence with the autonomist LSV was laid by the multicultural character of the province. Here, opportunities opened up for the Hungarian political community to cooperate with both provincial and nation-wide political forces on the basis of their engagement in two interrelated dimensions: 1) the process of expanding Vojvodina's autonomy, and 2) the process of Serbia's integration into the EU.

The LSV and the VMSZ cooperated since the foundation of both parties, running together for elections in electoral coalitions on the republican level before the abolition of the 5% threshold for minority parties. Their last joint participation in elections was in 2003, in the coalition "Together for Tolerance" (LSV, VMSZ, and the Sandžak Democratic Party). After the coalition failed to pass the threshold, the LSV gave the Hungarian party its support in directing European institutions' attention to the situation of the Vojvodina Hungarians. Once back in parliament, the LSV and VMSZ based their cooperation on their shared commitment to European orientation and regional interests. These shared attitudes determined that in most cases, the voting patterns of the two parties in the Parliament coincided. Likewise, the LSV has been one of the VMSZ's closest partners in the provincial coalition since 2000.

The 2009 Statute of Autonomy, as the legal framework for minority rights protection in Vojvodina, enables us to trace ethnicity-related cleavage within the Serbian party system in terms of policy practice. The Statute was elaborated and supported by the DS, LSV,

G17+ and the Serbian Renewal Movement (SPO) and opposed by the Democratic Party of Serbia (DSS), the Serbian Progressive Party (SNS) and the Serbian Radical Party (SRS).

A first-order change in the policies of the Socialist Party of Serbia (SPS) is notable. After entering the ruling coalition with the DS in 2008, the SPS passively supported the DS's ethnic policies. This first-order change in party policy stances and practices can be attributed to the impact of the critical juncture of the SPS's loss of power in 2000. With new leadership, the party adapted to fundamental changes in the political environment in order to survive as a parliamentary party. The rupture with the Milošević-era ethnic policy path can be explained in terms of both rational choice theory (as the only way to pursue viable office-oriented behavior) and historical institutionalism (as an impact of a fundamental critical juncture). In the case of the SPS, the two theories seem to be complementary, not contradictory.

Identical party voting patterns could be observed during the adoption of the Law on Establishing the Competences of the Autonomous Province of Vojvodina on November 30, 2009 simultaneously with the new Statute of Vojvodina. The DS, LSV, G17+, SPS and SPO voted for the law, while DSS, SNS and SRS opposed it (Tolvaišis 2012(2): 127). The law confirmed the Province's competences in the sphere of education (articles 33, 34, 38), culture (Statute 2009: art. 41), and the management and control of the official use of languages and alphabets (art. 76). Other important stipulations included the province's commitment to cofinance public media in minority languages (art. 62), and the possibility of delegating the Province's competences in the field of culture, education and public media to national councils (art. 74.5). These stipulations represented elaborations of the LSV's concept of regional autonomy, backed by the provincial branch of the DS. In line with the programs of the DS and LSV, the Statute introduces new notions of multiculturalism and interculturalism as values of special importance for Vojvodina, and obliges provincial institutions to promote inter-ethnic respect and communication (art. 7).

An important legislative innovation introduced by the Statute is the principle according to which the level of individual and collective human and minority rights, once achieved, cannot be reduced (art. 23). The Province may raise the level of protection of national communities. This principle, introduced by ethnic and regionalist parties, surpasses the stipulations of the 1974 provincial Constituti-

on, and is in line with modern international standards of minority rights protection.

The principle of proportional representation introduced by article 24 is another example of the higher standards applied by the Statute as compared to the 1974 Constitution. It committed the provincial institutions to ensure that national minorities are represented according to their share in the population. These principles were the result of the DS's, LSV's and VMSZ's engagement.

The Statute's benefits for national communities of Vojvodina can be subdivided in several spheres that support both historical institutionalist assumptions emphasizing the perpetuation of party policy agendas over time, and rational choice arguments about the utility-seeking nature of parties. First of all, the provincial institutions proved to be far more sensitive and responsive than the rest of Serbia or even adjacent states with regard to the enforcement of minority rights. The tradition of interethnic cohabitation, rooted in Vojvodina's centuries-long civic culture, was adopted as an ideational value by ethnic Hungarian, Vojvodinian regionalist parties as well as provincial branches of Serbian nation-wide parties that adhere to the same side of the cleavage, and was preserved in party policy agendas over two decades, in line with the historical institutionalist paradigm. Second, by providing the province with additional financial means, the Statute creates the material basis for improving the enforcement of minority rights. Financial incentives could drive political parties' utility-maximizing behavior. Finally, institutionalization of cooperation between provincial institutions and the Hungarian National Council is the third benefit that the Statute brings to the Hungarian parties.

Vojvodina's Statute was drafted by the DS, the LSV and the Hungarian Coalition. The impact of the Hungarian Coalition is visible in those parts that regulate representation of national communities in provincial institutions. The contribution of autonomist and ethnic parties is reflected in the level of minority rights established by the Statute in the sphere of language use, which exceeds the level of rights of national minorities established by the Constitution and the republican laws. Namely, the Statute foresees 6 official languages, while the Constitution of Serbia stipulates that the only official language in the state is Serbian. The unequal situation created between the Serbian citizens living in Vojvodina and those in other parts of the country was picked up by the DSS, SNS and SRS as one of main criticisms of the Statute.

Likewise, the split around the Statute overlapped with the ethnic/civic cleavage. The VMSZ, DS, LSV and G17+ actively participated in drafting the Statute and voted for it, while the DSS, SNS and SRS opposed it, considering it a legal act that undermined the constitutional foundations of the Serbian state. On the initiative of the DSS, the Constitutional Court of Serbia challenged two thirds of the Statute's provisions on 5 December 2013. On 14 May 2014, the DS, SNS, SPS, VMSZ and NDS voted in favor of the modified Statute, while the DSS and the SRS opposed it, while the LSV abstained from voting.

The emergence of the SNS can be considered an example of an internal party split representing a form of critical juncture in its own right that complements the theoretical framework. The SNS emerged out of the SRS, as the deputy leader of the SRS Tomislav Nikolić supported the Stabilization and Association Agreement in 2008, contrary to the general party line. The VMSZ entered the coalition with the SNS on the local level as early as in 2010 in Zrenjanin, and converged with the SNS in Subotica. In the wake of April 2016 elections, the VMSZ was dubbed by the leader of the SNS Aleksandar Vučić to be the only reliable partner to form a coalition with. On the eve of the 2016 elections, minister of foreign affairs and trade of Hungary Péter Szijjártó, former spokesman of Fidesz, visited the party convention of the SNS in Pančevo and expressed unequivocal support to the SNS.

Still, the period of convergence between the SNS and the VMSZ was marked by the reduction of number of Hungarian radio programs across Vojvodina, including the Hungarian-language broadcasting of the Subotica Radio. The experience of the SNS shows that possible splits and significant changes in policies of individual parties not affect the general ethnicity-related cleavage dimension within the party system.

The establishment of national councils of national minorities is another third-order change that occurred in Serbia after the critical juncture of 2000. These institutions of cultural autonomy were established by several pieces of legislation, all of which reveal a long-standing policy cleavage between Serbia's political parties. The foundations of minority cultural autonomy were laid by the federal Law on the Protection of Rights and Freedoms of National Minorities and the 2006 Constitution (art. 19). Specific cultural autonomy legislation includes stipulations of the 2009 Statute of Vojvodina (art. 25) and the Law on National Councils of National Minorities.

The federal Law on the Protection of Rights and Freedoms of National Minorities defined national councils as advisory and representative bodies in the fields of education, culture, media, official use of language and alphabet (art. 19). The proposals elaborated by the VMSZ and the Hungarian National Council with regard to minority rights to cultural autonomy were accepted by all DOS-based parties. Thus, the right of every national minority to elect a national council was established by article 20 of the 2006 Constitution.

The beginning of Vojislav Koštunica's (DSS) first government (2004) coincided with a rapid slowdown in the elaboration of practical legislation that would allow for the implementation of the constitutional principles. Two terms of Koštunica's government (2004-2007, 2007-2008) were marked by a lack of political will to pass the Law on National Councils of National Minorities. The delays in making necessary changes to legislation occurred due to the opposition of the parties that represented the opposite side of the threefold cleavage: the DSS, SNS and SRS opposed the law, considering its stipulations anti-constitutional.

The second half of 2009 marked a watershed in the Hungarian political community's cooperation with the nation-wide establishment. The adoption of the Law on National Councils of National Minorities became possible due to the support of a part of the DS, led by minister of human and minority rights Svetozar Čiplić and characterized by a more liberal view towards national minority policies.

The said law gave hitherto unseen prospects for cultural autonomy of national minorities. It stipulated that national councils based in Vojvodina would be financed from the republican budget and co-financed from the provincial budget. Furthermore, the law entitled national councils to initiate the adoption of new laws or amendments to the existing legislation, and monitor its enforcement. National councils obtained the right to found associations, funds, institutions of education and upbringing (art. 11), culture (art. 16), media (art. 19), the public use of languages and alphabets (art. 10); or to co-found them together with the Republic, Province, local municipality or other legal persons. The Republic, Province, and local municipalities were entitled to transfer founding rights over the abovementioned institutions to national councils (art. 24).

The DS-led provincial institutions manifested their acceptance of national councils through the transfer of competences. In the field

of education, national councils were authorized to suggest teaching subjects relevant for national minorities, and to participate in drafting teaching plans and programs. Obtaining the national councils' opinion on school textbooks became an established practice in Vojvodina. In the field of official language use, national councils defined traditional toponyms in minority languages. In the field of media, the founding rights over printed media in minority languages on the territory of Vojvodina were transferred to national councils. The republican parliament, the government, other state institutions, as well as provincial and local government institutions were obliged by law to consult the national councils before making decisions on issues of minority cultural autonomy (art. 25). Summing up, we may note that the law largely corresponded to the Common Concept of Autonomy of Vojvodina Hungarian Parties (Magyar Koalíció 2008).

According to the legislation in force, national councils were not supposed to be politically subjective. Nevertheless, the Hungarian national council was practically influenced by the VMSZ. An example of indirect political benefits that could be potentially drawn by political parties from their control over cultural institutions was provided by the change in status of the Hungarian daily "Magyar Szó". With the election of the first Hungarian National Council in 2002, the Provincial Assembly of Vojvodina transferred the founding rights over "Magyar Szó" to the National Council. Later on, this move provoked criticism by other Hungarian parties that the daily had become the mouthpiece of the VMSZ, which also controlled the Hungarian National Council. The composition of the national council represented the distribution of influence within the Hungarian electorate, i.e., another cleavage dimension along party lines. During the direct elections, other parties' electoral lists (most notably the DS and the LSV) ran alongside the VMSZ. The national council as an institution of cultural autonomy thus proved to be a source of political capital in the inter-party struggle. The experience of Vojvodina Hungarians thus suggests that rational choice arguments on the utility-maximizing behavior of political parties and historical institutionalist assumptions on the perpetuation of party policy stances over time are not necessarily mutually exclusive. Parties may stick to their original policy agenda, which could also enable them to create new institutional spaces for drawing office-related benefits.

The political parties' engagement in the struggle over the national council reveals the attractiveness of this institution as an in-

stitutional resource of political capital, lending support to rational choice assumptions about the office-seeking nature of parties. On the one hand, this circumstance may benefit ethnic minority policies, prompting the parties to consider minority issues in their agenda, as shown by the experience of parties that stress their commitment to civic and regionalist values and whose contribution to the restoration of minority autonomy is presented above. On the other hand, the practice of political parties in Vojvodina provides examples of cases in which the tactical priorities of political parties are often defined by electoral considerations and do not always correspond to the priorities suggested by the real minority situation (e.g., the project of territorial autonomy; scarce attention toward the situation of Hungarian-language education in Banat and Srem where the Hungarian electorate is too weak for ethnic parties to rely on; or the example of minority mass media and cultural strategies, ethnicized and politicized by national councils). Minority policies pursued by ethnic parties had their limitations, as they were conditioned by "office-oriented" considerations.

Ethnic Cleavage in Estonia's Party System and Ethnic Minority Policies in Estonia

The origins of cleavage in attitudes toward minority policies within the Estonian party system can be traced back to the period of Estonian ethnopolitical mobilization on the eve of the Soviet Union's collapse. Already then, moderate and radical streams were discernible in the political programs of the two rival movements (Pettai, Hallik 2002: 505-529).

The moderate stream was represented by the Estonian Popular Front (ERR), with its gradual approach to pursuing ethnopolitical goals, as well as its use of the official framework provided by the Communist Party of Estonia (CPE). Its goals included the protection of Estonian language and culture, the restoration of national symbols, and a gradual transition toward independence (Semjonov 2002: 105-158), civic political identity and protection of the Estonian ethnicity within the USSR, taking on Estonian as the state language and establishing control over migration to Estonia. The ERR was inclusive toward Russian political activists.

The radical stream was embodied in anticommunist dissident political forces: the Estonian National Independence Party (ERSP),

the Estonian Citizens Committees and the Congress of Estonia. These advocated a radical turnover of the existing bicommunal (Estonian-Russian) ethnopolitical balance in favor of the Estonian nation.

The fundamental critical juncture that determined Estonia's ethnic policy path for more than two decades to come was the radical stream's success in taking over the lead in setting the ethnic policy agenda. Its peculiar ideology of legal restorationism denied the USSR any legitimacy and literally called for the restoration of the pre-war Estonian Republic (restoring pre-war laws and granting citizenship rights only to citizens of the pre-war Republic and their descendants). This ideology had an enormous appeal among the ethnic Estonian majority. By employing the criterion of pre-war citizenship as an effective tool for defining membership in the newly-restored state (Poleschuk 2009: 110) and successfully mobilizing 600,000 people at the elections of the Congress of Estonia, the Citizens Committees set an alternative policy agenda regarding Estonia's huge Soviet-era immigrant community (Pettai 2007: 1-23).

The ethnic policy path Estonia ultimately followed was further determined by rivalry between the CPE, the ERR and the Congress in the period 1988-1991, and the ethnic outbidding effect it produced in radicalizing the Estonian ethnic policy agenda. The ERR and the Congress gave rise to the main political parties that shaped Estonian politics after regaining independence. The core of the ERR later formed the KE and the Moderate Party, while the core of the Congress later formed the ERSP. The cleavage thus initially ran between a relatively more moderate approach to ethnic policies and the potential for civic-based participation on the one hand, and an uncompromisingly exclusive majority-centered policy agenda on the other.

Furthermore, and more importantly for understanding the later policy dynamics of the ERR-based parties, the cleavage became blurred as the restorationist agenda prevailed. In other words, over time crucial elements of the Congress's agenda were incorporated into the ERR's policies as well.

Finally, recognition of Estonia's independence in September 1991 became a turning point that set a nearly irreversible path for Estonia's citizenship, language and related policies. In 1992-1997, this minority policy path was definitively entrenched in state legislation.

The overall foundations of Estonian ethnic minority policies rest on a peculiar definition of national minority, restricted to Estonian citizens only. This definition originates from the Law on Cultural Autonomy of National Minorities, adopted on June 12, 1993 on the basis of the respective law of 1925.

Applying Hall's classification in order to measure the nature and degree of party policy changes in the area of Estonian citizenship policies over the two decades, we can distinguish first-, second- and third-order policy changes. These, in turn, can be liberalizing or restricting.

Third-order policy changes would imply changes in the foundations of citizenship policies. These foundations were laid by the decision made by the Supreme Assembly on November 6, 1991, which recognized the right to automatic citizenship for citizens of the pre-war Estonian republic and their descendants only.

Second-order policy changes refer to policy instruments, whereas policy goals remain unaltered. The main instrument of Estonian citizenship policies vis-à-vis non-citizens is the naturalization procedure, introduced on March 30, 1992, when the pre-war Law on Citizenship (Riigi Teataja 1938, with important modifications) was enacted. The law foresaw that residents of the ESSR that had not been citizens of the Estonian Republic before June 16, 1940 or their descendants could obtain Estonian citizenship only by undergoing the naturalization procedure (Riigi Teataja 1992). Accordingly, a second-order policy change would imply substitution of the naturalization procedure with alternative instruments for various applicant groups. For example, a permanent residence permit can also be considered a citizenship policy tool.

First-order policy changes refer to policy instrumental settings, whereas both policy instruments and policy goals remain unaltered. For Estonian citizenship policies, this would imply changes in particular naturalization modalities, requirements for naturalization, changes in particular requirements for permanent residency permits, etc.

Several trends can be distinguished with regard to the parties' role in developing Estonian citizenship legislation since 1991.

First, major Estonian political parties displayed a considerable degree of stability in citizenship policy practices over the two decades. This finding lends support to the historical institutionalist assumption on the path dependence of party policy lines. Over

time, all Estonian nation-wide political parties revealed a broad degree of consensus on the fundamentals of citizenship policies. It was only at the end of the second decade of independence that changes in the ethnic policy attitudes and practices of the Center Party (KE) and the Social Democratic Party (SDE) emerged. These changes are still in line with the historical institutionalist argument. Historically, the KE and the SDE date back to the Popular Front with its traditional duality of (1) consideration of alternative and more liberal solutions to minority policies and (2) a relative lack of political will in insisting on their enactment. Third-order changes in the KE's and SDE's policies can be explained by changes in the environment which render previous policy tools obsolete. By advocating the liberalization of citizenship policy for stateless children, the KE and SDE acknowledged the changing political and social environment.

Second, the policy content of legislative amendments proposed by various parties enables us to identify a stable ethnicity-related cleavage dimension among Estonian nation-wide parties. Third- and second-order changes to legislation, initiated by more moderate parties (KE, SDE), were opposed by parties strongly committed to the inalterability of citizenship policy principles: the Pro Patria and Res Publica Union (IRL) and the Reform Party (RE). The latter parties have been consistently guided by considerations of "historical justice", of preservation of the Estonian nation, language and culture, dating back to the critical junctural period of Estonian national revival. In line with the historical institutionalist paradigm, these motives, focused on the circumstances of the Russian-speaking population's appearance in Estonia, were taken up by political parties' programs (Tolvaisis 2012(2): 138-147). This "historical justice" motive mobilized the mass support of the Estonian population through Citizens' Committees, was subsequently reflected in party platforms, public discourse and adaptive expectations of the parties' electorate (Tolvaisis 2011: 106-133), and in the long run proved to be more viable than the European and international conditionality, calling for the equalization of the political rights of migrants' descendants with those of Estonian citizens.

Third, two phases can be distinguished in the evolution of Estonia's citizenship legislation: (1) the institution of a policy framework based on the principles of state restitution and historical justice (1991-1998, when the fundamental citizenship legislation was adopted), and (2) the consolidation of this policy framework (since

1998, or since the adoption of the state integration program and the introduction of changes in the legislation under pressure from the EU).

Fourth, the irreversibility of the current Estonian citizenship and language policy path owes a lot to the impact of the EU conditionality that helped to consolidate it. Of all the international organizations that have dealt with Estonia's minority policies, the EU was the only one to succeed in introducing a second-order change at the critical historical juncture of Estonia's EU accession (liberalizing naturalization requirements to non-citizens' children and Estonian language requirements in the private sector). On the other hand, the overall impact of the European Union on Estonia's minority policies was limited: it succeeded in persuading Estonia to liberalize certain policy particulars but did not demand that it alter the fundamental principles of these policies (primarily, citizenship policies and collective legal status). These policy principles, closely related to the official legal interpretation of Estonia's statehood, were laid down at the critical juncture of Estonian ethnic mobilization and drive for independence in 1989-1991. Thus, the fundamental legal principles of the restored Estonian state set considerable limits on the power of conditionality of international organizations (the Organization for Security and Cooperation in Europe, the Council of Europe and the European Union) in reversing Estonia's minority policies.

In the area of language policies, third-order changes would refer to alteration of the fundamental principle of language policy which declares Estonian the only state language. This principle was enshrined in the 1995 Language Law, which declared all other languages except Estonian as foreign (Riigi Teataja 1995). A first-order policy change would thus imply raising the status of the Russian language to a higher level than that of foreign.

Second-order policy changes would imply alteration of language policy instruments, such as introducing or lifting Estonian language requirements for various spheres; instituting or abolishing institutions of control for language use.

First-order changes denote policy instrumental settings. In the context of language policies, it would imply toughening or softening Estonian language requirements in various spheres, and toughening or liberalizing control measures of language use.

The two-decade development of Estonia's language legislation reveals several trends that are important for the present analysis.

In terms of policy goals, Estonia's language policy has been clearly directed toward the expansion and protection of the sphere of usage of the Estonian language. Amendments introduced in various years dealt with the limits of the sphere in which the use of Estonian would be mandatory (second-order changes), but no party has ever introduced a motion aimed at enacting a third-order change and legalizing the use of other languages in the public sphere. Since its adoption in 1995, the main policy line enshrined in the Law on Language has remained unaltered, directed toward propagating and helping to learn Estonian.

The language policy practices of all the major Estonian parties continued to toughen even during historical critical junctures. This adds credibility to historical institutionalist theoretical arguments on party policy inertia and considerable resistance to changes in the area of ethnic policies.

The first critical juncture was the European Commission's monitoring process (documented in the progress reports issued from November 1998 and October 1999). This circumstance prompted the Council of the EU to expand its initial guidelines in December 1999, adding new demands for second-order policy changes (Council of the EU 1999: 35-40). Thus by pointing to the EU free market requirements, the Commission managed to obtain the revocation of amendments to the Language Law which set Estonian language proficiency requirements for private business.

Another amendment passed in November 2001 under EU pressure abolished the requirement for electoral candidates to know the Estonian language. However, at the same time regulations for elected institutions were adopted that entailed the sole use of Estonian as the working language in parliament and local municipalities.

Thus despite EU pressure, the content of legislative amendments and the support given to them by various parties revealed a consensus on language policy fundamentals among major nation-wide parties. The example of the above-mentioned revocation of Estonian language requirements for electoral candidates in 2001 is telling: the more moderate and ERR-based KE proved to be even more radical than the Congress-based Isamaa, as most of the KE's deputies (including the party's leader Edgar Savisaar) voted against the liberalizing amendment.

The IRL and the RE consistently proved their adherence to the policies of exclusive prioritization of the Estonian language. In 2007,

their deputies, along with representatives of other parties, initiated a change to the preamble to the Constitution. The initial version of the preamble had enshrined the determination of the Estonian nation to ensure the preservation of the Estonian nation and culture for ages. The IRL's and RE's amendment expanded this statement by adding the protection of the Estonian language (Riigi Teataja 2007).

On the initiative of the ruling IRL-RE-SDE tripartite coalition, Estonian language policies kept toughening even against the backdrop of the Bronze Soldier crisis[3] and its aftermath. Thus on February 8, 2007 the ruling coalition initiated amendments to the Language Law. These first-order policy changes expanded the competences of the Language Inspection Authority, allowing it to visit private and state institutions without notification, to attend their sessions and to study documents, to revoke previously issued Estonian language proficiency certificates, to assign a re-examination and to suggest that employers dismiss employees with insufficient command of Estonian. In 2009 the Minister of Education and Science Tõnis Lukas (IRL) formed a working group charged with analyzing the shortcomings of the Language Law and assessing the need for a new edition of the law. The initiative was not aimed at introducing third-order changes in the foundations of language policies, nor did it consider measures aimed at promoting other languages. Instead, it aimed to protect the Estonian language from new challenges revealed during the monitoring of the language sphere. The law draft was intended to introduce new policy instruments (second-order changes) which would oblige the Parliament to analyze language policies and the development of the Estonian language as issues of state importance at least once every two years (this provision was ultimately excluded from the final version of the law). Aimed at more effectively protecting the Estonian language, the law set new, tougher requirements for knowledge and usage of Estonian. The scope of the Language Inspection Authority was defined more precisely, drawing its attention to people that graduated in Estonian (exempted from language examination requirements), but did not speak it. According to the new law, such people could be re-examined (Keeleseadus 2011). This law came into force on July 1, 2011.

The consensus among the parties on language policy fundamentals prevailed until the end of the first decade of the 21st century. In

3 The removal of the Soviet World War II monument from the center of Tallinn in April 2007 that provoked riots involving the Russian community.

this period, slight divergences on first-order policy details emerged, in particular regarding the degree of language policy restrictivity and the scope of the Language Inspection Authority. These divergences ran along the cleavage dividing more radical parties (IRL and RE) from more moderate ones (KE and SDE). The latter group of parties manifested a potential for more inclusive minority policies, dating back to the ERR policy tradition. Both the above mentioned consensus on policy goals and the divergence on first-order particulars are in line with historical institutionalist assumptions regarding the stability of party policy paths over time. The KE's and the SDE's more radical approach to language policies compared to their relatively more liberal stances on citizenship policies, correlates with the general acceptance of Estonian by Estonia's Russian population.

Meanwhile, ethnic Russian parties' policy effectiveness proved to be extremely limited. In the Riigikogu of 1995 and 1999 convocations, several voices from the Russian faction voiced issues but were not able to influence decisions or policy outcomes.

In summing up the analysis of the two-decades of Estonian language policies and the role of political parties in elaborating them, an argument usually passed over by analysts can be raised. The socioeconomic situation of Estonia's Russians shows the crucial role of Estonian language skills in determining individual social, economic and political opportunities in society (Estonian Human Development Report 2007: 47-54). Since the Estonian language requirements for naturalization and employment opportunities proved to be too rigid (as shown by decreasing naturalization rates and emerging socioeconomic stratification along ethnolinguistic lines), there were two ways to promote Russians' socioeconomic opportunities and achieve more efficient use of Russian human resources in Estonia: (1) a human-centered policy orientation, which would imply liberalizing Estonian language requirements; and (2) a language-centered policy orientation which would imply prioritizing Estonian language training among the Russian population in order to help it reach high language skill standards, instead of liberalizing those standards. Two decades of policy experience clearly reveals the consensus among Estonian nation-wide parties on the second policy way. A cleavage line can be distinguished among the more rigid IRL and RE and a slightly more moderate KE (since 2011 followed also by the SDE). Dating back to the times of the Congress

and the ERR, the persistence of this policy cleavage between parties speaks in favor of the historical institutionalist approach that emphasizes path dependence in party policies.

This party policy inertia proved to be stronger than the conditionality of critical junctures, the strongest being EU accession. Although the UN monitoring institutions went as far as to suggest that Russian become the second state language in Estonia, the EU – as the only international institution with conditionality power on Estonia – supported Estonia in its language-centered policy path. It did not question language and citizenship policy fundamentals, but rather provided abundant aid for Estonian language training programs. Thus the EU contributed to the irreversibility of the Estonian language policy path, as it did not demand third-order policy changes.

As regards education policies, third-order changes would refer to alterations of the strategic goal of transition of Russian-language education to Estonian language of instruction. Second-order changes denote instruments of this transition (the amount of the curriculum to be affected by the transition). First-order changes refer to the temporal settings of the transition.

The survey data on Estonia's Russian schools is important for assessing the parties' policy in terms of policy efficiency expected by the Russian school community affected by the reform. The main education priority was considered to be the preservation of Russian identity: this factor was of primary importance for 49% of parents and 39% of teachers (LICHR 2010). This shows that a considerable part of the Russian community attributed importance to the sociocultural function performed by the school, which was appreciated even more than the goal of obtaining knowledge and skills.

Although not a single political party managed to respond to this expectation, a second-order policy-related cleavage between parties came to the fore, as shown by the policy-shaping in parliament. Still, the education reform, once set along a particular track of transition of Russian gymnasiums into the Estonian language of instruction, was never reversed. Party policy attitudes and practices proved to be path-dependent for two decades, diverging only in second-order policy particulars. In historical institutionalist terms, no sufficiently strong critical junctures emerged in two decades to alter this policy path.

Summarizing the political parties' contribution to shaping cultural autonomy policy in Estonia, two conclusions can be made. The

first is related to a general path dependency of party policy attitudes and practices over time, in line with the historical institutionalist paradigm. This path dependency was manifested by most mainstream political parties, as no changes occurred in their stances toward minority cultural autonomy or the legal definition of national minority. The ethnic Russian Party of Estonia (RPE) also manifested trends of path dependency in policy priorities: the constant prioritizing of the implementation of rights to cultural autonomy was part of the party's political identity.

The second conclusion refers to changes in party attitudes: changes are possible, if prompted by the external political environment. A shift toward a more active attitude on the part of the SDE toward cultural autonomy policy happened in the context of its unification with the RPE, aimed at attracting more Russian votes (as the party's leadership publicly and repeatedly stated). This circumstance, while in line with rational choice assumptions, still does not contradict the historical institutionalist argument on path dependency. A change became possible in a party that, partially, dates back to the relatively liberal tradition of the ERR. Meanwhile, policy stances of the Congress-based parties remained unaltered.

Conclusions

Case studies of ethnic policy practices of Serbia's and Estonia's political parties empirically confirm historical institutionalist theoretical assumptions in the sphere of ethnic minority policies. Both cases reveal a considerable degree of stability and resistance to change in ethnic minority policies. Throughout the two decades, the ethnic policy-related cleavage within the party systems of both states proved to be long-standing and overlapping in all minority-related policy areas. In Sartori's terms (Sartori 1976: 291), ethnic policy-related cleavage within Serbia's party system can be characterized as polarized pluralism, with no consensus among major parties on the basic values and foundations of ethnic policies persisting for two decades. Ethnic policy-related cleavage within Estonia's party system can be characterized as moderate pluralism, with a general consensus on ethnic policy fundamentals persisting for two decades, and divergences on policy instruments and instrumental settings (i.e. on second-order and third-order changes) that appeared in past years.

Throughout the two decades since the introduction of multi-party systems, political parties' diverging normative orientations and ideational values with regard to ethnic minority policies both in Serbia and Estonia date back to the critical junctures marked by the political salience of ethnicity that coincided in time with the introduction of the multi-party system.

In Estonia, an ethnicity-related cleavage divides, on the one hand, the parties of relatively more moderate ethnic minority policy tradition dating back to the ERR (these parties are KE and SDE), and on the other hand, the parties formed on the basis of the Congress of Estonia (IRL and RE) that showed a two-decade-long consistency in advocating a legal restorationist approach to language, citizenship and other ethnic minority-related policies, established by the Congress in the late 1980s and preserved till this writing.

In Serbia the divergent ethnic policy stances of political parties were formed in the wake of the abolition of Vojvodina's autonomy and at the outbreak of wars of Yugoslav disintegration. The resulting ethnic policy-related cleavage between parties persisted for two decades.

In both studied cases, the prevalence of particular (first-, second- or third-order change) codes in ethnic policy attitudes and practices of individual parties enable us to establish overarching parallels that reveal a strong path dependence of political parties' ethnic policies. In line with historical institutionalist assumptions, first-order changes in parties' ethnic policies are rare and usually occur as a response to critical junctures, or exogenous shocks in the parties' environment. In Serbia, first-order changes in the League of Communists of Serbia (1989) and SPS's (after 2000) ethnic policies occurred as a response to fundamental exogenous shocks that delegitimized previous ethnic policy courses. In Estonia, first- and second-order legislative changes proposed by the KE and SDE were initiated mostly by individual Russian members of the respective parties and were framed in utility-maximizing (vote-oriented) terms.

In both cases, utility-maximizing approaches to ethnic policies, manifested by political parties, are in line with rational choice arguments, but these appear to be complementary, not contradictory to historical institutionalist theoretical assumptions. On the one hand, considerations of utility maximization can cause changes in parties' ethnic policy attitudes and practices (as shown by the examples of

the KE and SDE in Estonia). On the other hand, first-order changes are possible in parties with ethnicity-related ideational values that are relatively compatible with policy alteration (SDE and KE), and are not likely to occur in parties with ideational values, normative orientations and policy legacies that are diametrically contrary to first-order alterations of the existing policy paths (IRL). In Serbia, throughout the two decades attempts to introduce first-order changes in ethnic policies usually resulted in party splits (foundation of SPO, DSS, LDP, SNS) rather than alteration of policy courses of original parties (SRS and DS).

Both case studies reveal the crucial contribution of political parties in perpetuating and reproducing the particular ethnic minority policy courses of the respective states, as shown by legislation enacted in periods of various party rule. The proneness of political party policy attitudes and policy practices to path dependence in the ethnic policy sphere determines considerable difficulties for the reversal of state minority policies.

The case study of the Vojvodina Hungarians exemplifies the difficulties of reversal of ethnic minority policies pursued by the state. The reduction of Vojvodina's autonomy contributed to shaping the structure of political cleavages at the time of a "critical juncture", i.e., at the outset of the multi-party system. In Serbia, political parties enabled decades-long historical continuity of the standards of nationality rights protection enshrined in the 1974 constitution of Vojvodina. By preserving these standards in parties' policy agendas and ideational values, ethnic Hungarian, regionalist and nation-wide political parties bridged the centralist stage of Vojvodina's institutional arrangement and restored these standards in the 2009 Statute of Autonomy.

In Estonia, the EU's pressure to alter citizenship and language policies in the late 1990s did not result in alteration of party policy program attitudes on ethnic issues. Accordingly, due to political parties' intransigent ethnic policy stances, the general citizenship and language policy path of the Estonian state persisted through the major critical juncture represented by EU conditionality. In liberalizing naturalization requirements to non-citizens' children and Estonian language requirements in the private sector, the EU contributed to the consolidation of the Estonian citizenship and language policy paths, as it did not demand overall policy reversal.

Both case studies reveal that political parties' proneness to path dependence in the sphere of ethnic minority policies imposes li-

mitations on policy expertise (acquaintance with and professional interpretation of minority needs). Case studies of Estonia's Russians and Serbia's Hungarians show that nationwide political parties are not prone to prioritizing ethnic minority policies. In both countries under analysis, mainstream political parties do not manifest competent expertise in assessing minority needs, relying instead on their own path-dependent ideational values and normative orientations. As a consequence, the legal restorationist approach to citizenship and language policies on the part of the Estonian Congress-based parties determined that the huge share of non-citizens in the country's population and limited social cohesion still constitute major challenges for Estonia's integration policies. Prioritizing Estonian language training as a means of fostering naturalization and integration has proved to have limited effectiveness. Sociological survey data suggest that increasing the share of Russians in Estonia's citizenry is not likely to lead to the country's direct social and political destabilization, but is likely to overturn the existing balance of parties' electoral fortunes, creating incentives for perpetuation of existing language and citizenship policy paths.

Empirical evidence of political parties' limited policy effectiveness in the area of ethnic minority policies is provided by both case studies. If the ethnic minority political community has limited influence on the nation-wide level, ethnic minority policy effectiveness is contingent on the political will of nation-wide parties. In policy enactment, nation-wide parties act either as influential allies of ethnic parties (as in case of Serbia's Hungarians), or as avenues for minority politicians to pursue minority policies (participation of Russian politicians in Estonian parties). The findings suggest that political parties tend to incur crucial limitations to policy effectiveness posed by electoral considerations and the peculiarities of the available alliance structure. Both the experience of Serbia's Hungarians and that of Estonia's Russians provide examples of policies initiated by the state or advocated by majority parties that do not correspond to the policy expectations of minority communities (e.g. the failure of the official Estonian integration program elaborated without sufficient minority participation; simplistic visions of minority issues demonstrated by a significant part of the mainstream party elite in Serbia; politicization of the national councils and of minority mass media by political parties). The policy ineffectiveness of Estonia's Russian parties was followed by their electoral margi-

nalization; while Serbia's Hungarian parties, committed to cultural and territorial autonomy, gave proof of electoral considerations conditioning their policies that were beneficial for majority Hungarian North Bačka and detrimental for Hungarians dispersed across Banat and Srem. A distinction can be made between minority policies implemented by specialized institutions and policy agendas pursued by political parties. Limited party policy effectiveness suggests a need to empower nonparty-based institutions characterized by ethnic minority-representation and policy expertise within the ethnic minority policy network. The experience of Vojvodina suggests that minority policies, once (re-)institutionalized, would benefit if organized according to the principle of professionalism, rather than remaining party-based and politicized.

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Ketman - transideological phenomenon or concept that masks the fear and opportunism[2]

Abstract

The research on the pluralistic nature of the phenomenon of "ketman", which is at the same time as the art of duplicity, manifested in the sphere of (political) communication, social- psychological and psychological level is the main topic of this paper. Czeslaw Milosz's interpretation of this phenomenon was more than instructive in this regard, so his insight gained the central importance in the paper. As a form of dissimulation, the system of response to the political repression, a hidden form of (political) differences and socially shaped form of concealment ,"ketman" presents a very complex phenomenon that goes well beyond such a term for masking the sheer fear and opportunism, as determined by one of the critics of Czeslaw Milosz's study. Starting from the idea of a religious mask, taken from the Islamic tradition, Czeslaw Milosz singled out two of its dimensions: the moral principle that justifies the application of religious cunning disguise, thus providing a kind of satisfaction and sense of superiority of one who practices "ketman", and the moment of the hypocrisy of skills. These two dimensions of Gabineau's idea were developed by deepening their psychological, cultural and anthropological sense. Exploring the phenomenon of "ketman" in Polish society under Stalinist repression, the author has come to the definition of modern ideological forms of "ketman": "national ketman", "ketman of revolutionary purity", "ketman metaphysical", "aesthetic ketman" and "ethical ketman".

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Offering meticulous analysis of the circumstances, reasons and consequences of each of these types of "ketman", both for those who practice them directly and for the society as a whole, the author has focused on the socio-psychological level of phenomena. Thus, in the falsification of identity to the public in its need to survive revealed a complex acrobatics of the mind which should do the cunning duplicity and preserve the moral and psychological coherence despite segregation, and destructive consequences of this form of selfmanipulation. Taking into account all these dimensions of its expression, it can be concluded that "ketman" is transcivilisational and transideological phenomenon, and that the degree of application of "ketman" in a society is an indicator of its repressive system of government, disorders in relations between the private and public spheres, and the states of the public life of that society, as well as its political culture.

Key words: "ketman", manipulation, coercion/repression, totalitarian government, moral, propaganda, ideology, communism, popular democracy

As its primary meaning indicates, the term "ketman"[3] (ketm, kitman - to keep secret / suppress voice flickering /; to refrain /anger /, to hold, stop /breath /; to shut down numb / fire /; to cause the containment /of the stomach/), designates a traditional principle of Islam, according to, in a situation of temporary and apparent danger to their own life and dignity, Muslims have the right, almost sacred duty to protect their faith, by acting acceptance of the "wrong religion". It is a kind of "stratagem" strategy of duplicity, which was first described by Arthur de Gobineau (Arthur Gabineau), in the mid-19th century, in his book "Religion and philosophy of Central Asia". It is a technique by which the Islamic heretics masked the true beliefs and feelings against the powerful "infidels", in order to survive in a dangerous environment, a kind of "art of dissimulation" (Baehr 2010: 62).

In the opinion of Asian Muslims, according to the Gobineau, "the one who ownes the truth, should not expose himself, his property and respect to blindness, madness and wickedness of those who God would rather make mistaken and would rather keep deceived" (Milosz 1985: 66); and if the silence is not sufficient, in cases where it could be interpreted as a recognition, then one should not

3 From the numerous derivatives, *jektum* - discreet, thoughtful, cautious; *Ketten* - a well-kept secret, discreet, secretive; Arab-Serbo Dictionary, in Zirojević O. (1998) "Ketman", *Republika,* year X, No 197, 199).

waver. Then one should not only renounce publicly of his views, furthermore it is recommended the use of trickery to fool an opponent. Then one will confess all confession of faith that opponent might like, one will do all the rituals that are considered stupid, one will forge his own books, use all means of misleading. In this way, a lot of satisfaction and merit will be acquired for a man has saved himself and his family without exposing his valuable religion to the odious contact with unbelievers, and, finally, for deceiving the opponent, making him mistaken, humiliated and pushed into spiritual misery which he deserved" (Milosz, Ibid.: 67).

Czeslaw Milosz, the author of a study on "ketman", titled *The captive mind*, in his interpretation of this phenomenon emphasized the importance of the psychological benefit that accompanies it. The author writes about it just from the position of the one who had practiced "ketman". "To speak that something is white, but to think that it is black; to smile inside himself, but to show the outside solemn ardor; to hate, but to show signs of love, to know, but to show ignorance – while one deceives the opponent (who also deceives him) he begins to evaluate his perfidy above all. The success in the game becomes a source of pleasure", because "ketman" is a "high art which requires alertness of mind" (Milosz, *Ibid*.: 68).

Arthur Gobineau presented gradation application model of political behavior under pressure by means of three paradigmatic case. Hajji Sheikh Ahmed practiced "ketman", because his doctrine was bold, and therefore in his writings there is no visible sign of heretical beliefs that he secretly confessed. Mohamed Bab had never brought into question the basics of Islam in his words, but he strongly beat against vices of the Islamic priesthood. Mula Sandar challenged Islam, after several years of practicing "ketman", but he had used different forms of camouflage, disguise deepest personal beliefs, concealing, presenting ambiguous settings and use of false syllogisms before his heretical messages became quite explicit. However, as soon as he noticed that he could act openly, the preacher would hit full strength on Islam, expressing himself as a logician and a metaphysician as indeed he was" (Ibid.).

Czeslaw Milosz has actualized and recontextualized the meaning of Gobineau's concept, by looking at the phenomenon of "ketman" not only as a form of political reaction to totalitarian terror of the Stalinist regime in Poland, but also as a special social-psychological complex, through the mechanisms of counterfeiting of identity and

processes of the mind self- capturing in traps of practicing skills of duplicity.

In a new interpretation of this exclusive Islamic phenomenon, "ketman", which is irreducible to Islam or the Stalinist phase of communism, "had been transformed into a transcivilisational and transidelogycal idiom which operates equally well in the religious and the secular idiocracy" (Doskins 2011: 61).

The phenomenon of "ketman" in the interpretation of Czeslaw Milosz

Immediately after the publication in 1953. in Paris, the study of the phenomenon of "ketman" was rejected by the Polish public opinion, both in the country and in exile. The first condemned him for being an "anticommunist writer", and the latter for being a "crypto communist writer" (Janda, 1998). According to the basic thesis of the author's work, which was under the attack, the communism in Poland had the power to capture minds, and its power over minds was not based exclusively on the terror and fear. That notion was considered among both the communists and the anti-communist.[4] This was the reason why the author came into conflict with the dominant opinion that minimizes the impact of totalitarian communist ideology in the consciousness of Polish intellectuals.

Due to the fact that in his work Czeslaw Milosz was focused on the hidden psychological dimension of Stalinism, it was natural for him to see it as a form of government based on the manipulation, without prejudice to the presence of no systematic terror of the totalitarian system, as many have interpreted the focus of the author's approach. In this sense, his insights are in the line of understanding of Stalinism as totalitarian forms of intellectual violence, a concepti-

4 In her article "Captive mind, or strictly controlled Literature" Biserka Rajcic wrote about the events that preceded the writing of *The captive mind*, what the reactions of the writers in Poland and in exile were, first of all to the decision of Czeslaw Milosz to leave the country, and then to *The captive mind*. The text contains information useful for understanding the work of Milosz, as well as information about who behind the Alfa, Beta, Gama and Delta anonym was. In the book "Autobiography of four hands," Jerzy Gjedrojc, points out that alhough *The captive mind* was a significant work , we should consider it as a "fake book" that created the myth of ketman, while, in fact it, was a concept of plain fear and opportunism (Rosić 2002: 3).

on that Nikola Milosevic offered in his afterword to the edition *The captive mind* as a kind of corrections and additions to the author.[5] So, "'ketman' can't be only a unique mode of political manipulation, it is a phenomenon that indicates the existence of intense political coercion, outside which can be hardly imagined" (Milošević 1985, 265). However, Milosevic still observed fluctuations in the author's approach that ended in overcoming the manipulation in relation to the terror. In my opinion, Czeslaw Milosz had in mind the political manipulation and coercion, which could be clearly seen in the work places that speak of deportations, arrests and the political police.

By establishing a parallel between the Islamic and communist "ketman", Milosz emphasized that the Stalinist repression exceeds the degree of coercion in the Islamic and Persian regimes, in which Gobineau revealed its occurrence. According to the author, exactly that has constituted the main difference between Islamic "ketman" and "ketman" in 20th century; as alleged, daring of Islamic heretic Sadra, has to be finished in Europe soon. Even in spite of these differences, the author perceived the universal application "ketman" in his precise and stricter forms in the populistic democracies of countries dominated by the Soviet Union.

Czeslaw Milosz perceived the greatest evil of the totalitarian system in the "capture of the minds", destructive ideological oppression in the project of creating a "new man". Internal control of thoughts and feelings reached a situation of self-destruction of the mind, under these external pressures. In this sense, the author considered this type of the enslavement people inside, to be more frightening than physical terror.

The characteristics of life in Poland under communism, which was emphasized by the author are: the Inviolability of the "New Methods" ,a vulgarly simplified conception of philosophical orientation of dialectical materialism, and "New Religion" as a totalitarian ideology created on these simplifications –m the Stalinist ideological variant of Marxism; ubiquitous communist propaganda as institutionalized lying, as the division of people into "loyal" and "apostates"; the mass fanaticism of the "new believers" and the informers, a strict censorship and self-censorship under the squeezer named "education of the new man" and orchestration of public activities in overall atmosphere of insecurity and fear of omnipo-

5 Milošević (1985) "Socijalna psihologija staljinizma", in: Milosz, Cz. *Zarobnjeni um*, Beograd: Beogradski izdavačko-grafički zavod. pp. 253- 335, see also: Milošević (1990) *Antinomije boljševičkih ideologija: boševizam, staljinizam, marksizam*. Beograd: Beogradski izdavačko-grafički zavod.

tent authority's terror (arrests, deportations to labor camps). In such occasion, with "Murti-Bing"[6] as a phenomenon of mass self-hypnosis "ketman", naturally, had to appear, as well as the other one, opposite to the first mechanism to a great extent, the defense mechanism of identity - its duplication. It is a psychological phenomenon of self-manipulation, in order to survive, falsification of its own identity for the public; political mimicry and social game of duplicity and self-masking. While the acceptance of "Murti-Bing" captures mind unconsciously, through the processes of indoctrination, "ketman", guided by the needs of masking, consciously leads to the capture of the mind. In such occasion, with "Murti-Bing" as a phenomenon mass self-hypnosis, naturally had to occur "ketman", the second defense mechanism of identity - its duplication, opposite to the first mechanism to a great extent. It is a psychological phenomenon of self-manipulation, in order to survive, falsification of their own identity for the public; political mimicry and social game of duplicity and self-masking. Mind traps unconscious, by the acceptance of "Murti-Bing", through the processes of indoctrination, "ketman", guided by the needs of masking, consciously leads to the capture of the mind.

Combined effect of "ketman" and "Murti-Bing" is only one of the answers to the complex issue of conversion, the opportunity that already formed people become supporters of Stalinism; to adapt to the conditions that were quite strange to them. In the interpretation of Czeslaw Milosz, the process of the "stalinisation of intellectuals" reveals itself as a product of the functional symbiosis of ideological manipulation, self-maturation, and specific combinations of nihilism, hypocrisy and terror (Rosic 2002)

An intellectual – "arche-ketman"

Czeslaw Milosz presented the effects of "Murti-Bing" and "ketman" in a complex web of different circumstances that lead to the capture of the mind, through paradigmatic portraits of the four

6 The term "Murti-Bing" the author has borrowed from the novel by Stanislav Ignatius Vitkijevich named "Unsaturation", in which it was the name of pills that transfer organically the new view of the world that makes people happy, freeing them of their former nature, concerns and perspectives. These pills symbolize the power of manipulation or operating within artificial dialectics (dialectical materialism) that numbs the minds of men.

Polish writers, and in the case of each of them in a specific joint action. The study of "ketman" was designed as a literary form of a biography of four writers, with symbolic names Alpha, Beta, Gamma and Delta. The study provides an analysis of the circumstances, reasons and causes and the consequences of each type of "ketman", both for those who directly practice "ketman", and for the society as a whole. The analysis of the complex psychological motivations of the degrading changes that the writers had gone through, both as artists and as people, was complemented by synthesizing reflections on the time in which these fractures occurred, in the period between the years before the Second World War, through war time until the postwar period, time of falling under the Polish Stalinist regime of the Soviet Union.

The ideological meanderings of survival of four Polish writers, that led them to "ketman", dizzying mental acrobatics that they managed to maintain a semblance of their ideological transformation, by the "New Religion" and "New Method", were perceived in a close connection with their social and political contexts, the "historic moment". In the Stalinist period, some of them not only survived but also came into possession of an enviable social status, material gain, and even political power (a writer Gama became a functionary of "political police"). In this way, a phenomenon of "ketman" was depicted through a complex web of its psychological, social, political and cultural origins.

Unlike mass "ketman" which seems really necessary for the survival (for example, the People in Polish frontier area under Soviet communist occupation came out to vote only to get the stamp in the passport, without which they would become suspicious to the authorities), in the case of the four writers it is more about the gradual falling into a political trap in which every new role meant a growing deletion of themselves, too. The crack in the consciousness through which, in spite of distance, "Murti Bing" acted on the minds of the four writers, was also the assumption of superior skill of practicing "ketman".

Contemporary "ketman" in conjunction with "Murti-Bing", embodied in the elections and the behavior of the four writers, is presented as a product of the needs of intellectuals to be in service, to be useful; with that basic motivation each of them returned to Poland after wandering around the post-war Europe and Russia. The author cynically capitalized that no journalist was able to serve

the cause as a writer with a long period of literary work without self-interestest.

War suffering and rejection of previous beliefs, ethical and ideological/ political, brought indifference, emptiness and absurdity, and only one step forward from that was a feeling "to be in the mass", regardless of the fact that farmers who bury gold coins and listen to foreign radio stations, hoping that the war would free them from entering the collective farms (kolhoz) certainly did not see an ally in the regime engaged intellectual.

"Murti-Bing" as an effect of the attractiveness of a single comprehensive system of ideas and one language of concepts (dialectical materialism) made philosophy influential on life again. Opposite the absurdity of existence, was the thesis that nothing belonged to a man, but the historical formation which gave birth to him. In this conception an intellectual demonstrated embodied forces of inertia, precisely because he succumbed to the illusion "that he was only his own, while he was not his own in anything" (Milosz Ibid.: 20-21). The autonomy of the writer's world view was questionable.

The fear of independent thinking, as another motivation for engaging writers of the Stalinist regime was not simply the fear of dangerous conclusions, but the fear of their own intellectual infertility. Writers became artistically doubtful, asking themselves the question that countless times they had already heard and read: "Can they write well and think properly if they are not sailing on a contemporary flow that is 'real'?" Convincing argumentations of the theorists of socialist realism created a pressure on the writers, so they took care about whether their literary works have an "explanation of the time". Finally, the motivation for the writer engagement lies in the perceived success of the entire system, precision of debates, and "of ingenuity lies always nourished with a grain of truth" (Milosz , Ibid.*:* 26); the effectiveness of terror, a great mass of supporters all over the continent, the certainty of mastery of the whole world.

The transition from critical realism in which it was possible to balance on the edge between "ketman" and "Murti- Bing" into the stage of socialist realism for the writers meant painful separation with former themselves. Then it was necessary to take "Murti-Bing" as a whole. In the "era of rigor and precision" was not enough to write on ordered topics but also in ordered way. Describing the operation of motives of people confronted with the awareness of

the inevitability of choice between the physical and spiritual death - and rebirth in the predefined way, Czeslaw Milosz developed the impression of participation in the spectacle of collective hypnosis. The author registered the affective charges that exceed the initial ketman's calculation, internal fractures and slow surrenders.

In contrast to the constant exposure to the functioning of "Murti-Bing", which results in the reduction of distance and resistance towards the new and odious ideological and political order, "ketman" rests on the realization of oneself despite anything and as such it contains within itself a healthy impulse to internal rebellion which implies the existence of the inner center, in the name of which is realized. In this sense, "ketman" appears as a social custom that is not devoid of virtue. These virtues Czeslaw Milosz illustrated by the difference between the positions of Western and Eastern intellectuals communists.

The spiritual and emotional life of the intellectuals of Western is too scattered, "everything that they think and feel evaporates in the immense expanse. Freedom is a burden for them. No conclusions they come to are binding on for them" (Milosz, *Ibid*.: 236). The happiest in this context are those who have become communists and who, like their eastern like- minded, shape hitting the walls of the system in which they live. Resistance is the one that defines them. But the western and eastern walls are not the same, underlines Czeslaw Milosz, and pointed this thesis depicting the meeting of Eastern and Western supporters of the "Center". Moral rage and enthusiasm of a western comrade presents an unattainable luxury of moral comfort to an eastern comrade after everything his faith survived. Devoid of true insight into the weight walls that fetters the existence in the countries of Eastern communism, and bearing in mind aforementioned benefits of resistance that determines him, Pablo Neruda could just declare that he preferred dealing with an intelligent devil than with an idiot.

At the end of this part of the exposure, the following question arises: whether the intellectuals are truly the social element which has, with a few exceptions in the form of "dissident saints," always been too able to adapt? If the intellectuals were the power that has historically won critical public role in society, then how their adaptation was so successful that it became conforming social force that maintains order? Intellectuals have always been too confident of their prophetic sense of the role in society, as they always have been too dependent on the richest patron - state.

"Ketman": main types

"Ketman" represents/denotes a plural phenomenon, since the hypocrisy that is in its foundation can be manifested towards different content, and spheres of life, ideological preferences, practices, values and issues of the general importance, and the number of its possible variants is almost unlimited. Czeslaw Milosz singled out the following forms of contemporary ideological "ketman" which created the Stalinist era: "national ketman", "ketman of revolutionary purity", "ketman metaphysical", "aesthetic ketman" and "ethical ketman".

In the countries dominated by the Soviet Union "national ketman" was extremely widespread, even in the party top. Author explains this with the fact that the conditions in which a national road to socialism was rejected, "ketman" of those who loved their country and were not allowed to celebrate their cultural specificity was primarily direct and emotional. Thus, they cheered to the achievements of Russia in all areas in public, while secretly despised it as a "barbarous" country .The inner conflict came from a collision between a new ideology and patriotism, accepting the necessity for doctrinal break with loyalty to the nation and their own country, and thus to the its past full of victims and efforts of compatriots who aspired to maintain independence. The attitude to the culture of Europe inherited by the land of birth should be added to the constituents of an interior division the one who practices "national ketman" (Milosz *Ibid*.: 27).

"Ketman of revolutionary purity" could be reduced to a yearning for the "holy fire" of the original doctrine of Lenin's era, whose symbol was the poet Mayakovsky, and whose death marked the end of an epoch marked by the flourishing of literature, theater and music. On the one hand there was an awareness that the holy fire was extinguished, "collectivization was carried out in the a relentless way, millions of citizens were killed in forced labor camps (...) literature under the influence of imposed theory became shallow and colorless, painting was destroyed, a Russian theater deprived of liberty experimentation, Science was subordinated to directives from above" (Milosz 1985: 72); On the other hand, the emergence of the perfidious tyrant, who was hated because of the crimes, mass purges and "turning intelligence into the privileged lackeys, it looks as necessary in the exceptional historical situation of resistance to Nazism". Such "ketman", is widely practiced in Russia during

the Second World War and in Stalinist Poland, and, as author has skillfully pointed out, represents a "rebirth of an already disappointed hopes" (Milosz *Ibid*.: 73).

The "aesthetic ketman" is manifested in approach of the man of a good taste who doesn't treat seriously the results of official pressure in the cultural field, although he writes flattering reviews by order. Expected advertising effects of his work is the way he redeems the consumption of products rejected "bourgeois" art in the "luxury of privacy". In gray and monolithic poor mass in the outside world, guided by the fear that paralyses individuality, the man of a good taste strives to be as close as it is possible to an average guy, stereotype of "a round women" and "a quadratic men", by his movements, clothing and facial expressions (Milosz *Ibid*.: 74).

"Ketman of professional work" is reflected in the official adoration unscientific decrees, as an expression of rational acceptance of the inevitability, imposed by the current political reality, in order to maintain scientific laboratory; because "a political uproar passes, but the results achieved in the name of selfless research of the truths are permanent" (Milosz *Ibid*.: 7). Withdrawn deeper into their labs, educated people are neither capable for a further dialogue, nor they are in a position to conduct scientific, non-communist discussions. But they are involved in new activities: writing books for children, historical reconstruction of ancient times and the translation work. "Trapped in an everyday life, intellectuals sublimate their talents in any effort that looks as an authentic one" (Baehr 2010, 60).

"Metaphysical ketman" occurs especially in countries with a catholic past, as it is case in Polia,nd and rests in the "delayed belief in the metaphysical principle of the world" (Milosz Ibid.: 79) A man who practiced "metaphysical ketman" believes that epoch in which he lives is anti-metaphysical, the epoch in which, due to special causes, no metaphysical faith cannot be expressed. Therefore, he is not averse to help "New Religion", but does not reveal his attachment to "The Secret". For instance, some orthodox catholics serve in the police security, delaying their Catholicism, and some "patriots catholics", as permissive in political matters, enter in the ambiguous game with the ruling party" (Milosz *Ibid*.: 80).

"Ethical ketman" maintains a contact with the hidden and complex ethical focus of the individual, while at the same time implies the acceptance of public ethics, "New Religion" and its ideologically instrumentalized concept of good, based on the cult of the commu-

nity; according to which "good is all that serves the interests of the revolution, and everything that bothers it is evil" (Milosz Ibid.: 82). Education of the "new man" is the imposition of the values and rules in relationships that help the socialist construction. "The new man" as the norm of his behavior acknowledges exclusively the good of the majority, and denunciation, as a virtue of the good citizen encourages "the fear of all against all". "Puritan morality requires asceticism in the party top, while "human instruments" are encouraged in their intemperance as guarantor of obedience" (Milosz *Ibid*.: 83).

"Ethical ketman" arises from the realization that the ethics of loyalty to the majority has many weaknesses and, as pointed out by Czeslaw Milosz, it is not rare even among the high party officials, ready to carry out mass reprisals against the enemies of the revolution, in cold blood, those who are often in personal relationships more honest than people who cherish individual ethics, which compensates their brutality.

In the countries of popular democracy, in which the ethics of Christianity has operated for centuries and so has maintained the primacy of ethics over the recently introduced "New Religion" ethical "ketman" is one of the strongest. "Unpredictability of phenomenon 'ethical ketman' leads to the fact that in those people who should be most suspicious occurs loyalty towards friends and strangers, and sick ways of denouncing in the behavior of those who give the least reason to doubt them" (Milosz *Ibid*.,85). Unpredictability of "ethical ketman" complicates control over the minds of the citizens; given the variety of situations in which it may be applied, it is so widespread that often slips away the means of pressure.

Analyzing each of the aforementioned forms of "ketman" Czeslaw Milosz avoided clearly accounts of his definitions, whether they are workers, peasants, of intellectuals the middle class, or working class of intellectuals, because he did not want the phenomenon of "ketman" connected to certain social category. but he offered meticulous analysis of the circumstances, reasons and causes, and consequences of any of these types of "ketman", as well as for those who applied them directly and for society as a whole. In fact, being practiced for many years, a forced servility, or citizens "ketman" in relations to the authorities, and in a wider social interactions in general, becomes a permanent feature of social life. In this key one should read the author's remark that the emotional life of the

masses manifests an enormous tension of hatred that cannot be explained only by economic reasons, and which was hiding many surprises and dangers. "The peasants who received land felt hatred; the workers and officers who joined the Party felt hatred, the members of the legal Socialist Party, which received a nominal share in the rule felt hatred, the writers who worked on the publication of their manuscript felt hatred" (Milosz *Ibid*.: 208).

"Ketman": social-psychological complex

Although the phenomenon of "ketman" primarily conceived as a political mimicry, an emergency system of response to the political repression, because of the complexity of its social and psychological dimensions, it goes beyond the category of political behavior (hidden political dissent), as the figures in the fields of mental and intellectual acrobatics, counterfeiting identity, encompasses not only the conscious but also the unconscious plane of human motivation, and both the public and the private sphere of his life. Czeslaw Milosz pointed out in the relation to its approach to the problem "ketman" that the political aspect was only external, and that in fact he was writing about a kind of anthropological or sociological studies.

Bringing together the inside position of powerlessness and a sense of superiority, the phenomenon of "ketman" manifests a kind of psychological contradiction. The "ketman" on one hand represents a last resort before the force, defense of bare life, dignity and a sense of being in infirmity; On the other hand, as it was pointed out by a Gobineau, and problematized by Czeslaw Milosz, practicing "ketman" as a simulated loyalty provides a sense of intellectual satisfaction and moral superiority over deluded; because only intellectually daring and skillful man, smart enough and careful, can engage in this dangerous game and survive in it, because the slightest oversight can lead to disclosure.

Counterfeiting of the mental life in the public is a great burden on the spirit that "grinds" intellect and "torture moral imagination", "requires the creation of a new vocabulary of morals, politics and culture in order to survive in an atmosphere of constant danger and continuous acting that requires alertness of mind" (Donskis 2011: 63). As the author points out, describing the inner conflict in a writer called Alfa, a change of style and content of the book is impossible without personality changes.

The pride and satisfaction of one who has practiced "ketman" out of trouble is a special kind of rationalization; as it was pointed out by Nikola Milosevic, "it looks psychologically logical that it is acceptable for one to interprete his political behavior as a result of certain automanipulation rather than a result of the pressure to which he was exposed to in an atmosphere of terror" (Milošević 1985: 271).

Absolute power which is realized in totalitarian systems monopolize, by its operations both the public and private spheres of society; more precisely, in that order of control and supervision, a public sphere penetrates a private sphere, deforms social life of the individual; powerless and devoid of any privacy and autonomy, he loses contact with itself. "Seen in this context, 'ketman' appears as the only form of survival of privacy and confidentiality in totalitarian systems" (Donskins 2011: 60). If we start from the premise that "the realization of ourselves despite something" is the basic position of "ketman", the question is how in such a barren and in secrecy crowded privacy, under the constant surveillance, a "sacred" core of human identity can be stored, as we know that it creates and realizes in social interactions; how and at what cost it preserves, or what remains of privacy put aside in complete confidentiality, distorted by fear and caution in every contact with it.

Leaving aside the defense of bare life, which certainly was not the motive for the "ketman" of four writers, the question is what the final benefits of their playing were. Is it more than the current security, material benefits and ephemeral glory that gets politicaly expandable intellectual who was playing a role that was intended for him, while he was believing that he primarily played his role? He certainly did not preserve the value of his "sacred center" which was lost by keeping it the misappropriated way, entering into political traps of ketman's compromises.[7] Over the long term replication in a public communication and action, he was losing a psychological coherence and a moral center of gravity, was experiencing an internal conflict or even the disintegration (suicide of the writer Beta), by which the main objective of the enterprise "ketman" became pointless; unless his psychopathological playing role was able to satisfy him with possession of political power (writer Gama became a "director of conscience").

7 Ideas for problmatisation this theme can be found in: - Kolakowski, J. (1989) *The Devil in history*. Banja Luka: NIGRO "Voice".

A psychological trap of "ketman" appears as a paradoxical retaliation for well done acting job. As the author points out, "an act of conscious acting, if it has been done for a long time, develops those qualities of the individual, which in his acting work are preferred, and one grows so tightly with his role that we cannot distinguish what is his own and what is acquired – the elements of the role become his second nature. This coalescence with the role has, however, its positive effects, because it brings a kind of relief, allowing person to reduce tension due to constant alertness of mind" (Milosz *Ibid*.: 64). So we return to the idea that for the optimum "ketman" skill a small dose of "Murti-Bing" should be taken for the sake of persuasion, which, however, with all distance, achieves its activities in the spirit of one, who believes that only deceives tyrants, or reacts out of necessity, but in fact he is caught in a political trap. This notion leads us to the problem of human plasticity, ie its borders, and the question of whether there is a degree of flexibility over which skills "ketman" calls into question the very meaning of its practice, the overcoming of which leads to the loss of moral and psychological justification for the act. If the necessity cancels the measure of plasticity, then the definition of necessity becomes crucial. But, the definition of necessity is a subject to the functioning of the effects of subjectivity and manipulation, no matter how clear the differences between the factual terror and the one that is only perceived as such, are.

The social meaning of existence of the boundaries of a human adaptability is closely linked with the problem of civic responsibility towards society, and their participation in the creation of the identity of the community in which they live. In this regard, the attitude of Czeslaw Milosz is ambivalent. On one hand, he wonders what would happen "if a man tried to live without pressure and without "ketman", if he challenged fate and said: "If I lose, I will not regret myself ?" But then he noted that "if we can live without the imposed pressure if a man can create his own support, then it is not true that man is nothing. That would be an act of faith" (Milosz Ibid.: 39). On the other hand it is quite the opposite sense of his grotesque image of a man's extreme flexibility: "Speed and constantly changing are the features of change, a man is a plastic being, and I can imagine a day when a quality of a citizen who respects himself would be walking on his four legs, with some kind of colorful plumes that he would wear on his buttocks" (Milosz Ibid.: 88).

"Ketman": hidden form of dissent

In one of the shortest and most general definition of the phenomenon of "ketman", it is defined as "the art of dissimulation". As specific model of survival "ketman" was applied throughout its history both in religious and philosophical thought, in terms of which they were not tollerated. In this sense, "ketman" can be viewed as "preheretical, preheterodox form of dissent", while a history of philosophy, or pre-modern civilization, can be viewed as the history of monotheism as the history of lofty form of "ketman" (Donskis *Ibid*.: 62).

The phenomenon of "ketman" has been construed as a companion to the conflict of doctrines, ideologies, ideas, or as "preheterodox form of dissent that is passed from the religious sphere into the ideological/political sphere in the form of disguised political disagreements, surviving as a form of adaptation to the secular idiocracies" (Ibid.).

Viewed as an interactive phenomenon, "ketman" represents "a socio-shaped form of concealment" which introduces theatricality into the public sphere. Nothing on the public stage can be spontaneous, because all action must be calculated to convince and deceit. "These dynamic an interactive rituals generate strong emotional energy, requiring constant need for self masking as a counterpart to the tireless searching of the authorities for the enemies of the system, and the inexorability with which it tends to unmask it" (Baehr Ibid.: 59).

"Ketman" is, therefore, more the case of unconscious than conscious act of adaptation, it is a participation in a massive piece rather than an automated behavior. In this sense, "ketman" differs from its relatively related socio-psychological phenomenon named "the spiral of silence", which occurs when "the expression of the opinion of the individual is conditioned by their assessment of "social climate of opinion" [8], especially when its conditionality is supported by a monophony of the media messages, or the state in the public sphere. Elizabeth Noel Neumann observed this phenomenon, while she was exploring the reasons for the good reception that Nazism encountered in the German nation.

8 The conformism of an individual is motivated by the fear of social isolation, if his own judgment differs from the majority. The result of such reactions produces a kind of "air-opinion" that members of the Society detect with their "quasi-statistical sense"; cited by: Pesic, M., Novakovic, A. (2008) *Freedom and the public*. Belgrade: Institute for Political Studies,Belgrade, p. 119.

Conclusion

As a form of dissimulation, a hidden form of (political) differences, the system response to the political repression and socio-shaped form of concealment, "ketman" is one transcivilisational and transideological phenomenon, the complexity of which, deserves serious research attention. Namely, being understood in this way "ketman" is much more than a mystifying concept for masking mere fear and opportunism, as it was defined by Jerzy Gjedrojic, one of the critics of the Milosz's study.

As a concept of the Islamic tradition "ketman" means a moral principle which justifies the application of cunning duplicity against a stronger force (conqueror, religious enemy) and the very religious concealing skills. These two dimensions of the concept were the ones Czeslaw Milosz took over from Gobineau and developed by deepening its psychological, cultural and anthropological meaning.

As I have tried to show in this paper, "ketman" represents a plural phenomenon that simultaneously manifests in the sphere of (political) communication in a social-psychological level and an individual psychological level. This social-psychological complex that follows the forgery of identity to the public in order to survive, involves complex acrobatics of mind that needs to carry out a cunning duplicity and preserve the moral and psychological coherence, through the opposite of what is manifested in behavior.

The degree to which "ketman" is practiced in a society, is an indicator of the level of its repressive system of a government, a disorder in relation between private and public spheres, and the conditions of both its public life and its political culture, considering that it is not socially productive form of political behavior, but a form of political response out of necessity. In the general idea, "ketman" is a symptom of disharmony of society with itself, the gap between what the society is and what its dominant discourses mediate as the truth about it.

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Cultural Diplomacy in Action: The United States' Export of Hip Hop to the Muslim World[2]

Abstract

Among its other manifestations, the globalization has brought unparalleled development of the music platforms, logistically supported by the widespreadness of Internet. This article elaborates on the specific type of music-based diplomacy: hip hop diplomacy. After placing in the theoretical and practical context, the author analyzes the usage of hip hop diplomacy by the United States, particularly, in the Muslim world. I argue that while hip hop diplomacy seems to be a smart 'new edition' to the US cultural diplomacy portfolio, it suffers from the same systemic paradox as its Cold War's predecessor - jazz diplomacy.

Key words: hip hop, cultural diplomacy, United States, music diplomacy, Muslim world

Introduction

Among its other manifestations, the globalization has brought unparalleled development of the music platforms, logistically supported by the widespreadness of Internet. Both descriptive and analytical, this article elaborates on the specific type of music-based diplomacy: hip hop diplomacy. After placing in the theoretical and

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2 The views expressed in this paper do not necessarily reflect the positions of the Protector of Citizens.

practical context, I seek to analyze the usage of hip hop diplomacy by the United States, particularly, in the Muslim world. I argue that while hip hop diplomacy seems to be a smart 'new edition' to the U.S. public diplomacy portfolio, it suffers from the same paradox as its Cold War's predecessor - jazz diplomacy.

The article is organized in three main parts. Firstly, I introduce hip hop as a subculture, music genre and an emerging academic field, followed by a short description of the relevance of Islam to hip hop. In the second part, I situate hip hop diplomacy in a wider context of public and cultural diplomacy. In the most elaborated third part, I present the case of the U.S. hip hop diplomacy in the Muslim world and, finally, close with its strengths and weaknesses.

Setting the Scene: Hip Hop from Bronx to Beirut

The history of Hip Hop begins in the Bronx suburbs of New York City in the 1970s. The key elements which at that time came together and started to form an emerging Hip Hop culture are DJing (deejaying), MCing (rap music), graffiti art and dance (most notably breaking or break dancing). Motley and Henderson (2008) gave useful short definitions of all main hip hop elements. 'Graffiti is the visual art and break dancing is an element of the performance art of the hip hop culture. The disk jockey (DJ) selects and blends the background music tracks. Originally, the master of ceremonies (MC) introduced the DJ and the music. To generate excitement, the MC would encourage and greet the audience with verbal exchanges' (Motley and Henderson 2008: 245). Over time, that practice developed into a style called 'rapping' (for a useful historical account, see Hager 1984). An average rap song consists of the rhythmic lyrics spoken or chanted over a (usually) syncopated and repetitive beat.

Hip hop has evolved during the 1970s as a liberation movement, or as Emmet put it: 'it was a next-generation civil (human) rights movement sparked by ostracized, marginalized, and oppressed inner-city youth' (2006, 1). It has embraced the traditions of U.S.-born Blacks and first- and second-generation Latinos as well as people of Caribbean origin. 'It is a means and method of expression thriving on social commentary, political critique, economic analysis, religious exegesis, and street awareness while combating long-standing issues of racial prejudice, cultural persecution, and

social, economic, and political disparities' (Emmet 2006, 1). Over decades, it evolved from a local phenomenon addressing the needs and desires of poor inner-city youth to global, multi-billion-dollar institution that has virtually changed the rules of the game, i.e. the nature of the music and entertainment industries. In a recent study on the evolution of popular music in the USA, Mauch and others (2015) analyzed approximately 17.000 recordings that appeared on the US Billboard Hot 100 top list between 1960 and 2010. They concluded that the emergence of hip-hop, which crash-landed in the charts in 1991, reinvented the musical landscape like nothing before or since. In addition, the Spotify – one of the world's leading commercial music streaming website - has created a live 'musical map of the world', analyzing nearly 20 billion tracks to show localized listening trends for over 1000 cities. The map revealed that hip hop is the world's top genre, showing up on playlists more than all others, regardless of geography or language (The Independent 2015).

In addition to being seen as a subculture, Hip Hop has also emerged as an academic subfield. Since 1991 when Howard University, a historically black college, introduced the first specific hip hop course, over 300 courses at US universities in some related to hip hop way have been established, including those at top-ranked universities, such as Harvard, Penn State, USC, UCLA, Stanford, Duke, Princeton, and NYU. Hip hop-related books have appeared on more than 700 college syllabi (The Huffington Post 2013). Furthermore, hundreds of dissertations about hip-hop have been written[3], specialized journal were launched (i.e. Journal of Hip Hop Studies), followed by a huge proliferation of academic conferences and the development of readers and anthological texts (Hill and Petchauer 2013; Forman and Neal 2004; Jackson and Anderson 2009). Moreover, the establishment of the Hip Hop Archive and Research Institute at Harvard University with the most comprehensive bibliography on hip hop[4] certainly helped raising the relevance, visibility and academic interest to the field.

As noted by literally all hip hop scholars, there is often confusion over the terms *rap music* and *Hip Hop*. The general trend in the

3 The first American PhD dissertation about hip-hop was written in 1989 by Tricia Rose. Her dissertation was subsequently published in 1994 as "Black Noise" and is widely viewed as one of the masterpieces of the academic hip-hop genre. According to: Söderman 2013.

4 Visit the bibliography at http://hiphoparchive.org/scholarship/bibliography, last modified April 30, 2016.

academic literature defines Hip Hop as a specific cultural group or youth arts movement, while rap is the musical expression of that social group (Keyes 2002). To the extent that rap music is the music of Hip Hop, the terms rap music and hip hop music can be used interchangeably, as in this article. I will borrow from Keyes spelling distinctions between hip hop and Hip Hop (Keyes 1996, 231). I use the former for music direction and the latter to denote a culture.

For the purposes of this article, I will use the distinction between mainstream and underground rap. The mainstream covers the entertainment, materialistic, and gangster aspects of the genre, while the underground rap relates to social, political and religious topics.

Religious rap, one of sub-genres of the underground rap, can be defined as 'a musical representation of a faith as a means to praise, entertain, or recruit listeners to the faith' (Jones 2009, 10-11). Religious rap is usually divided into Christian and Muslim rap, but other 'congregational sub-genres' are not to be excluded.

'Rap's got religion and that religion is Islam'

(Ahearn 1991 as cited in Samy Alim 2006, 25)

The question of permissibility of music in Islam has drawn sizable attention among scholars. Some of them say it is *haram* (forbidden) in all cases, some say that only *a-capella* is allowed, but it seems that majority stands by the opinion that music is *halal* (permissible) as long as it is free from content which violates the basic principles of Islam, i.e. sex, drugs, violence, profanity.[5]

While the Muslim rap is hard to find within the mainstream rap music, i.e. on the commercial top lists, it would be utterly wrong to underestimate its significance to the origins, evolution and contemporary practice of hip hop. In fact, as early as in 1991, well-known hip hop journalist, Harry Allen, has described Islam as Hip Hop's 'official religion'. Despite that, Islam's dynamic presence and important role in the Hip Hop have been notably unexplored. The first study of Hip Hop to highlight the widespread practice of Islam in Hip Hop, its 'unique modern tones', and how it has impacted the philosophy of key hip hop players, was 'Nation Conscious Rap: The Hip Hop Vision' (Spady and Eure 1991 as cited in Samy Alim 2006, 23). Some of the most recognized rap artists such as Rakim, Brand Nubian, KRS-1, Afrika Bambaataa or Public Enemy have all introduced some version of Islam to Pop Culture (Toop, 1984).

5 For more on permissibility of music in Islam see, for example: Khabeer 2007.

Stanford scholar H. Samy Alim seems right when saying that:

'Given that Islam has been a normative practice in Black America for centuries since slavery, and that Black American popular culture from the Blues to BeBop has always contained strong elements of social protest, the dynamic presence of Islam in the Hip Hop should not come as a surprise. In fact, the lack of a Muslim presence in Hip Hop would represent an astonishing rupture from Black American popular cultural tradition' (2006, 27).

Diplomacy: Public, Cultural, Music, Hip Hop

The Google search of 'Hip Hop Diplomacy' generates over 400.000 results. The article by Hisham Aidi published in *Foreign Affairs* in 2014 tops the list. Hip hop diplomacy is part of a wider notion of public diplomacy.

As noted by many scholars (Gregory 2008, 275; Cull 2006; Roberts 2006), the term public diplomacy was adopted by practitioners in the United States in the 1970s as an alternative to propaganda, which had negative connotations, and as an umbrella label for the U.S. government's international information, cultural relations, and broadcasting activities. Gregory observes that 'it is a term that describes ways and means by which states, associations of states, and non-state actors understand cultures, attitudes, and behavior; build and manage relationships; and influence opinions and actions to advance their interests and values' (Gregory 2008, 276; see also Tuch 1990, 190).

Most studies in public diplomacy are historical, and they overwhelmingly deal with the U.S. experiences during the Cold war, including the ones drawn from anecdotal sources and personal testimonies of former diplomats. While public diplomacy is often confused with propaganda, public relations (PR), international public relations (IPR), psychological warfare, or public affairs, it is in most cases equated with another US product - 'soft power', as famously coined by Joseph Nye (1990; 2004). That is despite the fact that 'public diplomacy today encompasses much more substance than these terms convey individually' (Gilboa 2008, 56). That especially refers to propaganda. Nye, himself, stated 'skeptics who treat the term public diplomacy as a mere euphemism for propaganda miss the point; conveying information and selling a positive image

is part of it, but public diplomacy also involves building long-term relationships that create an enabling environment for government policies' (2008, 101). In Nye's account of soft power, it is an ability to shape the preferences of others, resting primarily on three resources, where culture is the first, followed by the political values and foreign policies.[6] It seems worthy to point out that cultural attractiveness *per se* is not soft power on its own, but 'can be a soft power resource, provided it is deployed to achieve clearly defined policy objectives under a thought-out strategy' (Ang, Isar and Mar 2015, 368).

From the public diplomacy practice emerged a narrower notion of 'cultural diplomacy', as coined by Milton Cummings as 'the exchange of ideas, information, values, systems, traditions, beliefs, and other aspects of culture, with the intention of fostering mutual understanding' (2003, 1). A landmark US Department of State report, in fact, defines cultural diplomacy as the linchpin of public diplomacy, because 'it is in cultural activities that a nation's idea of itself is best represented; cultural diplomacy can enhance national security in subtle, wide-ranging, and sustainable ways' (2005, 1).

It is important to take note that cultural diplomacy 'should not be considered an accessory of state's foreign policymaking process and not be limited to referring to state policy alone' (Jorgensen in Chay 1990). Nonetheless, in this article I cover primarily the state policy, leaning on the view that 'cultural diplomacy is a governmental practice that operates in the name of a clearly defined ethos of national or local representation, in a space where nationalism and internationalism merge' (Ang, Isar and Mar 2015, 367).

After completing a survey regarding the effectiveness of cultural diplomacy, Arndt (2005) observed that it is a cost effective practice considering its outcomes and impacts on international ties between countries. The integral part and the most visible expression of the cultural diplomacy is music, i.e. so-called music diplomacy articulated through deploying selected musicians abroad for the purposes of reaching the goals of public diplomacy. Its most known category is so-called jazz diplomacy, as used by the US during the Cold War. In recent years, hip hop diplomacy has started to assume the leading role, as to be demonstrated below.

6 See more: Nye 2004.

United States and Music Diplomacy: from Satchmo to Chen Lo

Cultural diplomacy and music in particular has played an important and unique role in American foreign diplomacy for many years. Indeed, as early as in 1954, the President Dwight D. Eisenhower called for the creation of a worldwide cultural exchange program for the performing arts to improve the world's perception of American cultural and political life (Davenport 2009, 3). As Nicholas Cull has deftly shown, cultural diplomacy became part of an expansive American effort to invest the P factor—the 'psychological dimension of power'—to wage the Cold War (2008, 81) and respond to Soviet public campaign, painting 'Americans as racist and segregationist' (52). The most vivid and researched expression of the US Cold War foreign cultural efforts has been the so-called jazz diplomacy, that 'profoundly helped reshape perceptions of the American identity throughout the world' (Davenport 2009, 4), with the help of artists such as Duke Ellington, Dizzy Gillespie, Louis 'Satchmo' Armstrong, Dave Brubeck and others. They have travelled around the world, playing thousands of concerts, mostly between mid-50s and early '70s, particularly in the states whose allegiances were not well defined or that were perceived as being at risk of aligning with the Soviet Union. Dave and Iola Brubeck, in collaboration with Louis Armstrong and his band gave arguably the best description of jazz musicians' experience in their jazz musical 'The Real Ambassadors' (1961).

Lisa Davenport captured the importance of jazz in these decades, saying '[jazz] held a unique place in American cultural policy' (2009, 5). One could add - 'in American foreign policy, as well', as it has been integral part of the U.S. containment policy. The containment policy was introduced in the late '40s, following the infamous George Kennan's Long Telegram, later published under the title 'Sources of Soviet Conduct' in Foreign Affairs (1947) and the National Security Council Report 68 (NSC-68). Two documents shaped U.S. foreign policy in the next twenty years and both advocated for non-military means to contain the Soviet influence, making culture its important component.

With the end of the Cold War, the foreign cultural program of that scale seemed to be redundant, but still continued to operate passively in the background during the 1990s, lamenting over its meaning in a globalizing post–Cold War world. The infamous US

Information Agency which was responsible for majority of the Cold War cultural diplomacy endeavors, or as Albro put it 'charged with "telling America's story" to the world' (2015, 382) ceased to exist in 1999.

Three years into the War of Terror, that has followed the terrorist attacks on 11 September 2001, a respected Pew Research Center published its Global Attitudes survey. The results can be summed as follows. 'Majorities in many Muslim nations believe America's war on terrorism is really an effort to control Mideast oil or to dominate the world. The war on terrorism was a smokescreen for a campaign against unfriendly Muslim governments' (Pew Research Center 2008). In George W. Bush's existing year as the President of the USA, the same survey reported that 'in the view of much of the world, the United States has played the role of bully in the school yard, throwing its weight around with little regard for others' interests' (Pew Research Center 2008). In addition to public surveys, the academia has also been very critical to the US post-9/11 cultural diplomacy. Schneider has claimed that cultural/public diplomacy has been used by the U.S. government in a reactionary fashion rather than as a means of consistent engagement with foreign audiences (2006, 192). Another scholar argued that American thinking on public diplomacy became largely an introspective examination of public diplomacy's relevance to terrorism and pervasive anti-Americanism in a post-9/11 world (Gregory 2008, 275).

As a part of the efforts of changing the negative U.S. picture abroad, especially in the Muslim world, the first US Undersecretary for Public Diplomacy after 9/11, Charlotte Beers, known as a marketing guru, has launched, what ended up to be very short-lived, soft power-motivated 'Shared Values Initiative', aimed at the Muslim audience in the Middle East. Beers` attempt to use business marketing strategy to increase American favorability in the Muslim world failed spectacularly. A 'more pictures, less words' approach followed by a new State Department website campaign centered with infomercial-like videos of Middle East-born Americans living happily in USA and advocating so-called U.S. values, i.e. freedom or religious pluralism, has been doomed to fail. As Albro noted, 'it met almost immediate opposition from governments in the Middle East, with Egypt, Lebanon and Jordan refusing to air the videos' (2015, 387). Snow captured the essential reason of Shared Values Initiative`s failure, emphasizing that it portrayed the Muslim Americans as products, and while that was perhaps successful in US domestic market, proved to be completely wrong 'take home message' for

here 'target audience' – conservative Middle East societies (2003, 96; 105). Instead of such product selling campaign, the U.S. has needed a convincing two-way approach, that would give chance to target audience to act as an active counterpart, not just a pure recipient.

Returning to its most successful campaign to date, the State Department decided to re-activate its music diplomacy program in 2005. The new program called 'The Rhythm Road' was modeled on the jazz diplomacy initiative, except that in the War on Terror, hip hop plays the central role of countering 'poor perceptions' of the U.S. (Aidi, 2011). The program began sending "hip hop envoys" - rappers, dancers, DJs - to perform and speak in different parts of Africa, Asia and the Middle East, covering the majority of the Muslim world. Since 2006, the program has sent more than 100 musicians on tours to 97 different countries, most of them outside the immediate reach of American music. Ten performers are chosen each year from a comprehensive audition process who then tour around the world, staying in each county around one week. The program is implemented by Jazz at Lincoln Center in partnership with the U.S. Department of State's Bureau of Educational and Cultural Affairs. Adrian Ellis, Executive Director of Jazz at Lincoln Center, defined transnational communication, through the language of music, as the ultimate objective in the Rhythm Road program (Constant 2011).

The (un)spoken goals of the U.S. hip hop diplomacy

In 2010, rapper Chen Lo was sent to perform in Damascus. Following his performance, U.S. secretary of state Hillary Clinton was asked by CBS News about U.S. diplomacy's recent embrace of hip hop. 'Hip hop is America', she said, noting that rap and other musical forms could help 'rebuild the image' of the United States (CBS News 2010). The artists stage performances and hold workshops. This emphasis on making connections between bands and local audiences is one of the biggest differences between the old jazz ambassadors and the Rhythm Road program (The Wall Street Journal 2010). The new program includes much higher number of workshops, lectures, round tables and master classes, focusing on smaller events and smaller groups, enabling a more in-depth and personalized approach.

'Hip hop ambassadors who are Muslims talk to local media about being Muslim in the U.S. The tours aim not only to exhi-

bit the integration of American Muslims, but also, according to planners, to promote democracy and foster dissent' (Aidi, 2011). Speaking on the preferred outcome of the program, Clinton said 'you have to bet at the end of the day, people will choose freedom over tyranny if they're given a choice', highlighting that cultural diplomacy is a complex game of 'multidimensional chess'. 'Hip hop can be a chess piece?' asked the interviewer. 'Absolutely!' responded the secretary of state (CBS News 2010).

Clinton seized the very essence of the entire U.S. 'new music diplomacy' endeavor. It is aimed at changing young Muslims' negative U.S. perception, at their homes. The U.S. smartly chooses the underground over mainstream rap artists and particularly selects the moderate Muslim, socially engaged, rappers, known for their strong lyrical content rather than catchy music beat, for at least two obvious reasons. Firstly, sending so-called 'bling bling'[7] rappers would definitely not help changing the 'Infidel America' picture, as the success of public diplomacy depends on the attractiveness of country's culture, values, and policies, to draw again from Nye. 'Exporting Hollywood films full of nudity and violence to conservative Muslim countries may produce repulsion rather than soft power' (Nye 2008, 95). In other words, local audience cannot relate to aggressive, offensive, gangsta American rap.[8] Secondly, who would be best to testify on the integration of the Muslims in America than believing American Muslims? Here it is important to notice that opposite to infomercials of Shared Values campaign, the Rhythm Road is concentrated on a live presence of musicians abroad, enabling the two-way communication. With a live presence comes a live communication. According to Ari Roland, international jazz musician, who has traveled into twenty-six countries as a part of the program, despite being supported by the government, the Rhythm Road's participants do not have to agree with every single policy by the administration. He argued that on every tour he has been a part of, the State Department 'made very clear to us that we were private United States citizens who were completely free to express our views and opinions on any matters' (Constant 2011). The goal, nevertheless, stays the same - promotion of other, moderate, religiously tolerant America, open to Muslims. The music

7 Bling bling is the US rap slang describing expensive, ostentatious clothing and jewelry and the style or materialistic attitudes associated with them.

8 Gangsta rap is a subgenre of rap with a lyrical focus on the activities of illegal street gangs and the 'thug' or 'gangsta' (gangster) lifestyle.

of majority of rappers involved in the Rhythm Road reflects the everyday life of common people and the most pressing issues they encountered with - political, social, and economical.

Paradoxes of the U.S. hip hop diplomacy

The U.S. specially aims to deploy rappers in the regions/countries where they would like to see regime change. At the White House Millennium event honoring jazz in 2000, Vaclav Havel said 'music is the enemy of totalitarianism' (Schneider 2008). In the new U.S. vision, hip hop is the face and sound of that 'enemy'. Its provocative and engaging massage should serve as a boost for youth mobilization and politically-conscious activism. H. Samy Alim (2005) calls the Muslim rappers - both American performing abroad and foreign ones active in their respective countries – 'verbal mujahidins' and their activism - 'transglobal Hip Hop umma'. As media freedoms in the Muslim world are known to be at least questionable, he sees rappers' activities as alternative media source narrating the beliefs and experiences of the nation (umma).[9] According to him, their very experiences, when verbalized, represent a discursive struggle against oppression (Samy Alim, 2006, 21). While the general hip hop audience has widened immensely through the years, the target audience of Muslim rap is still predominantly conservative, i.e. young Muslims of lower economic status, socially excluded, often politically oppressed and most responsive to the calls for change. This usage of hip hop to help generating a critical mass for inducing political change, like with other non-violent methods, calls for comprehensive and context-sensitive approach. Despite a large body of literature on non-violent political change, equipped with concrete tools, methods and lessons-learned[10] representing the non-violent struggle as a success story, the U.S. is known for influencing the violent foreign regime changes throughout its history.[11] Recent examples, most notably Arab Spring, show that producing the regime change is much easier that making sure that the new one will play by the Western rules. While the West has prompted the changes, the actual outcome is far from positive. The vast majority of population is not only exposed to the same problems as before

9 Alternatively spelled as 'ummah' meaning the whole community (nation) of Muslims bound together by ties of religion.

10 The work of Gene Sharp alone is sufficiently instructive: Sharp 2005 and 1973.

11 For a good overview see: Kinzer 2006.

– poverty and oppression – but has had to flee for their life. The ones that stayed are under overwhelming influence of the extreme fundamentalists and are becoming increasingly prone to violent radicalization.[12] That is particularly important when adding that, as Ang, Isar and Mar have argued, 'in a world where opportunities for global exchange and networking are ubiquitous, the rise of counter-hegemonic forms of cultural diplomacy, driven by forces that are working against established nation-states, is a distinct possibility' (2015, 375). For some time, the so-called Islamic state (ISIS) has implemented soft power-like activities, in an extreme form, of course.

There is another paradox of the U.S. foreign policy. In this article central - music diplomacy - suffers from the paradox of its own. In her critically acclaimed book 'Jazz Diplomacy: Promoting America in the Cold War Era', Davenport has neatly observed that as the United States propelled jazz abroad, jazz diplomacy transformed relations between nations and created a bold Cold War paradox: the cultural expression of one of the nation's most oppressed minorities came to symbolize the cultural superiority of American democracy (2009, 5; see also Bratton 1998). At the time, Soviet propaganda highlighted the fact that 'the US protected democratic rights for whites, while it violently denied those rights to African America' (Davenport 2009: 11).[13] That paradox is easily observed today, as well, given that the profile of hip hop envoy's artists in sense of race, age and social background is essentially the same as of jazz musicians back in the day. Additionally, despite being partners of the State Department in music diplomacy efforts abroad, at home, rappers are of particular interest to some other branches of the government, namely Federal Bureau of Investigation (FBI) and police departments of major cities, most notably New York and Miami. As noted by Shepherd, 'the FBI in collusion with the New York Police Department (NYPD) have been so adamant about profiling (and

12 In this article, the violent radicalization is to be described as a process of individual evolution towards adopting certain ideas and sometimes the use of violence and terrorist tactics to achieve political goals. Number of studies on the violent radicalization has been published in recent years. Particularly informative source is the journal 'Terrorism and Political Violence'. See, for example, Bartlett and Miller 2012 and Sedgwick 2010.

13 Additionally, at the time when Duke Ellington was one of the leaders of the US efforts abroad, domestically the Government through the congressionally-approved budget of the National Endowment of Arts allocated 70 times more funds for symphony orchestras than to jazz ($3.500.000 to $50,000). See more in Walton 1972, according to Bratton 1998, 19.

taking down) well-recognized stars of the genre. The 'hip hop cops' are also known as the "rap task force", and they exist solely for the surveillance of rappers' (Shepherd 2012; see also RHHR 2013). Such particular FBI's attention on rappers is not a novelty. As early as in 1989, the FBI issued an infamous letter to the recording house of a rap group N.W.A. because of their hit song 'Fuck tha police', arguing that it encourages violence against and disrespect for the law enforcement officers (see more in Hochman 1989). While the song has obviously been a lyrical form of protest against police brutality and racial profiling, and in fact, expression of approval of violence against police, the FBI's letter has been widely considered as an attack on the freedom of expression. While in 1989 rappers have almost exclusively been treated as a threat, today, they are often perceived as menace at home, but desired ambassadors abroad.

Conclusion

Despite shown difficulties to communicate its soft power to the audience in the Middle East, the U.S. Government has to continue to lead those efforts, not the entertainment sector. As Bayles (2014) has suggested, 'allowing the entertainment sector to assume the job of communicating the U.S.'s image to the world has been disastrous, since such cultural content is too often violent, sexualized, anti-religious, politically cynical, and celebrates rootless individual freedoms outside of any social or collective context' (Albro 2015, 388). The target audience in the Middle East is the last that should be exposed to such contents.

There is no doubt that the Rhythm Road is far more successful program than the Shared Values. Its focus on rap music has been innovative and thoughtful, given the target audience in the Middle East. However, as argued here, the usage of rappers for cultural diplomacy's goals suffers from the same paradox as the jazz diplomacy of the Cold War. The same oppressed subcultural group in the U.S. is used to promote it abroad.

Often unspoken, but certainly necessary precondition for a successful cultural diplomacy is a consistency, both in domestic and foreign policy. If cultural activities are in obvious disparity with other foreign policy manifestations in the region, than the audience will interpret them as insincere, annulling its attractiveness.

Similarly, attempt to promote something abroad, while having a problem to implement it fully domestically, would most likely cause suspicion. That seems to be a problem of the U.S. export of hip hop to the Muslim world, as shown in this article.

When recent high profile cases of racial riots caused by murders of black civilians by white police officers are added to that, the U.S. seems to have not that impressive 'good practice' to export. If lessons are learned, than they sound more like a product to export.

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Standards of Appellate Review in the International Administration of Criminal Justice

Abstract

Proceedings before contemporary international courts and tribunals are truly international, without counterpart in national legal systems, and that is also a characteristic of the proceedings on appeal. The author discusses standards of appellate review, namely standards of review applied by appeals chambers of various international courts and tribunals (the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Mechanism for International Criminal Tribunals and International Criminal Court). The issues discussed in this article are whether standards of appellate review applied by international courts and tribunals safeguards the appellant's right to a fair trial and whether they are appropriate for international criminal proceedings.

Key words: Appeal, Standard of appellate review, International Criminal Courts and Tribunals, International Criminal Tribunal for the Former Yugoslavia, Error of fact, Error of law, Standard of reasonableness, de novo, discernible error.

Introduction

Understanding standards of appellate review in international administration of criminal justice is of crucial importance for

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understanding the nature and reasons of the decisions of the appeals chambers of international criminal courts and tribunals. Despite an impressive body of jurisprudence the international criminal law literature remains sparse on this issue. Today, it seems desirable to consider whether the standards of appellate review, as developed in the jurisprudence of various courts and tribunals, safeguard the appellant's right to a fair trial and whether they are appropriate for international criminal proceedings.

In international criminal administration of justice, like in some national jurisdictions, particularly common law jurisdictions, "[s]tandards of review are complex, often difficult to understand, and frequently confusing even to experienced attorneys"(Calkins and Kicks 2003:1). Page limits do not allow comprehensive discussion on appellate review in international criminal proceedings and on all issues that are related to the standards of appellate review. In this article, only fundamental issues of appeal against conviction, acquittal and sentence that are necessary for understanding standards of appellate review are discussed.[2] The issue how those standards were or are actually applied in the international criminal jurisprudence remain outside the scope of this article, and require detailed case-by-case analysis.

Courts and tribunals encompassed by this study are the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR)[3], the Mechanism for International Criminal Tribunals (MICT), and the International Criminal Court (ICC).

Standards of review on appeal are developed in the jurisprudence of the ICTY and ICTR.[4] The MICT will certainly follow the jurisprudence of the ICTY and the ICTR[5], and the ICC jurisprudence follows the path established by those *ad hoc* tribunals. The ICC Appeals Chamber pronounced a dozen of judgments on interlocutory matters. However, only one case (*Lumbaga case)* it had an

2 Outside the scope of this article remains, for example, significant procedural issues, production of new evidence during appeals proceedings, the right of victims on appeal, appeals against interlocutory decisions.

3 The same standard will probably be applied by the Special Tribunal for Lebanon (STL) whose rules of procedure and evidence are substantially the same as those of the ICTY and the ICTR.

4 The ICTY and the ICTR Appeals Chambers have common members. The purpose for this solution was to obtain "consistency in interpretation and development of international criminal law and procedure" (Drumbl 2001:607)

5 On this topic see: McIntyre 2011:923-983.

opportunity to pronounce appeals judgments on convictions and sentence.[6]

Standard of appellate review in international criminal law is an innovation (Fleming 2002:202), a judge-made law. International criminal courts and tribunals are not bound by the rules of any one national legal system.[7] Statutes of various international criminal courts and tribunals are skeletal on the issue and open possibility for variety of solutions, however, grounds of appeal and corresponding standards of appellate review are unique or almost unique, described in common law terminology and with prevalence of common law influence.[8]

In international criminal law we are sometimes confronted with a need of *post factum* rationalization of existing jurisprudence on particular issue or its critique. It seems that prior to formulation of standards of appellate review there was no solid theoretical basis in international law. While the jurisprudence is, for the time being, conservative, scholarly attention on appropriateness of the standards of appellate review may have an impact on further development of the jurisprudence of the ICC and possibly some further international criminal tribunals.

6 *Lumbaga Conviction AJ*; No. ICC-01/04-01/06 A 4 A 6, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lumbaga Dyilo, Judgment on appeals of the Prosecutor and Mr. Thomas Lumbaga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute,* 1 December 2014 (*Lumbaga Sentencing AJ*)

7 See., for example, Pocar, F. 2006: 92 ,"The International Tribunal is, in fact, a *sui generis* institution with its own rules of procedure which do not merely constitute a transposition of national legal systems. " neither the rules issuing from the common law tradition in respect of the admissibility of hearsay evidence nor the general principle prevailing in the civil law systems, according to which, barring exceptions, all relevant evidence is admissible, including hearsay evidence, because it is the judge who finally takes a decision on the weight to ascribe to it, are directly applicable before this Tribunal. The International Tribunal is, in fact, a *sui generis* institution with its own rules of procedure which does not merely constitute a transposition of national legal systems. The same holds for the conduct of the trial which, contrary to the Defence arguments, is not similar to an adversarial trial, but is moving towards a more hybrid system." Murphy, S. D. 1999:57-96 quoting Case No.: IT-95-14-T Prosecutor v. Blaškić, Decision on the standing objection of the Defence to the admission of hearsay with no inquiry as to its reliability , 21 January1998.

8 Compare with: Cassese 2003, §§20.2.10-20.3.3. K. Ambos observed that „While the generous scope of the right to appeal resembles the civil law, the appeals procedure is based on the common law since it does not allow a trial de novo but only a review of the decision on clearly identified points of fact and law with limited opportunities for new evidence." Ambos 2011:33.

The right to appeal, permissible grounds of appeal and standards of appellate review

The right to appeal in contemporary law is a human right that consists of the right of an accused, the prosecutor or some other participants in the criminal proceedings to request the higher court or the chamber (court of appeal, court of cassation, appeals chamber) to review the decision of the lower court or the chamber. The scope of the right to appeal is "determined by the law", and in various jurisdictions it varies (significantly) depending on permissible grounds of appeal and standard(s) of appellate review.

Grounds of appeal concerns the issue what decisions of a trial chamber and for what reasons can be appealed (for example conviction on the basis of error of law, error of fact, procedural error, discretionary decision), and they significantly vary in different systems.

Standard of appellate review is an institute of common law origin that consist of rules that guide analytical process in reviewing trial (or pre-trial) chamber decisions, particularly the degree of deference that is to give to the to the actions and decisions under review (Calkins and Kicks 2003:1, Davis 2000:47, Davis 1988:469) In other words, standard of appellate review determines of parameters of appellate review, [9] Each standard of appellate review has "a name or phrase intended to denote the level of deference" (Davis, 1988:470.), whether on the appeal the standard will be *de novo*, standard of reasonabless, standard of clear error, discernible error or some other standard.[10] It defines, as M. Davis observed, "the relationship and power shared by decisionmakers." (*Ibid*., 469.) The very notion of standards of appellate review is unknown to the legal systems of continental Europe (civil law).

The right to appeal, grounds of appeal and standard of appellate review in international law and national legal standards

The right to appeal in international criminal proceedings is of recent origin

9 As noted by A. Peters, the standard of review guides an appellate court or chamber "in determining how wrong the lower court has to be before it will be reversed" (Peters 2009:235)

10 In the United States it could be identifies six standards of appellate review – *de novo* review, clearly erroneous review, reasonabless review, arbitrary and capricious review (for agency decisions), the clear error of judgement test, abuse of dicretion for discretionary decisions, and no review. *Ibid.*, 471

The right to appeal in international criminal law is of recent origin first appearing in the Statute of the ICTY. In the interwar period, the idea of appellate jurisdiction of an international criminal tribunal was fluid, and certainly the right to appeal had not been established as a component of the fair trial.[11]

Nuremberg and Tokyo trials did not recognize a right to appeal. Statutes of those tribunals were explicit that the judgment of the Tribunal is final and not subject of review.[12] However, while there was no possibility to review convictions,[13] review of sentences was treated as a political issue, since convicted persons "could only

11 The International Law Association in the period between the I and II World Wars provided in Article 15 of the Draft Statute of the International Penal Court that "[w]here sentence of death or imprisonment for life, or for a term of not less than five years, has been passed by a Sectional Court, there shall be a right of appeal to a Full Court consisting of not less than seven Judges, of whom no more than two may be Deputy Judges. A defendant State charges with an offence shall be entitled in any case to appeal to the Full Court from the decision of a Sectional Court." (International Law Association, 34th Report (Vienna) 1927, pp. 113-125 (see. Historical Survey of the Question of International Criminal Jurisdiction – Memorandum submitted by the Secretary-General, Topic: Question of international criminal jurisdiction, UN. Doc. A/CN.4/7/Rev.1, pp.61etc) However, other proposals, for example Voeu of the International Congress of Penal Law concerning an international criminal court (Brussels, 1926) provided in paragraph 8 that "No appeal against decisions of the Court should be admissible other than review under the terms of the present Statute of the Court". It was proposed that "The Council of the League of Nations should have the right to suspend or commute sentences" (para. 10). Similar proposition was contained in the Draft Statute for the Creation of a Criminal Chamber of the International Court of Justice prepared by Professor V. V. Pella and adopted by the International Association for Penal Law (Paris, 16 January 1928, and revisited in 1946) (*Ibid.,* pp.75etc.)

12 For example Article 24 of the Statute of the International Military Tribunal provided that „The Judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review". See also. Roth and Henzelin 2002:1535-15578.

13 There was no judicial reexamination of the facts or law underlying the conviction" For details see: Fleming 2002:111-112. Estimating the legacy of the International Military Tribunal Heller concluded that "because of the liberal good-conduct and parole programs created by the United States after the tribunals shut down, very few of the convicted defendants ever served even a fraction of their modified sentences. To take only the most obvious example, seven defendants were facing life sentences after McCloy's clemency decisions in January 1951: List and Kuntze from the Hostage case; Biberstein, Klingelhofer, Ott, Sandberger from Einsatzgruppen; and Reinecke from High Command. List was released from prison in late 1952; Kuntze was released in early 1953; Klingelhofer was released in late 1956; and the others were all released in early 1958. In practice, therefore, a life sentence meant as few as three and no more than 10 years—a result that is impossible to reconcile with retributive principles." Haller 2011:371

request clemency from political body."(Haller 2011:331-367) Cassese observed that: "[t]he Nuremberg and Tokyo tribunals belong to era that preceded codified human rights under international law the rights guaranteed to the defendants were rudimentary and, in practice, were not always fully respected."(Cassese 1997:331)[14]

Soon after the World War II, under auspicates of the United Nations, there were some efforts in order to examine a possibility of creation of an international criminal court and to draft a parameters of its jurisdiction. The Committee on International Criminal Jurisdiction of the UN General Assembly examining possibility of creation of an ICC discussed the issue of the appeal in the context of the question whether the proposed ICC should have more than one chamber. In 1951 the Committee decided that there should be no separate chambers and consequently no right to appeal, particularly not by any of the authority outside the proposed international criminal court. It took position that it should be possible to review cases on the basis of fresh evidence.[15]

In the work of the International Law Commission (ILC) on the Draft Code of Crimes against Peace and Security of Mankind, the right to appeal appears for the first time in 1994 when it has already become a human right and provided as a right in the Statutes of the ICTY. The ILC in the context of proposal for an International Criminal Court proposed the right to appeal against conviction and sentence in international criminal proceedings in accordance with Article 14 (5) of the International Covenant on Civil and Political Rights (ICCPR) and Article 25 of the Statute of the ICTY. [16]

The ILC proposed that "the standard to be applied by the appeals chamber, and its power to alter a decision or order a new trial, are

14 See also: Case No. IT-94-1-T, Prosecutor v. Tadić, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paras. 20-21. "As a body unique in international law, the International Tribunal has little precedent to guide it. The international criminal tribunals at Nuremberg and Tokyo both had only rudimentary rules of procedure."
It seems that Klamberg is of different opinion. He argued: "Even though the statutes of the International Military Tribunal in Nuremberg … and the International Military Tribunal for the Far East… preceded the ICCPR, they both contain fair trial guarantees falling shorts but still similar to present day norms."(Klamberg 2010:287)

15 For a summary of the work of this Committee see: Roth and Henzelin 2002:1536.

16 Report of the International Law Commission on the work of its forty-six session, 2 May-22 July 1994, Official records of the General Assembly, Forty-ninth session, Supplement No. 10. , UNN Doc. A/49/10, Yearbook of the ILC 1994, vol. II (2), Draft Code of Crimes Against Peace and Security of Mankind, *p. 61(ILC Commentary)*

dealt in Article 49"[17] which provides that "The Appeals Chamber has all to powers of the Trial Chamber". Very brief commentary of the ILC opens a number of questions about proposed standard of appellate review. In the commentary of Article 49 it is stated that:

> "The appeals chamber combines some of the functions of appeal in civil law systems with some of the functions of cassation. This was thought to be desirable having regard to the existence of only a single appeal from the decision at trial."

The Commentary made clear that only "the error that had to be a significant element in the decision taken" might lead to reversal or annulment, and added that proposed court, "like national appellate courts-necessarily have to exercise a certain discretion in these matters, with any doubt being resolved in favor of the convicted person".[18]

In the Commentary it was further stated that:

> "It is not intended that the appeal should amount to a retrial. The court would have power if necessary to allow new evidence to be called, but it would normally rely on the transcript of the proceedings at the trial. "[19]

From this explanation it seems that the ILC did not deal with particular measure of deference as to the trial chamber decisions. A proposed solution seem to be a compromise between common law and civil law understanding of the role of appellate courts and in final resolution of the issue is delegated to the discretion of an international criminal court. However, from the ILC Commentary it cannot be concluded with certainty that it allows a great margin of deference to the trial chamber either legal or factual findings or discretionary decisions (as in the common law systems). This

17 Article 49. (Proceedings on appeal) reads as follows:
1. The Appeals Chamber has all the powers of the Trial Chamber.
2. If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may: (a) If the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial; (b) If the appeal is brought by the Prosecutor against an acquittal, order a new trial.
3. If in an appeal against sentence the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with article 47.

18 *ILC Commentary*, para. 3.

19 *Ibid*., para. 6. It is interesting to note that the ILC took a position that no dissenting or separate opinion should be allowed.

conclusion follows from at least two considerations, the first one is that "the Appeals Chamber has all the powers of the Trial Chamber" (this is now a part of the Rome Statute of the ICC) and the second, that "any doubt should be resolved in favor of the convicted person".

The ILC draft was made in absence of any Appeals Chamber jurisprudence that would be under the scrutiny and a very basis for discussion,[20] and, on the other side, in the jurisprudence of the ICTY and the ICTR there is no a single reference to the work of the ILC on the issue.

The Preparatory Commission for the International Criminal Court and the Working Group for the Rules of Procedure and evidence discussed the issues of appeal. (Brady and Jennings 1999:294) As observed by H. Brady and M. Jennings, although the Rome Statute "… only contains a small number of articles compared to other parts of the Statute, its negotiation proved difficult and time-consuming. This was in large part due to the need to achieve a blending of the approaches taken in the major legal systems".(Roth and Henzlin 2002:1537)

At the outcome of the Rome Conference there was no clear indication about relevant standard of appellate review, and whether there should be any departure from standards (already) crystallized in the ICTY and the ICTR jurisprudence.

International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights and Fundamental Freedoms (ECHR)

Human rights treaties are of little help in determination of the appropriate standard of appellate review in international criminal administration of justice.

The ICPR in Article 14 (5) provides:

> "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. "

20 The first Judgment of the Trial Chamber was pronounced in 1996, and the first Judgment of the Appeals Chamber in 1997, both in the *Case No. IT-96-22, Prosecutor v. Dražen Erdemović*, Judgement of 7 October 1997, and Sentencing Judgment, 29 November 1996.

Peter D. Marshall observed that when proposed "relatively late in the gestation of the ICCRP … did not envisage a particular standard." (Marshall 2011:17)

The UN Human Rights Committee described in robust terms essential features of the right to appeal (*Ibid*:18) and repeatedly emphasized that in order for there to be compliance with article 14(5), the conviction and sentence must be "review[ed] substantively, both on the basis of sufficiency of the evidence and of the law, . . . such that the procedure allows for due consideration of the nature of the case." (*Ibid*.)

The right to appeal, surprisingly, was not envisaged in the original text of the ECHR, but in Protocol 7 (1984) (Article 2 Right of appeal in criminal matters) which reads as follows:

> "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."[21]

In the Commentary contained in the Explanatory Report it is stated that:

> „Different rules govern review by a higher tribunal in the various member States of the Council of Europe. In some countries, such review is in certain cases limited to questions of law, such as the *recours en cassation*. In others, there is a right to appeal against findings of facts as well as on the questions of law. The article leaves the modalities for the exercise of the right and the grounds on which it may be exercised to be determined by domestic law."[22]

Jurisprudence of the European Court on Human Rights shows how many differences exist between various legal systems concerning the scope of the right to appeal. In the ECHR's jurisprudence it is commonly observed that:

> "The Court reiterates that the Contracting States may limit the scope of the review by a higher tribunal by virtue of the re-

21 The 2nd paragraph reads as follows: "This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

22 Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *European Treaty Series - No. 117*, Strasbourg, 22 November1984, para.18.

ference in paragraph 1 of this Article to national law. In several Member States of the Council of Europe such a review is limited to questions of law or may require the person wishing to appeal to apply for leave to do so. [23]

In the *case of Krobmbach v. France* the ECHR reiterated that:

"However, any restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right" [24]

From the practice of the both the European Court on Human Rights and the UN Commission on Human rights it follows that the scope of the right to appeal remains undefined. However, the right to appeal must be effective. As stated by the European Court on Human Rights, „[t]he right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience".[25]

In determination of the appropriate standard of review, which differs significantly among various legal systems, as argued by P. Marshall, "all appeals must afford a convicted person the ability to access and adequate and effective review of conviction and sentence...Beyond these minimum requirements, the right to appeal does not mandate a particular standard of review." (Marshall 2011:45)

Origins of the Right to Appeal and Standard of Appellate Review in Contemporary International Criminal Law

Today the right to appeal conviction and sentence is recognized as "an indispensable guarantee of a fair trial", and there was no doubt that this right should be provided in the statutes of international courts and tribunals. (Book 2011:47)[26]

23 See, for example, *Case of Pesti and Frodl v. Austria*, Applications no(s) 27618/95 and 27619/95, ECHR Reports of Judgments and Decisions 2000-I, para. 4.

24 Case of Haser v. Switzerland, Application no. 33050/96, Judgment of 27 April 2000, para. 96.; Case of Krombach v. France, Application no. 29731/96, Judgment of 13 February 2001, para. 96.

25 Case of Lalmahomed v. the Netherlands**,** App. no. 26036/08, Judgment of 22 February 2011, para. 36.

26 See also: Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808(1993), UN. Doc. S/25704, (Report of the SG) para. 10.; Karibi-Whyte 2000: 644-653. He was of the opinion that „the genesis of vesting of

In the *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808(1993)*[27] it is stated that:

> "It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary General, such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights"[28]

Concerning the right of appeal, in the Report it was stated as follows:

> "Secretary-General is of the view that the right of appeal should be provided for under the Statute. Such a right is a fundamental element of individual civil and political rights and has, *inter alia,* been incorporated in the International Covenant on Civil and Political Rights. For this reason, the Secretary General has proposed that there should be an Appeals Chamber. "[29]

Except for enumeration of grounds of appeal and that the prosecution may also appeal against acquittal, and the power of the Appeals Chamber to affirm, reverse or revise the judgment of the Trial Chamber, there was no indication of the appropriate standard of appellate review.

Various states and organizations provided various proposals as to the appeal, almost always in terms of its limitations.[30] It might be identified two approaches, board light to appeal reserved to defence, and limited right to appeal (on allegations of error of law) for both

appellate jurisdiction in an international criminal court would seem to be current provision of Article 25 of the Statute of the ICTY and Article 24 of the Statute of the ICTR. This followed from the recommendation of the Secretary General..." (*Ibid*., 631.)

27 This Report was a basis for the establishment of the ICTY.

28 *Report of the SG,* para.106. About protection of human rights of the accused at international courts and tribunals see, Gajić 2005.

29 *Report of the SG,* para.106

30 Just for example, the Russian Federation, The Netherlands and the France, proposed that all appeals need to be limited on questions of law, and the France proposal was in opposition for the creation of an appeals chamber, "but recommended that appeal procedure be available in the nature of cassation", Much boarder right of appeal was proposed by the USA, and the most comprehensive right of appeal was proposed by the Organization of Islamic Conference. See: Fleming 2002: 118-119.

parties. The Secretary General proposed board light to appeal for both parties that reflects proposal of the United States of America.[31]

Constitutive instruments of international courts and tribunals remain silent on the issue of standards of appellate review and provide a huge space for variety of solutions. In final outcome this issue was transferred to the discretion of the Appeals Chamber.[32]

A Few observations on standard of appellate review in national legal systems

The scope of the right to appeal in terms of permissible grounds of appeal and standards of appellate review differ significantly even between national legal systems that belong to the same family, and between civil law and common law countries.

P. Marshall observed that comparative studies of the standards of appellate review "are virtually non-existent." (Marshall 2011:2) A. Peters, discussing standard of review in common law system noted that "finding a general history on standards of review is virtually impossible."[33] In common law jurisdictions standard of appellate review also vary from jurisdiction to jurisdiction.(Sward 1991:1-43, O'Hear 2010:2123-2167) In civil law countries the situation is different and those systems do not recognize a particular standard of review understood in terms of a margin of deference to a finding of a lower court.[34]

31 *Ibid*., 119.

32 It should be noted that Secretary General Proposals are quite different from the proposal of the ILC discussed above.

33 "One can find the earliest formulations of modern-day standards of review beginning in the late 1950s and 1960s.The first commentators on standards of review began to discuss them in the 1970s and 1980s. However, it was not until the late 1980s and early 1990s that appellate courts routinely began to include a discussion on the applicable standard of review in most opinions. As Martha Davis, professor and coauthor of the treatise Federal Standards of Review stated, "[t]he idea of using standards to guide appellate review of decisions of tribunals below has existed from the beginning of American jurisprudence, but the articulation of those standards is a fairly recent and still not always clear development." Having established that standards of review, as we know them today, are relatively modern creatures, it is important to examine why they were created and what purposes they serve." (Peters 2009: 238)

34 For short summary of the „exercise of right of appeal in national courts" see: Karibi-Whyte 2000:644-653

The law on criminal appeals has different historical foundations in the common law and in the legal systems of continental Europe, and different parameters. (Damaška 1974:482-490)

From the perspective of common law layers, unlike in common law countries, in civil law jurisdictions appeals proceeding are consider "as a continuation of the /trial/ proceedings."[35] However systems differ significantly. For example in Germany and France the scope of appeal (defined by permissible grounds of appeal) differs depending on the court from which the appeal is taken. (Marshall 2011:23) In various systems appeals may be on different grounds, however, no deference will be given to the trial court's rulings.

The nature of appeal might be dependent on various factors such as, who is a fact finder (a jury, professional judge or a chamber composed of both professional judges and lay persons), the rules of admissibility of evidence, hierarchical structure of the judicial system, whether there is a reasoned judgment as to the factual issues (in a jury trial decision on factual issues remains unexplained.)

In common law jurisdictions certain common standards are established. It should be noted that, as one common law judge said, they are not always "black and white… standard of review will be the determinative issue on appeal." (Chartier 2011)

In common law systems, it is tradition that judges decisions "are divided into three categories: questions of law (reviewable de novo), questions of fact (reviewable for clear error or standard of reasonabless), and discretionary matters (reviewable for abuse of discretion)." However, there is a mixed error of fact and law that consist in application of the law to the facts in issue. It is usually observed that:

> "In practice, the lines between these categories can blur, leading to the application of several layers of review on a single issue or a case where it is unclear whether the appellate court is reviewing a question of law or a question of fact. This fluidity requires the practitioner to make strategic decisions about how to frame the standard of review."[36]

35 Because reconsideration of first instance decisions is standard, appal in hierarchical systems are regarded as a continuation of the trial process. (Marshall 2011:15).

36 *Kansas Appellate Practice Handbook* 2013:§ 8.5. See also, for example, Peters 2009: 243-247. One particular problem is in differentiation of the error of law and error of fact. It is commonly observed that "Although there are situations where it is difficult to determine whether a given question is properly one of law or one of

If a lay jury is a trier of fact, crystallization of a particular standard of appellate review required a great measure of deference as to factual findings. However, lay jury is also a judge of the law because they make decision "on the manner and extent to which the law expounded by the judges fits the facts brought out into the evidence" (Davis 1988:473). Division of tasks between professional judges and a lay jury has its reflection on the scope of the jurisdiction and powers of appellate courts. If there is no deference as to the findings by the jury, the very existence and the role of the lay jury would be put in question.[37] However, as observed by A. Peters, "[t]heoretically, standards of review are one thing; in practice, they are often another" (Peters 2009:247).

In common law system, lay jury is a fact finder (a trier of fact), and the role of the judge is to filtrate evidence on the basis of which a lay jury would take decision. There is no reasoned opinion as to factual findings. If a court of appeals would have an unlimited right to reverse factual findings of a lay jury, fundamental division of tasks between a judges and a jury would be practically annulled and the very purpose for a very existence of a jury will be put in question. On the other side, in civil law system professional judges (with or without lay persons sitting at the bench) are triers of both, fact and law. There is a complete trial record (recorded or summarized witness statements and documents produced, record of all procedural decisions etc.) and more importantly reasoned opinion on both, legal and factual issues. The judges of the appellate court in civil law systems, (we are trying to express our opinion in common law terminology) review factual findings with caution, but are free to reverse or revise them if they found that there are not correct (not only in the case when they are unreasonable like in common

fact, the statement that there is "no fixed distinction" between the two types of question must, unless taken in a very limited sense, be regarded largely as hyperbole." Brown1943:900

37 In the USA, as well as in other common law jurisdictions, the right to a jury trial is the constitutional right. For example, in the USA, the Seventh Amendment of the Constitution provides that "In suits at common law no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law." This provision has been construed to mean that if there was any substantial evidence which supported the verdict it must stand." "Substantial evidence" has been best defined by Chief Justice Hughes: "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Rives 1959:72.

law jurisdictions). If the conviction, sentence and reasoning are of such a nature that they persuade the appeal judges that they are correct, they would be confirmed on the appeal. Because there is a reasoned opinion, there is no need to show significant margin of deference to the trial court's findings. Court of appeals in civil law system cannot base its decision on argument commonly expressed in common law systems - we are of different opinion, however, the trial court rendered reasonable decision or did not commit a clear error, and the judgment is confirmed.

No general standard of appellate review in national jurisdictions

The state of "the law of criminal appeals" is such that it is impossible to find a general agreement or a general principle of law recognized by civilized nations[38] that would guide the Appeals Chamber of an international criminal tribunal in determination of standards of appellate review. In other words, a common standard or appellate review is impossible to find, e. g. sharp distinction between common law standards and absence of those standards in civil law systems makes that it is almost impossible to formulate some generally accepted principle defined at the level of abstraction that can be applied in concrete cases.

Grounds and nature of appeal in the international criminal administration of justice

Statutes of the ICTY, the ICTR and the MICT provide that the Prosecution or convicted persons may appeal on two grounds: "error on a question of law that invalidates the decision" and "error of fact which has occasioned a miscarriage of justice."[39]

Acquitted person has no right to appeal against the trial judgment even if it belief that the judgment contain some error in law or in

38 Understood as a source of international law in accordance with the Statute of the International Court of Justice.

39 Article 25 (1) of the ICTY Statute, Article 24 (1) of the ICTR Statute. Article 26 (Appellate proceedings) of the Statute of the Special Tribunal for Lebanon. M.A. Drumbl –K.S.Gallant observed that those statutes "generally do not refer to mixed questions of law and fact, a classification often used in common law appellate courts to discuss issues such as negligence" (Drumbl and Gallant 2001:620)

fact, and even when the Prosecution appeal against a judgment of acquittal. In that case, the acquitted person, because it has no right to appeal, is deprived of the possibility to challenge factual findings of the Appeals Chamber in appropriate way.[40]

In accordance with Article 81 of the Rome Statute (Appeal against decision of acquittal or conviction or against sentence)., a judgment of the Trial Chamber may be appealed on the ground of "procedural error", "error of fact" or "error in law", and convicted person, "or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds: "procedural error", "error of fact" "error of law" or "any other ground that affects the fairness or reliability of the proceedings or decision". In accordance with paragraph 2 of that Article: "A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence". Article 83(s) provides that "the Appeals Chamber may also interfere with a conviction decision if the error of fact or law or a procedural error "materially affected" the decision, and in respect of unfairness allegations, that unfairness "affected the reliability of the decision".[41]

Like ICTY and ICTR statutes, the Rome Statute on appeals proceedings is skeletal and provides for a (high) degree of discretion to the Appeals Chamber in determination of standards of appellate review. As a matter of principle, the ICC is not obliged to follow jurisprudence of other international tribunals and the text of the Rome Statute provides a basis for different interpretations as to the standards of appellate review. On closer examination it can be concluded that the Rome Statute and statutes of ad hoc tribunals provides opportunity for the same grounds of appeal. For example, procedural error is by its nature en error in law.[42]

40 That happened, for example, *Stanišić and Simatović case* before the ICTY. In that case, the Defence argued that response to the Prosecution appeal "is not the appropriate instrument to argue against" findings challenged by the Defence. (Case No. IT-03-69-A, Prosecutor v. Jovica Stanišić and Franko Simatović, Judgement, 9 December 2015, para. 13)

41 *Lumbaga Conviction AJ*, para. 16. Some authors as M. Škulić provide that the ICC Appeals Chamber has board powers without consideration of standard of appellate review, and without consideration of the jurisprudence of ad hoc tribunals and positions of various states in the course of drafting the Rome Statute. See: Škulić 2005: 522.

42 Appeals Chamber of the ICTY has argued that „With regard to the alleged errors of law, the Appeals Chamber recalls that, as arbiter of the law applicable before

The ICC jurisprudence, even it use somewhat different terminology, is substantially the same as the jurisprudence of the ICTY and the ICTR, and the ICC frequently relied on that jurisprudence in determination of permissible grounds of appeal and standard of appellate review. However, that does not mean, *per se*, that the appellate law of the ICC is or will be the same as the appellate law of the ICTR and the ICTY. Interpretation of statutory provisions may lead to some difference, and States parties to the Rome Statute may, by way of revision of the Rome Statute or more conveniently the Rules of the Procedure and Evidence, introduce a new standard of appellate review. However, that possibility seems to be very distant and dependent on scholarly attention on the issue.

Statute of the ICTY (and subsequently the ICTR, the MICT and the STL) contains limited guidance expressed in common-law terminology. An error of law must be of such a nature that "invalidates the decision" and a factual error must be of such a nature that "occasioned a miscarriage of justice".[43] Those terms are missing from the Rome Statute. Reliance on national laws can be of little help. In civil law jurisdictions the terms "miscarriage of justice" and "invalidation of decision" could be easily translated (understood) as relevant legal and factual findings that (significantly) affected the outcome of the case. However, this is not a simple issue, and using common law terminology might be understood in terms of particular standard of review and a measure of deference to the findings of a trial chamber.

It seems undisputable that the powers of the Appeals Chamber are designed to be of corrective nature. However, common law layers may have different opinion in determination of the standard commonly named "*de novo*". It seems that it should be noted that in any legal system (common law or civil law) appeal proceedings is not concerned with new presentation of evidence already on the record, however differences exists in the scope and standards of review, particularly whether an appellate body is obliged to defer

the International Tribunal, when a party raises such an allegation, it is bound in principle to determine whether an error was in fact committed on a substantive or procedural issue. (Case no. IT-97-25-A, Prosecutor v. Milorad Krnojelac, Judgment, 17 September 2003 (*Krnojelac AJ*), para. 10) However, it seems that the sentence may be appealed on the basis of an error of law or error of fact, or procedural error. Klamberg argues that it follows form Article 83(2) of the Rome Statute. Klamberg Commentary, p. 652.

43 Article 25 of the ICTY Statute, Article 24 of the ICTR Statute.

or not to defer as to the particular legal or factual finding and discretionary decisions of the trial chamber. For layers of civil law background understanding of common law notion of the standard *de novo* may be strange. Trial record is preserved, and no evidence will be presented at the appeal which has already been presented during the trial and there is a limited right or no right to present fresh evidence on appeal. There is no rehiring in the sense of fresh presentation of evidence already on the record. Those (mis)understandings had been reflected in the work of the ILC that concluded that "it is not intended that the appeal should amount to a retrial … The court would have power if necessary to allow new evidence to be called, but it would normally rely on the transcript of the proceedings at the trial."[44]

Deference as to the factual findings and discretionary decisions of the lower court is another topic and concerns applicable standard of appellate review. It is not the issue of whether the proceedings on appeal are considered as a "trial *de novo*" or a continuation of a "trial". The key point is – what conditions need to be satisfied in order for the appeals chamber to exercise its power to substitute its decision or factual finding of that of the trial chamber. Those parameters are defined in the terms of deference to a finding of the trial chamber.

The authors differ, basing its observation on the *travaux préparatoires* and the text of the Rome Statute, on the nature of the appeal. While some argues that the appeal is of corrective nature, others open a possibility for a *de novo* review.[45] Others argues that "The nature of the appeals review at the ICC is less clear and the Statute leaves the appeals chamber with board discretion; the Chamber has all the powers of the Trial Chamber and evidence may be presented in the appeals proceedings."[46] However, those observations were made at the time when there was no the ICC Appeals Chamber jurisprudence.

44 *Ibid*., para. 6. It is interesting to note that the ILC took a position that no dissenting or separate opinion should be allowed.

45 *Klamberg Commentary*, p.651. See also: Klamberg 2013:415-416.

46 The authors differ, basing its observation on the *travaux préparatoires* and the text of the Rome Statute, about the nature of the procedure. While some argues that the appeal is of corrective nature, others open a possibility for a *de novo* standard od appellate review. "The nature of the appeals review at the ICC is less clear and the Statute leaves the appeals chamber with board discretion; the Chamber has all the powers of the Trial Chamber and evidence may be presented in the appeals proceedings." (Crayer et al. 2008:389)

Corrective nature of the appeals proceedings are frequently emphasized by the Appeals Chambers. The Appeals Chamber, in the words frequently employed by the Appeal Chamber, "does not operate as a second Trial Chamber" providing that its "role of the Appeals Chamber is limited, pursuant to Article 25 of the Statute, to correcting errors of law invalidating a decision, and errors of fact which have occasioned a miscarriage of justice".[47] However, this consideration does not resolve the issue of applicable standard of review that could be discussed in terms of difference between common law and civil law approach as discussed above.

One element in estimation of the nature of appellate review is the division of tasks of trial and appeals chamber. Unlike in common law jurisdictions, there is no statutory base of "division of tasks" between trial and appeals chamber as understood in common law jurisdictions. The Statute of the ICC is explicit that "the Appeals Chamber has all the powers of the trial chamber". Division of tasks is a matter of consecutiveness, before the trial chamber all evidence is produced, and the Appeals Chamber has before itself a complete trial record and there is no need to call all evidence for its presentation again. However, fresh evidence could be presented on the Appeal if they satisfy strict criteria.[48]

Limits of the right to appeal and determination of the scope of appellate review

In international criminal proceedings, as in common and civil law jurisdictions, not every legal, factual or other error deserve intervention of the Appeals Chamber, but only those that have an impact on the outcome of the case.[49] Starting point in determination of the limits of the right to appeal (including standards of appellate review) are that an appeal is not a trial *de novo*[50] and corrective na-

47 See, for example, *Kupreškić AJ*, para. 23

48 See, e.g. Case No. IT-05-88-A, Prosecutor v. Popović et al., Public Redacted Version of 2 May 2014 Decision on Vujdic Popović's Third and Fifts Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 23 May 2014, paras. 6-12

49 No. ICC-01/04-01/06 A 5, Appeals Chamber, Situation in the Democratic Republic of the Congo in he case of the Prosecutor v. Thomas Lumbaga Dyilo, Judgment on the appeal of Mr. Thomas Lumbaga Dyilo against his conviction, 1 December 2014.

50 This sentence is common to all appeals judgments.

ture of the Appeals Chamber's jurisdiction.[51] The Appeals Chamber exercise only limited scrutiny over the Trial Chamber's decisions.[52]

The ICTY Appeals Chamber observed that:

> "This appeal system affects the nature of the submissions that a party may legitimately present on appeal as well as the general burden of proof that the party must discharge before the Appeals Chamber acts."[53]

Appeal is an opportunity right, and the parties to the proceedings need to satisfy demanding formal requirements, and to express their arguments in a limited page numbers against judgments that has a few hundred pages and based of thousands of pages of transcripts and on thousands of exhibits.[54] Frequently, Counsels find that that page numbers does not satisfy their needs to properly argue issues on appeal, particularly in very complex cases of circumstantial nature.[55]

In all, or almost all, Appeals Chamber judgments the Appeals Chamber observed that:

> "The Appeals Chamber reiterates that it does not review the entire trial record de novo; in principle, it takes into account

51 Appeals Chamber of the ICC held that „The Appeals Chamber repeatedly held that its review is corrective in nature and not *de novo.*" *Lumbaga Conviction AJ,* para. 18.; No. ICC-01/04-01/10-283 (OA), Prosecutor v. Callixte Mbarushimana, "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the "Defence Request for Interim Release""", 14 July 2011, para. 15; No. ICC-01/05-01/08-631-Red (OA 2) Prosecutor v. Jean-Pierre Bemba Gombo, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber 11's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", 2 December 2009, para. 62.

52 Case No. IT-95-14-A, Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004, para. 8-24.

53 Case No. IT-97-25-A, Prosecutor v. Milorad Krnojelac, Judgment, 17 September 2003, para. 5.

54 See: Practice Direction on Formal Requirements for Appeals from Judgement, IT/201,7 March 2001.

55 Case no. IT-05-88/2-A, Prosecutor v. Zdravko Tolimir, Decision on Motion for Setting a Time Limit for Filing and Appellant's Brief and for an Extension of Word Limit, 17 May 2013. (Considering that the lengths of the trial judgement, the number of exhibits admitted at trial, and the number of grounds and subgrounds of appeal does not per se provide sufficient reason to enlarge the word limits prescribed by the Practice Direction")

only evidence referred to by the Trial Chamber in the body of the judgment or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence admitted on appeal, if any"[5657]

One of the basic principles in determination of the scope of appellate review is expressed in following terms:

"The Appeals Chamber recalls that it has an inherent discretion to determine which of the parties' submissions merit a reasoned opinion in writing and that it may dismiss arguments which are evidently unfounded without providing detailed reasoning in writing. Indeed, the Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties. In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically and exhaustively. A party may not merely repeat on appeal arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted an error warranting the intervention of the Appeals Chamber. Additionally, the Appeals Chamber may dismiss submissions as unfounded without providing detailed reasoning if a party's submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies. It is not for the Appeals Chamber to guess what the consequence of an alleged error is. It must be explained in terms that it occasioned a miscarriage of justice." [58]

56 See, for example, Case No. IT-95-11-A, Procecutor v. Milan Martić, Judgment, 8 October 2008, para. 13, Case no. IT-05-87-A, Prosecuor v. Nikola Šainović, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić, Judgement, 23 January 2014.

57 Appeals Chamber of the ICC held that „The Appeals Chamber repeatedly held that its review is corrective in nature and not *de novo.*" *Lumbaga Conviction AJ* 18.; No. ICC-01/04-01/10-283 (OA), Prosecutor v. Callixte Mbarushimana, "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the "Defence Request for Interim Release"'", 14 July 2011, para. 15; No. ICC-01/05-01/08-631-Red (OA 2)Prosecutor v. Jean-Pierre Bemba Gombo, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber 11's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", 2 December 2009, para. 62.

58 Case No. IT-98-32-A, Prosecutor v. Mitar Vasiljević, Judgement, 25 February 2004, para. 20.

It is commonly observed that "On appeal, parties must limit their arguments to errors of law that invalidate the decision of the trial chamber and to factual errors that result in a miscarriage of justice".[59]

The exception is that "in exceptional circumstances, the Appeals Chamber will … hear appeals in which a party has raised a legal issue that would not lead to the invalidation of the trial judgment but that is nevertheless of general significance of the Tribunal's jurisprudence".[60] Also, the Appeals Chamber in the exercise of its discretion may raise some issues *proprio motu* if it is "of general significance to the jurisprudence of the Tribunal."[61]

However, before the ICTY and the ICTR there are more restrictions imposed on the parties in the proceedings or, looked form different angle, formal requirements in order the appeal be considered. It seems that they are all based on proposition that parties to a proceedings are represented by qualified and experiences counsels acting with due diligence and that the trial chambers are composed of professional judges. At the ICTY and ICTR (and probably before the MICT and STL) in general, the parties' mistakes cannot be remedied on the appeal. Generally, a party cannot raise an issue on appeal if the issue was not raised at trial. The appeal is not an opportunity for the parties to remedy their own failings or oversights during trial (Drumbl and Gallant 2001: 631).[62] If the issue is of importance for outcome of the case, failure to file a motion for grant to appeal on particular decision of the trial chamber can also be considered. In other words, from the parties it is expected to act

59 *Stanišić and Simatović AJ*, para. 15.

60 *Ibid*., para. 15.

61 Case No. *IT-05-88/2-A, Prosecutor v. Zdravko Tolimir*, Judgment, 8 April 2015, fn. 662 at 96. However, in this particular case concrete issue was raised by the Defence. Compare, para. 230 of the Appeals Chamber Judgement and Public Redacted Version of the Consolidated Appeal Brief, 28 February 2014, paras. 160-166 „The Appeals Chamber has raised preliminary issues *proprio motu* pursuant to its inherent powers as an appellate body once seized of an appeal lodged by either party pursuant to Article 25 of the Statute. The Appeals Chamber finds nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties. The preliminary issues revolve around the question of the validity of the plea of guilty entered by the Appellant. This is a question to be decided *in limine*. Case no. IT-96-22-A, Prosecutor v. Dražen Erdemović, Judgement, 7 October 1997, para. 16.

62 Drumbl and Gallant, 631. relying on *Delalić AJ*, 790 and *Furundžija AJ*, 174.

with a due diligence and during the pre-trial and trial proceedings take every step possible to preserve an issue for an appeal.[63]

That follows from the corrective nature of the role of the Appeals Chamber. For example, concerning examination of the grounds of appeal that relate to sentence the Appeals Chamber was clear that „The accused, generally, cannot raise a defence for the first time on appeal. "[64] The Appeals Chamber observed that "appeal proceedings are not appropriate forum" to raise issues concerning mitigating or aggravating circumstances for the first time. „Rule 85(A)(vi) of the Rules provides that a trial chamber will consider any relevant information that may assist it in determining an appropriate sentence Appeal proceedings are not the appropriate forum to raise such matters for the first time."[65]

The other example is that "the Prosecution cannot seek to have a more severe sentence imposed on appeal where, as here, the Trial Chamber, by exercising its discretion, imposed a sentence within the Prosecution's requested range."[66]

From the parties, represented by qualified counsels, are expected to properly raise any issue at the trial. Failure to properly raise an issue at trial sometimes is referred as "waiver" of an issue on appeal or "failure to preserve" an issue for appeal.[67] However, this role is not absolute[68], and the party must provide reasons that are sufficient to persuade the Appeals Chamber to consider the issue.

63 "The rationale for this rule is simple: a trial court cannot wrongly decide an issue that was never before it…There are several exceptions to the rule that a new legal theory cannot be raised for the first time on appeal. The appellate courts may consider an issue that was not properly preserved when: (1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court is right for the wrong reason." *Kanzas Appellate Practice Handbook* 2013, § 8.4

64 Case No. IT-95-14/1-A, Prosecutor v. Zlatko Aleksovski, Judgement, 24 March 2000, para. 51. However, in Aleksovski case, the Appeals Chamber „In this Appeal, the Appeals Chamber will nevertheless consider the defence of necessity, as pleaded." However, the Appeals Chamber dismissed this ground of appeal as misplaced.

65 *Tolimir AJ*, para. 644 (footnoted omitted). However, this consideration is in sharp contradiction with the right of the accused to remain silent.

66 *Šainović et al. AJ*, para. 1834.

67 Drumbl and Gallant , 631

68 *Ibid*.

The Appeals Chamber routinely states that it can summarily dismiss a ground of appeal that contains "mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial chamber constituted an error warranting the intervention of the Appeals Chamber".[69] This is of particular importance for appeal against factual findings and discretionary decisions.

As noted by M. A. Drumbal and K. S. Gallant, "there is no clear rule concerning when either Appeals Chamber will permit either party to raise issues on appeal that were not preserved below". (Drumbl and Gallant 2001: 631) However, there is "no clear rule" also in the Statute or Rules of the ICTY and other ad hoc tribunals. In *Lumbaga case*, the Appeals Chamber argued that

"In respect of Mr. Lubanga's arguments which challenge findings in the Conviction Decision that are raised for the first time in the present appeals, the Appeals Chamber will consider these arguments on an individual basis and declines, as requested by the Prosecutor, to decide in the abstract whether they can be considered in the context of the present appeals."[70]

An error of law that invalidates the decision

There are many types of legal errors. They may consist in wrong understanding of particular legal standard or in its application.[71] They may be errors if substantive law or of procedural law (procedural error).

At the international criminal tribunals, as in many national jurisdictions, the main purpose of the appellate jurisdiction is to serve as "the final arbiter of the law of the Tribunal".[72] The Trial Cham-

69 *Tolimir AJ*, para. 14, Case No. IT-05-88-A, Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić and Radivoje Miletić, Judgment, 30 January 2015, para. 22-23; Case No. IT-05-87/1-A, Prosecutor v. Vlastimir Djordjević, Judgment, 27 January 2014, para. 19-20; *Šainović et al. AJ*, 26-27, Case no. IT-00-39-A, Prosecutor v. Momčilo Krajišnik, Judgment, 17 March 2009, paras. 17-27.

70 *Lumbaga Sentencing AJ*, para. 50.

71 Application of a legal standard is sometimes qualified, in national jurisdictions, as mixed issue of law and fact.

72 Case No. IT-95-17/1-A, Prosecutor v. Anto Furundžija, Judgment, 21 July 2000, para. 35

bers are, generally, obliged to follow legal position of the Appeals Chamber.[73]

The requirement on appeal is that: "A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision".[74]

In the case of an alleged error in law on the basis of the lack of a reasoned opinion, it is necessary for an appellant "to identify the specific issues, factual findings, or arguments that an appellant submits the trial chamber omitted to address and to explain why this omission invalidated the decision"[75]

Only legal error that invalidates decision may be reversed on the appeal. It is unique jurisprudence of all international criminal tribunals that "an allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground".[76] In other words, "A judgment is "materially affected by an error of law" if the Trial Chamber "would have rendered a judgment that is *substantially different* from the decision was affected by the error, if it had not made the error".[77]

The Appeals Chamber is not tied with the arguments of parties concerning alleged legal errors. If the arguments of the party is "insufficient to support the contention of an error, the Appeals

73 "Important use is being mande of the appellate jurisprudence of the Tribunals. Judgements are being used as precedents within the Appeals Chamber and by the Trial Chambers. " One author observed that "Although this may not seem newsworthy to a common law layer, the emergence of *stare decisis* within the Tribunals is an important development in international law" Drumbl. M. A. and Gallant, K. S. 2001:592 However, various appeals chambers of the same tribunal may render a conflicting decisions concerning articulation of some legal standard. That appears, for example in the case of determination whether "a specific direction" is necessary to establish in order to enter a conviction on the basis of aiding and abetting as a mode of liability under international law. Compare: Case no. IT-06-90-A, Prosecutor v. Ante Gotovina and Mladen Markač, Judgment, 16 Novemer 2012; Case No. IT-04-81-A, Prosecutor v. Momčilo Perišić, Judgment, 28 February 2013, paras. 25-36.; *Stanišić and Simatović* AJ, paras. 103-108

74 *Stanišić and Simatović AJ*, para. 16.

75 *Ibid*. As stated by the Appeals Chamber "Insufficient analysis of evidence on the record can amount to a failure to provide a reasoned opinion. Such failure in the reasoning "constitutes an error in law requiring de novo review of evidence by the Appeals Chamber." *Separate and Partly Dissenting Opinion of Judge Antonetti*, *Tolimir AJ* para. 58.

76 *Stanišić and Simatović AJ*, para. 16.

77 *Lumbaga Conviction AJ*, para. 19.

Chamber may still conclude for other reasons that there is an error of law".[78]

In sharp contrast as to the alleged factual errors, the Appeals Chamber needs not to defer to the Trial Chamber's interpretation of the law. As stated by the ICC Appeals Chamber:

> "[T]he Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision".[79]

In the ICC jurisprudence it is clarified that

> "the appellant has to substantiate that the Trial Chamber's interpretation as of the law was incorrect; contrary to the Argument of the Prosecutor… this may done including by raising arguments that were previously put before the Pre-Trial and/or Trial Chamber. In addition, the appellant must substantiate that the decision under review would have been substantially different, had it not been for the error".[80]

If the Appeals Chamber find that the Trial Chamber applied the wrong legal standard, "the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly"[81]"In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, applies the correct legal standard and the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by a appellant before the finding is confirmed on appeal".[82]

However, even if the Appeals Chamber found that the trial chamber committed a legal error, it "will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred by the trial chamber in the body of the trial judgment or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, addi-

78 *Stanišić and Simatović AJ*, para. 16.

79 *Lumbaga Conviction AJ*, para. 18.

80 *Lumbaga Conviction AJ*, para. 31

81 See, for example, *Stanišić and Simatović AJ*, para. 17., *Popović et al. AJ,* para. 18, Šainović et al., para. 21.

82 See, for example, *Stanišić and Simatović AJ*, para. 21.

tional evidence admitted on appeal."[83] In other word, the Appeals Chamber will review only factual findings of the Trial Chamber taking into consideration arguments of the parties in which they refer to evidence contained in the trial record as well as evidence produced for the first time before the Appeals Chamber.

Procedural error

In the ICTY and the ICTR jurisprudence procedural errors are considered as errors of law. The Appeals Chamber stated that "With regard to the alleged errors of law, the Appeals Chamber recalls that, as arbiter of the law applicable before the International Tribunal, when a party raises such an allegation, it is bound in principle to determine whether an error was in fact committed on a substantive or procedural issue."[84]The Rome Statute provides that a procedural error is a distinct ground of appeal. Providing a procedural error as a type of error distant from factual and legal errors is highly desirable, because it often requests considerations that, by its very nature, differ of these concerning allegations of an error of law or error of fact.

As stated by the ICC Appeals Chamber:

> "the Appeals Chamber will only reverse a conviction decision if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the judgment would have substantially different from the one rendered."[85]

There are many possible types of procedural errors, and "the substantiation required will also depend on the precise type of error alleged"[86] Qualification of a procedural error as a separate ground of appeal emphasis the need for a clarification of particular standard of review. It differ significantly from the errors in law or errors in fact, "and may be based on events occurred during the trial or pre-trial proceedings."[87]

83 See, for example, *Stanišić and Simatović AJ*, prara. 17.

84 *ICTY, Case No. IT-97-25-A, Prpsecutor v. Milorad Krnojelac*, Judgment, 17 September 2003, para. 10

85 *Lumbaga Conviction AJ*, prara. 20.

86 *Lumbaga Conviction AJ*, para. 32.

87 *Lumbaga Conviction AJ* prara. 20.

As stated by the ICC Appeals Chamber: „To the extent that the appellant is arguing that a mandatory procedural provision was violated, this has to be sufficiently substantiated both in fact and in law. To the extent that a discretionary decision of the Trial Chamber is at issue, the arguments of the appellant must be tailored to the specific standard of review for such decisions. Further, when alleging such an error, the appellant must substantiate specifically how the error materially affected the impugned decision."[88]

Discretionary decisions (standard of discernable error)

Standard of review of discretionary decisions of the Trial Chamber, such as, for example, the issue of admissibility of evidence, credibility of witnessed, reliability of evidence adduced, is standard of "discernible error".

The Appeals Chamber will not lightly disturb discretionary decisions. With regard to discretionary decisions the Appeals Chambers usually observe

> "that a trial chamber is best placed to assess the credibility of a witness and reliability of the evidence adduced, and therefore has broad discretion in assessing the appropriate weight and credibility to be accorded to the testimony of a witness. Indeed, the ICTR Appeals Chamber has previously noted that it "is loathe to disturb such credibility assessments". As with other discretionary decisions, the question before the Appeals Chamber is not whether it "agrees with that decision" but "whether the trial chamber has correctly exercised its discretion in reaching that decision". The party challenging a discretionary decision by the trial chamber must demonstrate that the trial chamber has committed a discernible error. The Appeals Chamber will only overturn a trial chamber's discretionary decision where it is found to be: (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of discretion. In such cases the Appeals Chamber will deem that the witness evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or that the evaluation of the

88 *Lumbaga Conviction AJ*, para. 32.

evidence was "wholly erroneous", and proceed to substitute its own finding for that of the Trial Chamber."[89]

The Appeals Chamber in assessing discretionary decisions will provide a great margin of deference without requiring the Trial Chamber to provide detailed explanation. It is commonly observed by the Appeals Chamber that:

> "The Appeals Chamber recalls that a trial chamber is not required to set out in detail why it accepted or rejected a particular testimony, and that an accused's right to a reasoned opinion does not ordinarily demand a detailed analysis of the credibility of particular witnesses. However, a trial chamber must provide reasons for accepting testimony despite alleged or material inconsistencies when it is the principal evidence relied upon to convict an accused." [90]

Erroneous factual findings and error of fact that occasioned a miscarriage of justice

Erroneous factual finding that are basis for conviction, acquittal or sentence may be a consequence of an error of law, procedural error, error in exercise of discretion or error of fact. For example, erroneous understanding or application of the requisite standard of proof[91], abuse of discretion in estimation of credibility of witnesses

89 *Popović AJ*, 131.

90 *Popović AJ*, para. 133.

91 Wrong understanding or applicability of required standard of proof is very hard to raise before international tribunals. Namely, in introductory part of the judgment they frequently refer to applicable standard of proof quoting previous jurisprudence. That does not mean that they actually applied that standard. In one case that issue was of particular importance. For example in Martić case the Appeals Chamber established that: "The Appeals Chamber finds that the Trial Chamber's reference to a "high degree of probability" in one of the footnotes to the section on standard of proof is confusing and not in accordance with the standard of proof of a criminal trial. However, the Appeals Chamber is not satisfied that Martić has shown that the Trial Chamber's application of the standard of proof as requiring the trier of fact to be satisfied of guilt beyond reasonable doubt was in error." *Martić AJ*, para.57. However, this ground of appeal challenging applicable standard of proof was denied, inter alia, because" The Appeals Chamber finds that, despite making reference to a probability standard once in a footnote, the Trial Chamber's other statements regarding the standard of proof establish that it properly understood the requisite standard." *Martić AJ*, para. 58- 59. Moreover, with respect to

or reliability of evidence, denial of some fair trial right are considered as errors of law. A lack of reasoned opinion or insufficient analysis of evidence on the record[92] is also an error of law. If the Appeals Chamber finds that a legal error occurred it might correct the error and substitute its finding as to those of the trial chamber or to order partial or complete re-trial[93].

As noted above, difference between legal and factual error is sometimes hard to explain in clear terms, and pleadings need to be composed on the basis of a well developed appeal strategy. In the absence of well developed strategy the appellant runs the risk of summary dismissal.

Standard of appellate review as of the facts is a complex matter, and generally the Appeals Chamber considerations disfavors appe-

the application of the standard, the Trial Chamber adopted the proper standard in its consideration of the evidence by consistently holding that a conviction could not be entered when there was a reasonable conclusion other than the guilt of the accused. Following this approach, the Trial Chamber only made findings leading to a conviction when stating that it was satisfied "beyond reasonable doubt" that they were correct. In various instances, the Trial Chamber refrained from making a finding of guilt, when a reasonable doubt remained." *Martic AJ*, para. 59.

92 *Kupreškić et al. AJ*, para. 32. *Krnojelac AJ,* para. 11. As regards errors of fact, the party alleging this type of error in support of an appeal against a conviction must provide evidence both that the error was committed and that this occasioned a miscarriage of justice. The Appeals Chamber has regularly pointed out that it does not lightly overturn findings of fact reached by a Trial Chamber. This approach is explained principally by the fact that only the Trial Chamber is in a position to observe and hear the witnesses testifying and is thus best able to choose between two diverging accounts of the same event. First instance courts are in a better position than the Appeals Chamber to assess witnesses' reliability and credibility and determine the probative value of the evidence presented at trial. *Krnojelac AJ,* para. 12. Thus, when considering this type of error the Appeals Chamber applies the "reasonable nature" criterion to the impugned finding. Only in cases where it is clear that no reasonable person would have accepted the evidence on which the Trial Chamber based its finding or when the assessment of the evidence is absolutely wrong can the Appeals Chamber intervene and substitute its own finding for that of the Trial Chamber. Thus, the Appeals Chamber will not call the findings of fact into question where there is reliable evidence on which the Trial Chamber might reasonably have based its findings. It is accepted moreover that two reasonable triers of fact might reach different but equally reasonable findings. A party suggesting only a variation of the findings which the Trial Chamber might have reached therefore has little chance of a successful appeal, unless it establishes beyond any reasonable doubt that no reasonable trier of fact could have reached a guilty finding.

93 See: ICTY, Case No. IT-04-84-A, Prosecutor v. Ramuš Haradinaj, Idriz Balaj and Lahi Brahimaj, Judgment, 19 July 2010. and *Stanišić and Simatović AJ*.

llate review on factual issues (Drumbl and Gallant 2001: 624)[94] The starting position of the ICTY Appeals Chamber is that

> "The Appeals Chamber has regularly pointed out that it does not lightly overturn findings of fact reached by a Trial Chamber".[95]

In order to revise particular factual finding is a two step analysis. The Appeals Chamber need to be satisfied that an error occurred and that it occasioned a miscarriage of justice. Examining allegations of an error of fact the ICTY and the ICTR Appeals Chamber applies standard of "reasonabless" or "wholly erroneous", while the ICC named the same standard as a standard of "clear error". In another word, in the case of an allegation of an error of law, the Appeals Chamber examines whether the decision is correct, in the case of an allegation of an error of fact, the Appeals Chamber examines whether challenged factual findings are reasonable or whether there exist a clear error.

In the ICTY Appeals Chamber wording:

> "In reviewing the findings of the trial chamber, the Appeals Chamber will only substitute it s own finding of that of the trial chamber *when no reasonable trier o fact could have reached the original decision*. The Appeals Chamber applies the same reasonabless standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence. Further, only an error o fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the trial chamber".[96]

In other words:

> "… It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence"[97]

94 As noted by those authors „The ICTY Appeals Chamber ha used language disfavoring appellate review of factual issues"

95 *Krnojelac AJ*, para. 11., *Stanišić and Simatović AJ*, para. 19., *Popović et al.,* para. 20.

96 *Stanišić and Simatović AJ*, para. 18, *Popović et al. AJ*, para. 19, *Šainović et al. AJ*, para.24.

97 *Tadić AJ*, para. 64.

The ICC applies the standard of a "clear error". In the words of the ICC Appeals Chamber:

> "Regarding factual errors, the Appeals Chamber has held that it will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely misappreciated the facts, took into account irrelevant evidence, or failed to take into account relevant facts. As to the "misappreciation of facts", the Appeals Chamber has also stated that it "will not disturb a Pre-Trial or Trial Chamber evaluation of the facts just because the Appeals Chamber might have come to a different conclusion, It will interfere only in the case when it cannot discern how the Chamber's conclusion could have reasonably been reached from evidence before it"[98]

J. P. Book observed that

> "defining the notion of reasonabless is a complex exercise… the question of reasonabless is to be answered in relation to a specific finding in its specific context. … What may reasonably be inferred from certain evidence is not predominantly a matter of logic, but of probabilities. What exactly separates and unreasonable conclusion from a reasonable one is the respective degree of probability attached to them. However there is no abstract measure to determine the necessary degree of probability required for a conclusion to be regarded as reasonable." (Book, J. P. 2011:61)

The standard of reasonabless or of a clear error seems to be too high. It might have justification in the system where the trial record does not contain all elements of the trail and/or pre trial proceedings, or where the functions in criminal proceedings are divided between professional judges and lay jury. However, in the system where professional judges are triers of both facts and law, where every second of the trial is recorded in the transcript and where official audio and video recording of every session are part of the trial record, it seems that this standard does not have proper justification.

Factual findings might be based on direct evidence or on circumstantial evidence (inferences). In criminal proceedings against high ranking political and military leaders, where there is no direct evidence as of their guilt, which involve a complex matrix of

98 *Lumbaga Conviction AJ*, para. 21, quoting other ICC appeals judgments.

facts that might produce different outcomes, this standard of proof seems to be too strict and allow outcome that might have serious consequences beyond the trial.

It is not enough that a party succeeds in establishing an error of fact, in the wording of the ICTY Appeals Chamber:

"the Appeals Chamber still has to accept that the error occasioned a miscarriage of justice such that the impugned finding should be revoked or revised. The party alleging a miscarriage of justice must, in particular, establish that the error strongly influenced the Trial Chamber's decision and resulted in a *flagrant injustice*, such as where an accused is convicted despite lack of evidence pertaining to an essential element of the crime."[99]In other words, it must be established "that the error of fact was critical to the verdict reached by the Trial Chamber, thereby resulting in a "*grossly unfair outcome in judicial proceedings*, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[100]

Sentencing appeal (standard of discernable error)

Statute of the ICTY, the ICTR, and the MICT does not specifically regulate sentencing appeal. The Rome Statute provides boarder normative framework. However, the jurisprudence of all international criminal tribunals, despite differences in normative framework established by statutes and rules of procedure and evidence, are the same.

The ICTY Appeals Chamber determined that:

"The trial chamber is vested with board discretion in determining an appropriate sentence reflecting circumstances the particular accused and the gravity of the crime".[101]

„Similar to an appeal against conviction, an appeal from sentencing is a procedure of a corrective nature rather than a *de*

99 *Krnojelac AJ*, para. 13.

100 *Kupreškić et al.,* para. 29, *Furundžija AJ*, para. 37 quoting Black-s Law Dictionary. A miscarriage of justice is defined in Black's Law Dictionary as "a grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime." *Black's Law Dictionary* (7th ed., St. Paul, Minn. 1999).

101 See, for example, *Tolimir AJ*, para. 626, *Lumbaga Sentencing AJ*, para. 40, *Popović et al. AJ*, para. 1961, *Šainović et al. AJ*, 1797.

novo sentencing proceeding. A Trial Chamber has considerable though not unlimited discretion when determining a sentence. As a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless "it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law." The test that has to be applied for appeals from sentencing is whether there has been a discernible error in the exercise of the Trial Chamber's discretion. As long as the Trial Chamber keeps within the proper limits, the Appeals Chamber will not intervene."[102]

The ICC Appeals Chamber also pronounced the same:

"Thus, the Appeals Chamber's review of a Trial Chamber's exercise of its discretion in determining the sentence must be deferential and it will only intervene if: (i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion."[103]

As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising its discretion. It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing a sentence as it did. A Trial Chamber's decision may therefore be disturbed on appeal if the Appellant shows that the Trial Chamber either erred in the weighing process involved in the exercise of its discretion by taking into account what it ought not to have, or erred by failing to take into account what it ought to have taken into account.[104]

The Appeals Chamber will also estimate an impact of its own findings on the sentence. It is on the discretion of the Appeals Chamber to affirm the sentence, or to reverse it in the light of reversed convictions or acquittals. Article 83 (2) and (3) of the Rome Statute is in line with the ICTY jurisprudence and provides that:

102 Case No. IT-98-32-A, Prosecutor v. Mitar Vasiljević, Judgement, 25 February 2004, para. 9. (footnotes omitted). See also, Case No. IT-94-2-A, Prosecutor v. Dragan Nikolić, Judgement on Sentencing Appeal, 4 February 2005, para.8.,

103 *Lumbaga Sentencing AJ*, para. 44.

104 Case No. IT-94-2-A, Prosecutor v. Dragan Nikolić, Judgement on Sentencing Appeal, 4 February 2005, para.8.

"If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may ...Reverse or amend the decision or sentence…".

It seems that the ICC articulation of the standard of the review of sentence on the appeal is not in conformity with the Rome Statute. The standard of "discernible error" seems to be more in line with requirements of "manifest" disproportion between the crime and the sentence. Proposals by some stated that the sentence might be amended on the appeal only in if it is "significantly" or "manifestly disproportionate" did not find its place in the Statute.[105] That consideration seems to be without any impact on the formulation of the requisite standard of appellate review.

It seems that standard of "discernible error" is too strict, leaving a little opportunity for control of the Trial Chamber's sentencing considerations, or to establish a consistent sentencing practice.[106]

Concluding remarks

In international criminal jurisprudence there have not been comprehensive discussions either on standards of appellate review, or on the question whether contemporary standards fit the needs of international administration of criminal justice. However, it seems that the standard of appellate review, as articulated in contemporary jurisprudence, has become a part of the "common law of inter-

105 *Lumbaga Sentencing AJ*, para. 40. quoting Roth and Henzelin 2002:545.

106 Standards applied by the Appeals Chambers of international criminal tribunal are the same as, or very similar to the standard applied in the USA (however not in all common law jurisdictions). Briana Lynn Roesnbaum, in recent article, discussing the scope of appellate review in various common law jurisdictions argued that:"The appellate function in sentencing is not limited to either enforcement or lawmaking; it can include aspects of both. Nor does the standard of review have to be either de novo or full deference; it can include a mix of both. And appellate review does not automatically inhibit individualized sentences; appellate review can expand to guide sentencing discretion in a way that retains the kind of discretion necessary to sentence each individual as appropriate in a particular case. Blind acceptance of deference as an institutional model based on assumptions like these is not only inaccurate, but may lead to the rejection of reforms at the appellate level that could further the goals of uniformity and fairness in sentencing." Roesnbaum:157

national administration of criminal justice"[107]. It eluded scholarly attention and developed exclusively in the jurisprudence of appeals chambers. However, there is room for argument that standards of appellate review may further developed in the jurisprudence of the ICC or of some existing or future international criminal tribunals, .

It should be noted that the strength of a precedent and consistent jurisprudence is great even in civil law systems.[108] In the first appellate proceedings following full trial (*Tadić case*), the parties

> "agree[d] that the standard to be used when determining whether the Trial Chamber's factual findings should stand is that of unreasonableness, that is, a conclusion which no reasonable person could have reached. … It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber, It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence"[109]

The Prosecution was keen to apply common law standards, whereby Defence Counsel[110] were of common law (U.K.) background, to which standard of appellate review as formulated by the Appeals Chamber was quite natural. One may ask only a speculative question: what if the Defence Counsel were of civil law background and if they opposed, in theoretical and practical terms, proposed standards of appellate review. Would the outcome have been different? It seems that due to lack of disagreement on this fundamental issue the Appeals Chamber was relaxed in appling this particular standard.

In one of the subsequent cases, *Kupreškić at all*, in which most of the Defence Counsel were of civil law background, the Defence challenged the standard of appellate review; the Appeals Chamber simply stated that:

> "The Appeals Chamber finds no merit in the Appellant's submission which it understands to mean that the scope of the

107 The term "common law of international adjudication" has been used by Chester Brown to describe a common principles of international adjudication of various (non-criminal) international courts and tribunals. Brown, C. 2007.

108 See, for example, Fon and Parisi 2006:519-535.; Pejović 2001: 821

109 *Tadić AJ*, para. 64.

110 W. Clkeag and J. Livingston

> appellate function should be expanded to include de novo review. This Chamber does not operate as a second Trial Chamber. The role of the Appeals Chamber is limited, pursuant to Article 25 of the Statute, to correcting errors of law invalidating a decision, and errors of fact which have occasioned a miscarriage of justice"[111]

An error that occasioned a miscarriage of justice could be found even if no deference or a little deference is shown to the Trial Chamber's findings. Reconsideration of evidence on the basis of complete and detailed record of the trial proceedings in the light of the Trial Chamber's findings and arguments of the both, the Defence and the Prosecution, seems to be, at least, an equally acceptable solution, and more in favor of the accused[112] and standard of proof applicable in international criminal proceedings "proof beyond reasonable doubt".

Standard of appellate review should not be confused with standard of proof.[113] If the applicable standard of proof is proof beyond reasonable doubt, frequently defined as "the only conclusion on the evidence on the record", how the Appeals Chamber may control application of that standard? Reasoning might be reasonable, but still not the only one available, so that another reasoning may be reasonable as well. If one keeps in mind that, as frequently observed by the ICTY Appeals Chamber, "it must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence", why opinion of 2 or 3 judges of the trial chamber (majority or unanimity requirement) should be prevalent over *intime conviction* (firm conviction) of 3, 4 or 5 judges of the Appeals Chamber? The standard of appellate review, as currently formulated, (standard of reasonableness or standard of clear error) has the following consequence – the Appeals Chamber might be of different opinion (it may have doubts or completely different opinion), however if the opinion of the trial chamber is reasonable, the Appeals Chamber will affirm the trial chamber's finding as the finding that satisfies the standard of proof beyond reasonable doubt. In another words, standards of appellate review may not be in line

111 *Kupreskic et al AJ*, para. 40.

112 As noted above, the ILC took position that "like national appellate courts-necessarily have to exercise a certain discretion in these matters, with any doubt being resolved in favor of the convicted person". *ILC Commentary*, para. 3.

113 Davis 1998:469-480.

with the applicable standard of proof.[114] If the "conviction could not be entered when there was a reasonable conclusion other than the guilt of the accused"[115] why that conclusion could not be under full scrutiny of the Appeals Chamber?

Besides that, factual findings confirmed by the Appeals Chamber in the jurisprudence of the ICTY and ICTR were frequently used for the purpose of other trials (for example, facts confirmed by the Appeals Chamber may be judicially noticed in another cases).[116] Control is exercised by the five members Chamber, the opinion of which could not be limited of reasonableness, but must include control of application of applicable standard of proof.

These considerations should not be understood as a call to the Appeals Chamber to completely disregard the Trial Chamber arguments. That is also not the case in civil law countries. The appeal remains corrective in nature regardless of the level of deference to the Trial Chamber's factual findings. In common law systems the jury trial is a constitutional right, and a measure of deference to the jury findings seems to be the matter of a legal necessity. In international criminal proceedings there is no lay jury and there is no reason for a high level of deference to the trial chamber's discretionary decisions, factual findings and findings that are result of an application of relevant legal standard (rule). On the contrary, since an appeals chamber has all the powers of a trial chamber, it should reach its decision with little deference to the trial chamber findings. That does not mean that the Appeals Chamber should disregard the Trial Chamber's arguments. That is also not the case in civil law jurisdictions. The appeal remains corrective in nature regardless of the level of deference to the Trial Chamber's findings.

114 C. M. Rohan, discussion standard of appellate review concerning factual findings provided an opinion that "having obtained the benefit of the reasonable doubt standard during the course of trial, an accused faces and extremely high appellate standard of review when seeking to overturn Trial Chamber factual findings on appeal" (Rohan 2010:688) However, standard of proof and distribution of standard of proof remain unchanged during the whole proceedings. One of the main issues is whether the Trail Chamber applied that standard regardless of the words employed in order to explain challenged finding. If standard of reasonable doubt as to the guilt of the accused does not have its prominent place in appeals proceedings, than it could be considered as a serious defect of the appeals procedure and minimization of its correcting powers.

115 See, for example, *Martić AJ*, paras. 55-63.

116 See: Gajić 2012: 292-326

One of the main issues is whether standards of appellate review as have been formulated in the jurisprudence of international courts and tribunals fit the needs of international administration of criminal justice. The answer to that question is highly dependent on the understanding of the goals of a particular international criminal tribunal. If an international tribunal tends to establish a reliable historical record, the Appeals Chamber should have much less deference to the rulings of the trial chambers.

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Mihailo Marković on Conservatism[2]

Abstract

This paper focuses on an analysis of political and scientific reflections by academic Mihailo Marković, with special review of the links existing between ideology and science. Unlike ideology, whose scope is limited in terms of value and science, Mihailo Marković regards philosophy as a science open to all humankind. A prominent place in Marković's research belonged to the conservative ideology and in this context, distinction was made between the conservative spirit in its broader sense, manifested in its views on art, creation and all other segments of life and conservatism as an ideological and political position. The aim of this paper is to explore Mihailo Marković's approach to the value system proposed by conservative ideology, leading to the author's conclusion that Marković had an objectively critical approach in his analysis of conservatism. Marković discovered a humanistic alternative to all forms of conservatism, proposing radical democratic socialism as a appropriate substitute model.

Key words: Mihailo Marković, conservatism, ideology, theory, science, political thought, political theory, tradition.

Introduction

It is fair to suggest that Mihailo Marković is one of the most prominent 20th century philosophers, not only in Serbia but also within

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world science.[3] His extensive body of research includes the analysis of conservative ideology, among various other political categories. Mesmerised by left-wing ideas of freedom and equality as a young man, Marković captured the deficiencies of rigid conservative views early and criticized and explained the phenomenon of conservatism in his writings accordingly.

As a political programme, conservatism initially appeared in Western European countries in mid-nineteenth century, but it was only later, in Edmund Berk's 1970 book : *Thoughts on French Revolution,* that the conservative thought was explicitly revealed for the first time. The etymology of the word itself (lat. *conservare*) points to a tendency to preserve and to hold on to something that has been functioning in a human society regularly and for a long time.

Conservative thought in its essence strives to conserve the *status quo* due to its fear of change that is unpredictable, new, untested, while its greatest fear is the „trepidation of losing the acquired social status through change" (Marković 2002: 216). Therefore, it is not surprising that in all established societies, proponents of the conservative spirit are the dominant classes and elites, by which Marković implies: big bourgeoisie, feudal aristocracy, political and military bureaucracy, the clerical class and apologetic intelligence are the keepers of conservatism. In conservative ideology, Marković discovers the existence of human self-interests predisposed by psychological and cultural factors, such as love for traditional values, true religiousness, romanticism in idealising the past, etc.

Mihailo Marković did not reject every segment of the conservative spirit and thought, but he did largely criticize conservatism shaped as ideology, mainly since the „ideological phenomenon is not characterized by the secrecy of opinion and conflict of opinion and its public expression, but by the fact that thinking does not come from the mind, is not open to rational, critical reconsideration, nor universally applicable to all people in different specific circumstances of their lives." (Marković 1994: 183).

Mihailo Marković particularly criticized the ideological myth that is directly incorporated in all types of ideologies, claiming it to be the enemy of the humanistic praxis. In his analysis of ideological myths, he highlights their dominant function – that

3 Two of his books, *Dialectical Theory of Meaning* and *Philosophical Foundations of Science* were translated into English and are considered as important philosophical works in world science.

of obscuring the actual social relations with a thick veil and substituting the truth with illusion. Myth is a weapon of the conservative forces which "by repeating the same stereotypes at will, shape people's spirit, feelings, needs "(Marković 1994: 118).

In order to understand ideology, it is necessary to elucidate its relationship with science, complex in its nature. Although he always prioritized science as objective cognition, or, to put it in Hegelian terms, as an „absolute spirit", Mihailo Marković believed that ideology held a special place in a man's reality. In discussing the phenomenon of ideology, Marković made a distinction between conservative thought and praxis, searching for a humanistic alternative to all forms of conservatism and proposing radical democratic socialism as a adequate substitute model.

Ideology and science

From the beginning of his academic work, Mihailo Marković showed an interest in science, logic and philosophy, but at the time when the journal *Praxis* was founded, his attention shifted into the areas of political theory and political philosophy. During the latter phase associated with the *Praxis*, Marković was mostly engaged in critical theory of society and in understanding human nature in „non-normative, or descriptive terms" (Živanović 2010: 121).

Although he remained devoted to science until the end of his life, in terms of political practice, Mihailo Marković stayed committed to his left-wing ideological beliefs. His *logos* often balanced between ideology and science and hence, his works were inspired by these phenomena.

In contrast to the constraints of the phenomenon of ideology and its limitations in terms of value and science, Mihailo Marković viewed philosophy as open towards the whole world and humankind „even when it is an expression of a very special human situation and work of a unique individual"(Marković 1994: 183).

In keeping with Fichte's saying – *By philosophy the mind of man comes to itself* - Mihailo Marković also lived by his own philosophy, despite the troubles and consequences he faced, since it was the only way for „the unity of theory and praxis" to materialise (Marković 1988: 27). This kind of Mihailo Marković's life philosophy corresponds to Gramsci's distinction „between philosophies that spring

from other philosophies and philosophies deriving from life, so to speak, that is, from *a significant lived experience*" (Marković 1994: XIII). Academic Mihailo Marković belonged to the latter group.

Marković was right in observing that views on the relationship between science and ideology are often simplistic, along the lines of true and false. Accordingly, ideology would be synonymous with „distorted conscience", untruth or political demagogy. But actually, the relationship between science and ideology is much more complex in nature than it appears at first glance since, in addition to the scientific truth, considered as the only valid one, there is also the so-called "ideological truth". Or, as Stojanović and Pavlović wrote on the subject: "Transforming scientific truth into ideological match or equating them, even when it is presumed that the truth is non-existent (…) is in fact a way for an ideological truth to become scientific" (Stojanović, Pavlović 2015: II).

Today, different definitions of science are available, but the most common one defines it as synonymous for knowledge. According to Hegel, science is „conceiving knowledge of absolute spirit (...). It is a term which consists and conceives itself" (Hegel 1985: 212). A similar definition is provided by Mihailo Marković who suggests that „all real knowledge, i.e., all objectively verified knowledge is comprised by science" (Marković 1985: 62), and hence, no other superior form of knowledge aquisition exists. By placing science on the pedestal of knowledge, Marković remarks that science has its own tasks to fulfill (constructing and testing of hypotheses and scientific predictions), which transcend the borders of practical intelligence. Another important feature of science is that it constructs theories that help to explain reality.

Scientific theory is "scientifically based, reasoned and systematized, and therefore corroborated by theoretical arguments and such empirical facts that yield to analysis and so can serve as its basis and testing ground" (Simeunović 2009: 31). In this paper, special focus will be on the correlation between political theory (as an intrinsic component of science) and ideology.

Etymologically, the term *theory* originates from the Greek word *theoria*, which can be translated as contemplation, not just any but that which aims „at conceiving the true and the essential" (Simeunović 2009: 30). According to Simeunović, the creation of theory is explained by three reasons. First, man as a curious being shows his desire for knowledge, which inevitably leads to a feeling of happi-

ness. The second reason for the construction of theory is existential in nature, as it refers to the preservation and improvement of life, and the third reason is explained by man's curious nature which aims Klaus von Beyme in his work asserts that political theory is the opposite to ideology (Von Beyme 2002: 59). Radoslav Ratković shares the same view, considering that science „as a relatively autonomous form of social consciousness" (Ratković 2009: 188) does not correspond with ideology. However, Ratković sees the relationship between science and ideology as a complex one: "Scientific thinking – as long as there is grounds for ideological thinking – cannot be disengaged from ideological elements" (Ratković 2009: 188). On the other hand, ideological thinking may completely disregard scientific elements. It is because of such a complex relationship between science and ideology that Ratković believes the relationship between science and ideology to be a process that cannot be reduced to a formal logical formula (Ratković 2009: 189).

Through a comparative analysis of ideology and science one may arrive at a conclusion that these two terms are interdependent. Although Marković prioritized science in the cognition of truth, he was aware of the ideological influence on not only society as such, but also on the scientific domain of research. One of the ideologies that no doubt had a great impact on the shaping of various social processes in the past and present and which was the subject of Mihailo Marković's criticism, was conservatism.

Critics of conservative ideology

David Mc Lellan is right in claiming that ideology is the most elusive phenomenon in social sciences.[4] Regardless of this assertion, ideology occupies a prominent place in political theory, as evidenced by the proliferation of papers on the subject. Given the uniqueness of the ideology phenomenon, Mihailo Marković paid it considerable attention, which can be seen in his work *Ethics and Politics*.

Marković made a distinction between the *conservative spirit* in its broadest meaning, manifested in its views on art, creation and in all segments of life, and *conservatism as an ideological and political stance*. The word ideology itself was initially used by Destutt de

4 See more in: Mc Lellan, David, *Ideology*, Open University Press, Buckingham, 1996.

Tracy in 1796 in his lecture, and later in *Elements of Ideology* (1801-1807) and it is, as Marković notes, contradictory in character. For him, although there are dozens of definitions of this phenomenon, he points to a few basic interpretations.

The first group of interpretations is close to de Tracy's original interpretation of ideology as a form of exact science "which studies the ways ideas are constructed" (Marković 1994: 185). According to the second type of interpretations, ideology is conceptualised as a kind of social upgrade, which corresponds to Marx's and Mannheim's comprehension of ideology.

The third interpretation of ideology in Marković's view, granted, an overly narrow one, is provided by Marx and Engels in *German Ideology* and it perceives ideology as a false social consciousness. The main goal of this book was criticism of the German idealistic philosophy and contemplative historical idealism. Marx and Engels intended in a way to "come to grips" with idealism and replace it with historical materialism. Their primary starting point is the fact that man differs from other beings for his consciousness, but that humans became a separate species "as soon as they started producing their life assets" (Marx, Engels 1956: 20). By explaining ideological consciousness and conditions conductive to its development, Marx and Engels established a materialistic conception of history in which – social being determines social consciousness.

Marx and Engels were mainly resented for showing inconsistency in their elaboration of ideology as this term often had different meanings in their different works. Thus, it is quoted that in some works they termed ideology „wrong consciousness", while in others it was synonymous with the „conceptual upgrade". For example, Stalinist-oriented theoreticians mostly perceived ideology as a „conceptual upgrade". Lenin perceived ideology as a set of ideas of some class which could advance its position in society. Marx negated ideology believing that the thoughts of the "exploiting class" were, at the same, the ruling ideas in a given era, and thus regarding ideology as a "false worldview".

The Marxist concept of ideology was additionally developed by Antonio Gramsci, who believed that the capitalist system is perpetuated through economic exploitation of labourers, political power and bourgeois ideology. Gramsci believed that the power of ideology was extremely high, since it exercised influence on the overall social life, including politics, economy, art and culture.[5]

5 See more in: Gramsci 1959.

Only in the 20th century would ideology be discussed from an objectively scientific point of view thanks to Karl Mannheim, who wrote a well-known piece *Ideology and Utopia*. Mannheim analysed the phenomenon of ideology with the help of sociology of knowledge, by which he finagled its gnoseological neutralization.

There is also a fourth interpretation of ideology, which regards a given social reality through dualist consciousness: it either idealizes or exerts destructive influence on it. The last, fifth interpretation, points to the social function of every ideology which tends to "mobilize for defence or attack, integrate the addressed group, provide value benchmarks and give meaning to global political activity" (Marković 1994: 189).

In his philosophical and theoretical reflections, Mihailo Marković clearly observes that all ideologies, including conservatism, are dangerous, because they „create illusions and prejudice". Aside from this, they are conservative since "they serve the interests of the social elite, being too static and vitally lagging behind the actual social occurrences" (Marković 1994: 208). Even though ideologies are based on distorted, wrong consciousness, and are antagonistic to science, which is an "objectively, critically, methodically deduced knowledge" (Marković 1994: 13), they always attempt to vindicate and legitimize themselves.

Academic Marković believed that legitimizing the conservative ideology is first realized thanks to anthropological pessimism. Namely, "man is allegedly a fragile, unstable, restless, but also cruel, greedy being" in the conservatives' view (Marković 2002: 216) and hence, the only good is that which was developing gradually and for a long time and which passed the test of history.

The next commonly used argument in favour of the need for conservatism, as Marković noticed, is the "thesis on the indefinite complexity of history" (Marković 2002: 216). This thesis proposes that there are hardly any rules and laws in history and that human behaviour is unpredictable, so projects of the future are uncertain and dubious. All this implies the conclusion that, owing to such an understanding of man and history, progress in human society is impossible and, by analogy, radicalisation of society should be avoided by all means.

The basis of every ideology consists in ideas seeking to materialize in practice. Depending on the nature of these ideas, ideologies of one society can be constructive or destructive. If one is aware

that every action and initiative is preceded by mental strain which consequently generates ideas, it becomes clear how significant their role may be in achieving certain political goals.

The world of ideas can be found even in Plato's *State* where he wrote that beyond the world of senses, there is a constant and eternal "world of ideas" (Platon 2005). According to Plato, ideas are timeless, unchangeable entities that represent models, i.e. ideals after which material things are fashioned. They are elements of ontological reality, pre-images according to which demiurge created the world. Everything that exists in the tangible world, according to Plato, firstly emerges based on an idea, from which comes a conclusion that all material things are just mere reflection of original ideas. As ideas do not reside in material world, they cannot be seen, but can onl

In Marković's view, ideas that form the conceptual framework of conservatism include: continuity, tradition, duty, discipline, inequality (Marković 2002: 215). Conservatism pays particular attention to tradition, however archaic, since it is "the only pledge of stability and sole barer of wisdom" (Marković 2002: 215).

Conservatism emerged as a reaction to liberalism and revolutionary social developments during the 18th century. It was precisely for these reasons that conservative ideology is often called reactionary – a term coined by revolutionaries. Although Berk was its main advocate, the 19th century successors of this idea were *Joseph de Maistre* and Louis de Bonald. Conservative ideology was upheld by the aristocracy's fear of losing their privileged position and material standing in society, so most of its representatives came from the ranks of aristocracy.

While it is true that conservatism emerged in reaction to liberalism, we can nonetheless observe some convergences "in support to market economy, struggle against communism or at present against Islamic fundamentalism and terrorism, and in general against everything that threatens the existing order in general" (Simeunović 2009: 122), while the main dividing line lies in that liberalism favours the individual principle in terms of social freedoms and rights, while in conservatism social position, as well as human rights, are subject to competences and origin as the basis for the establishment of the elitist principle.

Conservatives in essence seek to conserve the *status quo* as they fear of change that is unpredictable, new, untested, while the gre-

atest of all fears is their anxiety of losing the existing social status through change. Hence, it is not surprising that in all established societies, proponents of conservative spirit are dominant classes and elites, such as big bourgeoisie, feudal aristocracy, clerical class and apologetic intelligence. The reasons for someone's preference for conservative ideology, according to Mihailo Marković, might even be entirely personal (psychological and cultural factors), such as love for traditional values, true religiousness, romanticism in idealising the past, etc.

When it comes to politics, from the conservatives' point of view it is perceived as a technique (*techne*) passed down from one generation to the next generation of the ablest individuals, that is to say, aristocracy, in Mihailo Marković's view. Such a view of conservative politics was regarded by some theorists as traditionalism, which they elaborated as a special type of ideology (Tadić 1972).

For the purpose of this research, it is worth mentioning that Marković insisted on comparative analysis of conservatism vs. liberalism and radicalism. First, these are three fundamental orientations in contemporary political thought which can be conceptually delineated as types of thinking and action. In his book *Ethics and Politics*, Mihailo Marković points that "some elements of liberalism and conservatism might become conservative, just as conversely, in some situations, the insistence on continuity of the course of history, on the need to preserve specific traditions, on responsibility for the long-term impacts of our projects, on maintaining the social stability and harmony, might play a progressive role" (Marković 1994: 230). Here we see that Marković's approach to analysis of conservatism is not one-sided and that, despite dismissing specific segments of this ideology, there are principles that might be considered expedient for humanity.

In the comparison between liberalism, radicalism and conservatism, it is especially difficult to differentiate the relation between moderate conservatism and some variants of neoliberalism. Both options support free market economy, seeking to diminish the role of the welfare state, struggle against communism and insist on militarization of society. However, differences are evident because, while liberalism insists on the individual freedoms and rights, conservatism is immanently elitist and aristocratocentric. Marković believes that, conservatism experienced a kind of defeat from liberalism between 1830 and 1880, by accepting the concept of parliamentary

democracy. And while conservatism does not believe in the possibility of progress of humanity, liberalism eschews this thesis believing that a man can prosper due to his primordial desire for freedom and self-affirmation.

The differences between conservatism and radicalism are visible at a glance: "One tends to preserve, the other to change from the roots; one emphasises continuity, the other – discontinuity of history, one rejects the idea of social equality, the other prints it on their combat flags" (Marković 2002: 217). The very etymology of the names suggests a contradiction of the two concepts. While conservatism involves the preservation and safeguarding of the tried and tested traditional values, Latin word *radix,* whose primary meaning is root and radicalism its derived form, denotes changes from the root, qualifying the two phenomena as two opposed poles.

A specific problem arises in the analysis of hybrid phenomena, as in the case of radical conservatism, by which Marković means Nazism and fascism, which reinstate traditional social relations of superiority and subordination, blind loyalty and irrationality. Albeit radical or "root" changes, they are not emancipatory in character so as to allow the progress of society, but are based on authoritarianism and spiritual degradation of man. A further aggravating circumstance in defining fascism is the very perplexity of the author as to whether conservatism should be understood so widely as to include fascism as one of its extreme forms, or if it would be better to introduce a separate term for defining reactionary thought and practice. Marković saw fascism as an ideology which "uses the most brutal forms of violence in order to prevent further development of class conflicts and which aims to mobilize all social classes in order to fulfil extreme national and racial interests" (Marković 1994: 215).

Particularly dangerous for Marković is transforming radical thought into its total opposite, i.e. conservatism. An example for this is the case of revolutionaries who stop half-way and "instead of continuing their struggle for the full realisation of their own radical project, instead of seeing the conquered ground on the way to human liberation as the base for their further efforts, they falter, fixating themselves in the past, in the outdated past rituals, in duly paid credits, in mythologizing events and characters in the short history of their own movement" (Marković 2002: 218). Mihailo Marković criticized this kind of radical-conservative transformation because radical theory no longer conforms to practice. His conclusion

is that we should distinguish between the theory and practice of conservatism.

In Marković's view, there are different classifications of conservative ideologies in scientific literature. Thus, for example, we can find classical conservatism, conservative nationalism, conservative liberalism, conservative technocracy and conservative socialism (Tadić 2007: 415).

Classical conservatism, which emerges in reaction to the French revolution, guarded the achievements of the aristocratic society and criticized enlightenment. De Maistre, for example, asserted that "aristocracy is sovereign and ruling by its essence". Classical conservatism featured a strong preference for Christianity and religion in general, organizing society by organicistic principles.

Conservative nationalism placed nation, without which an individual could not exist, on the pedestal of its values. All nations aspired to states of their own and hence the idea of conquering or liberation wars in which every nation would gain the state they deserve, as a confirmation of its "maturity".

According to Tadić, conservative liberalism advocates classical moderation which can be found as early as with Aristotle. This strand in the conservative ideology stood for the so-called "enlightened conservatism" and philosophical scepticism.

Conservative technocratism is guided by the following intention: to reconcile progress and order. We encounter such ideas in the works of Auguste Comte, and we come accross some typical conservative-technocratic ideas in the anthropological works of Arnold Gehlen. In his perception, the basis of an orderly society lied in institutions, and changes were allowed only if serving as means for the "stabilizing" of society. In addition to „stabilization", he also mentioned the phenomenon of the "crystallization" of society, which can be defined as some kind of cultural integration. In the "technical state", there would be a depolitization of the individual, who would no longer be capable of independent decision-making, thus supporting the thesis on the incompatibility of democracy and technocracy.

Hybrid merging of conservatism and socialism could be treated as a separate strand in conservative ideology, known as conservative socialism. This form of conservative ideology is believed to owe its emergence to revisionism and reformism, though in our view, this strand is closer to socialist that to conservative ideology.

According to Haywood, conservative ideology ramifies in several directions, so we can distinguis authoritarian conservatism (including Nazism and fascism), paternalistic conservatism, libertarian conservatism and new right-wing, emerging in the 1970's.

There is no firmly set and established classification of conservatism in academic circles, but the fact remains that conservatism is one of the oldest ideologies, which has been adjusting to social trends, while keeping its fundamental characteristics. Knowing that conservatism is a "phoenix-ideology", constantly renewing itself, Marković framed his classification based on its historical development.

Academic Marković believed that the genesis of contemporary conservative thought could be divided into three phases of development. In the first phase at the beginning of the 19th century, conservative thought opposed bourgeois revolutions and aimed to preserve aristocratic socio-political systems, achieving minor successes in France and other parts of Europe. And while in the first phase the main enemy of conservatives was Jacobinism, in the second phase these were communism and socialism. This phase in the development of conservative thought involves right-wing liberalism, meaning the defence of *laissez-faire* capitalism from the workers' movement.

At the beginning on 20th century, conservatism had no answers to many questions, which rendered it weak and vulnerable. For example, it failed to supress the Russian revolution, but also to offer adequate solutions for the 1929 crisis. During that period, as Marković notes, conservatism is compromised due to cooperation with fascist movements, which only strengthened the position of the communist movement. But still, conservative thought in this phase shows a phoenix-like, incredible power of revival, so it finds new strength in opposing the heavy bureaucratic state internally and Soviet communism in the foreign policy arena.

During the third phase, starting in the 1970s, conservatism gained dominance in many countries. Above all, "Reganomics" in the United States and "Thatcherism" in Great Britain have a significant influence on the spreading of modern right-wing movement in the shape of neo-conservatism, implying a massive shift of the middle classes to the right. And while globally one part of conservatives aims to renew traditional capitalism, others aim to conserve "real socialism", which represents two different ideologies. Their similarities are militarism in the form of military interventions world-wide,

favouring technics and technology and irresponsibility for the quality of life of ordinary people. Both these types of contemporary conservatism, according to Mihailo Marković, resulted in a deep social crisis.

Conservative thought in Yugoslavia

As a left-winger and a patriot, academic Marković also examined the phenomenon of conservatism in our region, analysing the conservative thought in Yugoslavia very objectively, from the point of view of "critical social science". The phrase critical social science, as contained in his book *Ethics and Politics*, implies an approach "that subjects conservatism and other contemporary ideologies to criticism" (Marković 1994: 237). This is actually the method of contrasting scientific truth with the semi-true information in ideology. It is about the relation of truth and science on the one hand, and semi-truth (or even untruth) and ideology on the other.

Just after World War Two and the victory of Partisan revolutionary forces, not only conservatism but also "liberalism of non-compromised civil political organizations, intellectuals and entrepreneurs" (Marković 1994: 235). Along with embracing the Soviet model of the state system in general, Yugoslavia also embraced "the elements of the kind of conservatism that was already largely established in the Soviet Union under Stalin" (Marković 2002: 220). Despite considerable theoretical legacy of socialism (for example, Svetozar Marković's idea of self-governance), according to Marković, we turned to the Russian form of socio-political system.

Mihailo Marković even believes that the system of the communist Yugoslavia was conservative in many, due to the fact that it was elitist, past-oriented, regressive and obstructing its own further revolution. He criticized a vast conglomerate of projects in post-war Yugoslavia, three of them being extremely conservative in character. The best known project subjected to his critique is associated with the failure of implementation of the principles of the: 1965 *Economic reforms* and of the 1984 *Long-term program of economic stabilization*.[6]

In his theoretical work, but also in his public engagement, Mihailo Marković searched for a truly democratic alternative of

6 Essential idea of these froject was freeing of economy from politics and free operation of economic laws.

humanistic character to all forms of conservative ideas in our country. In this context, he made a discrepancy between radical long-term vision and direct system reform. For him, the most appropriate solution for our society is long-term – the model of radical democratic socialism.

Radical democracy, according to Marković, is characterized by the following elements (Marković, 1994: 236):

1. Self-governance in the entire public life
2. Direct democracy in microstructure and representative democracy in macrostructure
3. De-professionalization of political leaders
4. Political pluralism
5. Federalism as autonomy of certain parts
6. Respect and practice of all human rights
7. Free exercise of group and individual civil initiatives (provided that it does not pose a risk for other people).

Alhough society in Yugoslavia was unprepared for this model of democracy at the time, Mihailo Marković believed that critical social theory had reached the level that it was capable to further elaborate radical democracy free from conservative elements that hinder its development. While elaborating this idea further, Marković noted that transformation from conservative to radical, without being mediated by liberalisation, either calls for the use of violence or is unattainable. At this point, he signals the possibility of radical changes by means of the so-called "evolutionary reformism", but also recommends a series of measures that would eliminate conservative tendencies from the Yugoslavian society. Thus, Marković proposes the making of the free and critically-minded public and the creation of different forms of civil society with an autonomous stance to the political society. In addition, he proposes the elimination of corruption in politics and the creation of atmosphere in which national equality and national minorities' rights would be exercised.

It is easy to notice that the majority of these ideas are mainly liberal and not radical in character. Marković, indeed, invokes the liberal principles which are inherent in the present civilization in order to rise above the barbaric level. Those are: sovereignty of the people, national self-determination, market unity, civil rights etc.

The problem was that at the time, most of these liberal principles were considered radical.

All these ideas, however progressive and necessary for society, remain utopian, if their realisation is not aided, and so embodied, by the force of resistance. In the context of citizens' resistance, Mihailo Marković quotes the part of a letter written by Thomas Jefferson in 1787, in which he wrote: "What country can preserve its liberties if their rulers are not warned from time to time that their people preserved the spirit of resistance" (Marković 1994: 246).

It was in this very spirit of people's resistance that Mihailo Marković saw the only opportunity for the resolution of the social crisis, elimination of everything that is outdated and conservative, and for the embracement of new progressive ideas.

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Is nation state still possible? – Dissolution of State-Centric Order of Modernity –[2]

Abstract

In this paper we will attempt to show how modern nation-state model is jeopardized by current globalization trends to the extent that its institutions are being dissolved and fundamental functional framework is at risk. The dissipation of the state-centric order of Modernity has been advancing at an acute pace over the last few decades in the context of complex measures undertaken by neoliberal politics. The consequences of these processes are: challenged state sovereignty, institutional dissipation, destroyed economy base, threatened basic security, trend of identity re-coding, reduced spending on social welfare and the overall large-scale pauperization of citizens.

Key words: state, modernity, institutions, order, identity, globalization

Until recently, debates in theory and history of state revolved around discussions on the issue of the temporal location of its emergence in the Middle Ages, at least when it comes to the type of state that is close to our contemporary understanding of this political and legal entity (Vincent 2009: 26). Debates in those disciplines had

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not yet subsided when a new theoretical field opened, its focus on the processes of dissolution of the state-centric order of Modernity that has been unfolding before our very eyes. Hence an apparently radical formulation of the issue of its future sustainability in the title of this paper. It is our intention in this paper to prove the basic hypothesis that the state-centric order of modernity is dissolved by a series of planned and synchronized activities, the main consequence being the collapse of the political and legal institutions of the modern nation-state. Although during the 20th century, in V. Pavlović's view, the interest of political science shifted its focus from the state to some other political science topics such as interest group theories, political behavior research, new polyarchical pluralism, social movement theories, civil society and the like, theoretical debates in the last few decades rekindled the interest of political scientists in the issues of state, its position, functions and changes that it is exposed to. According to him, there are many reasons for such developments: the rise of ethnic nationalism in Europe associated with the post-Yugoslav and post-Soviet fragmentations and the creation of small new states and of their characteristic synthetic national identities, intense regionalization processes, creation of transnational links and supranational integration in the context of EU. Of course, there are also the "inevitable" processes of globalization and cosmopolitism that allowed for the creation of the so called post-sovereignty order and the rise of new institutionalism (Pavlović 2008; 10).

Although in this paper we will not engage in presenting a deeper historical retrospective of doctrinal contributions to understanding the nature and character of the state, at this point we will repeat some key theoretical contributions that have become virtually commonplace in political science. This is done for the purpose of achieving a better theoretical definition of the modern concept of statehood, whose current status we intend to review. This list of modern-age thinkers undeniably includes Niccolo Machiavelli, whose view of the state is centered on its *political power*, and Jean Bodin, who in his *concept of sovereignty* designated one of the state's most important properties. Thomas Hobbes) who was the first to raise the issue of *state security* concept, no doubt belongs to the list, too, as does John Locke, who laid the foundations of modern *state constitutionalism* and burgeois society as its ineluctable correlate. Not to be forgotten are also Jean Jack Rousseau) who insisted on the *Volonté Générale* concept and on direct democracy, and Hegel, who pointed

to the *rational state order* that - with its inner logic - overcomes the particularities and egoism of the bourgeois society and strives for its historical fulfillment as an altruistic order rounded in its legal and political universality. Karl Marx (Marx, 2010) is indispensable, too, with his marking of the *state`s class character* and domination of the ruling classes' and groups' particular interests... Max Weber viewed the state as a *political organization* with attributes of a *public institution* and bureaucracy as its fundamental feature. Then, there is also Alexis de Toquille, whose political thought points to the significance of the state in several important political domains: *theory of democracy, civil society*, *political culture* and also in the context of the transition from the old authoritarian regime to the democratic society. (*Ibid*.: 13)

Whatever tradition we rely upon in defining statehood, their smallest common denominator is that modern state must fulfill its three core functions to be recognized as such: first – the provision of internal and external security of the public order and of citizens; second - the availability of the necessary level of legitimate and functional representation; and third – facilitation of economic functionality, or, a satisfactory level of welfare of its citizens by providing enough goods and services for redistribution. For the successful fulfillment of these basic state functions, it must fulfill six important conditions (Stojanović, Djurić, 2012; 30):

- *Clear territorial definition as a source of sovereignty and legal absolute power within its constitutionally defined space.*
- *A transparent and guaranteed set of constitutional principles and rules with a clearly distinct national identity.*
- *A guaranteed body of citizens' uniform rights and liberties.*
- *Direct and unmediated (without the involvement of other, mediating communities) relations with other states and their institutions*
- *A clearly defined "one-nation" concept with the majority representation and decision-making.*
- *In case of unitary state, the equality of federal units.*

(see: Stojanović, Đurić 2012: 30)

The presented concept of modern state based on the neo-Weberian tradition is facing a significant crisis. Globalization processes (gradual decline of sovereignty and territory, de-industrialization, de-legitimization, pauperization, identity destruction etc.) caused

a radical imperilment and reduction of autonomy, challenging the main role of the state. According to S. Orlović, nation-states are not the only or main power-holders in the world. *Their sovereignty, their identity and institutional capability, their security functions, economic role and existential framework that it was providing for its citizens are systematically questioned.*

Globalist ideology's basic approach is the view that the traditional state concept is obsolete and should be replaced by new forms of transnational and regional associations and structures. The modern nation state is perceived as a key obstacle for the acceleration of globalization and the creation of financial, media, information and other markets as significant segments of its universal order. Theorists, as well as the political public are led to believe that national state is too small for big problems and yet too big for small ones. This has led to the problem of so called *national state management crisis*. In order to create a space for their influence and operation, the new transnational structures deliberately globalized the perceptions of some existing international issues (terrorism, organized crime, climate change, economic and financial crises etc.)

"Today, nation-states are less involved in creating the rules of the game and more in observing them. They implement decisiona taken by international organizations. Two interpretations of the same thing are possible. The first is Anthony Giddens' approach, that "citizens understand that politicians have limited power to resolve problems and, as a result, they lose their trust in the existing systems of government". The second is M. Pecujlic's view that "governments no longer feel responsibility towards citizens, but only toward international organizations". The authority of state is dissolving and transforming into new forms of supranational structures." (Orlović 2008; 109)

The dismantling and dissolution of their institutional capacities, states are faced with the impossibility of efficient functioning and sometimes with a complete obstruction of their capacity to solve national problems within the national scope. This concept resulted in the so-called delegitimization of both national institutions through the dismantling of their institutional and functional capacities, and of their national elites that, in the new circumstances and with destroyed institutions were not fully capable to respond to the needs of citizens and their accumulated existential problems. Moderators of globalization elites diverted citizens' justified discon-

tent to further pressure and profanation of nation-state institutions and the uncritical acceptance of solutions imposed from the outside influence of international organizations. All that was done under the guise of the alleged "nation-building and state-building". "The other external source of demands for institutions is political power that all states, state`s alliances or occupation forces exercise in their direct coordination with local authorities. That is what we call "building of the nation" (Fukuyama 2007: 49).

The state of citizens' complete disorientation was skillfully used to further devalue everything labeled as "national" since in reality, a sharp crisis in the functioning of national institutions was quite visible. This mistrust and discontent are – without any question - the most obvious indicator of people`s feelings for the state. In its extreme form, it is manifested in declining readiness to fight for it and therefore, states are increasingly abolishing their standing armies and justifying this by economic and functional reasons. (Creveld 2012: 398)

On the national level, political elites were increasingly losing their election legitimacy as, due to the dilapidated institutional capacities of the state (in which the nation-state also played a subordinate part), it was not in position to keep election campaign promises or perform its defined obligations in public policies. Thus, basis of legitimacy for their position of political authorities was quickly crumbling, creating the space and need to fill the vacuum of institutional inefficiency by the increasingly pronounced interventionism of international organizations of the global order of world power. "Financial markets are being de-nationalized with breathtaking speed, out of any state control. (…) It is quite unreasonable and immoral that daily speculations with amounts that exceed one billion dollars per day can "put out of the track" lives of millions of ordinary people and to force them to clash with states that used to represent interests of their population (Cirn 2003: 9). "Rollercoaster, named as "casino capitalism" keeps going on. It was under control - if there was any control at all - of IMF, itself also a non-government subject. (Creveld 2012: 379)

Unfolding together with the globalization tide were processes that jeopardized the *security functions of the state*. Since Thomas Hobbes' time, the security function of the state was given great prominence, along with the principle that the state that is not able to protect its own citizen lacked its prime reason for existence and deserves disobedience. "Providing security – which was since times

of Thomas Hobbes considered as most important function of the "corporation" called the state - will be sometimes given to the other entities. Some of them were territorial, but not sovereign - they will represent some form of union even larger than state itself; other, more numerous, were neither territorial nor sovereign." (Creveld 2012: 393) Adam Smith, in his liberal contemplations about the basic roles of a constitutional state underlined that, out of its three functional areas, security issues fulfilled two most important ones. The first one is the protection of citizens from violence and threat from other states and the second one is protection of citizens from violence and threat from other citizens, within the society. *Consistent with this statement, and considering the previously described serious crisis of state`s management caused by globalization processes, the security area will in future become decisive in terms of the survival of nation-state.*

"The phase of latent risky threats is coming to an end. The invisible threats are becoming visible." (Beck 2001: 81) It is no wonder that Urlich Beck labels modern society as the risk society, and that he sees security risks as a results of the permanent inability of state to provide quality protection for its citizens. The recent tragic events in Paris and Brussels caused by terrorist attacks give bleak evidence of these assertions. Also, "more and more citizens inside OECD countries claim that their security has been endangered by risks associated with the the deterioration of the natural aspects of life. An increasing number are affected by diseases that are caused by the environment (…). Therefore, more people in the OECD region feel insecure due to the rise in crime and heightened risks from environmental pollution". (Cirn 2003: 84) A particular space for the degradation of the state's security function was created by introducing private agencies and security corporations in this vital field. The fast expansion of the scope and type of services and the volume of business done by these corporations is crucial evidence to the extent of security risks faced by citizens and the state itself. This fundamental function without which there is no respectable state system is thus "placed at the disposal of entirely private goals".

The so-called "external risk" was also often used as a good excuse to constantly extend the role of the NATO Alliance which was otherwise rendered useless, and to seek additional reasons for preserving its existence, even if it is totally contrary to the international law and decisions pass by the UN as was the case with the 1999 aggression on the Federal Republic of Yugoslavia. Its allegedly

protective role was disputed even within some EU member-states. "As the French stated several times, the existence of NATO in its present form is obviously at odds with the continuation of European integrations it its traditionally most important segment – securing common defence from outside aggression." (Creveld 2012: 375) A large portion of the Serbian public perceives this issue correctly, regarding it harmful for national interests. "Serbian public has no illusions that NATO membership mostly signifies remodeling of its own security to suit the interests of its most powerful members, primarily the US, which also entails exposure to the pressures to join their military ventures that have nothing to do with Serbia's security or interests" (Gajic, 2015; 183). This is, in fact, a typical process of sovereignty transfer from the national level to NATO institutions. Widely recognized French geo-politician Henry de Grossouvre clearly points out that "one community is either the master of its own interests, or it vests them in another party that does not consider them vital" (Groussouvre 2014: 7).

New global actors and global power

Global power, personified in a *global governance* system, has generated the so called "new global actors" who have assumed the management and coordination role from the nation-state level to the level of international institutions and organizations, even if they are part of states belonging to the so called "core" or "inner circle" of the most developed states like the European Union itself, as their supranational-level organization. These new global actors are involved in the transfer of sovereignty for the benefit of transnational corporations, international financial organizations, global capital and international organizations, including IGOs. The entire process is vigorously promoted and advocated by global media networks, global and regional NGO`s and other similar organizations set up at the national levels as their local broadcasters. Ivan Krastev clearly proves that in his view that „international actors also contribute to the de-legitimization of national elites. They are not punishing elites because of their failed promises to voters, but rather encouraging them to continue to do so. The international community is punishing governments only for not acting upon their obligations to the IMF and it is not interested in establishing to what extend politicians fail to deliver on their promises to voters." (Orlović 2008: 111) This is occurring in the same context as the so-called economic

loss of sovereignty of states where "multinational corporations erode state sovereignty with the sheer mobility of their capital – by investing and withdrawing their capital, but foremost by the evasion of tax payment as the principal source of state income (…) Economic sovereignty of states is threatened by supranational organizations to which it delegated part of its sovereignty, accepting the „rules of the game", transnational financial institutions (IMF, World Bank) multinational corporations and globalization of the world market, as well as information and communication technologies (internet, satellite television)…"(Orlović 2008: 111).

An important consequence of these processes is the crisis of state`s readiness to keep tackling such problems. Institutionally damaged, functionally blocked, politically delegitimized, with recoded identity, legally deregulated, militarily decimated, economically impoverished, nation-state increasingly tends to concede its full capitulation. "Whatever those processes, they are almost always accompanied by decline of state`s readiness to assume responsibility for its economy, to provide social benefits, to educate the young generations, even to perform its function of citizen protection from terrorism and crime. At best, it shares these tasks with other organizations, or in the worst case scenario – it simply fails to do so". (Creveld 2012: 400)

Seen in a geopolitical context, these process are very efficient as they are part of the specific economic policy of guiding or coercing entire regions to "specialize" in poverty by means of planned impoverishment, de-industrialization and slowed modernization. They are part of a projected outcome of the *globalizing elites* in their effort to preserve their economically privileged position, to enable the unhindered and unjust appropriation of the work and resources of others, briefly, to preserve and strengthen their own monopoly position in the globalized structures of the financial, economic, media, military and geopolitical power. In other words, there is a kind of "geopolitics of poverty" – "a planned concept of control over the economic decline of regions and nations that are seen as *geopolitical opponents of great geopolitical powers* and their smaller allies. Conversely, there is a significant economic rise and accelerated economic development of states labeled as "pivot states", whose task is the regional preservation and promotion of the exiting geopolitical order of world power." (Despotović 2015: 39).

Figure 1 below simplify but distinctly presents the structure of contemporary international relations under the influence of global institutions strongly supported by world financial capital. It explains

how the new global actors are positioned as *key actors* in current international relations who create not only the new power order, but also dictate the dynamics of relations within that order: Meanwhile, modern nation-state is completely instrumentalized and serves the purpose of maintaining but also development of the global corporate sector even in the segment of its remaining institutional capacities.

This development, geared toward the domination of *corporatism,* was foreseen with astonishing precision and almost prophetically by Abraham Lincoln who said: "I see the coming of the crisis that scares me, and because of which I fear for the future of my country... Corporations are placed on the throne and the age of high level corruption is approaching, when those who represent the financial power of the country will try to prolong their rule using people`s prejudice until the whole fortune is accumulated in a few hands, and the republic is destroyed." (Grup 2012: 65)

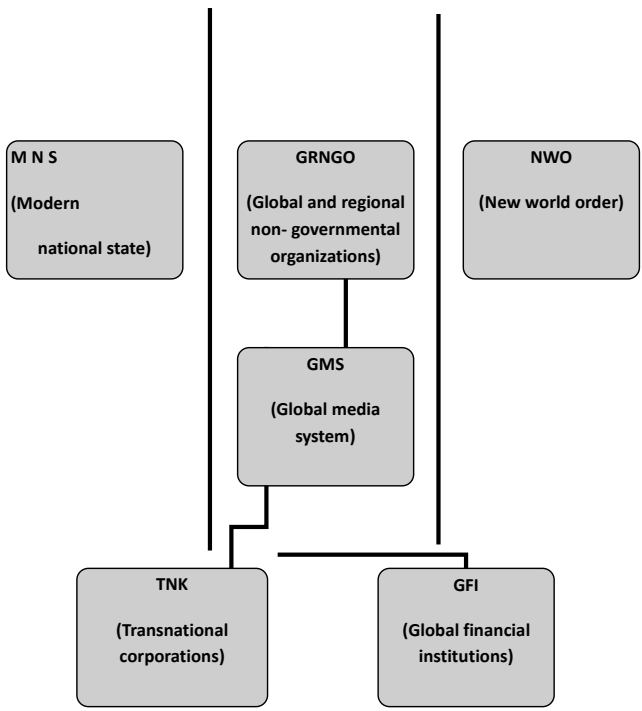

Figure 1. New Global Actors

The danger of *new corporate order* lies in the fact that today's corporations do not have any obligations toward the state or states on whose territory they operate. They not only evade tax payment or compliance with the legal system, but they are vigorously insisting on maximal deregulation. Corporations refuse to participate in the state's commitments towards its citizens in any way, even symbolic one. The *tragedy is all the more evident since citizens are the biggest victims of the trans-corporate sector, whether as their employees, consumers of their goods and services taxpayers or mostly as tax payers that bear the brunt of their insatiable appetites.* "In contrast to the states, multinational corporations didn`t have to protect their citizens, they didn't have to provide them with any welfare or to protect the border, they didn`t posses any sovereign territory to be concerned about. Free from all responsibilities and limitations, corporations could use economic opportunities wherever they arose…" (Creveld 2012: 337)

But the consequences of those actions for citizens were not just economic or financial. The global political experiment taking its place on a living, human tissue is very cruel in its malignant "creativity". "Neither the population nor individual citizens were spared from the effects of globalization. The population is exposed to many impacts, from ethnic cleansing, forced movements, stateless people, refugees, internally displaced persons or individuals with dual citizenships." (Orlović 2008: 117) If those megatrends continue, they will face even harder consequences in future. "They will be forced to find some new stronghold for their economic status, and, in some cases, even for their physical safety or they will probably have no future." (Creveld, 2012: 406) Even Jagdish Bhagwati, who wrote his book in defense of globalization, in the chapter dealing with multi-national corporations did not conceal their destructive impact of on the nation-states where they operate and on their citizens, especially if they are small, poor and politically poorly governed. "The danger that small countries will become the objects of large corporations are bigger among the smaller and poorer nations with weak government. We must face the fact that politicians and bureaucrats of those countries could be bribed by rich corporations that are making huge profits at the expense of their host-country." (Bhagwati 2008: 279).

For most citizens this is bad news: their future is dismaying, and the existential uncertainty increasingly certain. It is quite hard to fully understand or explain these trends in outside the context of

processes of advanced depopulation and, metaphorically and philosophically speaking - "dugouts" whose essence of being is reduced to the technical and technological sector's attachment and corporate slavery. "As was the case in the past, when empires fell and new feudal structures emerged - similar transition will also mean deprivation of freedom, because citizens will become users of services of mighty and wealthy individuals or - which is more possible in most cases – of various corporations. (Bhagwati 2008: 406)

States that opposed such a state of affairs were very soon confronted with various forms of political, economic and even military sanctions. Some of them were declared f*ailed* or *weak states*, and some of them even *renegade states*, the main reason for such "branding" being their refusal to obey to the existing international practice of unfair trade. That open and, for many countries, destructive policy drew its inspiration from the concept of "geopolitics of destruction". "Sometimes, the whole regions and pan-regions were exposed to the forces of "geopolitics of destruction". This doctrinal and ideological concept asserted itself at first in the shape of hidden "friendly globalization" and enforcement of the standards of neoliberal economic trade (robbery), and, in cases of refusal or even organized resistance, the state-actors which denied such "rules of the game" were subjected to exemplary punishment by means of aggressive political and economic sanctions and eventually, by acts of brutal military reprisals." (Despotović 2015": 65)

Conclusion

At the time when numerous challenges and crises (many of them deliberately generated) threaten to completely annul available state capacities for addressing them, new theoretical knowledge and political approach that stands for the renewal of the nation-state and its institutions is slowly but surely and bravely emerging. We believe that now is the right moment for a clearer insight into the increasingly distinct demand for *an efficient nation-state*. There is a rising awareness of the fact that it is not possible to overlook, avoid or ignore the national level of security (Gacinović 2012: 127).

Global challenges – no matter how radical or widespread across the world, cannot be efficiently resolved without the institutional capacities of the nation-state. "Nation-state is irreplaceable in

offering internal security, safety, a sense of belonging and identity… today maybe even more than before we need strong and efficient states with a limited scope of their necessary functions." (Orlović 2008: 116)

One of the more optimistic visions in this respect is David Held's, whose *model of cosmopolitan democracy* it trying to conciliate globalization trends with the functional importance of the modern state (Held 1997: 255). Considering all of the above-said, we are disinclined to believe that it is possible to achieve *viable and sustainable compromise* between globalization and the nation-state - and not because it is not achievable *per se,* but because of the knowledge and belief that most of the *new global actors* are not ready for any concessions or flinching. However, there is also the other side, that of the nation-state, *that can and must seek its measure of freedom and purpose in the space of legitimate struggle for the preservation of the democratic order of a modern nation-state and the welfare of its citizens.*

At the end of this paper, let us answer the question in its title: the nation-state is not only possible, but - today more indispensable than ever. The world has entered the phase of turbulent relations and is overwhelmed by multiple problems that are threatening to destroy not only the Westphalian state-centric order but also the basic existential framework of millions of citizens. Those destructive processes can only be confronted by an *interconnected order of nation-states* which is yet to be created, with internal re-democratization, re-institutionalization and re-legitimization of its primary functions as its important pre-requisites. Otherwise, nation-states will perish in the ruins of their past order of democracy and welfare transformed into a neo-corporate structure of global power and monopoly of private interests.

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Book review

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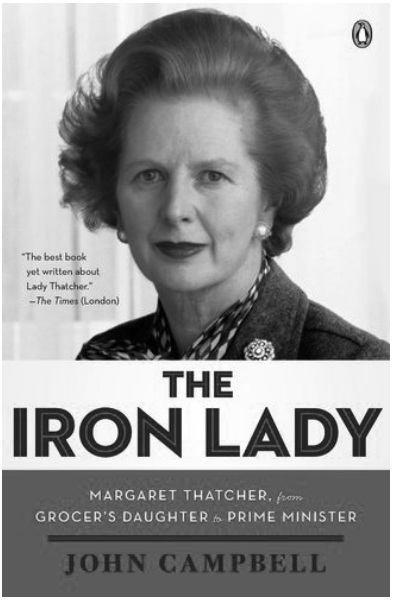
The iron lady[1]
John Campbell, The Iron Lady: Margaret Thatcher, from Grocer's Daughter to Prime Minister, Penguin Books, New York, 2011, p. 564.



Recent international context, including the security concerns regarding global wave of terrorism spurring from the prolonged Middle Eastern crises; uneasy relations between Russia and the West; successful EU withdrawal referendum in the United Kingdom ("Brexit"); and rising authoritarian tendencies in several established democracies – seemed to many as a sign of history repeating itself. A number of researchers, analysts, and commentators predicted the "Second Cold War", a new era of instability and conflict in international arena. The analogies of this kind are certainly appealing to the general public. Geopolitical reality is, however, more complex. Today's events

1 This review was created in the framework of the scientific project "Democratic and National Capacities of Political Institutions in the Process of International Integrations" (no. 179009), funded by the Ministry of Education, Science and Technological Development of the Republic of Serbia.

often have their roots in the complicated network of causes, motives and reasons, a number of them reaching from as far as the original Cold War period. Whatever the readers' approach is, the reviewed book is the perfect read for anyone wanting to know the events of the second half of 20th century, and assess their impact on our time. After all, the book is about a person who so strongly influenced the internal British and global political dynamics, that her legacy is still topical today, 26 years after retirement as Prime Minister.

John Campbell, a master of political biography genre, created this edition as an abridgement of the two previous, much larger volumes ("Margaret Thatcher: The Grocer's Daughter", published in 2000: and "Margaret Thatcher: The Iron Lady", from 2003 – totaling over 1550 pages); but nevertheless presented an important and comprehensive insight in Thatcher's life, from her small town upbringing to the positions of power, painting an image of a person, a party, a country and an epoch. Although the abridged version is more convenient to the general readership, the Campbell provided a mass of material and substance sufficient to stimulate the learned debate about the Thatcher's Era. The author did not hesitate to make a number of judgments of his own in the process: some of them are poignant, others generous, but most of them are well balanced and fair. Regardless of personal affinities, one cannot deny that Margaret Thatcher is one of the most influential women and at the same time most controversial figures in modern politics, whose impact on history is unquestionable.

Few of the most recognizable characteristics of Mrs. Thatcher, which at the same time made her so controversial, were acknowledged as the specific traits of her personality: inexhaustible energy, work ethics, high confidence and ruthless determination on one hand; but also her uncompromising style of politics, her stubborn Machiavellian reasoning and even her constant moralizing and self-righteousness, on the other. Campbell's approach in research and writing is paying much attention to these features and their influence on politics (and policies), evaluating the input of psychological state and personal values on decision making process, which is often neglected in modern political sciences – which is examining actors more as rational agents. Far from the claim that Mrs. Thatcher was not rational, that

part of her personality was well founded in the entrepreneurial heritage of her family and her own professional beginnings as the Oxford-educated chemical engineer. Other, more moralist side of her persona rose from conservative and Christian Methodist upbringing, which was heavily influenced by her father. Other influences, which Campbell masterfully observes, include her wartime experiences and memories, legal training, and personal relation and subsequent marriage with businessman Dennis Thatcher.

She also had a constant need for enemies, making all possible rivalries personal. Their name and form varied depending on the period: from trade unions and local self-governments, to Soviet Union, Irish Republican Army and European Community; from UK media to her former political allies. Some of these adversaries would subsequently cost her political career. Although Campbell does not say it explicitly, Thatcher poses as a perfect role model for populist leaders in today's democracies: neglecting the collective decision making, bypassing the formal procedures, dealing with rivals and allies on personal basis, and imposing her morals and worldview in an aggressive manner.

As we already underlined, this well researched book follows the "Iron Lady" (nickname originally coined as an insult by the Soviet media) from her early days, including education, through her first steps in politics as young parliament member and junior minister, to her unexpected rise to power as the successor of Edward Heath at the helm of Conservative party (1975), and finally, as United Kingdom's Prime Minister, after the electoral victory of 1979. But that was only the beginning! During her 11 years at the helm of the United Kingdom, Mrs. Thatcher created cultural, economic and political changes visible even today. She transformed UK into a society of popular capitalism – a "property-owning democracy" – unleashing the forces of market and entrepreneurship, breaking the back of the trade unions (most importantly, the miners) in the process. That made the Britain "governable" once more, having in mind that several governments before her were dismantled by aggressive trade union strikes and uprisings. Her political legacy included the displacement of the whole political spectrum to the right, steering not just her Conservatives, but also the Labor party in the ideology framework of free market capitalism. Thatcherism is even

today, three decades after her downfall, an established political ideology mimed all over the world.

Campbell praised the spirit of cooperation and her careful approach demonstrated in the first cabinet – both in internal politics, and also abroad. However, the results of reforms were slow to arrive, and social discontent grew larger with each new day. This all changed with the Falklands War. As John Campbell notes, this was her "finest hour", which also gave her the confidence boost needed to clash with all potential enemies, home and abroad – often with a high dose of moral grandeur and self-righteousness. Falklands had triple effect: it established Margaret Thatcher as an uncompromising political figure; it gave the government and their measures high support in general public, making the support for Thatcher almost a civil duty for every Britton; and it reestablished UK as global power. Campbell thoroughly examines Thatcher's special relations with US president Ronald Reagan, her uncompromising attitude toward Mikhail Gorbachev, and her uneasy relations with the European Community.

The European Community, as author stated, gradually evolved into her prime political opponent, fitting perfectly not just into compulsive need for enemies, but also in her moralist worldview emphasizing British exceptionalism over the rest of continent (stance debated in her own Conservative party and whole UK society even today, culminating with the "Brexit" referendum in June 2016). Campbell considers Europe to be one of the failures of her premiership (with immense consequences for Britain and the EU in the decades to come), finally causing her own downfall. Other causes for "defenestration" of 1990 included fatigue of voters with her hardheaded political style, several minor affairs connected with arms trade, and finally, a growing number of hostilities she created in her own party. Namely, a number of associates and former allies she once discarded, found their revenge in November 1990, siding with internal party opposition, and finally electing John Major as a new Conservative leader and Prime Minister.

It is ironic, as author himself notes, that Margaret Thatcher, who devoted almost entire political career to fighting Communism in all forms she perceived it (both as trade unions and Labour party at home, and as Soviet Union and its satellites abroad), was not in the position to relish the fruits of Cold War victory. But her hawkish and

dichotomical view on international relations continued, for example in an attitude toward the Yugoslav conflict, which she saw in clear (yet, from our perspective, erroneous) Cold War, East vs. West, frame.

Nevertheless, Thatcher attracted enormous global interest and is often cited as greatest UK prime minister since Winston Churchill. She transformed Conservative Party and modern United Kingdom, simultaneously planting the seeds of the division on the European issue, whose far-reaching consequences are yet to be observed. This actuality is just one of the many values of John Campbell's notable book, presenting an image of dynamic, dominant character, with all of its strengths and flaws; and remarkable legacy she created. Campbell style is fluent and simple, but sometimes burdened with redundant episodes and characters often unknown and irrelevant for foreign readers – an objection which is not diminishing the overall worth of the book, which can be useful not just to the political and social scientists examining the Cold War period or contemporary British society, but also to the general readership eager to find out more about an extraordinary period of history and an extraordinary person. After all, the new British Prime Minister, Conservative Theresa May, was faced with hundreds and hundreds of comparisons with Mrs. Thatcher in the first days of her rule – and will continue to be compared with the "Iron Lady" during the whole term as her premiership. This is just one of the indicators that Margaret Thatcher is a person whose place in history, for better or for worse, is secured.

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