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## Editorial Note

Dear Reader,

You have before you a special Politikon volume comprised of works presented at the Autumn Convention of the International Association of Political Science Students in Nijmegen, The Netherlands, in October 2014. We selected in total seven original papers that show the wide variety of topics presented at the Convention: from post-colonial perspectives on human rights, through freedom of speech issues in Slovakia, feminist theory's contribution to the construction of the concept of media literacy, to political cartoons in Ecuador. The papers also show the various stages through which a researcher's work goes, from first stages of exploration, later early discoveries, to final conclusions. We believe that you will find the present volume interesting and are looking forward to editing the next conference volume that will be launched after the 2015 IAPSS World Congress in London.

And now, for a good measure of top quality academic entertainment, onto the next page!

Your Editors

## **Rights from the Other Side of the Line: Postcolonial perspectives on human rights**

### **Owen Brown**

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### **Abstract**

*This paper discusses the theorising of human rights from a postcolonial perspective, a process that entails placing the dominant human rights discourse in its social and historical context, in order to highlight the ways in which human rights are discursively constructed and become naturalised. The definition of human rights is problematised through an examination of both the more traditional European viewpoints as voiced by such theorists as Hannah Arendt and Giorgio Agamben, and from the postcolonial perspectives of such writers as Boaventura de Sousa Santos, Vivienne Jabri as well as Siba N. Grovogui. While readjusting the conception of human rights to one that expands beyond the borders of Western tradition and legalism to a recognition of how human rights are embedded in culture, it is hoped that such an analysis will broaden our understanding of the various definitions of human rights.*

**Keywords:** Eurocentrism, Human Rights, International Law, Political Theory, Postcolonialism

## Introduction

Human rights as they have traditionally been viewed had their birth in the European Enlightenment, where they arose in the midst of philosophic discourse around what it meant to be human and what intrinsic rights were attached. This Enlightenment discourse accompanied the movement in Europe away from the feudal age and towards capitalism, a period in which the previously “bound” person began to explore the meaning of his<sup>1</sup> status as a “free” person under the law and to define the social contract, and all that it entailed, between himself and the state. This was a process that Hegel described as the beginning of “civil society.” Hegel’s terminology serves to underline how traditional rights theories made the connection between ethics, civilisation, and the rights and duties of the citizen.

Because this notion of human rights came from the Euro-American historical experience, particularly through the French and American Revolutions, there has been a tendency to see human rights as something to be encouraged by the West in the postcolonial world. There is, therefore, a risk of not recognising the practice and policies of human rights that do not fit the Euro-American template. Behind this tendency may be perceived a Eurocentric bias toward thinking of civilisation and modernity as arising in the West and bestowed upon the non-Western world.

In recent years, however, focus has shifted towards an examination of human rights practices and policies as they have arisen outside the West and apart from direct Western intervention and influence. In fact, as Grovogui (2011) points out, “the concept of human rights contains cultural and historical notions of the human, of human faculties, and of the requirements of public and private lives” (46). Postcolonial human rights theory puts particular emphasis on notions of the human and on what it means to be a political and a private subject under the law. An awareness of postcolonial perspectives on human rights makes the limitations of the traditional conception visible while at the same time demonstrating the need for a new conception, including an acknowledgement of both the ways in which Western-grounded views have ignored or denigrated other rights, beliefs, and practices, and the ways in which other cultures have formally and informally asserted their rights that can be extended to those peoples not originally included or those peoples restricted by traditional views.

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<sup>1</sup> In the context of this paper, the masculine pronoun is employed in situations where, as in the case of Enlightenment human rights discourse, the subject under discussion was the male only. In other cases, where recognition of both genders is required, both male and female pronouns will be employed.

The purpose of this paper is to problematise the definition of human rights through an examination of both the more traditional European viewpoints and the postcolonial perspectives while readjusting the conception of human rights to one that expands beyond the borders of Western tradition and legalism to a recognition of how human rights are embedded in culture. It is hoped that such an analysis will broaden our understanding of the various definitions of human rights. I will begin by discussing some of the philosophical underpinnings of Enlightenment views of man and the rights of man, as well as how these were manifested in the declarations arising from the French and American Revolutions of the late eighteenth century. This examination will be followed by an explanation of the postcolonial critique of traditional human rights theories and how this critique has resulted in alternate conceptions of human rights viewed through the post-colonial lens. To this end, the contributions of African, Caribbean, and South American theorists are essential in showing the problems and limitations of the traditional perspective and how this can be expanded through awareness of postcolonial perspectives on human rights.

### **Conventional Approaches to Human Rights**

In the West, human rights were set forth in a number of philosophical treatises that became the underpinnings of the French and American constitutions. Enlightenment political philosophers employed notions of reason and of ethics as rationally derived to attempt a definition of what it means to be a “man,” his inherent virtues and vices, and the constitutional principles needed to ensure his rights. According to thinkers like Hugo Grotius, John Locke, Jean-Jacques Rousseau, and Immanuel Kant, man was first subject to what they saw as natural law, which varied, depending on the philosophical viewpoint, from a state of benign innocence to one of competitive savagery. However, these philosophers claimed that civilisation required development from a state of nature to a state of civilisation through the recognition and adoption of universal rights (although in the case of Rousseau, this development was accompanied by regret for the loss of primordial innocence).

The rights that man as a citizen and as an individual could expect were to be formally voiced in the declarations and constitutions that arose from the French and American Revolutions. These constitutions, although closely related in time, arose from differing societies with differing historical processes, but both were concerned, explicitly and implicitly, with defining the nature of “man,” partly by a description of the “inhuman,” and thereby delineating what would be considered as outside such definitions. These definitions, Grovogui (2011) observes, were needed in order to give rights a formal, constitutional voice, setting out the government’s limits

of intrusion into both the private and the public sphere, as well as the expectations of aptitude and behaviour assigned to various groups. He comments that “These ideas, models, and views shaped the substance, essence, and nature of the legal dispositions imposed on citizens or required of individuals as a matter of constitutional justice” (48). The American Declaration of Independence, later expanded by the Bill of Rights, and the French Declaration of the Rights of Man and of the Citizen represented the Enlightenment covenants that were designed to guarantee such constitutional justice. Although they differed in the events that gave them birth, common to both conceptions of human rights were the belief that reason and morality were inextricably linked and that all that was considered “savage” in the individual came from “animal” instincts that must be suppressed.

As mentioned above, the constitutions that resulted from revolution were to set rules for both private and public morality as delineated in human rights, while at the same time recognising their separate spheres. The French, concerned with defining and establishing an ideal state that would replace the monarchy, put in place the Third Estate as the governing body, and through the Declaration of the Rights of Man and of the Citizen aimed to educate French citizens on their rights and duties to maintain public order. On the other hand, the American constitutional order aimed to foster the individual talents needed to build a new and thriving nation, with an emphasis on industry and science. Hence, the protection of freedom of speech and thought, as well as freedom from the intrusions of the state (private freedoms), are the matter of the First and Second Amendments. Such views also reflected the “scientific, moral, and legal significance” (Grovoqui 2011: 48) of the human, whose intellect was perfectible through education. Where the French and American views aligned was in confining their constitutions to the white citizen subject, excluding slaves from the protection of guaranteed rights and, hence, from the fully human. Thus, as Cowell (2014) observes, it is necessary to distinguish between Enlightenment “ideals” of human rights as voiced in their covenants, and their practices. In reality, writes Cowell, these practices “were principally focused on granting and securing liberties from the state for a minority of individuals” through promising rights to some by excluding others (for example, women, slaves, non-citizens) from these rights (264). This exclusion, as well as the methods employed to accomplish it, is one of the chief concerns of postcolonial human rights theorists, who see traditional human rights theory and its applications as viable only when the rights of certain groups have been set aside.

## Problematising Conventional Human Rights Perspectives

Such concerns, however, have also been voiced by those not considered to be postcolonial thinkers. The enshrining of human rights in such documents as the Declaration of the Rights of Man and of the Citizen as well as the Declaration of Independence and Bill of Rights has been recognised by modern theorists as both historically significant as well as limited and problematic. Two of the most important of these theorists are Hannah Arendt and Giorgio Agamben. Arendt was particularly concerned with the situation of refugees and the stateless created by war and with how human rights as they were currently formulated were powerless to relieve their plight. With its dependence on the duty of the sovereign state to guarantee rights, human rights policy did little to protect “human” rights when membership in a political community was a crucial requirement for protection. As James D. Ingram (2008) comments, “In practice, human rights ended up being rights people had after all their other rights had been taken away—in the end, no rights at all” (403). Human rights, therefore, were recognised more in their breach than in their observance. Arendt (1973) remarks on the “poignant irony” of “the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as ‘inalienable’ those human rights which are enjoyed only by the citizens of the most prosperous and civilized countries, and the situation of the rightless themselves” (279). Those most in need of having their rights ensured, she observes, are precisely those excluded through their statelessness from those rights.

Arendt (1963) was concerned with the question, as she herself put it, quoting Rousseau, “How to find a form of government which puts the law above man,” particularly since those who have themselves set out to do so must act *against* the government of the time. Rousseau answers his own question: to put the law above man through the creation of man-made laws, “one would actually need gods” (183-184). In the absence of gods, Arendt uses the example of the American Revolution to demonstrate how it is “possible to have a politics of foundation in a world devoid of traditional (foundational) guarantees of stability, legitimacy, and authority” (Honig 1991: 98). It was the science of politics, argues Arendt (1963), that allowed the American founding fathers to situate their constitution in absolute law that was aimed at protecting their civil liberties. What resulted, she claims, was a paradox: “It was precisely the revolutions...which drove the very ‘enlightened’ men of the eighteenth century to plead for some religious sanction at the very moment when they were about to emancipate the secular realm from the influences of the churches and to separate politics and religion once and for all” (185-186). Such a paradox would

underlie the “civilising” missions that were based on supposedly scientific and religious principles.

Some of Arendt’s statements, however, are problematic. In her comment in *The Origins of Totalitarianism* (1973) that refugees and concentration camp survivors are eager for national rights, which they trust more than natural rights because of “their realization that natural rights are granted even to savages,” she manages to contrast the “civilised” European whose civilisation has been stripped from him or her through the savagery of war with those whom she sees as having been denied civilisation and thus not fully human (300). As seen in her other writing, Arendt divides humanity into those with and those without ‘history,’ implicitly devaluing those outside of ‘history’ (300). Klausen (2010) observes that such a division is a problematic one in terms of recognition of the development of human rights awareness if such awareness is dependent on a particular definition of culture and civilisation: Arendt, “simultaneously includes primitives within humanity qua humankind but excludes them from humanity qua historically developed faculty of culture” (395). Such normative conceptions of rights thus betray their Eurocentric origins. Klausen (2010) argues that the “antiprimitivism” of Arendt’s theories “will need to be squarely confronted by political theorists” (397) if the currently stateless, the indigenous peoples, and those whose development of rights awareness has not followed the Euro-American path are not to be misjudged and in some cases mistreated by neoliberal governance systems.

Among the most controversial and significant critiques of conventional understandings of human rights is that of Giorgio Agamben, whose name is often paired with that of Arendt as two theorists whose notions have expanded perspectives on human rights. Agamben is in the forefront of a number of critics who see human rights as an excuse for the exercise of power in the form of interventions into the ‘developing,’ largely formerly colonised world. In some ways, Agamben’s critique of human rights echoes that of Arendt, in that both perceive that rights as they are currently constituted and practiced are “biopolitical” rights, that is, rights that derive from being born within a particular state. However, it is Agamben’s argument that the very enshrining of human rights allows hegemonic exercise of sovereignty against the “human.” His theory of the “biopolitical” is based in part on Foucault’s theory of the emergence of “biopower” in the modern age, but whereas Foucault sees biopower as differing from sovereign power, Agamben sees its roots as more archaic and as, in fact, allowing sovereign states and absolute monarchies to exercise their control over the human body. This phenomenon, he suggests, enables such eighteenth-century declarations as the Declaration of the Rights of Man

and of the Citizen, to conflate “man” with “citizen,” and the natural with the political, to the extent that every aspect of life is under the control of the sovereign power (1998: 125).

According to Agamben, because the rights subject’s “bare life” is ultimately the ground on which rights are inscribed, this life is constantly under threat by the withdrawal of rights and/or the suspension of the constitutional order. Agamben takes the distinctions made by Arendt via Aristotle between biological life or *zoe* and political life or *bios* to introduce a third term, “bare life” (1998: 11). Whereas Arendt sees the development of the public, political sphere as having arisen from the Enlightenment, Agamben goes a step further and posits that with the emergence of the modern “biopolitical” state, the lines between public and private have become blurred to the extent that it is the human body, not human actions nor human culture, that is the focus of granting or denying rights. He writes in his critique of Hobbes’s notion of the “state of nature” that bare life “is not simply natural reproductive life, the *zoe* of the Greeks, or *bios*” but rather “a zone of indistinction and continuous transition between man and beast” (1998: 109). In this “zone of indistinction,” the human is at the command and mercy of the sovereign state, becoming what Agamben calls *homo sacer* or “sacred man,” whose persecution or execution is permissible because he exists outside the legal order of rights. *Homo sacer* may be a “sacrificial offering” whose suffering is permitted for the good of the larger society, or he may in fact be considered as dispensable because his life is of little or no value. Therefore, writes Agamben, modern treatments of human rights must grapple with the problem of belonging or lack of belonging to the dominant political community.

Hence, a modern focus on human rights involves “bearing witness to the human,” according to Lechte and Newman’s (2012) comparison of Arendt and Agamben, and ultimately “rethinking the human” whose nature transcends both biology and membership in the polity of the nation-state. Whereas Arendt argued that the rights of the human could only be protected within the political sphere, and that, therefore, the stateless and other oppressed groups must be bestowed citizenship within the political community, for Agamben “being human” means ultimately existing beyond the confines of the state, outside the designation of “citizen” as designated in the French Declaration of the Rights of Man and of the Citizen, for example, which states that men “are born and remain equal.” Agamben observes of the inclusion of “birth” within human rights that it has inscribed a potentially dangerous connection between nation, citizenship, and biology. He writes that the modern citizen is “a two-faced being, the bearer both of subjection to sovereign power and of individual liberties” (1998: 125). In the end, Agamben highlights the problematic of Arendt’s theory that it is political community that bestows “human” rights; as

Arendt (1973) comments, “Only the loss of a polity itself expels [someone] from humanity” (177). Therefore, not belonging to such a community allows the coloniser, for example, to think of the colonised as not fully human. However, whereas Agamben argues that given such tendencies there is no possibility of formulating a new conception of human rights postcolonial theory sees such a denial as itself arising from an implicit assumption that the Western “myths” of human rights are the only possible formulation. Postcolonial theory puts its emphasis on the very “bare life” of the human as at the basis of a new rights theory.

### **Postcolonial Theories**

Postcolonial theories had their roots during the period of late colonialism, specifically arising from the work of Frantz Fanon, whose *Black Skin, White Masks* (2008), first published in 1952, has been called “the first book to investigate the psychology of colonialism.” His theories were later expanded by such writers as Ashis Nandy, Ngũgĩ wa Thiong’o, and other theorists of colonial subjectivity. Fanon’s treatise foregrounds the idea of “dignity” and the psychic damage that ensues when the black “subject” attempts to adhere to the definition of “man” voiced by the white oppressor. When that definition serves not only to “de-humanise” but also to exclude the subject from the rights accorded to the European coloniser, Fanon calls the inevitable internalisation of inferiority an “epidermalization” that leads to the collapse of the ego and self-esteem as his emulation of the white man will never lead to his acceptance as “white.” Therefore, say postcolonial theorists, evaluating the ability of the colonised to adhere to human rights ideals which they had no part in formulating represents yet another dehumanisation of the colonial subject and a continuation of colonisation in the postcolonial world. Similarly, the “idealized” black man is also a white construct that has grown from white guilt, the guilt arising from European humanists attempting to explain and excuse the colonisation of Africa, the Caribbean, and Latin America. The history of the non-West, writes Fanon, is created by the West through the “absence” of that history; it is visible only in the effects it has had on the colonising states and in the mythologising depictions of exotic “savageries” such as cannibalism. The inferiority of the black is then inscribed in the “first chapter of history that the others have compiled for me, the foundation of cannibalism has been made eminently plain in order that I may not lose sight of it” (91). The “chapter of history” compiled for the subject of colonialism, say postcolonial theorists, assumes that the concept of human rights is one developed in the West and then bestowed on the colonised and formerly colonised.

Although they owe a debt to the work of Fanon and other early thinkers on decolonisation, postcolonial theories as formally recognised initially developed from considerations of how the

colonial/‘oriental’ subject of colonialism was depicted in literature and art. Postcolonial theories, however, cannot be contained within one brief characterisation. Just as postcolonialism also recognises that the colonial experience varies from continent to continent, and from colony to colony, as well as over the period of colonisation and beyond, so too postcolonialism as a theory is not a discrete set of principles. Rather, it is an organic and varied approach to examining and explaining the effects of colonialism on both the colonised and the coloniser, and it has continued to develop and expand since the formal end of colonisation. In fact, many postcolonial theorists are quick to point out that rather than there being three distinct periods of precolonialism, colonialism, and postcolonialism, the postcolonial does not begin simply when a colony attains independence, nor does colonialism end at that moment, since colonialism has acted as a disruptor to the historical experience, identity, and memory of the formerly colonised. According to postcolonial theory, then, mainly European philosophers and thinkers have produced theories embracing the universal, the entirety of humankind in, as Dipesh Chakrabarty (2000) remarks, “relative, and sometimes absolute, ignorance of the majority of humankind—that is, those living in non-Western cultures” (29). The fact that those cultures have had their own theories and systems of rights suited to their own conditions and beliefs has also largely escaped notice. Among the universal theories produced in the “university” that Chakrabarty identifies as Europe are those setting out universal human rights and the ways they are embedded and expressed. This “European” version of “history” is inextricably linked, then, to “the modernizing narrative(s) of citizenship, bourgeois public and private, and the nation-state” (Chakrabarty 2000: 41). Hence, the colonial subjects come to see themselves as they are inscribed by the colonisers.

The colonised may be doubly inscribed with the projections of the coloniser when the “subaltern” is a woman, ironically the frequent subject of modern human rights activism. In her famous and seminal essay, “Can the Subaltern Speak,” Gayatri Spivak (2010) criticises the “masculine-imperialist” ideology that gives rise to the “masculine-imperialist rescue mission” (48), a rescue mission that some postcolonial rights theorists assign to Western human rights law. Because the colonised woman is denied a voice, first by her gender and second through her very existence as a colonised Other, a history and a culture are created and interpreted for her, thus obstructing the possibility of any alternative histories. Spivak frames her critique around an analysis of “Intellectuals and Power,” a conversation between Gilles Deleuze and Michel Foucault. Deleuze and Foucault, she writes, are “doubly incapacitated” and hence unable to recognise the nonuniversality of the Western experience and position, as well as the role played by gender in being denied a voice and hence access to power (23). Postcolonial theory aims to

emancipate and empower these and other voiceless subjects who have been marginalised by rights policies devised by the most powerful.

A somewhat similar depiction of the silencing of the colonised is developed by the sociologist Boaventura de Sousa Santos (2007), whose theory of abyssal thinking describes “a system of visible and invisible distinctions,” with the invisible being the basis upon which the visible stands (1). Social reality, writes Santos, is divided into two realms, “the realm of ‘this side of the line’ and the realm of ‘the other side of the line’” (1). Abyssal thinking, according to Santos, is distinguished by the fact that the co-existence, the recognition in reality of both sides of the line, is impossible. In socio-political terms, the two sides of the line can be characterised as the dichotomy between “metropolitan societies and colonial territories,” and the “tension between social regulation and social emancipation” (2). In the making of modern knowledge and modern legal systems, then, whole experiences (the experiences of those on the other side of the line, that is, the “colonial zone”) are discarded, made invisible. In fact, according to Santos, “it was the global legal line separating the Old World from the New World that made possible the emergence of modern law and, in particular, of modern international law in the Old World, on this side of the line” (5). Modern international law, of course, is most apparent in the creation and ratifying of universal declarations of rights; these “universal” covenants, however, decided upon in the West and the global North, are then applied to the global South, the largely invisible “other side of the line.”

### **Postcolonial Approaches to Human Rights**

It cannot be denied that Enlightenment ideas of “human” and of “rights” also served to legitimise colonialism. Beth Lyon (2002) has remarked upon postcolonial theory’s attentiveness to ‘a history still in process,’ the effects of history as they are played out in the present in the postcolonial world (34). As postcolonial theorists have observed, at the same time as Enlightenment constitutionalism was ensuring rights to European and American citizens, it was denying them to non-Europeans, in particular those whom they had colonised. Santos observes that the legal system established in Enlightenment era Europe through the writing of rights covenants established a “tension between regulation and emancipation” whereby human freedom was protected through legal guarantees. However, on “the other side of the line,” denial of rights was accomplished through the “tension between appropriation and violence” (9). Linked to this denial were the period’s beliefs about civilisation and education, and the need to “develop” these qualities in the colonised subject. However, in reality, these beliefs were used to postpone indefinitely the endowment of rights. This postponement was accomplished,

according to Vivienne Jabri (2013), by emphasising “the dichotomy of modernity and tradition, civilization and barbarism, freedom and unfreedom,” the former in each binary perceived as characteristic of the liberal self whose “global reach” meant that any notion of rights would reproduce a “racialised, culturalist, as well as gendered” postcolonial discourse (3). Jabri remarks on the tendency for “Western” theorists to attribute such tropes as “‘self-determination’, ‘free expression’, ‘progress’ and ‘scientific’ knowledge, the primacy of mathematical thinking, contractual obligation, satire, and critique” to specifically European roots and to fail to recognise their expression in non-European contexts (32). Hence, the assertion of rights over such concepts is also not recognised except in European contexts or when they follow the pattern already established in the West.

It is also necessary to distinguish between the imposition of international law coming largely from the West and the notion of human rights. While the European ideal of rights given at birth and guaranteed by law was elaborated on and developed during the Enlightenment, this fact should not be taken to mean that prior to this time and outside of Europe the idea of rights did not have a hold. In recent years, postcolonial thinkers have looked outside of traditional human rights history to report on the awareness of rights outside of the West as revealed both in cultural and social practices and in formal documents. Nevertheless, conventional rights covenants still dominate social and political analysis; as Fitzpatrick and Darien-Smith (1999) argue, human rights have become an “instrument of occidental assertion” whereby the West judges the level of “civilisation” in the developing world through its adherence to Western-determined human rights standards (5). In addition, the signing of universal human rights declarations has not been without controversy. Universal covenants, although they may not have been consciously designed to do so, have tended to perpetuate inequalities that were introduced in colonial times. Nevertheless, theorists such as Siba N. Grovogui (2006, 2011) have pointed out that the colonised themselves had their own notions of the rights to be accorded to the human, and embedded these notions in their own revolutionary principles and in the constitutions that followed upon attaining independence. In addition, Gayatri Spivak (2010) observes that the idea of universal human rights as currently enshrined in international law has arisen from the period of turbulence and global economic restructuring contingent on independence from colonialism. Therefore, as currently practiced, the application of international law may be seen as the continuing of an imperialist project.

Just as the French and American Revolutions inscribed “the rights of man and of the citizen” and “the rights of the individual” into their constitutional documents, so too in modern times

the period of decolonisation and independence has been one in which a spotlight has been shone on the presence or absence of human rights practices. In fact, Jabri (2013) employs Hannah Arendt's notion of the "founding moment" that foregrounds the "declaration of independence" to show how this moment in part constitutes the nature of the postcolonial subject as a subject of politics and all that it implies in terms of rights and duties, or of their denial (67-68). Thus, a postcolonial approach to human rights must also include an analysis of how the postcolonial subject's situatedness in time (history) and space (the nation-state) impinges on his or her access to political and international rights. At the same time, in late modernity, states and international institutions have at their disposal the means to enforce their interpretations of human rights onto those societies that they wish to render "civilised" and "governable" in terms of their human rights practices.

As mentioned above, traditional human rights proponents see the notion of universal rights as arising from the period of revolution in Europe and in America in the eighteenth century. These rights would have to be encouraged in the newly independent former colonies of Africa, Asia, and the Americas. According to Grovogui (2011), implicit in the trust that European man was possessed of rationality and morality that would eventually lead to an enshrining of the justice of rights in legislation, was that "the reverse common sense applied to slaves in revolt in any country" (55). However, postcolonial theory sees the desire for and the establishment of rights policies as a grassroots growth (just as had been the case in France and America), coming from the oppressed themselves, rather than bestowed by their former oppressors. In fact, just as in the case of the French and American assertions of rights, arising from their perception of oppression by their rulers, so too the awareness of and assertion of the rights of the colonised and formerly colonised, to be authentic, must come from the oppressed themselves, rather than being bestowed or indeed theorised by the colonisers. As Mahmood Mamdani (1990) observes, "Without the experience of sickness, there can be no idea of health. And without the fact of oppression, there can be no practice of resistance and no notion of rights" (359). Mamdani refers to Paul Hountondji's observation that one can only "make human rights an invention of Western culture" if one ignores the fact that the oppressed have the right to their own experience of oppression and the right to express their indignation at the flouting of their own rights (359). The recognition of this fact is central to postcolonial human rights theorising.

A significant example is provided by Siba N. Grovogui (2011), who in his essay "To the Orphaned, Dispossessed, and Illegitimate Children: Human Rights Beyond Republican and Liberal Traditions" analyses how Haitian slaves of the eighteenth century perceived human rights

when compared to the constitutional enshrining of such rights in the French and American Revolutions. He calls “myopic” the traditional view of a straight line development from civil and political rights to economic and cultural rights as this view “cannot be aptly grafted onto other traditions of human value” (45). The common thread of the condition of slavery runs through all three revolutionary experiences—that of France, of the United States, and of Haiti—but whereas the drafters of the French and American covenants were members of the white political elite, the drafters of the Haitian constitution were themselves members of the very group excluded from the former two documents. The dichotomy between the bestowers and the recipients of rights, and the primacy given to the recipients in terms of their ability to determine their own human rights paths, is one that is emphasised in postcolonial thinking.

Grovogui (2011) distinguishes between the notions of the subject of rights in these three declarations. For the French, the subject was the citizen, and the rules concerned the relationships between citizens and between the citizen and the government, with the rights that ensued from this relationship. In the American States, the individualistic subject wished to protect his rights from a government that he perceived as potentially encroaching on them. In both, the desire was to afford protection against government oppression. However, because in Haiti the slave had never enjoyed constitutional protection, the purpose of the constitution was to moralise what it meant to be human and to ensure what was needed to sustain life. Hence, it included within its provisions the illegitimate child, the orphan, the divorced and abandoned woman, and others normally excluded within its constitutional order. In the preamble to the Haitian Constitution, it is stated that the document is “the free spontaneous and invariable expression of our hearts, and the general will of our constituents” (as cited in Grovogui 2011: 54). In contrast to the Enlightenment mistrust of unrestrained emotion as characteristic of those still living in a state of nature and needing to be educated to a state of reason, Haitian human rights relied on what Grovogui (2006) has elsewhere called “the politics of the gut.” Furthermore, in a strikingly progressive move, the Constitution stated that all beneath its protection, of whatever race, would be considered to be Black: “the Haytians [sic] shall hence forward be known only by the generic appellation of Blacks,” thus turning a term of exclusion into one of inclusion (as cited in Grovogui 2011: 57). In addition, because as slaves the Haitians had been victims of the slaveholders’ intrusions into their private lives, the Constitution ruled that marriage and divorce were given legal protection and provided a set of laws many of which were to be judged on individual circumstances, but not without due legal process. One of these laws stated that “The house of every citizen is an inviolable asylum” (as cited in Grovogui 2011: 59). Adding awareness of the Haitian Constitution to the already widely studied French and

American constitutional orders can demonstrate that, while the delineation of human rights in the West played a significant role in its history and indeed in the history of the world, Western human rights theory alone cannot account for the ways in which rights have been perceived and expressed globally.

Also central to postcolonial notions of human rights is the recognition that the contents of a notion of human rights are not unchanging, but are rather subject to both historical and social contexts. In Africa, for example, post-war independence took place against the background of rivalry between the two main former colonial powers, France and Britain, for continued access to the continent's resources, and of the entrance of the United States as it sought to block Soviet influence on the newly independent states. One can see from this example the continued involvement of the West in the governance practices, and specifically the exercise of human rights policy, of the newly independent African states. Despite the African state's own history of colonisation and of the drive for independence, the West has inserted itself and its experience into African human rights policies and practices. Behind the issue of African human rights, therefore, as pointed out by Mamdani (1990), "there stand different and contradictory forces, both external and internal" (362), the most significant external force or example being that of the United States.

The promise of rights, thus, became a weapon of the Cold War. Because African "revolution" ultimately threatened the stability upon which the French, British, and American powers relied and allowed inroads for Soviet influence, writes Mamdani (1990), the former colonial powers offered the solution of "rights": "The historical significance of this should be clear if we realise that power is to popular sovereignty as rights is to the rule of law. It was thus a rearguard action that sought to displace the discourse of 'revolution' with that of 'reform'" (363). Hence, in Africa, as elsewhere in the postcolonial states, human rights represents a site of contestation, whereby in some states the guarantee of rights may represent an attempt to avert revolution, and in others the battle for reform may represent the beginning of the revolution itself. While it is not possible to generalise the attitudes toward human rights held by the peoples of such a large continent, the perception of certain patterns of needs not addressed by the universalist and individualist emphasis of Western-engendered human rights covenants has arisen in the last four decades. There has developed a critique of Western human rights concepts in favour of approaches to human rights rooted in African cultural practices of communalism and egalitarianism. The result has been the drafting of the Banjul Charter of Human and Peoples' Rights, which was agreed on in 1981 and implemented in 1986. This was followed in 1987 by

the establishment of the African Commission on Human and Peoples' Rights. The title of the Charter itself indicates the ways in which it differs from other universal treaties on human rights. In addition to protecting the "human" rights of the individual African, it also refers to collective "peoples" rights, as well as both collective and individual duties. Sirkku K. Hellsten (2004) has suggested that the Banjul Charter sees as inextricably linked both individual and collective rights, as well as the duties which must be fulfilled in order to realise them. The Banjul Charter, however, has met its share of criticism from a number of international lawyers, human rights scholars, and philosophers, who take exception to what they call the relativist nature of collectivist values and practices. The result has been a broadening of the gap between Western and African approaches to human rights along with a valorisation of individualist (Western) above collectivist (African) approaches.

The example of Tanzania and its move from the *Ujamaa* or Brotherhood politics of its first leader during independence, Julius Nyerere, to the politics of market democracy can demonstrate the clash of traditional and postcolonial approaches to human rights. As a socialist, Nyerere argued that *Ujamaa* (Brotherhood or Familyhood Socialism) represented the communalist and egalitarian ideals of precolonial Africa that had been lost under colonialism and foreign influence and that must now be reclaimed. In such a system, there was no need for the amassing of wealth as the ideal of mutual self-reliance would be pursued. However, when the socialist beginnings of the state of Tanzania gave way to a pluralistic democratic government which pursued investment in development, it was seen that many marginalised groups had been left outside the benefits of such development. It had been assumed, writes Hellsten (2004), that "as elsewhere in Africa, change with the political system [would not] require a change in fundamental human values, since the values are found in the *communalist* history of Africa" (73). Such beliefs rest on what Ingram (2008) calls the "horizontal effect of human rights" (406), the notion that not only must governments guarantee rights, but that the individuals themselves are responsible for ensuring the rights of those around them.

As a result of such beliefs, the protection of individual rights in Tanzania has clashed with the premises of the African Charter, particularly where protection of communal rights is perceived to conflict with individual rights. In fact, the first Tanzanian constitution did not even include a Bill of Rights, justifying its absence in the return to traditional collectivist cultural practices that needed no legal grounding. Rights protection was seen to be a Western construct employed in the past to justify colonialism and in the present to block development goals. However, even with the adoption of a Bill of Rights within the Constitution and the signing on to the African

Charter of Rights, the violation of individual rights can be and has been legally justified through an appeal to the public good. In addition, there are contradictions between the Bill of Rights and other parts of the Constitution; for example, Tanzania's Preventive Detention Act allows for the president's detaining and indefinite holding of any person perceived to be dangerous to the public good. These contradictions have led to criticism by traditional human rights and legal scholars who see in such conflicts justification for the enforced (if necessary) imposition of universal human rights on the postcolonial world.

On the other hand, such criticism also reveals the value of postcolonial approaches to human rights that see rights as ideally arising organically from the social and historical realities of the postcolonial state. In the case of Tanzania, for example, it would appear that colonisation and subsequent decolonisation made return to a pre-colonisation rights system, although idealised, difficult if not impossible, thereby necessitating, in the eyes of the West, human rights intervention. In this sense, the imposition of international law and neoliberal values may be seen as displacing the local rights system and thereby threatening the independence of the postcolonial state (Chimni 2006: 3). It does so by ignoring the uneven development of these states, lumping them together under the label of "Third World" or "developing states," thus constituting their citizens as the Other in need of rights to be encouraged or bestowed by the "First World," and making them vulnerable to hegemonic domination through the demands of adherence to international law. According to Chimni (2006), it is only through collective action and collective struggle against such hegemony that postcolonial states can protect the rights of their peoples despite economic and gender differences (6-7). In such situations, it is not universal human rights bestowed by the West that are appealed to, but the rights to autonomous communitarian decision-making.

This situation is particularly the case with property rights, which represented one of the primary threads in Enlightenment rights philosophy and declarations, as these statements were intended to be expressions of what could be expected both by and of those who considered themselves to be civilised. One crucial factor in moving from a state of nature to that of civilisation, Enlightenment thinkers argued, was the ability to keep one's property safe from the depredations of unrestrained monarchs. The establishment and protection of property rights were seen as fundamental to progress, and hence when land previously communally shared was privatised through colonisation, this step was described as key to the establishment of civilisation in the colonised world. Kant, for example, characterised property ownership as a postulate of pure reason and, hence, an inevitable step on the path to civilisation. Therefore, property became

identified as a legal concept, and as such was granted legal protection “as a natural, sacred, and inviolable right” (Schacherreiter 2014: 231) in such documents as the 1789 Declaration of the Rights of Man and of the Citizen. Yet, as Judith Schacherreiter (2014) argues, “There are additional troubling dimensions to ethnocentricity and universalism which go beyond the mere fact of human rights being embedded in ‘Western’ concepts” (227). A determinant of the achieving of modernity and the move away from the feudal past was the dividing up of the commons into privately held property. Hence, the communal holding of land that had been characteristic in Europe before capitalism and in the Americas before the coming of the Europeans was dismissed as primitive and in need of reform.

The indigenous peoples of the Americas were in the eyes of the colonists, then, and (postcolonial theorists would argue) in the eyes of the Enlightenment thinkers who provided their justification, “not yet fully developed humans.” They were the Other considered necessary for the civilised Europeans to define themselves against and for these same Europeans to bring into the modern period and thus bestow “humanness” upon them. As Schacherreiter (2014) observes, rather than being approved as another form of legal property ownership, “The common usage of land is not recognized as an autonomous legal form of land tenancy, but reduced to a ‘not yet property’, a space without law and cultivation. It represents the state of nature which is characterized by the absence of law in general and property rights in particular” (231). Therefore, those who hold traditionally communitarian values, those Others who, in the words of Santos exist on “the other side of the line” of civilisation, tend towards invisibility when rights policy is set. In fact, following Santos’ line of thinking, that there is no possibility of coexistence of both sides of the line, the modern can only prevail through causing the vanishing of the traditional. Beyond “this side of the line,” that is, colonially-sponsored modernity, “there is only nonexistence, invisibility, non-dialectical absence” (Santos 2007: 1-2).

In the Americas, and particularly in Mexico, this attitude resulted in the colonial dispossession of land that had been previously held by the indigenous populations, and the practice was continued by Mexican governments following independence as a sign that Mexico had moved away from its “barbarous” past and could take its place among modern, developed nations. Throughout Mexico’s history, however, popular counter-movements have attempted to take back the land, using what Schacherreiter (2014) identifies as postcolonial discourses to challenge the universalisation of private property as a human right. During the Mexican Revolution, in the Zapatista Uprising of 1994, and since that time, both indigenous and non-indigenous groups have called for a reversal of the so-called agrarian reform which abolished earlier communal

agrarian structures, and their arguments against privatisation and commercialisation have been echoed in other Latin American countries. These arguments have targeted not only land ownership, but also privatisation of parks and other public services, such as internet service. As Schacherreiter (2014) observes, “In the context of Latin America, defending the commons against appropriation implies their defense against neo-colonial forms of propertization” (237-38). Santos (2007), too, has remarked upon what he calls the “return of the colonizer” through “the new indirect rule” whereby the state withdraws from regulation of social and public services, leaving them to be privatised by powerful non-state elites. He calls this “the rise of social fascism, a social regime of extremely unequal power relations which grant to the stronger party a veto over the life and livelihood of the weaker party” (16-17). In this pattern, the rights of the powerful elites are used to deny the most basic right, the right to life itself, of the weak majority. Propertisation and privatisation, and their protection as human rights, then, can be viewed in postcolonial theory as merely modern representations of the colonial dispossession of indigenous land and all that this dispossession implies about one-dimensional attitudes towards tradition and modernity.

## **Conclusion**

The need to take account of traditional, non-Western approaches to human rights within modern human rights analysis has been foregrounded in recent years by the increasing number of challenges to the established human rights regime and by the growing awareness of the need to address social and cultural practices before civil and political rights can be agreed upon and enforced. It is here that postcolonial human rights theory has a role to play, in pointing out not only the position of those who have been marginalised or excluded by traditional approaches, but also the acknowledgement and formalisation of rights outside of the Euro-American sphere of influence. A promising result of the inclusion of postcolonial approaches to human rights is the opportunity they offer to the human rights community. This opportunity is now being recognised. In making suggestions for the United Nations Committee on Economic, Social, and Cultural Rights—suggestions concerning the United Nations’ addressing of the rights most often ignored in favour of political and civil rights—Beth Lyon (2003) comments that “[p]ost-colonial theory can provide a meaningful interrogation of the goals and methods of the human rights regime” (2), providing human rights organisations the opportunity to examine their agendas and mandates. At present, while the language of the International Covenant on Civil and Political Rights is clear, strong, and unambiguous, the International Covenant on Economic, Social, and Cultural Rights is couched in more hesitant terminology. For example, its enforcement clause

states that “Each State Party...undertakes *to take steps*, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources, with a view to achieving progressively* the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures” (UNOHCHR 1966: Part II, Article 2; italics added). With economic, social, and cultural rights the primary concern of the peoples of the developing world, postcolonial theorists have argued that such “lip service” to non-political and non-civil rights reflects the desire of the West to keep the awarding of such rights as rewards for compliance with their own political and economic ambitions toward the non-West.

As more and more powers to set policies and to enforce human rights are passed to international institutions, some postcolonial theorists argue, the still developing postcolonial states are being limited in their right to independent self-development, which includes the right to establish and enforce human rights. More significantly, Siba N. Grovogui (2011) cites a number of serious results of the assumption by the West of an exclusively European and American history of human rights, including within the assertion at the United Nations of Western positions to solve current non-Western crises, that social and economic rights (of chief concern in much of the ‘developing’ world) are less pressing than civil and political rights, and that “non-Western idioms protecting human faculties and capacities are simply localized translations of the more universal Western language of human rights” (42-43). The power of the Westernised, traditional conception of human rights is also present in the implicit assumption of the need to intervene in situations where violators of human rights may be characterised, either directly or implicitly, as barbaric and savage.

However, there are a number of genealogies of human rights extant today; in the postcolonial states, those which have the most relevance are very often not the traditional histories that place their origin in the West. Grovogui (2011) comments, “Western categories are neither historically unique nor morally indispensable to an ethical life. Every imaginable duty and obligation in the area of human rights may be validated and defended by most of the world’s moral systems, even if they have different inflection and, therefore, legal, political, and moral implications than the Western conception” (45). Postcolonial perspectives on human rights can serve to remind us of the existence of both the variety of moral systems and of the ways in which they intersect, providing an opportunity to expand the interpretation and the application of universal human rights.

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## Perspectives for a Social Integration of Human rights in the Muslim world

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### Abstract

Human Rights are defined<sup>2</sup> as sort of humankind “Esperanto”, a neutral language able to promote the difficult task of dialogue across communities. When speaking about “Islam”, it is easy or generates a misunderstanding, because the word Islam does not refer to a monolithic entity: *Ummah*, the global community of all Muslim believers, is indeed plural and fragmentary from both a geographical and a cultural perspective. In the course of my essay, I will start from the work of John Rawls and Abdullahi Ahmed An-Naim, then focus on a new concept of Human Rights, stressing practical tools rather than hermeneutical ones. As a matter of fact this project should start within the Islamic world in order to be more easily accepted. Furthermore, it is necessary to firstly undertake this task there, so that it cannot be claimed to be the result of western cultural imperialism. The Islamic countries ought to rethink the idea of “public reason”, which must not be confused with the “reason of the sovereign” and should instead outcomes from the dialogue between people. This is possible thanks to a progressive rooting out of the traditional concept of *Shari’a* and a renovated concept of *ijtihad*, the concept of personal reasoning, so that the Islamic world can achieve a stronger critical sense towards itself and its religious dogmatism.

**Keywords:** Islam, Public reason, Ummah, Ijtihad, Human Rights

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<sup>2</sup> Anselmo D. (2007) *Shari’a e Diritti Umani* (Introduction)

## Introduction

We have recently been facing a new wave of globalization characterized by a greater interdependence that is directly reflected on the individual, one that has modified by time the outdated economic and social superstructure built after the World War II. These bottom-up transformations require legitimisation and all the levels of governance must become aware of this evolution. Not less importantly, this evolution requires a rethinking of the impression of religion in present-days in relation to our multicultural society. The rise of such a powerful crisis on the social and political level all over the world have deeply touched the Islamic humankind, bringing into question the secular perspective related to the religious identity. The practicable and interpretative methodologies contribute to create solutions on the field, highlighting meaning-making practices in order to observe reasonable outcomes. This article describes a basic solution for the integration between different ideas of a Human Being's public life. Starting from the contemporary situation in the Middle East and its religious background, I contextualize the current identification of Human Rights in the Islamic public affairs comparing it with the western culture in order to find an unambiguous context for Human Rights and therefore determine a cornerstone of a further essential approach able to create a common field for these themes: the Islamic liberalism.

### Is this a cultural crisis?

Islam is not merely a religion: it is considered a holistic and all-embracing concept, which includes different aspects and a wide range of principles. The preliminary and necessary consideration for studying Islam is that there is no a single Islam but, on the contrary, different ones. *Ummah* is an Arabic word, meaning nation or community. It is a synonym for *ummat al-Islamiyah*, the Islamic Nation, and it is commonly used to mean the collective community of the Islamic people. In the Quran, the *Ummah* typically refers to a single group that shares common religious beliefs, specifically those that are the objects of a divine plan of salvation. In the context of Pan-Islamism and politics, the word *Ummah* can be used to mean the *Commonwealth of the Believers*<sup>3</sup>. This community is spread in all five continents reaching 1.2 billion of believers (according to Pew Research Centre, 23.2% of the world population).

As the work of Mr. Talbi shows, we cannot include the Islamic culture in a narrow scheme<sup>4</sup>. The Dar Al-Islam, literally “the home of Islam”, should be extended to include a wider framework. In

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<sup>3</sup> The same Muslim, during childhood, learnt to be part of this community and being firstly believers and then part of a national community. Cf. M. Charfi (1998), *Islam y libertad: el malentendido Histórico* (p. 121)

<sup>4</sup> Ibid. (p. 124).

fact Islam lacks hierarchical structures and central authority and except for a core of shared inalienable principles, Islam is distinguished by an extreme flexibility and an unsuspected dynamism, where Islamic official “schools” have the legitimacy to supply autonomous interpretation of the Quran. I emphasize this concept because it is supposed that the normal connotation of the Islamic world as a static and stiff religion sorted recently by media information must be refused. Therefore in the Islamic world we can find different cultures, which come from different traditions, national governments and so forth. According to Talbi, cultures are composed of two components: the first one is firm and homogeneous (synchronic aspects); the second one is in continuous variation and development diachronic aspect<sup>5</sup>. We should arrange a double approach able to consider both aspects in order to prevent a partial or falsified vision that may lead either to eradication from tradition nor to a refusal of change.

Nowadays the multicultural society is by the time part of our daily life. In fact cultures cannot be exempt from considering other cultures. However, is it possible to reach a complete recognition between cultures, even if they have fundamental values which are in contrast? For intellectual uprightness the solution to this requisite is controversial. Different scholars consider this possibility. Kymlicka<sup>6</sup> recognizes a possibility for integration only if cultures deserve this recognition, bringing evidence which is justifiable by each member of the society. Habermas sustains the political acknowledgement only if that group of people is able to perpetuate so autonomously inside society. This process can reach a practical solution if cultures are living in reasonable disagreement<sup>7</sup>.

This short foreword is important to address my work: in fact these considerations consist in a platform for a wide support of Human Rights in general and above all in the Islamic Countries. Human Rights are the most suitable support for creating a constructive dialogue between cultures. The traditional matter to face at the moment is if it is possible to have a universal recognition. This theme usually clashes against religious visions of some populations on our planet, in which there is no complete secularized society and where religion continues to play a key role in the public and private lives of the citizens.

We know that the reference point about this matter is the *Universal Declaration of Human Rights* (1948). Muslim States reactions brought to different responses: a straight opposition to this declaration seen as a western imposition, or an Islamic reformulation without dispositions

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<sup>5</sup> Talbi (1981); *Le vie del Dialogo nell'Islam* (p. 143)

<sup>6</sup> Kymlicka (2001); *Politics in the Vernacular: Nationalism, Multiculturalism, Citizenship* (p. 34)

<sup>7</sup> Habermas (1996); *The inclusion of the other* (p. 55)

contrary to *Shari' a*. Several documents were published, both by public and private organisations<sup>8</sup>. It is important to give evidence to some positive and comforting signals analyzing the Arabic Charter on Human Rights: in fact in this document the shortage of a specific lure of *Shari' a* is deemed together with the insertion of particular western rights and the creation of specific legal guarantees for protecting them.

The individualistic anthropology on Human Rights used to legitimate the *Rights of freedom* is overcome by time and it remains obsolete regarding *social* and *cultural* rights. Universalism of Human Rights should be recognized as an ethic and juridical code generally accepted as defined by Francisco de Victoria and Grozio: *Ius as qualitas moralis*. The second assertion for defining the universality of Human Rights comes straight from the subject of these privileges: humanity. This natural law approach would consider all people as legitimate holders of these principles but this point of view often remains obsolete and without basis. This is why it may be right to consider universalism as double: regarding both contents and holders.

The union of the standards could solve once and for all this problem but, even if it were possible to reach an agreement about contents, who will have the possibility to claim these rights? For instance, a threefold inequality exists in the Islam cultures: man vs. woman, believers vs. non-believers and master vs. slave.

### **Which context for Human Rights?**

I am looking for a proposal, which goes beyond the previous methods. Nowadays we are standing in a sort of middle-earth: in the West we are approaching new forms of multilevel governance. People are facing new forms of multiculturalism in all aspects of the society, encountering also a reform of the secular power, a crisis of the structure that was born during the Westphalia's peace and a very unstable situation concerning the international relations in the Muslim world. After the Arab spring revolution in 2010 we are witnessing a new awakening of Islamic thoughts in public affairs, not only in the revolutionary movement in Northern Africa, but also in the current Islamic State of Iraq and the Levant. It could be defined as a sort of new "autumn of nations", that period raised at the end of Second World War and at the end of the Cold War in 1989 in Eastern Europe.. I disagree with this sort of categorization in as much as

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<sup>8</sup> Cf. the three fundamental Islamic charts on Human Rights in the Islamic World: the Universal Islamic declaration of Human Rights adopted by the Islamic European Council (1981), The Cairo Declaration on Human Rights in Islam (1990), the Arab Charter on Human Rights (2004). Concerning the private sector I highlights the importance of all the private institutions as Human Rights Watch/Africa or the Advisory Council of the Arab program for Human Rights & Development which have declared several documents referring on the Universal Declaration of Human Rights

the trouble concerning more some internal aspects of the Muslim World sorted by external causes (Economic crises, unemployment, political corruption, inflation) but it reflects a vulnerable structure and a kind of rift between religion and secular power. Going beyond this cross system of new powers we can observe a “wind of change” in the Islamic area but probably many different governments are refusing this possibility for a reform.

### **Liberalism in the Muslim world**

Regardless of the importance to create a stable and peaceful community between different societies all over the world, Islamic people need to increase awareness about their own role in a globalized world in which it is up to each citizen to be involved and responsible. Islamic countries ought to open a constructive dialogue with “the other” (in Arabic we can translate it as *Dar al-harb*, the house of war), and with itself: a serious, deep and sustainable dialogue. A way for developing this work is the philosophic way of thinking of *Muslim Liberalism*: this conception aims to rise points of contact with the western tradition, although it maintains some peculiarity which makes it deeply different. It seems to be an oxymoron in terms: the term liberalism in fact comes from the eighteen-century revolution in America and Europe. However, also the term “liberalism” has different meanings. Liberal movements within Islam are pooled from a solid line-up in favour of Human Rights. This political thought is born from several varieties of philosophical currents starting from European liberalism reaching also Socialism and Marxism. Nevertheless the contemporary Muslim Liberalism nowadays continues to be ostracized by western mass-media which is affected by lack of objectivity towards oriental thoughts, and internally by conservatories who categorizes all of this as a sort of capitalism, individualism and above all as a new colonialism.

Liberal movements within Islam arose during the XVIII century with the diffusion of some revivalist currents (which changed the relationship between believers and God assuming a more public background). Shah Wali-Allah (India, 1703–1762) for instance sustained that Islamic law could not be unique and immutable but it necessarily needed to adapt to the people of a certain society and not only to the human reasoning<sup>9</sup>. Shari’a’s norms have a deep connection with the Muslim society and for this reason they should evolve together; on the contrary, at that time this was rather the product of human reasoning which comes from the scholars and where the citizens were supposed to train the *taqlid* (imitation) and follow the teaching of the experts. This attitude represented the mainstream until XIX century until expressing the end of *taqlid* and the rise of *ijtihad*, which finally becomes a right for all Muslim believers in all its aspects not

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<sup>9</sup> Cf. Kurzman (1998), *Liberal Islam and Its Islamic context*, in C Kurzman, *Liberal Islam: a Sourcebook* (p. 7)

expressively regulated by Quran and Sunni. The purpose was not the laicisation of the society but rather the exigency of a refurbishment. Some of these authors became the root of the “Islamic Reformism”, a political movement, which promoted the end of *taqlid* even if it remained far off the modern liberalism. Moreover it gave rise to the social movement of the Brotherhood Muslim which developed in 1928 and which also became one of the most famous transnational Islamic organisations. The Liberalistic approach tries to legitimate the rights of the western declaration using tools of the Islamic tradition without using a pragmatic top-down approach.

“The feasibility of the project is based on the possibility of finding a cultural legitimacy” In fact it is fundamental for the acceptance of all the rights concerning the social rights until reaching the rights of freedom. Thanks to it, we can expect a greater respect of the norms. Cultural legitimacy is the necessary condition of the universality of Human Rights. However we should watch out to consider it as “neutral”: in fact even if we are in a liberal society it is uncertain. My point of view prefers to focus attention on practical tools. The abstraction proposed by Rawls’s overlapping consensus remains too unbind with facts. Habermas in *The inclusion of the other* (1998) criticized Rawls’s theory as a sort of *Deus ex machina* because there is a lack of a deliberative process which would be able to put in contact citizens. Reconsidering the dawning of philosophy: “man is a social animal” and he cannot live without this. Taking into consideration this cultural level we figure out a thesis who lays the foundations to establish solid basis for comprehension. I agree with An-Naim when he defines the *cross-cultural approach* but I prefer to retain only the human integrity as a sort of common denominator for a common identity, already articulated by different international declarations, particularly the 1948 Declaration. He considers human dignity as well a linchpin but I prefer to put it aside seeing it as more difficult find a common value for defying it. Every person has got a core of personal integrity, formed precociously, which may influence one’s own behaviour. It is not dominated by education or context. The persons are not influenced by society and by its conduct deemed as a sort of common praxis. Moral integrity is based on the consideration of the importance of responsibility: choosing and taking the responsibility of developing one’s own culture. My considerations seem to be originated by the nature of law, in spite of this I address my target on the Principle of Reciprocity. This is considered a common basis for dialogue between cultures since it can be discovered in many of them, both in the present and in the past. Carefully, we do not interpret it in a utilitarian meaning, as a sort of *do ut des*. Furthermore reciprocity cannot be a justification for the perpetration of a wrongful act.

The last point to discuss for a complete discourse about Human Rights in Islam concerns the concept of public reason. In the Islamic countries especially in the Middle East area there seems to be a lack of dialogic approach between people. Public reason is often translated as reason of the sovereign where the political elites maintain a detached approach, making the interest of their own social class. Therefore we can understand the difficulty to reach a common public reason for all the social classes if this work remains at an international level in the hands of a government without a constructive accountability in emphasizing the role of civil society. Actions ought to coalesce through a combination of different efforts where the key role is bound by local NGOs, with the help of international cooperation and pressure. In fact, the growing of globalization and other distinct factors are transforming the social context of these territories. This situation brings to seeking the best tools for determining long terms strategies and immediate responses. An-Naim wants to consider an indispensable step forward the breaking of what he has called “Human Rights dependency”<sup>10</sup> by which he means “the widely prevalent perception that the governments of developing countries are more responsive to international pressure for the protection of Human Rights in their countries, than to the activities of local NGOs and other actors within their own societies<sup>11</sup>”. Due to the political situation, the indispensable importance of these local entities remains extremely problematic. Moreover the international NGOs are not accountable for the local society which considers they have a sort of western charity agenda.

Liberal movements prefer to imagine the “rethinking of Islam” using traditional tools, just to get it more sustainable and to avoid a cultural trauma. Eminent thinkers proposed different solutions and in my assessment I refer to one of the methods proposed by Charfi: the hermeneutic approach<sup>12</sup>. His thought focuses on the religious point of view, which I assume is the common basis of society in the Islamic world whereby laws and praxis. These considerations touches the spirit of the Quran very well and of the tradition posing them within the global divine project. This approach supposes the role of the time to understand if some rules will became inadequate or not. The Quran has already used this policy for waiving some verses on the basis of *lex posterior derogat priori*.

Focusing on the wide landscape of Shari’ a reinterpretation is really complex but possible nevertheless: using one of the more general interpretations; it means “great route for reaching

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<sup>10</sup> An-Naim (2010), Human Rights in the Arab World: A regional perspective in Abdullahi An-Naim edited by Mashood A. Baderin, Islam and Human Rights (p. 136)

<sup>11</sup> Ibid. (p. 136).

<sup>12</sup> M. Charfi (1998), Islam y libertad (p.158)

God”, in this case Shari’ a would achieve a meta-juridical and universal principle, a sort of criteria of justice. Unfortunately, Shari’ a assumes the connotation of positive law, bounded with tradition. This second interpretation doesn’t face the world problem, denying the modernisation of Muslim society. However, considering Shari’ a as a combination of principles and not as a conglomeration of positive rules, represents a positive changing without assuming a rupture with tradition. Considering the work of Tariq Ramadan in *Radical Reform* (2009) and withdrawing some Arabic words from Islamic Science sources<sup>13</sup>, we can find the term *tajdid*: rebirth, renewal, regeneration. The meaning can be attributed by one prophet *hadith* (narration about the life of the Prophet or what he approved): “God will send this [Muslim] community, every hundreds years, someone/some people who will renew [yujaddidu] its religion”. These is famous words have a deep purport: the intention is to fix the importance of a stable guide for the Muslim community through a group of people able to lead this renewal able to “regenerate” the Islamic religion without putting principles and basic ideas into question. Our reading and understanding “will be renewed by the contribution of Scholars and thinkers who will point to new perspectives by reviving timeless faith” (Ramadan). According to the *hadith* reported by Abu Dawud the other term used several times in Quran and in the *ahadith* (pl.) for covering the concept of improving, reconciling and reforming Islam is *Islah*<sup>14</sup>. The Midianite prophet Shu’ayb in the Quran said: “I do not desire, in opposition to you, to do that which I forbid you to do. I desire nothing but reform [purification] (*al-Islah*) as far as I am able”. The purpose aims to reconstruct the original meaning of the object, to remake order and to reform

## Conclusion

Islam liberalism may be defined as a juridical-cultural liberalism and not political as it was born in the western area. This connotation helps the construction, through the identification of a juridical liberalism and later submits a political liberalism with the acknowledgment and safeguard of Human Rights. Moreover this approach is able to identify a useful contribution for the recognition of universal rights in the daily life of Islamic *ummah* and not only in declaration of governments. This critical study establishes as fundamental a renovation of relationship between people and sources. However reforming does not mean changing referent and model in order to imitate the western liberalism. It is important to change outlook, human and social context and above all rebalancing legitimacy and authority. In practice, the possibilities are numerous: firstly

<sup>13</sup> Abu Hamid al-Ghazali (1970), *Scritti scelti* (p. 22 )

<sup>14</sup> Abu Dawud is considered one of the main collectors of prophetic *hadith*. In fact Sunni Muslim consider its *Sunan Abi Dawud* the third of the six “canonical” *hadith* collections.

being coherent with the main goals of Islam religion, and then starting to create space for study outside religious building where scholars could start exchange collaborations, ideas and sharing practices with other contexts even if with different religions and therefore learning by interacting. In this moment of worldwide cultural crisis I assume as fundamental the rise of a moral and ethical personal dignity where States can serve the ideals of social justice and peace in order to build a political life with the neutrality of religion.

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## Human Rights Relations between Europe and Russia A genealogy of diverging concepts

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### Abstract

There is a gap between the academic discourse's acknowledgement of the importance of the question of diverging values in the relations between Russia and the European Union (EU), especially in the light of recent human rights cases, and the ongoing tendency of recent analyses of EU-Russia human rights relations to focus on rationalist cost-benefit accounts which leave out value interpretation issues. I seek to fill this gap by genealogically analyzing the origin of different human rights understandings of Europe and Russia and their constitution of the scope of foreign policy action. The results point to a high divergence of the meaning of human rights between the European Union and Russia as well as a high relevance of this divergence for both parties' foreign action and identity formation.

**Key words:** constructivism, EU-Russia relations, genealogy, human rights, Pussy riot

## Introduction

“The problem we are facing today with Russia does not lie in the fact that Russia [...] does not acknowledge common values [...], but that Russia obviously understands these values in a different way. The distance between the European Union and Russia in terms of diverging interpretations of common values has meanwhile become so wide as to suggest a *de facto* rejection of these values by Russia”(Sandschneider 2006, translation A.H.). In light of recent human rights issues in Russia (e.g. the Pussy Riot case or the “Foreign agent law”) which challenged its Western partners’ human rights conceptions, the question of diverging values is now accepted by the academic discourse as one of high importance, especially as communication between Russia and the European Union (EU) is limited mostly to mutual accusations. In spite of this, recent analysis of the human rights relations between the EU and Russia focuses on rationalist cost-benefit accounts leaving out value interpretation issues.

This paper wants to fill this gap by genealogically analyzing the origin of different human rights understandings in Europe and Russia and how they define the scope of foreign policy action of both actors. To show the historicity of human rights ideas, the analysis looks at socio-political conditions, ideas of the relations between community and individual and the view on the individual as a (potential) human rights subject; “contested meanings” (Klotz/Lynch 2007: 32ff) will be included to avoid a teleological impression. Examples of human rights issues between the EU and Russia illustrate how the respective human rights ideas are externalized in foreign policy identities.

I seek not only to contribute to the theoretical discussion of the universality of human rights, but also empirically in terms of a deeper understanding of value interpretations in their effect on foreign policy, especially for the EU as a “normative power” towards Russia, itself not clearly outside the “European” cultural space.

## Theoretical background: Constructivist approach

Social constructivism as a school of international relations thought was developed as a critique of neo-realism (cp. Wendt 1987 und 1992) and other (positivist) approaches. Constructivism is less a substantial theory than – depending on the respective work's focus—a method, a research approach or a theoretical orientation (Krell 2009: 357, Ulbert 2006).

“Constructivism” outside of international relations theory is an epistemological approach doubting that human understandings of reality (or of “true” ideas, such as human rights ideas) are direct reflections of an independently existing or perceivable reality. Rather, constructivists

assume the observer herself to play an important role in constructing these ideas (Ruffing 2006: 41f). While philosophy usually locates this construction process in the human brain (Ruffing 2006: 41f), the adaptation of the concept by sociology, especially by Peter Berger and Thomas Luckmann, (Berger/Luckmann [1969] 2012) as “social constructivism” transferred it to the societal level. Berger and Luckmann's central epistemological assumption is that people externalize their ideas about the world, these ideas become objectivated and in turn internalized by people. This thought of endogenous construction of ideas (and interests) was introduced to international relations theory as international relations “consist of social facts, too” (Krell 2009: 359); the other theories' assumptions could then be true or false, but scholars should become aware that what they consider as true or false is the result of an endogenous construction process.

Nicholas Onuf was the first to use the term “constructivism” as a school of thought of international relations and includes in his definition all approaches that stress the intersubjective character of the world, the mutual constitution of actor and structure as well as the constitutive role of rules and norms in the endogenous production of interests and identities (Onuf [1989] 2013).

Constructivism's epistemological assumptions lead to a focus on the mutual constitution of actor and structure (see the above definition by Onuf [1989] 2013). Alexander Wendt criticized existing approaches for taking either the actor or the structure side as given (Wendt 1987). He suggested that rather structures constitute actors and actors in turn confirm (objectivate) structures, but also – crucially– can change them (Harnisch 2010: 103). Structures are not (only) regulative-constraining, but constitutive for the actions, as without structures meaningful action would not be possible (Krell 2009: 359; Lerch 2004: 28). (Political) Actors can only act in relation to other actors or objects on the grounds of what these actors or objects mean to them (Ulbert 2006: 401).

There are also constructivist works that rather focus on the regulative effect of e.g. norms (e.g. Kirste/Maull 1996); this paper, however, focuses on the constitutive power of structures.

The products of these mutual constitutions are ideas, which can be defined as the views of individuals (Goldstein/Keohane 1993: 3) or collectives (Harnisch 2010): These can be worldviews, norms (e.g. “principled belief” in Goldstein/Keohane 1993: 9), systems of meanings (Krell 2009: 365), as well as self-ideas in relation to another, i.e. individual or collective identities (Weller 1997) and (foreign policy) roles (Kirste/Maull 1996). Ideas do not replace “interests”

(central to rationalist approaches), but are constitutive for them (Ulbert 2005). The ideas and meanings over the course of history become “stable” rules and norms (like human rights), which are connections between actor and structure (Lerch 2004: 28), or structures themselves (see e.g. „stable meanings“ in Klotz/Lynch 2007: 25).

This idea-based approach of constructivism stands in opposition to the purely materialist assumptions of neo-realism and liberalism (Lerch 2004: 22). Yet, moderate constructivists still include material factors (whose meanings vary depending on the relevance they are assigned to by the actors, Ulbert 2006: 13), while radical constructivists argue that any material reality of international politics is not perceivable in the first place (Krell 2009: 359). Constructivism also challenges rationalist assumptions; though it is debated (in the “rationalism-constructivism” debate) whether both schools are completely incompatible or whether rationalism is simply one of the possible constitutive ideas, a special case of constructivism (Lerch 2004: 22).

Although constructivism thus endogenizes factors such as identities and norms, which are by other approaches not conceptualized at all or considered as exogenously given, this does not mean that (moderate) constructivism ignores e.g. interests; these are still expected to be subject to change, e.g. by processes of social learning (Ulbert 2006).

Critics of the social constructivist approaches have warned that by transferring the concept from sociology to international relations, the danger arises that one reifies or anthropomorphizes the state (Ulbert 2006: 412). For any analysis this means that that states should not be attributed an individual character, but should be analyzed as collective structures. Other critics have mentioned that the ideas that are central to constructivism are themselves social products that do not only define power, but are also formed by power and particular interests (Krell 2009: 377f). I will thus in the following also consider in how far powerful actors influence the discourse about the ideas.

### **Methodological approach: Genealogy**

In constructivist terms, human rights are a kind of constitutive norms (transformable into positive law) influencing (political) action (cp. Sikkink 1993). The very existence of human rights norms is hard to explain without constructivism, as other (international relations) approaches ignore human rights altogether or their emergence (Lerch 2004).

The following analysis follows the Foucauldian genealogy, developing a “history of the present“ (Foucault 1979: 31) by looking at the legal, societal, and political contexts of the emergence of

the dominant understanding of human rights in the Russian Federation and the states that are today in majority members of the European Union, an understanding that is assumed to still guide the “present” actions. Both analyzed entities here are heterogeneous cultural spaces and at the same time parts of bigger cultural contexts (some parts of Europe can be called “Western” and the very border between Russia and Europe is debated). It must be clear that the analyzed “patterns” cannot be considered “true” for all parts of and exclusively for this respective actor, but as the dominant interpretations after a struggle with competing views. To stay close to the Foucauldian demand to study history as a series of “discontinuous practices” to be seen in their “specificity” (Foucault 1971: 67), I include cases challenging the dominant interpretation (“contested meanings,” Klotz/Lynch 2007: 32), which prevents the impression of a teleological development (cp. Bielefeldt 2008). The stepwise approach looks at socio-political factors and legal culture (4.1), as the basis for ideas about the relation between the (legal) community and the individual (4.2), which in turn favor a certain view on the human as a potential human rights subject (4.3).

I explicitly refrain from giving any definition of human rights (which would most likely be of Western origin), but rather focus on the historicity of the ideas and definitions to show these ideas’ constructedness.

I will furthermore (4.4) show how the human rights ideas are externalized into policies by the two actors and how this is related to the emergence of foreign policy identities in the Russian Federation and the European Union, respectively.

## **Analysis of Human Rights Concepts**

### ***Socio-political conditions and legal culture***

#### **The role of the Russian Orthodox Church**

This section shows the structural conditions creating a special position of the Russian Orthodox Church (ROC) as a significant discursive power (Foucault 1971) in the human rights definition.

A short sketch of the situation in (Western) Europe shall suffice here as a background of comparison: The principle of the separation of secular and sacral issues dates back to Ancient Greece (Feldbrugge 2009: 237), a concrete separation of the church and the state as institutions were largely realized after the French Revolution. Legal philosophy turned away from religious thoughts, focusing rather on natural laws and natural rights (of humans) (Feldbrugge 2009: 238). Before this time, God had been the prime source for laws, the possibility for human rights was

given by the “image of God” in human beings (Bielefeldt 2008). This does not preclude the relevance of religious elements for Western European human rights ideas, yet the church as an institution has since this time lost any considerable influence on the dominant definition of human rights (Bielefeldt 2008). The Vatican, for example, not included in making the EU Charter of Fundamental Rights, rejected its contents as “godless” (Catholic Telecommunications 2000).

In today’s Russian Federation and Eastern Europe there has traditionally been a strong link between church and state because a “separating” event like the French Revolution did not occur. The sacral concept of “symphonia” describes an interplay of state and church (Morgenstern 2009: 78) and was developed during the foundation of the Kievan Rus’, when a Byzantine strongly hierarchical imperial idea met with a churchly component that has since then preserved a largely theocratic state image (Feldbrugge 2009). In praxis, this resulted in a great influence of the Orthodox Church in politics, including human rights policies (Kostjuk 2005).

After the only interruption of this strong link during the Soviet times, the ROC became a source of identity in the ideological vacuum after the breakdown of the Soviet Union (Wieck 2011: 3); at the same time, the ROC’s moral relevance is utilized by the state (Schroeder 1996). The context of the Soviet Union isolated the ROC from the development in the Western European states, where the church had to compromise with secular institutions (Schroeder 1996); thus, the values propagated by the ROC today are mostly the same as during the Tsarist time.

The church still strives to be active in the human rights discourse: The 2008, declaration on “The foundations of the Russian Orthodox Church’s doctrine about dignity, freedom and human rights” (Russian Orthodox Church 2008), reflects the concept of “symphonia”: The ROC cites among its tasks the survey of (legal) acts of the government related to morality and the relations between church and state (Russian Orthodox State vb2008: 36ff). The ROC in has a high authority due to the values system it supports (Bremer 2012: 7) and also is a member of the “Civic Chamber”, established by President Putin (here again the mutual relationship of church and state in the formation of human rights ideas becomes clear) as well as in the World Council of the Russian People (with consultative status in the United Nations), whose 2006 “Declaration on Human Rights and Human Dignity” was influenced by churchly ideas (Pfau 2008).

### **The role of the state and the judicial system**

This section analyzes how the philosophical-abstract concepts translate into the role of the state and the judicial system in securing human rights.

(Western) European state and legal philosophy sought to solve the dilemma of adequate state power (a balance between the containment of the state and the powers it needs to secure human rights, Hamm 2003: 30, Kühnhardt 1991: 39) by Montesquieu's separation of powers (Feldbrugge 2009: 236) or contractual theory (Kühnhardt 1991: 48). Human rights, developed as "answers to the experience of structural injustice" (Bielefeldt 2008: 126, translation A.H.) are defensive rights to protect individuals against a state's potential misuse of power (Bielefeldt 2008; Feldbrugge 2009); they are, according to contractualists like Locke, antecedent to the state; if the state fails to protect them, the social contract can be dissolved. Thus, the state is contained, but still centrally responsible for the protection of human rights (Bielefeldt 2008: 18).

In Russian state philosophy, the question about an adequate state power is missing, as the state is not qualified to preserve (libertarian) human rights. Libertarian endeavors bypass the state, freedom is not defined as a balance of rights and duties, but as the chance to survive only possible by tricking the state (Makarychev 2012, Plotnikow 2011): Tolstoy writes that as long as states exist at all, there will be no recognition of human rights (in Plotnikow 2011: 233).

This mistrust against the state is also present in the Russian legal system; the "legal nihilism" (Melzer 2012: 157, Nussberger 2004) can be explained by looking at the historical development of Russian law: The influence of the Greco-Roman understanding of law is missing (Melzer 2012: 157). A systematic collection of law like the Napoleonic "Code Civil" is lacking and leads to inconsistencies in legislation and jurisdiction (Nussberger 2004). Human rights have never been seen as antecedent to the state, but as state-made instruments of power (Melzer 2012: 166). Although president Putin announced a "dictatorship of the law", it is rather Putin's dictatorship with the help of the law (Melzer 2012: 168), legal culture is still limited in Russia, as Gulina (Gulina 2008: 74) shows with contemporary proverbs: "Where there is law, there is crime" (mistrust in law); "What are laws for me if the judge is a friend" (higher importance of personal relations than laws, see below "emotional community"); "Before God with the truth, before the judge with money" (relevance of corruption and religion). The persistent unfairness of justice has led to a disregard of law as a social institution for the implementation of individual rights (Plotnikow 2011:11).

In spite of the mistrust in the state, we find the "philosophical paradox of Russian history" (Plotnikow 2011: 224), a tension between an uncontained state power and radical protest against it. There is strong hatred against state power, but a basic trust in authoritarian leaders (Melzer 2012: 166). While in Western Europe the history of human rights was one of the emancipation from overly powerful states, in Russia there is an authoritarian tradition with a "servant culture"

still reflected in recent surveys (Hartmann 2012: 61). The defects of today's democracy can also be partly explained by this "winner takes all" mentality (Melzer 2012: 259). The social contract idea was dissolved in an idea of the state that derived directly from the person of the emperor (etymology: russ. emperor: gosudar; state: gosudarstvo) and did not differentiate between the leader and the people in a "emotional community" (see next chapter, Plotnikow 2011). State and society were considered a unity, state and individual yet antagonists (Plotnikow 2011: 234): The ROC's symphonia idea and anthropology (see also next chapter) are central: The state should not care about the individual's freedom, but about their salvation, the human in the sacral sphere always being God's slave. "The idea of [...] an entitlement to human rights and a libertarian, democratic constitutional state is not thinkable from this perspective" (Kostjuk 2005: 166, translation A.H.).

### ***The relation between individual and community***

Another strong divergence in concepts lies within the relative emphasis put on the individual and the community.

Human rights concept in the Western sphere have an individual quality (Bielefeldt 2008). Aristotle, often considered one of the first human rights thinkers, considered humans first and foremost as "social beings" that are dependent on a community (Tönnies 2011: 24). Also later the individuality of human rights has been a "contested meaning" (Klotz/Lynch 2007: 32), e.g. in the liberalism-communitarism debate (Sturma 2000: 40) or among "collectivists" like Marx, Hegel and, the 19th century's romantic-nationalist thinkers (Bielefeldt 2008). The collectivist idea was also reflected in the French Revolution's "fraternity" (Tönnies 2011: 108).

The transition from the pre-modern socially contained being and the view of the human as an egoistic individualist (Plotnikow 2011) was what Tönnies termed the transition from community to society (Tönnies 2011). It took place when ancient Rome took over the ancient Greek philosophy of natural rights: The Greek polis being an emotional community, the cultural mixture in Rome had less social cohesion among the strangers. The anonymity of the individual led to a re-definition of the Greek "fraternity without rights" (Tönnies 2011: 217) into today's idea of "equality before the law."

Individual rights still can only exist in a legal community (Bielefeldt 1998), they do not contradict the idea of a community, but are considered as the condition for collective rights and not vice versa (Bielefeldt 2008: 118).

This idea is reversed in Russian human rights philosophy: Individual rights are only acceptable when they are in the interests of the community (Pfau 2008: 242). This thought can already be found in Dostoyevsky's writing, mirroring the thinking in Tsarist times, as he deemed impossible any escape of the individual from a world of radical collectivism, (Tönnies 2011: 217). During the Soviet era, the idea of collective rights was naturally very dominant; the constitution under Stalin only granted human rights insofar as they served the collective spirit (Pfau 2008: 242). The ROC conserved the idea of collective rights after the Soviet times: The orthodox concept of an "emotional community" is reflected in the "sobornost" which describes an organically grown community, dissolving the contrast between individual and collective in the religious body (Buchenau 2007, Melzer 2012: 172, Russian Orthodox Church 2008). The community is considered the natural, divinely ordained state of the human that is to be protected (Russian Orthodox Church 2008). While Western philosophy's defensive rights of the individual give them protection against others, the Russian orthodox view seeks to protect the community from potential "breakaways." Individual human rights give the individual the possibility to betray the community; the individual's egoism is considered the real origin of human rights violations (Bremer 2012, Buchenau 2007: 171). Political rights must not lead to a division of the community (Russian Orthodox Church 2008); religion, morality, sacrality and the fatherland are equally important as human rights (Pfau 2008: 5). The strong connection between political and religious ideas of community leads to a combination of the idea of collective rights with a patriotic element: Human rights must neither contradict Christian love nor patriotic love for the fatherland (Russian Orthodox Church 2008: 21). Here the mutual character of state-church relations in shaping human rights ideas becomes relevant again, with patriotism being utilized by the state as an argument against individual rights.

### ***Conception of the human being***

Closely related to the diverging views on the relation between individual and community are the different anthropologies.

For Western European human rights concepts, the relation between individual and community is defined by the anonymized and atomized abstraction and individuation of the human rights, whose holder is an "unqualified individual" (Tönnies 2011: 51) owning rights and dignity by birth. The cynic and stoic philosophy focused on the inner life of the human and derived from this introversion a kind of independence from external circumstances, deriving from this a natural equality of humans in spite of their "external" differences (Hamm 2003: 16, Kühnhardt 1991: 43). The Christian concept of the God-likeness of every human also meant that every

human has the same rights (Bielefeldt 2008). In the Middle Ages, this concept was partly abandoned and the idea of the sinful human was stressed (Tönnies 2011: 61). The Renaissance brought together the Stoa, Roman law, and Christendom; the Enlightenment led to justification of dignity based on human reason, not religion, the Kantian imperative asked to treat all humans as an end in themselves (Tönnies 2011: 34).

This condition-free endowment with rights does not contradict the idea that rights are connected to duties, as rights obligate a potentially unrestricted number of people to respect the rights of all other people (Kratowil 1991: 158). However, the differentiation between formal and substantial symmetry between rights and obligations is crucial (Bielefeldt 1998: 162ff): The obligation to respect everyone's rights in occidental thought is a formal symmetry; substantial symmetry is rejected, as this would mean the re-interpretation of rights to obligations; Bielefeldt here points to the "common praxis of authoritarian regimes to affirm human rights, but in practice to put them under the condition of the fulfillment of social duties" (Bielefeldt 1998:164, translation A.H.).

In contrast to the idea that derives human dignity (which, according to the Western definition of human rights, is the basis for assigning human rights) from the inner self of the human, in Russian philosophy one finds a normative view on the human being that is critical of individualism (Plotnikow 2011). The origins of this view are, again, closely related to the relationship between individual and community, in different historical contexts derived from the "utopian vision of a solidary community of [in Tsarist times] religious or socialist origin" (Plotnikow 2011: 9, translation A.H.).

A central point of departure again is religion. There is conformity between Western European and Russian view in deriving human dignity from God-likeness. As there was no Enlightenment in Russia, the concept of human dignity was never detached from its religious origin (Tönnies 2011: 34 ). Still today the Russian Orthodox Church explicitly claims that human dignity is only derived from God-likeness (Russian Orthodox Church 2008); it is this link to God-likeness that creates moral obligations for the individual.

This duty firstly is one towards God, humans are obligated by their God-likeness to strive for the perfection of this resemblance ("theosis" thought, Russian Orthodox Church 2008: 2); this is an example of substantial symmetry which re-formulates rights, or here, dignity, and defines them as a duty. Secondly, this duty also relates to the (religious, national) community; human rights are a danger that force people to defy divine laws (Russian Orthodox Church 2008: 5). The concept of

human dignity is basically accepted, yet every human must constantly prove to be worthy of this dignity; an unworthy life in sin does not ontologically lead to a destruction of the dignity, but “it blurs dignity so much that it is hardly perceivable“ (Russian Orthodox Church 2008: 11, translation A.H.). This suggests the interpretation that in a concrete case the person would lose their dignity in legal terms. The ROC’s document tries to evade the question of the inalienability of dignity by introducing the difference between an eternal “value” of a person and their morally conditioned “dignity” (Russian Orthodox Church 2008: 9).

There is consequently also a religious-normative re-interpretation of the notion of freedom: In Western thought, it is translated as a personal space of protection against the state and freedom of choice, in Russian philosophy it is rather understood as “freedom from sin” (Makarychev 2012: 54). This normative anthropology has also become widely assimilated by legal philosophy that tends to use the terms “legal subject” and “moral subject” synonymously (Pribytkova 2011).

The obligatory character of the rights can also be found in non-religious contexts, for example in the already mentioned constitution under Stalin that contained a catalogue of basic rights followed by a catalogue of basic duties (Schroeder 1996).

### ***Effects on Foreign Policies and Foreign Policy Identities***

The basic thought that leads this analysis is the constructivist assumption that human rights as a kind of ideas constitute the interests, identities and roles of (international) actors (and are constantly re-affirmed by the actors) and serve as norms that direct the behavior of these actors by enabling certain actions. In the following paragraphs, I analyze how far the conceptual differences concerning human rights manifest themselves in recent problems of human rights politics between Russia and the European Union. Primarily, these are cases of Russian politics that could not be understood by the European Union; a special focus is on the Pussy Riot case.

Concerning the special role of the Russian Orthodox Church in terms of influencing the morality ideas of Russian society and the state’s policies alike, the conviction of the members of the punk-rock band “Pussy Riot” after their performance in Cathedral of Christ the Savior in Moscow is a case in point. The charge was not only based on Art. 5.26(2) of the Russian code of law on regulatory offences concerning “violations of religious feelings“ (this would not have justified a penalty of two years prison camp), but also on Art.282 of the Russian penal code related to public actions that cause the violation of human dignity (among others) due to their relation to religion (von Gall 2012: 2). Different from regulations concerning the freedom of religion and non-discrimination known in the Western European legal area, human dignity itself is here put

into a religious context; the freedom of expression, although cited in the constitution, is bound to certain conditions (exclusion of “agitation“, von Gall 2012). The European Union’s Charter of Basic Rights, for instance, does not contain any similar limitation of the freedom of expression (Brodocz 2005).

Furthermore, in the Pussy Riot case, Art. 213 of the Russian penal code was cited: “rowdyism due to religious hatred”. As a clear definition of these elements of offense is missing (see also further below), again it was the church as a discursive power that filled up the vacuum of meanings, so that the main argument in the end was that the band had violated the regulations of the church (von Gall 2012); such a blurry justification for a legal charge is hardly thinkable in the European legal area, as this justification does not explain which “regulations of the church” are referred to and thus becomes a catch-all element for everything that does not coincide with the ideas of the church.. Considering the “threat scenario” that the Russian Orthodox Church currently sees for itself and its values (Bremer 2012: 6), one can here again argue that the state took over the role he has traditionally been assigned to by the church – securing the individual’s salvation, not the freedom of expression (Kostjuk 2005).

This case also illuminates the understanding of the role of the Russian state in terms of human rights: It reflects the idea that the state is not suited for securing the freedom of people and can only secure the freedom from sin, which yet demands a lot of obedience (Makarychev 2012).

The European Union’s reaction to this case shows its diverging understanding of human rights: The High Representative of the European Union for Foreign Affairs Catherine Ashton voiced her concerns about the functioning of the legal system in Russia while stressing that the freedom of expression must be protected also when the expressed opinion is “controversial” (Ashton 2012). This reflects the role of human rights as emancipation rights against the state (Bielefeldt 2008): They should give room for criticisms about injustice and defects (Pussy Riot criticized the corruption and the close link between state and church, Bremer 2012) of the state (that only has power because the sovereign citizens have assigned this power to him in the framework of the social contract).

Another structural factor, namely the missing coherency in the legal system, was already mentioned concerning the blurry definitions of the elements of offense: The lack of appreciation for the individual protective function of the law and an incoherent legal interpretation due to a missing scientification of the law make it possible that the band was accused although the elements of offense were as ill-defined as already described (Melzer 2012, Nussberger 2004).

Another discrepancy between the European Union and Russia that is induced by different understandings of human rights can be seen in both actors' statements revealing elements of their foreign identities and roles (cp. Kirste/Maull 1996): The Russian understanding of the state as an emotional community with a tradition that is to be protected and that human rights must not contradict (Russian Orthodox Church 2008: 21) becomes visible in an initiative that was mainly brought forward by Russia about a resolution in the Human Rights Council of the United Nations (A/HRC/RES/21/3 of October 9, 2012). This resolution promotes the idea that what has to be respected above all in human rights politics are the traditional values of different cultures. The European Union voiced its concern that this could be used to legitimize violations of human rights understood with the Western European concepts (International Service for Human Rights 2012). While the Russian Federation has repeatedly stressed that each state is responsible for the human rights policies on its territory, the EU is less critical when it comes to international interventions on the grounds of human rights violations (see e.g. United Nations General Assembly 2012). Furthermore, the EU defines its foreign role more and more by active politics of democratization with the aim of a norm transfer ("civil power," see Kirste/Maull 1996), which is considered by the Russian side as "interference" with internal issues. The EU's understanding comes from the idea that human rights precede the state and that the social contract can be broken if the state fails to deliver (Kühnhardt 2009: 58ff); this state-transcending view on human rights has furthermore a legitimizing relevance for the EU internally (Sieg 2012). In Russia, human rights are rather seen as constructed by the states themselves (cp. Melzer 2012: 166). This does not preclude Russia having active human rights policies abroad; it is in human rights terms that the Russian Federation justifies their politics vis-a-vis the Baltic states (or, more recently, Crimea) when it criticizes the discrimination of the Russian minority (Grigas 2012). This double-standard again shows the role of the community in the Russian human rights philosophy as well as the role of human rights politics for the own identity: Russia perceives the Russian people in the Baltic states or in Crimea as parts of its own emotional community. The specific concepts about the community and the individual become clear also in the Pussy Riot case. The band's performance was also a violation of the religious emotional community ("sobornost", Melzer 2012: 172), which has such a high importance in the Russian legal philosophy; the community is thus more important than those individuals that turn against the community.

A similar justification background can be found in the context of the Foreign Agents Registration Act of 2012: Non-governmental organizations in Russia that receive money from abroad have to register and are declared as "foreign agents" (Siegert 2012). These organizations are also under suspicion of betraying the Fatherland and the community (while here it is not the

rights of individuals that are limited, but organizations that, among other things, try to promote Western human rights ideas).

Here, again, the European Union criticized the Russian government's lack of protection of the freedom of expression, as well as the right of assembly in other contexts (Ashton 2012), which can be explained by the Western European notion of an absolute priority of individual rights over collective rights (Bielefeldt 2008: 118) and the priority of transferring Western ideals in other countries. Furthermore, the European Union itself as a union of states can rather be described as a "society" than as a "community" (Tönnies 2011), although the political elites try to create a sense of community and also use the common human rights understanding to achieve this goal. The Pussy Riot case also illustrates how Russian anthropology forms the political behavior: As the members of the band have not fulfilled their duties towards the community or God, they still have an inherent value as a human, but as they used their freedom to violate the moral (churchly) regulations, they forfeited their dignity and their salvation has to be re-established (cp. about values and dignity: Russian Orthodox Church 2008).

## Conclusion

The above stepwise approach has demonstrated two phenomena: Firstly, the actual ideas about the meaning of human rights strongly diverge between the European Union and the Russian Federation, which can, *inter alia*, be related to Russia's isolation from the ancient Greco-Roman ideas about law as well as from the Enlightenment and its philosophy. At the same time, historically speaking, there were usually also "contested meanings" (Klotz/Lynch 2007: 32ff) on both sides. Secondly, it was shown how (at least in the selected cases) these ideas are constitutive for policy actions.

This continuity of the respective human rights concepts can be explained, in a constructivist sense, as they deliver useful identity concepts for both actors' "precarious" identities that are still in the making. Russia is in an identity "vacuum" after the breakdown of the Soviet Union; the European Union, due to its *sui generis* character, is looking for a legitimizing self-definition towards the inside and outside (Sieg 2012).

The connection between self-definitions and human rights ideas appears on all the analyzed levels: The Russian nation is defined by collectivist philosophy, influenced by clerical ideas, as an emotional-religious community (Tönnies 2011) with an almost symbiotic relation to their autocratic emperor situated beyond any laws; individual (egoistic) human rights threaten the community. For the European Union, lacking a common "nation," human rights as a pre-state

conception present a chance to compensate the lack of an emotional sense of belonging with the reference to common values (Brodocz 2005; for foreign policy, see “civil power,” Kirste/Maull 1996). In the mutual identity construction, the other's norms become a constitutive “other” (a more general phenomenon in European-Russian relations, cp. Ignatow 1997, Makarychev 2012), which results in mutual accusations and counter-criticism by the Russian side when the EU criticizes their behavior and vice-versa (Teevs 2009).

Studying the actual understandings of human rights helps to understand problems in EU-Russia relations and overcome the assumption that the content of human rights is “naturally” universal, with either acceptance or non-acceptance possible. While ideas are constitutive for (foreign policy) interests, it is relevant that there are also interests behind certain ideas (cp. Krell 2009: 367). This is true both for Russia's strive for influence e.g. in the Baltic states (cp. Grigas 2012) and for the EU for which the civil power role with active external human rights policies is an opportunity to create an international “profile”. Further research is needed to show which (power, material) interests drive the utilization of the diverging meanings of human rights in the political discourse.

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## Country Specifics of a Universal Right?

### Freedom of political speech in the Slovak Republic

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#### Abstract

This paper tests the assumption of a universal right to freedom of speech in the context of the Slovak Republic, a Central European country still facing the legacies of suppression of freedom of speech during the communist regime, in order to find out whether the conception of free speech understood as European is used in Slovakia as well. Firstly, it examines key theories of freedom of speech both in the Anglo-American and Central European scholarship with emphasis on the reflections of 'Western' ideas in post-communist philosophical, legal and political thought. Secondly, it utilizes simple statistical methods to analyse the outcomes of judicial decision-making concerning issues of political speech in Slovakia according to the incidence of theoretical justifications of freedom of speech. The results indicate that the Slovak (and as some indicators show, also Central European) approach to freedom of speech differs from the one viewed as 'European' in some respects.

**Keywords:** European Court of Human Rights, freedom of speech, judicial decision-making, political discourse, philosophical and theoretical justifications, Slovak Republic, theories of freedom of speech

## Introduction

In the 17<sup>th</sup> century, long before major international human rights declarations, conventions and constitutions of democratic states, the well-known Dutch philosopher Benedict de Spinoza (1670) remarked that ‘It is far from possible to impose uniformity of speech, for the more rulers strive to curtail freedom of speech, the more obstinately are they resisted; not indeed by the avaricious [...], but by those whom good education, sound morality, and virtue have rendered more free.’ Spinoza’s requirement of a possibility to express various, even conflicting opinions among the people in the public sphere anticipated one of the key ideas of vibrant civil society, that was about to be formed in democratic countries. The view of the right to freedom of speech (expression)<sup>15</sup> as one of, if not the most important individual rights, was enhanced by its incorporation into the Article 19 of the Universal Declaration of Human Rights (below: Declaration) as follows: ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’ Soon, other documents which encompassed freedom of speech followed; the International Covenant on Civil and Political Rights (below: Covenant) and, in Europe, the European Convention on Human Rights (below: Convention). The latter plays an especially crucial role in safeguarding of (not only) the right to freedom of speech in this region, as it creates a largely effective oversight system that is voluntarily accepted by the participating states (Donnelly 2003: 138-141). The influence of the Declaration on the development of these legally binding mechanisms shall not be neglected, though, as ‘it has been at the heart of demands made by peoples and individuals around the world that their rights be respected and protected’ (Clapham 2007: 42). For freedom of speech, this is ultimately true, despite some objections towards the Declaration as a whole, according to which it focused too much on civil and political rights and paid not enough attention to economic, social and cultural rights (e.g. Darraj 2010: 99). In other words, the positive influence of the Declaration on spreading of standards for freedom of speech is not affected by this ‘Western ideals’ criticism and the right itself, therefore, can be viewed as standing in the heart of individual political rights without which it would not be possible to live in democratic political regimes anywhere in the world.

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<sup>15</sup> The term ‘freedom of expression’ is used in more often than ‘freedom of speech’ in the overview of major human rights documents. However, as my paper concentrates mostly on one specific kind of expressions – political speeches – I consider more proper to use the term ‘freedom of speech’ throughout the text.

The key position of freedom of speech in a democracy is, in my view, essential for analysing its scope, protection and examples of violation in either state that declares its commitment to this form of government. In my paper, I start with a more detailed account of these and similar arguments from a theoretical point of view, in order to justify the role of theory of freedom of speech at recognition and entrenchment of this right in legally binding acts, especially the democratic constitutions. Then, I provide an overview of scholarship about freedom of speech with emphasis on Central Europe (and within it to Slovakia, the Czech Republic and Hungary), where I seek for similarities and differences between the global understanding of freedom of speech and its view in these countries. Furthermore, I explain the methodology of an empirical analysis based on examination of philosophical and theoretical (below: PH-T) justifications of freedom of speech in Slovak judicial decisions in cases concerning conflicts between freedom of speech and personal rights (the protection of personality). Finally, the results of the analysis will be presented, which answer the question, what role do philosophical and theoretical justifications of freedom of speech play in reasoning of Slovak courts in the analysed type of cases. The results of this case study allow formulating some assumptions about the whole region possible to be tested via further research, including the one that the approach to freedom of speech in Central Europe differs from the ‘universal’ one encompassed in the Declaration, constructed mostly on a careful account of theoretical justifications of freedom of speech.

### **Theories of freedom of speech: what are they and why are they important**

Before turning to the review of free speech scholarship, which is carried out on the basis of distinguishing between philosophical and legal approaches to the phenomenon, some introductory arguments about the theory of freedom of speech may be useful to provide. Firstly, freedom of speech as a political right emerged predominantly as a result of rather philosophical theories put forward by influential political thinkers, such as Baruch Spinoza and John Stuart Mill.<sup>16</sup> Specifically, in the era of enlightenment freedom of speech became essential for progress in societies, as it is manifested in Article 11 of the Declaration of the Rights of Man and of the Citizen.<sup>17</sup> Later, the provision of the First Amendment in the US Constitution<sup>18</sup> laid down the

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<sup>16</sup> This is not to say that all philosophers have been supporting freedom of speech. In fact, from the ancient times, a well-known position to the issue was that of Plato (2006: 91-92), according to whom a strict regulation of various forms of expressions would be necessary in an ideal society.

<sup>17</sup> ‘The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.’

<sup>18</sup> ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’

pattern for safeguarding freedom of speech in democracies. This short historical excursion demonstrates that a philosophical discussion about freedom of speech was present long before any legal guarantees of this fundamental right.

Secondly, by legal proceedings in which freedom of speech is at stake, it is impossible to set firm borders between legal and philosophical arguments (Barendt 2005: 2-6). A legal interpretation of the scope of freedom of speech, as well as other human rights, is in fact limited by the text of the Constitution and legislation of the state concerned. These limits, however, offer only a general framework, which requires legal interpretation by courts.<sup>19</sup> By such interpretations, philosophical arguments derived from theories of free speech play an important role, as they summarize the reasons and principles which stand behind the legal protection of the right. For instance, in one of its precedential cases called *Handyside v. the United Kingdom*, the European Court of Human Rights (below: ECtHR) expressed, that 'Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man'. It acknowledged freedom of speech as important because of its role in a democracy and for the self-fulfilment of an individual. Such a thought builds directly on some premises included in the theories of freedom of speech.

Thirdly, the term 'theories of freedom of speech' raises some concern about its clarity as it is not exactly determined what should be included under its scope. The best approach in my view is to concentrate on different justifications that support freedom of speech (such as the argument of searching for truth, self-fulfilment of an individual or democratic participation which I mention below). These arguments create a convincing reasoning for freedom of speech if we consider them as various philosophical views on the role of free speech in the society which often overlap or complement each other (Bartoň 2010: 26). A search for these arguments in legal provisions and documents, such as the decisions of courts, does not mean that the right to freedom of speech is violated in the moment when one of these arguments is not applied, as for some types of speeches some arguments are more relevant than others. For political speech, for instance, it

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<sup>19</sup> On the one hand, courts are 'the appropriate bodies to adjudicate disputes as to the content of [those] rights and their application to concrete situations' (Christie 2011: 3). They must interpret constitutional freedom of speech provisions in accordance with 'the text of the constitution as a whole', national principles and precedents and decisions of international courts and tribunals (Barendt 2013: 892-3). On the other hand, legal rules are binding also for courts and they determine the outcome of their verdicts. As a result, the judges of these courts may not become 'philosopher kings' because although they often incorporate their views about ideal society into their decisions (and decisions in free speech cases exceptionally allow to do that), the public can itself judge these decisions and criticize them (Christie 2011).

The relationship between legal provisions and courts' decision-making in free speech cases points out the specific position of interpretation and argumentation in favor of or in opposition to freedom of speech. For more on this issue, see also Steuer (forthcoming).

is more plausible to argue that the importance of such speech lies in the possibility of participation of citizens within a democratic regime, than to view political speech as a way of self-fulfilment of an individual (this justification is mostly used by speeches connected to artworks or culture). Naturally, this approach to theories of freedom of speech is not the only one, as we will see from the state of the art below. Some theorists prefer to deal with theories of freedom of speech when they place this right into context of other rights (e.g. Smolla 1992). Others use the term to identify different perspectives that can be applied by concrete speeches (Scanlon 2003). Either approach we apply, the classic philosophical justifications seem to remain at the core of these theories, as it would be impossible to discuss the actors, perspectives or relationships connected to freedom of speech without understanding, why is it an essential individual right.

In sum, theories of freedom of speech are built of arguments which justify the importance and reasons for protection of this fundamental right. Their practical understanding and applying in concrete legal cases where freedom of speech is involved strengthens the link between them and the current legal provisions which can also be derived from the philosophical theories of freedom of speech.

### **Approaches to freedom of speech in the world and Central Europe: State of the Art<sup>20</sup>**

Freedom of speech allows for a variety of different interpretations, which may be divided into two groups: (1) interpretations of free speech as a philosophical and theoretical issue, (2) analyses of legal protection, guarantees or case law concerned with the right to freedom of speech. We may apply this division criterion also to the literature available but a further difference should be emphasized: whether the source relates only to the US context of free speech or it takes into account also the European tradition.

#### ***Philosophical approaches to freedom of speech in the world and in Central Europe***

Chronologically, the most important philosophical defence of freedom of speech is that of J.S. Mill (2009 [1859]). Although there were works which mentioned free speech before Mill (such as that of John Milton), ‘Mill’s argument is more than just one amongst other, equally influential arguments. It really is the classic version of the classic defence’ (Haworth 2002: 7). Mill’s arguments that ‘the opinion which it is attempted to suppress by authority may possibly be true’

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<sup>20</sup> See also Steuer (2014a).

(Mill 2009 [1859]: 29) and ‘however true [an opinion – M.S.] may be, if it is not fully, frequently and fearlessly discussed, it will be held as a dead dogma, not a living truth’ (ibid.: 58-59), influenced a range of, especially US, scholars such as Scanlon (2003), O’Rourke (2001) or Smolla (1992). Some US theorists prefer the so-called ‘marketplace metaphor’, which is a modification of Mill’s argument by Supreme Court Justice O. W. Holmes. As Smolla (1992: 8) notes, ‘for Holmes, the benefit of the marketplace was not the end but the quest, not the market’s capacity to arrive at final and ultimate truth but rather the integrity of the *process*. The value of the market was its capacity to provide ‘the best *test* for truth’. This rationale can better stress the ‘preferred position’ of free speech than ‘general theories of free speech’, to which belong *absolutism*, *historicism* and *balancing* (ibid.: 23-42). The problem with this argument is, as is noted in overviews of free speech issues (e.g. Barendt 2005: 12-13), that the free market does not have to see truth as the highest value and therefore its role in providing the ‘test for truth’ is undermined.

It should be noted here, that a negative attitude to marketplace metaphor could be influenced by the author’s personal view on the issue of market regulation. Leaving all opinions to be judged at a fully unregulated market is, in my view, associated with a strictly libertarian position, although the content of such a position is sometimes unclear. For instance, Heyman (2008: 27) differentiates between ‘libertarian and modern view’ on free speech and associates all the well-known arguments (pursuit of truth, democratic self-government, and individual liberty) with the ‘classical libertarian traditions of Locke, Cato, Jefferson and Madison’. In his opinion, this tradition linked individual rights to societal interests, while today the individuality of these rights plays a primary role (at least in the US tradition – M.S.). Paradoxically, then, the modern view is closer to the usual understanding of the ‘libertarian’ position than the classical view explained by this term. In my opinion, however, it would be more appropriate to use the word ‘liberal’ with the classical tradition and not to seek to make sharp distinctions with the modern understanding. After all, in many countries including those in Central Europe, the ‘free speech tradition’ is much younger than in the United States.

Other philosophical and theoretical sources stick to the arguments of J.S. Mill. For instance, O’Rourke (2001: 159-163) sees the value of Mill’s arguments in the importance of ‘the discovery of truth for the sake of individuality’, that is a necessary condition for truth being ‘desirable for the progress of society’. O’Rourke therefore criticizes another philosopher, Alan Haworth (2001) who acknowledges John Milton as the author of the original free speech defence. Apart from these ‘authorship’ issues, Haworth also introduces four criteria that are necessary for an argument to fall under the protection of free speech. The author summarizes them in this way.

An argument [...] '(i) must identify a class of acts and argue for their legal protection; (ii) that they must be speech acts; (iii) that they must treat the right to free speech as a public right; (iv) that they must treat it as a component in a wider, liberal, value system' (Haworth 2002: 10, 221-222). He views 'political material addressed to a wider public' as the most accurate type of speech that fulfils all these criteria and therefore demands protection.

The 'Millian principle', which allows restrictions to free speech only 'to prevent harms to others', is the starting point also for Scanlon's (quite complex) theory of freedom of speech (expression) (2003: 6-25). In Scanlon's view, the Millian Principle sets the limits of restrictions of free speech (or 'acts of expression', as he calls speech) and within this principle 'governmental policies [...] are subject to justification and criticism on a number of diverse grounds' (ibid.: 22-23). Another benefit of this theory lies in distinguishing the interests of different kinds of actors (participant, audience, bystander) in protection of free speech (ibid.: 85-92), and in acceptance of the existence of different categories of speech that allow for different rules for restriction. Scanlon's theory is sometimes criticized; e.g. by Haworth (2002: 219), who points out to an inconsistency: Scanlon attempts 'to support a 'Millian' principle with a roughly Rawlsian argument'. This relates to the difference between utilitarianism (or consequentialism of which Mill is usually referenced as a supporter) and contractualism, but it is not necessary for us to examine this in greater detail now. All in all, this theory remains influential and quite consistent because of its applicability also in modern world.

Naturally, almost no Anglo-American scholar (including those who form theories of freedom of speech) supports the idea of absolutely unregulated speech. Heyman (2008: 32-33) lists three reasons why an absolutist position is dangerous: (1) the inability to distinguish between 'legitimate and illegitimate restrictions' makes opposing the latter ones more complicated, (2) free speech absolutism leads to 'sacrificing other individual rights' which also deserve protection, (3) 'an excessive defense of First Amendment freedoms may weaken the legitimacy – and thus the public acceptance – of the very rights it means to defend.' The author therefore develops an own 'theory of the First Amendment', which he calls a 'liberal humanist' theory. This theory, which unifies the values of liberty (part of which is free speech) and dignity, forms a contribution to the discussion by stressing the fact, that rather than searching for conflicts of rights, we should identify their common characteristics, which allow for protecting both of them.

The presented overview deals only with selected aspects of philosophy and theory of free speech. Warburton (2009) offers a popular introduction which covers these aspects and a number of complicated issues today (but deals less with the problem of political speech).

Bahgwat (2012) introduces a 'structural understanding of the Bill of Rights' and especially freedom of speech, according to which '[the Bill of Rights is] not generally intended to protect individual liberty, but rather to organize and place limits upon government' (ibid.: 79). Classic free speech arguments are reflected also in political science, for instance in Dahl's theory of polyarchy (Dahl 1989). Even a Marxist theory of free speech was developed in recent times (Roberts 2003), although its application in society today is doubtful. Some authors critically assess the changing approach to free speech values in US society after 2001 and declare, that 'arguments for free speech must be made. Otherwise, it all comes down to who hollers loudest' (Levinson 2003: 18). Because of the changing trends, many discussions are being opened in both academic and popular level (e.g. the discussion between Sunstein and Levendosky in Egendorf (2003)). The range of English sources indicates the utmost importance of free speech issues in the USA and – to a lesser extent – in Britain.

When, however, searching for philosophical and theoretical sources in the European scholarship (and especially in Central Europe), it is not easy to find a complex philosophical interpretation either. As professor Višňovský (2013: 444-445) emphasizes, Mill's liberal approach misses, except from some traditions from the First Czechoslovak Republic, a broader articulation of its ideas and attitudes in the public. This is true as even the most complex monographs (of Czech authors) focus on the legal application of free speech provisions and mention philosophical problems only in some minor cases or at the beginning of their explanation (see Bartoň 2010, Herczeg 2004, Jäger and Molek 2007). Petrík (2004) wrote an article about the 'liberal theory of free speech' which is, however, a less significant theory which stresses the importance of the place where the speech is being carried out (i.e. on whose property). This is definitely not a liberal theory as it is understood by leading US scholars. To some extent, the general theory is applicable to Central Europe, but any conception of free speech in this environment needs to deal with 'the combination of freedom and responsibility in European understanding', as opposed to the US one (Smolla 1992: 354). A theory of free speech for postcommunist countries is yet to be developed.<sup>21</sup>

### ***Legal approaches to freedom of speech in the world and in Central Europe***

Among the second group of interpretations of free speech and studies which deal with it from a legal perspective, the prevalence of Anglo-American literature is also more than noticeable. As a legal concept, the scope and protection of freedom of speech is a concern of constitutional law.

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<sup>21</sup> Obviously, some signs of such a theory are visible in the publications already written in the Czech Republic and it cannot be excluded, that something was already published but is not well known yet.

However, ‘identifying a value or set of values underlying any single constitutional system of freedom of expression is likely to be difficult’ (Stone 2011: 416). In the same study, Stone (2011: 417) also notes the difficulty to study free speech comparatively because of the specific ‘legal and political culture’ of the country observed. The US constitution gives freedom of speech a privileged status in the First Amendment that is examined in many legal studies. However, the Amendment is not immune to changes in time. According to Sunstein, ‘the law now faces new constitutional problems’, which require an ‘ambitious reinterpretation of the principle of free expression’ (1993: 16). However, for those who do not need to study precisely the case law of the USA, the complex examination of different legal approaches in the US, Britain, Australia, Canada and the ECtHR provided by Barendt (2005) is perhaps the most comprehensible source available. Apart from other problems, Barendt (2005: 154-197) devoted a chapter also to political speech which he classifies as seditious speech, group libel, blasphemy laws and official secret laws. As we may see from this classification, more relevant for this paper is the next chapter in Barendt’s monograph called ‘Libel and Invasion of Privacy’ (2005: 198-246), where he deals also with initiation of actions by politicians. However, it is hard to understand, why he does not qualify speech acts concerned with politicians as political speech. Nevertheless, the book offers many examples of judicial decisions that became precedential in the case law of a selected country or of the ECtHR.

The last category of sources relates to legal issues of freedom of speech in Central Europe. The offer here is richer than in philosophical issues, although it mostly consists of studies about specific problems. In Slovakia, it includes law commentaries to Article 26 of the Slovak Constitution, dealing with freedom of speech, and relevant provisions (Bröstl 2010, Drgonec 1999, 2012, Svák and Cibulka 2013) or selected decisions of the ECtHR (Svák 2011).

This category also covers legal analyses of selected issues connected to freedom of speech, such as non-pecuniary damages in actions for protection of personality (Wilfling and Kováčechová 2011), the highly discussed decision in the case of the journalist Tom Nicholson (Deák 2013a, 2013b), collection of judicial decisions of higher courts in defamation cases (Horváth and Budinská 2013), commented judicial decisions connected to media freedom (Kamenec 2013) or media policy in general (Školkay, Hong and Kutaš 2011) and a handbook for journalists (Kerecman 2009). A monograph from Czech author Ondřejek (2012) about the application of principle of proportionality is also beneficial for gaining theoretical knowledge about judicial decision-making. Recently, a monograph was published by the former judge of the Slovak Constitutional Court which concentrates on freedom of speech and compares its legal status

with the European level, represented by the case law of the ECtHR. It critically assesses the level of freedom of speech in Slovakia and concludes that ‘there is no clear conception of freedom of speech in Slovakia’ (Drgonec 2013: 386). According to Drgonec, the most apparent deficits can be identified in the positive obligations of Slovakia to protect freedom of speech in specific situations on the one hand (here he is concerned mostly with media regulation), and in improper functioning of the media and public opinion which is mostly concerned with tabloid news rather than offering and receiving reliable and actual information on the other.<sup>22</sup> The monograph forms a contribution to the knowledge of freedom of speech in Slovakia, but still, in the prevailing part it uses a legalistic, not interdisciplinary approach.

On the Central European level, sources which deal with freedom of speech in connection with overcoming the legacies of the communist regime deserve special attention. As András Sajó, the current judge of the ECtHR for Hungary notes, postcommunist countries still often do not recognize the role of freedom of speech for embodying democracy.

We can often hear opinions, according to which it is not possible to apply freedom of speech in its whole range because of the specific characteristics of the transitional period. Several people, including judges, refer to the low level of political culture when justifying the necessity of regulation of freedom of speech in the name of personal rights. (Sajó 2005: 126).

Moreover, Sajó – rightly – considers such interpretation of freedom of speech in times of transition as an exact opposite of what would be desired (2005: 128-132). In addition, if such view gains dominance, the public also loses its trust in the power of freedom of speech and becomes rather apathetic and uninterested in political matters. In my opinion, an example of such approach can be found in the scientific production of Sajó’s country. The most complex assessment of freedom of speech in Hungary, a more than 800-pages long monograph of an expert on media issues (Koltay 2008), reaches the conclusion, that ‘freedom of speech is an ideal, an unattainable mirage, which when we approach it, loses its shape, becomes blurry and disappears in the hot air in the summer’ (ibid.: 705). Although the analysis of the phenomenon itself and specifically in Hungarian environment is very comprehensive, including the explanation of the ever more intensive conflict between freedom of speech and personal rights in modern societies, the position that ‘sometimes freedom of speech has to bow its head before other *interests* (basic rights or constitutional values)’ (ibid.: 695 et seq.) carries possibly dangerous signs of its extensive regulation.

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<sup>22</sup> See more on the content and assessment of the publication in Steuer (2014b).

## Research design of the empirical analysis

While the analysis of scholarship, which in the area of philosophical approaches to freedom of speech showed the absence of a clear theoretical conception in Central Europe, comprised references from more countries, the upcoming empirical analysis of the application of PH-T justifications of freedom of speech in judicial decisions provides a case study of one country, i.e. the Slovak Republic. This design strives to satisfy the necessity of testing the general finding on the theoretical level via simple statistical analysis.

### *The choice for Slovakia*

The reasons for choosing Slovakia as the country of observation are two – one related to historical roots of freedom of speech in the country and the other to current criticism of lowering free speech standards here from both domestic and international sources. Although the former reason could be possibly applicable also for the Czech Republic, which formed together with Slovakia a common state for the major part of the 20<sup>th</sup> century, and the latter one for Hungary, where significant lowering of press freedom were identified (see e.g. Freedom House 2013), Slovakia combines both of them and therefore is, in my opinion, the most proper country to start such an examination.

More exactly, the special historical roots of freedom of speech in Slovakia are connected to the traditions of the First Czechoslovak Republic and then the dissent against the oppressive communist regime. The democratic Constitution of the First Republic (1920) encapsulated freedom of speech in paragraph 117.<sup>23</sup> Although the formulation of the provision expressively limited the individual's right to express his/her opinions by 'the limits of law' without any further conditions or explanations of these limits, this did not undermine the view of the Constitution as a as a stabile pillar of democracy (Vojáček, Schelle 2007: 228) and provider of basic guarantees of freedom of speech. However, after the break-up of the First Republic caused mainly by the interventions of the Nazi Germany, freedom of speech lost all stable mechanisms of its protection for more than fifty years. An interesting detail connected to the drafting of the Declaration after World War II is that the only experts who asked for more restrictive formulations of freedom of expression, were of the Soviet Union and of Czechoslovakia (Morsink 1999: 67). Although these demands were (officially) connected to the limitations of

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<sup>23</sup> '1. Every person may *within the limits of the law* express his or her opinion by word, in writing, in print, by picture etc. 2. The same applies to legal persons within the limits of their competence. 3. No one shall suffer in the sphere of his work or employment for exercising this right' (italics M.S.).

fascist and other speeches (ibid.), they indicate that freedom of speech in its Western understanding was not a priority for Czechoslovak leaders.

Soon, the communist uprising in 1948 led to the new regime, where the constitutional protection of freedom of speech was only a formality and the real situation an exact opposite. The real extent of freedom of speech was close to zero, which could be observed already at reading the first sentence of Article 28 of the Constitution of Czechoslovak Socialist Republic (Simons 1989: 148-149, italics M.S.): *'In accordance with the interests of the working people, freedom of expression in all fields of public life, including in particular freedom of speech and of the press, is guaranteed to all citizens.'* After the so-called Helsinki Accords with the participation of socialist Czechoslovakia were signed, dissidents such as the Movement of Charter 77 began to stress the need for material freedom of speech. In their words, "The right to freedom of expression, for example, guaranteed by Article 19 of the [Covenant], is in our case purely illusory. Tens of thousands of our citizens are prevented from working in their own fields for the sole reason that they hold views differing from official ones, and are discriminated against and harassed in all kinds of ways by the authorities and public organizations" (Manifesto 1977). The dissident movements were the clearest personification of the struggle for freedom of speech in this territory.

After 1989 and the short period of the Czechoslovak Federal Republic, freedom of speech was entrenched into the Charter of Fundamental Rights and Freedoms and later, short before the dissolution of Czechoslovakia, into Article 26 of the newly-created Slovak Constitution. In the Constitution, the conditions for legitimate restrictions of freedom of speech were stressed in a far more strict way than in the documents in former regimes, where the 'laws' or 'interests of working people' satisfied the need for regulation. Here, three cumulative conditions in accordance with international standards have to be fulfilled in order to restrict the freedom legitimately: (1) there has to be a law allowing such regulation, (2) the measure has to be necessary in a democratic society, (3) it has to follow a legitimate aim i.e. the protection of rights and freedoms of others, state security, public order, or public health and morals.

Still, some of these formulations are quite vague (see also Drgonec 1999), and therefore require specification by case-law of Slovak courts. This leads us to the second reason why Slovakia is a relevant case to examine, which is the current criticism of Slovak courts' judgments in the so-called proceedings on protection of personality according the Slovak Civil Code (e.g. Kamenec 2013). There is also an example of such criticism stemming from international organizations, specifically the OSCE Representative on Freedom of the Media (Mijatović 2013). Naturally, the

presence of PH-T justifications in court's judgments is not the only relevant factor to determine the scope of freedom of speech in Slovakia. In fact, previous analyses showed interesting conclusions also in other areas, such as the referencing to legal standards or principle of proportionality (Malová and Steuer 2014, Steuer forthcoming). However, investigating the presence of PH-T arguments allows answering the research question of this paper, concerned with the approach to freedom of speech in Slovakia (and, to some extent, in Central Europe) from its theoretical point of view as a universal right.

### ***Data collection and analysis***

Three points are worth to be mentioned here to elucidate the process of collecting and analyzing empirical data. Firstly, the units of observation were 162 judgments of Slovak courts in proceedings on protection of personality. Each of these judgments included a verdict either in favor of freedom of speech (i.e. it upheld the right of the opponent and denied the claim of the applicant, who wanted to restrict freedom of speech in some way) or against it (in this situation, the claim of the applicant was approved and freedom of speech was limited e.g. in a requirement to apologize for previous statement or to pay a compensation to the applicant).

Secondly, the presence or absence of PH-T justifications was determined according to examination of the court's decision where the reasons for the judgment for or against freedom of speech were explained. If the court mentioned some philosophical views on freedom of speech (e.g. that it is necessary for searching of truth, a democratic regime or a free and open society), the judgment was labelled as containing PH-T justifications. If not, then it was placed into the opposite category of not including PH-T justifications.

Lastly, the correlation between the presence/absence of PH-T justifications (as the independent variable) and the verdicts in favour or against freedom of speech (as the dependent variable) was investigated with statistical measures (Phi coefficient). In addition to the statistical measures, examples of concrete decisions were cited in order to better clarify and explain the results.

### **Results of the empirical analysis**

The majority of the 162 judicial decisions included in the sample did not use arguments which can be included into the category of PH-T justifications of freedom of speech. As can be inferred from Table 1, less than a third (53) of the decisions used these justifications in the reasoning of their verdict. By these decisions, the probability of a verdict in favour of freedom of speech was more than twice as high as by decisions which did not utilize PH-T justifications.

However, almost a third of all decisions decided in favour of freedom of speech without referencing to PH-T justifications, which means that they are far from necessary to be included in the argumentation in favour of freedom of speech in Slovak legal environment, although they can be helpful to such decision.

If we look at the statistical relationship between these two variables (Table 2), we see that although we can reject the null hypothesis stating there is no relationship between them, there is only a rather weak correlation between them (with Phi reaching the value of 0.19 on the interval from 0 – no relationship, to 1 – full correlation). The mild positive relationship between the inclusion of some philosophical justifications and the decision in favour of freedom of speech is demonstrated also on Chart 1.

**Table 1. Presence and absence of PH-T justifications in judicial decisions**

		Verdict		Total
		In favour of personal rights	In favour of freedom of speech	
PH-T Justifications	No	Count <b>57</b>	<b>52</b>	<b>109</b>
		% within PH-T justifications 52,3%	47,7%	
PH-T Justifications	Yes	Count <b>17</b>	<b>36</b>	<b>53</b>
		% within PH-T justifications 32,1%	67,9%	
Total		Count <b>74</b>	<b>88</b>	<b>162</b>
		% within PH-T justifications 45,7%	54,3%	

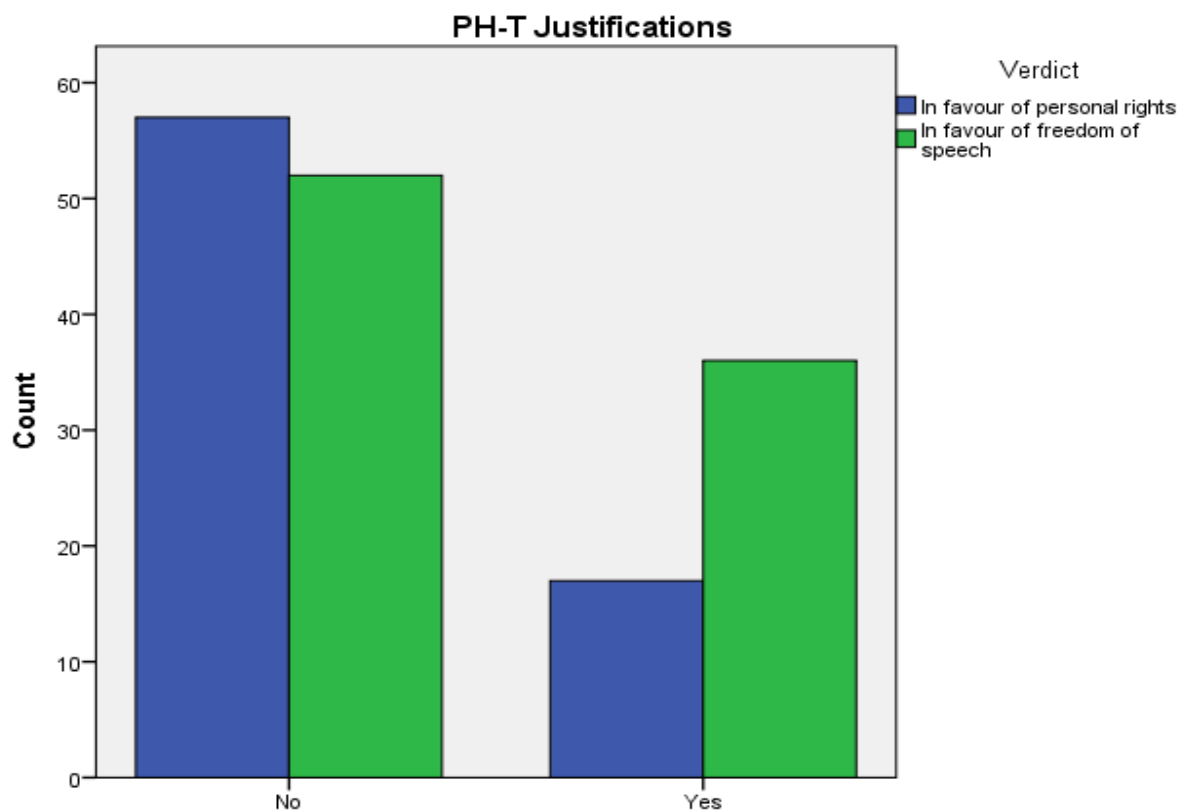
Source: Steuer (2014a).

**Table 2. Correlation coefficients for PH-T justifications**

		Value	Chi-Square Tests
			Approx. Sig.
Nominal by Nominal	Phi	,190	,015
	Cramer's V	,190	,015
N of Valid Cases		162	

Source: Steuer (2014a).

**Chart 1. PH-T justifications and verdicts in favour v. against freedom of speech**



**Chart 1**

Source: Steuer (2014a)

How did the 53 decisions use PH-T justifications from a qualitative point of view? In cases which were decided in a way that limited freedom of speech despite such arguments, mostly only brief references to PH-T justifications in the wording of the case law of the ECtHR were mentioned without any own interpretation of the domestic court. What is more, the limits of

freedom of speech were somehow stressed in the next sentences or sections. A typical example is the citation from a recent verdict in a dispute between a private person and the media:<sup>24</sup>

According to the case law of the ECtHR, which relates to the application of Article 10 of the Convention, the press plays an important role in a democratic society, and *although it cannot exceed some certain limits, including those for the protection of reputation of others*, its task is to provide, *in accordance with its duties and responsibilities, appropriate and reliable information and ideas on all matters of public interest* [...] However, *the right to freedom of speech is not absolute, it is limited* as is stated in Article 10 Paragraph 2 of the Convention and Article 6 [*sic!*] Paragraph 4 of the Constitution, with rights to protection of personality to the extent specified in § 11 et seq. of the Civil Code (italics M.S.).

Naturally, some cases escape this rule of superficial argumentation with PH-T justifications in case of deciding against freedom of speech. This, however, does not have to mean, that the decision is well justified. An interesting example is the verdict of the District Court Prešov,<sup>25</sup> which was formed after the annulment of the original verdict and returning the case to the district level by the regional court. In the first verdict, the court declined the application with detailed argumentation based on the test of proportionality and philosophical justifications. Some of these arguments were reproduced also in the 'corrected' decision, such as:

The court stated that freedom of speech is one of most important rights in a democratic society and includes freedom of opinions and freedom of receiving and dissemination of information. [...] [When basic rights standing on the same level conflict], the court has to carefully consider, taking into account the circumstances of each case, whether one right was not without any reason preferred before the rights of others. At the same time, it is necessary to respect *certain specificities of normal investigative journalism*, intended to inform the general public (in contrast to scientific publications, for example), which must, in particular with regard to the extent of individual contributions and the interests of the public, *access to certain simplifications, and it cannot be argued that each simplification (or distortion) must necessarily lead to interference with the personal rights of the person concerned* (italics M.S.).

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<sup>24</sup> Regional Court in Bratislava, verdict 8Co/131/2013 from June 25, 2013. The case was concerned with publication of unclear information about the applicant being placed in a custody. See similar citations in decisions 6Co/112/2011 (Regional Court in Bratislava, verdict from April 16, 2012) or 12C/121/2007 (District Court Bratislava IV, verdict from June 19, 2012).

<sup>25</sup> Verdict 14C/259/2008 from October 26, 2011, confirmed by the verdict 18Co/25/2012 of the Regional Court in Prešov on January 16, 2013, which mostly only reproduced the arguments of the District Court. It is worth noting that the applicant was a judge.

In contrast to this argumentation, with regard to the decision of the appellate court, the verdict limited freedom of speech. A particular attention deserves the reproduction of the appellate court's argumentation which misinterprets the case law of the ECtHR<sup>26</sup>:

The appellate court [...] stated, that *judges form a special category of natural persons which deserve even wider protection of their honour and dignity*. This conclusion follows from Article 10, paragraph 2 of the Convention and enhances protection not only against interferences to the honour and dignity of an individual, but also to those governed against the authority and impartiality of the judicial power (italics M.S.).

In most of the 36 decisions in favour of freedom of speech which used PH-T justifications, a somewhat different approach can be observed. These decisions more often include their own interpretations of the philosophical value of freedom of speech in a democracy and do not stress its limits in the same section. In one of the oldest decisions included in the sample<sup>27</sup>, the District Court Bratislava V

[...] thought about the limits of freedom of speech which is one of the basic elements of a democratic society. Freedom of speech applies not only to information or ideas that are favourably received or regarded as inoffensive or unimportant, but also to those that are unpleasant, shock or raise concerns. So it is required for plurality and the spirit of openness, without which a democratic society is impossible. Freedom of speech is valuable for everyone.

There is only a minor number of decisions which used wider more complex justifications of freedom of speech based on its philosophical traditions. Such an approach was presented in several rulings of the Constitutional Court, beginning with the ruling II. ÚS 152/08, where the Court upheld the right to freedom of speech in connection to criticism of a judge. Some courts of lower instances were inspired by this argumentation and reproduced it in their decisions. If so, the decision was in favour of freedom of speech. An example of this is provided by the decision of the Appellate court in Trnava,<sup>28</sup> which resolved a dispute between a regional politician and a regional newspaper, which reported about the politician's visit in a night club:

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<sup>26</sup> I was unable to get the original decision of the appellate court. However, the verdict from October 26, 2011 needed to be coded according to the presented methodology as a verdict which included all types of examined arguments and despite decided against freedom of speech. As some of the arguments in the 22-pages long decision conflict, it seems that the district court's judge decided contrary to his personal opinion, because he was bound by the legal opinion of the appellate court.

<sup>27</sup> 47Coch/3/2003, Verdict from September 13, 2005 in a dispute connected to information about the activities of the financial police. The court decided in favour of freedom of speech stating that 'the article itself did not deal with the applicant', who was a public figure.

<sup>28</sup> 24Co/252/2011, Verdict from July 18, 2012. Similarly the verdict of the Regional Court in Prešov 3Co/65/2012 from January 30, 2013 and Regional Court Nitra 25Co/108/2009 which among others states: 'For democracy, the dissemination of information, thoughts and opinions, either appraising, harmless or critical, shocking or concerning,

The appellate court draws attention to relevant conclusions in the finding of the Constitutional Court, No. II. ÚS 152/08 from 15 December 2009, according to which the protection of freedom of speech is essential for several reasons. Freedom of speech is essential for democracy and for creation of free public opinion in an open society. It is also a tool for searching the truth, an instrument of competition and confrontation of different ideas and beliefs [compare Mill: On Liberty and also the dissent of Justice O. W. Holmes in the verdict of the Supreme Court in *Abrams v. United States*, 250 U. S. 616 (1919)].

Finally, freedom of speech can serve the goal of personal self-fulfilment usually in the form of various works of art. [...] A similar approach to the protection of freedom of speech is applied by the ECtHR, which arises from its constantly-cited case law. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. It is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.

The sample of decisions allows identifying several examples in which PH-T justifications were not connected to other detailed arguments in favour of freedom of speech (such as referencing to the respective articles of the Constitution and Convention) and despite the decision was made in favour of freedom of speech. Again, an older decision<sup>29</sup> dealing with a dispute between a private person and a public figure about disseminating controversial information connected to ownership of property, offers an example of this kind, with the mention of quality of democracy as the most noticeable point:

The Charter of Fundamental Rights and Freedoms within freedom of speech and expression of ideas grants everyone the right to criticism. Criticism as part of freedom of speech is an important instrument determining the level and quality of democracy in the society. The exercise of the right to criticism is one of the important prerequisites for creating the atmosphere of critical society, fulfilling the need for confrontation of opinions, for the intransigence to negative social phenomena, i.e. for a versatile free development of the society.

Based on the abovementioned statistical data and examples it may be concluded, that although PH-T justifications do not enjoy a strong tradition in the case law of Slovak courts, if they are applied properly, not only mechanically reproduced to give the verdict a 'better appearance', they have a potential to provide a convincing argumentation line in favour of freedom of speech. The

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is a vital necessity, for the public to be supplied by all important facts which are necessary to produce a debate about matters of public interest of high quality and subsequently to form the opinions of individuals or to reach consensus in actions [...] Openness in relation to different opinions and critical views enriches the society, sufficient information help to break stereotypes in thinking and increase tolerance. Last but not least freedom of speech and information significantly contribute to personal growth of the individual in intellectual and personal way, which is also an interest of an open democratic society.'

<sup>29</sup> 39Coch/1/2002, Verdict of the District Court Bratislava V from 13 February 2006.

recent practice of the Constitutional Court leads me to the assumption that the role of these justifications in the decisions will rise slightly in the future, although it would be quite naive to think that they will one day play a dominant role in the legalistic environment of courts' judgments. In addition, if they are not interpreted in accordance with their philosophical background, which is included already in their name, it is possible to place them into conflicting positions and use them as a tool to argue against their rationale.

## **Conclusion**

Central Europe is not 'another Europe' any more, when it comes to terms of basic legal provisions guaranteeing freedom of speech. The protection system established by the Convention and the case law of the ECtHR has provided a legal framework worth to follow for national courts when they decide in cases concerning conflicts of freedom of speech and other fundamental rights (Steuer forthcoming). Nonetheless, this framework remains a distinct European one, where the legitimate conditions for restriction of the freedom are explicitly stated and (should be) applied in practice. This difference from other understandings of freedom of speech, especially the American one, does not mean, that the basic principle for free expressions set out in Article 19 of the Declaration is not respected in Europe; quite the contrary. The European approach is just another way how to reach and respect this universal principle.

In my paper I tried to shed some light on this approach by examining, firstly, the theoretical approaches and available scholarship about freedom of speech in comparative perspective, and, secondly, the empirical evidence for usage of theoretical justifications of freedom of speech in the decision making of Slovak courts. Methodologically, my research design strived to satisfy the ever-emphasized necessity to match theory to practice by showing, how philosophical discussions about a fundamental right can shape and influence the day-to-day practice of its protection.

Three conclusions may be drawn from the theoretical and empirical analysis which may be tested by further research. Firstly, although there are various ways how to grasp theories of freedom of speech, basically, its crucial elements comprise distinct philosophical justifications of the importance of free speech for searching for truth, development of an individual, suspicion of government in power and other crucial reasons which can be by no means omitted in a democratic political regime.

Secondly, from the perspective of such understanding of the theory, however, contemporary Slovak (and as some signs indicate, also Central European) scholarship does not provide a

satisfactory arrangement explaining the theoretical origins and evolution of freedom of speech in the region, even though these origins were apparently present during the resistance against the communist regime, to mention just one example.<sup>30</sup> As a consequence, the scope and quality of protection of the right is usually not evaluated according to the criteria put forward by theories of freedom of speech. Also, no alternative approaches to freedom of speech from a theoretical point of view have been introduced yet.

Finally, as the results of the empirical analysis demonstrate, the absence of the theoretical discussion about freedom of speech in Slovakia coincides with the lack of usage of PH-T justifications of freedom of speech in the reasoning of Slovak courts. It is true that sometimes they may be applied and that they encapsulate a potential for more detailed and precise justifications of courts' judgments. On the other hand, the lack of theoretical understanding of freedom of speech may lead also to misinterpretations of PH-T justifications and their improper application to support arguments for restricting freedom of speech, which they in reality oppose.

The differences in theoretical understanding of freedom of speech indicate that the Slovak (and as some signs show, also Central European) approach to freedom of speech is not the same like the one in Western Europe or in the USA. At least, it places less emphasis on discussing the origins and reasons for protection of this fundamental right. Even though there are no significant variations in the legal recognition of the right in Slovakia compared to Europe, represented by the Convention, some country specifics appear, like the concentration on legal interpretations of freedom of speech rather than a full understanding of its worth in a Millian manner. Whether the Slovak practice will converge with the European one or will differ even more in the future, remains to be seen, but the convergence option is more likely to happen because of the decision making of the ECtHR and the slowly emerging scholarly discourse about the right, often in response to controversial and highly tracked cases where freedom of speech was limited with unsatisfactory reasons for such restrictions.

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<sup>30</sup> Legal analyses of freedom of speech as a constitutional right are much more widespread.

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## “Positionality” and “Performativity”:

### Feminist theory and gender studies’ contributions to the construction of the concept of media literacy

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#### Abstract

Over the last few decades, educational reforms have been carried out in many different countries with the aim of expanding the concept of literacy in order to respond to challenges posed by the mass media and the new technologies of information and communication technologies and thus was born the concept of media literacy. Even though some activists consider this kind of education a human right, there is still no consensus over its meaning or even over what objectives such educational policy should seek. This paper aims, therefore, to clarify the most important current debates on the area, to emphasize media literacy’s role in improving the quality of people’s political participation in today’s democracies and to highlight important contributions from feminist theories and gender studies in the construction of this concept, such as the concepts of “positionality” (as developed by Linda Alcoff) and of “performativity” (as proposed by Judith Butler).

**Keywords:** education, media literacy, performativity, political participation, positionality.

## Introduction

This paper is part of an ongoing research that seeks to elucidate the debate surrounding the construction of the concept of media and information literacy, specifically identifying the contributions of feminism and gender studies for the area. In particular, the concepts of “positionality” (as developed by Linda Alcoff) and of “performativity” (as proposed by Judith Butler) are then highlighted in the literature in relation to the policy and practice of media literacy. More specifically, it also examines how the gender perspective on this educational policy has been adopted within the United Nations (UN), and especially within the United Nations Educational, Scientific and Cultural Organization (UNESCO). Among the methods employed are, in the first place, an extensive literature review in the area of media and information literacy. Secondly, an analysis of the discourse of UNESCO and its activities on the theme is carried through an extensive analysis of documents published by the organization. Special attention will be given to the latest policy guide published in the area: "Media and Information Literacy: Policy and Strategy Guidelines", from 2013. UNESCO was selected for being recognized as the organization that does the most systematic and enduring work to globally promote educational policies in the area of media and information literacy (Altun, 2011).

Although it is considered by some as a "public value of respect for democratic and social value of all types of public communication" (Bauer, 2011, pg. 16) or even as a basic human right by some activists (Moeller, 2009), the concept of media literacy is still the subject of many debates over its meaning and purposes, the field of study is quite recent, research on the impacts of such policy are still scarce, and indicators for its evaluation are still in the development phase. Several authors point to the need for greater effort towards conceptualization of this phenomenon, so that its practice becomes more informed. This paper aims to contribute in order to map the debate on the issue and to deepen the study on specific theoretical contributions to the area.

## Presentation of the debate on the concept of media literacy

In recent decades, educational reforms have been undertaken in several countries with the aim of expanding the concept of literacy in order to respond to the challenges posed by the mass media and new information and communication technologies (ICTs). These challenges range from fundamental issues such as access and developing basic skills to deal with the technology, to the development of more complex skills, such as the media and information literacy, which involves not only the ability to access different types of media, but also the ability to interpret, criticize and produce media messages in different contexts. The movement for media literacy has taken the proportion of a movement organized internationally. In all continents there are groups

working in this field in the form of educational associations and formal institutions that are gaining visibility and interacting together, sharing goals and strategies and spaces as college meetings, scientific conventions, magazines and publications, even if they have sometimes different styles of action (Tornero & Varis, 2010).

A wide range of concepts with different meanings and terminologies arose therefore to embrace this necessary revision of educational practices, in view of the enormous expansion of the use of ICTs. Along with these comes media literacy, whose broader definition would involve the idea of developing the skills to access, analyze, evaluate and create content across different media types (Martinsson, 2009). UNESCO, condensing diverse perspectives on the latest curriculum for teachers published, adopts the concept of media and information literacy. On the one hand, media literacy involves the skills of understanding the role and functions of the media in democratic societies, the necessary conditions for the exercise of its functions, plus the ability to critically evaluate media content and also to produce media contents through a variety of means. On the other hand, information literacy consists of the ability to define and articulate information needs, locate, access, organize, communicate and use information ethically, besides being able to use ICTs in information processing (Wilson et al. 2013). Although some authors criticize this unified approach, others point out that due to the increasing convergence of different media types, both capabilities are needed for active democratic participation, and therefore should be treated the same in a unified manner in order to promote participation more effectively (Martinsson, 2009). Other authors also point out that the existence of several types of concepts of "literacies" would be counterproductive since this could lead to unnecessary competition for space in the school curriculum and for resources. However, UNESCO's unified concept is fairly recent, and as the literature on the subject has used more widely the terminology of "media literacy", this is the term employed in this work.

We can identify similarities between the various definitions of media literacy, as the following assumptions: the media have the potential to exert a wide range of effects on individuals; the media have an influence not only on individuals but also on the broader social structures; because the influence of the media is constant and subtle, people are more susceptible to it when they are passive; the goal is to not only help people protect themselves from the potentially negative effects, but also to enable them to achieve their own goals through ICTs; media literacy should be developed, is multidimensional and the expansion of this capability involves more than just acquiring knowledge (Potter, 2013). Media literacy also should not be understood as a binary concept, where someone can be classified simply as literate or illiterate, but rather as a

continuum, which involves several stages of learning from the development of basic language skills to the development of a more critical thinking and a more responsible social position (Potter, 2011).

The French author Jacques Gonnet argues that, although in recent years there has been widespread adoption of the concept of media literacy in educational policies around the world, the broad adoption of the term conceals great controversies - "to refer to a single media education is an illusion" (Gonnet, 2001, p. 5). Gonnet adopts Len Masterman's timeline of the evolution of the concept of media literacy, which ranges from a more protectionist position initially, fearful of the effects of media, to an a more critical approach on the 1960's to then reach a stage of "decoding" the media, from the 1970s onwards, with the contribution of areas such as semiotics. However, the author points out that throughout this evolution there was a certain forgetfulness of the political role of media literacy, and even believes that the most pressing and cross-cutting controversy within this educational policy is over two distinct views regarding the objectives of media literacy: on one hand, those who believe that the goals of media literacy should not be so ambitious and should be treated as classical school discipline, starting with defined goals and objective ratings that students learn to decode media messages; and on the other hand, those who take media literacy as a political project, and to understand it as an education for democracy, fundamental source of regeneration of democratic practices, with emphasis on student participation.

The debate on media literacy also falls within the debate on critical pedagogy. Henry Giroux (1991) argues that modernism, postmodernism and feminism represent three of the most important theoretical contributions to the development of cultural policy and pedagogical practice that can substantially advance democracy, providing educators with the opportunity to rethink the relationship between the school and democracy. Incorporating these three theoretical perspectives the author posits some principles of critical pedagogy: education must have as a purpose the production of political subjects; ethics should be a central concern; focus should be given to differences in an ethically challenging and politically transformative way; critical pedagogy should give space to other discourses which are not reducible to a hegemonic narrative; critical pedagogy should be seen as a cultural policy committed to creating a sphere of empowered citizens; critical pedagogy must propose a revision of the Enlightenment notion of rationality, proposing alternatives, combining a language of critique and possibility; critical pedagogy must understand teachers as intellectuals with transformation power that occupy specific political and social positions; and, finally, the central notion of critical pedagogy is the

combination of the postmodernist idea of difference with the feminist emphasis on the primacy of the political. Pedagogy should thus be understood as a form of cultural production intrinsically historical and political.

Following the same line of thinking, Kellner (1991) argues that one of the most important contributions of postmodernism for pedagogy, and for the expansion of the concept of literacy towards the notion of media literacy, was the dismantling of barriers between "high" and "low" culture (or "popular culture") and the extension of the notions of textuality, which make popular culture an object of study. Several feminist studies have had as their object the popular culture, which is considered significant to this theoretical current for being a space of struggle and negotiation of meanings. Two assumptions are common when it comes to feminist studies of popular culture approaches: women have a relationship with popular culture that is different from the one that men have; and the understanding of how popular culture works is essential for women to take control over their identity and have the ability to change and to intervene (Storey, 2008).

In this sense, some authors use the concept of critical media literacy to highlight this political and transformative aspect of learning, focusing on the need to develop a critical view of the discourses and of the media representations, and emphasizing the importance of using different media for self-expression and social activism. However, it has been warned that media literacy programs that focus on developing critical thinking without a context of empowerment that addresses the fundamental rights of free expression can make students too cynical and disengaged towards institutions such as the government or the media, being therefore essential that the connection between media literacy, freedom of expression and civic engagement is emphasized so that it becomes an educational response aimed to encourage political participation (Mihailidis, 2009).

Policy advocates for media literacy therefore press for its inclusion in school curricula and for policies to ensure that everyone has access to this type of education, because the differential access to media and information leads to the expansion of opportunities for the already privileged at the expense of the marginalized population, since certain uses of ICTs can result in more human, financial, social and cultural capital leaving those who are left out of the learning process at a disadvantage. There is a wide spectrum of "exclusions" that operate when it comes to the use of ICTs, and thus, to understand the various inequalities around the use of ICTs, one must take into account factors such as differences in age, gender, race, ethnicity, special needs and education of users (Hargittai, 2008). Henry Jenkins, therefore, opposes educational

approaches of the "*laissez faire*" kind, which ignore gaps in participation with regard to three challenges posed by ICT: access to opportunities for engagement that technologies represent, the issue of transparency of messages transmitted and the ethical challenge of dealing with a complex and diverse social online environment (Jenkins et al, 2009).

The transparency problem of messages is also crucial and occurs both because of its apparent naturalness, which obscures everything behind its construction, and because of the representation and non-representation issues embedded in them (Luke, 1994). Thanks to the ubiquity of media, young people are exposed to their influence early on, but often they do not receive appropriate education to perform a systematic analysis of its contents. Starting from the assumption that neither the media nor the education are neutral or impartial, and cannot be separated from questions of power, politics and history, researchers argue that the school should be a place where students can reflect the powerful media representations and critically examine them (Boske & McCormack, 2011).

Furthermore, media literacy education can be understood as a method of teaching citizenship and human rights values. As the scholar Divina Frau-Meigs (2008) put it:

“Human rights need to be made explicit again, with strategies of high and low cultures within our nations, with a combination of school and media, via communities and individuals alike. There is a need for a global repositioning of values considering our increasing connectivity -an explicitly technical word, that means nothing without a human sense of connectedness. Media education and human rights are about connectedness. Hence, it is essential to identify some of the major disconnects that undermine them” (Frau-Meigs, 2008, p. 54).

Finally, recent trends towards e-government and also provide justifications for this type of educational policy, as points the report of a survey recently published by the United Nations, "United Nations E-Government Survey 2014 - E-Government For The Future We Want":

“There are clear opportunities for the future improvement of e-participation, including technology trends towards, for example, social media and mobile devices/technology which are inherently interactive, as well as crowdsourcing. There are also severe challenges, including the digital divide, low user take-up and the lack of incentives to participate. These opportunities and challenges call for effective strategies to create an enabling environment for e-participation, including appropriate legal and institutional frameworks, capacity-development for digital media literacy for citizens and a seamless integration of online and offline features for public participation. (...) Digital media literacy can facilitate e-participation by increasing the capacity of people. In order to be an effective e-participant, the inclusion of digital media literacy and lifelong learning efforts should become a social norm. Such literacy also includes the

formation of relevant attitudes, development of skills and transfer of knowledge” (United Nations, 2014, p. 6 and 72).

## **The gender perspective and media literacy**

### *Contributions of the feminist theory to the debate*

Since media content can be highly symbolic, several theories are sometimes necessary to perform its reading and interpretation, which resulted in the influence of several different theoretical perspectives in the field of media studies and in the very formulation of the concept of media literacy such as critical theory, post-structuralism, postmodernism, semiotics, multiculturalism and feminist theory (Agger, 1991; Luke, 1994; Kellner &Share, 2005). In particular, feminism postmodern and post-structural analysis of discourses promoted from the gender perspective, focusing on the different positions of power and influence in the writing and reading between men and women, concluding that the presentation of structured knowledge in discourse reflects power struggles (Agger, 1991).

Feminist epistemologies contribute, in this sense, since they seek to denaturalize what is taken as common sense, or hegemonic thinking, showing how the same message can be interpreted in various ways, which is essential to building a more pluralistic and representative democracy. Therefore, the school should be in charge of making visible the power structure behind the production of information, and how it benefits certain groups over others. For some authors that learning is linked to a project of a more participatory democracy, being other more "neutral" approaches considered innocuous in order to really generate more civic engagement through education (Kellner, 2005).

According to many feminist arguments, throughout history there was something very close to a repression of female voices. The representation of women was mostly left in charge of men, and this historical silencing of women "led to a fetishization and objectification of 'the feminine'" (Luke, 1994, p.32). Furthermore, it has already been attested in many studies that there are more negative female stereotypes than negative male stereotypes run primarily on television; men are usually portrayed with positive characteristics such as competence, leadership and bravery, while women are framed in basically two stereotypes, either as the sexual object or as the mother/housewife, and those profiles do not seem to have changed much since the beginning of television programming (Potter, 2011).

To illustrate this point more clearly, it is useful to review some data collected in the largest and longest longitudinal research on the subject of gender and media, and more specifically on news media, which, after all, remain the major and most influential source of information worldwide, despite the rise of social media. From the most recent report on “Who makes the news?”, carried out by the Global Media Monitoring Project (2010), it seems clear that while there has been some small progress in the presence of women as subjects of news stories (GMMP produces reports from five to five years since 1995), the world as depicted in the news is still largely male: 76% - more than 3 out of 4 – of news subjects are male and the small rise in women’s visibility in comparison with the last studies produced by GMMP is largely due to stories on ‘science & health’, which is a topic with the least space on the news agenda. Furthermore, women’s role as spokespersons or experts in the news is still low (19 and 20%, respectively); female news subjects’ ages are mentioned two times more than male subjects’ and women are identified by their family status 4 times more than men. As for the news content, only 13% of all news has a specific focus on women and, while only 6% deal with gender equality or inequality, a large amount of stories (46%) reinforced gender stereotypes. Finally, the overall picture of Internet news production and content shows similar numbers.

For Carmen Luke (1994), the different media provide a "public pedagogy" that influence and shape the perception of each of us about gender roles, identity and social relations. Therefore, in a classroom where critical literacy is practiced, it is possible to challenge such representations and understand how they reinforce or weaken the power of certain groups. This education should go beyond the understanding of how meaning is constructed to also examine how these constructed senses relate to broader systems of cultural, gender and class domination. In this situation, the knowledge and common sense that students bring to the classroom are used as a learning tool, which implies a multidisciplinary approach. The experience of students must therefore suffer a critical reappraisal so that assumptions and prejudices about themselves and about others are put in discussion and challenged.

The contributions of the field of feminist standpoint theory propose that the different subject positions (determined by class, race, gender, sexuality, etc.) produce different readings, being therefore important that media messages are interpreted from different perspectives so as to make education more conducive to a pluralist democracy. The theory of the feminist perspective in this type of analysis contributes by proposing that all reading seeks to apprehend subordinate perspectives, thus undermining the hegemonic reading and understanding them as just one of the possible interpretations of a message. In this sense, opening spaces for groups that do not

normally have the opportunity to express themselves is important, but this must be accompanied by the development of a critical analysis that exposes the structures of oppression (Kellner & Share, 2005).

In a similar vein, the concept of the subject as positionality is proposed by Linda Alcoff (1988) to supply the debate on the subject of feminism with an alternative, which is neither an essentialist conception nor deconstructed until its last consequences, as proposed by certain currents of post-structuralism. The concept of positionality developed by the author, therefore, is a non-essentialist conception of the subject and also inseparable from the external environment that surrounds the subject, taking into account objective, cultural, ideological and economic conditions etc. Carmen Luke (1994) then states that to feminist theories in general, and for feminist pedagogy in particular, this conception of the subject as positionality is critical, since women have complex and multiple identities that cannot be reduced to principles universally applicable, but it must be developed from the individual voices expressed from their particular positions. Here, therefore, the subject is understood as a cultural product of hegemonic discourses, but also as a cultural agent, able to negotiate and contest meanings assigned. This non-universal understanding of the subject combined with this notion of agency is, therefore, an essential contribution on the debate over media literacy policies.

Finally, the last contribution to be analyzed is that of performativity, as developed by Judith Butler (1990), whose post-structuralist and anti-essentialist concept of identity describes gender as a cultural performance or discursive practice performed by each individual. This theory is relevant to media literacy as it reinforces the idea of the capacity of individual agency in a participatory media culture. Butler's concept of gender performance is also one of the founding landmarks of queer theory, which in its relation to studies of popular culture seeks to criticize its "heteronormativity" and question the naturalness of gender roles (Storey, 2008).

Although, according to Butler, it is not possible that individual agency be situated outside the speech system to oppose or change it, the dominant system is open to intervention and reframing, processes that enable the existence of individual transformative action. This theoretical contribution, therefore, implies a revision of the policy objectives of media literacy towards a more participatory culture and more active citizenship:

"From this perspective, individuals' participation in media culture provides opportunities to perform the self in hegemonic or variational ways and particular types of media education activities may encourage (or discourage) performative variation. The media education classroom potentially provides the cultural space and technological access through which the "DIY citizen" can experiment with identity by performing

the self is less regulated contexts than usual, and in which they see others performing “citizenship” in unexpected and provocative ways. The need for this to occur in local contexts suggests that a singular media education discourse is unlikely to be successful and participation should not be constructed as a specific set of strategies that are universally applicable. Viewed this way, media education’s aim is not to ‘empower’ young people through particular disciplinary strategies, but to provide localised opportunities for democratic participation. In such contexts, hegemonic media representations and institutional processes may potentially be negotiated with in creative ways. This may lead to a form of social proficiency that is essential for successful citizenship” (Dezuanni, 2009, pg. 41).

### ***UNESCO and the gender perspective on media literacy***

UNESCO and the European Union are the two international organizations that most systematically promote educational policies of media literacy. Following them, the Alliance of Civilizations of the United Nations (UNAOC) also supports some projects related to the theme. Australia, Canada, New Zealand and South Africa are also regional exponents in media literacy. The United States, the largest exporter and consumer of media products, is ironically relatively behind many other countries in this area, although all the country’s states have a minimum standard of media literacy established in the school curriculum. On UNESCO’s latest publication in the area, "Media and Information Literacy - Policy and Strategy Guidelines", which outlines strategies for the development of this educational policy, the organization identified key conditions necessary for the development of a policy of media and information literacy, which involve briefly: resources, information and research in the area, presence of stakeholders in the country, and consensus both about the concept of media and information literacy as about the goals that this type of policy should follow. This partly explains the long delay on this educational policy in parts of Latin America, Asia and Africa.

UNESCO in particular had a significant and systematic role in the area by supporting and organizing conferences, symposia, seminars, research and publications. One important milestone is the Grünwald Declaration on media education, 1982, where the organization's position in relation to the adoption of an empowerment perspective is made clear:

“Rather than condemn or endorse the undoubted power of the media, we need to accept their significant impact and penetration throughout the world as an established fact, and also appreciate their importance as an element of culture in today’s world. The role of communication and media in the process of development should not be underestimated, nor the function of media as instruments for the citizen’s active participation in society. Political and educational systems need to recognize their obligations to

promote in their citizens a critical understanding of the phenomena of communication” (UNESCO, 1982).

Other landmarks are the international seminar "Youth Media Education" organized in 2002 and the Paris Agenda 2007 (which yielded 12 recommendations for educational policies of media literacy). In this last encounter, among other recommendations, the strengthening of the links between media education, cultural diversity and respect for human rights was proposed. Among the recent publications of the organization are: a guide to promoting user generated content for communicators (*Guidelines for Broadcasters on Promoting User-generated Content and Media and Information Literacy*, 2009), a global mapping of media literacy education policies (*Mapping media education policies in the world: visions, challenges and Programmes*, 2009), a curriculum of media literacy directed toward teachers (*Media and information literacy curriculum for teachers*, 2011), and a guide to educational policies and strategies for media literacy (*Media and Information Literacy: policy and strategy guidelines*, 2013). In 2013, the organization also launched the Global Alliance for Partnerships in Literacy and Informational media (Global Alliance for Partnerships on Media and Information Literacy), to coordinate efforts in the area, and the Global Alliance on Media and Gender (Global Alliance on Media and Gender), to articulate a systematic monitoring of the implementation of the Beijing Declaration and its Platform for Action.

The Beijing Platform and its Plan of Action specifically addressed the relationship between women and media, positioning media literacy as critical to the advancement of women and development:

“The mass media are a powerful means of education. As an educational tool the mass media can be an instrument for educators and governmental and non-governmental institutions for the advancement of women and for development. Computerized education and information systems are increasingly becoming an important element in learning and the dissemination of knowledge. Television especially has the greatest impact on young people and, as such, has the ability to shape values, attitudes and perceptions of women and girls in both positive and negative ways. It is therefore essential that educators teach critical judgment and analytical skills” (United Nations Fourth World Conference on Women, Beijing, China, Platform for Action, article 77, 1995).

On the last guide on the topic published by UNESCO (*Media and Information Literacy - Policy and Strategy Guidelines*, 2013), the inclusion of gender in policy debates about media literacy would entail the principles of "Information Society" (or "Knowledge Society"), involving equitable and universal access to quality information and education, multiculturalism and freedom of expression. A public policy of media and information literacy that takes into account gender

issues should be developed and implemented equally between men and women, and recognize that access to information differs both in terms of access and in terms of operation and authorship between men and women, and this reality must be transformed, taking into account also the most vulnerable groups within the country that are at disadvantage. This approach is particularly important in developing countries where these inequalities are more pronounced - a gender approach is considered, therefore, a development approach. In the authors' proposal, gender inequalities are considered in combination with various other forms of inequality arising from other social categories such as age, geographic location (urban/rural), ethnic inequalities, among others, noting that one type of inequality in combination with others can cause its exacerbation (Grizzle et al. 2013).

Studies in the area face difficulties in accessing data and accurate statistics, since there is a lack of gender disaggregated statistics to analyze different uses of ICTs. However, we can say that in the world in general, the participation of women in society information is lower than that of men, particularly in poorer countries. Recent studies also indicate that old stereotypes continue to be played worldwide in various media and women remain under-represented. In addition, men continue to dominate most of the highest positions of command media companies, as well as middle management positions, management and technical level. The organization argues that while technological change has been in favor of expanding access to information and knowledge, it also eventually generates other inequalities, and concludes that policies and strategies for gender sensitive media and information literacy can help address inequalities and negative stereotypes propagated by information providers (Ibid., 2013).

Within the UN, therefore, the issue of media literacy seems to be closely linked to the struggle waged by various women's movements. Media and information literacy is therefore considered a human right and it is also linked to the issue of development and as an instrument for overcoming various inequalities.

## **Conclusions**

Feminist theories and gender studies represent important contributions to the debate on media literacy education policy and cannot be ignored if the goals of this educational policy aim at building a more egalitarian and participatory democracy. Empirical studies on media literacy are still fairly recent, research on the impact of this type of educational policy is still scarce, and indicators for evaluation are still in the development phase. However, it seems clear that to have a positive transformative impact, it is necessary that educational policies such as this take into

account the diverse range of inequalities that are present in all classrooms. Being considered a human right in itself, but also an instrument for the promotion of human rights, media literacy education is considered fundamental for the empowerment of women and other groups in disadvantage, as the Platform of Beijing stresses and as UNESCO operationalizes it. Therefore, this kind of educational policy seems to meet the demands for a more inclusive education and may contribute for the universalization of human rights.

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## Political Cartoon in Ecuador:

### Exploring a *chilling-effect* after the sanction against ‘Bonil’ and El Universo

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#### Abstract

Cartoonist Xavier Bonilla and El Universo newspaper were sanctioned in 2014 after publishing a cartoon which, according to the sanction, motivated social agitation and was inaccurate. Against a backdrop of continuous friction between Rafael Correa’s government and private media in Ecuador, the text examines if the sanction created an environment of fear or self-censorship (chilling effect) in other cartoonists in Ecuador. For the analysis, 81 cartoons from three newspapers were monitored and analyzed during the month following the February 23th elections in Ecuador, in which the results were not as favorable for the government as in several previous elections. The results the paper shows signal there is no chilling-effect influencing how cartoonists draw cartoons or how they choose what to draw. On the other hand, it evidences that El Telégrafo, tough a public newspaper, eschews publishing cartoons portraying Correa or members of the majoritarian political party in Ecuador, Alianza País.

**Key words:** political cartoon; chilling-effect; freedom of speech; Ecuador; newspaper.

## Introduction

The entry into force of the Communications Law in Ecuador, on June the 26<sup>th</sup>, 2013, introduced an interesting but ambiguous normative framework in the country's political landscape. Ambiguous wording in several articles of the Law grants the Communications and Information Superintendence (Supercom) flexibility and discretion when interpreting the Law. Furthermore, as it is an organ which employs a rhetoric very similar to that of the government, Supercom acted as a judge and a party during the legal process against El Universo, Ecuador's biggest newspaper, and its cartoonist Xavier Bonilla 'Bonil'. On December the 28<sup>th</sup>, 2013, Bonil released a cartoon in which he portrayed a police raid on the home of a journalist and opposition deputy assistant, Fernando Villavicencio. The cartoon's caption reads: "Police and Public Ministry raid Fernando Villavicencio's home and confiscate documents related to corruption cases." After the release, Supercom declared in a report that the cartoon "delegitimizes authority and supports social agitation", as El Universo wrote. Beyond demanding the cartoonist's rectification within 72 hours, Supercom sanctions El Universo newspaper with administrative measures. The aforementioned cartoons can be found in the Annexes section of this paper.

It is disturbing to learn that the organ entitled to regulate communications in Ecuador considers Bonil's cartoon as a threat to the authority and a support for social disorder. Authors and scholars who will be mentioned and cited in this text agree on the responsibility the cartoon has: wielding a smart but amusing critique of the powerful and ensuring they are hold accountable. Some of those authors, as Villareal Morales, believe cartoons are, along being a mobilization trigger, an educational tool. Authors agree on several of the characteristics that define political cartoons: this paper defines them as an interpretation of reality through drawings and a way of criticizing. This is why, the analysis this text develops when identifying components of political cartoons in Ecuador is worth revising to understand which are their characteristics, which are the most common or popular figures portrayed in cartoons in the analyzed period of time and which are the most popular or relevant topics according to cartoonists.

## Literature Review

### *Political cartoon: definition and characteristics*

There is a common consent over the definition of 'political cartoon' in Latin America. Briceño (2005) describes it as "one of the faces of satire, this is, a way of unmasking, criticizing or attacking a person, a family, a party, a social class, an institution, a government, a situation, a

nation, an ethnic group, usually emphasizing their ridicule or negative aspects” (Briceño, 2005, p. 179). Pedrazzini (2012) reminds us that the term ‘cartoon’ – or ‘caricatura’ in Spanish – comes from the Italian *caricare*, which translates to ‘loading’, which not only serves the purpose of “giving weight or relief, squeeze or insist, exaggerate” but also it is “a weapon that is able to hurt”, whose spirit is critical and anxious about denouncing, “aiming at the disqualification of the political class and, particularly, of those ruling” (Pedrazzini, 2012, p. 27). The critique message is subtly transmitted by graphic and linguistic symbols and it could achieve a similar or wider effect than an editorial (Sanín, 2011, p. 37). Briceño states political cartoons transmit information and opinion, developing a fundamental role in the consolidation of democratic governments, expressing the realities of a society in a critical manner (Briceño, 2005, p. 181). For Briceño, cartoons “are able to discover and synthesize the positive and negative side of social structures”. That is why they reach a broader audience and, furthermore, they can be understood by different social groups (Briceño, 2005, p. 179). On the other hand, Sánchez Guevara (2012) states cartoons enjoy a “critical function towards social problems”, along with the function of “making readers laugh to mitigate, to some extent, the suffering of everyday national dramas” (Sánchez Guevara, 2012, p. 2).

Enumerating the characteristics of the political cartoon becomes a complex task when we consider the broad scholarly work written about it. However, there is common ground on which we can stand. It is particularly important to mention rhetorical figures the cartoon uses, specially the political cartoon. Sánchez Guevara states politicians themselves utilize rhetorical figures to “mask the failures of their public policies” (Sánchez Guevara, 2012, p. 6). Therefore, a certain kind of ‘revenge’ is achieved when those resources are employed by cartoonists, including parody, satire, analogies, drills or simulations, hyperboles, litotes or understatements, metaphors and metonymies (Sánchez Guevara, 2012, p. 11). In her text, Sánchez Guevara describes the strategies and context in which political cartoons parodied about the global economic crisis of 2009 and its effects in Mexico. The resources cartoonists frequently employed were litotes and hyperboles. The first one reduces the significance or relevance of objects or events, for instance, when describing the crisis as a brief or minor flu. In contrast, using hyperboles implied exaggerating something to make it relevant, as when transforming a crisis into a “Tsunami or a Category 4 Hurricane” (Sánchez Guevara, 2012, p. 4).

The importance of cartoons transcends this sphere, as they become tools to document historical events and create historical consciousness. Keane (2008) cites Spielmann, the creator of *Punch*, when emphasizing the importance of cartoons to understand history. In the words of Spielmann,

the cartoon "is not to be considered merely as a comic or satirical comment on the main occurrence or situation of the week, but as contemporary history for the use and information of future generations cast into amusing form for the entertainment of the present" (Keane, 2008, p. 849).

History is an important element in cartoons, and their influence is not at all recent. Johnson (1937) wrote during the thirties about the discovery of what is believed to be the oldest kind of cartoon, drafted around 1360 B.C. in Egypt. Since then, cartoons remained useful for those who wished to speak up their minds and they received a boost once printing was invented. The development of caricatures is explained by Villarreal Morales (2013), who locates their origin in the Middle Ages, arguing that illiterate peasants mobilized to criticize the Catholic Church (Villarreal Morales, 2013, p. 38). There were two objectives behind this tactic: to strategically mock the powerful and to indoctrinate the illiterate (Villarreal Morales, 2013, p. 38). According to Sanín (2011), caricature drawings are documented to have been exposed clandestinely. Before periodic publications were released, "until the middle of the eighteenth century", caricatures were released or displayed only at the domestic level, in intimacy. Later on, with printing, they acquired value as a potential image of public opinion (Sanín, 2011, p. 21). To the view of Johnson, Holland became rife for cartoonists during its Golden Age (seventeenth century). "Exaggerated drawings of an individual's deformities were hailed as the height of humor. The more malignantly cruel, the funnier the drawing was deemed to be" (Johnson, 1937, p. 21). Later on, already during the twentieth century, this author identified a shift in cartoons away from "personal caricature" towards a more "subtle and intellectual" type of drawing, as the individual "is rarely attacked today except as the sponsor or symbol of principles which the artist disapproves" (Johnson, 1937, p. 21).

In Ecuador, the public to which caricature magazines as "Caricatura" (1919), "La Bunga" (1966) or "El Pasquín" (1982) was small minority, and this threatened their success and survival. According to historian Carlos Freile, from Universidad San Francisco de Quito USFQ, their success was actually limited.

"I always paid attention to the fact that general or political humoristic magazines in Ecuador did not have a broad success. This was interesting, as I compared this case to the context of other countries. I guess this is due to the fact that the average Ecuadorian does not read much. Therefore, as these magazines did not enjoy a massive diffusion, their economic revenues were scarce, despite the fact that some of them, as "El Pasquín" or "La Bunga" were attached to newspapers. Unfortunately, these newspapers did not enjoy

a broad audience either. I consider the cartoonists working in those magazines to be excellent, but they suffered from those limitations because their readers did not actually read” (Freile, 2014).

It’s interesting to hear Freile’s opinion of whether a cartoon is art or not. In his opinion, cartoons cannot always be called art, unless their shapes and lines were extraordinary and deserved exposure. “They are basic strokes that emulate a specific moment”, as if they were frozen in time. This is similar to the opinion of Sánchez Guevara, who states that caricatures occur in a defined moment, without a past or a future. For this reason, the drawing’s efficiency when transmitting a message relies on how well informed about the represented situation the reader is (Sánchez Guevara, 2012, p. 8).

### ***Chilling effect or self-censorship***

La Marche (1991) states that “chilling effect” is a metaphor alluding to the self-censorship produced by the fear of legislation that sanctions opinion (La Marche, 1991, p. 56). According to Hurley (2009), “the fear of being sued prevents articles from getting printed and many others from even being written”, referring to the fear writers have of facing strict legal norms because of opinion or facing pressure from agents which also provoke self-censorship. The disadvantage, a writer answers to Hurley (2009), is that “real content may have been stripped off the articles which in fact were published” (Hurley, 2009, p. 1006). Legislation, as it was written, is one of the triggers of *chilling effect*; however, causes include violence from organized crime or from power groups whose interests are at stake (Salzburg Academy on Media & Global Change).

### ***Communication’s Law***

The sanction against Xavier Bonilla ‘Bonil’ has its origins in the cartoon he published on December the 28<sup>th</sup>, 2013, against the backdrop of continuous friction between private media and President Rafael Correa’s government. This friction became more evident in June 2013, when a new Communications Law was approved and entered into force, among a polarization of opinions surrounding it. The Law had been voted on favorably few days before it entered into force by Ecuador’s National Parliament –majorly composed by the President’s party, Alianza País. The last step, the President’s approval of the Law, occurred on June the 24<sup>th</sup>, as rejection was unlikely due to a majority in the Parliament favoring its approval. The 2013 Communications Law, reforming its 1975 antecessor, has ever since been heatedly debated. On the one side, the government praised its attributes, as that of guaranteeing more space on TV for national productions; punishing prior censorship established by editors and media owners; or distributing

TV and radio frequencies on a fair basis: 33% for public media, 33% for privately-owned media and 34% for community-owned media.

In this respect, Ecuadorian lawyer Xavier Flores, a political analyst, commends several components of the document. Although several principles as subsequent responsibility and respect for dignity are already enshrined in international conventions signed by Ecuador and guaranteed by its Constitution, the new Law recognizes them in its content. To this matter, he argues,

“People do not understand completely that information is a right. They think freedom of expression is saying what they want to say. But that right also implies that if one’s information is published inaccurately or without any evidences, one counts on resources to complain and confront the media” (Flores, 2013).

The fledging Communications and Information Regulation and Development Council, created in the Law’s body, is entitled to regulated universal access to communication and information, establishing mechanisms for the satisfaction of rights, regulating contents, elaborating and releasing regulations for the completion of its functions, elaborating reports to decide the conclusion or extension of TV or radio frequencies contracts, among others (Asamblea Nacional del Ecuador, 2013, p. 10). The Council, which is described by Flores as “a tiger with sharp teeth and claws which would not attack if it is not harassed”, works along the Communications and Information Superintendence (Supercom), a “technical organism” created in the Law’s body, “for the surveillance, audit, intervention and control, with punishing capacities”, which ensures the guidelines established by the Council are respected and fulfilled (Asamblea Nacional del Ecuador, 2013, p. 11). The concern private media workers and international human rights organizations such as Human Rights Watch, Reporters Without Borders and The Committee to Protect Journalists voice is based on the fact that both organisms and their leading figures share political views with the government (Otis, 2013).

## **Methodology**

In order to understand the topic at hand, several articles of the Communications Law and their impact on the development of public opinion in Ecuador were analyzed, taking into account widely-accepted conceptions of freedom of speech. Furthermore, cartoons in the web pages of three Ecuadorian newspapers (El Comercio, El Universo, El Telégrafo) were monitored from February the 24<sup>th</sup> to March the 24<sup>th</sup>, finally collecting and examining 81 cartoons. This period of time was crucial to investigate whether cartoonists had shifted to a more moderate or aggressive stance towards power, as it followed the sectional elections of February the 23<sup>th</sup> in the country,

commonly recognized as an “electoral defeat” by the political rivals of President Rafael Correa and remembered as “23-F”. In these elections, candidates belonging to other than today’s majoritarian political party, Alianza País, won the post of Major in several provincial capital cities, as Quito, Guayaquil and Cuenca.

Three criteria were analyzed:

- **General categories**, whether it was Politics, Sport, Economics, Society, Culture, Others.
- **Topic**, classifying them according to national or international relevance.
- **Character**, analyzing them according to the frequency with which they are drawn, classifying them into ‘national’ or ‘international’. The category ‘Others’ corresponds to those cartoons which did not include known characters. The category ‘Objects’ corresponds to those cartoons showing objects.

Finally, a brief analysis of two cartoons was developed, in order to evidence the two moments of cartooning in Ecuador, before the elections and after them: Bonil’s cartoons published on December the 30<sup>th</sup>, 2013, and March the 17<sup>th</sup>, 2014; and El Comercio’s Pancho Cajas’ cartoons published on May the 2<sup>nd</sup>, 2012, and March the 19<sup>th</sup>, 2014.

## Analysis

In his column in the Opinion pages of El Universo newspaper, Bonil’s caricature represented the Police and Public Ministry’ raid on the home of journalist and opposition deputy assistant Fernando Villavicencio. Villavicencio faced accusations of having hacked the email addresses of President Rafael Correa, vice President Jorge Glas and the Presidency’s judicial secretary Alexis Mera, and is known for having a strong opposition discourse towards Correa’s government. The cartoon’s caption read: “Police and Public Ministry raid Fernando Villavicencio’s home and confiscate documents related to corruption cases” (El Comercio, 2014). On January the 31<sup>st</sup>, Supercom sanctioned ‘Bonil’ and El Universo newspaper. The former was obliged to rectify his cartoon within 72 hours and the later was fined with the 2% of its average billing amount of the last three months (Teleamazonas, 2014). According to El Universo, the newspaper was sanctioned as it did not abstain from adopting an institutional position on the innocence or guilt of the accused, Xavier Bonilla (Teleamazonas, 2014). This aspect is justified by Article 25 of the Communications Law, which states that “communications media shall abstain from taking an institutional position on the innocence or guilt of people involved in legal investigations or judicial criminal processes until a sentence is established by a judge” (Asamblea Nacional del

Ecuador, 2013, p. 6). This clause and its implications have the capacity of hindering investigative journalism.

Against this backdrop, Bonil's defense became challenging. His lawyer, Ramiro García Falconí, assured that the caricature of December the 28th was based on information obtained from several sources as the newspapers *El Comercio*, *La Hora*, *El Telégrafo* and *El Nacional* in the previous days (Superintendencia de la Información y Comunicación, 2014, p. 3). Nevertheless, the Resolution Supercom issued to inform about the sanction states that the documents presented by Bonil and his defense do not include information "affirming that the Police or the district attorney's office took "documents related to corruption cases"". The Resolution states that this affirmation is only based on declarations made by Fernando Villavicencio in respect to the raid. The Resolution mentions a newspaper article where Villavicencio's complaint, what he assures are, in his words, "corruption cases", are written by the newspaper as "alleged corruption cases", as there are no evidences about it (Superintendencia de la Información y Comunicación, 2014, p. 3). Once again, investigating if this case is, in fact, denouncing corruption cases would not be possible considering Article 25 of the Communications Law, banning media from "taking an institutional position on the innocence or guilt of people involved in legal investigations or judicial criminal processes until a sentence is established by a judge".

Additionally, the sanction was further justified when Carlos Ochoa, the director of Supercom, cited Article 10 of the Communications Law, regarding deontological norms and the practices of communications media, which states that "responsibility over published opinions and information should be borne by the media" (*El Telégrafo*, 2014). This article adds that newspapers bear responsibility over the opinions included in their pages, as they participate in the "communicational process" where those are created. Along with this article, Article 20 obliges media to expressly assume responsibility for the contents published in their pages or attribute them to the author in order to eschew sanctions "in the administrative, civil and criminal" scopes (Asamblea Nacional del Ecuador, 2013, p. 5). However, in the case we analyze, Bonil enjoys a space in the Opinion pages of *El Universo* newspaper where his caricatures are clearly attributed to his pseudonym. Therefore, his case should not be included in this framework, although it is.

If we analyze this statement from the perspective of the Universal Declaration of Human Rights, we will find that Article 29 enables the Law to limit this right and freedom "solely for the purpose of securing due recognition for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare of a democratic society" (UN General Assembly, 1948), although Article 19, expressing the most widely-accepted conception

of freedom of speech and opinion, grants everyone the “right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (UN General Assembly, 1948)

The Inter-American Court of Human Rights has, as well, repeatedly expressed the necessity for increasing tolerance to opinion, as it reinforces democratic values within a society. “The democratic control exercised through public opinion encourages the transparency of State actions and promotes the responsibility of public officials in the performance of their duties. Hence, the greater tolerance to the statements and opinions expressed by individuals in the exercise of such democratic power. [...] These are the requirements of the pluralism inherent in a democratic society, which requires the greatest possible flow of information and opinions on issues of public interest”. (Case of Kimel v. Argentina, 2008)

### *Cartoon analysis*

It must be stated that there were very few occasions in which the newspaper did not publish a cartoon in its web page or in which it published more than one cartoon at the same day. El Telégrafo did not publish any cartoon on March the 9<sup>th</sup> and 12<sup>th</sup>, 2014. El Comercio did not publish any cartoon on March the 3<sup>rd</sup>, 13<sup>th</sup> and 17<sup>th</sup>. Nevertheless, it classified two cartoons on the same day, on March the 1<sup>st</sup> and the 5<sup>th</sup>. It must be also stated that there are two cartoonists in El Telégrafo (for the period which we analyze): Clavin and Alfons López. On the other hand, there are three working in El Comercio: Roque, Asdrúbal and Pancho Cajas. In El Universo, there is only one cartoonist: Bonil.

- *General categories*

In **Table 1** and **Graphic 1**, a highly political content is evidenced in cartoons. The definition of whether the content refers to Politics can be based on the analysis of **Illustration 1**, in which the message and debate are not only centered on the extraction of oil in the Yasuní National Park, but also to the campaign of collection of signatures of the general public to ask if the oil should be kept underground, an effort undertaken by the environmentalist group Yasunidos. The cartoonist was aware that a second and different kind of questionnaire, produced during the collection of signatures and deemed as “fake” by Yasunidos, would divide or curtail the process (Ecuador Inmediato, 2014). Therefore, he represented the probable outcomes of choosing either one of the questionnaires, in **Illustration 1**. In **Table 1** and **Graphic 1**, the topic category ‘Undefined’ refers to topics which did not fit in any of the offered categories, including as a

reason the little amount of information this author possessed at the moment when the drawing was analyzed.

- *Topic*

**Table 2** and **Graphic 2** show the topic each caricature developed. As the monitoring process followed the sectional elections in Ecuador on February the 23th (where Majors, Heads of Province and others were elected), a significant number of cartoons were related. El Comercio and El Universo, sharing an opposition stance towards the government, focused on Alianza País' "electoral defeat". On the other hand, El Telégrafo, a public newspaper, approached the results in a more general way or focusing, for example, in the low participation of traditional political parties, as in **Illustration 2** and **Illustration 3**. Additionally, there were cases in which two topics were included in the same cartoon in several occasions. In El Comercio, the outcome of the elections and Correa's constitutional reform to get reelected as President in 2017 is an example, as shown in **Illustration 5**.

It is remarkable to see how newspapers focused their attention on different topics, as following a political line. El Telégrafo focused more frequently in the civil conflict in Ukraine and the referendum of March 2014 in Crimea. Vladimir Putin, President of the Russian Federation, was represented in the cartoon celebrating an electoral victory obtained "with no weapons or pressure", as shown in **Illustration 4**. On the other hand, El Comercio focused more frequently on the 23-F elections, as in the constitutional reform for the reelection of Correa and on a normative which obliges workers to acquire the State's social security programs (although it was called 'voluntary'). El Universo approached similar topics although it included a wider variety than El Comercio. Its most frequently topic was, again, the 23-F elections, the constitutional reform for the reelection of Correa and the government's voluntary-obligatory social security program. Topics considered as 'Undefined' were those whose event or reference was not clear or which did not reflect common knowledge.

- *Character*

The section where the analysis of characters takes place include **Table 3** and **Graphic 3**. It is curious that El Telégrafo, for instance, did not cartoon Rafael Correa or any member of his party, Alianza País. This newspaper focused more frequently, instead, on characters which have been criticized by President Correa or which are portrayed as rivals, as United States' Secretary of State John Kerry. As well, characters which are seen with a positive lens, as President Vladimir Putin during the referendum in Crimea, were also portrayed. On the other hand, El Universo

included the President in five cartoons and *El Comercio* included him in nine. It must be taken into account, as well, those cartoons where Correa or any members of Alianza País shares space with other characters. The number, naturally, increases. **Table 3** and **Graphic 3** include the category ‘Others’, which refers to unknown or common citizens. The section ‘Objects’ did not portray any human beings but just objects.

### *Analysis of single cartoons*

To demonstrate that the critical tone of political cartoons in Ecuador did not decrease after the sanction against Xavier Bonilla ‘Bonil’, I chose two cartoons from the most critical newspapers we have analyzed in this text, *El Comercio* and *El Universo*. The cartoons correspond to May 2012 and March 2014 for *El Comercio*; and December 2013 and March 2014 for *El Universo*.

- *El Universo*

One can interpret the hats on Correa’s head in **Illustration 7**, corresponding to December 2013, as the ostentation of the President’s accumulated power and prestige, exhibiting academic achievements in reference to honorary degrees he received in 2013, but also wielding police authority. The camera he holds alludes to the recording before and after the raid of Fernando Villavicencio’s home, to which Correa pronounced “We have everything on film”. Another reference to this is found in **Illustration 6**. This illustration is compared to **Illustration 8**, which portrays President Correa as a wolf trying to persuade Little Red Riding Hood about his honesty. This cartoon is drawn on reference to the promises Correa had repeatedly made of not becoming a candidate for the presidential elections of 2017, contrasting them with his alleged intentions of reforming the Constitution and running for president again. Bonil draws green and blue clothes on Correa, in reference to Alianza País’ colors. In the dialogue Correa develops, he states: “Yes... I recognize having committed some mistakes. I spoke badly of your grandmother; I roared at everyone; I cheated on you with several things... But I swear I will not cheat on you so much again...” Bonil confirms in this way his critical position towards Correa when he infers that the possibility of a shift in Correa’s plans or attitudes exists.

- *El Comercio*

The chosen cartoons for the analysis were drawn by Pancho Cajas and portray Correa in two distinct moments: his critique against private media in Ecuador and his pondering upon presidential reelection in 2017. In the first cartoon, corresponding to **Illustration 9** of May the 2th 2012, one day before the remembrance of World Press Freedom Day, Correa is about to

shoot a canon full of garbage, wearing a hat blinding his eyes, made out of a newspaper that reads “Free Press”. At that moment, the struggle between private media and Correa escalated, and the day when this cartoon was published, US President Barack Obama pronounced a speech urging President Correa to guarantee freedom of the press in Ecuador (El Universo, 2012). In **Illustration 10**, Pancho Cajas draws Correa sitting in a royal chair, pondering upon getting reelected while discussing with an assistant. This topic was utilized by cartoonists to evidence shifts in Correa’s plans and attitudes, something that was skillfully portrayed by Bonil in **Illustration 8**.

## Conclusion

By observing the work of El Telégrafo when cartooning characters or public figures, it is interesting to see that there is a clear political line, which is evidenced when no members of Alianza País are portrayed during the analyzed period of time. Moreover, by focusing more strictly to opposition public figures, countries or institutions which do not follow the line of the Ecuadorian government, the aforementioned conclusion can be confirmed. To be more specific, the focus on Guayaquil’s major Jaime Nebot (considered by Correa as an opposition leader), institutions as the International Monetary Fund or governments as that of the United States or those of the European Union are examples of this tendency.

On the other hand, El Universo and El Comercio have focused on topics which are commonly treated by most of the private media in Ecuador. For instance, the tone with which both newspapers treat the exploitation of the Yasuní National Park does not focus on the urgency of developing extractive operations there but mainly on the possible impact on nature the operations would have. While El Telégrafo did not portray President Correa pondering upon reelection in a single cartoon, El Comercio and El Universo utilized repeatedly this issue, making Correa the most popular character of their cartoons. With these evidences it is shown how both sides differ and represent today’s political and opinion polarization in Ecuador.

Following the definitions of *chilling effect* revised in this text, we conclude with two ideas. Firstly, those newspapers more prone to suffer from *chilling effect* would be El Universo and El Comercio, because of their critical tone and discourse towards the Government. Secondly, however, it is recognized that political cartoons did not experience *chilling effect* after the sanction against Bonil. To prove this conclusion, it is useful to revise the results of this brief study in regards to which was the most popular topic in each newspaper. For El Comercio, the humorous critique focused on the 23-F elections, Correa’s reelection and the State’s obligatory-voluntary social security

system. El Universo's major pronouncements approached the same topics, announcing, along with El Comercio, their direct critique to the Rafael Correa's government.

Finally, it must be recognized that the main limitation of this research paper lies on the brief period of analysis: February the 24<sup>th</sup> and March the 24<sup>th</sup>. It represents, nevertheless, a remarkable opportunity to examine the contents newspapers choose based on 81 cartoons. However, developing a wider and more exhaustive research, including more analysis criteria, is highly recommended.

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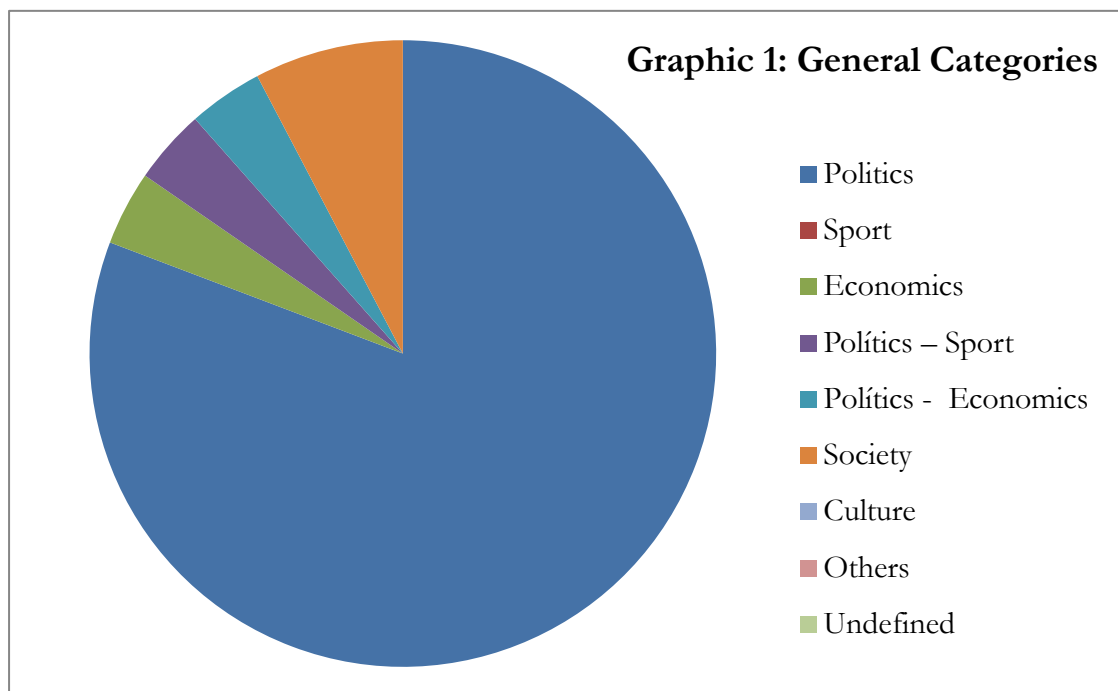
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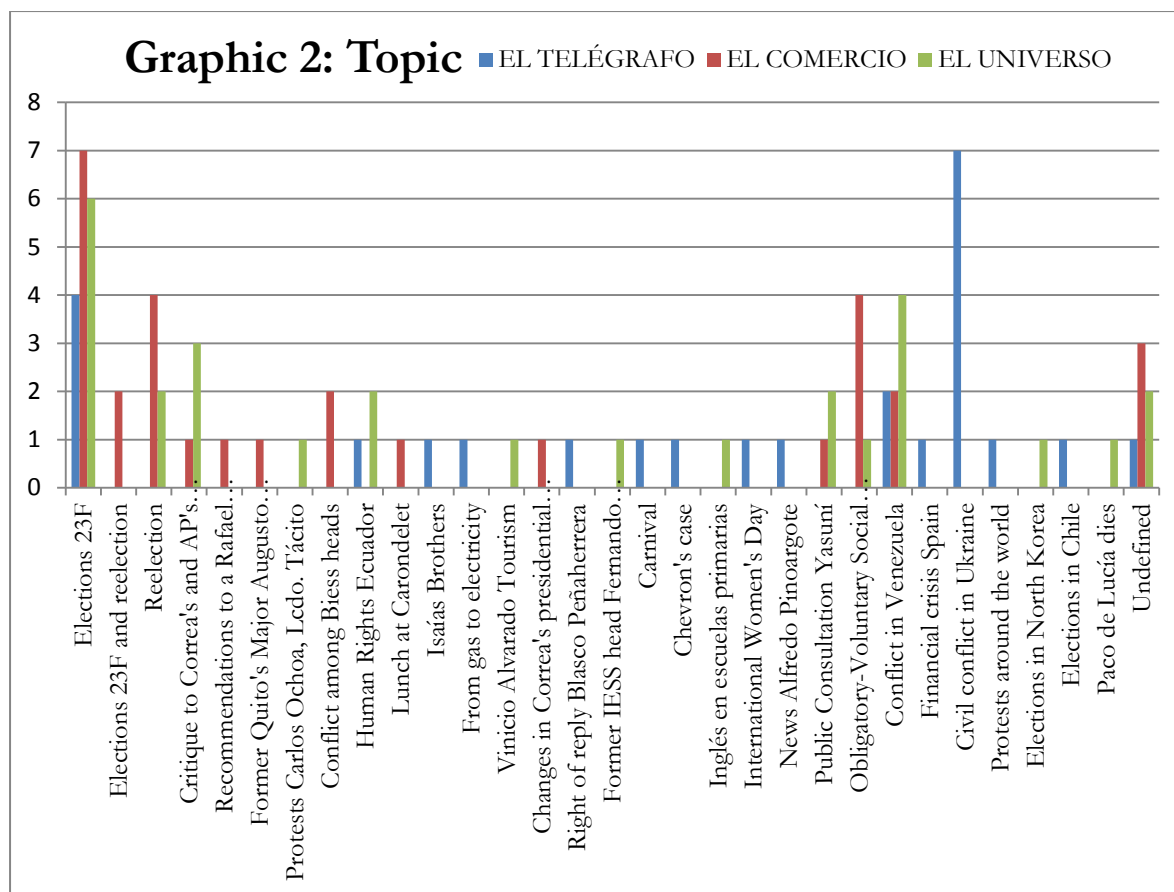
## Appendices

### Tables and graphics

Table 1			
General Categories	El Telégrafo	El Comercio	El Universo
Politics	21	24	23
Sport			
Economics	1		
Política – Sport	1		
Política - Economics	1		
Society	2	1	2
Culture			1
Others			2
Undefined		1	1

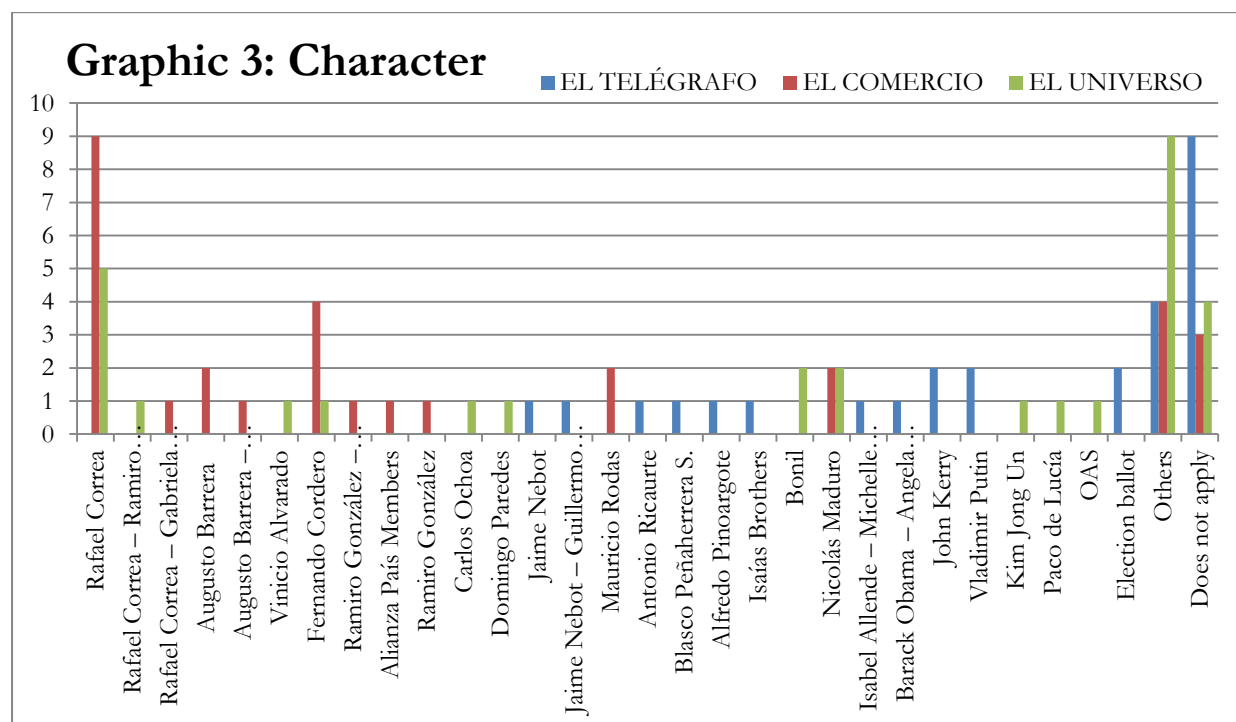


<b>Table 2</b>			
<b>Topic</b>	<b>El Telégrafo</b>	<b>El Comercio</b>	<b>El Universo</b>
Elections 23F	4	7	6
Elections 23F and reelection		2	
Reelection		4	2
Critique to Correa's and AP's government		1	3
Recommendations to a Rafael Correa		1	
Former Quito's Major A. Barrera management		1	
Protests Carlos Ochoa, Lcdo. Tácito			1
Conflict among Biess heads		2	
Human Rights Ecuador	1		2
Lunch at Carondelet		1	
Isaías Brothers	1		
From gas to electricity	1		
Vinicio Alvarado Tourism			1
Changes in Correa's presidential team		1	
Right of reply Blasco Peñaherrera	1		
Former IESS head Fernando Cordero resigns			1
Carnival	1		
Chevron's case	1		
Inglés en escuelas primarias			1
International Women's Day	1		
News Alfredo Pinoargote	1		
Public Consultation Yasuní		1	2
Obligatory-Voluntary Social Security IESS		4	1
Conflict in Venezuela	2	2	4
Financial crisis Spain	1		
Civil conflict in Ukraine	7		
Protests around the world	1		
Elections in North Korea			1
Elections in Chile	1		
Paco de Lucía dies			1
Undefined	1	3	2

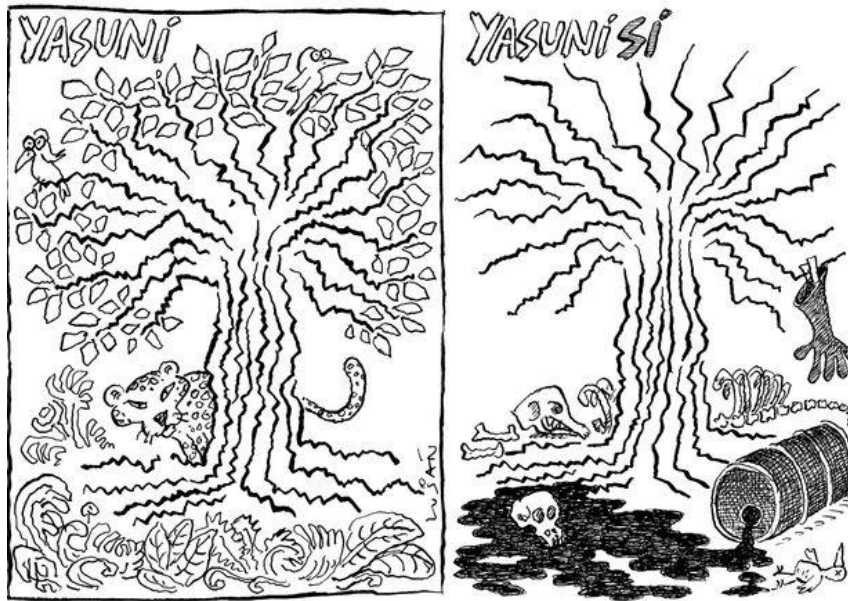


CHARACTER	EL TELÉGRAFO	EL COMERCIO	EL UNIVERSO
Rafael Correa		9	5
Rafael Correa – Ramiro González			1
Rafael Correa – Gabriela Ribadeneira		1	
Augusto Barrera		2	
Augusto Barrera – Mauricio Rodas		1	
Vinicio Alvarado			1
Fernando Cordero		4	1
Ramiro González – Fernando Cordero		1	
Alianza País Members		1	
Ramiro González		1	
Carlos Ochoa			1
Domingo Paredes			1

Jaime Nebot	1		
Jaime Nebot – Guillermo Lasso	1		
Mauricio Rodas		2	
Antonio Ricaurte	1		
Blasco Peñaherrera S.	1		
Alfredo Pinoargote	1		
Isaías Brothers	1		
Bonil			2
Nicolás Maduro		2	2
Isabel Allende – Michelle Bachelet	1		
Barack Obama – Angela Merkel	1		
John Kerry	2		
Vladimir Putin	2		
Kim Jong Un			1
Paco de Lucía			1
OAS			1
Election ballot	2		
Others	4	4	9
Does not apply	9	3	4



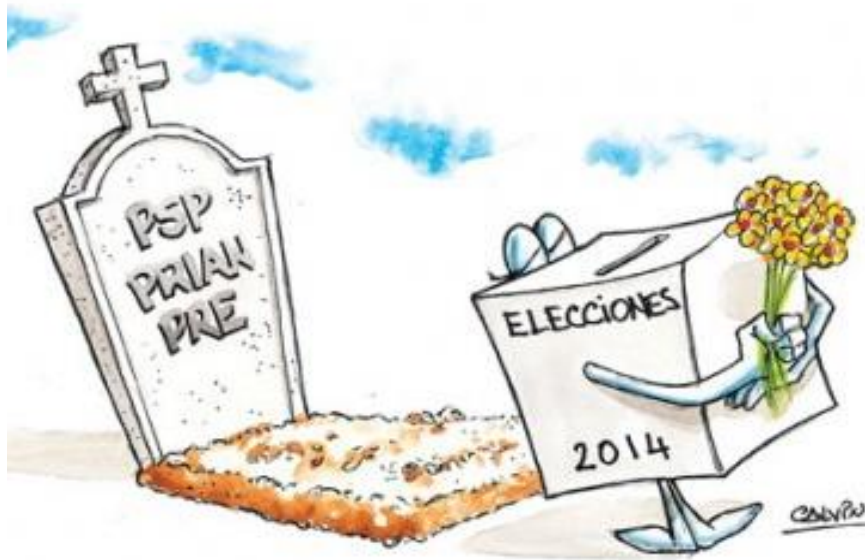
Illustrations



**Illustration 1.** Cartoon which alludes to both of the questionnaires presented to the citizenry. The group Yasunidos denounced that the second one, “YASUNÍ SÍ” (right of the picture) was fake. Source. El Comercio, March 15, 2014.



**Illustration 1.** This elections ballot argues: “In these elections democracy won...” Source. El Telégrafo, February 24, 2014.



**Illustration 2.** Partido Sociedad Patriótica (PSP), Partido Renovador Institucional Acción Nacional (PRIAN) and Partido Roldosista Ecuatoriano (PRE) were all traditional political parties. Source. El Telégrafo, February 26, 2014.



**Illustration 3.** Vladimir Putin says: *¡“Welcome to the first “Intervention” realized by referéndum...! And without any bullets or victims...”* Source. El Telégrafo, February 24, 2014.



**Illustration 4.** Gabriela Rivadeneira, President of the Ecuador’s National Parliament, states: “We solved the mayoralty’s defeat: “Let the boss run for president again, but without him becoming his own chief of campaign”. Source. El Comercio, March 4, 2014.



**Illustration 5.** Rafael Correa’s twitter account. Messages referring to the raid on Villavicencio’s home. It reads: “Months long hacking of the President’s and high profile civil servants. Investigations led to Cléver Jimenez and his “assistant” Fernando Villavicencio. With a judicial order, raids have been developed. Surprising discoveries. We have everything on film, so pretending they are the victims will not be useful as usually. We have discovered really serious stuff, which will be legally and timely unveiled. ¡What this people had been doing is terrible!” Source. Twitter, December 28, 2013.



**Illustration 7.** Rafael Correa states: “We have everything on film”. The cartoon’s caption reads: “Accused of spying”. Source. El Universo, December 30, 2013.

### Mejorar el cuento...



**Illustration 8.** Correa, as a Wolf, states: “Yes... I recognize having committed some mistakes. I spoke badly of your grandmother; I roared at everyone; I cheated on you with several things... But I swear I will not cheat on you so much again...” The cartoon’s captions read “Improving the fairy tale... to eat you in a better way...”, as remembered in the original fairy tale. Source. El Universo, March 17, 2014.



Illustration 9. Source. El Comercio, May 2, 2012.

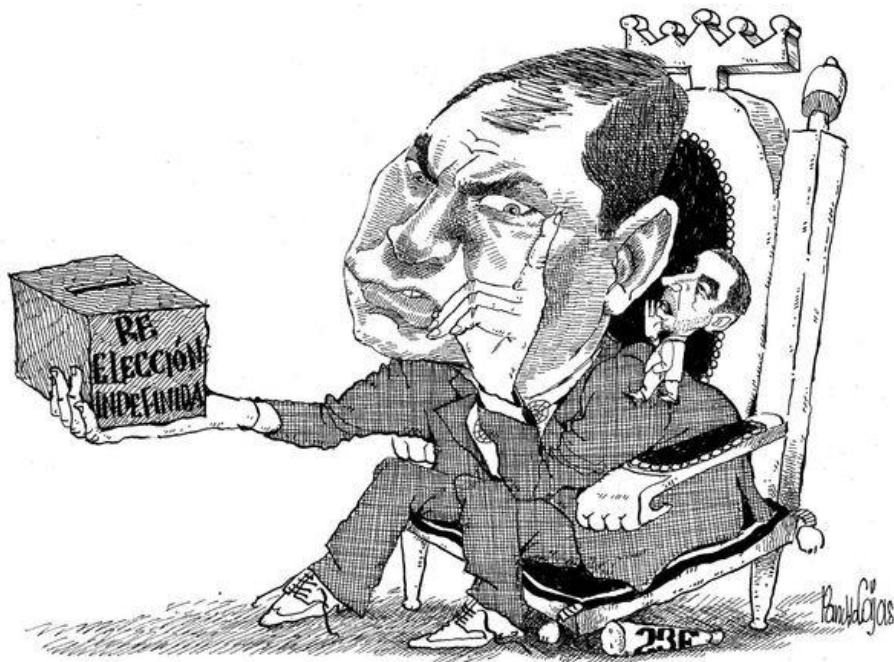


Illustration 10. The ballot Rafael Correa holds in his hand reads “Indefinite reelection”. Source. El Comercio, March 19, 2014.

## Theories of Universal Human Rights and the Individual's Perspective

### Linda Walter

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### Abstract

The current scientific debate about the universality of human rights can be structured into a horizontal and a vertical dimension. Whereas the horizontal dimension is about the different ways one can approach the topic "human rights" from different disciplines, the vertical dimension is dealing with the fundamental question whether human rights are universal or particularistic. However, the debate lacks the view of the most important group: the individual human being. Consequently, this paper aims to bring the individual's perspective on universal human rights into focus by a) striking a balance between universal and particularistic views on human rights and b) building on a realistic human nature in order to understand and embrace the individual's conviction. The approach meeting these two criteria is a combination of Rainer Forst's "right to justification" and Richard Rorty's "sentimental education". This is the only way to an individually backed and culturally sensitive universality.

**Keywords:** cultural relativism; human rights; individual; political theory; Rainer Forst; Richard Rorty; right to justification; sentimental education; universality

## Introduction

“The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms [...]”.

This statement is a part of the preamble of the Universal Declaration of Human Rights (UDHR), the most widely accepted declaration of its kind. It clearly proclaims the universality of human rights and it is taking as a given that “every individual” is aware of its universal rights and shall be willing to promote it.

The current scientific debate about the universality of human rights can be structured into what I call a horizontal and a vertical dimension. The horizontal dimension is about the different ways one can approach the topic “human rights” from different disciplines. It is threefold, consisting of the *moral* question about its normative ideals, the *political* endorsement of a concrete conception of human rights and its *legal* implementation (including the actual enforcement on the ground). The vertical dimension adds a second layer to the horizontal dimension by asking for the scope of application of human rights in different *cultures*. It consequently is concerned with the fundamental question whether human rights are universal or particularistic. All horizontal perspectives of human rights research raise different questions concerning the vertical division between universal and particularistic approaches.

This seems to be a full overview over the possible debates about the universality of human rights. But one main group – if not even the most important group – is often out of focus: the individual as bearer of human rights. Christoph Menke and Arnd Pollmann (2007, p 72) point to this void: “Even though human rights recognize per definition all human beings as equal, not all humans equally recognize human rights.”<sup>32</sup>

To make the universal demand that every individual shall promote respect for these rights and freedoms – as stated in the UDHR’s preamble – become a reality, an approach has to be found that meets the following *two criteria*: it has to be *universal and culturally sensitive at the same time* in order to be universal in scope but to leave no individual with its respective culture aside; and it has to be built on a *realistic human nature* in order to understand and embrace the individual’s conviction. Only if everybody, irrespective of its cultural background, is really convinced of the universal idea of human rights, the latter will actually become universal.

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32 Own translation; original text as follows: „Die Menschenrechte anerkennen zwar ihrem Begriff nach alle Menschen gleichermaßen, aber tatsächlich anerkennen nicht alle Menschen gleichermaßen die Menschenrechte.“

In a first step the current debate on universal human rights shall be summarized. The different definitions and debates about human rights according to different disciplines will be summed up in what I call the horizontal dimension. In a second step, the vertical dimension will deal with the question of universality with a focus on the related problem of cultural sensitivity. In a third step, the approaches identified as weakly universal and weakly particularistic of Rainer Forst and Richard Rorty will be described as ideal combination to meet the two criteria mentioned above: Forst bridges the gap between the universal claim and the diverse cultural reality of human rights and, therefore, meets the first criteria. Rorty, on the other hand, deals with the unrealistic description of human nature in most human rights theories (including Forst's theory) and proposes an alternative view.

Consequently, this paper aims to bring the individual's perspective on universal human rights into focus by a) striking a balance between universal and particularistic views on human rights and b) building on a realistic human nature in order to understand and embrace the individual's conviction.

The goal of this paper is to provide an overview over the existing research and to point to an approach that is taking the individual's perspective on universal human rights into focus by combining the theories of Rainer Forst and Richard Rorty. A detailed discussion and an in-depth testing for the presented proposition will be left to further research.

### **The horizontal dimension: Three perspectives on human rights**

In order to point to the academic void in the research on the universality of human rights it is necessary to set the stage by categorizing the different perspectives on how to approach human rights. Whatever approach you follow, they all ground in an empirical problem, meaning that the reason for their appearance can be traced back to a concrete threat to human beings, to their dignity or freedom, in human history. Haller (2013, p 29) describes it as follows:

"Human rights are negatively oriented towards the real conditions. If human rights theories are proposed and philosophically backed, the reason for its proposal is always an unsatisfactory reality, a painful experience of an affront to human dignity."<sup>33</sup>

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33 Own translation; original text as follows: „Menschenrechte orientieren sich negativ an den wirklichen Verhältnissen. Wenn Menschenrechtstheorien aufgestellt und philosophisch begründet werden, so liegt der Grund dafür immer in einer nicht befriedigenden Wirklichkeit, in leidvollen Erfahrungen der Verletzung von Menschenwürde“; cf. also Haspel (2005, p 17).

Haller clarifies that violations always precede rights. Based on this negative orientation towards reality, a need for further reflection on human rights occurs.

These reflections differ strongly depending on the angle of view taken by the various disciplines dealing with the topic. A first broad but also main division is made *inter alia*<sup>34</sup> by Jürgen Habermas (Habermas 1999, p 216) who explicitly states that human rights have a Janus face: one side is related to law and the other to morality. This twofold description also follows an intuitive association of the two words forming the term “human rights”. Most scholars build on the same differentiation but add a third perspective, the political one.<sup>35</sup> These three areas - moral, law and politics – shall therefore be the ones I will refer to.

### ***Moral perspective***

Based on the negative reality as described above an ideal counterpart has been developed: a normative moral perspective on human rights. Tönnies (2001, p 11) clarifies, that this perspective displays what ought to be and not what is; it cannot be justified scientifically (understanding the term in a narrow and quasi-natural scientific way). Consequently, the moral perspective is an imaginary, normative ideal. Amartya Sen emphasizes that this is the primary character of human rights:

"They [human rights, L.W.] are not principally ‘legal’, ‘proto-legal’ or ‘ideal-legal’ commands. Even though human rights can, and often do, inspire legislation, this is a further fact than a constitutive characteristic of human rights." (Sen 2004, p 319)

Human rights as moral rights are independent of their legal implementation. (cf. Haspel 2005, p 19) They are rights that human beings have just because they are human. To justify this claim most theories rely on the idea of human dignity.

### ***Dignity***

The term dates back to ancient Greece (Haller 2013, p 10) but is firmly in focus of the moral human rights approach only since the enlightenment. Immanuel Kant defined dignity as follows:

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34 Cf. Nickel 2013, pp 6; 8-11; Koenig 2005a, pp 10-11; Haller 2013, p 28.

35 Cf. Menke & Pollmann (2007, pp 25–41); Forst (2013, pp 38-39); Steiner & Alston (2000), subtitled their work on human rights with „law, politics, morals“; Haspel (2005, pp 19-21), providing the same threefold definition, while adding some hybrid forms like “political theory” moving between the moral and the political dimension; Kühnhardt (1991, p 17), next to politics, ethics and law he also mentions anthropology as perspective which can be seen as a first hint to the missing perspective shown here.

"What has a price is such that something else can also be put in its place as its equivalent; by contrast, that which is elevated above all price, and admits of no equivalent, has a dignity." (Kant 2002 (originally 1785), Ak 4:434)

There is extensive literature on the meaning of the term "dignity" and its basis as justification for human rights. (cf. Kateb 2011; Rosen 2012; Menke/Pollmann 2008, pp 129-166; Köhler 1999, p 111) What dignity actually means depends on various aspects such as the personal background, the sociological determinants and the point of view. ( cf. Lebech 2009; Düwell 2010, p 68; Toivanen & Mahler 2006, p 86) There are also voices questioning the benefit of the use of the term in general. (cf. Beitz 2013; Ladwig 2007; Ladwig 2010; Köhler 1999, p 111)

Despite its unclear definition and highly debated benefit, the term "dignity" can be found in nearly every declaration of human rights and often serves as final justification for debates about contested human rights. In fact, it seems to be a construction that is needed to circumnavigate a closely related question: What it is, we human beings have in common that no other creature has?

### ***Human nature***

Human rights are founded on the nature of the human being, meaning that there is something in our nature that justifies the special rights we claim.

"The universal term 'man' already conceals the assertion that all people have an essential quality in common, and it is the same quality, which is considered as dominant over all other heterogeneous qualities that the statement appears to be justified that people are 'equal' despite their apparent diversity." (Tönnies 2001, p 39)<sup>36</sup>

But which quality is it that all human beings have but no other creature? The first decision to make here is whether this answer shall be based on religious beliefs or biological science. Based on the enlightenment and a general conviction of the value of theories, the first path of explanation shall be left aside here<sup>37</sup> – but there are still a variety of perspectives on the subject. Certainly, the question of human nature is transdisciplinary. Psychologists, sociologists, neuroscientists, philosophers and many more work on mapping human nature.<sup>38</sup> Concerning human nature as basis for human rights, philosophers dominate the scientific debate about the question which quality every human has in common. From Aristotle to Kant, most philosophers

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36 Own translation; original text as follows: „Schon in dem Universale ‚Mensch‘ liegt die Behauptung, dass alle Menschen eine gemeinsame wesentliche Qualität gemeinsam haben, und es ist dieselbe Qualität, die gegenüber allen anderen, heterogenen Qualitäten als so dominierend angesehen wird, dass die Aussage gerechtfertigt erscheint, die Menschen seien trotz ihrer offensichtlichen Verschiedenheit ‚gleich‘.“

37 For a detailed discussion of this topic see Stevenson, Haberman & Wright (2013).

38 See inter alia Betzig (1997); Bjorklund & Pellegrini (2002); Sandis & Cain (2012); Wells & McFadden (2006).

give the same answer: rationality. As Kant said, man is "the only rational creature on earth" (Kant 1963 (originally 1784), p 13). Or to put it in Richard Rorty's words: "Traditionally, the name of the shared human attribute that supposedly 'grounds' morality is 'rationality'." (Rorty 1998, p 171) We have an image of humanity which understands man as capable of reason in a universal sense – and this is the quality that makes us human. As we shall see in chapter three, most influential theories on human rights are based on the idea that rationality is the common quality of humankind.

This insight – and its downsides – will be discussed in more detail below.

### *Political perspective*

Inspired by the normative ideals developed within the moral approach, the political perspective transfers theory into practice. The results emerge from a concrete process based on negotiations between contracting parties.

"Instead of seeing human rights as grounded in some sort of independently existing moral reality, a theorist might see them as the norms of a highly useful political practice that humans have constructed or evolved. Such a view would see the idea of human rights as playing various political roles at the national and international levels and as serving thereby to protect urgent human or national interests." (Nickel 2013, p 7)

Nickel describes human rights here as a political practice. One should be more concerned about an actual list of human rights adopted by political representatives than of its moral foundation.

The idea behind this approach is, as Menke and Pollmann (2007, pp 31-33) sum up, that moral rights are obligations single human beings are liable to. Human rights, however, are obligations political representatives in charge of the public order are liable to.

Two of the most famous theorist of justice and human rights, John Rawls and Charles Beitz,<sup>39</sup> opt for a political conception of human rights by dealing with the topic only as far as it has developed in contemporary human rights practice. This approach limited to the political dimension implies the basic belief "that a person can accept and use the idea of human rights without accepting any particular view about their foundations. [... It is] about the practical use that human rights do, not their reflection of some underlying moral reality." (Nickel 2013, p 17) From this perspective, human rights are a concrete catalogue which is the outcome of an international exchange.

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<sup>39</sup> Nickel (2013) and Koenig (2005a) refer to Rawls and Beitz concerning the political concept; Menke & Pollmann (2007) refer to Rawls.

"John Rawls distinguishes 'comprehensive religious, philosophical, or moral doctrines,' such as Islam, Kantianism, Confucianism, and Marxism, from 'political conceptions of justice,' which address only the political structure of society, defined (as far as possible) in dependent of any particular comprehensive doctrine." (Donnelly 2007, p 289)

Whereas Rawls (1999, pp 78-81) advocates an abbreviated list of human rights, Beitz (2009) opts for a broader understanding and denies the idea of a minimal interpretation of human rights. (cf. Nickel 2013, pp 16-17) This is only one example of the constant difficulty to decide which norms should be counted as human rights.

The most widely accepted list of human rights is the Universal Declaration of Human Rights (UDHR) adopted in 1948 by the United Nations,<sup>40</sup> endorsed again by the Vienna Declaration and Programme of Action (VDPA) adopted by 171 states at the World Conference on Human Rights in Vienna in 1993.

### *Legal perspective*

Whereas the UDHR is only a declaration stating a common will and is not legally binding, it has served as foundation for the following two UN human rights covenants, which are actually legally binding: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both adopted in 1966. All legally binding conventions - be it the seven UN conventions following the two covenants as well as the optional protocols<sup>41</sup> or the treaties established by different regional human rights regimes<sup>42</sup> - are steps toward a legally binding human rights regime. Only by codifying human rights, the political will and the rights written down in the declarations can actually be commanded on the ground:

"Human rights, in a strict sense, are understood as rights that are defined by the fact that they are enshrined (codified) in a legal manner and can in principle also be enforced. Claims become human rights only through their codification according to the principle of legality." (Haspel 2005, p 20)<sup>43</sup>

However, even codified laws hardly make a difference if they're not backed by juridical and executive bodies that can finally enforce rights. Europe and America established regional human rights courts, but most regions, covering the majority of human beings (and human rights

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40 For an in depth description of the drafting process and the parties involved see Morsink (1999).

41 Office of the UN High Commissioner for Human Rights (2014).

42 Office of the UN High Commissioner for Human Rights & International Bar Association (2003).

43 Own translation; original text as follows: "Menschenrechte werden im strengen Sinne als Rechte verstanden, die dadurch definiert sind, dass sie auf legale Weise festgeschrieben (kodifiziert) wurden und prinzipiell auch durchgesetzt werden können. Ansprüche werden erst durch ihre Kodifizierung nach dem Prinzip der Legalität zu Menschenrechten."

violations), have no bodies to enforce human rights - let alone an international court for human rights to enforce the internationally binding treaties.

"The global human rights regime relies on national implementation of internationally recognized human rights. [...] Enforcement of authoritative international human rights norms, however, is left almost entirely to sovereign states." (Donnelly 2007, p 283)

At least under some UN treaties, quasi-judicial bodies have been founded. Theoretically, "[h]uman rights are norms that help to protect all people everywhere from severe political, legal, and social abuses." (Nickel 2013, p 1) Without the mentioned legal frameworks and the human rights courts, this remains theory.

### **Vertical dimension: human rights as universal or particularistic**

The three perspectives of the horizontal dimension left aside the role different cultures and their individual understanding of human rights play. The aspect of culture cannot be seen as a fourth perspective – it rather adds another dimension to each of the three horizontal perspectives which is vigorously discussed under the topic “the universality of human rights” - this is what I call the vertical dimension. It is moving between the two opposite poles of universality and particularism.

Concerning the first, Jack Donnelly (2007, p 282)<sup>44</sup> distinguishes “the conceptual universality implied by the very idea of human rights from substantive universality, the universality of a particular conception or list of human rights.” *Conceptual universality* only states that human rights must be held equally by all – this conception is tied to the moral perspective of human rights as stated in above. It is referred to by statements like this: "By definition, human rights are rights that apply to all human beings and are therefore universal." (Kirchschläger 2011, p 22) The *substantive universality*, however, is asking for the universal application of a concrete list of human rights and is therefore closely linked to the political and the legal approach described above. By outlining the connection between the two different dimensions of universality it already becomes clear that the horizontal dimension was built on a universal understanding of human rights.

Particularism – often referred to as cultural relativism<sup>45</sup> -, on the other side, first of all questions the statement that human rights are universal; without necessarily supporting diverging human rights concepts. (cf. Kühnhardt 1991, p 135) Most texts of the numerous publications on human rights mention the particularistic view only in passing without going into detail and build, often

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44 Ludger Kühnhardt is making a similar division naming conceptual universality just universality and substantive universality applicable universality. (Kühnhardt 1991, pp 138ff).

45 I will use the term “particularistic” human rights following Koenig 2005b – for more details see above.

implicitly, on a universal understanding of human rights. (cf. Arndt 2000, p 19) To take the universality of human rights implicitly for granted turns a blind eye to reality. Human rights violations often occur because of a lack of *mens rea* which can be traced back to a particularistic understanding of human rights. Consequently, it is one of the main duties of every approach to human rights to deal with this fundamental question.

To go more into depth, Matthias Koenig (Koenig 2005b) is providing a very well-structured and full picture of the different approaches in the debate on universal or particularistic human rights. He sums up his concept as follows:

**Figure 1: Validity and justification of norms in the human rights discourse**

	Universal	Particularistic
Strong	Natural law Rationality	Cultural relativism Communitarianism
Weak	Discourse theory	Post modernism

**Source: Koenig 2005b, p 92.**

This table shall be the basis for a further evaluation of the topic by combining it with the definitions given above. In addition, the division made by Koenig will serve as a starting point to identify possible approaches that can meet the two criteria as stated in the introduction: In order to bring the individual's perspective on universal human rights into focus an approach has to a) *strike a balance between universal and particularistic views* and b) *build on a realistic human nature*.

### ***Universal human rights***

I already clarified that chapter two was written from a universal point of view. The above mentioned concepts can easily be connected with the table Koenig provides. The two strong universal understandings were already explained: The debate on *natural law* is based on the nature of human beings and is consequently to assign to what I called the moral approach. *Rationality* in Koenig's understanding refers to the thoughts of Rawls and Beitz, belonging to the political perspective on human rights.

What is "missing" in the table is the legal conception, for the simple reason that there is no debate about the universality of human rights in law. Either something is positive law and has to

be enforced or it is not. Questions related to law, like the difference between “natural law” and “positive law” or where law shall be applied, shall be understood as part of the moral or political perspective on human rights.

In addition to the strong universal concepts, Koenig also describes something he calls weak universality. It refers to the *discourse theory* mainly founded by Jürgen Habermas. He is building the legitimacy for norms on a process of intersubjective understanding achieved by individuals in argument and not like Kant on a thought experiment of the rational individual. For Habermas, individuals need to engage in a discursive justification of human rights to legitimize them. (Habermas 1999; cf. Tönnies 2001, pp 176–191; Koenig 2005b, pp 101-103) Due to its discursive nature the Habermasian approach is suited to build a bridge between the universal and the particularistic approach. One of his scholars submits a theory that seems to be especially promising to strike a balance between the two poles: Rainer Forst, who is said to constitute “the third generation of the Habermasian School” (Suárez Müller 2013, p 1049), developed the “right to justification”, arguing that “every norm that is to legitimize the use of force [...] needs to be justifiable by reciprocally and generally non-rejectable reasons.” (Forst 2013, p 140) Tying this to the human rights debate, Forst proclaims that the “right to justification” is the one, universal human rights and that it serves as a basis to develop a human rights catalogue in accordance with its procedures. (Forst 2013)

But even though the Habermasian school sets itself apart from Kant by proposing that it is not the single individual but the discursive group that has to justify norms, they have one thing in common: the unrestricted belief in the rational human being. Habermas foresees a perfectly rational process of argumentation by defining presuppositions that are far from real world debates. The same goes for Forst: ”Together with Apel and Habermas, Forst defines reason as the search for a universal justification that claims general validity and that must be acceptable for all concerned.” (Suárez Müller 2013, p 1051) This also leads to the main criticism: Their approaches state processes that humans owe to one another as rational beings. (cf. Koenig 2005b, pp 102-103)

Consequently, the discursive approach by Forst meets the first criteria but fails to meet the second one – it does not build on a realistic human nature. It is still worth examining it further which will be done below.

### ***Particularistic human rights***

The term “particularistic”<sup>46</sup> as opposing to the term “universal” human rights is less common than the term “relative”<sup>47</sup>. However, Koenig’s table clarifies that “relativism” or “cultural relativism” is only one out of different possible particularistic strategies of reasoning. Therefore, this paper will follow Koenig’s wording.

*Cultural relativism*, by Koenig classified as strong particularistic approach, basically means what the most widely known statement of relativism by the American Anthropological Association suggests:

"Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole." (The Executive Board, American Anthropological Association 1947, p 542)

Koenig differentiates three different types of relativism: The *descriptive relativism* states that moral norms vary from culture to culture. *Metaethical relativism* doubt the existence of a neutral rational method to assess different cultures consequently meaning that norms like human rights can always only be understood from within a certain culture. The third type, called *normative relativism*, states that the diversity of cultures shall be respected and supported. (cf. Koenig 2005b, pp 96-98)

The last category, Koenig opens in his table, is the – classified as weakly particularistic – approach of *post modernism*. Mainly referring to Richard Rorty, Koenig emphasizes the problem nearly all approaches to human rights have in common: their indestructible believe in human beings as rational entities. (Koenig 2005b, pp 100-101)

In his famous essay “Human Rights, Rationality, and Sentimentality” (1998) Rorty is stating that it is not knowledge, respectively rationality, that makes us people become human beings but rather feelings. Rorty clearly doubts the often proclaimed merely rational nature of humans and argues “that since no useful work seems to be done by insisting on a purportedly ahistorical human nature, there probably is no such nature, or at least nothing in that nature that is relevant to our moral choices.” (Rorty 1998, p 172)

Hereby, Rorty is providing an alternative to the disproportionally present approach to reduce humans to rational beings. By stating that the foundation of human rights is outmoded (Rorty 1998, p 180), he leaves the question of justification aside. (cf. Barreto 2011, pp 96-99) Koenig

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46 Cf. Arndt 2000 who is also using the word „particularistic“.

47 Most authors use the term „relativism“ or „cultural relativism“ cf. Donnelly (2007); Donnelly (2008).

sees this as a “helpful step on the way to overcome the classical controversy on universalism versus relativism.” (Koenig 2005b, p 100)

This chance, at the same time, has a weak spot: Without reasonable justification there is no possibility to specify the actual content of human rights. The missing clarity on what human rights are leads in turn to the impossibility of Rorty’s approach. How can one educate people for a “global moral sentiment” without having a common understanding of human rights?

Nevertheless, to focus on the moral sentiment of humans leads the debate of human rights away from theory, politics and law towards the individual on the ground by drawing a picture of human nature that is much more realistic. Consequently, Rorty supposes a valuable contribution to the second criteria.

### **The missing debate**

From the current debate about the universality of human rights the following conclusion can be drawn: there are various perspectives on human rights and two main poles in the debate about their universality. Most of the debates are dealing with the subject from a rather abstract point. They are hardly taking into account the most important group concerning the universality of human rights as described in the preamble of the UDHR: the individual human being as a culturally bound creature and its nature. But it is the individual, as the bearer of human rights, who shall be in focus of research.

Even though the main research on the topic is not dealing with the individual, I already pointed to two connecting factors in the preceding chapter: On the universal side, the Habermasian School of discourse theory - and on the particularistic side, the neo-pragmatic approach mainly represented by Rorty. The two approaches do not only take individuals into focus and try to overcome the universal/particularistic controversy; they also seem to complement each other:

One of the main points of critique concerning the Habermasian school of thought including Forst is the continuing concentration on humans as rational beings. Rorty is providing a valuable supplement for this problem. On the other side, Rorty is often criticized because one cannot justify any specific set of human rights – and this is what the right to justification can contribute to.

To connect this again to Koenig’s table, one could restructure it as follows:

**Figure 2: Horizontal and vertical dimensions of human rights**

	Moral	political	individual	Legal
Universal	Natural law	Rationality	Discourse theory	
Particularistic	Cultural relativism	Communitarianism	Post modernism	

**Source: own variation of Koenig 2005b, p 92.**

The horizontal dimension as described above can be found in the first row and substitutes Koenig's division into strong and weak theories. The theories formerly defined as "weak" ones are the ones I see the potential in to form a new theory of human rights. The vertical dimension sticks to the division made by Koenig.

An individual approach, as suggested in this paper, has the potential to a) overcome the difference between universal and particularistic angles and b) bring the individual's perspective on the universality of human rights into focus by clarifying the human nature and building on a pragmatic constructivist discourse. To support this claim, I will summarize the relevant theories.

### ***Rainer Forst: The right to justification***

Even though discourse theory is mainly connected to the name of Jürgen Habermas, I will focus on one of his successors, Rainer Forst. By developing the theory of the "right to justification" and applying it to human rights, he is refining discourse theory with the goal to combine universal and particularistic views by claiming to be universal in theory and still particularistically applicable.<sup>48</sup> (Forst 1999a, p 68) Consequently, he already developed discourse theory into the direction of the first aim of this paper.

First of all, it shall be clarified what the "right to justification" is:

"This basic right to justification is based on the recursive general principle that every norm that is to legitimize the use of force (or, more broadly speaking, a morally relevant interference with other's actions) claims to be reciprocally and generally valid and therefore needs to be justifiable by reciprocally and generally non-rejectable reasons." (Forst 2013, p 140)

<sup>48</sup> Forst is not the only author who tries to strike a balance between the two poles (cf. Donnelly 2007), but his account takes the individual's perspective into account.

All norms meant to be enforced, including human rights, have to be reciprocally and generally justifiable. Reciprocity here means that the author must not assert a claim that is denied to others. By generality Forst means that all affected parties of a norm must be able to equally share the reason for the norm in question. (cf. Forst 1999, p 82; Forst 2013, p 140) The criteria of generality is crucial to reject arguments from the cultural relativist side because it implies that a culture has to redefine its norms as soon as the norm is not equally shared by every member of the culture. Consequently, there is no external pressure on cultural change.

Concerning human rights, this means “that human rights are meant to ensure that no human being is treated in a way that could not be justified to him or her as a person equal to others” (Forst 2013, p 39). According to Forst, one has to take as a given that there is only one basic human right: the right to justification. Thereby, this does not mean that the other human rights can be developed from this right - it rather serves as a main guide for the construction of concrete human rights.

“The basic right does not determine from the outset which substantial reasons are adequate, which rights can be demanded, or which institutions or social relationships can be justified. As the universal core of every internal morality, the right to justification leaves this to the members' specific cultural or social context.” (Forst 1999b, p 42)

The underlying notion here is that every human being is recognized as a person to whom another person owes a justification of the reasons for their actions. (cf. Forst 1999b, p 44) The only criteria these justifications have to fulfill are – as already mentioned above – reciprocity and generality. These rights shall then be made socially effective in two aspects: Human rights must be a) substantive, meaning here that the formulated rights must express adequate forms of mutual respect, and b) procedural, meaning that everyone who is living under certain rules has to have the possibility to participate in the determination of these rules. (Forst 2013, p 39)

This moral constructivism can lead to an abstract list of human rights – this is why moral constructivism always has to be accompanied by political constructivism, meaning that these rights must also be justifiable in a concrete political order. (cf. Forst 1999b, p 48)

"The right to justification in this legal-political context does not fall prey to Frank Michelman's *reductio ad absurdum* according to which any interpretation of human rights would only be legitimate in a state if it could be accepted concurrently in a more or less 'pure' procedure. Rather, it means that in procedures of political justification that exclude no one arbitrarily, no fundamental, reciprocally and generally irrefutable claims are ignored;" (Forst 1999b, pp 59, note 29)

Concerning the internationalization of this concept, Forst denies the necessity of a “world state”. He rather proclaims that humans – as moral persons and citizens of a state - are “world citizens”

who consequently are obliged to not only respect the human rights of others but also to actively support them when they become victims of human rights violations. (cf. Forst 1999b, p 53)

As already mentioned above, one of the main problems of Forst's approach is that he takes the rational nature of human beings for granted:

"Reason, according to Forst, is inescapable and therefore it is nonsensical to ask 'Why be rational?'. Asking or answering this question already implies a commitment to rationality. And this, according to Forst, also applies to the question 'Why be moral?'" (Suárez Müller 2013, p 1053)

### ***Richard Rorty: Sentimental education***

According to Richard Rorty, this last question "Why be moral?" is already the wrong approach:

"[...] one will see it as the moral educator's task not to answer the rational egoist's question 'Why should I be moral?' but rather to answer the much more frequently posed question 'Why should I care about a stranger, a person who is no kin to me, a person whose habits I find disgusting?' The traditional answer to the latter question is 'Because kinship and custom are morally irrelevant, irrelevant to the obligations imposed by the recognition of membership in the same species.' This has never been very convincing, since it begs the question at issue: whether mere species membership is, in fact, a sufficient surrogate for closer kinship. [...] A better sort of answer is the sort of long, sad, sentimental story that begins, 'Because this is what it is like to be in her situation - to be far from home, among strangers,' or 'Because she might become your daughter-in-law,' or 'Because her mother would grieve for her.'" (Rorty 1998, pp 184–185)

What Rorty is criticizing here is the idea that sentiment is weaker than reason, that human beings are understood as purely rational. In his work on human rights he is referring to Annette Baier's understanding of David Hume's moral theory. According to Hume "[r]eason is, and ought only to be the slave of the passion, and can never pretend to any other office than to serve and obey them." (Hume s.a., 127) Baier sums up that Hume – in difference to Kant – "claims that morality rests ultimately on sentiment" (1994, pp 56). This is why Rorty suggests answering to the above stated question rather with a sentimental story than with a rational argument. His suggestion is to make security and sympathy the main values for a human rights culture:

"By 'security' I mean conditions of life sufficiently risk-free as to make one's difference from others inessential to one's self-respect, one's sense of worth. [...] By 'sympathy' I mean the sort of reactions [...] that whites in the United States had more of after reading Uncle Tom's cabin than before, the sort we have more of after watching television programs about the genocide in Bosnia." (Rorty 1998, p 180)

What Rorty hopes for is to enliven "the global moral sentiment and of constructing a worldwide ethos favourable to human rights." (Barreto 2011, p 112) Barreto sums up perfectly what Rorty has in mind:

"Rorty defends the epistemological presupposition of the contingency of human rights, understands rights and morality in terms of human suffering, and elaborates the idea of advancing human sensibility to

consolidate the rights culture. He thematizes the concept of a 'global moral sentiment' and finds in sympathy and solidarity the appropriate feelings and values for a human rights culture." (Barreto 2011, p 93)

Reference should be made to the fact that Rorty's approach is the only one that is addressing the main root of the problem that leads to the lack of research into the individual's perspective of the universality of human rights: He questions the mere rational nature of humans and develops an advanced understanding of the human race.

On the other hand, Rorty's approach has two main deficits: It lacks the ability to opt for a specific (not necessarily immutable) catalogue of human rights. Furthermore, Rorty's global moral sentiment underlies the implicit presupposition that we all feel the same, when we hear a sad story about a human rights violation. (cf. Menke & Pollmann 2007, pp 60-68) But maybe, some people have to be "reeducated" concerning their feelings, especially those who "decided" to exclude certain human groups from being human. To be able to do this, one needs a common understanding of human rights – and this is where Forst comes in again.

### ***Justifying sentimental education***

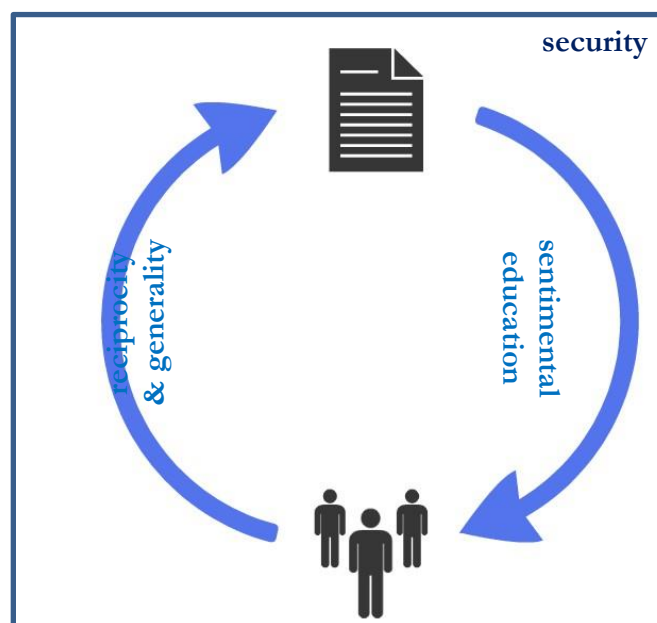
The aim of this paper is to bring the individual's perspective on universal human rights into focus by a) striking a balance between universal and particularistic views on human rights and b) building on a realistic human nature in order to understand and embrace the individual's conviction. Each of the two approaches described in this chapter fulfills one of the criteria. Adding up the critical counter-arguments from the two approaches described, it seems obvious to combine them and consequently develop an approach that leads to an individually backed and culturally sensitive universality.

Forst is striking a balance between the universal and the particularistic approach but his approach is based on a rational human nature. Rorty, on the other hand, does not combine universal and particularistic views but he develops an alternative understanding of human nature and points out that it is more important to educate people sentimentally than to rationally justify a norm.

One can combine the two approaches to a new one that meets both criteria and therefore brings the individual's perspective of human rights into focus. Security, the precondition brought forward by Rorty, is the framework the whole approach is located in. Within this framework the two authors can be combined as follows: Whereas Forst provides a reasonable structure on how to *develop a human rights catalogue* based on its two criteria of reciprocity and generality, Rorty deals

with the question *how to convince people* to act in accordance with the developed catalogue by using sentimental education. In a first step, a culturally sensitive catalogue can be developed on the basis of the universal right to justification, in a second step, this (temporarily) fixed catalogue is used as a guideline for defining the normatively best goals for sentimental education. The universal, global human rights catalogue consists of reciprocal and general norms accepted by all human beings. In addition to this global catalogue, every culture can develop its own, more detailed catalogue in accordance with the criteria brought forward by the right to justification. Local norms that do not meet the two criteria – for example because a certain group within a cultural entity brings forward reasonable arguments against a certain norm – have to be revised.

**Figure 3: Justifying sentimental education**



**Source: author.**

This is an ongoing process: As soon as somebody brings forward reciprocally and generally non-rejectable reasons to change a certain human right the human rights catalogue has to be modified. If somebody cannot justify his claim by reciprocal and general reasons the declaration remains unchanged and the process of sentimental education takes over.

If the individual knows that it could bring forward arguments to change the human rights set but on the other hand is “sentimentally educated” to feel for its fellow human beings it either starts to be convinced of the human rights already stated or it can bring forward general and reciprocal reasons why it is not. Like this, the individual’s perspective on human rights becomes the center of the theory.

The presented idea merely serves as a first outline for an approach that is focused on the individual's perspective. An in-depth testing and further research on the presented proposition must follow.

## Outlook

Whereas the landscape of human rights theories dealing with its universality is broadening more and more, perspectives focusing on the individual are still underrepresented. The approach to combine the theories of Richard Rorty and Rainer Forst is a first idea on how to proceed here. It gives every individual the chance to change a set of human rights by bringing forward justifiable reasons – but it also puts straight that a process of justification cannot convince people of any proclaimed norm. This is only possible by sentimental education. By allowing for a realistic nature of humans and a culturally sensitive universalism the approach brings the individual perspective of human rights into focus.

To follow this direction is especially compelling because the validity of the idea of sentimental education might be verifiable via the social web. Taking the actual set of human rights as stated in the UDHR and the following treaties as a given<sup>49</sup> (because they are justifiable by reciprocal and general reasons) the second part of the presented idea comes into play: How can one effectively realize sentimental education around the globe? The structural possibilities of the social web are strengthening and prolonging connections to acquaintances and – as Granovetter (1973) already stated 40 years ago – these weak ties often have a stronger impact on us than our close friends. (cf. Golbeck 2013) Consequently, digital social networks might be the port of call for taking the individual's perspective into account by using the social web to put sentimental education into practice.

In 1948 Eleanor Roosevelt's answered to the question "Where Do Universal Rights Begin?" as follows:

"In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world." (Youth for Human Rights International 2014)

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49 Donnelly (2008) points out why this assumption, which is counterintuitive at first sight, is actually reasonable.

In 2014, her statement still seems to be understandable, but the second part is outdated. Nowadays, we can possibly reach out to the whole world with one sentimental video via the social web. This may be our chance to speed up the “progress in the larger world” – and it would be one more step to an individually backed and culturally sensitive universality.

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What theoretical framework and approach is used and why. If applicable, causal model may be shown at this point, or later, after data investigation.

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Definition of basic terms and their indicators, choice of variables and their validity testing. Formulation of hypotheses (explicit or implicit) based on the theory/theories. Elaboration of specific claim(s) in the investigated theory/theories. If applicable, description of the causal mechanism, i.e. the chain of events purported to link your explanatory variables to the specific outcome.

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### ***Data***

Description of the data used, number of cases, method of case-selection, source of data, method of data collection, sampling method.

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What the data show in detail, general tendencies and interesting particularities.

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Causal models may be formulated and general conclusions reached. Conclusions may or may not specifically challenge or support findings in existing literature.

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Every piece of data used shown so as to facilitate potential replications. If possible, data shared publicly and/or presented together with the manuscript.

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