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TABLE OF CONTENTS

DANA DOBRIĆ JAMBROVIĆ, MARIELA MAREŠIĆ
THE SUBNATIONAL DIMENSION OF EUROPEANIZATION 7

ROBERT TABASZEWSKI
THE PERMISSIBILITY OF LIMITING RIGHTS AND FREEDOMS IN THE EUROPEAN AND NATIONAL LEGAL SYSTEM DUE TO HEALTH PROTECTION 51

C. ADRAINNE THOMAS, CAROLYN CASALE
COMMUNITY PARTNERSHIPS 91

WILLIAM N. LAFORGE
CAMPUS GOVERNANCE IN U.S. UNIVERSITIES AND COLLEGES 113

PATRICK J. MCKINLEY
PROSECUTING ATTORNEYS IN A DEMOCRACY – A CALIFORNIA PERSPECTIVE 141

EMERIC SOLYMOSSY
BUSINESS IN THE U.S. DEMOCRACY 169

KATARZYNA MAĆKOWSKA
ACADEMIC FREEDOM: A CHOICE BETWEEN CONSERVATIVE OR LIBERAL PERCEPTIONS – THE CASE OF THE UNITED STATES 193

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THE SUBNATIONAL DIMENSION OF EUROPEANIZATION

Dana Dobrić Jambrović, Mariela Marešić***

ABSTRACT

Despite the increasing influence of European legislation on the subnational level of government and local public policy, until recently, the subnational level has played only a marginal role in exploring Europeanization processes. With the creation of the single market in the early 1990s, the process of European integration began to have a significant impact on local governments across Europe. Subsequently, the development of European regional and cohesion policy resulted in the adaptation of the political and administrative structures of the local units of the Member States. However, the impact of European integration is not one-sided. The European Union's multilevel governance system and the spread of the impact of Europeanization on interstate levels pose new challenges for European cities and local actors and enable them to actively participate and influence political decision-making processes at the European level. The main aim of the paper is to identify, explain and classify aspects of Europeanization of local self-government. Therefore, research questions include identifying the dimensions, mechanisms and adjustments that local units make under the influence of European institutions. The paper first conceptualizes the phenomenon of Europeanization and then identifies and addresses its dimensions and mechanisms in the field of local self-government. Emphasis is placed on the implementation of European

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legislation by local authorities and the institutional and non-institutional (indirect and direct) participation of subnational units in European governance. In an attempt to provide answers to research questions, the authors applied the theoretical approaches of political sciences, sociology and international relations, and also the teleological and linguistic method.

Keywords: Europeanization, local government, paradiplomacy, institutional changes, networking

1. INTRODUCTORY REMARKS ON EUROPEANIZATION

Europeanization, as a topical issue, is addressed within a number of disciplines and in different contexts. The ever-increasing number of books, articles, research, projects, and conferences is dedicated to the phenomenon of Europeanization[1]. It is justified to characterize Europeanization as a phenomenon since it is attributed to many meanings and encompasses a number of processes. According to Harmsen[2], Europeanization as a political process actually encompasses two processes that are simultaneously occurring and running in parallel, namely the creation of a European community, i.e., new levels of governance (*bottom-up* approach), and the adaptation of national policies to the process of European integration (*top-down* approach). However, within the social sciences, a whole range of meanings of Europeanization is addressed and problematized.

Firstly, Europeanization implies the emergence of new institutional and functional forms of European rule. In this interpretation of Europeanization, the emphasis is placed on the European Union. However, Europeanization should not be seen as synonymous with the process of European integration, but rather as a concept that encompasses how this

[1] The following journals may be highlighted among those dealing with Europeanization: Comparative European Politics, European Journal of Political Research, Governance, Journal of Common Market Studies, Journal of European Integration, Journal of European Public Policy, Living Reviews in European Governance, Public Administration, Public Policy and Administration, Queen's Papers On Europeanisation.

[2] Robert Harmsen, "Europeanization and Governance: A New Institutionalist Perspective", in *Europeanization, Institutions, Identities and Citizenship*, eds. Robert Harmsen, Thomas M. Wilson, Amsterdam-Atlanta: Rodopi, 2000, 52.

process has redefined the conceptions of governance at the national and supranational level. It is about creating a hub for collective action that, in addition, should ensure a certain degree of coordination and coherence. Europeanization, therefore, represents the emergence and development of political, legal, and social institutions at the European level that formalize interactions between different actors, as well as the emergence of policy networks specialized in the creation of relevant EU rules.

Secondly, Europeanization represents the *adaptation of national institutional structures and decision-making processes on public policies* to the development of European integration, i.e., political and economic developments at the EU level. Each multi-level governance system requires the division of powers and responsibilities between different levels and must, among other things, ensure a balance between unity and diversity, central coordination, and local autonomy[3]. From an institutional perspective, the processes of experimental learning and competitive selection do not always produce perfect results in terms of automatic, continuous, and accurate adaptation. Adaptation requests are often not well received by the Member States, or the adaptation process is not monitored to the necessary extent. Also, the degree of adaptation is often inconsistent with the degree of change to which institutions should adapt, and there may be no optimal institutional response to environmental change. The most common case is the selection of one practice from the existing repertoire that could be used. These requirements are interpreted and modified by national authorities in accordance with their traditions, institutions, identities, and resources, thereby limiting the degree of convergence and homogenization. In Europeanization research, the focus is on determining the measure of convergence of domestic institutions and the decision-making process of the European model. A key issue that needs to be addressed is whether the Member States converge with interstate negotiations or take on an increasingly European model.[4]

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[3] Johan P. Olsen, "The Many Faces of Europeanization", *Journal of Common Market Studies*, 5(2002): 924, https://doi.org/10.1111/1468–5965.00403.

[4] European institutions and the decision-making process evolve differently within different institutional spheres and areas of public policy. Therefore, there are differences in pressure for the Member States to adapt as well as in their responses to these pressures, i.e., their ways of adaptation. The impact of adaptation pressures in a particular country will

Thirdly, Europeanization also signifies *public policy coherence*. In this context, the concept of isomorphism gains in prominence whereby organizations “cope with their environment at the borders and mimic environmental elements in their structures”[5]. In doing so, organizations apply a defensive strategy against pressures from the relevant environment, leading them to an isomorphic transformation. This includes: (1) adopting structural forms or elements of an organizational structure for their external legitimacy, not for reasons of efficiency[6]. (2) adopting external criteria for evaluating the value of structural elements that legitimize an organization and assess its social suitability, and (3) stabilizing external and internal organizational relationships by relying on organizations to be legitimized from the outside, which leads to isomorphism and reduction of turbulence[7]. In this respect, a distinction is made between the direct and

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depend on the legal basis of the change, whether it relies on binding norms (hard law) or informal sources of law (soft law), and whether the actors who need to implement them are involved in determining concrete measures, the economic and financial capacity of each country, etc. Also important is the attitude of national authorities towards European demands/pressures. Some countries are proud of their historical achievements and seek to protect their traditions, while others want to dispose of the burden of the past.

[5] Anamarija Musa, *Agencijski model javne uprave*, Zagreb: Pravni fakultet Sveučilišta u Zagrebu, Studijski centar za javnu upravu i javne financije, 2014, 44.

[6] The success of an organization does not depend on the effectiveness of its operations but the degree of isomorphism with respect to the institutional environment, whereby it gains legitimacy and resources. (John W. Meyer, Brian Rowan, “Institutionalized Organizations: Formal Structure as Myth and Ceremony”, in *The New Institutionalism in Organizational Analysis*, eds. Walter W. Powell, Paul J. DiMaggio, Chicago-London: The University of Chicago Press, 1991: 43.)

[7] DiMaggio and Powell distinguish three mechanisms of isomorphic institutional change. The forced isomorphism of organizations is due to the formal and informal pressures exerted by other organizations on which they depend and due to certain cultural expectations in society. The pressures come in the form of legal regulations, non-binding rules, and guidelines that point to subtler changes. Mimetic isomorphism involves taking on “the usual responses to organizational technology uncertainty, ambiguity about goals, environmental trends, etc.”. Organizations take on the solutions of those organizations in their field that they deem more legitimate or successful. Finally, normative isomorphism is defined as “the collective effort of members of the profession to define the conditions and methods of work, control the creation of professionals, and establish the cognitive basis and legitimacy for their professional autonomy”. (Anamarija Musa, *Agencijski model javne uprave*, Zagreb: Pravni fakultet Sveučilišta u Zagrebu, Studijski centar za javnu upravu i javne financije, 2014, 46–47.)

indirect Europeanization of public policies. In the first case, Europeanization is accomplished by delegating the regulatory powers of the Member States to the European Union, and, in the second case and to a different extent, by means of mutual adaptation of certain public policies and/or regulatory frameworks of the Member States[8].

Apart from the fact that the process of Europeanization imposes a number of problems on national political systems, it can also open up new possibilities for deciding issues that fall outside national boundaries. Member State governments must find a way to reconcile all potentially contradictory pressures coming from national and European levels. Although one of the principles of EU policy is the protection of fundamental national interests, certain Member States are compelled, in certain circumstances, to implement public policies that do not have support within the national political system. In such cases, Europeanization is a form of external restriction on the domestic order. On the other hand, there is often a situation where the ruling elite, under the pretext of EU-made demands ("Europe Made Me Do It!") and in pursuit of their own interests, seeks to implement certain policies that they would not otherwise be able to impose at the national level.

In terms of geographically peripheral and less economically developed EU Member States, Europeanization can also be seen as a modernization process that involves a number of structural transformation measures. Such measures are implemented to bring less developed countries closer to the economic and political model prevailing in more advanced and influential Member States. The structural measures are aimed at reducing the overall administrative system, involving the voluntary, non-profit sector in public affairs, and loosening the links in the rest of the system (referring to political and administrative decentralization, separation of political affairs from routine, executive tasks, functional independence of public services, etc.)[9].

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[8] Robert Harmsen, Thomas M. Wilson, "Introduction: Approches to Europeanization", in *Europeanization, Institutions, Identities and Citizenship*, eds. Robert Harmsen, Thomas M. Wilson, Amsterdam-Atlanta: Rodopi, 2000, 15.

[9] Following the crisis of the welfare state and the penetration of the concept of the neoliberal model of governance, there is a change in the understanding of the role of the state and the relationship between the state and the market. The focus has been shifted from "a system of clearly separated institutions and functions and a hierarchical principle" to "network

Furthermore, Europeanization can be considered in the context of *EU enlargement*. States are requested to adopt the *acquis communautaire*, to meet the political criteria[10] and administrative standards based on which their progress is assessed on an annual basis. According to Schimmelfennig and Sedelmeier, institutional change is most often driven by a model of external incentives based on conditionality policy. It is a model in which Europeanization is initiated by the Union with "the use of positive conditional incentives (ultimately EU membership) as a reward for countries adopting certain EU-specified rules"[11].

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management with intertwined functions and actors". Under the influence of the new public management doctrine, the welfare state is transformed into a regulatory one, with a significant institutional change in the form of "retreat of the state." However, this does not imply the withdrawal of the state entirely, but a change of its functions. From the previous role of the holder of the command and control functions, the state becomes an active stakeholder of various forms of interaction and cooperation at multiple levels of governance. Within the European Union, Member States continue to have instruments of command while the Union relies on the regulation and functioning of regulatory agencies as a new institutional model of governance. Thus, the Union has instruments of regulation that can be classified into: (1) binding – primary (founding contracts) and secondary legislation (regulations, directives, decisions), (2) non-binding – recommendations, resolutions, declarations, and (3) activities such as organizing conferences, designing studies, disseminating good practice, etc. Although not legally binding, soft law regulations are regulating an increasing number of public policies, especially in areas where the Union is not authorized to act through classical regulatory instruments. Since the adoption of the White Paper on the completion of the internal market, the Commission has been proclaiming to focus more on regulation through the open method of coordination and, as a new approach, has promoted regulation through a combination of uniform objectives and flexible means. (Anamarija Musa, *Agencijski model javne uprave*, Zagreb: Pravni fakultet Sveučilišta u Zagrebu, Studijski centar za javnu upravu i javne financije, 2014, 104.)

[10] There are four sets of political criteria: 1) the Copenhagen criterion (1993) requires the construction or strengthening of institutions that will guarantee democracy, the rule of law and human rights, 2) the Madrid criterion (1995) focuses on adapting administrative and judicial structures, 3) the Luxembourg criterion (1997) on strengthening and improving institutions with a view to achieving greater reliability, and 4) the Helsinki criterion (1999) establishes an obligation to adopt the values and objectives of the Founding Agreements. (Francisco Cardona Peretó, Anke Freibert, "The European Administrative Space and SIGMA Assessments of EU Candidate Countries", *Hrvatska javna uprava*, 1(2007), 56.)

[11] Frank Schimmelfennig, Ulrich Sedelmeier, "The Europeanization of Eastern Europe: the External Incentives Model Revisited", Paper for the JMF@25 conference, EUI,

The broadest notion of Europeanization refers to the *transformation of identity* at the European level in a way that relativizes the importance of national identity. Changes occur because of the two-dimensionality of identity. The first dimension is cumulative and refers to the individual's disposition to feel a sense of belonging to more than one group. The second is characterized by exclusivity, which is a direct consequence of the actions of national political elites seeking to preserve their power and decision-making authority. According to Eurobarometer (2018)[12], the citizens of the Member States are still more connected to the country in which they live (93%) than to the European Union (56%). 89% of the citizens feel a sense of belonging to the local community and the region[13].

Finally, Europeanization can signify *transnationalism*[14] and *cultural integration*. In this context, Europeanization refers to the areas of interaction that the citizens of Europe encounter daily. Such interpersonal interactions are a reflection of transnational and intercultural relations that are being strengthened by globalization and European integration. Emphasis is placed on maintaining and crossing borders, both in terms of cultural

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22/23 June 2017, https://www.eui.eu/Documents/RSCAS/JMF-25-Presentation/Schimmelfennig-Sedelmeier-External-Incentives-Revisited-JMF.pdf.

[12] Standard Eurobarometer 89, Report on European Citizenship, Spring 2018.

[13] For more about the relationship between the European and national identity, see Richard K. Hermann, Thomas Risse, Marilyn B. Brewer, *Transnational Identities: Becoming European in the EU*, Oxford: Rowman & Littlefield, 2004; Michael Bruter, *Citizens of Europe? The Emergence of a Mass European Identity*, Houndmills. Basingstoke: Palgrave Macmillan, 2005; Paul Magnette, „How can one be European? Reflections on the Pillars of European Civic Identity", *European Law Journal*, 5(2007); James A. Caporaso, Min-hyung Kim, "The dual nature of European identity: subjective awareness and coherence", *Journal of European Public Policy,* 1(2008).)

[14] Transnationalism is a term that was first used in the study of migration and referred to the activities of migrant groups that resulted in the relativization of basic features of the nation-state. Today, the term transnationalism is interpreted very extensively and encompasses a number of multinational, transnational, and transnational phenomena that lead to nation-state transformation. Transnational activities are primarily carried out by non-institutional actors, such as numerous international non-governmental organizations, which, by acting on the global political scene, diminish the meaning of nation-state borders. They also create extraterritorial zones where access to state institutions is hampered. (Saša, Božić, "Nacionalizam-nacija, „transnacionalizam"-„transnacija": mogućnosti terminološkog usklađivanja", *Revija za sociologiju*, 3–4(2004):188.)

and political identity, and in terms of legal, political, and administrative borders between the states.

The concept of Europeanization can, in addition to the processes that take place vertically, between the EU and the Member States, also include the horizontal transfer of ideas and good practices between European countries, whether or not they are Member States[15]. In horizontal transfers, the EU can play a role in facilitating such processes. Europeanization may also involve the transfer of European political ideas and practices outside of Europe[16]. For example, the Treaty of Lisbon emphasizes the need to develop, represent, and globally expand the European model of society[17]. The White Paper on European Governance proposes to promote EU goals globally, which would make the Union stronger at the global level[18].

Although the definitions and applications of the term Europeanization mentioned above are quite different from one another, they each contribute in their way to a better understanding of the EU and its impact on the Member States. They also point to different aspects of political and social change in contemporary Europe. In other words, Europeanization means the totality of transformations of local, regional, national, and international structures and relations of government, i.e., the process of becoming and

[15] European countries make decisions about their actions by looking at each other, looking for role models, and copying each other, which results in the diffusion of specific institutional and functional models and practices. The consequence is an isomorphic transformation as a basis for realizing the legitimacy of European countries.

[16] This is cultural dissemination of patterns, institutions, ideas, and principles typical of Europe beyond the borders of the EU, through a process of diffusion that depends on the "interaction of the external impulses and internal institutional traditions and historical expectations" of each country. (Johan P. Olsen, "The Many Faces of Europeanization", *Journal of Common Market Studies*, 5(2002):938, https://doi.org/10.1111/1468–5965.00403.) The cultural notion of Europeanization comes to light in two contexts. First, in the context of EU enlargement, when the countries of Eastern Europe seek to make up for lagging behind the West and to meet EU membership requirements. Secondly, in the context of the European Neighborhood Policy, the realization of certain forms of cooperation is conditional on the adoption of European values and norms by countries located along the EU's immediate borders, which have no interest in becoming a member.

[17] European Union. 2007. Treaty of Lisbon. OJ C 306, 17. 12. 2007.

[18] "Successful international action reinforces European identity and the importance of shared values within the Union." (Commission of European Communities: European Governance. A White Paper. Brussels 25. 7. 2001. COM (2001) 428 final.).

being increasingly "European". This is achieved by changing the mode of action within and between individual state bodies, or more broadly, the actions of politicians, civil servants, entrepreneurs, farmers, etc.

2. CONCEPTUALIZATION OF THE EUROPEANIZATION PROCESS

The first approach to research on the phenomenon of Europeanization was to examine the impact of European integration on lower levels of governance, i.e., the structures, processes, and public policies in the Member States (*top-down* approach), while later studies have highlighted the importance of upward Europeanization, i.e., the transfer of ideas and practices from the Member States to the supranational level (*bottom-up* approach)[19]. Despite the clear focus on downward causation research, Europeanization as a two-way process is a widely accepted view. Featherstone and Kazamias emphasize that the Member States are not only passive recipients of the European impact and that domestic and EU institutional arrangements are characterized by the interconnectedness and involvement of actors in vertical and horizontal networks. Interaction between the Member States and the EU involves, on the one hand, the transmission of preferences of subnational levels to the European level and, on the other, their adaptation to pressures from the European level and the implementation of European public policies[20].

The Europeanization process can be classified into three categories. The content of each category needs to be analyzed separately and then comparatively in order to develop a complete concept of Europeanization.

Top-down Europeanization (En1) seeks to explain the conditions and causal mechanisms by which the European Union causes change at the level of the Member States and third countries. The starting view is that Eu-

[19] Tomasz P. Woźniakowski, Frank Schimmelfennig, Michał Matlak, "Europeanization Revised: An Introduction", in *Europeanization Revised: Central and Eastern Europe in the European Union*, eds. Michał Matlak, Frank Schimmelfennig, Tomasz P. Woźniakowski, European University Institute, Robert Schuman Centre for Advanced Studies, 2018., 7–8.

[20] Kevin Featherstone, George Kazamias, "Introduction: Southern Europe and the Process of 'Europeanization'", *South European Society and Politics*, 2(2000): 10, https://www.tandfonline.com/doi/pdf/10.1080/13608740508539600?needAccess=true.

ropean norms lead to domestic changes[21] but not the convergence of national structures, processes, and public policies. If there are misfits between European and subnational levels, the impact of the EU can be explained by the theory of institutionalism of rational choice and sociological institutionalism. Representatives of both theories agree that institutions play a key role as mediators between European influences and domestic systems but differ in their interpretation of how institutions fulfill this role[22].

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[21] The term 'domestic changes' is used to refer to the changes that the Europeanization process is causing not only at national but also at subnational levels of government (regional and local). In a broad sense, the term may also include non-state actors (civil society organizations and the private sector).

[22] According to the institutionalism of rational choice, the EU encourages the adaptation of subnational levels by changing opportunity structures for domestic actors. (Christoph Knill, Dirk Lehmkuhl, "How Europe Matters: Different Mechanisms of Europeanization", *European Integration Online Papers*, 7(1999): 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=302746) This does not involve directly prescribing their institutional set-up but indirectly changing the constellation of domestic actors involved in the political decision-making process by influencing the EU on the distribution of power and resources between them (Birgit Sitterman, *Europeanization – A Step Forward in Understanding Europe,* 2006, https://ceses.cuni.cz/CESES-141-version1–2_1__Sittermann_Nachwuchsgruppe_on_Europeanisation_2006.pdf.) The existence of discrepancies between European and national norms requires domestic adaptation in terms of downloading EU policies and institutions. The conditions and modalities for adaptation are defined based on a cost-benefit analysis conducted by interested stakeholders, i.e., all those whose interests are affected by the downloading process. In doing so, institutions facilitate or restrict certain actions of domestic actors by making some options more expensive than others. From this perspective, Europeanization is mainly conceived as a political opportunity structure that offers some actors additional resources to exert influence, while significantly limiting others to achieving their goals (Tanja A. Börzel, Diana Panke, "Europeanization", in *European Union politics*, eds. Michelle Cini, Nives Perez-Solorzano Borragan, Oxford: Oxford University Press, 2010, 411.)

The theory of sociological institutionalism explains that the mechanisms of change are based on the cognitive and normative processes involved in top-down Europeanization, and it relies on a logic of appropriateness, which implies that actors are guided by shared values and perceptions of right and socially acceptable behavior. Such shared beliefs significantly influence the way domestic actors define their goals and their understanding of rational action. Europeanization is therefore understood as the emergence of new rules, norms, procedures, and opinions that the Member States must implement into the domestic structure. If there is a discrepancy, it is the task of epistemic communities and advocacy coalitions to socialize domestic actors through persuasion and social learning models into

Bottom-up Europeanization (En2) analyzes the process of preference uploading of domestic actors to the European level. Preferences may relate to the functional (public policies), process (political processes), or structural (institutions) dimension. Theoretical approaches that study upward Europeanization and are compatible with one another are rationalism and constructivism. The basic premise of a rationalist approach is that domestic actors pre-define their interests according to a cost-benefit analysis of the various options and then seek to achieve them by relying on their own sources of power, such as financial capacity or the number of votes in the European Council[23]. Constructivists, on the other hand, believe that the preferences of state and non-state actors are not entirely predetermined, but may be reversed in the case of valid and strong counter-arguments. Domestic actors have an idea of what they want. However, there is a potential to change their preferences in the course of negotiations at the European level if other actors make convincing claims, such as new scientific insights[24].

In this context, Börzel highlights three different strategies that the Member States apply when representing national interests in competition for European policies. The "Pace-Setting" strategy involves an active shaping of European policies in accordance with the domestic preferences of

a new system of suitability norms and rules so that they can adequately adjust their interests and identities. It should be noted that the stronger the cooperation of informal institutions in the Member States, the more likely there will be changes in the domestic system (ibid.).

[23] Countries with more votes and higher bargaining power are in a better position during the political decision-making process. More powerful states will have more influence in shaping European policies, especially if they succeed in forming "winning" coalitions. Some countries, however, use coercion to achieve their goals. For example, they threaten other countries by interrupting further cooperation, denying support in other matters, reducing additional payments, etc. Subnational authorities are also, to a greater or lesser extent, engaged at the European level and exert their influence on the decision-making process through multiple access points (see *infra*), lobbying, and participating in the activities of the trans-regional networks of which they are members.

[24] According to this approach, the policy outcomes and dynamics of integration depend on the process of discussion between the Member States, supranational institutions and policy experts, and epistemic communities. That argument, which wins within the contest of different ideas, will affect the policy outcome. States will be more successful in shaping public policies as their arguments align with the values and ideas of other actors (*ibid.*).

each Member State. They "export" domestic public policies to the European level that are subsequently adopted by other countries. Member States that choose to apply this strategy should have sufficient capacity to successfully negotiate and stand up to the opposition of Member States with divergent policy preferences. The second is "Foot-Dragging," a strategy that aims to obstruct or delay the uploading of public policies by other Member States to avoid implementation costs. Finally, the "Fence-Sitting" strategy is ambivalent and aimed at tactically forming coalitions with the first two groups of Member States or, in turn, taking a neutral position depending on the issue[25].

The practices of Member States' public policies are being consolidated at the European level through micro and macro uploading and integration procedures. This is followed by downloading and micro and macro crossloading (En3) of consolidated content into domestic discourse, political structures, and public policies. The macro aspect refers to the mechanisms of positive integration and the micro aspect to the mechanisms of negative integration. Positive integration represents the EU activities in creating a supranational model of public policy that the Member States need to implement through appropriate legal regulation. Negative integration involves creating an efficient market, not by sectoral regulation, but by removing obstacles[26]. The concept of crossloading introduces a horizontal dimension to the concept of Europeanization[27]. Macro crossloading represents mutual learning and procedures that take place between national authorities, and micro crossloading subnational interaction and learning

[25] Tanja A. Börzel, "Shaping and Taking EU Policies: Member State Responses to Europeanization", *Queen's Papers on Europeanisation* 2(2003): 8, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.535.1021&rep=rep1&type=pdf.

[26] Anamarija Musa, *Agencijski model javne uprave*, Zagreb: Pravni fakultet Sveučilišta u Zagrebu, Studijski centar za javnu upravu i javne financije, 2014, 252. Also see: Laszlo Bruszt, Visnja Vukov, "Making states for the single market: European integration and the reshaping of economic states in the Southern and Eastern peripheries of Europe", *West European Politics* 4(2017):663–687.

[27] Graeme Crouch, "New Ways of Influence: 'Horizontal Europeanization in Southeast Europe", in *Europeanization Revised: Central and Eastern Europe in the European Union*, eds. Michał Matlak, Frank Schimmelfennig, Tomasz P. Woźniakowski, European University Institute, Robert Schuman Centre for Advanced Studies, 2018., 41.

through group mediations. With prior coordination of policy areas, learning leads to integration. The values, norms, beliefs, procedures, policy processes, and possibly the discourse and ideology of subnational levels of government are integrated[28].

3. DIMENSIONS OF THE IMPACT OF EUROPEANIZATION ON DOMESTIC STRUCTURES

In exploring the effects of Europeanization processes, changes in the structure of the Member States can be identified in three dimensions: process (political processes; politics), functional (public policies; politics), and

[28] Crossloading Europeanization (En3) is explored in the context of policy transfers that can be vertical and horizontal. The vertical policy transfer (VPT) is linked to EU policy and European integration processes, while the horizontal (HPT) involves the process of learning and equalizing public policies between the Member States without the involvement of European institutions. It is generally accepted that policy transfer is understood as Europeanization, provided that the European institutions participate in the process, even if it involves only their coordinating function. It follows that vertical policy transfer is taken as explicit Europeanization, which cannot be said of the horizontal policy. If the horizontal policy transfer is also defined as Europeanization, its conceptual stretching is expanding. (Elizabeth Bomberg, John Peterson, "Policy Transfer and Europeanization: Passing the Heineken Test?", *Queen's Papers on Europeanisation* 2(2000):5, http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilos ophy/FileStore/EuropeanisationFiles/Filetoupload,38445,en.pdf.) The horizontal policy transfer does not necessarily involve Europeanization. However, if this happens, En3 will not be as explicit as in the case of vertical policy transfers. However, horizontally transposed public policies may become the norm to be applied at the EU level if the Member States carry out their uploading (En2) in the EU domain. Subsequently, based on the interaction between En2 and European integration, policy outcomes are eventually transferred to the national domain (En1) where their cultural interpretation takes place. Also, any cultural interpretation by the Member States can lead to further En3 in terms of the vertical policy transfer, and again, En2 and European integration. Therefore, HPT is a driver of change, occurring only in the initial phase of the policy transfer through the EU system, and is considered the 'content' of Europeanization. On the other hand, VPT, or En3 in the narrower sense, is the outcome of the top-down Europeanization and is considered to be part of the 'Europeanization' process. (Kerry E. Howell, „Developing Conceptualisations of Europeanization: Synthesising Methodological Approaches", *Queen's Papers on Europeanisation* 3(2004):9, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.496.9117&rep=rep1&type=pdf.)

structural (political structures; polity)[29]. The demarcation of these dimensions is made solely for analytical purposes, while in reality, there is an interplay of their elements.

Table 1: Domestic structures influenced by Europeanization

Europeanization dimensions			
POLITICS (political processes)		*POLICY* (public policies)	*POLITY* (political structures)
Political parties and interest groups	Interest formation	Standards	Political institutions
	Aggregation of interests	Instruments	Intergovernmental relations
	Representation of interest	Approaches to problem solving	Judiciary
	Public debates	Discussions on public policies	Public administration
			State traditions
			Economic institutions
			Relations between the state and society
			Collective identities

Source: adapted from Börzel and Risse[30]

[29] By political processes, Katenhusen and Lamping imply structures of formation, aggregation, mediation, and representation of interests and public discourse. Public policies relate to policy content, instruments, and styles, as well as approaches to problem solving. Political institutions include political rules and decision-making procedures, legal and administrative structures, systems of territorial organization, national tradition and identity, and the economy. (Sošić, Mario. "Europeizacija nacionalnih politika: concept i istraživački pristup", *Anali hrvatskog politološkog društva* 1(2006):238.)

[30] Tanja A. Börzel, Thomas Risse, "Conceptualizing the Domestic Impact of Europe", in *The Politics of Europeanization*, eds. Kevin Fetherstone, Claudio M. Radaelli, Oxford: Oxford University Press, 2003, 60.

The dimension of political processes is a very heterogeneous area in which we find a connection between EU and domestic political activities. The term "politics" is extremely broadly defined and can most easily be defined as the area of activity of individual and collective actors aimed at supporting or challenging domestic public policies and other activities, as well as expressing their interests. There are many forms of conducting such activities: voting in elections and referendums, polling, social movements, interest groups, political parties, etc.[31]. However, compared to the actors of the other two dimensions, those mentioned above have little or no formal interaction with EU institutions or the decision-making process at the supranational level. Thus, the impact of Europeanization on the Member States' political processes is indirect.

In the public policy dimension, it is easiest to see the impact of the EU. EU legislative activity is mainly related to the regulation of the internal market so that public policy is generally characterized by an economic and regulatory, and less social and redistributive character. In doing so, the European Commission most often applies the traditional method of action, also called the direct or "hard" method. Binding regulation is made based on public policy proposals formulated in accordance with the outcomes of intergovernmental negotiations[32]. However,

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[31] Robert Ladrech, *Europeanization and National Politics*, The European Union Series: Palgrave Macmillan, 2010, 23.

[32] Under the Treaty of Lisbon, EU institutions adopt two types of acts. Legislative acts (Article 289 (3) TFEU) are adopted in the ordinary (Article 289, paragraph 1 TFEU) and special legislative procedure (Article 289 (2) TFEU) and at the initiative of a group of Member States or the European Parliament at the recommendation of the European Central Bank or at the request of the Court or of the European Investment Bank in the specific cases provided for in the Treaties (Article 289, paragraph 4 TFEU). As legislative acts, directives are fully binding and directly applicable in all Member States (Article 288, paragraph 2 TFEU). They completely replace existing national standards in order to harmonize the legal systems of the Member States. Directives are binding with regards to the objective to be achieved, while the way to achieve it (e.g., passing a new law, amending the existing law, passing a by-law) is left to the discretion of the Member States. Therefore, their purpose is not to equalize but to approximate national rights. (Ivan Koprić et al. *Europski upravni prostor*, Zagreb: Institut za javnu upravu, 2012, 78.) Decisions, being the third category of legislation, are fully binding to those to whom they are addressed, including natural persons. (Trevor C. Hartley, *Temelji prava Europske zajednice*, Rijeka:

the traditional method is complemented by the so-called Open Method of Coordination (OMK) as a "soft" method. Member States seek to coordinate national policies and ensure the achievement of European policy objectives through mutual cooperation and the exchange of information and good practice, while the European Commission emerges as an advisor and promoter of ideas. The outcomes of such initiatives are not legally binding, but it is up to the Member States to refine and implement the policy proposals.

The dimension of domestic political institutions is also a broad area of research that covers national and subnational political institutions, their mutual relations, central government, relations between the legislative and executive branches of government, and the judiciary. Changes visible at the central government level are, for example, an increase in the role of the Prime Minister, the emergence of new coordinating bodies and organizational units within the ministry responsible for EU policy affairs[33]. Also, Europeanization processes can refer to constitutional changes in terms of the ratification of EU fundamental treaties, a change in the nature of relations between central and subnational governments, and the formation of EU affairs committees within representative bodies. However, in the study of the effects of Europeanization, the focus is placed on the national executive, the national legislature, national courts, and the relationship between national and subnational levels of government.

Pravni fakultet u Rijeci, 2004, 103.). Non-legislative acts can be delegated and implemented. The power to adopt non-legislative acts (delegated regulations, directives, and decisions) may be delegated exclusively to the European Commission to supplement or amend certain elements of non-key legislative acts (Art. 290 (1) TFEU). In situations requiring a uniform implementation of binding acts of the Union, the Council of the European Union or the European Commission is empowered to adopt implementing acts (implementing regulations, directives, and decisions) (Art. 291 (2) and (4) TFEU).

[33] Flavia Jurje, "Europeanization of New Member states: Effects on Domestic Political Structures", in *Europeanization Revised: Central and Eastern Europe in the European Union*, eds. Michał Matlak, Frank Schimmelfennig, Tomasz P. Woźniakowski, European University Institute, Robert Schuman Centre for Advanced Studies, 2018., 59.

4. ADAPTATION OF DOMESTIC STRUCTURES

The main problem that arises in the study of the phenomenon of Europeanization is the (in)ability to determine a unit of measure which could objectively determine the measure of Europeanization of the Member States. In this regard, Börzel offers a measurement scale with five different responses that the Member States give to adaptation pressures[34]. However, before explaining each of them, it should be noted that it is challenging to define objective criteria by which to accurately distinguish each of the stages on a scale of measurement; in most cases, it is necessary to rely on the "intuition and interpretative skills" of the researchers[35].

The stages of change range from inertia and retrenchment to absorption, accommodation, and transformation[36]. Inertia implies the absence of change as the Member States resist implementing the adaptation required to meet European requirements. In such cases, the European Commission may institute legal proceedings against the Member States, resulting in a further increase in adaptation pressures. The second stage is the so-called retrenchment, which represents a situation where "resistance to change can have a paradoxical effect in terms of increasing rather than reducing the discrepancy between the European and domestic levels"[37]. Absorption represents a low degree of adaptation whereby the Member States adopt European requirements without substantially altering the existing structures and the logic of political behavior. This might include, for example, revising strategies established to achieve specific

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[34] Tanja A. Börzel, "Europeanization: How the European Union Interacts with its Member States", in *The Member States of European Union*, eds. Simon Bulmer, Christian Lequesne, Oxford: Oxford University Press, 2005, 58.

[35] Claudio M. Radaelli, Romain Pasquier, "Conceptual Issues", in *Europeanization. New Research Agenda*, eds. Paolo Graziano, Maarten P. Vink, Houndmills, Basingstoke: Palgrave Macmillan, 2007, 40.

[36] Because no changes in domestic structures occur in the first two cases, some analysts limit the measurement scale to three points: low (absorption), moderate (accommodation), and a high degree of adaptation (transformation).

[37] Tanja A. Börzel, "Europeanization: How the European Union Interacts with its Member States", in *The Member States of European Union,* eds. Simon Bulmer, Christian Lequesne, Oxford: Oxford University Press, 2005, 59.

goals or minor institutional changes aimed at redesigning how EU-related information becomes a priority area in the legislative process[38]. Accommodation, on the other hand, is an adaptation of the existing processes, institutions, and policies without changing the key features and collective understandings (e.g. by "patching up" new policies and institutions onto existing ones)[39]. It indicates a moderate degree of adaptation. Adaptation pressures are more pronounced in this case. The most common way of accommodating is to "add" new policies and institutions to the existing ones, but without changing the latter. For example, adopting European initiatives to increase the scope of a particular ministry so that the new instruments of public policy coordination can be adopted. Finally, a high degree of adaptation is achieved through the transformation of policy and systemic domestic structures. Transformation can be a complete replacement of the existing with new processes, institutions, and policies, or a fundamental alteration of the existing processes in terms of their key features and/or collective understandings. Ladrech points out that fundamental changes are very rare. They can occur in times of crisis when the EU intervenes in a Member State to a greater extent than it would normally do. In addition, Börzel and Risse believe that transformation can occur if the uploading of domestic preferences results in a proposal for public policies that will facilitate Member States' intentional implementation of fundamental changes[40].

[38] Robert Ladrech, *Europeanization and National Politics*, The European Union Series: Palgrave Macmillan, 2010, 36.

[39] Adrienne Héritier, "Differential Europe: National Administrative Responses to Community Policy". in *Transforming Europe. Europeanization and Domestic Change*, eds. Maria Green Cowles, James A. Caporaso, Thomas Risse, Ithaca, NY: Cornell University Press, 2001, 54.

[40] Tanja A. Börzel, Thomas Risse, "Europeanization: The Domestic Impact of European Union Politics", in *Handbook of European Union,* eds. Knud E. Jørgensen, Mark A. Pollack, Ben Rosamond, London: Sage, 2007, 495.

Table 2: Categorization of adaptations of domestic structures

CATEGORY	FEATURE	DEGREE OF CHANGE
Inertia	Member States resist adaptation	No change
Retrenchment	Resistance to change, which further increases the discrepancy	Increase in discrepancy
Absorption	Adoption of European requirements without substantial changes in public policies, practices, and preferences	Low
Accommodation	Adaptation of public policies, practices, and preferences, but without changing their key features	Moderate
Transformation	Fundamental changes to the existing public policies, practices, and preferences or their replacement with new ones	High

Source: adapted from Börzel and Risse[41]

According to the diversity of systems in the Member States, the degree of EU impact, and the intensity of adaptation pressures on each of them varies. Therefore, there is a common position on the lack of convergence of domestic institutions, policies, and processes in relation to the common European model. However, research has also shown that the EU has not caused any divergence between the Member States, i.e., there has been no deepening of the differences between their institutions and policies. Member States facing similar adaptation pressures, as a rule, have similar responses to these pressures as they learn from each other in this regard.

[41] Tanja A. Börzel, Thomas Risse, "Conceptualizing the Domestic Impact of Europe", in *The Politics of Europeanization*, eds. Kevin Fetherstone, Claudio M. Radaelli, Oxford: Oxford University Press, 2003, 71.

Therefore, it is possible to talk about convergence in clusters, i.e., groups into which the Member States are grouped by similarity[42].

5. EUROPEANIZATION OF SUBNATIONAL LEVELS

Over the last thirty years, European countries have undergone significant changes in the relationship between central and subnational governments. In this sense, the impact of Europeanization on states varies with the diversity of their territorial organization and system of local self-government. Changes are visible in a number of limitations, but also new possibilities for action and ways of realizing the influence of subnational units[43]. On the one hand, the EU questions the territoriality defined by the traditional conception of the state. By transferring the political decision-making power from the national to the European level, the central government ceases to

[42] Risse, Cowles, and Caporaso highlight several reasons for the convergence partiality. First, the EC Treaty stipulates that the adoption of directives only determines the policy outcome that is to be achieved and leaves the Member States the choice of how to achieve the objectives of the directives. Thus, the process of implementing European legislation is characterized by discretion and flexibility. The principle of mutual recognition, which requires the Member States to adopt the standards of other Member States in order to achieve regional trade, also does not contribute to harmonization and uniformity. This establishes a standard of single conditionality in the sense that products must meet the criteria of only one country. Secondly, Europeanization denotes a continuous interaction between the uniformity of the EU system and the diversity and individualism of each Member State. Although the EU system primarily operates on the assumption of uniformity, i.e., for the standards adopted at the European level to be applied uniformly in all Member States, the diversity that derives from the different historical and cultural traditions of the Member States must also be nurtured. The third reason for partial convergence should be sought in the intervening factors that mediate European demands and the outcome of domestic change. Regardless of the degree of adaptation pressures, each country has different institutions and mediating factors that facilitate or limit the implementation of European policies, which then gives them a national character. (Thomas Risse, Maria G. Cowles, James Caporaso, "Europeanization and Domestic Change: Introduction", in *Transforming Europe. Europeanization and Domestic Change*, eds. Maria G. Cowles, James Caporaso, Thomas Risse, Ithaca, London: Cornell University Press, 2001, 16.)

[43] Hussein Kassim, "The Europeanization of Member State Institutions", in *The Member States of European Union*, eds. Simon Bulmer, Christian Lequesne, Oxford: Oxford University Press, 2005, 282.

be the highest authority within its borders. The loosening of the hierarchical relationship between central and subnational authorities has led to a reconfiguration of the territoriality of the Member States. Subnational actors operate in a political system that crosses national borders and enables them to pursue their interests independently of the central government. They can directly communicate with EU institutions and cooperate with the sub-national levels of other Member States. The multilevel nature of EU systems enables them to be involved in public policies beyond national borders, for example, through the Committee of the Regions, the Congress of Local and Regional Authorities, or local authorities' networks. In addition, the paradigmatic activities of local actors are also based on informal contacts and personal networks that are very difficult to monitor and therefore provide additional impetus to local autonomy. This provokes the dominant position of central authorities in the European decision-making process[44]. Schulz emphasizes that, by replacing hierarchical and cooperative governance, participatory management has led to significant changes in the logic of influence in European decision making and the triangulation of relations within the European community[45].

Europeanization processes, on the other hand, influence the way subnational governments perform their functions. The EU's regional policy and cohesion and structural funds are of paramount importance. The possibility of subnational units receiving funding encouraged their participation in lobbying activities. Some units seek to influence the decision-making process through national governments and others through direct action at the European level, individually or in cooperation with other units[46]. Thus, EU regional policy has increased the opportunities for subnational actors to participate in the policy process. This interaction between the subnational and European levels of government is a fea-

[44] Marius Guderjan, "European Integration from a Local Government Perspective Theoretical Considerations", UACES Student Forum Conference, University of Surrey. June 30-July 1 2011, https://www.uaces.org/documents/papers/1140/guderjan.pdf.

[45] Claus J. Schulze, "Cities and EU governance: policy-takers or policy-makers?", *Regional and Federal Studies* 1(2003):140.

[46] Hussein Kassim, "The Europeanization of Member State Institutions", in *The Member States of European Union*, eds. Simon Bulmer, Christian Lequesne, Oxford: Oxford University Press, 2005, 283.

ture of a multi-level governance system. However, it should be noted that there is noticeable inequality in subnational mobilization, both within and across the Member States[47]. As a rule, the capacity of stronger subnational higher-level units is better represented at the European level. Also, the European Commission intends to ensure the participation of subnational authorities in the design and implementation of national programs, which does not necessarily impact the strengthening of their position vis-à-vis the central government.

Local-level Europeanization also includes a download, upload, and horizontal component. Marshall defines the *top-down* Europeanization of the local self-government as changes in the policies, actions, preferences, and participants of the local governance system that result from the negotiation and implementation of EU programs[48]. On the other hand, *bottom-up* Europeanization is the transfer of innovative urban practices to the transnational arena for the purpose of incorporating local initiatives in Pan-European policies and programs. In addition, cities have developed various instruments to simplify the transfer of best practices among themselves, which introduces a horizontal component to the Europeanization process.

In the first case, local authorities, as part of a hierarchically structured state system, implement and enforce European regulation and have no direct influence on the political decision-making process at the EU level[49]. Therefore, the local self-government is not viewed as an active subject but

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[47] Subnational mobilization can take many forms, institutional and non-institutional. The first group includes the Committee of the Regions, which, as an advisory body to the EU institutions, represents subnational interests and partnerships as part of EU structural policy. The second group consists of collective and individual channels of action at the European level. Collective organizations include organizations such as the Assembly of European Regions (AER), the Council of European Municipalities and Regions (CEMR), the Permanent Conference of Local and Regional Authorities of Europe (CLRAE), the International Union of Local Authorities (IULA), etc., and numerous networks of local and regional authorities. Individuals, however, refer to the direct action of subnational authorities in the European arena.

[48] Adam J. Marshall, "Europeanization at the urban level: local actors, institutions and the dynamics of multi-level interaction", *Journal of European Public Policy* 4(2005):674.

[49] Sbragia and Stalfi elaborate these areas as market-building policies, such as market-building policies, market-correcting policies, market-cushioning policies, and non-market policies, such as asylum. (Alberta Sbragia, Francesco Stalfi, "Key Policies", in *The Euro-*

an "affected" object[50]. Three areas governed by European law are relevant to subnational governments: the internal market, environmental law, and cohesion policy[51]. In addition to binding regulation, the European Union is also working through various programs and financial instruments in these areas to achieve as many policy objectives as possible. John identifies several stages of Europeanization of the local self-government that he schematically depicts with a ladder. The degrees of Europeanization range from the lowest step that represents absorption in terms of *top-down* Europeanization to the highest at which European ideas and practices are incorporated into the local policy agenda.

Figure 1: Adaptation levels of local units of government

				Making council's policies more "European"
				Advising European institutions on implementation issues
				Participating and cooperating in joint projects
				Transnational networking
				Facilitating economic regeneration
				Maximizing EU grants
				Communicating with public and private sector
				Managing European information
Fully Europeanized	Networking	Financially Oriented	Minimal	Responding to hard law

Source: Peter John, Local Governance in Western Europe, London: Sage Publication Ltd., 2001, 72.

pean Union: How does it work?, eds. Elizabeth Bomberg, John Peterson, Alexander Stubbs, Oxford: Oxford University Press, 2008, 117.)

[50] Claus J. Schulze, "Cities and EU governance: policy-takers or policy-makers?", *Regional and Federal Studies* 1(2003):131.

[51] Mike Goldsmith, "Variable geometry, multi-level governance: European integration and subnational government in the new millennium", in *The Politics of Europeanization*, eds. Kevin Fetherstone, Claudio M. Radaelli, Oxford: Oxford University Press, 2003, 120.

Local levels of governance respond to *top-down* Europeanization by bridging national borders and making an impact in the European political arena. They seek to achieve their goals by lobbying EU institutions (in particular the Committee of the Regions) and the Council of Europe, creating thereby a direct link between subnational and supranational levels of governance. The emergence of "foreign policy," predominantly cities, and the involvement of local actors in transnational spaces opens up a number of new opportunities for their action[52].

Finally, Europeanization of local self-government can also occur without the involvement of the European institutions or with their minimal, coordinating role in the process (e.g., the role of the European Commission in funding projects). This refers to collaboration, sharing of experiences, and best practices and finding innovative solutions through transnational networks of local units[53]. These include a broad range of concepts such as lesson drawing[54], policy transfer[55], and policy convergence[56]. Twinning between local units and the formation of transnational networks of local governance form a new dimension of the emergence of "foreign policy" and the paradigm of European cities[57].

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[52] Hubert Heinelt, Stefan Niederhafner, "Cities and Organized Interest Intermediation in the EU Multi-level System", in *Diskurs und Governance – Abschlussbericht der Forschungsabteilung „Zivilgesellschaft und transnationale Netzwerke"*, ed. Wolfgang van den Daele, Discussion Paper SP IV 2005–103, Wissenschaftszentrum Berlin für Sozialforschung, 2005, 77.

[53] Marius Guderjan, "Local Government and European integration – beyond Europeanisation?", *Political Perspectives*, 1(2012):108, http://www.politicalperspectives.org.uk/wp-content/uploads/PP_6–1_Europeanisation-or-integration-of-local-government-6.pdf.

[54] Richard Rose, *Learning from Comparative Public Policy*, London-New York: Routledge, 2005, 80.

[55] Mark Evans, "Understanding Policy Transfer", in *Policy Transfer in Global Perspective*, ed. Mark Evans, Aldershot–Burlington: Ashgate, 2004, 11.

[56] Katharina Holzinger, Christoph Knill, "Causes and conditions of cross-national policy convergence", *Journal of European Public Policy*, 5(2005):780.

[57] Stephane Paquin, "Paradiplomacy", in *Global Diplomacy. An Introduction to Theory and Practice*, eds. Thierry Balzacq, Frederic Charillon, Frederic Ramel, translated by William Snow, Paris: Palgrave Macmillan, 2019, 55. The concept of paradiplomacy refers to the international activities of subnational governments beyond the control of their central governments. They open trade and cultural missions abroad, sign treaties and agreements with transregional and transnational local authorities and non-state actors, they participate

5.1. Dimensions of Europeanization of subnational levels

In the analysis of the process dimension (*politics*), attention is most often focused on political parties and interest groups. With regards to political parties, the EU has no direct jurisdiction over their organization and activities, nor is there direct funding from European funds that would motivate them to invest their own organizational resources in redirecting action to the European level. Although the members of political parties are elected to the European Parliament, their activities remain primarily related to the domestic political arena, i.e., the executive and the representative body. The Europeanization of political parties can be discussed if there is a change in their program, organization, party competition, and integration with European actors, considering that the motive for change is not exclusively of a "domestic" nature[58]. Research on party programs has shown a moderate increase in references to the EU and a slightly weaker reference to specific policy proposals. However, most programs, as a rule, contain a chapter expressing the views of the party on the position of their country as an EU Member State.

One consequence of Europeanization on the organizational structure of political parties is an increase in the degree of leadership autonomy. A moderate increase in the number of intra-party positions dealing with EU issues can also be observed. Most often, in this respect, these are sections for international activities. There are more opportunities for participation of the party apparatus at the European level: (1) infiltrating Members of the European Parliament into the governing bodies of the party, (2) involving party representatives in transnational party federations, (3) involving representatives of sections for international activities at the European and world level, or (4) drafting party manifests and other policy documents for the European Parliamentary elections. Furthermore, possible changes in party competition may be caused by the emergence of

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in international networks of local units and they "sometimes even challenge the official foreign policy of their central governments through their statements or actions" (Alexander S. Kuznetsov, *Theory and Practice of Paradiplomacy. Subnational governments in international affairs*, London, New York: Routledge, 2016, 3).

[58] Robert Ladrech, "Europeanization and Political Parties: Towards a Framework for Analysis", *Party Politics*, 4(2002):396.

Eurosceptic or anti-European political parties. Whether they will influence and evoke change depends on the number of votes, i.e., the confidence that will be shown toward them in the elections. Finally, the Europeanization process encourages the establishment of relationships and the involvement of domestic parties in transnational federations of parties operating at the European level[59].

Unlike political parties, interest groups do not have the primary goal of seizing power, although they support a particular party that represents their interests. Also, interest groups do not restrict their activities solely to the national political system, as do political parties. In addition to the national arena, they can be activated at the European level if they consider it an appropriate political structure to achieve their goals. The European Commission calls on domestic interest groups to contribute to the creation of European public policies by providing information and commenting on the proposed legislation. Whether its focus will be at the European level depends on the cost-effectiveness of such engagement at the national level, as determined by a cost-benefit analysis. Therefore, the Europeanization of interest groups is considered to be present if their activities are shifted to the supranational level or changes in the strategy of action in the domestic arena. The EU system of multilevel governance is a key factor in

[59] John McCormick, *Understanding the European Union: A Concise Introduction*, The European Union Series: Palgrave Macmillan, 2011, 132. According to Mair, the impact of Europeanization on political parties and electoral systems can be direct and indirect. In both cases, it can be a process of institutionalizing a particular European political system and/or the penetration of European rules, directives, and norms into the domestic sphere. The direct effect of institutionalization is evident in the creation and consolidation of trans-European party alliances and coalitions, while the direct effect of penetration may be the emergence of new anti-European political parties or anti-European inclinations within the existing parties. On the other hand, indirect, non-partisan channels of representation (interest groups, civil society organizations) and the "enlargement of 'Europe' in domestic discourse" appear as indirect effects of institutionalization (Peter Mair, "Political Parties and Party Systems", in *Europeanization. New Research Agenda*, eds. Paolo Graziano, Maarten P. Vink, Houndmills, Basingstoke: Palgrave Macmillan, 2007, 157.) Penetration, in turn, is indirectly affected by the weakening of national party competition due to the constraints of national decision-making and the transfer of powers to the European one.

motivating national interest groups to create associations at the European level and/or to lobby EU institutions directly[60].

In examining the impact of Europeanization on domestic public policies, attention must be paid to distinguishing the downloading process of European regulations that domestic structures, including subnational authorities, are required to implement in the national legal system from the effects of such implementation on domestic public policies, including local ones. In the first case, for example, the measure of coherence between European and domestic public policies and the variation in the degree of coherence between different countries can be explored. Also, when it comes to the effects or consequences on public policies, the research focuses on finding, for example, new organizational forms designed to implement EU policies, identifying changes in existing national policies, or brand-new policy dimensions that have not existed so far in the domestic system[61].

The dimension of political institutions, among other things, involves a change in the relationship between national and subnational levels of government. The Europeanization process has opened new possibilities for action and channels of influence to subnational authorities. One consequence of the redefinition of Member States' statehood is the activation of subnational actors within a broader political system that crosses national borders and within which they can develop and pursue projects independently of domestic capital. EU regional policies, the activities of the Committee of the Regions and the Congress of Local and Regional Authorities of the Council of Europe, and the activities of networks of local and regional authorities at the European level are mechanisms of Europeanization that allow subnational levels to promote their interests and influence public policy making.

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[60] Robert Ladrech, "The Europeanization of Interest Groups and Political Parties", in *The Member States of European Union*, eds. Simon Bulmer, Christian Lequesne, Oxford: Oxford University Press, 2005, 323.

[61] Robert Ladrech, *Europeanization and National Politics*, The European Union Series: Palgrave Macmillan, 2010, 11.

5.2. Mechanisms of Europeanization of subnational levels

Finally, it is necessary to analyze the main mechanisms, i.e., actors of the Europeanization of subnational levels of government. The purpose of the analysis is to identify the ways and possibilities of involving local units in the European integration process as well as to create European public policies. In addition to the influence of the European Union, activities of the Council of Europe and networks and associations of local and regional units promoting their interests and participation in European governance are crucial.

The European Union has no exclusive competence to regulate local self-government. Therefore, EU primary and secondary legislation does not systematically regulate this area but rather with specific provisions. Such provisions are found in acts that regulate other areas and policies within those areas that may be significant for subnational authorities. On the other hand, EU institutions have adopted a number of soft-law instruments, such as communications, resolutions, and opinions that address various local government topics but produce no legal but rather practical effects.

In addition to the regulations, the EU influences subnational levels through regional policy and the activities of the Committee of the Regions and the Office for Development and Cooperation. The European Commission contributes to the regional and local development of the Member States. Specifically, a Directorate-General for Regional Policy is set up within the Commission, whose mission is to strengthen the economic, social, and territorial cohesion of the regions and countries of the European Union[62]. Reducing the level of development gap is achieved by investing

[62] Territorial cohesion becomes the third dimension of cohesion policy with the entry into force of the Treaty of Lisbon (Protocol 28) and the introduction of the Europe 2020 strategy. The concept of territorial cohesion builds links between economic efficiency, social cohesion, and environmental balance, putting the sustainable development of different territories at the heart of public policy making. (European Commission, Territorial Cohesion. Turning territorial diversity into strength. A Green Paper. COM (2008) 616 final, 06.10.2008.) The main goals are to achieve integrated development of national territories, to formulate public policies tailored to local needs, and to foster cooperation between national territories in order to strengthen European integration.

in infrastructure projects, building an information society, education, and innovation, sustainable development, developing new products and production methods, energy efficiency, etc. and encouraging cross-border cooperation. In doing so, it helps less prosperous countries or those facing structural problems of improving competitiveness and achieving a higher rate of economic development in a sustainable way. One of the EU goals is to design an efficient and effective structural policy that will benefit European citizens and directly contribute to creating the conditions for successful enlargement of the European Union in accordance with the principle of sound financial management[63]. Regional policy is an investment policy, and its fundamental principle is financial solidarity, which is reflected in the channeling of funds through the Structural Funds. It encourages job creation, competitiveness, economic growth, and improving the quality of life.

The Committee of the Regions represents the local and regional interests of the Member States in the process of shaping EU policies and legislation. The Treaty of Lisbon reinforced the Committee's position, underlining the commitment of EU institutions to consult it on new proposals in areas that have an impact on regional and local governance. In addition to working with institutions daily, it maintains contacts with all other stakeholders representing local and regional units and civil society[64].

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[63] Ian Bache, "Cohesion Policy", in *Europeanization. New Research Agenda*, eds. Paolo Graziano, Maarten P. Vink, Houndmills, Basingstoke: Palgrave Macmillan, 2007, 244.

[64] The Committee of the Regions maintains relations with various stakeholders through a consultation process and structural dialogue. The consultations aim to establish contacts between the rapporteurs of each committee and representatives of different stakeholder groups, such as associations of local and regional authorities and local and regional public services. Stakeholders present their views for which rapporteurs will decide whether to consider them when drafting an opinion. Structural dialogue, on the other hand, is a new form of contact that applies in addition to existing methods of public and institutional consultation with EU institutions and whose nature is necessarily political. The purpose of the structural dialogue is to improve EU legislation, taking into account the views of local and regional associations before the formal decision-making process begins, i.e., in the pre-legislative phase. Structural dialogue also seeks to ensure a better understanding of policy guidelines, to make the functioning of the EU system more transparent and meaningful to citizens, and to strengthen policy coordination between the European Commission and local or regional authorities. The idea of structural dialogue stems from the White Paper on European Governance, which emphasized the need to strengthen the cooperation

In the area of the European Union's external relations, the Office of Development and Cooperation was set up in 2011, whose mission is to contribute to the creation of the Union's development policy and to assist countries in need through various programs and projects. The organizational unit D2, which is responsible for cooperation with local authorities, operates within Directorate D. The specificity in the work of this unit is conducting a structural dialogue with the representatives of civil society organizations and local authorities of the EU Member States and partner countries. The objective of the Structural Dialogue initiative is to increase the effectiveness of involving all stakeholders in the process of shaping European development policies and programs. It is, in fact, the European Commission's initiative to respond to the conclusions of several reports on the evaluations of civil society organizations and the Court of Auditors, as well as the requests made by the European Parliament, local authorities, and civil society at the Accra Development Assistance Forum[65]. It had a goal to reach a mutual understanding and agree-

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of EU institutions with representatives of European regions and cities. Accordingly, the European Commission has adopted a "Communication on Dialogue with Associations of Regional and Local Authorities on the Formulation of EU Policy," which emphasizes the lasting character and involvement of the Committee of the Regions in the political decision-making process. (Communication from the Commission, 2003. Dialogue with associations of regional and local authorities on the formulation of European Union policy, COM (2003) 0811 final, 19.12.2003.) The dialogue can be general or thematic. In the first case, he or she meets with the President of the European Commission on issues of broader interest, such as the EC's annual work program. Thematic dialogue, however, is conducted with an individual EC member and focuses on a specific policy area, such as communication policy, education, energy, etc.

[65] The 2008 Ghana Forum adopted an Action Plan which states that three challenges need to be addressed in order to enhance development cooperation: (1) governments of developing countries should, together with Parliament and citizens, be involved in the formulation of development policies and take the lead in managing their implementation, (2) integrate all stakeholders in development policies into effective and inclusive partnerships, and (3) achieve as many development outcomes as possible, with the assurance that Member State Ministers will be responsible for them. Also, the Forum launched the International Aid Transparency Initiative (IATI), which seeks to facilitate access to, and interpretation and use of, aid spending information. (Accra Agenda for Action, http://siteresources.worldbank.org/ACCRAEXT/Resources/4700790–1217425866038/AAA-4-SEPTEMBER-FINAL-16h00.pdf, 30. 10. 2019.)

ment on the main challenges facing civil society and local authorities, find ways to improve and strengthen their partnership with them and explore ways to better adapt them to European policies. Unit D2 acts as a single point of contact for providing information to civil society organizations and local authorities, as well as distributing their inquiries to the relevant services. It is also responsible for developing and promoting development policy education and raising public awareness of development issues. To that end, it is responsible for the formulation of multi-annual programs and the management of the Non-State Actors and Local Authorities in Development program[66].

In the early 1990s, the Council of Europe began implementing assistance and cooperation programs to develop democratic stability, i.e., to strengthen the democratic institutions of its Member States. In the area of local democracy, the programs were inspired by the European Charter of Local Self-Government and prepared in accordance with the needs expressed by national authorities. The programs are funded from the Council of Europe budget and by means of European Commission support and voluntary contributions from individual Council members to specific projects. Three core strategic objectives of the program are related to the implementation of the subsidiarity principle in the legal order of the Member States: (1) fostering the process of decentralization, (2) supporting the development of effective local and regional self-government, and (3) entrenching democracy at the local and regional level. The approach to reforming local government systems is characterized by the involvement of all potential stakeholders and the preparation of national plans for decentralization. In addition to the proposed legislation and institutional changes, capacity-building programs are being formulated, enabling an integrative reform of local self-government[67]. The Council of Europe seeks the involvement of local and regional authorities in the integration process through the activities of the Congress of Local and

[66] European Commission, 2012. Main missions of DEVCO Directorates & Units. 21.12.2012.

[67] The Council of Europe's fundamental regulatory documents are international treaties (conventions, framework conventions, protocols, charters, and agreements. In addition, a number of recommendations, resolutions, and opinions have been adopted in the field of local governance.

Regional Authorities, the Center of Expertise for Good Governance, the European Committee on Democracy and Governance, and specialized ministerial conferences.

The Congress of Local and Regional Authorities, as an advisory body to the Council of Europe, has the role of promoting local and regional democracy, improving local and regional governance, supporting the process of devolution and regionalization, and cross-border cooperation between cities and regions. To this end, it adopted a number of recommendations, resolutions, and opinions. Within the Congress, there is a Committee of Local Authorities whose work is mainly focused on monitoring local democracy in the Member States, observing local elections, and supporting initiatives promoting cohesion in European cities. However, it is also responsible for civic participation, intercultural dialogue, e-democracy, and respect for equality and diversity. The Committee discusses these issues and prepares draft recommendations and resolutions for submission to the Congress.

The Center of Expertise for Good Governance works closely with Congress. It is the Council of Europe's executive body in the field of multilevel governance, which supports central, regional, and local authorities in improving their regulations, institutional capacity and efficiency in providing services, and exercising public authority. Through its activities, the Center seeks to demonstrate to the Member States the importance of the decentralization process and the strengthening of the capacity and role of local authorities. To this end, it offers, in line with good practices in the European Union, a range of practical programs and instruments in different fields: performance management, citizen participation, education and training, and exchange of experience. Currently, 32 programs are implemented in twenty countries in Europe[68]. In addition to legal aid programs, an important initiative of the Center is the Strategy for Innovation and Good Governance at the local level, which was adopted by the Valencia Declaration of 2007.

The strategy is based on the lessons and experiences of the Member States and their cooperation within the Council of Europe and contains

[68] Centre of Expertise for Good Governance, https://www.coe.int/en/web/good-governance/centre-of-expertise, 25.09.2019.

twelve principles of good democratic governance that guide public bodies in improving the quality of local governance: (1) fair conduct of the electoral process, representative and participatory democracy, (2) responsiveness of local authorities, (3) efficiency and effectiveness of resource utilization, (4) openness and transparency of local government work, (5) rule of law, (6) ethical conduct, (7) competence and capacity, (8) innovation and openness to change, (9) sustainability and long-term orientation, (10) sound financial management, and (12) accountability. Considering the fact that the local level is closest to the citizens and provides them with essential public services, it is of utmost importance to adopt the principles of good local governance. Therefore, national and regional authorities and associations of local authorities are urged to commit themselves, in accordance with their respective competences and powers, to the pursuit of democratic governance. Developing an action program for this purpose is an expression of public commitment to improving the quality of management and operation of public services[69].

The Council of Europe also operates a European Committee on Democracy and Governance, which has four main areas of activity[70]. The first area concerns democratic participation and public ethics. Since the effectiveness of democracy depends on the possibility of citizen participation in governance, it seeks to facilitate the exercise of that right and increase its role in political decision making and resolution of local issues. To achieve this, measures such as increasing transparency, e-governance, good communication, promoting youth participation, increasing the availability of local political information, etc. are used. The second area covers the institutional structure and legal framework. Local authorities are a key element of the European political system as they provide numerous services and are major players in developing the social and economic well-being of citizens. The Committee examines issues related to the legal and institutional framework of local governance, the structure of local authorities and action in different Member States, and finds ways to strengthen, harmo-

[69] European Committee on Local and Regional Democracy, 2007. The Valencia Declaration. MCL-15 (2007) 5 final, 16.10.2007.

[70] Depending on the area, tasks are performed by the subcommittees on finance and public services (LR-FS), good governance (LR-GG), and institutions and cooperation (LR-IC).

nize, and improve the system of local self-government. For example, efforts are being made to address the difficulties that state authorities encounter when carrying out territorial reforms, or to engage in an institutional dialogue between different levels of governance on issues of common interest or competence. Within the third area, local finance and public services, the European Committee on Local and Regional Democracy seek to secure sufficient financial resources to carry out local affairs so that local and regional authorities can provide citizens with a better and more efficient service. This can be achieved if the authorities have a high degree of autonomy in managing their own finances, if they act transparently, and show a high degree of responsibility. Finally, the fourth area involves cross-border cooperation. In this respect, confidence-building measures are promoted to enhance good neighborly relations and tolerance; cross-border bodies are established to maintain and enhance cross-border relations and increase the efficiency and effectiveness of public services through shared facilities and services.

One of the Council of Europe's methods of work is the holding of specialized ministerial conferences, including those of ministers responsible for local and regional self-government, which is held every two years in order to discuss current local governance topics and define actions to be taken in the coming period. From 2005 to 2015, four conferences were held to adopt the Declaration on Delivering Good Local and Regional Governance (Budapest Declaration, 2005), the Declaration on the Strategy for Innovative and Good Governance at Local Level (Valencia Declaration, 2007), the Declaration on Good Local and Regional Governance in times of crisis (Utrecht Declaration, 2009), and the Declaration on Local Government in Critical Times: Policies for Crisis, Recovery and a Sustainable Future (Kyiv Declaration, 2015)[71].

Finally, the activities of transnational networks bringing together European local and regional units are also significant. The most active are the Network of Associations of Local Authorities of South-East Europe, the Council of European Municipalities and Regions, EUROCITIES, the Eu-

[71] Council of Europe, https://www.publicsearch.coe.int/#k=ministerial%20conference#f=%5B%5D, 26.09.2019. According to the current list of ministerial conferences, this is no longer foreseen.

ropean Federation Local Authority Chief Executive Officer, and the European Association for Local Democracy.

The Network of Associations of Local Authorities of South-East Europe (NALAS) was established in 2001 and today brings together 20 associations. In order to bring local governance closer to European standards in Southeast European countries, NALAS has the status of an observer in the European Committee of the Regions and the Council of Europe, and maintains business cooperation with the Forum for Economic and Sustainable Development of Europe (FEDRE), the Council of European Municipalities and Regions (CEMR), Austrian cities and regions, the Council of Europe, etc. The Network's activities are implemented through several working groups of experts responsible for association development, energy efficiency, fiscal decentralization, solid waste and water management, urban planning, and sustainable tourism. In addition, the Network provides several services to its members: (1) Quick Response service, specialized in regional *ad hoc* information collection and analysis, used by member Associations in dealing with important policy issues or otherwise negotiating with their respective central governments; (2) Shadowing Program, as a mechanism for permanent exchange and transfer of knowledge between members, through coaching, mentoring, and on-job learning using the expertise within the NALAS network; (3) Peer Review, as a service designed to promote the process of learning from the experience of other NALAS members on the topic of importance for the member that requests the service (Host Association); (4) E-academy, i.e., lectures on topics such as local finance management, disaster risk management, equality for local people, and others are offered; and (5) the tools that challenge some of the local management segments: cost and finance model for solid waste management, water asset management, and solid waste management information system.

The Council of European Municipalities and Regions (CEMR) was founded in 1951 and today counts 60 national associations of cities, municipalities, and regions with around 130,000 local and regional authorities represented. In order to foster an exchange of experiences and good practice, the Council organizes seminars, focus groups, and conferences on a broad range of topics (governance, environment, international engagement, local public services management, etc.). Particularly important

twinning projects are connecting cities from across Europe. In this regard, the Council closely cooperates with the Directorate-General of the European Commission responsible for education and culture.

EUROCITIES is a network of major European cities that brings together more than 140 major cities in over 39 countries. Within the Network, forums for culture, economy, environment, knowledge society, mobility, social issues, and cooperation have been established. The main priority is to support the inclusion of cities in the process of shaping and implementing public policies, which is hoped to be achieved by strengthening the position of the Network as a partner of EU institutions and national governments. To accomplish these goals, the Network performs several key activities: (1) projects in areas such as culture, the environment, knowledge society, mobility, etc., with the aim of creating public policies and exchanging experiences among its members; (2) organizing workshops, forums, and conferences, and (3) publishing publications on policy priorities and measures for their implementation at the local level as well as case studies on individual members.

The European Federation Local Authority Chief Executive Officer (UDiTE) is a professional association that brings together about 15,000 members of national associations of 14 local governments. Primarily, exchange and internship programs of local managers are being developed between local European units because such experience is invaluable for the professional development of the individual and is the most effective way of transferring knowledge and good practice as well as building strong links between European countries. In this project, the Federation works closely with the Committee of the Regions and the EU Commission.

The European Association for Local Democracy (ALDA) has more than 300 members from over 40 countries. It primarily promotes good governance and civic participation at the local level (facilitating co-operation between local authorities and civil society), but also in the creation of European policies. It has the status of an observer in the Regional Council and Congress of Local and Regional Authorities of the Council of Europe, and is linked to organizations such as the European Confederation of Non-Governmental Organizations for Reconstruction and Development, the World Alliance for Citizen Participation, the European Movement In-

ternational, the Conference of International Non-Governmental Organizations, the Central and Eastern Europe Citizens Network, and others. It conducts its activities through various forms of action: co-ordination of 14 local democracy agencies, conducting their own projects, and supporting various initiatives of local stakeholders by providing them with the necessary experts.

6. CONLUSION

Opportunities for local authorities to participate in governance processes at the European level are increasing in parallel with the strengthening of the European integration process, which results in the loosening of territorial political ties and the allocation of regulatory powers between different institutional levels. Thus, the Europeanization process increases the number of relevant international actors, strengthens international cooperation, and the cross-border learning process. The increasing intersection of national political systems and national and international policies has led to the emergence of multi-level governance in Europe, in which local authorities are seen as partners in policy processes. This means that, in addition to the implementation of European standards (downloading), they have the ability to upload their own preferences to the supranational level.

Although the central, primarily, the executive branch, it is still considered the "gatekeeper" of the European institutions, several factors contribute to strengthening the position of subnational levels of government in the European environment. These are various mechanisms of Europeanization of local self-government, such as EU regional policy, the opening of representative offices of local units in Brussels, the activities of the Committee of the Regions and the Congress of Local and Regional Authorities, the activities of European networks and associations of local authorities, etc. With the entry into force of the Lisbon Treaty 2009, the role of local self-government was further strengthened by explicitly prescribing the application of the principle of subsidiarity to the exercise of European Union competences (TEU, Art. 5 (1)). In addition, Protocol no. 2 on the application of the principle of subsidiarity and proportion-

ality at all stages of the legislative procedure forms an essential part of the Lisbon Treaty.

Europeanization processes have stimulated reorganization and changes in the structure of local units, as well as the implementation of a strategic and participatory approach to governance. Intra-organizational structural changes include the creation of a special organizational unit (department, office, service) or the creation of a new position of an advisor (associate) in charge of European integration affairs. Also, in order to better prepare local units for the use of European funds, they need to accept the challenge of strategic planning for development projects[72]. Such an approach to development requires an adaptation to the requirements imposed by the Europeanization (and globalization) processes. Specifically, in the context of local development planning, the European Union promotes the principle of partnership, i.e., the joint action of territorially and sectorally different actors. In this case, the principle of partnership also implies the participation of all who can find their interest in developing and implementing a development strategy[73].

It is possible to distinguish between horizontal and vertical participation. The first form assumes the participation of different sectors, social groups, manufacturers, companies, etc., while vertical participation refers to the hierarchy between national and local authorities in the decision-making process. Thus, the actors in the participatory process can be representatives of local and central government, local population, civil society organizations, the private sector, scientific institutions, sponsors, etc. Finally, local development agencies whose key activities are to achieve so-

[72] Development projects contain strategic goals and priorities for achieving them. The priorities are specified by strategic measures, which determine the institutions responsible for the implementation of the project, the estimated implementation period, the expected costs and sources of funding, the monitoring of implementation, the final beneficiaries, and the final benefits.

[73] In contrast to the participatory approach, whose main feature is citizen involvement in planning, the traditional approach consists of engaging external stakeholders (experts): international organizations, networks, individual entrepreneurs, governments of other countries, etc. (Paul Stubbs, "Participacija, partnerstvo i/ili pomoć: unutarnji i vanjski dionici u održivom razvoju", in *Participativno upravljanje za održivi razvoj*, ed. Željka Kordej-De Villa, Zagreb: Ekonomski institut Zagreb, 2009, 155–156.)

cial consensus on development strategy and its development, encouraging networking and cooperation of local units, local businesses, and citizens. The ultimate goal of their activities is to create an attractive environment for investors and trade.

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THE PERMISSIBILITY OF LIMITING RIGHTS AND FREEDOMS IN THE EUROPEAN AND NATIONAL LEGAL SYSTEM DUE TO HEALTH PROTECTION

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ABSTRACT

This article concerns the permissibility of limiting human rights and freedoms in European and national systems due to the protection of individual and public health. The author's goal was to analyse the current practice in the application of human rights limitation clauses in the European system of human rights protection. This is an important issue because the practice of limitation and margin of appreciation enjoyed by the member states of the Council of Europe is subject to scrutiny by means of complaints addressed to the European Court of Human Rights in Strasbourg, which examines the correct application of individual limitation clauses contained in the 1950 Convention. Human health is one of the main prerequisites for which it is possible to limit other human rights and freedoms. In the context of numerous epidemiological threats and natural disasters of a cross-border nature, assessing rights and freedoms becomes one of the most important issues in the field of public international law, constitutional law and public health law. Against the background of existing solutions in the universal system, the practice of the member states of the European Union and the Council of Europe was examined by comparing it with the views of the doctrine and the results of my research.

Keywords: legal limitations, public health, individual health, human rights and freedoms, international law, domestic law, environmental health law

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1. PRELIMINARY REMARKS

Health is one of the basic values in the European system of protecting rights and freedoms[1]. In dogmatic and legal terms, health is most often treated as a degree of physical fitness, determined by disabilities: diseases, injuries, accidents, changes related to ageing processes or insufficient functional development in the early stages of life. Health should be understood as a certain amount of strength, well-being and the degree of biological, mental and social preparation that is achievable for a given individual in the most favourable conditions[2]. According to Preamble to the WHO Constitution of 1948, *health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*[3]. Very convergent definitions of health could be found in EU documents. Full health gives people the opportunity to fully develop social activity on various planes of life, including allowing them to perform ordinary, everyday social roles and exercise other human rights[4].

Although a separate human right to health is not formally included in the catalogue of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[5] of 1950, health is subject to spe-

[1] Henriette Roscam Abbing, "Health Law & the European Union," *European Journal of Health Law* 1994, No. 1: 123–126; Michael Krennerich, "The Human Right to Health Fundamentals of a Complex Right," in *Healthcare as a Human Rights Issue. Normative Profile, Conflicts and Implementation*, eds. Sabine Klotz, Heiner Bifeldt, Martina Schmidhuber, Andreas Frewer (Bielefeld: Verlag, 2017), 29–47.

[2] Janusz Opolski, Maria Miller, "Marcin Kasprzak. Komentarz do prac," *Postępy Nauk Medycznych* 2009, No. 4: 317–318.

[3] Robert Tabaszewski, "Rola ius cogens i soft law Światowej Organizacji Zdrowia w kształtowaniu praw i wolności człowieka," in *Ius cogens – soft law, dwa bieguny Prawa Międzynarodowego Publicznego. Księga dedykowana profesorowi Uniwersytetu Jagiellońskiego Kazimierzowi Lankoszowi*, ed. Milena Ingelevič-Citak, Brygida Kuźniak (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków, 2017), 390–401.

[4] Dorota Kiedik, Andrzej Fal, "Zdrowie jednostki," in *Zdrowie publiczne. Podręcznik akademicki*, eds. Anna Felińczak, Adam Fal (Wrocław: Akademia Medyczna im. Piastów Śląskich, 2010), 9; Talcott Parsons, *Struktura społeczna a osobowość* (Państwowe Wydawnictwo Ekonomiczne: Warszawa, 1969), 150.

[5] Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950 as amended by Protocols Nos. 11 and 14 supplement-

cial protection under a number of other provisions issued by the Council of Europe (CoE) and the European Union (EU)[6]. The member states of these international organisations have given health features of particular value. Without good health, a person cannot use goods and pursue other values[7]. In the light of international law, recognition of health as a superior value over other human rights is enabled by two concepts of limiting rights and freedoms: limitation and the margin of appreciation. The purpose of this article is to examine the functionality of these concepts by analysing the provisions of the Convention and case law. This makes it possible to check whether and to what extent public health, and health as a value of an individual, can be the basis for limiting other rights and freedoms. This is particularly important due to the growing amount of international and national case law supplementing heterogeneous provisions as well as the new endemic and pandemic threats facing European societies[8]. The subject of permissibility of limitations, absent in Polish literature, also appears when analysing various obligations imposed by states on their citizens, including those related to compulsory vaccinations, creating sanitary zones free of specific substances, quarantining, ordering disclosure of specific test results, or limitations of freedom of movement and communication.

ed by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, ETS No. 5: ETS No. 009, 4: ETS No. 046, 6: ETS No. 114, 7: ETS No. 117, 12: ETS No. 177.

[6] Robert Tabaszewski, "Health as a Legal Term and its Evolution in the Council of Europe's Human Rights Protection System", *Studia Ełckie* No. 4(2019): 583–594.

[7] John Tobin, *The Right to Health in International Law* (Oxford: Oxford University Press, 2012), 47–48, 125–126; Eibe Riedel, "The Human Right to Health: Conceptual Foundations," in *Realizing the Right to Health*, ed. Andrew Clapham, Mary Robinson (Zurich: Rüfe&Rub, 2009), 28; Theresa Murphy, *Health and Human Rights* (Oxford-Portland-Oregon: Hart Publishing, 2013), 23–27.

[8] Roojin Habibi, Stephanie Dagron, Lawrence O. Gostin, Stefania Negri *et al.*, "Do not violate the International Health Regulations during the COVID-19 outbreak," *Lancet* 29;395(2020): 664–666.

2. THE CONCEPT OF HUMAN RIGHTS LIMITATION IN INTERNATIONAL HUMAN RIGHTS LAW

Limiting human rights is an important legal issue. This concept is based on the recognition that not all human rights are absolute[9]. In situations of conflict between the interests of an individual and those of an entire community, priority must be given to the rights of the entire community[10]. The concept of limitation was supported by the creators of the Universal Declaration of Human Rights (UDHR), who recognised that, in addition to the rights of a human being, every individual also has obligations to society, without which the free and full development of their personality is impossible[11]. In exercising their rights and freedoms, a human being is subject to restrictions set by law solely to ensure proper recognition and respect for the rights and freedoms of other individuals and solely to satisfy the legitimate requirements of morality, public order and the universal well-being of a democratic society[12].

The exercising of human rights contrary to these universal values does not deserve the protection granted by United Nations (UN) and implemented by the authorities of a given country. *Mutatis mutandis*, human rights are not absolute in every case and do not always apply as *ius infinitum*[13]. The provision of Article 29 of the UDHR is therefore a guarantee and aims to prevent the arbitrariness and abuse of human rights by

[9] Robert Tabaszewski, *Prawo do zdrowia w systemach ochrony praw człowieka* (Lublin: KUL, 2020), 83–84.

[10] Luka Anđelković, "The elements of proportionality as a principle of human rights limitations," *Facta Universitatis Series: Law and Politics* 15, No. 3(2017): 235–244.

[11] See: art. 29(3) Universal Declaration of Human Rights adopted 10 December 1948), G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); UN Charter and Statute of the International Court of Justice, signed on 26 June 1945 at the San Francisco Conference.

[12] The person who applies for such protection will therefore not obtain it from the Human Rights Committee and other UN committees. See: art. 29(1) UDHR; Hurst Hannum, "The UDHR in National and International Law," *Health and Human Rights* 3, No. 2(1998): 147; Brigit Toebes, *The Right to Health as a Human Right in International Law* (Antwerpen: Intersentia/Hart, 1999), 36–40.

[13] United Nations Human Rights Committee, Case André Brun v. France. Communication No. 1453/2006, U.N. Doc. CCPR/C/88/D/1453/2006, Geneve 2006.

an individual[14]. However, it is difficult to require every individual to decide when their right has primacy over the right of another human being. Therefore, the authorities of a given state must ensure that priority is given to the applicable law or freedoms in the event of a conflict between several human rights and freedoms. In this way, through a specific process of assessing rights and freedoms, national authorities should ensure the proper functioning of the entire human rights protection system. This process is called the interpretation of the so-called limitation clauses[15].

The possibility of limiting rights and freedoms is currently a normative concept recognised by international law. Most often, there are limitation clauses regarding the entire document, such as Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[16]. Limitation clauses prevent the collision of interests of individual values with the rights of society, in terms of both their substantive content and the permissibility of their derogations[17].The use of limitation clauses knows no restrictions, neither temporal nor subjective. This means that limitations

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[14] Bogusław Banaszak, *System ochrony praw człowieka* (Kraków: Wolters Kluwer, 2003), 42–43; Łukasz Górski, "Prawa jednostki wobec praw grupy. Konflikt czy współistnienie?," in *Człowiek – jego prawa i odpowiedzialność*, ed. Robert Tabaszewski (Lublin: KUL, 2013), 27–29.

[15] Nicolas Croquet, *The Role and Extent of a Proportionality Analysis in the Judicial Assessment of Human Rights Limitations within International Criminal Proceedings* (Leiden: Brill-Nijhoff, 2015), 286.

[16] International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966; entered into force 3 January 1976), UNTS 993: 3; Robert Tabaszewski, "Achieving the Sustainable Development Goals in Europe and Asia: role of regional organizations in monitoring human right to health and well-being," *Ius Novum* Vol. 13, No. 2(2019): 250–269.

[17] In accordance with Article 19 of the Vienna Convention on the Law of Treaties, states can lodge reservations when signing, ratifying, accepting or approving a treaty, and when acceding to a treaty See: art. 2(d) of Vienna Convention on the Law of Treaties, May 23, 1969, Vienna, 1155 U.N.T.S. 331, 8 I.L.M. 679. By lodging reservations, states can completely exclude or modify the legal effects of certain provisions of a treaty that may apply to that state. These objections are referred to by international human rights law as limitation clauses and may take the form of individual clauses expressed in particular provisions. See: Tadeusz Jasudowicz, *Administracja wobec praw człowieka* (Toruń: TNOiK 1996), 31–32; Idem, "Granice wymagalności międzynarodowo chronionych praw człowieka," in *Prawa człowieka i ich ochrona*, eds. Bożena Gronowska (Toruń: TNOiK, 2010), 227–235.

on the use of particular rights can be imposed due to the interests of individuals, entire communities and a state, regardless of the situation of the state and its apparatus but the ratio of the limitations imposed cannot violate the essence of the rights[18]. The Vienna Declaration and Programme of Action[19] encourages states to consider limiting the extent of any reservations they lodge to international human rights instruments, formulating any reservations as precisely and narrowly as possible, ensuring that none is incompatible with the object and purpose of the relevant treaty and regularly reviewing any reservations with a view to withdrawing them[20].

In the universal system of human rights protection, the possibility of limiting human rights is provided not only by the UDHR, but also by the International Covenant on Civil and Political Rights (ICCPR)[21] and the ICESCR. Limitation of rights and freedoms is also possible in the European system, both in the CoE and EU documents. Limitation clauses have been included in the two most important CoE conventions, namely the basic version of the European Convention on Human Rights (ECHR)[22], and the European Social Charter (ESC) from 1961 and the European Social Charter (Revised) from 1996[23]. The limitation clauses contained therein constitute a model for other normative acts of a regional nature. Also, all rights contained in the Charter of Fundamental Rights of the European Union (ChoFR) '*are subject to a general limiting clause*'[24]. This determines the relative nature of the EU's fundamental rights.

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[18] United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1984 Siracusa, Italy, U.N. Doc. E/CN.4/1985/4, Annex (Siracusa Principles).

[19] Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993.

[20] See: Diego Silva, Maxwell Smith, "Limiting rights and freedoms in the context of Ebola and other public health emergencies: how the principle of reciprocity can enrich the application of the Siracusa Principles," *Health and Human Rights Journal* vol. 17, No. 1(2015): 52–57.

[21] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966; entered into force 23 March 1976), UNTS 999: 171.

[22] Council of Europe, European Social Charter, ETS No. 035, Turin, 10 October 1961.

[23] Council of Europe, Revised European Social Charter, as amended (ESC), ETS No. 163, Strasbourg, 3 May 1996.

[24] See: Article 52(1) of the ESC.

Detailed rules for the possibility of applying limitation by national authorities are set out in the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights of 1984, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights from 1987[25] and The Maastricht Guidelines on Violations of Economic, Social and Cultural Right from 1997[26]. These documents set out the characteristics of limitation clauses. The clauses are characterised by a specific construction, including the use of open and vague terms, such as: '*prescribed by law*', '*in a democratic society*' and '*public order*'. A limitation clause '*includes all norms constituting the basis for limiting human rights if they condition the permissibility of interference with its legality, purposefulness or necessity of application*'[27]. Limitation clauses should be interpreted strictly, taking account of the nature and context of a given law, as well as observing the rules of friendly interpretation. None of the above limitations can be applied arbitrarily by a state[28].

3. PERMISSIBILITY OF LIMITING HUMAN RIGHTS IN THE NATIONAL SYSTEM

National human rights protection systems also provide that rights and freedoms are not absolute[29]. European constitutions specify formal and material guarantees and limits as well as conditions for applying necessary

[25] The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights, UN ESCOR, Commission on Human Rights, Forty-third Sess., Agenda Item 8, UN Doc. E/CN.4/1987/17, Annex (1987).

[26] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/13(2000).

[27] They have the mentioned characteristics that distinguish them from *ex definitione* limitations, derogation clauses and other methods of limiting human rights, see: Rafał Mizerski, "Granice wymagalności międzynarodowo chronionych praw człowieka," in *Prawa człowieka i ich ochrona*, eds. Bożena Gronowska (Toruń: TNOiK, 2010), 234–235.

[28] See: Siracusa Principles, pt. 3–8.

[29] Joanna Zakolska, "Problem klauzuli ograniczającej korzystanie z praw i wolności człowieka w pracach konstytucyjnych, w poglądach doktryny i orzecznictwa Trybunału Konstytucyjnego," *Przegląd Sejmowy* No. 5 (2005):11–29.

limitations on rights and freedoms. The conditions for limiting human and citizen rights are set out in the general limitation clause contained in Article 31(3) of the Constitution of the Republic of Poland[30]. It largely corresponds to the clauses contained in the conventions that Poland has ratified[31]. In particular, the solution regarding limitation of rights and freedoms is modelled on the ECHR. This means that any limitations can be made by statute when they are necessary in a democratic state in order to: ensure its security or public order; protect the environment, public health and morals; and protect the rights and freedoms of others[32]. At the same time, all limits must not violate the essence of rights and freedoms underlying the entire national human rights protection system[33].

National authorities can also limit rights and freedoms in the Polish system of human rights protection due to the need for human health protection, among others, thanks to the so-called judicial margin of appreciation doctrine[34]. The margin of appreciation, which is referred to as a margin of discretion in European doctrine, is a relatively recent concept of interpretation of treaties in international law that has sprouted from national case law. While the scope of the meaning of each concept is slightly different, both terms are usually treated interchangeably in the Polish system of human rights protection. This doctrine is related to the activities of courts in individual human rights protection systems[35]. It grants freedom to nation-

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[30] The Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended.

[31] Krzysztof Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP* (Kraków: Zakamycze, 1999), 192; Marek Piechowiak, "Klauzula limitacyjna a nienaruszalność praw i godności," *Przegląd Sejmowy* No. 2 (2009): 55–77.

[32] Paweł Kuczma, *Prawa człowieka w zarysie* (Polkowice: Dolnośląska Wyższa Szkoła Przedsiębiorczości i Techniki, 2011), 33–34; Anna Łabno, "*O ograniczenie wolności i praw człowieka na podstawie art. 31 Konstytucji III RP*," in *Prawa i wolności obywatelskie w Konstytucji RP*, eds. Bogusław Banaszak, Artur Preisner (Warszawa: C.H. Beck, 2002), 693–694.

[33] See: Polish Constitutional Tribunal, Judgment of 12th January 2000, sign. P 11/98, Journal of Laws 2000, No. 3, item 46, as amended.

[34] Adam Wiśniewski, "W sprawie koncepcji marginesu oceny w orzecznictwie strasburskim," *Państwo i Prawo* No. 2(2008): 97–104.

[35] "Margin of discretion," in *Encyclopedic Dictionary of International Law*, eds. John Grant, Craig Barker (Oxford: OUP, 2009); Eyal Benvenisti, "Margin of appreciation, con-

al public authorities and its representatives in applying certain norms of international law. The prevailing view in the literature is that the concept of the margin of appreciation is '*a doctrine that gives national authorities a certain degree of freedom in applying the requirements of the Convention depending on specific conditions*'[36].

The margin of appreciation doctrine recognises that a state and its officials are entitled to a degree of discretionary power, that is, free discretion in the process of interpretation and application of treaty provisions, and administrative recognition is at its source[37]. It is worth noting that in the universal system, the margin of appreciation doctrine is only being created. It is used by the International Court of Justice as a method of interpreting treaties, particularly in relation to human rights limitation clauses[38]. Appeals to the margin of appreciation are made by Human Rights Committee experts, among others, who have repeatedly examined complaints about violations of human rights to life and health. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights specify that '*states enjoy a margin of discretion in selecting the means for implementing their respective obligations*' for a more complete implementation of these rights[39]. The concept of the margin of appreciation in the UN system can also be useful in interpreting special conventions such as the Convention on the Rights of the Child[40]. The convention grants every child the right to enjoy and preserve their health[41]. It is increasingly accepted that this

sensus, and universal standards," *The New York University Journal of International Law and Politics* No. 31(1999): 843–854; Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR*, (Antwerpen-Oxford-New York: Intersentia, 2001), 199.

[36] See: Marek Antoni Nowicki, *Słownik Europejskiej Konwencji Praw Człowieka* (Warszawa: Wolters Kluwer Polska, 2009), 315–16.

[37] Jan Zimmermann, *Prawo administracyjne* (Kraków: Zakamycze, 2006), 309–313.

[38] Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?," *European Journal of International Law* No. 16(2005): 907–940.

[39] See: Maastricht Guidelines, pt 8.

[40] Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20, UN Doc. No. 27531 November 1989.

[41] See: John Tobin, *The Right to Health in International Law,* 178–179.

doctrine can also be applied to conciliation and arbitration courts, whose subject of activity may relate to public health[42].

In regional systems, the concept of the margin of appreciation first appeared in the jurisprudence of the European Court of Human Rights in Strasbourg (ECtHR) in the first decade of its operation. The margin of appreciation doctrine was recognised and reinforced only in 1979. The culmination of this process were changes, which were proposed in Protocol 15, supplementing the ECHR Preamble with the margin of appreciation doctrine[43]. It is a specific structure created for the purposes of dialogue with national authorities. It allows the Strasbourg Court '*to take account of the discretion of national authorities in the process of monitoring the application of the Convention and its protocols by States Parties*'[44]. The material scope of the margin of appreciation is essentially left to the discretion of national public authorities, although the degree of this '*discretion*' varies depending on the right to be protected. In the case of health, we deal with an exceptionally strong law, subject to many protection mechanisms[45].

The significance of this institution is also expressed in the fact that the principle of the margin of appreciation, in the context of health protection by national authorities, allows certain values to be prioritised. It modifies the process of interpretation and application of the ECHR, and also performs the role of modifying the manner in which the court supervises the scope of compliance with binding legal norms by states[46]. In general, the margin is only applicable to a part of a given norm, while the entire discre-

[42] See: Judgment of 12 December 1996, Oil Platforms (Islamic Republic of Iran v. United States of America); Judgment of 31 March 2004, Avena and Other Mexican Nationals.

[43] See: Adam Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka* (Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego, 2008), 25.

[44] Idem, "Uwagi o zastosowaniu koncepcji marginesu oceny w prawie międzynarodowym," in *Prawo międzynarodowe i wspólnotowe wobec wyzwań współczesnego świata*, ed. Elżbieta Dynia (Rzeszów: Wydawnictwo Uniwersytetu Rzeszowskiego, 2009), 330.

[45] See: Julia Kapelańska-Pręgowska, "Koncepcja tzw. marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Czowiek*a*," in *Państwo i Prawo* No. 12, 2007: 88; Jan Kratochvíl, "The inflation of the margin of appreciation by the European Court of Human Rights," *Netherlands Quarterly of Human Rights* No. 3(2011): 326–328.

[46] Adam Wiśniewski, "Uwagi", 335–336.

tionary process is judicially conditioned and supervised by the ECtHR[47]. National authorities are also obliged to prove (*onus probandi*) and clarify all circumstances of facts and provide reasons justifying the use of the level of discretion in the case of preference for standards regarding, for example, health protection[48].

4. HEALTH AS A PREREQUISITE FOR LIMITING RIGHTS AND FREEDOMS IN THE EUROPEAN SYSTEM

In the European system for the protection of human rights, individual limitation clauses contain direct references to health as a condition limiting the possibility of applying other rights and freedoms. They are contained in EU documents and the CoE conventions[49]. This is very important for member states, such as Poland, because state authorities do not have complete freedom in modifying the content of the rights and freedoms of their citizens under the guise of the need to protect human health, and can only do so under the conditions specified in the documents of both international organisations. This is important in the event of a collision between at least two legally protected goods; some goods, such as health, are given special significance. As national authorities apply individual limitations, caused in particular by the need to protect human health in the universal dimension, other rights or freedoms (or several rights and freedoms) are restricted. The basis for such restrictions may be the obligation to protect health or morals, which was imposed on national authorities by the provisions of the original version of the ECHR expressed in Article 8(9),

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[47] Oren Gross, Fionnuala Ní Aoláin, "From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights," in *Human Rights Quarterly* No. 3(2001):625–649.

[48] ECtHR, *Case Handyside v. The United Kingdom*, application no. 5493/72; ECtHR, *Case Haase v. Germany*, application no. 11057/02.

[49] See: Steve Peers, "Taking Rights Away? Limitations and Derogations," in *The European Union Charter of Fundamental Rights*, ed. Steve Peers, Angela Ward (Oxford-Portland-Oregon: Hart Publishing, 2004), 143–148.

Article 10 and Article 11 of the Convention and Article 2 of Additional Protocol No. 4 to the 1963 Convention[50].

The European Social Charter (ESC) also provides for the possibility of limiting rights and freedoms for the protection of public interest, national security, public health, or morals[51]. The permissibility of limiting the rights specified in the ESC has been expressed in Article 31 of the ESC. Due to the need for health protection, it is possible to limit certain categories of rights and the limitations allowed in accordance with the provisions of the ESC in relation to the rights and obligations established in it may not be used for any purpose other than the one for which they were envisaged[52]. In accordance with the principle of equality adopted in the ESC (Revised), which consequently introduces a prohibition of discrimination and the obligation of equal treatment, the guarantee rule ensures the exercise of the right laid down in the ESC, which must be ensured without any discrimination arising from the enumerated reasons listed, including the state of health[53]. As can be seen, unlike the provisions of the 1950 Convention, which uses the concept of health, the ESC (Revised) allows national authorities to limit rights and freedoms not due to health, but due to public health, which concerns entire communities, not individuals. In practice, both concepts, health and public health, are blurred because the ECtHR narrows the concept of health to public health. Individual health does not appear in the text of the Convention and must be combined with the

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[50] See: ECtHR, *Case Olsson v. Sweden*, application no. 10465/83.

[51] See: Article 31 ESC(Revised).

[52] See: art. 31(1) ESC „The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals The Commitee of Independent Experts, restrictions on the application of ESC regulations can be justified only if the following requirements are met: necessary protection of rights and freedoms or protection of public security, national security, public health. See: European Social Charter: *Conclusions XIV-2 – Articles 1, 2, 3, 4, 9, 10, 15 and Articles 1 to 4 of the 1988: Norway*, 220–222.

[53] See: Tadeusz Jasudowicz, "Limits of Enjoyment of Human Rights in the System of the European Social Charter," *Polish Review of International and European Law*" vol. 6, No. 1(2017): 49–70.

right to life[54]. It also means that in certain situations, CoE member states are required to suspend other human rights when public health is at risk. *Mutatis mutandis*, the lack of a proper response by state authorities may be considered a violation of Article 2 in the general dimension and result in liability for violation of the Convention.

Imposing limitations by national authorities due to the need '*for the protection of health or morals*' is difficult because, as already noted, a legally binding definition of health is not included in the ECHR or in any CoE Convention[55]. Therefore, my analysis of the court's case law has shown that the ECtHR is based on functional theories regarding health protection. In light of this, being healthy is being able to perform everyday activities[56]. This opinion therefore stands in partial opposition to the holistic concept of health provided by the World Health Organization (WHO)[57]. According to ECtHR judges, health is an attribute of every human being, but the court recognised health as a component of public health of special importance only in individual rulings[58].

It is worth noting that health is only one of several purposes for which the ECHR allows a state to limit certain human rights and freedoms. In Articles 8–11 of the ECHR and Article 2 of Additional Protocol No. 4, although health occurs together with the prerequisite for the protection of morals, it functions as an independent and sufficient premise for limiting five convention rights and freedoms: the right to respect for private and family life[59]; freedom of thought, conscience and religion[60]; freedom of expression[61]; freedom of assembly and association[62]; and freedom of movement[63]. Although the right to health, in both public and individual

[54] Art. 2 ECHR.

[55] Robert Tabaszewski, *Prawo do zdrowia*, 106–107.

[56] Mildred Blaxter, *Zdrowie* (Warszawa: Wydawnictwo Sic!, 2009), 15.

[57] John Charles, "Origins, history, and achievements of the World Health Organization," *The British Medical Journal* vol. 4, No. 2(1968), 293–296.

[58] Robert Tabaszewski, *Prawo do zdrowia*, 83–84.

[59] See: art. 8(2) ECoHR.

[60] See: art. 9(2) ECoHR.

[61] See: art. 10(2) ECoHR.

[62] See: art. 11(2) ECoHR.

[63] See: art. 2(3) of the Protocol No. 4 ECoHR.

dimensions, is in close interaction with all these human rights, the ECHR regulations provide for the primacy of health over other goods[64].

The human right to privacy is the first of the rights subject to individual limitation contained in the ECHR's catalogue. Undoubtedly, the state of human health, as a rule, should be an individual's personal and private information, which should be kept confidential at all levels of prevention, treatment, care and support[65]. Therefore, the content of the Convention relating to the possibility of limiting the right to privacy is categorical. It acknowledges that '*there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*'[66]. Using the concept of '*health protection*' in Article 8(2), the Convention, therefore, allows limiting privacy only where medical or preventive care necessary for maintaining health in the general dimension is provided.

The other two rights that may be limited *on the grounds of human health protection* are freedom of thought, conscience and religion (Article 9) and freedom of expression (Article 10). The freedom to manifest religion or beliefs may collide with the right to health, for example, in the event of a religious group preventing sanitary or epidemiological control ordered by the authorities, or a breach of its information obligations regarding compulsory vaccinations or check-ups by a community. In the light of the ECHR, this freedom '*shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety for the protection of public order, health or morals, or for the protection of the rights and freedoms of others*'[67].

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[64] Bartłomiej Latos, *Klauzula derogacyjna i limitacyjna w Europejskiej Konwencji o ochronie praw człowieka i podstawowych wolności* (Warszawa: Wydawnictwo Sejmowe, 2008), 8, 194–199.

[65] Adeline M. Connelly, "Problems of Interpretation of Article 8 of the European Convention on Human Rights," *International & Comparative Law Quarterly* vol. 35, No. 3(1986): 567–593.

[66] Art. 8(2) ECoHR.

[67] Art. 9(2) ECoHR.

Also, exercising freedom of expression '*may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*'[68]. As can be seen, health is only one of many grounds for limiting freedom of expression by a state. The potential limitation of freedom of expression due to health protection is, however, considered controversial in the literature, as it potentially limits scientific debate[69]. Therefore, any limitation should only be made exceptionally, for example, to prevent the spread of false content in order to protect the population at risk of a global pandemic or ecological disaster[70].

Another individual clause allowing limitation due to health protection concerns freedom of assembly and association. Article 11 of the Convention obliges the authorities of a given state that '*no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State*'[71]. It is recognised in the literature that restricting freedom of assembly is possible if there is a justified risk to the health of even one person, and the state of danger cannot be avoided in any other way.

The last of the rights subject to individual limitation, which, however, has not been included in the original text of the ECHR, is human freedom of movement. The permissibility of limiting freedom of movement, due to a prerequisite for health protection, among others, is possible thanks to

[68] Art. 10(2) ECoHR.

[69] Varun M. Malhotra, "Freedom of expression and health: is the association causal?," *Lancet* vol. 388, No. 10044(2016): 561.

[70] Victoria Sutton, "Emergencies, disasters, conflicts, and human rights," in *Advancing the human right to health*, eds. José M. Zuniga, Stephen P. Marks, Lawrence O. Gostin (Oxford: Oxford University Press, 2013), 379–388.

[71] Art. 11(2) ECoHR.

the inclusion of Additional Protocol No. 4 to the ECHR by CoE member states in 1963. Article 2(3) of this protocol provides that '*no restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*'[72]. This provision is very important because it allows a state to restrict freedom of movement or impose isolation due to a risk of infectious diseases. In such a situation, state authorities are required to justify the reasons for applying restrictions on the free movement of patients and medical staff.

The possibility of limiting fundamental rights on the grounds of health protection is provided for in the Charter of Fundamental Rights[73], which also recognises a separate right to health care and treatment under the conditions laid down by national provisions[74]. In the EU system, all restrictions on exercising fundamental rights must be provided for by law and respect the essence of these rights and freedoms[75]. Any limitation may be introduced subject to the principle of proportionality and only when it is necessary and genuinely meets the objectives of the general EU interest or the need to protect the rights and freedoms of others. This is because the ChoFR does not recognise any rights and freedoms as absolute[76]. As a rule, all rights contained in the ChoFR are, therefore, subject to mechanisms of their limitation and even derogation in situations of particular threat to the existence of a nation or state[77]. The possibility of limiting fundamental rights due to the need for human health protection is also provided for by

[72] Art. 2(3) of the Protocol No. 4 ECoHR.

[73] European Union: Charter of Fundamental Rights of the European Union. Official Journal of the European Communities, C 364, 18 December 2000.

[74] See: art. 35 of ChoFR.

[75] See: Dimitris Triantafyllou, "The European Charter of Fundamental Rights and the "Rule of Law": Restricting Fundamental Rights by Reference," *Common Market Law Review* No. 1(2002): 53.

[76] Art. 52(1) ChoFR.

[77] Elżbieta Morawska, "Prawa konstytucyjne człowieka i obywatela w Rzeczypospolitej Polskiej a prawa podstawowe Unii Europejskiej. Analiza porównawcza," *Przegląd Sejmowy* No. 1(2009): 41.

the Court of Justice of the EU. However, it is the ECHR rulings that remain the most important for determining the scope and degree of possible limitations imposed by European countries[78].

5. THE PERMISSIBILITY OF LIMITING RIGHTS AND FREEDOMS DUE TO THE NEED TO PROTECT HEALTH IN THE ECTHR JURISPRUDENCE

As has been demonstrated so far, the content of the provisions of Articles 8–11 of the ECHR and Article 2 of the Additional Protocol No. 4 of the ECHR regarding the scope and degree of limitation is not uniform, as is also pointed out by the Strasbourg Court in its rulings[79]. As a result, in practice, states may interpret these provisions improperly and, consequently, violate human rights and freedoms owing to the need to protect human health and public morals. In practice, such cases are becoming more common. This obliges the ECtHR to adopt a more '*dynamic interpretation*' of the provisions of Articles 8–11 of the ECHR and Article 2 of the Additional Protocol No. 4 of the ECHR and take account of the margin of appreciation that the states complained against may apply[80]. However, the action of a state is not always deliberate and conscious, hence the ECtHR must interpret these matters *in concreto*. The analysis of the number of cases shows that the court most often formally analysed relationships between health and the right to privacy and family life.

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[78] See: Robert Tabaszewski, "Health as a Value in the Integration Policy of European and East Asian Countries. Historical and Legal Perspective," *Journal of European Integration History* vol. 25, No. 1(2019): 106. To the extent that the CFR contains rights that correspond to the rights guaranteed in the ECHR, the meaning and scope of these rights are the same as the meaning and scope of the rights conferred by the Convention, which means that the powers of both courts overlap.

[79] Berend Hovius, "The Limitation Clauses of The European Convention on Human Rights: A Guide for the Application of Section 1 of The Charter?," *Yearbook of European Law* vol. 6, No. 1(1986): 1–54.

[80] Tadeusz Jasudowicz, *Administracja wobec praw człowieka*, 31–32; See: Susan Marks, "The European Convention on Human Rights and its „democratic society," *The British Yearbook of International Law* No. 16(1995): 209–238.

Complaints lodged by complainants against the national authorities that broke the limitation procedure have appeared since the beginning of the ECtHR and the no longer functioning European Commission of Human Rights. When examining cases concerning the abuse of the possibility of using the limitation instrument by national authorities, the ECtHR begins by analysing whether there has been a violation of national law and the ECHR provisions and determining whether state interference in rights and freedoms was justified due to the need to protect public health[81]. The ECtHR then examines whether there was a legal basis for the state's interference or the purpose of protection (in this case the protection of public health) for which the interference was made, and whether the limitation was necessary from a democratic society's point of view[82].

When analysing the court's case law, the following trends should be pointed out. As an object of the ECtHR jurisprudence, health is not only a personal attribute, but also a good of special importance to society[83]. However, the court makes no distinction between an individual's health and public health. At present, it is sufficient to state a premise for health protection, conditioning the protection of an individual's personal rights *per se*. This most often concerns the right referred to in Article 8 of the ECHR, and to a lesser extent also in Article 9, Article 10 and Article 11 of the ECHR, as well as the freedom mentioned in Article 2 of the Additional Protocol No. 4. The court now gives national authorities a very wide margin of appreciation as to whether it is possible to limit other rights due to the need to protect human health. In practice, the margin of appreciation regarding the limitation of rights and freedoms is wide as it is not contrary to the general provisions of the Convention[84].

As regards the right to respect for private and family life, contained in Article 8(2) of the ECHR, the court recognised that a certain margin

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[81] Elizabeth Palmer, "Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights," *Erasmus Law Review* No. 4(2009):398.

[82] B. Latos, *Klauzula derogacyjna i limitacyjna w Europejskiej Konwencji o ochronie praw człowieka i podstawowych wolności*, 150–151.

[83] Ibidem, 198; Steven Greer, "The exceptions to Articles 8 to 11 of the European Convention on Human Rights," *Human Rights Files* No. 15(1997): 24–29.

[84] ECtHR, *Case Jalloh v. Germany*, application no. 54810/00.

was left to national authorities regarding discretion as to whether a given human behaviour regarding their private and family life is compatible with the prerequisite for health protection. Therefore, health remains one of the main prerequisites allowing a state to interfere in the sphere of parental rights. An analysis of the Strasbourg Court's rulings shows that national authorities have extremely high powers regarding the possibility of restricting and depriving parental rights. This applies particularly to situations where a child's health and development are at risk. Limiting the right to privacy is therefore necessary because all parental negligence has implications for a child's physical and mental health as well as for their '*satisfactory care and education*'[85]. With a view to a child's health, when deciding on the permissibility of a parent's contact with their child, it becomes possible to determine such permissibility on the basis of precisely defined statutory pre-conditions. Based on this, '*its scope and manner of implementation must be clearly defined to grant such protection against arbitrary interference*' and the primacy of children's rights over the rights contained in the ECHR[86].

In certain situations, the court has recognised that national authorities may abuse their right to limit private life as some provisions of family law may constitute an interference with the sphere of respect for the right of parents to raise children in accordance with their beliefs. The application of limitations allows a state to protect the rights and freedoms of others, in this case children, who should be protected in a special way so that state authorities can ensure their universal security[87]. It is different, however, when human behaviour is reduced only to interfering in one's own health, and the intensity of these actions can threaten the life of that person, even if their action or omission is consistent with the maxim *volenti non fit*

[85] The permissibility of interference with parental powers on the grounds of health protection is justified by Polish legislation, which '*clearly aims to protect children and there is No. indication that this right was used in the present case for any other purpose*'. ECtHR, *Case Olsson v. Sweden*, application no. 10465/83; ECtHR, *Case Nielsen v. Denmark,* application no. 10929/84.

[86] Donna Gomien, David John Harris, Leo Zwaak, *Law and practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg: Council of Europe, 1996), 252. ECtHR, *Case Eriksson v. Sweden*, application no. 11373/85.

[87] See: *Handbook on European law relating to the rights of the child* (Luxembourg: Council of Europe 2015).

iniuria. This applies in particular to cases in which the complainant was unable to make deliberate decisions threatening their health.

In the light of the theory of limitations, although national authorities have a certain margin of discretion in this respect, they are obliged to counteract masochistic behaviour which has a negative impact on the undisturbed exercise of the rights and freedoms of other people. In the case of *Laskey, Jaggard and Brown v. The United Kingdom*[88], the court recognised that the state was required to respond properly and adequately by protecting public health and morals even if that protection concerned such an intimate and personal sphere of life as the sphere of sexual health[89]. Undoubtedly, authorities also have an absolute obligation to respond to the existence of torture, regardless of whether it was carried out by mutual consent of all participants. This poses a threat not only to an individual, but to the health of the entire population[90].

When examining the cases referred by complainants alleging violation of Article 9, Article 10 and Article 11 of the ECHR, as it did in the case of the right to respect for private and family life, the court recognised that these rights are not absolute and may be subject to limitation in the event of a threat to the protected good which is health[91]. State interference, within the margin of discretion, which is based on the prerequisite for the protection of health and morals, must be purposeful, justified, and '*necessary in a democratic society*', that is, meet the requirements of sub-

[88] ECtHR, *Case Laskey, Jaggard i Brown v. The United Kingdom*, application no. 21627/93.

[89] ECtHR, *Case Dudgeon v. The United Kingdom*, application no. 7525/76; ECtHR, *Case Norris v. Irland,* application no. No. 10581/83; ECtHR, *Case Modinos v. Cyprus*, application no. No. 15070/89.

[90] The premise to protect health and morals was tacitly accepted by the ECtHR until the late 1980s in relation to the admissibility of criminalizing homosexual behavior. Masochistic behaviour should be qualified as justifying state interference, particularly when the behaviour performed by an individual goes beyond their sphere of privacy due to the level of suffering. In such a situation, it can be said that the prosecution and conviction of complainants were necessary in a democratic society for the protection of health within the meaning of Article 8(2) of the ECHR. Jarosław Krzysztof Warylewski, "*Karalność praktyk sadomasochistycznych a prawo do prywatności*," *Gdańskie Studia Prawnicze* No. 1(1999): 53–82.

[91] ECtHR, *Case Douglas-Williams v. The United Kingdom*, application no. No. 56413/00.

stantive legality. For the sake of protecting the health of an individual and society, interference with freedom of thought, conscience and religion is permitted. These interventions may be permissible when '*health protection considerations, including hygiene of food production, or other values deserving protection, are involved*'[92]. In the case of *Cisse v. France* regarding the permissibility of the dissolution of a legal assembly for health reasons, the court considered that it was possible to dissolve a hunger strike in which persons were grouped in a place whose basic hygiene conditions could endanger all participants in the assembly[93]. Therefore, the premises that limiting strike activity or participation in specific religious ceremonies are real factors that are negative for health and threaten the population, especially when the assembly takes place in public buildings[94].

The prerequisite for health protection, as the basis for limitation, also appeared in the context of a potential violation of Article 10 of the ECHR on freedom of expression, including about the functioning of the system of services operating in public health care[95]. In turn, the possibility of limiting the publication of opinions on a given product intended for marketing and its impact on human health became the subject of a ruling in the *case of Hertel v. Switzerland*. The applicant published his research in the local press. He reported that food prepared in microwave ovens is a danger to health and leads to changes in the blood of those who consume it. The article was illustrated with a photograph of a deadly reaper. He was convicted of this by local courts. According to the ECtHR, in this type of cases public health is at stake, so the margin of appreciation was limited to '*statements related to products on the market which were not purely "commercial" if these statements were expressed in a serious public debate,*

[92] ECtHR, *Case Cha're Shalom Ve Tsedek v. France*, application no. 27417/95; ECtHR, *Case Vergos v. Greece*, application no. 65501/01.

[93] ECtHR, *Case Cisse v. France*, application no. 51346/99.

[94] ECtHR, *Case Tymoshenko et al. v. Ukraine*, application no. 48408/12; ECtHR, *Case Magyar Keresztény Mennonita Egyház et al.*, applications no. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 i 56581/12; ECtHR, *Case Izci v. Turkey*, application no. 42606/05.

[95] See: ECtHR, *Case Bergens Tidende et at. v. Norway*, application no. 26132/95; ECtHR, *Case Juppala v. Finland*, application no. 18620/03; ECtHR, *Case Frankowicz v. Poland*, application no. 53025/99.

including on health care'[96]. Due to the prerequisite for health protection, it becomes possible to introduce actual limitations in advertising, including with respect to the promotion of certain types of pharmaceuticals and parapharmaceuticals, stimulants, psychotropic substances, drugs and other substances harmful to human health[97]. Most often, however, the prerequisite for protecting universal health in the limitation procedure is used by states in relation to so-called hard drugs, psychotropic substances and other types of stimulants.

The ECtHR made interesting considerations in the case of *Palusiński v. Poland*, dealing with the issue of the permissibility of restricting freedom of expression due to the obligation to protect life and health[98]. In 1996, the complainant was convicted for writing and publishing a book in which he examined marijuana, LSD and hallucinogenic mushrooms in detail, calling them '*soft drugs*. The ECtHR concluded that the state did not violate Article 10 of the ECHR and met the goals of limitation. The monograph written by the complainant posed a threat to public health and provided very little information on the negative effects of the use of these substances and possible addiction to them[99]. Moreover, it posed a very serious threat to the health of the entire population because it contained '*instructions for obtaining ingredients and preparation*' *of drugs and* '*doses to be taken*'. The limitation of freedom of expression was justified in order to protect life and health. Hence, the court found that the Polish domestic courts had correctly applied the standards contained in Article 10 of the Convention and the authorities had provided '*relevant and sufficient*' reasons for issuing their decisions in the field of protecting human health.

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[96] On the other hand, the ECtHR gives special protection to the possibility of referring to statements having a special, public character, including those related to public health. See: ECtHR, *Case Hertel v. Switzerland* application no. 25181/94.

[97] ECtHR, *Case Hachette Filipacchi Presse Automobile and Dupuy v. France,* application no. 13353/05.

[98] See: ECtHR, *Case Palusiński v. Poland*, application no. 62414/00, LEX No. 195832.

[99] See: Robert Palusinski, *Narkotyki-przewodnik. Soft-Drugs: Marijuana, LSD-25, grzyby: historia, produkcja, sposób użycia, efekty, niebezpieczeństwa* (Warszawa: Total Trade & Publishers, 1994).

6. HEALTH AS A PREREQUISITE FOR LIMITING HUMAN RIGHTS AND FREEDOMS IN THE NATIONAL SYSTEM

In the system of domestic law, just like in the European system, constitutional rights and freedoms related to the need to protect human life and health are not absolute. Restrictions applied due to the need to protect human health may result from norms of constitutional or conventional rank[100]. It should be noted that the current regulation of constitutional rank differs from the content of the European Convention on Human Right (ECHR), in which the possibility of restricting rights and freedoms other than the right to health due to the premise of 'health' is much broader. The Polish Constitution allows limiting certain rights and freedoms due to 'public health', that is the health of entire communities, not the health of an individual or the health of a group of people. Referring to the premise of 'public health protection' will justify interfering with other rights and freedoms if it is used to protect the existential interests of a very large number of members of society, and not individual people. It is worth noting here that the premise of 'public health protection' has nothing to do with the '*right to health protection*' contained in article 68 of the Polish Constitution[101]. The law formulated therein has the character of a norm guaranteeing all citizens access to health protection measures, particularly to health care services.

According to the Polish Constitutional Tribunal, '*the first reason for which all individual rights can be limited is the protection of the common good*', primarily regarding the need to ensure personal and individual se-

[100] Robert Tabaszewski, *Prawo do zdrowia*, 163–165.

[101] See: art. 68 of The Constitution of the Republic of Poland: "(1) *Everyone shall have the right to have his health protected. (2) Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute. (3) Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age. (4) Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment. (5) Public authorities shall support the development of physical culture, particularly amongst children and young persons.*

curity, pursuant to the provision in Article 5 of the Polish Constitution[102]. Secondly, in order to protect life and health, the Constitutional Tribunal has decided that it is possible to deprive citizens of not only economic, social and cultural rights, which constitute the so-called second generation of human rights, but also of the rights of the first generation. It is therefore possible to deprive citizens of personal rights and freedoms regarding an individual's private life, including their fundamental rights, when it is necessary to protect human health, if this does not lead to a violation of human dignity. This is due to the need to protect human life and health, which is an extension of the constitutional principle of a democratic state of law[103]. According to the Constitutional Tribunal, '*constitutional guarantees for the protection of human life must therefore necessarily include health protection*'; the provisions constituting the basis of these guarantees therefore also constitute the basis for inferring a constitutional obligation to protect health, regardless of the degree of physical, emotional, intellectual or social development[104].

Health, along with life, is treated in the Constitution as a superior good. This makes it possible to consider health a subjective right because it is '*simple emanation of dignity*'[105]. Unlike ECHR regulations, the Polish system puts more emphasis on the compatibility of rights and freedoms related to human health with the attribute of dignity. The Constitution assumes that since the right to health is essentially connected and normatively associated with dignity, and, as a rule, it is to serve this dignity, this right

[102] See: art. 5 of The Constitution of the Republic of Poland: "*The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development*".

[103] Polish Constitutional Tribunal, Judgment of 4th November 2006, sign. K 19/06 Journal of Laws 2010, No. 215, item 1418, as amended; Polish Constitutional Tribunal, Judgment of 23rd June 2009, sign. K 54/07, Journal of Laws 2009, No. 105, item 880, as amended.

[104] Polish Constitutional Tribunal, Judgment of 28th May 1997, sign. K 26/96, Journal of Laws 1999, No. 102, item 643, as amended.

[105] Andrzej Zoll, "*Problemy służby zdrowia w świetle doświadczeń RPO*," *Prawo i Medycyna* No. 8(2000): 8; Michał Piechota, "Konstytucyjne prawo do ochrony zdrowia jako prawo socjalne i prawo podstawowe," *Roczniki Administracji i Prawa*, No.12(2012): 93.

cannot be subject to restrictions other than constitutional. The exception is one of the social components of this right, that is, the right to healthcare, the content and scope of which is subject to statutory modifications[106]. In the light of the Constitution, man can dispose of their freedom, including a free choice in the scope of disposing of their health status, which leaves them with a free choice of all factors influencing health[107]. The limits of this activity are only determined by the maxim *quod non vetat lex, hoc vetat fieri pudor108*.

The possibilities of limiting other rights and freedoms due to the premise of '*public health and morality protection*' are provided for in provisions of the constitutional and statutory rank[109]. In particular, this possibility has been provided for in Article 31.3 of the Constitution. According to the Constitutional Tribunal, this '*possibility for the legislator of limiting the scope of exercising freedom due to health protection may refer to the protection of health of the entire society or individual groups, as well as the health of particular persons*'[110]. The development of this norm enables appropriate measures to be taken by the relevant organs of the state apparatus, in particular by means of administrative measures[111]. The need to respect human health in a democratic society as a value listed in Article 31.3 of the Constitution, in addition to goods such as: state security, public order, the environment, and freedoms and rights of other persons, does not justify depriving an individual of the right to assert their freedoms and rights in the court, as

[106] Robert Tabaszewski, *Prawo do zdrowia*, 170–171.

[107] See: article 32.1 of the Constitution of the Republic of Poland.

[108] John R. Stone, *Routledge Dictionary of Latin Quotations: The Illiterati's Guide to Latin Maxims, Mottoes, Proverbs, and Sayings* (New York: Routledge, 2005), 102.

[109] Robert Tabaszewski, *Prawo do zdrowia*, 171–172.

[110] Polish Constitutional Tribunal, Judgment of 9th July 2009, sign. SK 48/05 Journal of Laws 2009, No. 114, item 956.

[111] Polish Constitutional Tribunal, Judgment of 18th July 2011, sign. K 25/09 Journal of Laws 2011, No. 156, item 934; Polish Constitutional Tribunal, Judgment of 12th November 2002, sign. SK 40/01 Journal of Laws 2002, No. 194, item 1641; Polish Constitutional Tribunal, Judgment of 11th October 2006, sign. P3/06 Journal of Laws 2006, No. 190, item 1409.

assumed in Article 77.2 of the Constitution, which enables the use of the institution of a constitutional complaint[112].

Possible restrictions of human rights and freedoms due to the premise of human health are also provided for in the provisions of the Constitution of 1997 on emergency states. In accordance with the Chapter XI of the Constitution, an appropriate state of emergency may be introduced in situations of particular threats, if ordinary constitutional measures are insufficient, and there is a condition requiring emergency measures, including to protect human life and health[113]. In order to protect human health and life, among others, a state of natural disaster is introduced, which means 'natural disaster or technical failure, the effects of which threaten the life or health of a large number of people, property of large sizes or the environment in large areas'. In such a situation, '*assistance and protection can be effectively provided only with extraordinary measures, in cooperation of various bodies and institutions, as well as specialist services and formations operating under a single managemen*t'[114].

In the event of martial law or a state of emergency, it is not possible to introduce the restrictions enumerated in Article 233.1, including on the protection of life[115] and personal rights (Article 47), that is, the components of the right to health according to the World Health Organization (WHO)[116]. However, the list of underogated rights does not include the provision of Article 68 of the Constitution, which means that in emergency situations it is possible to limit the benefits and other rights of an individual arising from the universal health care system. During martial law, it is possible to limit human freedoms and rights, and to impose additional obligations on individuals, but only to the extent that their personal and family conditions, including their health, allow. In no case, however, is it possible to limit the rights and freedoms of individuals exposing them to

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[112] Marek Szydło, "Komentarz do art. 31," in *Konstytucja RP*, t. I: *Komentarz do art. 1–86*, ed. Marek Safjan, Leszek Bosek (Warszawa: C.H. Beck, 2016).

[113] See: article 228.1 of the Constitution of the Republic of Poland.

[114] Robert Tabaszewski, *Prawo do zdrowia*, 171–172.

[115] See: article 38 of the Constitution of the Republic of Poland.

[116] Frank Grad, "The Preamble of the Constitution of the World Health Organisation," *Bulletin of the World Health Organisation* 12(2002): 981–984.

health and life threats expressly, and the behaviour of public officials who pose a direct threat to the life or health of civilians is unacceptable[117].

While the abovementioned restrictions due to the premise of an individual's health protection are addressed to public authorities, the subject of subsequent constitutional restrictions are entities whose activities could potentially affect the health of other people[118]. The Constitution provides for three situations in which health is superior to other goods. The first concerns Article 53.5, enabling statutory restrictions on the freedom to manifest religion when it is necessary to protect state security, public order, health, morality or the freedom and rights of others. The second group of restrictions resulting from the obligation to comply with the legal conditions for conducting business activity has been included in Article 76 of the Constitution[119]. Entrepreneurs as qualified entities have been obliged to comply with specific requirements regarding protection against threats to human life and health, as well as other conditions set out in building, sanitary, fire and environmental protection regulations[120].

The second constitutional exception, which allows limitation of the constitutional right to health, is established by the Constitution in the provision of Article 68.2. The provision introduces the possibility of actually limiting the component of the right to health protection, resulting from the specific structure of the provision itself, which states that '*the terms of healthcare services shall be specified by statute*', which leaves the legislator too much freedom, including the possibility of introducing additional fees for basic medical services. An overly restrictive interpretation of this provision may consequently be seen as an opportunity to limit access to healthcare.

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117 Act on state of emergency of 21th June 2002, Journal of Laws 2014, No. 111, as amended.

118 Polish Constitutional Tribunal, Judgment of 9th July 2009, sign. SK 48/05 Journal of Laws 2009, No. 114, item 956.

119 See: Robert Tabaszewski, "Dopuszczalne ograniczenia prawa podejmowania i prowadzenia działalności zawodowej lub gospodarczej ze względu na przesłankę ochrony zdrowia," in *Ochrona praw człowieka w Polsce. Aksjologia – instytucje – nowe wyzwania – praktyka*, ed. Jerzy Jaskiernia, Kamil Spryszak (Toruń: Adam Marszałek, 2017), 115–135.

120 Supreme Administrative Court, Judgment of 14th March 2006 r., *OSK* Pos. 67(2006 r.); See: Krzysztof Walczak, "Corporate governance – moda czy konieczność," *Monitor Prawa Pracy* nr 9(2005).

Such a limitation of the right to health protection is first of all possible when state resources do not allow it to be fully shaped in a democratic state in accordance with the principle of equality[121]. In this context, attention should be paid to the functioning on the medical market of entities (e.g. doctors, nurses, midwives and paramedics) whose business is health. The Constitutional Tribunal has decided that their activity requires special qualifications and the quality of their services cannot be limited[122].

The last group of constitutional restrictions on the rights and freedoms due to the primacy of human health is provided for by the electoral law. The Constitutional Tribunal states that, like other rights and freedoms, electoral rights are not absolute, which means that they can be limited due to the need to protect public health. The Constitution provides for only two possible exceptions to the full exercise of active and passive voting rights, aimed at protecting human health[123]. With regard to individual health, procedural restrictions for individuals are contained in the Constitution[124]. On the other hand, the public health norm which has been included in Article 31.3 of the Constitution is more general. It allows limiting the use of the constitutional electoral law by '*everyone*'. Much more detailed regulations limiting electoral rights due to human health protection are provided for by the Electoral Code.

7. FINAL REMARKS

The above analysis of the most important European and national domestic regulations has shown that health is a prerequisite for limiting the so-called absolute rights. Actually, the protection of health is the most valuable constitutional value in the domestic human rights protection sys-

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[121] Robert Tabaszewski, *Prawo do zdrowia*, 171–173.

[122] Polish Constitutional Tribunal, Judgment of 23th April 2008, sign. SK 16/07.

[123] See: Robert Tabaszewski, "Dopuszczalność ograniczania czynnego i biernego prawa wyborczego ze względu na potrzebę ochrony zdrowia," in *25 lat demokratycznego prawa wyborczego i organów wyborczych w Polsce (1991–2016). Księga jubileuszowa*, *t. II*, eds. Wojciech Hermeliński, Beta Tokaj (Warszawa: Państwowa Komisja Wyborcza, Krajowe Biuro Wyborcze, 2016), 75–84.

[124] See: Article 62.2 of the Constitution of the Republic of Poland.

tem. Most often it appears as a dependent prerequisite together with the obligation to protect morals and the need to ensure national security[125]. Importantly, in recent years, Strasbourg judges have increasingly emphasised the need to limit social rights and freedoms due to the requirement to protect health. This is a consequence of the court's adoption of the concept of a holistic interpretation of the provisions of the Convention, requiring a holistic analysis of the legally binding documents of the CoE, which include guarantees regarding human rights and freedoms. The health protection order, supported by ECtHR and Strasbourg case law, obliging national authorities to take all necessary steps for a fuller implementation of this right, even at the cost of limiting other rights and freedoms, also appears in national constitutions, codes and other documents regarding personal rights and the security of an individual[126].

In addition to the ECHR, the possibility of limitation is provided for in a number of CoE conventions in the field of personal security of an individual, which, however, have not been ratified by Poland and do not constitute a formal source of rights and freedoms for persons staying in the territory of the Republic of Poland. In this group of documents, Article 26 of the Convention on Human Rights and Biomedicine (Oviedo Convention) should be considered the most important[127].The provisions contained therein allow the formulation of the conclusion that, in principle, the rights and freedoms protected in the European system and, consequently, the rights and freedoms protection systems of member states are not absolute. This means that in the event of a threat to human health in the universal dimension, they are subject to the mecha-

[125] See: Marta Szuniewicz, *Ochrona bezpieczeństwa państwa jako przesłanka ograniczenia praw i wolności jednostki w świetle Europejskiej Konwencji Praw Człowieka* (Warszawa: C.H. Beck, 2016).

[126] See: David Beyleveld, Roger Brownsword, *Human dignity in bioethics and biolaw* (Oxford: Oxford University Press 2001), 29–47.

[127] This provision introduces limitations on the exercise of rights and guarantees for an individual that 'are prescribed by law and are necessary in a democratic society in the interest of public safety, for the prevention of crime, for the protection of public health or for the protection of the rights and freedoms of others'. See: Council of Europe, Convention for the Protection of the Human Being with regard to the Application of Biology and Medicine: Convention on Human rights and Biomedicine, Oviedo, 4 April 1997, ETS No. 164.

nism of actual limitation. Moreover, the possibility of specific limitation of rights and freedoms has been increasingly provided for in many resolutions of the statutory bodies of regional organisations, often inspired by the ECtHR jurisprudence. All this confirms that health is universally considered a good of special importance for society by national authorities, who, however, must take into account that the effect of the limitation will be examined and evaluated by the ECtHR.

Unfortunately, due to the SARS-COV-2 pandemic, legal solutions used so far have not stood the test of time. From early 2020, as many as 46 out of 47 member states of the Council of Europe have decided to temporarily limit civil rights and freedoms[128]. The governments of these countries have considered it expedient to introduce additional legal restrictions due to the unprecedented nature and extent of the threat to human health and life and public security. Public authorities declare that these temporary restrictions of rights and freedoms have been introduced solely to protect human health. This position has also been adopted by the Strasbourg Court, which has considered SARS-COV-2 to be the most dangerous epidemic since World War II and has thus decided to limit the current mode of work and extend the deadlines for submitting complaints[129]. Starting from 16 March 2020, due to potential threats to universal health, the procedure for asserting rights and freedoms in the Court has also been modified.

In response to the unprecedented global health crisis, Polish authorities have also decided that there is a need to protect health on a universal scale, even at the cost of limiting fundamental rights and freedoms. Admittedly, the provision of Article 230 of the Constitution, enabling the introduction of a state of emergency, has not been used, but the provisions of the Act of 5 December 2008 on preventing and combating infections

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[128] Marija Pejčinović Burić, *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. A toolkit for member states* (Strasbourg: Council of Europe, 2020).

[129] See: Alessandra Pierucci, Jean-Philippe Walter, *Joint Statement on the right to data protection in the context of the COVID-19* (Strasbourg: Council of Europe, 2020); DH-Bio, *DH-BIO Statement on human rights considerations relevant to the COVID-19 pandemic* (Strasbourg: Council of Europe, 2020).

and infectious diseases in humans have been applied[130]. Thus, under the ordinance of the Minister of Health of 20 March 2020, an epidemic was announced in the territory of the Republic of Poland[131]. The regulations introduced in Poland in March and April 2020 make it possible to limit the vast majority of rights and freedoms on an unprecedented legal scale due to the need to preserve human health. In particular, freedom of movement, freedom of economic activity, right of access to court and freedom of religious practice have been radically limited.

The steps taken by the Polish authorities and the governments of individual member states of the European Union confirm the thesis contained in the article about the primacy of public health over other rights and freedoms. The practice of the states to date indicates that limitation of rights and freedoms due to the need to protect public health is not only possible and desirable, but can be the only way to preserve human life and health security of its citizens in crisis situations, provided that it is carried out after careful assessment of the situation and that it complies with the law.

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[130] Journal of Laws 2009, No. 234, item 1570, as amended.

[131] Journal of Laws 2020, item 491, as amended.

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COMMUNITY PARTNERSHIPS

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ABSTRACT

An egalitarian model of university-school partnerships starts with a theoretical frame of equity and social justice. This qualitative research study sought to understand high school students' perception of community service through an intergenerational university-high school-elementary school partnership. Data analysis consisted of detailed notes collected from university faculty who oversaw the focus group discussions and two graduate assistants who took observational notes. These notes were analyzed and thematically organized. The findings indicate that the students enjoyed the experience and were highly motivated to complete and read their community themed book for the younger children in their community. This research contributes new knowledge to the field of community engagement and to the field of informal and formal education through its analysis of discussions on meaningful community service pertaining to university-school collaborative partnerships.

Keywords: community engagement, school partnerships, collaboration, service, social justice

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1. INTRODUCTION

Increasingly more universities and faculty are seeking to develop meaningful ways to engage their students with local or global communities[1]. The need to continually rethink the "what" and "how" we engage students has become paramount in higher education. In addition, there is an increasing demand to not only juggle competing interests, needs and resources of campuses, faculty, and students with those of community partners, but to also develop meaningful pedagogies of engagement that can result in transformative[2], as opposed to transactional[3], relationships. Calls for universities to engage communities through service learning, civic engagement, and scholarship have been made for over a century[4]. In fact, John Dewey famously called for such pedagogical advances in his Pedagogic Creed in 1897.

This study consisted of focus group discussions with fourteen high school students who attended field trips to either the National Civil Rights Museum in Tennessee or/and the Japanese American Internment Museum in Arkansas. The participants then created and read their books to the elementary students in two public schools in a southern state in North America, discussed their experiences from attending a field trip and their perceptions on developing and reading their stories to elementary children. This was an intergenerational and multi-academic leveled activity, wherein high school students explored social justice concerns through interactive field trips to sites in the Southeastern United States, a geographic region where there has been historical inequality among racial and socio-economic lines, particularly for African-Americans. We chose this activity because,

[1] Deborah Romero, "The Power of Stories to Build Partnerships and Shape Change", *Journal of Community Engagement and Scholarship* 6, no. 1 (2012): 11.

[2] Judith Ramaley, "Embracing Civic Responsibility", *Campus Compact Reader* 1, no. 2 (2000): 1.

[3] Sandra Enos, Keith Morton, "Developing a Theory and Practice of Campus–Community Partnerships", in *Building Partnerships for Service Learning,* ed. Barbara Jacoby (San Francisco, CA: Jossey-Bass, 2003). 20–41.

[4] Stephen Danley, Gayle Christiansen, "Conflicting Responsibilities: The Multi-Dimensional Ethics of University/Community Partnerships", *Journal of Community Engagement & Scholarship* 11, no. 2 (2019): 1.

as researchers we recognize that storytelling is a powerful tool for community engagement and for raising awareness about cultural diversity and social justice issues[5].

The public high school, whose students participated in this study, was in its first year of being integrated. Previously, there were two public high schools. One was on the "white" side of town and the other on the "black" side of town. In the fall of 2018, due to a federal court mandate, the two schools merged into one public high school and the newly integrated school was situated on the "white" side of town. Similarly, there were two segregated middle schools combined and the new middle school is on the "black" side of town. A regionally recognized public university sought to build rapport with the newly formed high school, focusing on the theme of community. Social justice concerns are ever present in public education and race plays a role. For example, the choice to attend the National Civil Rights Museum in Tennessee or the Japanese American Internment Museum in Arkansas, decisions to attend one or the other were sharply divided along racial lines. At both the high school and university level more African-American students chose to attend the National Civil Rights Museum and more white students chose to attend the Japanese American Internment Museum.

This study focused on high school students' perceptions of a community partnership activity that involved a variety of stakeholders, i.e., university faculty/students, high school faculty/students and elementary school faculty/students, which focused on group discussions surrounding social justice. We believe that when stakeholders come together as partners to exchange knowledge, and resources, opportunities for members to develop the relationships essential to creating healthy communities are presented[6]. Through the collaborative efforts of partners from a local school district, community organizations, and an institution of higher education, we were able to create opportunities for students to engage in activities designed to support our goal of community engagement focused upon social justice.

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5 Romero, *The Power of Stories to Build Partnerships*, 12.

6 Mary D. Burbank, Rosemarie Hunter, "The Community Advocate Model: Linking Communities, School Districts, and Universities to Support Families and Exchange Knowledge", *Journal of Community Engagement & Scholarship* 1, no. 1 (2008): 48.

2. PURPOSE OF THE STUDY

The purpose of this study was to ascertain the importance of understanding and building engaging democratic spaces where new constructs are built in order to promote social justice. This qualitative study sought to answer the following research questions:

How do secondary education students express their perceptions of community through authoring a children's book?

How do high school students feel about being authored?

How do they perceive their reception from the elementary students?

What were the benefits they received from this community service?

3. LITERATURE REVIEW

This research originated from a university faculty member and a high school teacher. Throughout the intention was to have all collaborative partners, including the high school students, involved in the process. The premise of this research was to develop a collaborative space among education community members that drew on each member's strengths. This collaborative, or democratic, space served to support the notion that "engagement emphasizes a two-way approach in which institutions and community partners collaborate to develop and apply knowledge to address societal needs"[7]. Each stakeholder in the community takes on different roles based on their expertise, for example teacher educators bring their research abilities and skills at assisting pre-service teachers; on the other hand, seasoned teachers bring the expertise of student knowledge and school culture[8]. In effect, democratization is linked to university-school collaborative partnership.

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[7] David J. Weerts, Lorilee R. Sandmann, "Community Engagement and Boundary-Spanning Roles at Research Universities", *The Journal of Higher Education* 81, no. 6 (2010): 632.

[8] Kenneth Zeichner, Katherina A. Payne A. K., Kate Brayko, "Democratizing Teacher Education", *Journal of Teacher Education* 66, no. 2 (2015): 6.

With this in mind, there was an emphasis on building partnerships through shared responsibility[9]. Implicit in this idea was the notion of building trust through addressing concerns surrounding social justice. The concept for this research originated with a university faculty member and a high school teacher seeking a way to bring their students (high school and university) to a museum surrounding social justice. In order to develop authentic community engagement there needs to be three essential components:

> "(1) being physically located at the school or community site in order to build trust and become integrated into the life of the school or community, (2) conducting community studies in order to learn about and understand the lives of community members, and (3) becoming involved in community engagement activities"[10].

Noel contended that "trust" needs to be established. This research study takes place in a geographical area where trust has not been established across racial and socio-economic lines and where there are clear inequalities. Our study was possible because of the trust established between the university faculty and a high school teacher. Their trust in one another created a foundation to develop this interactive collaborative project across academic institutions. In Noel's study, the faculty member made numerous trips to the high school and exchanged multiple emails with the lead teacher, school administration, and district administration. Similarly, the university faculty and high school teacher made time in their schedules to coordinate activities and worked together to ensure a smooth foundation.

Haddix maintained, "community engagement can get at issues of race and racism, equity and inequality, and social justice and injustices more pointedly than reading scholarly articles, learning new methods and ped-

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[9] Lorena Guillen, Ken Zeichner, (2018). "A University-Community Partnership in Teacher Education from the Perspectives of Community-Based Teacher Educators", *Journal of Teacher Education* 69, no. 2: 149.

[10] Jana Noel, "Striving for Authentic Community Engagement: A Process Model from Urban Teacher Education", *Journal of Higher Education Outreach and Engagement,* 15, no. 1 (2011): 31.

agogies, or completing student teaching placements"[11]. Finally, Safrit contended that sustaining authentic engagement requires efforts on the part of university-community partnerships to (a) address ongoing mutual needs and interests over time, (b) reflect collaborative, reciprocal and scholarly work; (b) require active involvement in communities (c) value and engage a diversity of people, expertise, and culture; (d) utilize authentic processes for learning, teaching, integration and investigation in and with communities; and (e) have institutional philosophies and core values embedded in the tenets of democracy, collaborative leadership, and mutual respect.[12] This research study sought to understand the complexities of community relations by looking through the lens of high school students engaged in a multilevel community service project.

4. METHODS

Merriam and Grenier argued that, "qualitative research lies with the idea that meaning is socially constructed by individuals interacting with their world"[13]; and that qualitative researchers explore, "how individuals experience and interact with their social world, and the meaning it has for them, is based on an interpretive (or constructivist) perspective"[14]. This study is an interpretive and descriptive qualitative study in that the researchers' focus is on "understanding how participants make meaning of a situation or phenomenon"[15]. The focus here is on how high school students make meaning from an intergenerational community social justice activity.

The intention of this research was to address the problem of inequality through an intergenerational university driven community activity.

[11] Marcelle Haddix, "Preparing Community-Engaged Teachers", *Theory into Practice,* 54, no. 1 (2015): 69.

[12] 12. Safrit, R. Dale, "The Guest Editor's Page", *Journal of Higher Education Outreach and Engagement,* 15 no. 3 (2011): 1.

[13] Sharan B. Merriam and Robin S. Grenier, *Qualitative research in practice: Examples for Discussion and Analysis*. 2nd ed (San Francisco, CA: Jossey-Bass, 2019), 3.

[14] Merriam, and Grenier, *Qualitative Research in Practice*, 4.

[15] Ibidem.

Merriam and Grenier maintained that action research, "is conducted by those who want to address some problem or issue in their workplace or community and take action based on the findings"[16]. Our interest was to have readers learn from this research to inform university social justice community driven projects. As a result, we sought and received approval from the university institutional review board approved, and funding for the field trips was acquired through university and outside grants. These grants mainly served to cover the cost of the two field trips to ensure equal access regardless of income.

5. PARTICIPANTS

The participant population was purposefully selected. Eighty-eight individuals from the university and high school participated in this activity, 51 eleventh and twelfth grade students from the public high school, and 37 university students majoring in education and/or adolescents in their junior/senior year. From those 51 high school students, 17 (33%) created 11 books.

6. DATA COLLECTION

Data collection consisted of focus group discussions with 14 high school students who created and read their books to the students. High school participants discussed their experience from attending the field trips and their perceptions on developing and reading their stories to elementary children. Originally, 51 high school students (grades 11 and 12) attended one of two interactive field trips, Japanese American Internment Museum in Arkansas (29) and/or National Civil Rights Museum (24). Two of the participants attended both trips. Thereafter, the 51 high school students were asked to participate in a community project where they created books for first grade students.

[16] Ibidem, 11

Over a three-month period during the spring semester of 2018, the 17-high school authors participated in three workshops co-organized and co-conducted by high teachers and university faculty. A workshop was held at the high school with the 51 high school students to explain the community service project that would have them use their experience from the trips to write a book and read those books to elementary students in a nearby public school. The participants were asked to write their books on the theme of community. They were told that they would then have an opportunity to read their books to elementary school children and participate in focus group discussions surrounding their experience.

The initial workshop provided training on how to translate their experience into books that were appropriate for first and/or second grader readers. The first presentation introduced the concept of creating mini-books for first-second grade students surrounding the theme community and based on their experiences from the field trips that they attended. Faculty from the university, and teachers from the high school provided step-by-step instructions, word lists, and brought in over 15 examples of story books, informational stories and moral tales. In this workshop, the elementary and secondary faculty co-designed with the English and social studies teachers how to write a children's book leveled to the kindergarten-first-second grade level.

Kindergarten through first grade was selected because there are a variety of reading abilities and the elementary school had not yet been chosen. After this initial workshop, over the course of six weeks, the 17 participants attended two additional workshops. In these sessions, the university secondary education faculty member assisted participants to develop their books.

The second workshop occurred two weeks later, where faculty clarified and explained the details of creating the books by providing two sizes of mini-blank books, a rubric peer check list, and more book examples. Although we had originally envisioned the participants working on individual books, the participants requested to work in pairs or groups of three explaining that one could write and another illustrate. Interestingly, in the second workshop none of the drafts were informational in nature. When shown examples of informational, storybooks and books with moral tales, one group commented "that's boring" and a second group asked to borrow the moral lesson books.

The third workshop session, provided a space to have the participants discuss their ideas and gather further ideas from one another. After a series of three supportive workshops to facilitate the book creations, the 17 participants created 11 books on the kindergarten to first grade reading level.

The community activity culminated with 16 of the 17 students reading their books to 83 kindergarten and first grade students. One participant had a medical emergency and the co-author read their book.

Seventeen of the 51 participants, 33%, agreed to participate in the next phase of study, the focus groups. The data collection consisted of focus group discussions with 14 of the 17 participants who wrote the mini-books and read their books to children. Two students read their book to the students, but were unable to attend the focus group discussions because of a work commitment. Specifically, two focus group discussions consisted of six guiding questions (Appendix A) asked to 14 of the 16 authors (two readers left due to outside work commitments) who had read their books to the elementary students. One of the 17 participants was unable to due to a medical emergency. One group had six participants and the other had eight participants.

Since this research takes place in a small town (approximate population of 12,000), the high school students were asked at which one of the six elementary schools they would like to read their stories. One elementary school stood out representing the theme of community (three of the 17 students said they had graduated from that school and still visited occasionally). One student suggested another school with the remaining students not voicing an opinion. The university faculty member sought out the school that the three students suggested. When the researcher reached out to the administration of the school (after first acquiring school district superintendent authorization), she sent examples of the high school student's books. The principal expressed enthusiasm to have her students participate and thought the level was geared toward kindergarten and first grade. This elementary school is one of two magnet elementary schools in the town and it is required to maintain a diverse enrollment balance. Further, this elementary school has the highest test scores on the third-grade reading level and is the number one ranked elementary school in the town. Our intention was not to select a high performing school but to

have the participants chose a school they wanted to connect to and/or they perceived as representing community.

The participants read their books to the elementary students in the university library. There were 83 kindergarten (44) and first grade (39) students broken into 11 groups. The groups were organized based on grade level and ranged from six to eight students per group. The 16 high school authors divided among the 11 groups (six groups were single authored). The kindergarten and first grade students rotated after each reading enabling all eleven groups of kindergarten/first grade students to listen to all the stories. After the reading, 14 of the 16 high school students divided into two groups and we conducted focus group discussions using the focus group discussion tool (Appendix A). Responses were recorded and the notes combined to find emerging themes from the 14 participants.

7. DATA ANALYSIS

Data analysis consisted of detailed notes collected by university faculty who oversaw the focus group discussions and two graduate assistants who took observational notes. These notes were analyzed and thematically organized. According to Merriam and Grenier (2019), "qualitative research, data analysis is simultaneous with data collection"[17]. Further, "simultaneous data collection and analysis allows the research to adjust along the way, even to the point of redirecting data collection, and to 'test' emerging concepts, themes, and categories against subsequent data"[18]. Applying this concept to this study, we focused on the participants ideas to develop and organize the emergence of themes.

The results revealed how the high school student participants defined community and their interest in service activities. Overall, all 14 focus group discussion participants believed that the field trips, creating their books and reading to the elementary students was a rewarding experience. They all agreed that reading their books to the children was enjoyable and that it got better each time they read their book. Interestingly, they

[17] Ibidem, 15

[18] Ibidem.

also noted that towards the seventh reading the children looked tired and bored. The four elementary school teachers also remarked that eleven books over the course of an hour was a lot for kindergarten and first grade students.

The high school participants also agreed that this activity benefited the young authors, as well as the kindergarten and first graders. The participants seemed to take the responsibility of expanding the younger students' understanding of community seriously by encouraging them to ask and answer questions to clarify their stories. This was an inter-generational undertaking where high school students used their books to pass along their understanding of community to their younger peers.

The focus group discussion tool (Appendix A) contains six guiding questions that sought to answer the main research questions: 1) How do secondary education students express their perceptions of community through authoring a children's book? 2) How do high school students feel about being authored? 3) How do they perceive their reception from the elementary students? And 4) What were the benefits they received from this community service?

8. FINDINGS

In general, the findings indicated that the participants grew socio-emotionally from this collaborative university-high school-elementary school experience. This type of research delved into the informal learning spaces and looked at collaboration among key stakeholders in educational settings. The findings were guided by the above questions and thematically organized into the following themes: community, benefits, participants' perceptions of listeners, experience sharing, and participant recommendations.

9. COMMUNITY

Lester, Kronick, & Benson contended that, "university students who spend time volunteering have also changed their perspectives and sense of

civic responsibility"[19]. Although they were discussing the benefits for university students, in this case study this is was a finding for the high school participants in this study. This research delved into whether high school student's perspectives changed on their civic responsibilities, particularly in the understanding of community. The focus of this research is on understanding how the high school participants interpreted community and how this was expressed in their book. Interestingly, they became quite reflective in designing their book to be of interest to the elementary students. They designed the book with the children in mind. It was a selfless endeavor and demonstrated their interest in building a community.

In response to the first question, 'how do secondary education students express their perceptions of community through authoring a children's book?', 100% of the participants stated that their understanding of community was broadened from the field trips, developing the book, and reading the book to the children. Participant comments that summarized the idea that their definition of community expanded included: "Yes, it changed", "I use to think community was just an area, now I know it includes making friends who may be different from me", "Community includes all races", "Communities don't have barriers or boarders", "Community means all who stand up for a cause", and "Community includes people who are different but they love each other anyway".

One of the most reflective participant comment stated, "I used to not think kids were a meaningful part of the community but this experiences showed me they are also important members of the community". This represented a shift in thinking from kids are not meaningful, to kids being important players in the community. The authors inferred this to mean the high school participants perceived they were empowered through these activities.

Along similar lines, participants perceived their role as expanding the definition of community for the children. The participants incorporated this expanded view of community into their books. An example of this was a participant who stated he put an expanded view of community into his book by writing 'hello' in a variety of languages. Another exam-

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[19] Jessica Nina Lester, Bob Kronick, Mark Benson, "A University Joins the Community", *Kappan Magazine* 93, no. 6 (2012): 44.

ple is a participant who stated she created a book where people looked different "to demonstrate that we have different personalities". Further, another participant emphasized that "community meant working together to make a better place". Two other participants agreed that, "a community is defined as a group that stands together to make change and that this is not defined by race". Overwhelmingly, participants agreed this was an enjoyable experience, which expanded their definition of community.

10. PERCEIVED BENEFITS

Regarding research question two, 'how do high school students feel about being authored?' we followed up this question by asking whether they shared their experiences with their parents, guardians, and community members. Also connected to this question were the responses to questions four and five on the focus discussion tool – 'who do you think benefitted most from this project and what were the benefits you received from this community service?'

The fourteen participants explained that they had benefited by learning about their community. Participants' comments ranged from having discussions surrounding social justice with their parents – one participant stated, "My mother gave me the idea for my book" – to having discussions about community with friends and family. Ten participants said that their families were proud of them for working on this project.

Two of the 14 participants noted that their classroom teacher was giving them extra credit, but that that was not the driving force. Four of the participants commented that they needed the community hours, which worked toward their graduation requirements. Two of the 14 participants said they would put this experience on their resume. Two participants mentioned this was off their "bucket list" and one of these participants commented, "I have wanted to be an author since seventh grade. I feel great, like I really did something".

Ten of the students commented that these activities led them to make new friends and learn about people who are different from them. During this question discussion, one participant said, "People are different but [we need to] love each other anyway; it is important to donate [our time

and abilities to] help others'. Seven of the participants brought up other relevant community related projects that they completed for community service. These included: 'walks for breast cancer awareness and talking to elementary students about the importance of exams".

In summary, all 14 participants contended that this intergenerational activity was beneficial and that it was important to involve the "little kids". Summarizing these ideas one participant stated, "I feel humbled that I could write a book and have so much excitement from the children because of my book". Similarly, another participant commented, "I feel closer to the community. I felt involved in the children's learning".

11. PARTICIPANT PERCEPTIONS

The theme Participant Perceptions of listeners emerged in response to research question 3, 'How do the participants perceive their reception from the elementary students?' All 14 participants expressed their belief that the children thought it was a good experience. The participants used the following terms to describe how the children received them reading their book: "ecstatic" "cool", and "awesome". One participant noted, "a lot of the kids wanted the book". However, the participant did not state how many kids wanted a copy of the book. Eight participants mentioned that they also received positively by the elementary school teachers and teacher assistants. One participant commented that she "felt closer to the community [and] involved in their learning process". Another participant noted that she felt it was important to get "involved [because] they are our future" and "the future of our community". Another participant stated that it was "great to educate children on new topics". They felt that the students asked a lot of question.

The high school participants reflected critically on the elementary school students. One participant summarized the experience by stating, the "first and kindergarten students were very happy to be here". Two of the participants differentiated between the two groups stating, "the kindergarteners needed more pictures, but the first graders were grabbing the books to read it themselves". Three students said they were conscious of writing the book on an appropriate grade level and that they changed

the wording in their books to simpler words. The participants also noted the level of reading was higher than they expected and that this was an advanced group of kids from a special school. Two participants commented that first grade students "took the books to read" themselves.

Although they felt the students to be high academically, they also felt the concepts were to advanced, therefore they focused on simpler ideas rather than the historical content of the museums. One participant shared that the Japanese American Internment Museum may not have been understood at such a young age.

12. EXPERIENCE SHARING

The theme Experience Sharing emerged in response to research question 4, 'What were the benefits they received from this community service project?' The focus group discussion question number six asked students to add any ideas or comments that were not previously discussed. This was done to provide them a space to discuss any aspect of the project.

All 14 commented that they enjoyed donating their time to helping others. Further, participants commented on how the children perceived them. One participant stated, "They questioned if I wrote the book and were so awed that I did". On publishing a book, made one participant said she felt emboldened stating, "I can do anything". They made friends while completing this project and came to the conclusion that being different means they can still love each other. Critically reflecting on their overall experience and after having the children listen to 'the many stories on community, four of the participants agreed that they had developed a new understanding of community. This new definition was 'broader'. All 14 commented that it was a good experience and they were happy to have been a part of the project. One participant stated that, "it felt good to help children extend their understanding of community". Another participant commented that, they "would do it again with older children." This comment provoked a little laughter from the group and sparking another student to note the difficulties of working with young children.

Interestingly, along similar lines, all fourteen explained that they had shared their story with their mother and discussed it with their friends.

These experiences demonstrated that the students sought to revise and sharpen their stories. Two explained they had practiced reading their book and had shown their book to a cousin and/or younger sister. They commented that those people had liked it and that encouraged them. Clarifying, they explained that they shared their book because they were proud of their accomplishments. Another participant commented that he practiced reading his book on his four-year-old sister. The participant went on to explain that his sister "told him to add more pictures". Another participant noted reading her book to a 19-year-old cousin who commented, 'that it was good and flowed well'. These sharing experiences illustrate how this collaborative activity fostered students to self-reflect and critically think about their field experiences and community activity.

13. PARTICIPANT RECOMMENDATIONS

All 14 of the participants agreed that there should be more collaborative partnerships among the various stakeholders. In particular, they shared their belief that there should be collaborative field trips and field experiences for students to "branch out". Similarly, one participant commented that he "wished all schools had these chances". Another participant compared the elementary school students visiting the college campus for the reading to their travel to the Japanese American Internment Museum and/or National Civil Rights Museum stating, "all trips were educational and fun". He went on to argue there should be more field based learning trips.

Following up on this concept, two students in one of the focus group discussions mentioned the lack of opportunities to participate on field trips when they were in elementary school. There was awareness that some elementary schools have greater access and opportunities than other elementary schools. The two elementary schools cited as lacking opportunity were exclusively African-American. The magnet school, which is required to maintain a diverse population, was the only school that provided opportunities. One student stated, "all schools should have that opportunity [because] trips served to educate". The participants also weighed in on the importance of making reading an interactive process and the need to provide books students enjoy. Similarly, 12 of the 14 stated said they did

not talk about the trip details because they believed it would have been hard for the children to understand the concepts of inequality and social justice embedded in the two field trips.

These findings add to the field of study surrounding community engagement through formal and informal spaces. This is significant for understanding how to build better community relationships surrounding social justice themes through intergenerational academic partnerships.

14. LIMITATIONS

The full scope of this project took a year from spring 2017 to spring 2018 (from organizing the trips to the publication of the books). One limitation was time. More high school seniors might have participated given the time. In addition, during the focus group discussion, four of the participants requested to have us organize a book reading with another elementary school. Two other participants expressed the importance of involving other schools. A local public librarian also wanted the students to read their books at the public library. Unfortunately, the semester ended and participants were getting ready for final exams and college.

Another limitation was attrition. Only 17 of the initial 51 high schools students who attended the trip agreed to create the books for the elementary school students. Five expressed interest but had other obligations. Further, the two high school English and social studies teachers also expressed the difficulties of students volunteering due to a range of other commitments that included senior activities.

Similarly, we conducted this research in a deeply impoverished community which resulted in multiple inefficiencies, which were particularly evident in the publication of the participants' books. For example, six of the 11 books had mistakes that frustrated the participants reading the book. This ranged from missing pages to pages being cut off. Due to the time constraints, the revised books were not completed in time for the participants to read their book to the children.

Lastly, the high school participants were not trained to read to kindergarten-first grade students. We provided a quick overview that emphasized showing pictures and engaging the audience. In the focus group discus-

sions, three of the participants commented on how, after reading their book the first time to the students, they quickly learned they needed to engage the audience.

15. DISCUSSION

This research is original in that it sought to understand high school students' perceptions of community through an interlinked partnership activity that included discussions of social justice concerns amongst diverse generations of students. The setting for the research, the Southeastern United States, is also unique in that it is still deeply divided along racial and socio-economic lines. From the participants' responses to their involvement in this university administered social justice project there were many benefits for those involved. This study highlights ways a university can promote social justice and community through its administrative actions. Further, the findings of this study add to the field of study surrounding community engagement through formal and informal spaces. We posit that universities should be tasked with building community partnerships and relationships surrounding social justice themes through intergenerational academic partnerships. John Dewey stated, "I believe that education is a regulation of the process of coming to share in the social consciousness; and that the adjustment of individual activity on the basis of this social consciousness is the only sure method of social reconstruction"[20]. We concur.

The findings from this study add to the field of community service and university to school community engagement partnerships. Further research, could delve into the perceptions of the pre-service teachers who attended the social justice field trips with the high school students. Did they gain valuable field experience and/or knowledge of adolescents? Lester, Kronick, & Benson argued the importance of building community and the benefits to pre-service teachers[21]. The authors contended, "Education done in and with the community can play a central role in addressing sys-

[20] John Dewey, "My Pedagogic Creed", *The School Journal*, 54, no. 3 (1897): 79.

[21] Lester, Kronick Benson, *A University Joins the Community.*

temic inequalities and providing academic and nonacademic learning for students" (p. 43). The high school participants perceived the inequalities of their community. This was evident in the findings where twelve of the fourteen participants in the focus group discussions questioned the opportunities of the elementary children's exposure to visiting a college campus based on which elementary school they attended. Thereby, implying the racial divisions in their community limited opportunities.

Further, the findings hint that this type of community experience served to develop empathy in the participants to empathize towards the elementary students. For example, all 14 participants related and connected this experience to their own childhood. This led to a discussion in one of the focus groups on the inequalities in academic settings. Therefore, these collaborative activities provided safe spaces for the high school participants to critically reflect on social justice challenges. There was a clear emphasis among all participants that all children should have these types of experimental learning opportunities. This research supports the notion of the importance of creating collaborative spaces with various educational stakeholders to engage in discussions surrounding social justice to foster and co-create new knowledge[22].

Because higher education is a social institution[23], it has an implicit responsibility to serve the public that created, and sustains, it financially through tuition, government grants and contracts, corporate giving and partnerships, and public philanthropy. In fact, public land-grant colleges and universities were founded on "ideals that recognized the need to apply knowledge-based solutions to societal challenges, requiring that researchers work with people outside academia as partners with as much to offer as to learn"[24]. This community engagement project provided the high school participants a space to openly discuss the inequalities in their community. The participants shared that there were clear differences among their own elementary school experiences, and there was a shared consensus around

[22] Weerts, and Sandmann, *Community Engagement and Boundary-Spanning Roles.*

[23] Frank Fear, "Neoliberalism Comes to Higher Education," *Future U* (blog), February 14, 2015, http://futureu.education/uncategorized/neoliberalism-comes-to-higher-education/.

[24] Hiram E. Fitzgerald, Lou Anna K. Simon, "The World Grant Ideal and Engagement Scholarship", *Journal of Higher Education Outreach and Engagement* 16, no. 3 (2012): 34.

the unfairness of inequities in the school system. The concept of social justice and importance of building community served as focal points for this study. Participants agreed that the field experiences expanded their minds and the lack of these opportunities created an inequitable schooling experience.

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APPENDIX A
FOCUS GROUP DISCUSSION QUESTIONS

Central Research Question: How do secondary education students express their perceptions of community through authoring a children's book?

1. How do you feel about being authored? Did you talk about this project with family? Friends? Did you show your book to anyone? Who? Why? Why not? Explain. Provide an example.

2. How do you perceive your reception from the elementary students?

3. How did you define community? Did this change during the course of the semester? When you went on the trip? Developed the book? Read to the kids? Explain and provide a specific example.

4. Who do you think benefitted from this project? Explain.

5. Did you receive any benefits from this project? Co-authoring the book? Reading the book? Interacting with the children? Explain.

6. Please add other ideas or comments you have about this project.

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CAMPUS GOVERNANCE IN U.S. UNIVERSITIES AND COLLEGES

*William N. LaForge**

ABSTRACT

This article provides an overview of the main elements and characteristics of campus governance and administration employed by U.S. institutions of higher learning, with a closer look at the practices and operations of one public, regional university.

Keywords: universities, shared-governance, campus management

1. OVERVIEW

The governance of universities and colleges in the United States basically follows the concept and spirit of democracy embraced by the nation from its birth. The systems and practices in place at most U.S. institutions of higher learning include collaborative, representative, or collective decision-making arrangements known as shared governance. However, these systems and practices are hardly uniform due to the diversity of governance patterns that reflect the unique and different history, needs, and mission of a particular institution. Sometimes they are differentiated from, and contrasted with, corporate, business, and more authoritarian or centralized forms of institutional governance.

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Campus governance, *per se*, includes a number of features that generally serve and support the manner in which decisions are made concerning the institution as a whole or one of its constituent components, and how a university is organized, managed, and operated. Those features vary according to the type, needs, and complexity of an institution. But, they typically include common functions such as policy, processes, procedures, legal relationships, general rights and responsibilities, sources of authority, administration and management, organizational structure, decision-making responsibilities, and the relationships, roles, and collaboration among campus administrators and the various university constituencies.

In contrast with university governance elsewhere in the world – that can range from strong central government control to private self-regulated operations – the U.S. forms of campus governance have emerged in a country that does not have centralized authority over education. U.S. institutions of higher learning respond to a variety of controls and interests that are on display variously at public, private non-profit, private for-profit, and religious universities. Governance, authority, and administration are spread across a wide spectrum of players, including governing boards; presidents, chancellors, and other administrators; the academy/faculty; administrative staff; campus committees; students; and, even some external factors.

2. SHARED GOVERNANCE

The phrase most often associated with the governance of U.S. universities is *shared governance*. This concept is widely considered to be a basic tenet of higher education, and it is a key factor in the administration and operation of American universities. However, over time, the meaning of shared governance has morphed to the point where, regardless of its importance and continued application, it is confusing to, or misunderstood by, even those who are engaging its principles. In short, it is an ever-changing and developing concept. As shared governance has evolved over many years in the United States, it has developed increasingly more representation in campus decision-making processes by a wide array of stakeholders. Most contemporary university leaders in the U.S. reportedly tend to char-

acterize shared governance as "shared responsibility for the welfare of the institution," and as "an equal distribution between [*sic*] consultation, rules of engagement, and a system of aligning priorities"[1].

Shared governance has its definitional roots in a well-known 1966 "Statement on Government of Colleges and Universities" that was commissioned and adopted by the American Association of University Professors (AAUP), the American Council on Education (ACE), and the Association of Governing Boards of Universities and Colleges (AGB). The statement is an attempt to lay out common principles of shared governance, and to underscore the importance of the concept[2].

Governance is defined in that document as "the joint efforts in the internal operations of institutions," but it also allows for certain decisions to be made within the bailiwick of different groups. While not offered as a template for institutional decision-making, the statement nonetheless proposes that numerous members of the university community should have input on key decisions – the core principle of shared governance – including the governing board, president, administrators, and faculty. The thrust of the concept is that, for matters involving general education policy, strategic and long-range planning, budget priorities, and selection of the institutional executive officer, decisions should be joint or shared by a number of constituent groups. Reflecting strongly-held democratic principles, shared governance connotes consultative and participatory roles by various stakeholders on a university campus[3].

Shared governance has been described as more complex than merely a guide for consensus-building, decision-making, or assigning tasks and responsibilities. It is essentially a balance among various campus players – including boards, presidents, faculty, and staff – concerning participation in planning and decision-making processes that ostensibly result in productive actions and administrative accountability. The sharing concept

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[1] Autumn Arnett, "Finding Shared Governance on Campus", EDUCATIONDIVE (January 26, 2018): 1.September 2, 2019 https://www.educationdive.com/news/finding-shared-governance-on-campus/515635/.

[2] "Statement on Government of Colleges and Universities", American Association of University Professors (AAUP) (1966): 1–10. September 4, 2019 https://www.aaup.org/report/statement-government-colleges-and-universities

[3] "AAUP Statement".

involves delegating to various campus groups a role in key decision-making processes, while also assigning specific decision-making to designated groups – some elected, others appointed, or volunteers[4].

To be clear, this shared authority does not necessarily mean that every campus constituency will have a participatory role in every decision or at every stage of the decision-making process, and it does not guarantee that any constituency will be able to have control over a process or decision. Quite commonly, advice, consultation, collaboration, and consensus are operative forms of engagement in shared governance. For example, while a search committee to identify and recruit a new faculty member provides a forum for various parties, including faculty and students, who are involved in the process, a chair or dean makes the final decision from a list of recommended candidates. Similarly, student government exists, in part, to make decisions about certain student-oriented activities such as social and cultural events on campus, and the faculty, through a senate or academic council, typically make curriculum decisions[5].

The sharing aspect of shared governance is broad and encompassing in scope. It tries to balance decision-making participation with defined accountability, and provides a voice for campus constituencies and select groups to engage in campus decision-making. Most observers believe that a major focus on communication with and among all involved parties engaged in shared governance is a basic requirement of successful outcomes[6].

The scheme of shared governance can be quite complex, and there is no single "one size fits all" organizational approach or methodology. The sharing process typically involves a number of stakeholders or groups with varying degrees of authority and responsibility. Each institution basically adopts its own system and methodology.

[4] Gary Olson, "Exactly What is 'Shared Governance'?", *The Chronicle of Higher Education* (July 23, 2009): 2–3. August 19, 2019 https://www.chronicle.com/article/Exactly-What-Is-Shared/47065.

[5] "AAUP Statement", 4.

[6] "AAUP Statement", 5.

3. ASSOCIATION OF GOVERNING BOARD'S (AGB) THRESHOLD CONDITIONS FOR EFFECTIBE SHARED GOVERNANCE AND GENERAL PRINCIPLES FOR BOARD GOVERNANCE

In a 2017 research project titled "Shared Governance: Changing with the Times", the Association of Governing Boards reported some basic conditions that support the design and implementation of effective shared governance in any institution of higher learning, while also reaffirming the need for best practices to be tailor-made to suit a particular university.

1. A shared commitment on the part of faculty, administration, and board members to the principles of shared governance and a current, shared understanding among faculty, board, and president of what shared governance actually is and how it operates/functions/works in their institution.
2. A shared and clearly articulated commitment to *trust*, *collaboration*, *communication*, *transparency*, *inclusiveness*, *honesty*, and *integrity*.
3. An institutional culture of good will, good intentions, and commitment to common values that is reinforced through the practice of shared governance. Clear policies concerning authority and standard operating protocol are important to develop, but without goodwill and commitment to shared values, they can't lead to effective decision making on meaningful issues.
4. A shared commitment among all parties to focus the practice of shared governance on the institution's strategic goals, aspirations, and challenges.
5. Constitutional documents (such as bylaws, faculty handbooks, policy statements) that clearly codify decision-making authority as well as a thorough, nuanced understanding on the part of board members, faculty, and presidents of their own respective roles in shared governance, as well as those of their colleagues.
6. A shared appreciation by board members and faculty of the complexity of the president's role in facilitating a constructive relationship between the board and the faculty.
7. A recognition that while students, staff, and contingent faculty often do not have a formal role in shared governance, boards, presidents, and faculty should create regular opportunities to in-

clude their voices in the discussion of important issues and major decisions.

8. A shared recognition that institutional change is necessary, constant, and inevitable; the dynamically changing external environment and continued institutional relevance demand it. All stakeholders must be open to doing things differently when circumstances require.
9. A recognition that the most important decisions are often the most difficult and contentious, but that the preservation of relationships is vital to sustained effectiveness in governance.
10. A recognition by the president, board chair, and faculty leadership that they have collective responsibility to ensure that the above conditions exist"[7].

The ABG study observed that, "The most relevant question about shared governance facing governing boards, presidents, and faculty is: How can the principles of shared governance best be applied in the context of circumstances that are more complex and dynamic than they were even a generation ago? The practice of shared governance is, in many institutions and in various ways, changing with the times. It is important for practitioners to assess local policies and procedures as they exist today to determine – often collaboratively, sometimes creatively – the most promising ways forward given the challenges ahead. Board members, presidents, and faculty alike would do well to examine the threshold conditions above in determining where shared governance needs additional work in their institutions"[8].

The AGB study concluded that "shared governance is an essential component of America's higher education institutions that needs to be preserved and enhanced". It recommended that, "The notion that shared governance practices should be continuously reviewed for potential improvement hints at a key finding of this study: shared governance is a dynamic system that can become ineffective. The purpose of such assessments

[7] "Shared Governance: Changing with the Times", An Association of Governing Boards of Universities and Colleges (AGB) White Paper (March 29, 2017): 12. September 5, 2019 https://agb.org/reports-and-statements/shared-governance-changing-with-the-times/

[8] "AGB Shared Governance".

should be to ensure that, in both policy and practice, shared governance supports the institution's strategy and vision"[9].

4. THE PLAYERS/STAKEHOLDERS IN SHARED GOVERNANCE

In the scheme of shared governance, a wide array of stakeholders can play a role in decision-making at various levels of authority and in certain circumstances, depending on their campus position and relationship to an issue or decision. Each university has its own discreet set of "players". However, there are several stakeholders who are typical participants in any shared governance structure.

4.1. Governing Board

The U.S. higher education governance model begins with a governing board, in which legal governing authority is vested, and from which that authority is exercised. For public universities, created constitutionally or by statute, governing boards are usually appointed by the governor or other public authority, and operate under the auspices of state laws and regulations, typically with oversight by, and budget accountability to, the state legislature. These governing boards are variously established with authority over a statewide system of public universities or over just one institution. For private and religious institutions, respectively, charter documents and individual religious denominations establish the institution, dictate how board members are selected, and hold the institutions accountable under budget and administrative policies.

Board members, holding the title of governors, trustees, regents, directors, overseers, visitors, or something similar, typically serve for a term of years established by law or policy. Governing boards establish basic institutional policy, engage in strategic planning, set standards and expectations, create and/or approve budgets, and hire an institutional executive officer

[9] "AGB Shared Governance", 11.

(IEO), whom they hold accountable for performance, programming, and the general administration of the operations of the institution[10].

While the authority of governing boards varies from campus to campus, most boards essentially act as the "holder of the trust" of the university's mission, and serve as custodians and overseers of the institution's assets, funds, and general operations. They are ultimately responsible for the institutions they serve, and they stand guard over the sacrosanct notion of academic freedom. Board members can come from a wide variety of professional backgrounds, and often include university alumni, elected officials, community and business leaders, and civic-minded individuals. Board membership and service are considered an expression and practice of civic duty in the United States, and service is typically voluntary in the spirit of citizen governance – a concept that is part of the fabric of the American form of democracy[11].

In its 2010 "Statement on Board Responsibility for Institutional Governance", the Association of Governing Boards of Universities and Colleges (AGB) outlined general operational principles and responsibilities for institutional boards:

1. The ultimate responsibility for governance of the institution (or system) rests in its governing board.
2. The board should establish effective ways to govern while respecting the culture of decision making in the academy.
3. The board should approve a budget and establish guidelines for resource allocation using a process that reflects strategic priorities.
4. Boards should ensure open communication with campus constituencies.
5. The governing board should manifest a commitment to accountability and transparency and should exemplify the behavior it expects of other participants in the governance process.
6. Governing boards have the ultimate responsibility to appoint and assess the performance of the president.

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[10] "Governance and Decision-Making in Colleges and Universities", Education Encyclopedia – State University.com (2019): 2. September 5, 2019 https://education.stateuniversity.com/pages/2014/Governance-Decision-making-in-Colleges-Universities.html.

[11] "Governance and Decision-Making", 2–3.

7. System governing boards should clarify the authority and responsibilities of the system head, campus heads, and any institutional quasi-governing or advisory boards.
8. Boards of both public and independent colleges and universities should play an important role in relating their institutions to the communities they serve"[12].

The governing board's formal delegation of authority to an institutional executive officer (IEO) to manage the day-to-day operations of the institution begins and further enables the sharing of authority with respect to campus governance.

4.2. Institutional Executive Officer (IEO) – President/Chancellor

Higher institution boards delegate authority and responsibility for the administration of institutional operations to an executive officer (IEO), commonly called a president or chancellor, whose role, function, and responsibilities are similar to those of a chief executive officer (CEO) of a corporate business. As the chief campus administrative officer, the IEO leads and manages the institution, implements and administers policies set by the board, guides the university according to established policies and procedures, and hires and leads other key administrators. The IEO oversees university programming, establishes long-term strategic goals, as well as short-term operational goals, and, together with his/her leadership team, basically oversees all the operations of the campus, ranging from academic, student, and financial affairs, to athletics, fundraising, alumni relations, and external/community relations. Shared governance occurs as the IEO engages campus constituencies in decision-making, delegates authority and management over certain aspects of the university to other officials on campus, and holds those individuals accountable for executing policy and programs, as well as for achieving results.

[12] "Statement on Board Responsibility for Institutional Governance", Association of Governing Boards of Universities and Colleges (AGB) (January 22, 2010): 5–9. September 5, 2019 https://agb.org/wp-content/uploads/2019/01/statement_2010_institutional_governance.pdf

4.3. Key Administrators

Principle administrators serving under the IEO may include a wide array of vice presidents, academic deans, department chairs, program directors, managers, and other professionals who have responsibility for a particular aspect of the university's programs or activities. Typically, the head of the academy is a vice president, provost, or a similarly titled official who has top-down administrative responsibility for all academic, faculty, curriculum, and teaching functions. Vice presidents for finance, student affairs, research, advancement, external affairs, executive affairs, university relations, and other key areas are also frequently employed at U.S. universities. Their respective portfolios and responsibilities vary from campus to campus. All of these administrators share in the governance, management, and administration of the university with regard to the personnel, programs, and functions under their respective purview.

4.4. President's Cabinet or Council

Most universities operate with a president's cabinet or council that, in one form or another, includes officials who represent all or most of the key constituencies and functions on campus. This forum of representatives of the university serves as a major platform for campus governance, policy-setting, decision-making, budget prioritization, and advisement for the president and other officials. They engage variously in long-range planning and in short-term operational decisions. Some members of the cabinet may serve continuously as long as they hold a certain position, such as a vice president with a particular portfolio. Other cabinet members may change individually from time to time as their constituent groups change leadership. In most cabinet organizational models, the highest form of shared governance can be found in practice. In true democratic style, cabinet members represent a campus sector, administrative portfolio, or other constituent group. Yet, they work collaboratively to discuss issues, make decisions, arrive at consensus, and help shape the direction and mission of the university. Periodic meetings are typical, complete with an agenda, minutes, business action items, discussion topics, and a general sharing of the campus's activities and environment among colleagues, both in general

and on specific topics. The record of Cabinet deliberations and decisions is generally made available to the university community, if not to the general public, as well.

4.5. President's Executive Committee/Council (EC)

Some universities employ the use of a small, select, top-level executive committee or council to consider major issues on campus, serve as a "steering committee" or sub-cabinet group for decision-making and policy implementation, and support the president as close advisors. This group can meet regularly or at the call of the president, and it typically includes the vice presidents and any other top officials of the university preferred by the president. This executive committee or council assists the president with advice and decisions on major issues, including those that are driven by a sense of urgency. It can also serve as a planning group for issues that need full cabinet attention. The EC usually consists of the president's closest and top advisors, such as the vice presidents, and, thus, serves as another forum for the practice of shared governance.

4.6. The Faculty and the Faculty Senate

The faculty of a university are the essence of the academic institution, and they play an important historical role in the governance of universities in the United States. The imperative for their engagement stems simply from the fact that the faculty are the heart and soul – the core – of the university in their instructional, research, and service capacities. They typically have a role in a wide spectrum of matters and processes ranging from policies, decisions on the curriculum, rank and tenure, and subject matter and methods of instruction, to research agendas, faculty status, consideration of the university budget, and the safeguarding of academic freedom on campus. They set the requirements for general education courses and for the degrees granted by the university, and authorize the university to grant degrees. Members of the faculty engage in these areas of review and decision-making at all levels in campus processes, from the inner workings of their departments, divisions, colleges, and schools, to service on numerous important campus-wide and departmental committees, to the evalua-

tion of student progress, and up the administrative ladder to the academic council and the university president's cabinet. The faculty provide valuable support to the administration through their interaction, advice, and recommendations on issues such as salaries, course loads, and department chair selection.

In addition to the traditional institutional involvement afforded the faculty as described above, most U.S. university faculty exercise much of their shared governance role through a faculty senate. The university faculty senate is a longstanding tradition at U.S. institutions of higher learning. Comprising elected members from across the academy, the faculty senate can be a small (15–30) or large (a hundred or more) representative group in size, depending on the size, organization, and needs of a particular university. It is one of the basic and most important forums and outlets for the faculty's engagement in shared governance on a campus.

Faculty senates meet regularly, and, depending on the institution, can be charged with responsibilities for many of the functions outlined above. Additionally, faculty senates often fulfill the role of providing "checks and balances" to the university administration, another democratic principle borrowed from the U.S. governmental model. They have been known to evaluate administrators and programs on campuses, offer opinions and advice on any number of issues, and even censure or express lack of confidence in the performance of a president or other university official. The scope of issues that the faculty senate may consider is basically endless, including organizational, structural, social, cultural, work-place, and academic matters. Its basic mission is to represent the best interests of, and speak for, members of the academy. Its discussions, recommendations, and actions are intended to advise the administration and influence university-wide decision-making. Many universities include the faculty senate president as a member of the university president's cabinet, further enhancing the practice of constituent representation and shared governance.

4.7. Academic Council

Many universities utilize an academic council to focus on concerns and decisions that specifically affect the academy, curriculum, academic calen-

dar, class schedules, and related matters. This council is usually chaired by the vice president for academic affairs or provost, and its membership normally includes academic deans, the registrar, and other key officials with direct responsibility for academic decision-making. The academic council is a vital component of many universities' organizational structure, and it is charged with significant decision-making authority. In this way, the academic council is a major player in the realm of shared governance and authority. Some universities also include a representative from the academic council on the university president's cabinet as another way to practice shared governance.

4.8. Academic Colleges and Schools

For administrative purposes, most universities divide the academy into organizational units known as colleges or schools, typically presided over by a dean. These entities consist of various academic departments, divisions, and programs. Colleges and schools within a university structure are empowered to engage in substantial decision-making regarding the departments, divisions, and programs within their purview, and the dean works with the chairs and other faculty members to consider issues and make decisions pertinent to their academic fields. Additionally, some institutions utilize a deans' council to advise and work with the academic vice president or provost on certain matters and decisions affecting the colleges or schools. These collaborations are further examples of shared governance.

4.9. Academic Departments, Divisions, and Programs

Similar to the above description of shared authority and decision-making opportunities and practice for an institution's colleges and schools, the next organizational level down – academic programs, divisions, and programs – also engages in significant ways with respect to academic programs, curriculum, majors and minors, teaching assignments, and course content, as well as the overall mission of the entity. Departments and divisions are typically led by a chair, and programs usually have directors or managers.

4.10. Administrative Staff Council

Just as the faculty organize a representative senate, members of the university administrative staff often organize a staff council. This council typically is an association of non-faculty and non-administrative employees of the university, and its leadership is elected or selected from the staff population. Much of the council's activity generally surrounds professional development, workplace improvement, and matters and activities relating to its membership. However, the staff council frequently has a voice and a role in discussing and considering decisions regarding campus affairs that are specific to the administrative staff, and even to the university at large. The council often makes recommendations for consideration by the president's cabinet, and many universities include the chair or president of the administrative staff council as a full voting member of the president's cabinet. As an engaged constituency, the administrative staff council and its membership participate in the exercise of shared governance.

4.11. Campus Committees and Task Forces

On most university campuses, a considerable amount of work, research, programming, and planning is conducted through a variety of university committees and task forces. Most institutions have standing committees that devote attention to institutional matters such as tenure and promotion, and certain aspects of campus engagement, activities, and life. Sometimes a special committee or a task force might be appointed to address a specific topic, such as a search, a particularly difficult topic, complaints, a campus process such as the appeal of a personnel decision, or any number of concerns. Committees and task forces are typically populated by either a cross section of campus stakeholders, or a group of individuals from a specific area with expertise in that field. In at least a minimal way, the functions of campus committees and task forces also serve the purpose and mission of shared authority and governance.

4.12. Alumni Relations/Affairs

While not directly involved with the main thrust of a university's mission – i.e. instruction, research, and student development – the alumni affairs function on a campus plays an important role in keeping graduates of the institution connected to their alma mater and knowledgeable about campus affairs, even if from afar. A university director of alumni relations/affairs and his/her staff are the liaisons between the university and alumni, and those relationships are valuable to the institution from a perspective of support (financial, volunteer, and program), reputation, pride, and other forms of engagement, such as recommending students for admission and sponsoring alumni-based social events. To some extent, alumni association boards, chapters, and even individuals are given the opportunity to provide input on general university matters, at least in the form of opinions or advice to the university administration. In most cases, they also self-govern with respect to the organization, structure, and activities of the alumni association itself. Shared authority is not highly prevalent in the context of alumni relations, but it does exist to some degree, especially in the form of a voice from an important constituency of the institution.

4.13. University Foundation/Fundraising and Donors

All U.S. institutions of higher learning engage in fundraising from a wide variety of sources, including alumni, government grants, businesses, private foundations, and friends of the university. This enterprise is typically conducted by university officials, *per se*, in the case of private universities in some cases, or, in the case of public universities, by a separate, private foundation established for the sole purpose of raising private funds for the university in support of its mission. In the case of private foundations, a separate board of directors or trustees essentially governs the foundation and its activities, usually in conjunction with the university's advancement functions.

Foundation board members can be drawn from the ranks of alumni, local businesses, political leaders, university friends, and donors. These individuals are usually high profile, successful professionals who volunteer to serve the foundation as a civic and educational duty. While

usually preoccupied with the major challenge of raising funds for the university, these individuals carry a high level of credibility and respect in university circles, and their opinions and advice matter to the university leadership. Donors to a university, especially major gift donors, also may engage in a more direct way with the university in ways such as directing the use of funds given for student scholarships, research, or any number of university functions that may be designated to receive financial support from the donor. In these ways, however tangential or minimal, foundation boards and financial donors join in the exercise of shared governance on many campuses.

4.14. Student Engagement

The involvement of students and their voice in the administration of a university is an important feature in higher education. After all, students are the raison d'etre for the institution's very existence. They are our target audience and the primary users of our services. Student engagement can take many forms, including student government activity, student service on university committees, and the voice of student organizations across a wide spectrum of interests, ranging from honorary, service, and fraternal societies to religious, professional, and sporting clubs. Student government is quite prevalent throughout the U.S. higher education world. Through self-governance relating to student-focused issues on campus, student leaders are elected and appointed to various positions to represent and serve their student peers in conducting a wide array of student-related functions on campus. This service provides the benefit of a democratic leadership laboratory for those students who participate.

The student voice on a college campus is important and should be heard. Most universities embrace methods to involve students formally in issue discussion, information dissemination, and, to some extent, decision-making regarding policies that affect students and their academic and extracurricular activities. For example, campus committees dealing with searches, policy consideration, and activities often include student members. Some universities even include the president of the student

body as a non-voting or even full-voting member of the university president's cabinet.

There is a long-standing tradition of student voice and expression on U.S. university campuses that underscores and celebrates both the American legacy and constitutionally protected right of free speech, and the university's role in providing a forum for expression, discussion, and debate for any of its constituents, especially its students. University administrations are wise to listen to student interests, and engage the student voice. Student opinions and actions can and do influence university administrative decisions on many levels. In all these cases of student engagement – individually and collectively – a certain, if modest, element of shared governance is afforded to students.

4.15. Intercollegiate Athletic Department/Activities

A large majority of U.S. universities sponsor intercollegiate athletic activities in a number of sports. Athletics is a major part of university life in America, and it can be both a big business and a big budget item for an institution. The responsibility for these enterprises falls to the university athletic department, typically headed by an athletic director. That individual hires the team coaches and oversees all the sports programs and their budgets. While ancillary to the academic mission of a university, college sports are embedded in the fabric of higher education in the U.S. like nowhere else in the world. College athletics are important to sports fans, alumni, donors, recruiters, and the universities at large. Those individuals and corporate sponsors who support college athletics, as well as fans and alumni, feel a vested interest in their chosen university sports programs. University pride, reputation, and standing are often influenced greatly by the success and effectiveness of the athletic program. Consequently, as a major constituent of a university's domain, the athletic department has a certain modicum of input in university decision-making related to budgets and priorities. Thus, to some extent, shared authority and governance extend to intercollegiate athletic programs, as well.

5. OTHER INFLUENCERS, OVERSEERS AND ENGAGEMENTS

While not directly involved with campus governance, *per se*, numerous external factors, regulatory entities, and organizational engagements and activities often influence a U.S. university's attitude toward, and practice of, shared authority and governance.

5.1. Institutional and Program Accreditation and Certification

Absent a central governmental authority overseeing U.S. higher education, as is found in many countries around the world, U.S. institutions of higher learning, nevertheless, must undergo the scrutiny and approval of U.S. Department of Education-endorsed accreditation agencies that are organized by region around the country. These entities employ higher education experts and evaluators whose job it is to visit, audit, evaluate, and accredit colleges and universities in America to ensure high standards of academic and business performance. That accreditation is the gold standard for U.S. universities, and compliance is always an issue, both during periodic evaluations and continuously throughout the years between evaluations.

These accreditors set the standards for a variety of university functions, including faculty credentials, curriculum design, campus governance, budget processes, and other activities central to a university's success. In addition to institutional accreditation at-large, certain academic colleges, schools, departments, and programs in the U.S. are also subjected to required or recommended specific accreditation by a recognized national or regional evaluation entity in a particular field or concentration. Similarly, there are certification programs for various academic disciplines and their faculty. In these vital, if extended, ways, external accrediting and certifying entities have a role in – and certainly an important influence on – the notion of campus shared governance.

5.2. Governmental Involvement and Oversight

All U.S. universities are subject to a variety of governmental influence and oversight that can emanate from federal, state, and local governmental

agencies and regulation. At the top of the list for public universities, of course, is their governing board, which is constituted by their respective state government. State universities also depend, at least to some extent, on budget support from their state, so the state budget process and legislative oversight apply to public universities and colleges. State regulatory agencies also have a hand in overseeing university enterprises, such as state-sponsored retirement programs, environmental compliance, and building and renovation supervision. Examples of federal government involvement and oversight also include federal regulation of student tuition grant and loan programs, mandated federal civil rights and social programs, federal research and service contracts, and compliance with a plethora of federal laws and regulations concerning taxation, health and safety, environmental concerns, and immigration policy, among many others. Local governments may have special relationships with a university regarding public services and land usage. Governmental relationships at all levels play an important role in how a university governs and administers its operations and programs.

5.3. Professional Associations

U.S. universities, their academic units, and individual faculty members often belong to national, regional, and state professional membership associations that provide a variety of services, resources, and targeted engagement opportunities for their membership. There are several national associations that serve and support higher education generally, as well as specific organizations for discreet sectors such as public, private, or religious institutions. These organizations typically concern themselves with academic and leadership conferences, research, standards, best practices, educational trends, and issue management, as well as publications, information dissemination, and government relations services.

There are also national associations in specific academic fields that serve the departments and faculty members in those areas of endeavor. These associations provide important and unique resources and capabilities for universities and their stakeholders, and, thus, can play a significant role in supporting professional development, research and other scholarly endeavors, increased institutional and individual knowledge

and skills, and networking with other professionals in the higher education world.

Through these relationships and avenues, professional associations can have an influence on how an institution governs and manages itself.

5.4. Unions

Many universities in the U.S. engage with one or more trade unions on their campuses. These unions represent sectors of a university's employment base, and, consequently, have an influence on employment conditions and compensation. Some observers argue that unions today are actually a part of shared governance on campus because of their importance and influence in university decision-making.

5.5. Relevant Legal Precedents and American Jurisprudence

U.S. universities are subject to federal and state constitutional, code, and case law jurisdiction. Federal and state laws, and court decisions in the U.S. common law system, all play an important role in shaping the organization and actions of institutions of higher learning.

Basic U.S. constitutional concepts, such as due process and equal protection, permeate the organization and processes of U.S. universities. The First Amendment of the United States Constitution that provides individual guarantees of freedom of speech and assembly, coupled with a long line of case law precedents, ensure that these special liberties and protections remain intact everywhere in the country, including on college campuses.

The totality of federal and state codified laws that affect higher education can be considered part of the framework in which institutions of higher learning have to operate. As examples, the federal Family Education Rights and Privacy Act (FERPA) affords students certain rights of privacy relating to their student records, and The Health Insurance Portability and Accountability Act (HIPAA) provides data privacy and security measures for safeguarding medical information.

More specifically to higher education, there are numerous lines of court decisions dealing with tenure, promotion, academic freedom, free speech, research outcomes, intellectual property, and myriad other topics.

Like society in general, universities must be attentive and subject to the laws of the land, and jurisprudential influences on higher education are extensive.

5.6. Community Engagement/Town-Gown Relations

U.S. universities strive to foster good relations with the city, town, or locale in which they are situated. There is considerable and mutual benefit to cooperation and collaboration on matters ranging from events and activities to facility use and project sponsorship. The basic fabric of good town-gown relationships typically includes some modicum of economic, cultural, and social interdependence. Universities also embrace various forms of community engagement that can include providing programs, classes, and facilities for local citizens; organizing conferences; supplying faculty and student volunteers for charitable projects; and, hosting visitors for special educational, cultural, and social events. These relationships and collaborations that focus on positive community engagement have an important influence on the operations and roles of a university.

5.7. Media Influence

Like all organizations and sectors in the public eye, universities are subject to the scrutiny and influence of the media. Whether a university is being proactive in placing advertisements, providing stories for print or broadcast, or responding to press inquiries and investigations, the influence of the media is always present. University communication and marketing plans and activities help shape the image, brand, and reputation of the institution. And, the media's influence – including social media more than ever – can have a significant impact on the public relations and publicity strategies of a university, as well as on internal operations.

5.8. Other Engagements, Arrangements, and Examples

There are countless examples of other activities, engagements, and arrangements – far too many to list here – that foster and support shared authority and governance on a university campus. These examples usually

entail internal operations such as faculty and staff personnel searches, program reviews, selection of departmental chairs, and special projects that serve the university or one of its departments or programs. Typically, representatives from the faculty and staff ranks undertake these responsibilities, thus contributing to shared decision-making and governance.

6. SHARED GOVERNANCE THROUGH THE LENS OF ONE INSTITUTION – DELTA STATE UNIVERSITY

I can perhaps comment most authoritatively about the informal model and system of shared governance employed at the university that I lead – Delta State University in Cleveland, Mississippi.

Delta State is a rather typical public, regional state university in the southern region of the United States with an enrollment just under 4,000 students. Our academic offerings are organized and delivered through a nursing school, a graduate school, and three colleges – Arts and Sciences, Business and Aviation, and Education and Human Sciences.

As president, I consider shared governance to be a key element in how Delta State is governed and managed. From an organizational and structural perspective, the university employs many of the functions and features outlined above, and discussed in more detail below. In numerous ways, the key tenets of shared governance permeate campus administrative, management, and decision-making processes at all levels.

However, a vital part of shared governance is the attitude with which it is approached and implemented. By that, I mean the need for genuine sharing of ideas, superb communication, active participation, transparency, and trust on the part of all players or stakeholders. It means giving voice to campus-wide interests in a truly deliberative manner. It includes hearing all sides of an issue before making a decision, and ensuring that voices and votes matter. While no system is ever perfect, I believe that Delta State enjoys a high level of shared governance, because its leaders and its stakeholders are committed to the principle. Like democracy, shared governance is often difficult and challenging because it requires the investment of a significant amount of time and energy – by many stakeholders – in communicating, consulting, researching, collaborating, and, ultimately, decision-making.

6.1. Shared Governance Practices and Engagement at Delta State University

The profile and practice of shared governance at Delta State University include many of the elements and features previously discussed. The sharing aspect begins with a system-wide governing board that hires the IEO. The Board of Trustees of the Institutions of Higher Learning of Mississippi, appointed by the governor for nine-year staggered terms, and its Commissioner of Higher Education, appointed by the Board, delegate the administration and management of this university to me as president. In turn, I lead the university, and engage the campus constituencies, in a variety of ways to ensure representation of viewpoints in discussions and deliberations that lead to decisions, and I delegate a significant amount of decision-making to other administrators and groups.

The president's cabinet is a very important ingredient in this engagement. My cabinet consists of ten professionals representing basically every area of activity on campus: Vice President for Academic Affairs and Provost; Vice President for Executive Affairs and Chief of Staff; Vice President for Finance and Administration/Chief Financial Officer; Vice President for Student Affairs; Vice President for University Advancement and External Relations; the Director of Athletics; a dean representing the Academic Council; the president of the faculty senate; the chair of the administrative staff council; and, the president of the student government association. The cabinet meets weekly throughout the year, and is the basic representative decision-making body on campus with respect to policy, programming, and budgeting. The cabinet also meets for one or two days each summer in retreat fashion to consider long-range and strategic planning, and to address major issues or challenges confronting the institution.

The president's executive committee consists of the five vice-presidents noted above. We meet weekly, as well, to consider key campus issues prior to cabinet review, and to formulate decisions on any number of matters that need to be made in a timely fashion. The five vice-presidents are my closest advisors on campus, and, together, we comprise the top leadership and administrative team for the university.

The university academic council advises, and is chaired by, the Vice President for Academic Affairs and Provost. It considers academic pro-

grams and issues, the curriculum, degree requirements, and the academic calendar. It is composed of the deans of the university, – including Arts and Sciences, Graduate School, Education and Human Sciences, Business and Aviation, Nursing, and Library Sciences – Registrar, president of the faculty senate, executive director of the Student Success Center, and chief information officer. It can make recommendations to the president's cabinet, but it also shares some independent decision-making with the Provost.

The Provost also presides over periodic meetings of the informal Deans Council that is charged with overseeing the general administrative and academic guidelines used to govern the respective schools and colleges, and implementing strategies. Within each college or school, a dean provides leadership, and works with the departmental and divisional chairs to conduct and administer the business of the academy. Chairs routinely meet with members of their respective department or division to ensure implementation of the academic mission, and to address issues and details specific to that particular unit. Academic decision-making is distributed and shared throughout these processes.

As a matter of institutionalized policy, Delta State University recognizes representative bodies that foster and practice shared governance. These entities include the faculty senate, administrative staff council, and committees, all of which participate in university policy discussions and decisions, as discussed below[13].

The faculty at Delta State University fulfill most of the basic roles, and are afforded the respect and engagement, outlined in the general section above on "The Faculty and Faculty Senate". The faculty senate at Delta State serves as the pinnacle delivery system for the faculty voice. It is an active and very representative organization with delegates from every quarter of the academy. Senators are elected from their respective academic units, with a total senate composition of twenty-four, plus a proxy for each senator, when needed. At any given time, four dozen members of the faculty can be engaged in senate activities. The senate meets monthly to discuss a wide array of issues and concerns, and to formulate recommendations to

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[13] Delta State University Policies, "Representative Bodies," (2019) September 9. 2019 http://www.deltastate.edu/policies/policy/university-policies/university-governance/representative-bodies/

the administration. The senate president sits on the university president's cabinet, thus providing representation of the faculty in the highest decision-making forum on campus[14].

Similarly, the university's administrative staff council enjoys representation on the university president's cabinet, thus affording all campus staff a voice and vote on major decisions. University staff from all quarters of campus select representatives from their respective administrative unit to serve on a council of thirty members. The council's elected leadership guides programming that focuses on professional development, workplace issues, and service.[15]

Dozens of campus standing and special committees, variously composed of faculty, staff, and students, engage in a number of important functions involving review and decisions concerning campus policies, hiring, adjudications and appeals, tenure and promotion, and internal operations. These engagements further support the university's effort to involve important constituencies in campus governance.

The president of the student government association also serves on the university president's cabinet, with full representational and voting rights. This arrangement ensures a direct link from the student body to the highest decision-making on campus. Delta State recognizes and respects the educational and participatory value and benefits of student engagement in campus issues and decision-making as important features of a thriving university, and we encourage our students to be involved on many levels.

Intercollegiate athletics is an important component of Delta State's mission, alongside the primary focus on academics. These competitive programs afford our student-athletes the opportunity to continue playing their chosen sport at a very high level during their college years. The director of athletics serves on the university president's cabinet, and brings a representational voice and vote to that body from this important sector.

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[14] "Delta State University Faculty Senate", (2019) September 5, 2019 http://www.deltastate.edu/about-dsu/administration/faculty-senate/

[15] "Delta State University Administrative Staff Council Constitution and By-Laws", (2019) September 5, 2019 http://www.deltastate.edu/MediaFiles/Administrative-Staff-Council-Bylaws-Updated-Sept-2016.pdf

The functions and activities of alumni relations and development/fundraising fall under the jurisdiction of the Vice President for University Advancement and External Relations, who has a seat on the president's cabinet. The boards of both the Alumni Association and the Foundation, composed mostly of Delta State alumni and supporters, provide valuable support, contacts, and networks for the university, and their voices and interests regarding issues of concerns are heard and considered by the university.

Delta State University and our faculty and staff have a healthy level of engagement with national, regional, and state professional associations that help support the professionalism of our enterprises. The university also works cooperatively with federal and state governmental and regulatory entities to comply with a variety of education-based and work place laws and policies. The university itself is accredited by the Southern Association of Universities and Schools Commission on Colleges, and many of our academic programs, such as nursing, art, counselor education, business, aviation, accounting, social work, teacher education, and music, are accredited or certified by their respective accrediting bodies. And, we engage with our local communities in a wide array of ways, with an eye toward maintaining excellent town-gown relations. A recent study showed that the university has a $175 million economic impact on our surrounding region.

All of these engagements, relationships, and practices serve to support the concept of shared governance at Delta State, and they are all important to our operations, success, and future.

7. CONCLUSION

As a concept, shared governance is not new to me. As student government president of this university a half century ago, I championed and spoke about shared authority and governance on a university campus. I also embraced the practice during my tenure as national president of the Delta State University Alumni Association more than three decades ago. Today, I have the opportunity to put it into practice as president of my university.

Shared governance is not a perfect formula or panacea for university administration and decision-making. It does, however, provide a methodology, system, and concept that can help guide the leadership of a university as it approaches the administration and conduct of its educational responsibilities. In today's higher education environment, the term governance is rather expansive. In one sense, it means top-down governance that is the rightful role and authority of an institutional board charged with overseeing policy, programming, performance, and executive guidance and evaluation. But, it also variously means the use of institutional strategies, operations, and components to distribute, disseminate, and "share" authority and responsibilities for a university's administrative, management, and decision-making functions, i.e., "on-campus governance". In this respect, shared governance "borrows" many of the attributes and principles of democratic government. In any case, shared governance, in its many forms and applications, is widely practiced in U.S. universities, including Delta State University.

Shared governance supports and advises university leadership and management in important ways. Its practice institutionalizes the welcoming of information and perspectives that can help lead to better information and decisions, and more sustainable decision-making processes. As the campus IEO at Delta State, I rely on the advice, perspectives, and experience of my colleagues in most, if not all, major decisions made on this campus. Their guidance and engagement help the university – and me – make decisions that are reasoned, responsible, fair, and appropriate, while taking into consideration the individual and collective stakeholder interests involved. Together, we attempt to make decisions and take actions that are ultimately in the best interest of the university and our students.

The practice of shared governance, I believe, results in better, well-considered decisions and policies that enjoy the support of a broad array of university stakeholders due to their participation in the processes of deliberation and decision-making. To be successful, its application requires significant time, engagement, thought, and communication, but the return on the investment can be high and rewarding.

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PROSECUTING ATTORNEYS IN A DEMOCRACY – A CALIFORNIA PERSPECTIVE

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ABSTRACT

A prosecuting attorney in a democracy is very important in the processing of criminal cases – from pre-filing to final appeal. Much of the involvement of the District Attorney, both before a criminal case is filed, and during the prosecution of the case, stems from the "Exclusionary Rule". It is the usual case that the police will bring their investigation, their arrest warrant or search warrant affidavit to a District Attorney to review it prior to taking it to the judge. In this connection, District Attorneys will themselves reject 5–10% of the warrant requests submitted to them for approval, often asking law enforcement to do some further investigation before resubmitting the warrant. Furthermore, because of the Doctrine of Separation of Powers, only the District Attorney or the California State Attorney General can make the decision to file or not file a case. This Article illustrates the impact of such discretion. The problem of democracy is strictly connected to the process of DA's selection, what has also been here presented. Another fundamental issue is a role of DA in *voir dire*, mainly because jury trials are guaranteed by the federal Constitution and are associated with the idea of democracy. Separation of Powers and Judicial Control of the DA, the police, and the sentencing of those convicted of crimes have been analyzed from the perspective of the California law. Additionally, the article includes final comments on the technological progress and its impact on criminal law and democracy. All the conclusions have been made in reference to Author's experience as Assistant DA in California.

Keywords: California criminal procedure, District Attorney, democracy

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1. INTRODUCTION

A prosecuting attorney in a democracy is very important in the processing of criminal cases – from pre-filing to final appeal.

What is a Prosecuting Attorney? In California the prosecutor is called the District Attorney. In other States the name might be Commonwealth's Attorney, or State's Attorney, and in the federal system, the prosecutors are called US Attorneys. For ease of reference here I will refer to the prosecutor as the District Attorney. Persons who review reported criminal case decisions from America must notice that the caption of the case varies from State to State. In some jurisdictions the name of the case will be "Commonwealth vs. Smith (the defendant), in others, State vs. Smith, or in the federal system, United States vs. Smith, and in California, People vs. Smith. Significantly, all criminal prosecutions are brought in the name of the government, and in California, all criminal cases are brought in the name of "The People". Thus, at the beginning of a jury trial it is common for the prosecutor to announce, "Ready for the People, Your Honor", and in making court appearances the prosecutor will often be referred to in this way, as the Judge asking, " Are the People ready to proceed?", or "What is the position of the People on this motion?" etc. When testimony starts, the prosecutor will say, "The People call (witness named) as our next witness[1].

2. THE ROLE OF THE DISTRICT ATTORNEY IN STATE CRIMINAL PROSECUTIONS – ARRESTS AND SEARCHES, WITH AND WITHOUT WARRANTS

Much of the involvement of the District Attorney, both before a criminal case is filed, and during the prosecution of the case, stems from the "Exclusionary Rule". Imposed on all 50 States by the U.S. Supreme Court in 1961, the Exclusionary Rule, generally, prohibits evidence that has been

[1] California Government Code Sec. 100(a): The Sovereignty of the State resides in the People thereof, and all writs and processes shall issue in their name. (b) The style of all process shall be "The People of the State of California" and all prosecutions shall be conducted in their name and by their authority.

illegally seized, and statements that have been illegally obtained, from being admitted into evidence against the accused individual. The main reason for the Rule, according to the Supreme Court, is to DETER the police from making illegal searches and arrests—that is – to deny the use of the evidence is the only way to stop the police from violating the U.S Constitution prohibition against unreasonable Searches and Seizures[2].

Because all that follows a finding of an illegal search or arrest will be excluded under the "Fruit of the Poisonous Tree Doctrine", there are crucial decisions that need to be made about what the police can do, and when and where they can search, with or without a Search or an Arrest warrant. The District Attorney is intimately involved in these decisions on many occasions, because the consequences of a mistake can be the loss of the evidence seized, and all that was seized thereafter because of the initial violation. Thus, it is the usual case that the police will bring their investigation, their arrest warrant or search warrant affidavit to a District Attorney to review it prior to taking it to the judge. In this connection, District Attorneys will themselves reject 5–10% of the warrant requests submitted to them for approval, often asking law enforcement to do some further investigation before resubmitting the warrant.

A Search Warrant and an Arrest Warrant are both court orders, signed be a judge and ordering a search of a specific location for items of evidence. Both the location of the search and the items to be seized must be described in detail. This is known as the "particularity" requirement, and stems from the very language of the U.S. Constitutions' 4th Amendment[3].

In California, Search and Arrest Warrants, like criminal complaints, (see fn.1) are captioned: "The People of the State of California" followed by language of the judge's order-for the police to search a particular place for specific items of evidence, and in the case of an Arrest Warrant, naming the person with particularity to be arrested and the charge. These are Court Orders, which are not issued unless an affidavit or statement under oath

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[2] Mapp v. Ohio 367 U.S. 643 (1961).

[3] U.S. Constitution, 4th Amendment: "The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the person or things to be seized".

is submitted to the judge, demonstrating that there is "probable cause" to believe that at a particular place specific evidence will be found, or in the case of an arrest warrant, that there is probable cause to believe that a particular individual committed an offense. In the usual case this means an address of the residence or business to be searched, and the name, date of birth and other identifying information about the person to be arrested. In some unusual cases it is impracticable to get an actual address – This is not required – only that the location of the search be described "with particularity". Thus, attaching a "Google Earth "photo or some other specific descriptor to the warrant and incorporating it by reference is permissible. In the usual case the law enforcement officer swearing to the affidavit does so in writing – but an oral statement, tape recorded, and later transcribed and made a part of the Court file is sufficient, the Judge authorizing the search etc. during a recorded telephone call. This procedure is used more and more in cases where time if of the essence.

Property subject to seizure via a Search Warrant is also described "with particularity". The warrant will not call for the seizure of "evidence that so and so committed a crime" or "stolen property" or other general non-specific terms. No, the warrant will state something like this: "A white, long sleeved cowboy hat"; "a green jade sculpture depicting 3 elephants in a row, all on wooden bases, approximately 6 inches in height", "Phone records for the following telephone number(---)-- – --- – showing all long distance toll calls during the following period of time; January 1, 2019 to October 31, 2019".

A good "test" of whether the warrant meets the "particularity" requirement is to ask if a police officer having no knowledge at all of the underlying criminal case could look at the warrant and determine for him or herself: where to search and what to look for.

Another important point is that the Supreme Court has said the US Constitution demands that impartial judges make the decision to search a residence unless well recognized exceptions are present, e.g. Hot pursuit, emergency, a crime being committed in plain sight of the officer, and others:

"(…) the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who happen to make arrests. Security against unlawful

searches is more likely to be obtained by resort to search warrants than by reliance upon the caution and sagacity of officers while acting under the excitement that attends the capture or persons accused of crime. Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful not-withstanding facts unquestionably showing probable cause"[4].

Prosecuting attorneys and law enforcement officers have significant training and continuing education requirements to ensure that the police actions do not run contrary to the constitution, and result in evidence being suppressed, or cases lost. Of course, there are many nuances, exceptions, and reported case law that further define the ins and outs of arrests and searches and some of it not so simple at all. Police officers trying to navigate in the wake of controlling precedent need and rely on the District Attorney to guide and advise them, when time permits, in the investigation. This is another reason why the District Attorney is very much involved in the investigation of major cases, often before an arrest is even made.

3. REVIEW AND FINDING OF CRIMINAL CHARGES

Once an arrest is made the cases will be submitted to the District Attorney for the filing of criminal charges. If the suspect is at large and the police present sufficient evidence for the case to be filed, an affidavit in support of an arrest warrant will also be prepared-resulting in the warrant being available on line throughout California in the case of misdemeanors, and throughout the United States for felony cases. In many cases the submission of the case to the District Attorney pre-cedes the arrest. The decision whether to bring (file) criminal charges is one of the most important decisions we as District Attorneys make. In the usual case the reports are submitted to the District Attorney by a Court officer of the law enforcement agency bringing the cases to the District Attorney. Recently

[4] United States v. Lefkowitz, 285 U.S.452, 464 (1932).

this is done, more and more, electronically-This saves time, and has added benefits not available in pre-digital times.

A criminal case is not supposed to be filed by the District Attorney unless we feel that the defendant is guilty of the charge and that there is admissible evidence sufficient to prove the truth of the charge, "beyond a reasonable doubt". In some cases, usually those in which the whereabouts of the suspect defendant is unknown, a case might be filed with the thought that upon arrest additional evidence may be uncovered: DNA, stolen property, etc., or incriminating statements might be obtained-usually after a valid waiver of the suspects Constitutional right against self-incrimination[5].

In making the filing decision, and other decisions as the case continues its course through the system, the discretion given to the District Attorney is extremely broad: e.g., to file or not; the level of the charge (felony or misdemeanor); the specific charge selected; to file against all suspects or to grant immunity to some in exchange for testimony; to seek an arrest warrant as opposed to sending the suspect a letter to appear in court; to allow the suspect to be released on bail or on the suspects promise to appear; to file the case under California's Three Strikes law, thus severely increasing the punishment; to seek the death penalty; to file the case in adult court against a juvenile given the nature of the offense, and to enter in to a "plea bargain" with the suspect.

Not every case submitted to the District Attorney is approved for prosecution (filed). For one reason or another about 6–10 % of such cases are rejected at the filing desk. The attorney who reviews the cases ("the

[5] Miranda v. Arizona, 384 U.S. 436 (1966). Miranda of course is the famous case wherein the U.S. Supreme Court ruled that an in-custody defendant must be advised of his or her Constitutional Rights against self-incrimination, to consult with their attorney before and during questioning, and to have a lawyer appointed to represent them before and during questioning if they cannot afford to hire one. Before statements are admissible the Judge must find that the suspect knowingly and intelligently waived these rights. Thus, every law enforcement does not leave the station house without his or her "Miranda" card, listing the 4 rights and the required waiver questions. In America, if a defendant is facing even 1 day in custody he or she is entitled to a free lawyer if they cannot afford counsel. Argersinger v. Hamlin (1972) 407 U.S. 25.

filing Deputy")[6] is usually a veteran prosecutor, not a new or recent hire, as the decision to file is probably one of the most important decisions that we make. The District Attorney has almost unlimited discretion to file or not to file – a fact that makes an unethical, ignorant, or lazy prosecutor so dangerous in our system. The filing deputy has to have the necessary knowledge and experience to determine if the case is winnable, the evidence is admissible, that the statute of limitations has not run, and the many, many additional filing options even if the decision is made to approve the prosecution. So specialized are some of the charges that the cases go directly to veteran prosecutors assigned to specific kinds of cases, e.g. child molestation, sexual assault, domestic violence, elder physical and financial abuse and drugs. In these latter cases the filing deputy will be the Deputy District Attorney assigned to handle the case from beginning to end, thus eliminating the need, say, in sexual assault cases, of the alleged victim having to repeat her story again and again as the prosecutor on the cases changes from investigation, filing, preliminary hearings, and the jury trial.

Once the filing Deputy decides to reject a case it is often referred back to the law enforcement agency for further investigation, and in some cases is resubmitted and ultimately filed. If a law enforcement officer, or the victim, believes that the rejection of the case was unwarranted, there is an appeal process internally that requires the case to be reviewed by a Supervising District Attorney, and in some cases by the District Attorney herself[7].

Because of the Doctrine of Separation of Powers, only the District Attorney or the California State Attorney General can make the decision to file or not file a case. Thus, if law enforcement or an individual victim believes that the rejected filing was in error, they may request the Califor-

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[6] The District Attorney of each of California's' 58 Counties is an elected official, whose name appears on the ballot every 4 years. People can and do run against an incumbent district Attorney. The elected District Attorney can usually appoint his or her top Assistants, but the line prosecutors are civil service employees – all of whom can exercise the full power and discretion of the District Attorney, subject of course to direct guidance or policy as set in place by the elected official. These line prosecutors are commonly referred to as Deputy District Attorneys.

[7] The current District Attorney of Santa Barbara County, Joyce E. Dudley, is only the 2nd female elected District Attorney in the history of Santa Barbara (beginning in 1850).

nia State Attorney General to file the case – and in very rare cases this has been done. A private person, unlike in some of our Sister States, may not institute a criminal action. Only the District Attorney or State Attorney General may do so for State charges. A private citizen cannot "swear out a complaint" as is done in some jurisdictions, and even a Judge is not authorized to order the filing of a criminal case[8].

To illustrate the discretion vested with the District Attorney, it has also occurred that cases were rejected for filing even though the guilt of the defendant was virtually uncontested. For example, a case where a defendant was prosecuted, convicted and sent to prison for multiple forgery counts, and not sentenced to prison for consecutive terms. The District Attorney can reject the filing of additional checks, given the thought that further prosecution will add nothing to the overall enforcement of the criminal law. A second Santa Barbara cases is also illustrative: an elderly woman driving her husband home from the hospital following chemotherapy, inadvertently crossed over the center line on a rural two-lane road, hitting and killing an on-duty California Highway Patrol officer coming the opposite direction on his motorcycle. It is a misdemeanor to drive on the wrong side of the road, and where death results, it is a misdemeanor manslaughter case – punishable by up to 6 months in jail. The driver turned in her driver's license right after the accident, was not herself under the influence of drugs or alcohol, had a spotless record, and was fully insured. A complaint was rejected – the thought being – what is the criminal system going to accomplish here under these unique facts? Should we try to send her to jail?

4. CONFLICT OF INTEREST

Beginning on the filing desk, and continuing for the duration of all criminal cases, significant effort is made to avoid a conflict of interest, or the appearance of impropriety. For example, a good friend and political supporter of the elected District Attorney is arrested, or a criminal referral

[8] People v. Municipal Court (Siple) 27Cal.App 3d 193 (1972).

arrives for filing consideration. In other situations, the relatives of someone in the District Attorney's Office are either witnesses or victims of crime, and a criminal case is pending against an individual. In these cases where an objective observer would be troubled by the possibility of special favoritism or treatment, or the appearance of impropriety, the usual recourse is to refer the entire case to the California State Attorney General's Office. That office has line prosecutors who handle such cases and thus avoid the conflict of interest. In the event the request to take over the case is denied, the usual procedure is to assign the case to a different geographical part of the office – another city in the same jurisdiction – where the principals involved are unknown to the assigned Deputy District Attorney. When this is done, documentation is produced and provided to the attorney representing the defendant, showing that the conflict has been seen and the steps that were taken to minimize the conflict. In the event the attorney for the defendant feels that the steps taken are insufficient, they still have the option to file appropriate requests with the Court, seeking removal of the District Attorney and the appointment of the Attorney General. These steps help ensure fairness in the treatment of the defendant and to minimize the suggestion that an individual is receiving special treatment or interest because of the conflict[9].

5. THE ELECTION OF DISTRICT ATTORNEYS AND JUDGES IN A DEMOCRACY JUDICCIAL OFFICERS

In Santa Barbara County, like in the all of California's 58 Counties, the District Attorney is elected to a 4-year term, and must stand for

[9] People v. Superior Court (Greer) (1977) 19 Cal.3d 255, 266: "The importance, to the public as well as individuals suspected or accused of crimes, that these discretionary functions be exercised with the highest degree of integrity and impartiality, and with the appearance thereof…cannot be easily overstated. The public prosecutor is a representative not only of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape, or innocence suffer."

re-election every 4 years. It is not unusual from time to time for individuals to mount campaigns against a sitting District Attorney or Judge. Judges of the Superior Court – the trial courts, in these same Counties, run for election for 6-year terms. Appeals from the Superior court are resolved by the California Courts of Appeal, and in some cases, by the California Supreme Court. Unlike elections to positions on the Superior Court (the trial court) elections for the Courts of Appeal and Supreme Court are not contested by one person running against another. Rather, when the term of the judge is due to expire, the Judge will appear on the ballot with the voter being asked to retain or not retain the Judge. This occurs every 12 years at the same time as the general election. If the majority votes "no" the seat becomes vacant and is then filled by the Governor of California.

Thus, for both the elected District Attorney and for Judges of the Superior Court, they must stand for election every term – and can – and do have opposition candidates run against them. Probably the most significant California non-retention of Judges occurred in 1986. There, led by a "white paper" prepared by the California District Attorneys Association, detailing many cases, the public was presented with a record of 4 Justices of the California Supreme court who were regularly reversing death penalty cases, often for what seemed to the public as a trivial reasons. The 4 Justices were painted as opposed to the death penalty in widespread pre-election advertisements. These were usually accompanied by the gut-wrenching facts of the cases themselves[10]. The voters overwhelmingly voted "NO" for three of the 4 targeted Justices, (57%-65%) and they were then removed forever from the Supreme Court. A similar result occurred in 2010, when 3 Justices of the Iowa Supreme court lost retention elections following their decision to legalize same-sex marriage[11]. A final example involves the "Recall" of Judge Aaron Pesky, a Judge of the Superior Court in Santa Clara, California. In 2016 he granted probation to a defendant in a mul-

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[10] E.g., People v. Stankewitz (1982) 32 Cal 3d 80,85 (Stankewitz and others kidnapped the female victim off the parking lot of a convenience store, drove to a secluded location where Stankewitz ordered her out of the car, put the gun a foot from her head and shot her dead. He returned to the car saying to his friends; 'Did I drop her, or did I drop her?" One replied "you dropped her" and they all then laughed.

[11] Varnum v. Brien 763 N.W. 2d 862 (Iowa 2009).

ti count sexual assault case, in what many observers felt was too lenient a sentence. It was also suggested that the lenient sentence stemmed from the fact that the defendant was a college athlete. Signatures were gathered sufficient to have a "recall" election – and the voters removed the judge from the bench. The elected District Attorney in Santa Clara County opposed the recall, but agreed the sentence was too lenient[12].

6. THE DISTRICT ATTORNEY

Like judges, but with much more frequency, elected District Attorneys face opposition when their 4-year term is ending. They must then run for re-election. If no one files the required paperwork to challenge the incumbent – or if only one person files the necessary documents, then only one name appears on the ballot and the election is a foregone conclusion. Elected District Attorneys are often anxious as the filing date draws close, to see if they will have any opposition.

Money and politics now play a significant role in these elections. For example, with the legalization of Marijuana in California, large growers are capable of making significant campaign contributions to the candidate of their choice, not just the District Attorney, but other elected local officials. The same is true of casino gambling-illegal in California – with one notable exception: land upon which a recognized Indian Tribe is located can, and do, run full scale casino type gambling establishments – and a huge amount of money is involved. These interests can, and do, make significant political contributions to state and local elected officials, and can do so with respect to a candidate running for District Attorney, Judge, or any other State or local office. Santa Barbara County is home to one such casino, which in operation is indistinguishable from similar establishments in Nevada, where gambling is licensed and legal.

Many candidates for District Attorney, Sheriff, and some other State and local office refuse to accept contributions from marijuana growers and

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[12] "California Judge Recalled for Sentence in Sex Assault Case", *Harvard Law Review* 132: 1369 (Feb. 2019), https://harvardlawreview.org/topics/feminist-legal-theory/.

casino operators, as the public in general does not like it. Nevertheless, the ability of such interest to make large donations is a dangerous situation.

Superimposed on the issue of money is outright opposition to an elected District Attorney, coupled with support for an individual running for the office who is seen as more "progressive" meaning less inclined to seek harsher sentences, to be more sensitive to race issues, and often campaigning on a promise to not seek the Death Penalty in any case, to not use various enhancements that increase the sentence dramatically (like alleging prior convictions or gang membership), and to make the police more accountable for police shootings and use of force in everyday encounters (often of a minority member of the community). Currently in California it is fair to say that most of the attention is drawn to the election for Los Angeles District Attorney. That office, the largest local prosecuting office in the United States, nearly 1,000 Deputy District Attorneys! The 2020 election will pit the incumbent against a former Public Defender as well as the former District Attorney of San Francisco, who recently quit that position, moved to Los Angeles, and is running for District Attorney of Los Angeles County. Like with other larger counties in California, it is expected that George Soros and the Open Society group will funnel large amounts of money into the campaign of their chosen candidate. This was attempted last year in three other counties here in California, but the incumbents were all re-elected. In other jurisdictions throughout the United States huge contributions have enabled these "progressive" individuals to become the elected District Attorney.

Crime remains a problem in America. Chicago, Illinois, with a population of less than 3 million people had 518 homicides in 2018. The overwhelming majority of Chicago shootings is Black on Black crime, causing some to say that criminals are the worst racial profilers. In 2019, 38 law enforcement officers have been killed by gunfire from suspects; police shootings have resulted in 896 individuals being shot and killed by the police in 2019 so far.

7. TRIAL BY JURY – DEMOCRACY IN ACTION

It is difficult to imagine any one thing more illustrative of Democracy in America than the Jury Trial. Most individual's participation in government is limited to voting and being on jury duty. The whole process itself stands in stark contrast to other systems.

Some basic legal principles have now been decided by our Supreme Court and by the very terms of our Federal and State Constitutions.

Who is entitled to a jury trial in a criminal case? The U.S. Supreme court has held that if the individual is facing a penalty of 6 months in jail or longer then the Federal Constitutions provision guaranteeing a right to trial by jury is applicable[13]. Thus, in some States, most misdemeanors do not permit trial by jury, and the same is true for misdemeanor federal criminal offenses, e.g., a protester being arrested for trespassing on a military base. In California however, under our State of California Constitution, all persons who face the possibility of 1 day in jail are entitled to a full jury trial.

Very recently the Supreme Court decided that a unanimous verdict is required to convict the defendant of a serious crime. Crimes that carry a punishment of less than 6 months in custody are not required by the Federal Constitution to be tried by a jury[14].

In California, our State's Constitution mandates that the jury will consist of 12 persons and, by statute, that the verdict must be unanimous – 12 out of 12 to convict or acquit an individual[15].

Juveniles (individuals under the age of 18 who are being prosecuted in Juvenile Court) and not as adults in the regular adult courts, are not entitled to a jury trial[16].

The Jury Services Section-a part of the Superior court – obtains the names and addresses of all persons in the jurisdiction who have a California driver's license. This information is added to another group of names

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[13] Blanton v. City of North Las Vegas (1989) 489 U.S. 538. [Penalty also included a $1,000 fine, driver's license restriction and attendance at alcohol and driving class].

[14] Ramos v. Louisiana 590 U.S. (2020).

[15] Calif. Const., Art. 1, Sec 16.

[16] McKeiver v. Pennsylvania (1971) 403 U.S. 528.

and addresses obtained from the County Voter Registration lists. These lists are combined, and duplicates eliminated. Those on the list then are sent a juror questionnaire – asking if the address information is correct, if they are over the age of 18, a phone number, and if the individual can speak and understand English. The questionnaire also asks if the individual has suffered any felony convictions, and, significantly, if the person is a U.S. Citizen. In California and in some other states, non-citizens can obtain a valid driver's license, but, as of now, still cannot vote in general elections. The only exemptions are for peace officers and nursing mothers. Thus, it is not unheard of for trial judges, district attorneys, criminal defense attorneys, doctors, nurses etc. to be included in the jury pool called for a particular case. In addition, in many states individuals who have a felony conviction – usually for possession of drugs – can now have that conviction expunged following either the legalization of the drugs, or by statutory changes making the crime a misdemeanor, and thus not a bar to serving on a jury in America.

Once the questionnaire is returned to the Jury Services Section a computerized list then is prepared of those persons eligible for jury service. Many California Counties have branch courts spread throughout the County, and cases from one particular area are usually tried in that same area, thus making it convenient to the witnesses and to the jurors who have to serve in the trial. An example of this is the well-known prosecution of pop singer Michael Jackson, then a resident of Santa Barbara County. His alleged crimes occurred, not in the area of the City of Santa Barbara, but closer to the Judicial District served by the Superior Court in the City of Santa Maria (also in the County of Santa Barbara)[17]. A third district serves Santa Barbara County cases that are closer to the City of Lompoc, and all three cities have a number of Superior Court Judges who serve there in both civil and criminal Departments.

The usual course of a criminal case is for the defendant to enter a not guilty plea, prepare and file certain pre-trial motions, and, in felony cases, to determine at a preliminary hearing whether there is probable cause for

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[17] The "Neverland" Ranch is located in Santa Barbara County. The trial, including jury selection, lasted 4 ½ months, ending with an acquittal on all counts on June 15, 2005. Jackson died 4 years later in his Los Angeles home from an overdose of propofol.

the case to move forward. As can be seen below, most criminal cases settle, either by way of an outright plea or following a "plea bargain".

If a criminal case cannot be settled, the trial date will be set about 2–3 weeks in the future, on a date certain. Once that happens then the Jury Services personnel send out a juror summons – it is a Court Order – commanding those individuals to appear at the date and time set for the jury trial. In the typical case about 100 persons are summoned. Those who do not appear are contacted, if possible, to determine the reason for non-appearance – usually because they have moved, died, forgetfulness, and in some cases, no excuse is given. In these infrequent cases the Court will usually set a hearing ordering the person to appear to show cause why they should not be held in contempt for court for failing to appear. These individuals spend a few sleepless nights awaiting the hearing on their possible contempt!

Once those on the Summons appear, some excuses are taken – usually sickness or immediate health concerns, and then the entire group – now usually 90–100 persons it taken to the courtroom of the judge assigned to the trial. They fill the courtroom as the lawyers for the parties, and their clients, await them while seated at counsel tables between the Judge and the Jurors. In a criminal case the defendant(s) are three with their lawyer, and the Deputy District Attorney.

The Judge takes the bench, introduces the parties and tells the jurors that the case is a civil case or a criminal case, and introduces the parties. Since this article dwells on criminal prosecution in a Democracy, the remainder of the initial procedure will be directed. Unlike many other jurisdictions, and obviously including jurisdictions where there is no jury at all and the Judge or Judges are very well informed about what the case is about in America, and in California, the jurors know virtually nothing about the case.

The Judge then proceeds to tell the prospective jurors a short basic summary of what the case is about; e.g., This is a criminal case; the names of the defendant(s) and their lawyer, the name of the Deputy District Attorney, and then a short statement similar to this: "The defendant is charged with the misdemeanor offense of driving while intoxicated: The witnesses who are expected to be called are (gives names); the trial is expected to last 5 days, etc. and other basic information. In a more

serious case, e.g. a bank robbery where someone was shot and killed, the jury would be told that the case involves an alleged bank robbery where a person was killed – the name of that victim – the location and date of when the alleged crime happened, and a list of all the witnesses. At this point the prospective jurors are still sitting in the courtroom, and no one is sitting in the seats reserved for the jurors at the trial [The jury box]. The judge will then take excuses that any jurors want to give (a student who has a final exam in a few days; a health issue; a home care issue of a relative; financial hardship, etc.) Often jurors are deferred – and told they will be called back soon on another case when the excuse they offer will no longer be an impediment to their serving on a jury. In the typical case about 10 of the 100 or so persons called will be excused or deferred. The Judge then asks the Court Clerk to "fill the jury box". The Clerk then draws the names randomly from those prospective jurors who have not been excused or deferred. Twelve names are called and those 12 persons take the first 12 seats in the jury box.

The Judge will then question each of the 12 prospective jurors individually, usually asking them their occupation and that of their spouse, the occupation of any adult children, whether they have served on a jury before, and if they have any knowledge of the current case or know any of the witnesses. Prospective jurors with only a casual knowledge of the case (e.g.: "I read something about it in the paper some time ago") are usually not removed from the jury box "for cause". Thereafter the District Attorney questions the 12 individuals, followed by questioning by the defense attorney(s). These questions are usually more case specific. For example, the prosecutor might ask about criminal cases that involved the juror or a member of the juror's family; prior incidents where the juror had a bad experience with a police officer, etc. The defense attorney might ask about pro-law enforcement group memberships, friends who are employed by law enforcement, and if race is in play, some quite specific questions to explore the area of racial bias: asking if the juror has friends who are Black, Hispanic, or if they have ever been the victim of a crime, and if the perpetrator was a member of a particular race.

It is not unusual at all for a juror, when asked if they have ever been the victim of a crime, to become very emotional, often being unable to even respond at all. The judge will then take the juror out of the jury box and

into the judge's chambers – with counsel and the defendant present, and individually question the juror. A common example that occurs frequently is the still very under-reported instances of sexual assault or child molesting. Many instances are revealed by these jurors, who never reported the offense at all. Such jurors are mostly excused from the case by the judge.

In those cases where the juror's answers might indicate that they cannot be fair to both sides, the judge can, and does, remove the juror from the jury box and replaces them with another prospective juror. The process then repeats itself for that juror. Finally, each side may then disqualify any of the jurors for no reason at all, just so the disqualification is not for a prohibited reason (e.g. race, religion, ethnicity, etc.)[18].

The number of jurors who each side can disqualify for no reason at all depends on the penalty set for the criminal offense: if it is death or life imprisonment, each side gets 20 challenges of prospective jurors – all for no reason at all – just so it is not a discriminatory one. If the penalty is more than 90 days in custody, each side gets 10 challenges, and if 90 days or less, each side gets 6 challenges[19].

Once each side passes on their opportunity to challenge a prospective juror, the Judge will order the 12 individuals to stand and they are then sworn on as the jurors who will decide the case. This process described above is tedious and time consuming, but very important. In a misdemeanor case the jury selection process just described can take a day or two before the jurors are finally selected. In major criminal cases the jury selection process can take much longer – 3–4–5 days or longer in some cases.

One thing that adds to the time jury selection takes is that in many cases the Judge will declare a need for alternate jurors, in case a juror gets

[18] People v. Wheeler (1978) 2 Cal.3d 258. If for example the prosecutor excuses a number of black jurors by use of the not for cause challenge – the defense can then, and does, make a "Wheeler" motion – asking the trial judge to make inquiry from the prosecutor as to why the jurors were excused. The prosecutor has to have reasons based in fact from the record. Judge can, and do, grant the Wheeler motion in those cases where the judge finds the explanation for the dismissal of a prospective juror are inadequate. In that case the entire panel is sent home, a new trial date is set, and the entire process starts over again. In addition, if a judge makes a finding that the prosecutor violated the "Wheeler" prohibitions, the judge will refer the prosecutor to the California State Bar for possible discipline.

[19] California Code of Civil Procedure, Sec. 231.

sick or incapacitated during a long trial[20]. In this situation the judge picks an appropriate number of alternate jurors – usually 2 to 6, and then the entire jury selection process starts over again for the alternate jurors, who are also now sitting in the "jury box" being questioned in the same fashion by the judge and the attorneys. Each side can also challenge any of the alternates for no reason[21], in which case the process starts again for the prospective juror called to replace the one thus removed. This stretches the time for jury selection even further.

In recent years it is not unusual at all in major cases for the defense, and sometimes the prosecution, to hire a "jury consultant", a person with psychological training in most cases, who provide questions to the lawyers to ask the jurors and who give a profile of what kind of juror will be most likely to favor a particular side of the case. In addition, it is increasingly common for such consultants, or others working for the prosecution or the defense, to be present in the courtroom and using the internet to "google" or check prospective juror's "Facebook" page for clues on any bias or leanings of the prospective juror.

The jury selection process, from initial questionnaires to final selection demonstrates the impact of this democratic institution on how criminal cases are processed in America, and the participation of everyday citizens in deciding guilt and innocence in criminal prosecutions. Jurors are ordered by the judge not to do any independent investigation of any kind, including internet searching, and that they must decide the case based only on the evidence presented to them during the trial.

It should be remembered that if the crime is so newsworthy, and pre-trial publicity is so intense so that many prospective jurors know much more about the case than would normally be the case, the Court can order the 'venue" of the trial changed, resulting in the entire case being transferred to another of California's 58 counties, with the jury selection process and everything else being conducted there – far away from intense

[20] This writer had a multi-victim murder case that lasted 3 months.

[21] The number of challenges for the alternates is the total of alternates declared necessary by the judge. Thus, if the Judge declares 4 are necessary, then each side gets 4 challenges insofar as these alternates are concerned. These jurors sit for all of the trial, and if they are needed, the Court will usually draw a name at random to replace a juror who was removed for some reason.

pre-trial publicity in the original county where the offense is alleged to have occurred. Once it is all said and done, the 12 jurors who eventually decide the case will still know very little about it when the trial starts but will know more than almost anyone else when the trial is over.

The criminal jury decides guilt only in California, and not the punishment, with the exception of imposing the death penalty as opposed to life in prison without possibility of parole. Currently the Governor of California has suspended all death sentences. In this connection there are currently 734 inmates on California's death row. Approximately 33% are Caucasian, 36% Black, 24% Hispanic and 6% other. All but 21 are males. Since the Death Penalty was re-enacted by the voters in California some years ago 15 were executed, while 23 committed suicide and 69 died of natural causes.

8. SEPARATION OF POWERS AND JUDICIAL CONTROL OF THE DISTRICT ATTORNEY, THE POLICE, AND THE SENTENCING OF THOSE CONVICTED OF CRIMES

Some decisions made by the District Attorney can be reviewed by a judge. For example, almost all felony offenses except the most serious [e.g., murder, arson, rape, robbery, residential burglary and kidnapping] can be filed as a misdemeanor offense by the District Attorney. That decision is not reviewable. It results in the maximum punishment being less than 1 year in custody and the individual will not suffer felony conviction on their record. However, if the District Attorney files such a case as a felony and not a misdemeanor, the Judge at sentencing can overrule the district Attorney and declare that the offense is a misdemeanor. Both the District Attorney and the Judge are to consider the same factors: what did the person do factually? How old is the suspect? What is the criminal record of the suspect? What were the damages if any? To give two examples – if an 18-year-old steals a car and gets caught, has no record, no damage was inflicted, and there was nothing unusual about the facts of the case, this is going to be filed as a misdemeanor by the District Attorney. If the person stealing the car is 30 years old, has a long record, engaged in a high-speed chase with the police, fought with them on arrest, and totaled the stolen car, this is going to be filed

as a felony. Another example – the crime of felony theft sets the amount of $950 dollars as the cut – off between a felony and a misdemeanor. If a person steals more than $950, the District Attorney can file that case as a felony, making the maximum punishment 3 years in prison. Many, many cases are filed by the District Attorney as a misdemeanor even though the amount taken exceeds $950. However, if a lawyer were arrested for stealing money from his clients' trust fund, and the amount exceeded the $950 amount, chances are good that the case would be filed as a felony, given the violation of a position of trust by the lawyer. In all of these cases however, if the District Attorney files the case as a felony, at sentencing the judge can review it and does, in some cases reduce the charge to a misdemeanor. Because the Judge has this power, it tends to form the exercise of discretion by the District Attorney towards a misdemeanor filing in close cases, so as to avoid the time and expense of a felony prosecution when the end result is likely to be a misdemeanor[22].

9. PLEA BARGAINING – MAKING A DEAL WITH THE DISTRICT ATTORNEY TO SETTLE THE CASE

Our Supreme Court in 2012 noted that in over 90 percent of criminal cases the case results in a guilty plea. Many, many of these cases are resolved via a plea bargain – an agreement made between the District Attorney and the defendant, his or her lawyer, and approved by the Court. In misdemeanor cases to plead guilty the judge requires a written waiver of rights form to be filled in, signed, and filed, detailing the exact terms of the agreement. In felony cases the form runs almost 10 pages long. While it is true that the Court can reject a plea bargain, in practice it is extremely rare for this to happen. As the Supreme Court noted, quoting with approval from a law journal: "To a large extent…horse trading between prosecutor

[22] California Penal Code sec. 17 (b). In addition, even in a felony case where probation is granted, the court upon motion of the defendant, can later reduce the crime to a misdemeanor following the successful completion of probation. This will result, for example, in clearing the felony from the persons record, making them eligible to vote, etc. See California Penal Code Sec 1203.3(a)(b).

and defense counsel determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it IS the criminal justice system.[23]" Given that there can be no plea bargain without the agreement of the District Attorney, and given that the majority of felony cases are disposed of via a plea bargain, one can see that it is in fact the District Attorney that is actually making the sentence determination in the overwhelming majority of criminal cases. This again emphasizes the importance of exercising discretion fairly, and why failure to exercise one's discretion at all is in fact an abuse of that discretion. So – while the Doctrine of Separation of Powers mandates that the Judicial Branch and the Executive branch shall not exercise the powers of the other, as a practical matter in criminal cases it is just not the case in fact.

Some control over this is found in the power to dismiss a case once it is filed. That may only be done by the Court, usually upon request of the District Attorney, and sometimes as a sanction for illegal, or unethical misconduct by the prosecutor. The Courts records are required to note the reason for the dismissal, so that the public is informed. This serves to prevent criminal matters from being handled in an improper way, of for improper motives (for example – if a simple traffic ticket is to be dismissed, or a murder charge, it must be done by the Court with reasons given-hopefully preventing "ticket-fixing" in minor cases and avoiding favoritism is others)[24].

10. VICTIM/WITNESS ASSISTANCE PROGRAMS

When I first became a prosecutor there was no such thing as Victim-Witness Assistance Programs. Santa Barbara County first hired a Witness Coordinator, then in the 1970's that position became one dealing with witnesses as well as victims. Today there are numerous Victim Wit-

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[23] Missouri v. Frye (2012) 566 U.S. 133, citing Scott & Stuntz, Plea bargaining as Contract, 101 Yale. L. J. 1909, 1212 (1992).

[24] California Penal Code Sec. 1385 (a) The judge may, either on his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be state orally on the record.

ness employees, working in the District Attorney's Office, providing a host if services to victims and witnesses. These include keeping the victim informed of the status of the case, referral to community services, counseling, temporary restraining order assistance, transportation to and from court, restitution assistance and victim compensation assistance. In California every defendant convicted of a misdemeanor or a felony is required to pay a victim restitution fine. This fund can be drawn on to fund counselling, for example to a sexual assault victim, relatives of murder victims, etc. This short description does not even scratch the surface of the assistance provided by these employees.

In addition, in domestic violence cases and sexual assault cases, these victim/witness assistants are often in touch with the victim the day of or the day following the crime and stick with that victim throughout the duration of the prosecution. Many are bi-lingual so they can deal personally with non-English speaking crime victims. They are invaluable to the assigned prosecutor and provide tremendous support to the victims of crime.

11. FINAL COMMENTS

The Road Ahead[25]

"Where are we now and where are we going?

In one word---"Privacy!"

As a California prosecutor I remember when our State Supreme Court decided that bank records were off limits without a search warrant – a different result from federal cases and interpreting our own California Constitution. Look what they said in reaching that decision in 1974:

"For all practical purposes, the disclosure by individuals of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed,

[25] "The Road Ahead" – published in 1995, and written by Bill Gates, the CEO and founder of Microsoft—and discussing the computer/internet impact on all of us.

the totality of bank records provides a virtual biography the logical extension of the contention that the bank's ownership of records permits free access to them by any police officer extends far beyond such statements to checks, loan applications, and all papers which the customer has supplied to the bank. To permit a police officer access to these records merely upon his request, without any judicial control as to relevancy, and to allow the evidence to be used in any subsequent criminal prosecution against a defendant, opens the door to a vast and unlimited range of very real abuses of police power"[26].

Contrast that to today – when so much information is available – with no legal process at all, simply by doing a Google search on a person, a business, or a group. We all have had the experience of searching some question on the internet – say, for example, flights from LAX to Poland. The very next thing that happens, almost instantaneously, is a bombardment of ads asking if I want to learn Polish, what hotel do I want, cheap flights to Krakow, and what tours are available to me! My supermarket knows what I buy; my Facebook page reveals what I "like", and my I Phone has my life history on it!

The entire field of criminal prosecution, jury selection, criminal offenses, and what is a lawful search etc. is changing. It used to be the case that if patrol officers did not make an arrest for crimes committed in their presence, it fell to detectives to go in to the field, interview witnesses, run down leads, use informants, etc. in an attempt to develop probable cause to arrest, and ultimately to prosecute. Now the law enforcement officers are solving many crimes while they sit at their desk in the station house – using the computer and linking to high-tech real time crime centers, scouring billions of data points, including arrest records, property records, commercial data bases, Web searches, social media postings, examining the "fit-bit" devices worn by victims and or suspects, and collecting data from police cameras, license plate scans, facial identification[27] iris scans and, of course, cell phones.

[26] Burrows v. Superior Court (1974) 13 Cal. 3d 239, 247.

[27] California has now banned – for 3 years, law enforcement from using cameras connected to a facial recognition data base. AB 1215, signed into law and effective January 1, 2020.

It is now extremely common for residential or commercial security cameras to be accessed for leads, often capturing the suspect in a case whose likeness is then put on the Internet, television, in the local newspaper, with the result that large numbers of perpetrators are identified given the proliferation of the image of the suspect. The new investigative devices work by and large to the detriment of criminals. One system, using multiple microphones spread throughout high crime areas, called "shot – spotter" – can triangulate the location and sequence of gunshots, distinguish them from a car backfiring, and send an instant notification to the area law enforcement agency.

With respect to cell phones, in 2014 the U.S. Supreme Court departed from precedent dating back more than 50 years, in ruling that the police may not search a suspect's cell phone "incident" to a lawful arrest, without a search warrant[28]. Prior to this case, if a suspect was lawfully arrested the police could search the suspect and everything he or she was wearing or carrying, incident to the arrest. No probable cause was needed, and there were of course many cases where suspects were found with contraband (e.g., drugs) or a stolen credit card, and successfully prosecuted for these crimes despite the fact that the evidence was found, not because the police suspected the contraband to be on the subject, but simply because it was on the suspect at the time of a lawful arrest. That is still the law, generally, but now with the exception of searching the contents of a cell phone. Now, under the Riley case, a search warrant is required, and the warrant must be supported by probable cause. The court explained at length that the cell phone, and its contents, are so full of private information, that a new rule was required to protect privacy, as the contents of the phone, in many cases, contain a person's whole life. The same is true for data from the carrier regarding the location of where the phone was at a particular date and time[29]. In this latter case, without a search warrant, law enforcement obtained location points for the suspects cell phone, suspecting him in a string of robbery offenses. The data stretched over 4 months and included 12 thousand different date points as to where the suspect was at any given date and time.

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[28] Riley v. California (2014) 573 U.S. 373.

[29] Carpenter v. United States (2018) 585 U.S.--, 138 S. Ct 2206.

The flood of digital information, and the ability of law enforcement to take advantage of this trove of information, increases every day. Things like firearm/projectile/ casing comparisons, which were done one item at a time, can now be inputted into a system that scans the entire data base for a possible match, and then the firearms expert can take a look at specific possible matches.

Finally, there is DNA. It is less than 35 years since it was first used in a criminal case, and when it first came to law enforcement's attention it was met with skepticism. But soon DNA testing was not only freeing inmates after a wrongful conviction, it also began to assist in the identification and conviction of many others. It used to take a significant amount of time to do the testing – now that time frame is shrinking daily – from months, then to weeks, to days, and ultimately hours for testing results.

Great strides were made in filling the DNA data base of the states (California's DNA data base is the 4th largest in the world) following U.S. Supreme Court approval of the taking of a DNA sample at arrest, as part of the search incident to a lawful arrest/and or identification[30]. Most recently law enforcement has also turned to genetic genealogy. In April of 2018 the police arrested Joseph DeAngelo, a former police officer, for 13 murder counts in six different California Counties[31]. DeAngelo (named by the press and law enforcement as "The Golden State Killer") was linked to the murders by use of crime scene DNA and matches submitted after a relative submitted their own DNA sample to an on line ancestry company. There are obvious privacy issues in play here as law enforcement uses this technology to identify perpetrators in these serious crimes[32]. The same tech-

[30] Maryland. King (2013) 569 U.S. 435. King was arrested in 2009 for an assault charge, and a DNA sample obtained as part of that arrest. The sample was matched in a 'cold case" hit to a 2003 rape case. King unsuccessfully appealed the rape conviction claiming the DNA swabbing was unlawful.

[31] Four of the 13 murder victims were from Santa Barbara County – in both cases the suspect entered the home of a couple, tied them up, put dishes on the male and told him not to move or he would kill the woman. After raping the female victim, the suspect killed them both.

[32] Just weeks ago the US Department of Justice issued guidelines to govern the growing use of genealogical databases in criminal investigations: Effective in November of 2019 the guidelines prohibit the surreptitious use of DNA databases – no fake names to sneak

nology is used in non-criminal matters, e.g., allowing in some cases infants kidnapped years and years ago to be reunited with surviving relatives after an ancestry data-base search, or finding a long-lost twin where both were adopted at birth by separate adoptive parents.

Despite occasional problems, the American jury seems to be working well[33]. Prosecutors can count on one hand the number of times where they were thunderstruck by a jury's decision. Given that the right to a jury trial is in both the US and California Constitution, it is going to be with us for a long time. Also, the whole system of electing the chief prosecutor, electing the judges, and calling on persons who are citizens by sending them a postcard to show up and decide guilt or innocence is about as democratic as one can imagine. The system is basically fair, with the reach of American justice feared by cross border criminals like El Chapo Guzman. Guzman, a Mexican drug lord, was captured in Guatemala, extradited to Mexico and imprisoned. He escaped by bribing his guards; arrested in 2014 he escaped again by digging a tunnel under his maximum-security jail cell. In 2016 he was arrested in Mexico after a shootout with the police, extradited to the USA on drug charges, convicted by an American jury in a public trial in 2019 and is now serving a life sentence.

In 2016, Otto Warmbier, a 23 year old American college student was arrested in North Korea, and found guilty in a secret trial for attempting to steal a propaganda poster, given 15 years, and dies a few days after he was released and brought back home, never regaining consciousness from head injuries inflicted after his arrest.

Compared to American justice, and many others, these systems are separated by more than geography.

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a crime scene sample in to a database; identification of the submitting entity as a law enforcement agency; prohibitions on using genetic genealogy companies that do not advise participants that law enforcement may use the same service, and a general prohibition that it only be used in homicide, sex crimes, or victim identification matters. See "United States Department of Justice Interim Policy-forensic Genetic Genealogical DNA Analysis and Searching" (https://www.justice.gov/olp).

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California Government Code, https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=GOV&tocTitle=+Government+Code+-+GOV.

California Penal Code, https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=PEN&tocTitle=+Penal+Code+-+PEN.

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Riley v. California (2014) 573 U.S. 373.

Ramos v. Louisiana 590 U.S. (2020).

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Varnum v. Brien 763 N.W. 2d 862 (Iowa 2009)

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BUSINESS IN THE U.S. DEMOCRACY

*Emeric Solymossy**

ABSTRACT

This paper discusses a model of business in a "democracy" by identifying the three underlying concepts; the individual, the collective (society), and the government (system and mechanics). Furthermore, each of these elements is also a multi-factor construct. The foundations and development of the United States is discussed. The exploration, discovery and development of any new country require risk taking and innovative behavior, which was instrumental in the creation of heroes and myths, which shaped much of the culture. From this background, some of the principle characteristics of the entrepreneur are explored and correlated to some generally accepted measures of national culture. The concepts are developed; their inter-relationships and the resulting dynamics are presented. The foundation(s) and uniqueness of the U.S. form of democracy is explored as a government typology. Data is presented exhibiting the variability of business confidence, and a conclusion is reached that the attitudes and policies of the government have a greater impact on business formation and success than the form of government.

Keywords: business in democracy, model of business, the United States

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1. INTRODUCTION

The U.S. is currently experiencing economic growth while many other economies are stagnant or declining. A longitudinal study by Roser[1] notes changes in GDP per capita using four points in time: 1950, 1970, 1990, and 2019. Two phrases from the paper are important:

1. *"What economic growth makes possible is that everyone can become better off, even when the number of people that need to be served by the economy increases. 2 An almost 3-fold increase of the population multiplied by a 4.4-fold increase in average prosperity means that the global economy has grown 13-fold since 1950."*[2]
2. *"Failure to grow the economy and to provide the goods and services that they need is one of the largest failures in recent decades. It means that populations in these places are now much worse off than the rest of the world – they are less healthy and die sooner, education is poorer, and many suffer from malnutrition."*

The question of what facilitates business implementation and growth generates a lot of attention. The definitions for business and government are explained, and the paper develops the concepts, explores the elements and their frameworks and the interrelationships of the three essential elements (the individual, society, and democracy (or government) that influence business formation and endurance.

2. BUSINESS

"Business" is often used to imply entrepreneurial enterprises to promote economic development. However, it is also used to characterize existing, small ventures focusing on continued operation rather than growth as the principle objective. (e.g. restaurants, small grocers, tradespeople).

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[1] Max Roser, "Which Countries Achieved Economic Growth? And Why Does It Matter?" in Our World in Data, 2019, https://ourworldindata.org/economic-growth-since-1950.

[2] The population increase wasn't quite 3-fold (but 7.43/2.53=2.937-fold) and the prosperity increase was more than 4.4-fold (but 14,574/3300=4.416-fold) so that the world economy grew 2.937*4.416=12.97-fold between 1950 and 2016.

It is also often used to characterize larger, established businesses (e.g. Solaris Bus and Coach, CD Projekt, Lidl Poska), and or global enterprises (e.g. Boing, Airbus, PKO Bank Polski, PGE). It is sometimes applied to industries (such as manufacturing, technology, service, utilities, consumer goods) None of the foregoing applications would be applicable as they are overly restrictive. Therefore, *business* is hereinafter defined as:

An individual or individuals organized as an economic enterprise, engaged in commercial, industrial, or professional activities where goods and services are exchanged for other enterprise's goods, activities, or monies.

This definition is intentionally inclusive of organized economic enterprises without regard to size, growth, ownership, industry, or market. It should also be noted that this definition implies that the production or transactions involve value creation. The limitation of value creation is important, especially when joining the terms *business* and *government*.

All enterprise, including large, global organizations had their beginnings as entrepreneurial ventures. As such, there are three very important aspects to be recognized: 1) person(s) with necessary competence, 2) risk, and 3) opportunity (to capture a market). Hernando DeSoto's book[3] identified private property as a fundamental requirement for business to succeed (and impact the economy). This requires an economic and legal framework. The dynamics of people, opportunity and risk imply a reliance on this framework. This is a function of government, which has influences beyond this framework. There are 20 types of government, ranging from Authoritarian to Totalitarian (alphabetically), including eight forms of democracy.

3. DEMOCRACY

Democracy, exists in multiple forms; Pure (direct) Democracy, Representative, Presidential, Parliamentary, Authoritarian, Participatory, Islamic

[3] Hernando DeSoto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Basic Books, 2000.

and Social[4]. For the purposes of this paper, this discussion focuses on the two most popular forms of democracy; Direct Democracy and Representative Democracy. Jean-Jacques Rosseau wrote extensively on the concept of social contract[5] (originally published as 1762), arguing that only the people have the sovereign, all power right to empower legislation, with John Stuart Mill[6] further arguing the freedom of the individual, and the merits of economic democracy and opportunity.

Representative democracies (such as in the U.S., the U.K., Germany, South Africa, Brazil, India, Japan, France, Turkey, Tanzania and many others) are frequently called a Republic. For the purposes of this paper, the differences between a representative democracy and a republic are insignificant. The terms have similar definitions in the Merriam-Webster Dictionary, Dictionary.com, and H.G. Bohn's classic work: *The Standard Library Cyclopedia of Political, Constitutional, Statistical and Forensic Knowledge*[7].

In a Direct (pure) Democracy, the people, by majority, decide on policy initiatives (rule of the majority). In a Representative Democracy, people select representatives, who in turn, decide policy initiatives. A Republic, on the other hand, is a term that can be applied to any form of government in which the head of state is not a hereditary monarch, or a tyrannical regime[8]. The term "republic" stems from the Latin "res publica," or "public affair," or not the private concern or property of the rulers.

The United States is a constitutional republic. In this form of government, control is primarily based upon a constitution (law), wherein the people do not control the law. Second, it establishes and protects the independence and sovereignty of each person (male or female) of competent age and capacity. Laws can be changed, however such change can only be effected by a higher source than the government. In the U.S., this requires

[4] https://www.scienceabc.com/social-science/different-types-democracy-direct-representative-presidential-parliamentary.html.

[5] Jean-Jacques Rosseau, *On the Social Contract; or, Principles of Political Rights* (Published by Marc Michel, Rev., Amsterdam,1762).

[6] Dennis Thompson, *John Stuart Mill and Representative Government*. Princeton University Press, 1976.

[7] Henry George Bohn, *The Standard Library Cyclopedia of Political, Constitutional, Statistical and Forensic Knowledge*. 4 volumes, London 1849.

[8] Encyclopedia Britannica.

a two-thirds majority vote in both the House of Representatives and the Senate followed by ratification by two-thirds of the state legislatures. (27 of the 27 amendments to the U.S. constitution were approved in this manner), or through a constitutional convention called for by two-thirds of the state legislatures. No Amendments have been approved this way.

The U.S. is young nation, with a storied history that displays more than a unique constitution and governmental form. From inception, it embodied a frontier spirit. People left the security of their city to pursue opportunities in an unsettled and frequently hostile land. This demanded courage, ingenuity and perseverance; it fostered a personality and culture that was individualistic and resistant to the restrictions or control imposed by a community or government. It favored flexibility over rigidities. Cultures create and reinforce stories and myths. The expansion of the country is romanticized by heroes that are well known to youth such as Davy Crocket, Buffalo Bill, Daniel Book, "Kit" Carson, and Lewis and Clark. The cowboy is immortalized, and the world knows of John Wayne. Less well known, but important for their contributions are the farmers who followed the frontiersmen (and women), which established boundaries and initiated the beginnings of civilization and created an environment of industrialization and innovation. Frederick Jackson Turner (writing his thesis in 1892) elevated the linkage between the frontier and the development of U.S. culture. Turner concluded "to the frontier the American intellect owes its striking characteristics. This is in contrast to the rigidity evidenced in many countries and cultures.

Randall Holcombe argued that the founders (authors of the U.S. Constitution) had no intention of creating a democracy where government is guided by popular opinion [9,10]. Holcombe argues that the main purpose of the constitution is to protect the rights of the individual and to limit the size and control of the government. Pure Democracy, on the other hand, requires decisions affecting all are made according the will of the simple

[9] Randall Holcombe, *Liberty in Peril, Democracy and Power in American History*, Independ Institute19, 2019.

[10] George Friedman, "The Founding Fathers Never Intended to Create A Direct Democracy," (originally written 2016, updated 2017): *Huff Post, U.S. Edition*, accessed at: https://www.huffpost.com/entry/the-founding-fathers-never-meant-to-create_b_13051196

majority. The founders feared governmental persons being under direct influence of individuals or groups driven by self-interest. Society's norms, values, and interests change, often drastically. Shifting cultural and social interests can cause fundamental and enduring changes in governmental laws and regulations. While this is still possible in a Representative Republic, it is less likely.

4. ESTABLISHING A BASIC MODEL OF BUSINESS AND DEMOCRACY

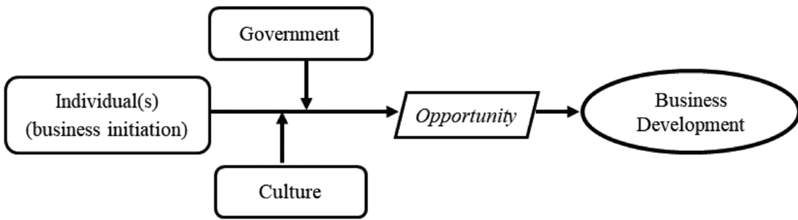

Figure 1: Author's own model diagram

The dependent variable, (the object of interest), is business development. This incorporates business starts, business growth, and subsequent economic growth and distribution of wealth. This outcome can be measured in a variety of mechanisms: business starts, employment growth, or overall economic growth demonstrated by per capita GDP. The norms, values, and perspectives pertaining to business and the culture are moderating variables, impacting the strength of the relationship between the individual and business. Opportunity is a mediating variable since the presence of opportunity allows business, whereas the absence of opportunity prevents business formation.

5. THE INDIVIDUAL FACTOR

All business ventures have a starting point; generally instigated by one, or a few individuals working together. The independent variable, there-

fore, is the individual(s) who initiate a business enterprise or push it to a higher level (for example, Apple Computers and Federal Express.)

Apple was begun by Steve Jobs and Steve Wozniak in 1976 in a garage. Initially, as a member of a computer hobbyist group looking at the MITS' (company, not the Massachusetts Institute of Technology) Altair (basically a box of lights and circuit boards), Steve Wozniak was motivated by a desire to show the capability of an individual (versus a company). He built a computer with a typewriter style keyboard and the ability to connect to a TV. From this innovative point, Steve Jobs pushed it through further (continual) innovation (involving financial, psychological, and social risk). Apple Computers is currently one of the largest economic enterprises in the world.

First series of the Apple 1 computer, Built in 1976 (source: Apple.com)

In 1965, while a Yale undergraduate, Fred Smith submitted a paper outlining a system for urgent, time-sensitive material shipment using a centralized hub distribution system. His instructor was not impressed; finding the concept "interesting, but not feasible," and graded it as "average"[11]. Six years later, Fred Smith initiated his original business concept. The first night of continuous operations occurred in 1973; today, Federal Express is a successful global enterprise.

[11] Contrary to popular stories, the professor, Challis A. Hall, (Economics 43A) did not "fail" the paper.

Both of these (virtually ALL business starts) demonstrate three truths that are not often exposed as fundamental. The first is the drive and competence of the initiator (the motivation may be psychological or economic). Second, both demonstrate a significant amount of risk (that prevent others from proceeding), and thirdly, and closely related to risk and competence, is recognizing an opportunity that others either do not see, or deem to be unlikely or "bad". At the time Steve Jobs and Steve Wozniak started Apple, experts questioned the viability of personal computers.

Scholars cite from 5 (Investopedia) to 35characteristics of entrepreneurs[12] – those individuals who take the risks to pursue their ideas to satisfy an opportunity. Embedded within the concept of competence are the technical and professional skills, the motivation, and the perseverance of the individual(s). Therefore, we can model the individual(s) as the dependent variable, and three (or more) independent variables that contribute to the competence of the individual(s).

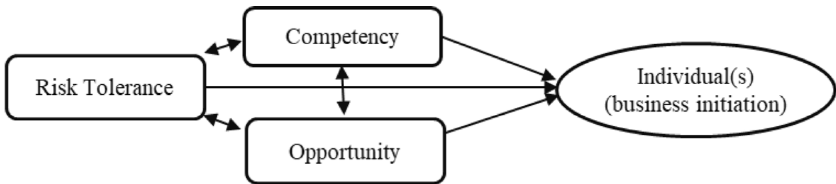

Figure 2: Author's own model diagram

It should be noted that each of the three independent variables are interactive, depending upon and influencing each of the other. For instance, a level of technical competency may reduce the perceived level of risk, however, weaknesses in business, marketing, or financial competency might increase the risk, or minimize the likelihood of pursuing the opportunity. Current findings reflected in the 2019 Global Entrepreneurship

[12] Tim Berry, "35 Common Characteristic of Successful Entrepreneurs," *Bplans*, on Palo Alto Software, (undated), https://articles.bplans.com/35-common-characteristics-of-successful-entrepreneurs/.

Monitor (GEM) indicate that 14% of working age Americans are starting or running their own business. Even in an entrepreneurial country and culture, the vast majority lack the motivation, competence, and willingness to assume risks. The exception for this is the "survival" motivation. The highest rate of entrepreneurial activity is in Angola, an extremely low-income economy. Most people don't see the opportunity until someone develops it (think Amazon, Facebook, or Starbuck's). How often has one heard, "Gee, I had thought of it, I could have done that!"

6. THE CULTURAL/SOCIAL FACTOR

Persons do not develop their personalities in isolation. Psychologists and sociologists maintain that culture influences the way people learn, live, and behave. The culture one is raised in is not the sole determinant of a person's personality. If so, all individuals raised within the same culture would share common personality traits. Culture influences individuals; it moderates (not creates) personality characteristics. Three aspects of culture have varying degrees of influence upon persons pertaining to business: 1) uncertainty avoidance (willingness to accept risk), 2) tolerance for failure, and a 3) cultures based on individuality versus a collective society. Individuals raised in a culture that has high levels of uncertainty avoidance will experience social resistance to risk. Individuals willing to take persistent risks must have an acceptance of loss; not all efforts succeed, and experience shows that most entrepreneurs fail, sometimes sensationally (Think in terms of Thomas Edison's 10,000 attempts to invent the light bulb), or Steven Spielberg (rejected from 3 film schools), or Henry Ford (founded two automotive companies that failed prior to having success with the Ford Motor Company), and Walt Disney (bankruptcy, mental breakdown, loss of his organization and his cartoon character "Oswald, the Lucky Rabbit") In each of these cases, failure was accepted as valuable learning experience, persistence was necessary. The willingness to face risk and accept failure is heavily influenced by national culture. Some countries (e.g., the United States) have a culture that focuses on success, seeing failure as an obstacle, not an end.

On the other hand, some cultures are not accepting of failure. In Japan, failing a business venture can be fatal to the individual's profession-

al reputation. In Germany (having a social structure reinforced by rules, laws, and long-term security concerns), failure is seen as a weakness, and inefficiency. Mexico (and many Latin cultures) has little tolerance for failure, considering it a loss of face (social legitimacy.)[13] Europe is beginning to acquire the cultural acceptance of some failure with regard to business, but has historically viewed business through the cautious lens of potential failure. This can be compared to Silicon Valley's (U.S.A.) often quoted view of "fail often-fail fast." This values experiential learning, improvements and that persistence result in eventual success[14,15.]

Further insight into the influence of culture is seen in the culture measure of social collective versus individualism. This author often reflects on the "Laws of Jante," first appearing in a satirical novel written by Askel Sandemose. The central theme of the laws is the homogeneity of Scandinavian culture. It is comprised of 10 "rules" (an 11th appeared in a subsequently in the novel *Penal Code*)[16]. The underlying message is one of the importance of the collective, the necessity of conformance, and the disdain for *any* expression of individuality. This sentiment is not exclusive to the Scandinavian countries. Japan phrase is; "出る釘は打たれる", which translates into English: "The nail that sticks out gets hammered down." While Japan is not a homogenous culture, there are elements of truth in this saying. Hofstede's cultural dimension of individualism provides insight.[17] On the individualism / collective scale, the United States is scored at 91 (high individualism), Japan at 46 (high collectivism, low individual orientation), while Poland scores 60 (a little above neutral)[17.]

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[13] Sue Bryant, "How Different Cultures Deal with Failure," *Country Navigator*, 5th August, 2019, https://countrynavigator.com/blog/cultural-intelligence/failure-across-cultures/.

[14] Glenn, W. Leaper, "Dare to Fail: The Awakening of the European Failure Culture", *StartUS Magazine*, 10th December, 2015, https://magazine.startus.cc/dare-to-fail-european-failure-culture/.

[15] Udechukwu Ojiako, Maxwell Chipulu, Paul Gardiner, Terry Williams, *Cultural Imperatives in Perceptions of Project Success and Failure*, Project Management Institute 2012.

[16] Aksel Sandemose, *A Fugitive Crosses His Tracks*, translated by Eugene Gay-Tifft. New York: A.A. Knopf., 1936.

[17] https://www.hofstede-insights.com/product/compare-countries/.

There are examples of individuals behaving contrary to cultural constraints and taking risks to seize an opportunity. Consider Ingvar Kamprad, founder of IKEA (1943, Sweden) when he was 17 years old. Consider Fusajiro Yamauchi of Japan, who founded Nintendo in 1889. Consider Kiichiro Toyoda, son of Toyoda Loom Works founder Sakichi Toyoda. Kiichiro assumed the risks to change Toyoda's focus from automatic looms into automobile manufacturing in 1933, creating what became Toyota Motor Corporation. Consider Ross Knap (Poland), initiator of CallPage, a system for real-time analysis of user behavior on websites. Started in 2015, they have over 31 employees[18] and 3,000 customers as of 2018[19]. These examples (there are many) show that while culture helps shape, it cannot completely control entrepreneurial behavior that is reflected in opportunity recognition, or the willingness to take measured risks. It can, however, exert influence on the likelihood of business initiation. The cultural element is therefore seen as a moderating variable (changing the strength of the relationship between the individual and the resulting business origination or development), and can be diagrammed as:

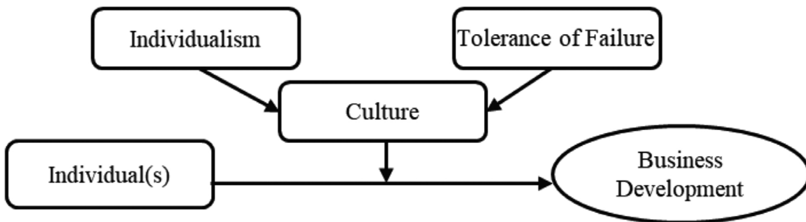

Figure 3: Author's own model diagram

7. THE GOVERNMENT FACTOR

Having established the characteristics of the initiating individual and the cultural influences, (essential for the first part of the original ques-

[18] https://www.callpage.io/team.

[19] https://techcrunch.com/2018/07/31/callpage-lets-you-call-your-website-visitors/.

tion), we now proceed to exploring the governmental factor. The most comprehensive analysis of global entrepreneurship is maintained by the Global Entrepreneurship and Development Institute.[20] 2018 data shows the United States remains at the highest level (GEI score of 83.6). Poland is ranked 30th, with a score of 50.4, two below Japan, which is ranked at 28, with a GEI score of 51.5. On the other hand, Denmark is ranked 6th (GEI score of 74.3), and Sweden 9th, with a GEI score of 73.1. This shows that culture is not the only influence to business activity. Insight is provided by reviewing recent research focusing on the Entrepreneurship Ecosystem which explores the overall environment within which entrepreneurship flourishes[21, 22, 23].

One of the key findings of the Entrepreneurship Ecosystem research is that each area of success (ecosystem) is unique, and because of the dynamic interaction of the components, is difficult to imitate. A supportive culture (and other successful ventures) is conducive to inspiration, support from non-governmental institutions is indicated, and infrastructure and the requisite financial and technical support, human capital are evidenced. One of the most counter-intuitive findings has been the necessity of the environment being either free from, or able to overcome cultural biases against failure and business initiatives. The ecosystem will be discussed later.

Governments exist in many forms. The United States is a constitutional republic with democratically selected representatives. It is often stated that if the judgement of the government's programs is delivered at the ballot box (by selecting representatives.) Unfortunately, it is not that simple.

What are the responsibilities of a government? Most persons acknowledge that a government can and should provide goods and services that an

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[20] https://thegedi.org/global-entrepreneurship-and-development-index/.

[21] Daniel Isenberg, "How to Start an Entrepreneurial Revolution," *Harvard Business Review* 2010, Vol. 88 Issue 6: 40–50

[22] Zoltan J. Acs, Saul Estrin, Tomasz Mickiewicz, László Szerb "Entrepreneurship, institutional economics, and economic growth: an ecosystem perspective." *Small Business Economics* 2018, 51 (2):501–514,DOI: 10.1007/s11187–018–0013–9.

[23] Daniel Isenberg, "What an Entrepreneurship Ecosystem Actually Is", *Harvard Business Review*, 12th May, 2014, accessed at https://hbr.org/2014/05/what-an-entrepreneurial-ecosystem-actually-is.

individual or community is not able to. Consider the following domains and consider to what degree government is responsible, and how its efforts and finances should be prioritized (recognizing that governments operate at different levels and reach):

- Protecting individual freedoms
- Establishing and protecting a system to ensure private property ownership (and transfer)
- Infrastructure (air traffic, highways, bridges, communication across borders)
- Protection from threats and dangers (internal and external)
- Establishing a common financial system to facilitate trade internally and externally
- Managing overall economic conditions
- Establishing and providing healthcare
- Establishing and providing or controlling education
- Redistributing income and resources (wealth redistribution
    - Wealth to poor
    - Young to old
    - To disabled
    - To socially challenged
    - Furnish subsidized housing, food, health care as well as pensions
- Preventing negative externalities
    - E.g. pollution, environmental protection, water quality
- Providing psychological or aesthetic protection
    - Liquor store or pornographic supply store next to grade school or church

As these issues demonstrate, this becomes a complex choice of the responsibilities and capabilities of the individual and family versus the collective, versus the duly elected government (local, regional and national). Do parents raise their children, does it take a village to raise a child, do government programs direct the maturation of a child?

Governments provide law enforcement personnel, build and maintain highways, and establish a centralized finance system; each of which requires funding. Population growth results in increasing pressures upon governments, resulting in an on-going increase in the size and scope of government.

The preamble to the U.S. Constitution states that the purpose of the Federal Government is to *"establish Justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity"*[24]. Population growth, geographic expansion, and changing technologies and economies increase the scope of the U.S. government's responsibilities. While laws are passed by the elected representatives in Congress, they are implemented through regulations. Regulations are created by a governmental agency, and monitored by political appointees who are not elected by the population. Regulations, however, carry the enforcement mechanisms (effects) of laws. Regulations can be Federal, State, or Local. This impacts business in the following 11 categories, each of which creates an administrative and financial burden on business;

1. Tax codes (Federal, State, Local)
2. Labor laws
3. Employee payment data
4. Collection of taxes (sales, employment, social security, Medicare)
5. Working with independent contractors (persons that are not employees)
6. Insurance
   a. The Affordable Care Act of 2010 is approximately 20,000 pages long.
7. Truth / manipulative advertising
   a. Electronic marketing
8. State and municipal business licensing
   a. Professional qualification licensing
9. Anti-trust laws
10. Environmental regulations
11. Privacy

The most current reports (2018), show the *U.S. Federal Register* having 78,724 pages in 2006, 97,110 pages in 2016, and decreasing to 68,082 in 2018. The impact of this is significant and will be discussed further.

[24] Preamble to the U.S. Constitution; accessed at https://www.usconstitution.net/xconst_preamble.html

8. THE STATE OF BUSINESS IN THE U.S. "DEMOCRACY"

As noted, the U.S. is a constitutional republic, within the framework (and control) of a constitution. It is governed under the framework and constraints of constitutional rules of law and the mandates and subject to amendments enacted by democratically elected representatives, and an elected president (elected through a democratic process that selects representatives that become the Electoral College.) This is a *form* of democracy.

The dynamics and interrelationships of the previously provided models are complex already, but serve to make several facts evident. Culture and governments can constrain entrepreneurial activity, but not stop it. This is evidenced by the emergence of economic activity in the grey (or shadow) economies, as well as criminal enterprise. A few individuals have a sufficiently high level of motivation, competence and risk tolerance that they will pursue *any* opportunity regardless of risks (including incarceration and death). That, however, is NOT the norm. To be considered a legitimate entrepreneur demonstrating opportunity recognition, the enterprise must be positive to the collective and economically a net contributor. It should be legal, moral, and ethical. Unfortunately, not all executives follow this model.

One of the most significant influences on business feasibility is the expectation of business environment stability. This stability is influenced by the relative stability of the laws and regulations governing business, which are enacted by the government. Imagine considering a business in a country where the political stability is so volatile that there are 5 different presidents within 2 weeks?[25] Imagine an individual considering a business in Europe in late 1999, when commissioners of the EU resigned en masse. Immediately prior to a major summit, Franz Fischler of Austria walked out of a debate (regarding a report on fraud and mismanagement) declaring "I've resigned. I'm going for a drink!"[26] This was the beginning of sever-

[25] Argentina had five different Presidents in a matter of two weeks in 2001–02. President Fernando de la Rua had resigned from the post on December 20, 2001, after a prolonged economic crisis, and had four successors till January 2, 2002. The last of the five, Eduardo Duhalde remained on the post till May 2003.

[26] Martin Walker, "EU Chiefs Resign En Masse," *The Guardian*, 16th March, 1999, accessed at https://www.theguardian.com/world/1999/mar/16/eu.politics1

al commissioners leaving, which caused a significant change of political power. There are numerous examples of political instability in the world. Arguably, because of changing populace, changing social values and priorities, and a perception of the power of the individual (driven by self-serving benefits), democratic processes are more susceptible to change. Democracy is not the only or most stable system. As stated by D. Alan Heslop, "The simplest definition of a stable political system is one that survives through crises without internal warfare. Several types of political systems have done so, including despotic monarchies, militarist regimes, and other authoritarian and totalitarian systems"[27].

Within the U.S.'s form of democracy, changes are less sudden, as illustrated by the economic changes that can be attributed to various political factors, ranging from financial stimulus to restrictive regulations and trade theories. To understand why the governmental effects are so pronounced on business, it is helpful to explore the concept of entrepreneurship ecosystems. While many of the foundations of this theoretical framework can be traced to the late 19th and early 20th century, scholars generally agree that the basics were solidified in the late 20th century as an outgrowth of the concept of the Triple Helix which considered the relationships of government, industry, and universities (a foundation of industrial economics). The ecosystem phrase and model were proposed by Daniel Isenberg in the Harvard Business Review in 2010, further clarified in 2011 and 2014[28,29,30].

[27] D. Alan Heslop, (undated) "Stable Political Systems," at https://www.britannica.com/topic/political-system/Stable-political-systems (the author encourages readers to read Heslop's paper in its entirety).

[28] Daniel Isenberg, "How to Start an Entrepreneurial Revolution," *Harvard Business Review* 2010, June 10, Vol. 88 Issue 6, p40–50.

[29] Daniel Isenberg, "Introducing the Entrepreneurship Ecosystem: Four Defining Characteristics," *Forbes.com*, May 25, accessed at https://www.forbes.com/sites/danisenberg/2011/05/25/introducing-the-entrepreneurship-ecosystem-four-defining-characteristics/#2319a8b55fe8.

[30] Daniel Isenberg, What an Entrepreneurial Ecosystem Actually is," *Harvard Business Review On-Line*, May 12 2014, accessed at https://hbr.org/2014/05/what-an-entrepreneurial-ecosystem-actually-is.

While scholars approach the entrepreneurship ecosystem in different ways, the concept (as established by Isenberg) has four defining assumptions (characteristics):

1. There are six domains (categories), each consisting of hundreds of individual elements.
   - A conducive culture
   - Policy and leadership
   - Appropriate finance
   - Quality human capital
   - Venture friendly markets
   - Infrastructural support(s)
2. Each entrepreneurship ecosystem is unique, and inimitable.
3. Attempting to specify the underlying causes of successful ecosystem has limited the practical value. This manifests the complexity of the ecosystem, and the result of high-order interaction made possible by unique individuals and circumstances.
4. Entrepreneurship ecosystems become relatively self-sustaining; success breeds further success in enhancing the six domains.

In the original conceptual diagram of the Entrepreneurship Ecosystem, the entrepreneur (individual(s)) is shown in the center of the surrounding domains. As stated previously, the individual requires characteristics *of risk tolerance*, *opportunity recognition*, as well as technical and personal *competencies* (pg 7–8). Culture has multiple dimensions (pg 8–11; the *social* dimension, include social norms, tolerance of failure, mentors and examples of success, etc.), *human capital*, (educational institutions as well as breadth and depth of skilled and unskilled labor), and *markets* (customers, distribution channels, networks). The influence of government is evidenced in three domains: *policy* (government, leadership, and venture-friendly legislation), *supports* (infrastructure, support professionals), and *finance* (loans, investors, availability and cost of financing).

We demonstrate some of the interaction by looking at the past 20 years of business and entrepreneurship in the U.S. In addition to the ordinary volatility experienced by businesses, there are visible trends – which can be seen to decrease business initiation as well as job creation (charts 1 and 2 in Appendixes). Further insight is provided into administrative perspectives on business. Larger, established businesses or smaller businesses may ben-

efit at different times, correlated to changing administrations. (Chart 3) in appendix[31].

It is helpful to note that less than somewhere between 8% (as cited by Southerland) to "more than 20% (as cited by Cembalest in the same article) of the Obama administration (including cabinet and political appoints) had *significant* private sector job experience (not counting lawyers), while both President Eisenhower and President Reagan had administrations with close to 60%[32]. Five of the 15 persons President Trump nominated to the Cabinet have spent all or nearly all of their careers in Business (with no significant public office or senior military service). Final numbers for administration are lacking because many of the appointees are pending.

The Pew Research Center offers graphs on the different attitudes regarding government administrator's private sector experience over the past 100 years. Four presidents stand out as pro-business (McKinley, Eisenhower, Reagan, and Trump)[33]. It is apparent that differing perspectives on the role of private enterprise within a country's strategic objectives impact business and economic consequences. In addition to the graphs (showing the changes in business formation, job creation, and impact of small business versus large businesses as economic contributors), overall economic activity is gathered from the Hudson Institute and Statista.[34] Under President Clinton's administration (1993–2000), the average annual change in of GDP per capita was 3.8%. Businesses were formed and jobs created at a nominal 4% increasing rate and smaller business carried a large share of the economy. Under President G.W. Bush's administration (2001–2009), the economy declined 1.1% (change in GDP average over eight years). Larger businesses were favored and expanded (greater share of employ-

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[31] https://www.bls.gov/bdm/entrepreneurship/entrepreneurship.htm

[32] Steve Southerland, "Comments at the Liberty County Chamber of Commerce Annual Dinner", appearing in *Politifact.com*, accessed at: https://www.politifact.com/factchecks/2011/jan/20/steve-southerland/92-percent-obama-administration-has-no-private-sec/

[33] https://www.pewresearch.org/fact-tank/2017/01/19/trumps-cabinet-will-be-one-of-most-business-heavy-in-u-s-history/.

[34] https://www.hudson.org/research/12714-economic-growth-by-president and https://www.statista.com/statistics/238600/gdp-per-capita-growth-by-us-president-from-hoover-to-obama/.

ment) and new business formation declined. Under President Obama's administration (2009–2016) overall economic decline continued in spite of higher numbers in new business formation. With continuing effects of the financial crisis and recession of 2007–2008, jobs were lost due to cut backs and layoffs. This often results in persons becoming self-employed (when jobs are not available (called push motivation)[35]. With these influences and with an increase in government size and regulatory control, the GDP annual change fell by –.42%. Business formation and labor utilization can be seen to have declined, and large businesses share of the economy grew. President Trump demonstrates a different direction. Since the 2016 election, real growth has been 2.6%, considerably higher than the G7 average (excluding the U.S.) which measures 1.5.%. (since the term in office has not been completed, average net change in GDP is not available)

As noted, there has been a significant reduction in federal regulations impacting business, in addition to changes in the income tax structure and rates. President Trump, in the first month of his presidency, issued an executive order to reduce government spending and regulations[36]. Underlying the previously mentioned significant reduction in the length of the Federal Register is the reduction in "economically significant" Rules impacting businesses; a 27% decrease in the first year of his term. All of this shows a more positive direction of the governmental dimension in the entrepreneurship ecosystem of the U.S.

9. CONCLUSION

As demonstrated by the economic health and standing of the United States versus the G7 average, business is in comparatively good health within the representative democratic constitutional republic of the United States – a truly unique form of democracy. At the same time, business con-

[35] Emeric Solymossy, "Push / Pull Motivation: Does it Matter in Terms of Venture Performance?", in Frontiers in Entrepreneurship Research, edited by P.D. Reynolds, W.D. Bygrave, N.M. Carter, P. Davidsson, C.M.Mason, and P.P. McDougall, Babson College, Boston, MA, 1997, 204–217.

[36] https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/.

fidence fluctuates drastically not only by changing administrations, but to a greater degree within each 4 years period of each administrative period[37].

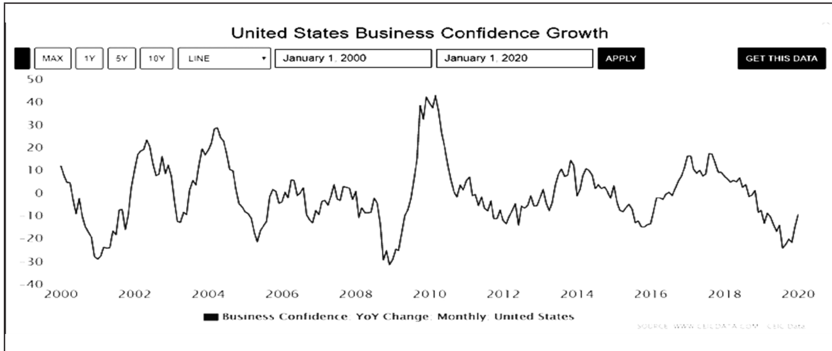

Figure 4: Data accessed and graphed at https://www.ceicdata.com/en/indicator/united-states/business-confidence-growth

Business confidence is affected by many things; consumer sentiment, labor availability, financial costs and availability, perceived inflation, and global issues Thoughtful analysis argues that the complex dynamic of motivated, competent and risk-willing individuals operating within a culture that provides a depth of experience and support and accepts failure are not by themselves sufficient. The presence of a self-sustaining ecosystem cannot be underestimated. The attitudes of government as well as external factors can constrict business, repress business formation, employment, and economic growth, or it can facilitate innovation and provide business incubators and tax incentives for business success. It is this author's conviction that the form of government is not as critical as the government's attitude towards the business environment (promote and facilitate, or suppress and control) in driving business health and economic prosperity.

[37] https://www.ceicdata.com/en/indicator/united-states/business-confidence-growth.

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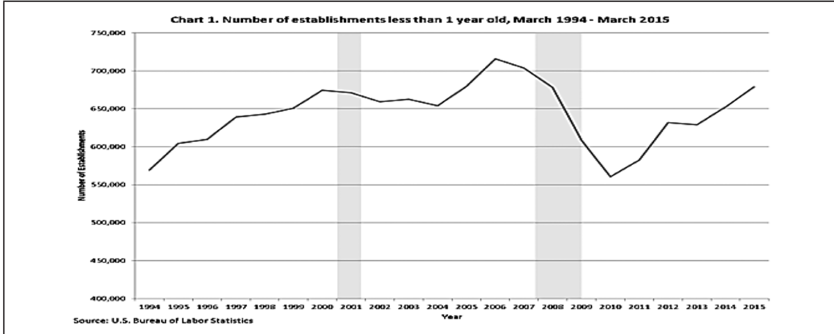
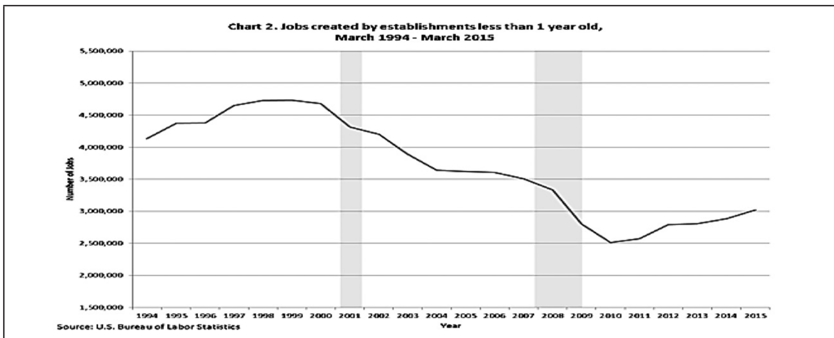
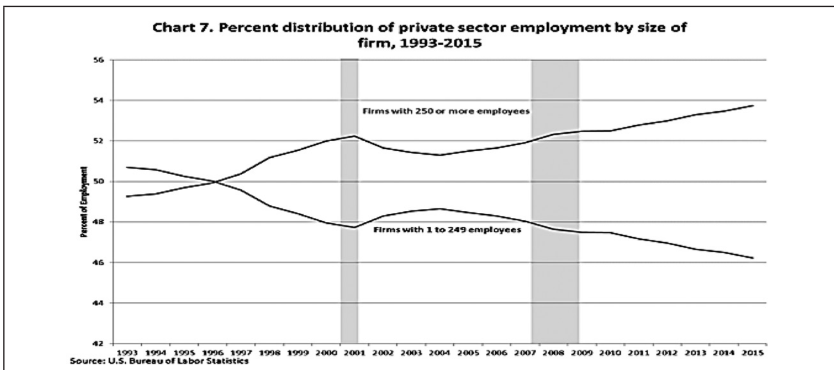
Figure 1; Three Charts from the Bureau of Labor Statistics, https://www.bls.gov/bdm/entrepreneurship/entrepreneurship.htm.

APPENDIX

Figure 1; Three Charts from the Bureau of Labor Statistics







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ACADEMIC FREEDOM: A CHOICE BETWEEN CONSERVATIVE OR LIBERAL PERCEPTIONS – THE CASE OF THE UNITED STATES

*Katarzyna Maćkowska**

ABSTRACT

It is only the minimum extent to which the law becomes the instrument of coping with social tautness regarding the academic freedom. On the one hand, legal provisions significantly limit the number of cases related to hate crimes but on the other, they sometimes narrow a discussion due to difficulties in harmonizing individual's rights and campuses' perception – a phenomenon, which in the U.S. had been called as "chilling" the freedom. Undoubtedly, the enactment of free speech or academic freedom regulations at universities is necessary as it helps to prevent from a "hate speech" but the legal shape of this process has been strictly connected to a determination for either liberal or conservative description of the academic freedom. Regarding the newest Niche's rankings, ten universities have been selected, five out of the most liberal and five the most conservative public ones. Furthermore, two catholic universities have been added to describe differences in defining the academic freedom. Moreover, some references have been made to the U.S. Supreme Court decisions, and the very fundamental documents, namely the 1940 Statement and Harvard Free Speech Guidelines. In the separate article a problem of legislative acts that had been enacted for the past two years in a response to Report of the Committee on Freedom of Expression by the University of Chicago of 2014 will be covered. A few remarks upon this matter have been hereby made, though.

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The article is based on a dogmatic legal method, including quotations of legal sources and their subsequent analysis.

Keywords: academic freedom, American universities, free speech at campuses

1. INTRODUCTION

A major terminological problem concerns the meaning of liberal and conservative universities. To some degree a colloquial understanding of both of these attributes should apply but since this article does not evaluate which solution is proper, better or more efficient, the term "leftist" ideology has been here avoided and the current descriptions of what liberalism and conservatism are, have been omitted. Nonetheless, it must be clarified that "liberal" universities usually stress their openness towards diversity, including sex identity, gender, and same-sex marriages. In other words, they accept liberalism not in its traditional classical sense, but liberalism as identity liberalism. In the context of academic freedom, one may conclude that at liberal institutions progressive ideas predominate, while conservative universities either expressly or indirectly refer to tradition, religious beliefs, anti-liberal morality, in other words they reject morality understood as a choice of values by an autonomous individual and envision a more limited status of individuals and identity groups at the campus community. Furthermore, such ideologies may have an impact not only on academic discourse but also on the functioning of the campus as well[1].

In 2015, Peter Wright in his essay published in the Harvard Political Review, wrote:

"There is an argument to be made by some students […] that free speech should be limited in order to allow others to speak. However, this idea is flawed. If only those with more politically correct views are allowed to voice their opinions, then they would effectively discriminate against all

[1] See also: Andrzej Bryk, "Wypaczona istota edukacji", *Rzeczpospolita* 15.08.2019, https://www.rp.pl/Rzecz-o-prawie/308159992-Bryk-wypaczona-istota-edukacji.html.

who held contradictory opinions. The declaration that every voice should be included, *except for those less inclusive*, can be viewed as hypocrisy"[2].

In Poland[3] academic freedom has become a significant field of study. It is only the minimum extent, however, to which the law becomes the instrument of coping with social tautness regarding free expression. On the one hand, legal provisions significantly limit the number of cases related to the so called hate crimes but on the other, they sometimes narrow a discussion due to difficulties in harmonizing individual's rights and campus rules – a phenomenon, which in the U.S. had been called as having a "chilling effect" on freedom.

Undoubtedly, the enactment of free speech or academic freedom regulations at universities is necessary as it helps to prevent "hate speech" but the idea of hate speech itself has been a subject of incessant debate both at the federal, state and campus levels. Apparently, a battle between liberal and conservative approaches sometimes allows for "hate speech" to be treated as an instrument of stifling a free inquiry. For some people, an assessment or criticism of a particular point of view is a justified opinion, but for others it may be considered as a grave offence or hate crime. Thus, careful regulation of hate crimes, commensurate with constitutional guarantees, should be applied in order that academic freedom is not limited.

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[2] Peter Wright, "Problematic: The Battle for Free Speech", *Harvard Political Review*, published December 6, 2015, http://harvardpolitics.com/harvard/problematic-battle-free-speech/.

[3] Among Polish researchers in the past six years, the issue of an academic freedom has been raised by: Marcin Górski, "Standardy ochrony wolności wypowiedzi akademickiej w perspektywie porównawczej", *Państwo i Prawo* 10/2019: 41–60. Jacek Sobczak, "Czy wolność słowa i wolność prasy są rzeczywiście potrzebne społeczeństwu i państwu?", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1(2018): 133.150. Zbyszko Melosik, „Uniwersytet współczesny i rekonstrukcje wolności akademickiej", *Studia Pedagogiczne* L/2017: 23–36. Sylwia Jarosz-Żukowska, Łukasz Żukowski, „Wolność badań naukowych i nauczania", in Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym, ed. Mariusz Jabłoński, Wrocław 2014, 709–740. Maria Gołda-Sobczak, "International Aspect of the Status of Academic Freedom in European Culture", *Środkowoeuropejskie Studia Polityczne* 3(2014): 145–168. Wojciech Brzozowski, "Konstytucyjna wolność badań naukowych i ogłaszania ich wyników", in Prawo nauki. Zagadnienia wybrane, ed. Aleksandra Wiktorowska and Aleksander Jakubowski, Warsaw 2014: 25–45; Joanna Rezmer, *Wolność badań naukowych w świetle prawa międzynarodowego*, Toruń 2016.

Interestingly, even the methodology that has been applied in this article gives an incentive for rethinking the subject itself. First of all, when seeking a proper method of selecting American universities, the rules of which should be analyzed in the context of academic freedom, the search was based on American 2020 most liberal/conservative public universities by Niche[4].To a certain degree, such classification shows that one of the criteria considered by candidates is a political lean at the particular educational institution. Obviously, it would be a misrepresentation to deduce thereupon that a lack of such rankings equals to lesser interest of applicants in choosing a university due to their political and ideological views. But surveys like the abovementioned allow a preservation of global diversity parallel to local majority-homogeneity. Therefore, when academic freedom has been discussed in a context of relations between an individual (academics/student) and a campus university, this helps to balance the individual's rights and the community's expectations.

Regarding the newest Niche's rankings, ten universities have been selected, five out of the most liberal[5] and the second half of the most conservative public ones[6]. Furthermore, two catholic universities have been added to describe differences in defining academic freedom. Moreover, some references have been made to the U.S. Supreme Court decisions, and the very fundamental documents, namely the 1940 Statement and Harvard Free Speech Guidelines. In a separate article a problem of legislative acts that have been enacted for the past two years in a response to the Report of the Committee on Freedom of Expression by the University of Chicago of 2014 is to be covered. A few remarks upon this matter have been hereby made, though.

The article is based on a dogmatic legal method, including quotations of legal sources and their subsequent analysis.

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[4] www.niche.com.

[5] Should not be confused with the general idea of the liberal universities in the U.S. See: Julita Jabłecka, "Niezależność, autonomia i wolność akademicka a modele koordynacji szkolnictwa wyższego. Na marginesie artykułu C. Kerra", *Nauka i Szkolnictwo Wyższe* 1(1993): 60–61.

[6] The Fashion Institute of Technology and New College of Florida excluded.

2. THE 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE AND HARVARD'S FACULTY OF ART AND SCIENCES FREE SPEECH GUIDELINES

According to Rodney A. Smolla: "hate speech is the generic term that has come to embrace the use of speech attacks based on race, ethnicity, religion, and sexual orientation or preference"[7]. In the eternal fight between liberal and conservative views, there arises a question what are the limits of freedom of inquiry, freedom of research, and freedom of expression. When formulating the university academic freedom policy, its frame may be constructed in a twofold way. The first one pays more attention to individual's status whereas the opposite one stresses the role of the individual's responsibilities in the campus community. The merits are generally the same but application of either of them may influence the employer-employee relations when it comes to a majority-minority conflict, which, in turn, may disturb the surroundings. The famous Free Speech Guidelines of Harvard University Faculty of Arts and Sciences adopted by the Harvard Faculty of Arts and Sciences in 1990 accentuates that "the University places special emphasis, as well, upon certain values which are essential to its nature as an academic community. Among these are freedom of speech and academic freedom, freedom from personal force and violence, and freedom of movement"[8].Saying that these freedoms constitute the foundations of development of the academic community is a platitude, but at the same time calling out such a fundamental phrase may seem to be either vague or ambiguous when we examine how the academic freedom depends on the community, its diversity or homogeneity, conservatism or libertarianism and how individual freedoms interfere with institutional ones. Nowadays, more difficulties in finding a happy medium appear within communities with conservative, including religious majorities. Should they enjoy the institutional academic freedom in presenting views that are opposite to some values protected by the legal system? For instance, shall we accept

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[7] Rodney A. Smolla, "Academic Freedom, Hate Speech, And the Idea of A University", *Law and Contemporary Problems* 3(1990): 195.

[8] Free Speech Guidelines of 1990, Harvard University, Faculty of Arts and Science, https://www.fas.harvard.edu/files/fas/files/freespeech_guidelines_1990.pdf.

that such universities conduct research questioning the anthropological and axiological validity of same-sex marriages or the right of homosexual spouses to adopt children in countries in which the legal system allows such marriages and adoptions? If we do, does this mean that positive law of the state trumps all the moral or conscience reservations of citizens who want to argue otherwise? Does it matter whether such university gets public funding or whether it is a private institution with no financial support of the government?

In the one-page Preamble of this act, it is claimed that the freedom of speech at universities is the basis for freedom of inquiry, education and rational discourse. And it clearly indicates why the freedom of speech must be protected in the academic environment. The policy also delineates what the limits of the freedom of speech are:

"There are obligations of civility and respect for others that underlie rational discourse. Racial, sexual, and intense personal harassment not only show grave disrespect for the dignity of others, but also prevent rational discourse. Behavior evidently intended to dishonor such characteristics as race, gender, ethnic group, religious belief, or sexual orientation is contrary to the pursuit of inquiry and education. Such grave disrespect for the dignity of others can be punished under existing procedures because it violates a balance of rights on which the University is based"[9].Undoubtedly, people might give the words of this clause different meanings due to their axiological assumptions, for instance religious creed.

Even more significant is the fact that these guidelines address the most critical point of discussion, namely how to solve the conflicts between existing freedoms. Obviously, there is no precise answer given as well as no explanation provided for whether one of these freedoms should be considered supreme over the others:

"It is expected that when there is a need to weigh the right of freedom of expression against other rights, the balance will be struck after a careful review of all relevant facts and will be consistent with established First Amendment standards"[10].

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[9] Ibidem.

[10] Ibidem.

Each case requires an investigation before determining if there is any conflict between constitutional freedoms and if so, who should receive stronger protection (depending on the general legal system of the specific jurisdiction) and who should judge between them. In the U.S. this solution is pluralistic because of a federal character of the country and states' sovereignty to enact their own laws. But it must be noted that the federal Constitution remains the ultimate source of individual rights and freedoms, and, thus, there are no doubts that academic freedom of speech is protected by the First Amendment.

One of the most fundamental documents which describes academic freedom – The Statement of Principles on Academic Freedom and Tenure[11], proclaimed in 1940 by the American Association of University Professors – claims that:

"Institutions of higher education are conducted for the common good and to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition"[12].

Furthermore, it stresses that seeking the common good is rooted in a free search for truth. This phrase requires to be looked into in the context of contemporary paradox of truth and its postmodern subjective understanding. From a general, classical view of academic freedom, which is basically perceived as truth's seeking free search for it, truth should not be limited. The antagonistic views in humanities, some relating to the core ontological and anthropological assumptions will never be equally protected by legal regulations, especially in a postmodern society when the very idea of objective truth is being questioned which makes a task of law, which should in principle facilitate the common good and social progress, even more difficult. The problem doesn't arise due to a lack of democracy but it is rooted in the need to protect it. It means that the campuses' general proclamations referring to the truth as the purpose of academic research, when a large part of the academic community questions the very concept

[11] See also: Melosik, „Uniwersytet": 23–24, "Wolność akademicka. Konteksty i rekonstrukcje", *Rocznik Lubelski* 2/2013: 13–14.

[12] The Statement of Principles on Academic Freedom and Tenure of 1940, https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure.

of objective truth as such, cannot solve potential conflicts let alone avoid them, for a simple reason that such conflicts reflect the modern academic culture, predominant at liberal colleges, that the aim of modern education is not a search for truth but for justice understood in the most subjective way. Assuming however that the axiological war in a liberal world is endless, the university which is based on specific values should clearly specify how to minimize hate speech, even subjectively defined.

The 1940 Statement entitles teachers to full freedom in research and in the publication of the results and to freedom of discussion in the classroom, not limited by a character of course syllabi, although the Statement encourages teachers to avoid controversies which might arise by discussing problems not related to the subject of classes. Significantly, the document explains that "controversy is at the heart of the free academic inquiry" and that "the passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject"[13].

On the margin of this reasoning, it goes without saying that teachers are required to respect their affiliated institution, so that when they present their personal opinions on controversial matters, they must bear in mind that their speeches may be associated with the institution. Therefore, the Statement indicates that they:

"should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution"[14].

This policy, the very classical understanding of academic savoir vivre[15], imposes on academics the common sense rules of any civilized discussion, even if the dispute belongs to a category of controversial issues. In these days we often observe that social media supports the unrestrained voice of some academics and the problem is not that they present controversial subjects but that the manner of how they speak out is improper, that is, that they are "offensive". Due to more options we now have to present

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[13] Ibidem, footnote 4.

[14] Ibidem, point 3.

[15] See also: Andrzej Bryk, "Wykręty w służbie ideologii", *Rzeczpospolita*, 10.08.2019, https://www.rp.pl/Rzecz-o-prawie/308109975-Wykrety-w-sluzbie-ideologii-Andrzej-Bryk-o-zakazie-krytyki-na-uniwersytetach-w-USA.html.

our opinions and also to the fact that people have become more open and direct in their expressions, but first of all because western societies ceased to share the same axiological and anthropological assumptions, we must remember that criticizing in reprehensible form is different from limiting free speech. In the U.S. the law on academic freedom is related to a civility requirement.

3. REVIEW OD JUDICIAL DEFINITIONS OF ACADEMIC FREEDOM

The first academic freedom judicial decision of the U.S. Supreme Court[16] was decided in 1957 *in re Sweezy v. New Hampshire*. Academic freedom was one of the aspects determined in that case:

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die[17]".

What we must reconsider today is the western civilization's thought that academic freedom stimulates democracy. This is extremely challenging in social sciences, which when developing freely should support a common good idea. If the truth is no longer objective, academic freedom may serve a purpose of ensuring simple "diversity", understood mainly in

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[16] The recent publication covering the evolution of the academic freedom in the U.S. has been: Matthew J. Hertzog, *Protections of Tenure and Academic Freedom in the United States. Evolution and Interpretation*, Palgrave Macmillan, Cham 2017.

[17] Sweezy v. New Hampshire, 354 U.S. 234 (1957), https://supreme.justia.com/cases/federal/us/354/234/ [access: 16.04.2020]. See also: Marcin Górski, "Standardy ochrony wolności wypowiedzi akademickiej w perspektywie porównawczej", *Państwo i Prawo* 10(2019): 50–51.

liberal identity ideological terms. Democracy also requires an open public debate so when it comes to zero-sum game we usually end up with unsolvable tensions.

The most crucial judicial decision was *Keyishian v. Board of Regents*. After this case had been decided, the academic freedom gained an expressly stated protection of the First Amendment. Judge Brennan cited, among others, the opinion *in re Shelton v. Tucker*, in which freedom of speech, free press and freedom of assemblies were considered as the very foundation of constitutional government and thereby the academic freedom has become one of the pillars of democracy. According to the U.S. Supreme Court:

"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom"[18].

In regard to ties between democracy, free speech and politics, it seems to be meaningful that in 1967 the protection given to the academic freedom dictated against traditional understanding of the role of an individual in community, while today those freedoms are often called out to fight for abolishing a supremacy of individualism. This observation somehow confirms that free speech will always bring social anxiety, especially in a digital era when so many people have not only a right but also a chance to publicly speak their mind. Should free speech be called „hypocrisy", then this „hypocrisy" perfectly reflects how difficult democracy is and how much maturity it requires from its beneficiaries. To fully understand that within past years nothing else but politics has modified how we perceive the freedom of speech, including academic freedom, we should not forget the reasoning of Justice Clark who had dissented from the majority opinion in *Keyishian*:

"Our public educational system is the genius of our democracy. The minds of our youth are developed there and the character of that development will determine the future of our land. Indeed, our very existence depends upon it. The issue here is a very narrow one. It is not freedom

[18] Keyishian v. Board of Regents, 385 U.S. 589 (1967), https://supreme.justia.com/cases/federal/us/385/589/. See also: Górski, 51.

of speech, freedom of thought, freedom of press, freedom of assembly, or of association, even in the Communist Party. It is simply this: may the State provide that one who, after a hearing with full judicial review, is found to have willfully and deliberately advocated, advised, or taught that our Government should be overthrown by force or violence or other unlawful means; or to have willfully and deliberately printed published, etc., any book or paper that so advocated and to have personally advocated such doctrine himself; or to have willfully and deliberately become a member of an organization that advocates such doctrine, is *prima facie* disqualified from teaching in its university? My answer, in keeping with all of our cases up until today, is "Yes![19]".

Starting with communism and Marxism and utterances against the government through racism as the backgrounds for considering a meaning of academic freedom, currently a deep conflict between the traditional approach that there is one objective truth and progressive views on diversity shapes the debate on the most fundamental concepts of academic freedom. Furthermore, we also demand that academic freedom protects the employment of professors, which means that for the past ten years this challenge of individual-academic community relations has still been an unsolvable one[20].

In that aspect, *Adams v. University of North Carolina-Wilmington* explains how multifaceted the problem remains. In 2011 the United States Court of Appeals for the Fourth Circuit decided a case, in which the Appellant Michael S. Adams alleged that he had been denied a promotion due to his conversion to Christianity and his active involvement in spreading conservative values. Importantly, the Court stated that[21]:

"If a federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, far less is it suited to evaluate the substance of the multitude of academic

[19] Keyishian, Dissenting opinion of Justice Clark, with whom Justice Harlan, Justice Stewart and Justice White joined.

[20] See the article from 2009: Robert O'Neil, "New Challenges in the United States", *International Higher Education* 57(2009): 4–6, DOI: https://doi.org/10.6017/ihe.2009.57.8451.

[21] Citing the following U.S. Supreme Court decisions: Bishop v. Wood and Regents of the University of Michigan v. Eving.

decisions that are made daily by faculty members of public educational institutions – decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision making"[22].

Subsequently, the Court has quoted the *Urofsky v. Gilmore* case and noted that:

"the Supreme Court has not established 'a First Amendment right of academic freedom that belongs to the professor as an individual,' but rather "to the extent the Supreme Court has constitutionalized a right of academic freedom at all, it appears to have recognized only an institutional right of self-governance in academic affairs"[23].

Therefore, the case has been decided under anti-discriminatory clauses. Focusing, however, on the excluded matter from the Court's judgement, it allows to conclude that the academic freedom as an individual right of lecturers and researchers would form a fragile protection to be invoked before courts when the alleged discrimination interferes with a promotion procedure. A democratic system obliges us not to discriminate against neither a liberal professor at conservative campus, nor a conservative professor at a liberal community. But this challenge is similar to a requirement imposed on judges to determine cases impartially. We may be close to an ideal but on many occasions, it is a very hard work for individuals not to forget about it.

The other context stemming from the judicial decisions is the relationship between the individual academic as an employee and a public University as an employer. In the *Adams* case the Court has applied „the McVey test" which compiles U.S. Supreme Court decisions in *Pickering v. Board of Education* and *Connick v. Myers.* The test demands that the Court determines:

"(1) whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; (2) whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and

[22] Adams v. University of North Carolina-Wilmington

[23] Ibidem.

efficient services to the public; and (3) whether the employee's speech was a substantial factor in the employee's [adverse employment] decision"[24].

When analyzing judicial decision in the U.S. regarding academic freedom from the Polish perspective it should be accentuated that the coming years will bring more legal disputes in consideration of academic freedom and that this embraces the following fields:

– relations between lecturer/researcher and university as employee/employer and the private utterances of the lecturer/researcher;
– relations between lecturer/researcher and university as employee/employer and the public utterances of the lecturer/researcher;
– relations between lecturer and students and the role of the lecturer as a person responsible for a proper communication in the classroom as well as students' arguments having little do with the content of the lecture and its objective presentation but its "offensive" character in the student's eyes.

Universities should consider whether more formalities governing this issue would either reduce or – unintentionally – increase the number of such disputes. The sooner the decision is made and the experiment carried out, the faster the problem would be „tamed" and the system prepared for the fact that the legal system will never efficiently balance the limits of academic freedom.

4. THE ROLE OF LEGISLATIVE ACTS IN PROTECTING FREEDOM OF SPEECH – GENERAL REMARKS

First of all, it should be noted that in the past years many states have enacted laws in order to support free speech at educational institutions. Given that there is a wide political background that determines this new legislative movement, this subject will be discussed in a separate publication. Below few words must be however added to mark the problem regarding recent documents, one, issued by the U.S. Justice Department, and the other – the Report of the Committee on Freedom of Expression

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[24] Ibidem. McVey V. Stacy, 157F. 3d 277–78 (1998).

dated back to 2014, which have had a huge impact on subsequent legislation throughout the U.S.

On December 9, 2019, the U.S. Justice Department posted the Statement of Interest relating to a lawsuit filed under Mississippi law by a Jones College' student. The plaintiff claims that freedom of speech is unconstitutionally restricted by the College's internal regulations requiring that students must seek approval for meetings and gatherings at least 72 hours in advance. On the one hand, if a meeting with a controversial topic is intended, there are some safety reasons which should be considered by the universities' government, what may result in prohibiting a meeting. On the other, the number of gatherings that had been cancelled for fear of riots may be understood as a First Amendment violation. This Statement is significant because it includes a direct reference to Orwell's "1984" and it expresses that preconditions to speech "might not be out of place in Oceania, […] the First Amendment to the United States Constitutions […] ensures that preconditions like these have no place in the United States of America"[25].

In 2014 the President and Provost of the University of Chicago appointed a Committee on Freedom of Expression. Briefly referring to this report, one conclusion is particularly worth quoting as sometimes it is unresolvable to balance the right of an individual university employee to raise controversial matters and the need of the university as a community for undisturbed functioning. Applying a part of the report, the priority is given to a right of an individual due to a stimulation of knowledge. Either agreeing or disagreeing therewith, a digitalized democracy demands a serious discussion and, in those countries, where such a discussion has not even started out, the American experience would be extremely significant.

Speaking of the report, the Committee says:

"[…] It is for the individual members of the university community, not for the University as an institution, to make those judgment for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose. Indeed, fostering the ability of members of the University community to

[25] https://www.justice.gov/opa/pr/justice-department-files-statement-interest-supporting-campus-free-speech.

engage in such debate and deliberation in an effective and responsible manner is an essential part of the University's educational mission"[26].

5. UNIVERSITY RULES – SELECTED EXAMPLES

With the methodology explained in the introduction, a classification of academic freedom/freedom of expression definitions have been hereby presented. The starting point is a consent that liberal and conservative views should be freely spoken out at the campuses by both professors and students. The question whether the political lean of the campus should impact the individuals-campuses relations, would – at this point – remain unanswered and as such it requires further academic discussion, especially from the Polish perspective. But the analysis of the internal rules of the selected universities allows for a formulation of a thesis that the liberal universities adapt various description of academic freedom, while the conservative universities implement more homogeneous responsibility-based definitions. Catholic and in general Christian campuses represent a separate category because they expressly indicate which Christian values must be respected, although they can be defined in a conservative, orthodox way, or progressive liberal way which makes a crucial difference. It goes without saying that final thesis requires a more detailed and complex survey.

5.1. Conservative universities

Utah State University has enacted a faculty-dedicated policy regarding academic freedom – a relatively long and detailed document. The last revision is dated back to 2012. This university in its policy stresses that:

"Thought and understanding flourish only in a climate of academic freedom and integrity, expressed collectively by colleges and departments as well as individually through research and teaching and as they exist within the wider context of advanced study as commonly understood by all universities. The community also values diversity and respect, without which there can be no collegiality among faculty and students. In addition,

[26] Report of the Committee of Freedom of Expression.

the university community values individual rights and freedoms, including the right of each community member to adhere to individual systems of conscience, religion, and ethics. Finally, the university recognizes that with all rights come responsibilities"[27].

Interestingly, to say that each has an individual system of ethics makes any sensible discussion of morality of freedom of speech meaningless. In addition to emphasizing the responsibilities, the policy also states that:

"The university itself shall not violate the academic freedom of any faculty member or the freedom of any student to learn and shall use its powers and resources to defend its faculty and students from unjustified attempts to compromise or restrict those freedoms, even should the exercise of those freedoms generate hostility"[28].

The Angelo State University, located in Texas, claims its strong commitment to:

"the principles of academic freedom for faculty in teaching, research, and the publication of scholarly inquiry accompanied by an equally demanding concept of responsibility"[29].

Judiciousness in introducing controversial matter in the classroom is demanded from the faculty, including a requirement that controversies must remain in relation to a class topic. Moreover, freedom in research must be accompanied by „responsible academic and professional practices"[30].

As we can see, this policy is directly derived from the 1940 Statement of Principles on Academic Freedom. In 2012 The Faculty of the Senate of the University of Tennessee requested:

"that the University of Tennessee Board of Trustees expand the definition of academic freedom to include protection for shared governance and other employment-related speech"[31].

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[27] Policy Manual No. 403, Section 1, https://www.usu.edu/policies/403/.

[28] Ibidem, Section 2.1.

[29] Operating Policy and Procedure 04.04, https://www.angelo.edu/content/files/14136-op-0404-academic-freedom.

[30] Ibidem, Section 1.

[31] The Faculty Senate of the University of Tennessee-Knoxville Resolution, http://senate.utk.edu/wp-content/uploads/sites/16/2011/09/2-Academic-Freedom-resolution-for-board-action.pdf.

In the policy of the Board of Trustees, additionally to the exclusion of controversies not related to the course subject, a cautiousness in expressing personal views is also recommended. Generally, the policy, partially rooted in the 1940 Statement points out:

"A healthy tradition of academic freedom and tenure is essential to the proper functioning of a University. At the same time, membership in a society of scholars enjoins upon a faculty member, certain obligations to colleagues, to the University and to the State that guarantees academic freedom. […] The primary responsibility of a faculty member is to use the freedom of his or her office in an honest, courageous, and persistent effort to search out and communicate the truth that lies in the area of his or her competence. […] A faculty member is entitled to full freedom in research and in publication of the results, subject to the adequate performance of his or her other academic duties […]. A faculty member should recognize that the right of academic freedom is enjoyed by all members of the academic community. He or she should be prepared at all times to support actively the right of the individual to freedom of research and communication as defined herein"[32].

Under the Statutes of the University of North Georgia:

„University Faculty members are entitled to full freedom of expression in research, teaching, and publishing, subject only to those restrictions that are imposed by professional ethics and respect for the rights of others. University Faculty members have the right to criticize and seek alteration of both academic and non-academic University policies, whether or not those policies affect them directly. University Faculty are free from institutional censorship, discipline, or reprisal affecting their professional careers for exercising freedom of expression[33]".

It also quotes the 1940 Statement in the Faculty Handbook[34].

As of April 2020, the University of Mississippi has no directly addressed policy governing academic freedom. On December 5, 2018 the

[32] Policies Governing Academic Freedom Responsibility and Tenure, https://policy.tennessee.edu/wp-content/uploads/policytech/system-wide/bt/BT0006-Policies-Governing-Academic-Freedom-Responsibility-and-Tenure.pdf.

[33] Statutes, Section 5, https://provost.uga.edu/policies/statutes/.

[34] Faculty Handbook, Section 6, https://ung.edu/academic-affairs/faculty-handbook/6-academic-freedom/index.php.

Faculty Senate enacted a resolution, in which the faculties manifested their fear of „chilling" academic freedom due to the activity of the university's chancellor. Therefore, the resolution reaffirmed an endorsement of the 1940 Statement and stated that:

„the necessity of academic freedom to the University's mission, upholds the 1940 "Statement of Principles," and encourages senior leadership to use their positions of authority judiciously, to generally refrain from questioning the credibility of faculty scholarship, and to recognize and mitigate against any and all threats to academic freedom[35]".

Currently, in the age of a polarized society, there is a danger of misusing personnel policies by both liberal and conservative universities against a campus member with opposite views. It is an endless problem of considering the academic freedom also as an extra-constitutional privilege[36].

Even though the voice for protecting academics from unjustified actions taken by the university – regarding tenure and promotion – has stimulated the recent changes to the internal rules of the abovementioned universities, still it is clear that those universities describe the academic freedom in the wide context of responsibilities imposed on individuals.

5.2. Liberal universities

On April 1, 2015 the Academic Council of the University of California, of which two universities, Berkeley and Santa Cruz are among top liberal universities, endorsed the position of the University Committee on Academic Freedom, which in few sentences expresses support "for the tenet that UC campuses should aspire to civil discourse, so long as this tenet is not allowed to operate in practice as a restraint on academic freedom[37]".

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[35] Faculty Senate Resolution, https://olemiss.edu/faculty_senate/archives/Resolution-AcademicFreedom.pdf.

[36] Term used and problem discussed by Ernest van den Haag, „Academic Freedom in the United States", Law and Contemporary Problems Summer 1963: 515. See also: "Academic Freedom and Tenure", *Pace Law Review* 5(1994), 5–13, https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1354&context=plr.

[37] UC Academic Council Position on Academic Freedom and Civility, https://academic-senate.berkeley.edu/sites/default/files/academic_freedom_statement_endorsed_by_council.pdf.

The position explains that:

"academic freedom includes the right of members of the university community to express their views, even in passionate terms, on matters of public importance[38]".

According to the Academic Personnel Manual:

"Members of the faculty are entitled as University employees to the full protections of the Constitution of the United States and of the Constitution of the State of California. These protections are in addition to whatever rights, privileges, and responsibilities attach to the academic freedom of university faculty"[39].

At Portland State University, academic freedom is considered as the most important privilege of Faculty members but it must be enjoyed consistently with the responsibilities imposed on academics as teachers, scholars, colleagues, members of the University, administrators, and member of the non-academic community. Consequently, the faculty member should "respect and defend the free inquiry of his associates", "show due respect for the opinion of others" and "observe the stated regulations of the University, provided they do not contravene academic freedom"[40].

The University of Oregon has indicated four contexts of academic freedom: scholarship, teaching, policy and shared governance and finally public service. Accordingly, faculty members are granted "autonomous freedom to conduct research […] limited only by the standards and methods of accountability established by their profession […][41]". As teachers they have a right to "investigate and discuss matters, including those that are controversial, inside and outside of class, without fear of institutional restraint. Matters brought up in class should be related to the subject of courses or otherwise be educationally relevant […][42]". One may add that

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[38] Ibidem.

[39] Academic Personnel Manual-010, https://www.ucop.edu/academic-personnel-programs/academic-personnel-policy/index.html.

[40] Faculty Conduct Code, 577–041–0005, https://www.pdx.edu/dos/psu-faculty-code-conduct#1.

[41] UO Policy Statement on Academic Freedom, Section 1(a), https://policies.uoregon.edu/content/academic-freedom-0.

[42] Ibidem, Section 1(b).

the last postulate is, especially in the humanities, very difficult to verify and may be subject to abuse.

Moreover, they have the freedom of expressing criticism against institutional policy[43] and to participate in public debate[44].

Similarly, the University of San Francisco describes academic freedom in three fields: teaching and instruction, research and creative expression, as well as university governance and public expression. Faculty members are free to:

– present in both formal and informal ways the academic subject, including controversies, insofar as they refer to the course's topic[45];
– "pursue any avenue of research or creative expression without interference"[46];
– express their views on University governance and functioning and on matters of public concern[47].

The selected liberal universities have expanded the meaning of academic freedom in all of its dimensions. They do not entail cautiousness in teaching controversies and allow informal educational methods. In addition to that, a faculty member's freedom to express opinions relating to public issues has not been impeded. In that sense, those examples give priority to a protection of individual rather than academic community.

5.3. Catholic campuses

What recently has been claimed by conservative academics and students is that they have no freedom to express their opinions because of liberal political correctness. One has also to bear in mind that today nominally Catholic universities may uphold the orthodox Catholic creed or may contest it accepting its liberal, progressive interpretation, which makes a difference in the context of academic freedom. It has to be remembered that freedom of speech must also be balanced with the freedom of religion

[43] Ibidem, Section 1(c).

[44] Ibidem, Section 1(d).

[45] Academic Senate Policy on Academic Freedom Principles, #F13–267, Section 2, https://senate.sfsu.edu/sites/default/files/%23F13–267001.pdf.

[46] Ibidem, Section 3.

[47] Ibidem, Section 4.

principle, given that both of them are different conceptual and axiological categories.

In this article the academic policies of the Catholic University of America and John Paul the Great Catholic University will be looked at. Importantly, both of these universities benefit from federal grants, what obliges them to apply current federal laws on campuses, which might conflict with their creedal mission[48].

At the Catholic University of America[49], pursuing truth and academic freedom in research and teaching is considered to be the very heart of the university policy, which expressly states that free speech is constitutionally protected from governmental restrictions. Without any doubt, this may imply that the campus community would support its member from any discriminatory action taken by the government. But in consideration of the object of the university, academic freedom may be limited in the context of relations between employer and employee. In its policy, the university indicates that freedom to express oneself "may be constrained in a private university by other values which are held to be equal, greater or prior"[50]. Furthermore, the university points out that "as a private institution, is not required to provide a forum for advocates whose values are counter to those of the University or the Roman Catholic Church" and the reasons underlying these restrictions are as following:

"The University recognizes a distinction between objective explanation and advocacy in the presentation of issues. This means, therefore, that it

[48] In the U.S. law it is claimed, that the source of academic freedom at private campuses lies with the University rules because the First Amendment does not apply directly. See: Rachel Levinson, Academic Freedom and the First Amendment, American Association of University Professors Summer Institute, July 2007, 18, https://www.aaup.org/NR/rdonlyres/57BFFE5E-900F-4A2A-B399–033ECE9ECB34/0/AcademicfreedomandFirstAmenoutline0907doc.pdf

[49] On the role of catholic campuses and academic freedom see: Joseph Koterski, "Taking a Catholic View on American Freedom", July 20, 2017, https://newmansociety.org/taking-catholic-view-academic-freedom/. Charles E. Curran, "Academic Freedom: the Catholic University and Catholic Theology", *The Furrow* 12(1979): 739–754.

[50] Policy for Presentations and Balanced Programs, https://policies.catholic.edu/students/studentlife/organizations/presentations.html.

may refuse permission to prospective speakers who in its judgment promote or advocate such counter values"[51].

Importantly, this provision allows the University not to host a speaker who expresses opinions against catholic values. The question arises whether academic freedom is violated and freedom of speech infringed by this limitation. Undoubtedly, a catholic community has a right to conduct research and to present opinions consistent with Roman Catholic Church doctrines. Does it mean however, that opposite views should not be expressed at campus at all? The policy says that:

"balanced programs explaining positions on both sides of a controversial, societal, political, moral, and/or ecclesiastical issues may be staged in the pursuit of a more complete educational experience and a greater understanding of the issues. Hence, in such matters, even in those in which the Roman Catholic Church has expressed clear and unambiguous official teaching, programs involving knowledgeable spokespersons representing opposing viewpoints may be considered to be appropriate within the University setting"[52].

This policy allows to conduct research and make speeches that include contends not consistent with the Roman Catholic Church doctrine. But there is one condition, namely the educational experience should be developed as a result of such disputes. Therefore:

"programs designed to promote action rather than understanding, while not necessarily inappropriate in themselves, are not clearly 'educational' in a strict sense"[53].

As a result, catholic values have been protected and opposite opinions are allowed at the university forum but only to the extent that agitation does not take place. The better understanding itself has been fully protected by academic freedom.

Individual and institutional academic freedoms are heavily regulated in the John Paul the Great Catholic University's internal rules. According to its Statement:

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[51] Ibidem.

[52] Ibidem.

[53] Ibidem.

"JP Catholic embraces the traditional freedoms of scholarship, inquiry, and dialog, together with the responsibilities implicit in its Catholic mission"[54].

Similar to the CUA's policy, intellectual challenges and development of knowledge have been underlined as determinants for research and highly qualified teaching.

Interestingly, some institutional restrictions exist and have an impact on the university community ordinary life:

"Catholic faculty must live lives reflecting faithfulness to the Word of God and sign a statement reflecting the fidelity. […] Faculty of other faiths must agree to respect the Catholic nature of the university and its mission, while the university in turn respects their religious convictions. […] It is not expected that the faculty will agree on every point of Catholic doctrine, much less on the issues in the academic disciplines that commonly divide faculties everywhere. It is expected, however, that a spirit of Christian charity will unite even those with wide differences and that questions will be raised in ways that seek to strengthen rather than undermine faith"[55].

Individual freedom is, in turn, characterized by a quotation from Pope Benedict XVI to Catholic Educators and it requires academics to seek the truth, which should be determined in its essence by a careful analysis of evidence. In addition to formal requirements, which had been addressed to the academics of JP Catholic, there is one more phrase in the Statement worth citing. The Preamble and the Conclusion include that:

"For those who seeks the truth Christ reveals, JP Catholic offers a genuinely true academic freedom"[56].

It expressly means that JP Catholic as a private college limits academic freedom due to affirmation and promotion of Christian anthropology and the values built on it. Obviously, there is space for a dispute but only within the contours of the Catholic mission. JP Catholic understands that there is always a tension between individual and institutional academic freedom. Therefore, some solutions have been implemented in order to mitigate potential conflicts. First of all, the Statement relies on a pre-

[54] Academic Freedom Statement, https://jpcatholic.edu/academics/freedom.php.

[55] Ibidem.

[56] Ibidem.

sumption of innocence and an explanation thereof that the awareness of the person that he/she violated the standard is required. The Statement gives a few examples of such violation, mainly: public dispute or opposing fundamental Catholic teaching, intentional attack or mock the Catholic church or its hierarchy or clergy and breach of JP Catholic's Honor Code. The Summary of Statement also refers to general descriptions of violations. It stresses that neither the individual faculty freedom nor the institutional freedom should be restrained unless it involves "matters that obstruct or betray the university's identity and mission or the Catholic Church"[57].

If the private university is established in order to promote truth seeking and to protect specific values, it is entitled to restrain some activities of faculty members. This restraint, however does not have to be necessarily considered as a restriction by the faculty itself. As a practical matter, the academics at such universities usually share the same values, and, thus, such a community, though less diverse, should not be *a priori* claimed to abate academic freedom.

6. FINAL CONSENSUAL CONLUSION

Undoubtedly, the university campus, including the employer-employee relationship, must be free from harassment, discrimination, and retaliation. But the review of doctrine over recent years illustrates that discussions on academic freedom have no longer been a dispute about the universal idea of this freedom. These days, it relates more to an interdependence between both individual's and the university's right to academic freedom. This perspective has been notably connected to the dichotomy between "conservative" and "liberal" views on the role of an individual in the society. Some of the universities express the freedom in a very wide context of responsibilities, while other focus on individual' role in shaping the academic climate for developing knowledge and pursuing a truth. Globally, in western civilization, with the number of inclusively heterogeneous and different homogeneous campuses, various paths have been

[57] Ibidem.

chosen on a way to develop academic inquiries and research, as well as the educational methods.

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