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US-CHINA LAW REVIEW

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INTERNATIONAL RECOGNITION OF THE COUNTRIES AND THE FOREIGN POLICY (THEORIES AND PRECEDENTS)

Aneta Stojanovska-Stefanova[*] *& Drasko Atanasoski*[**] *& Zoran Chachorovski*[***]

In order to recapture the essence and justification of this paper, the source of this theoretical review was found in the definition of statehood. After the end of the thirty years of civil war in Europe and the signing of the peace treaty of Westphalia in 1648, the creation and development of the country began to the form that we know today. In terms of increasing interdependence between the countries, the question of their mutual cooperation is essential. For the states equally important segment with internally arranged relations is the manner on which they concern and regulate the international relations. State boundaries are endpoints to where sovereignty lies within a country. The authorities within it regulate the relations inside and the nature of its international positions. The highest authority, which does not recognize any other form of higher power, is sovereignty. Considering that the law, especially the international, is an active matter open to interpretation, although the basic features of a country are clear, yet there are two types of states divided to a de jure-existing under law and de facto-existing in reality, based on the matter whether and which of the characteristics of statehood they own.

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INTRODUCTION

The institute of international recognition is one of the instruments for development of cooperation with other countries on the basis of their common interests. This institute of "recognition of countries" is known in League of Nations and United Nations. The legal effects from the recognition of countries are limited if they are downsized only to a declarative act but they can also be constitutive and more serious, if followed by an establishing of other legal and economic pressures such as isolation and boycott.

It is important to be emphasized that the recognition of countries is not directly related with the establishment of diplomatic relations. Namely, it can happen that the country can be recognized without any diplomatic relations to be established, however the oposite is not possible because establishing of diplomatic relations also means recognition of that country.

The foreign policy of a country depends from many factors but, above all, from the interests of the country in terms of specific issues.

Regardless of the existence of dilemmas regarding the sense on one hand and the challenges it faces before the light of globalization on other, the country manages to realize the obligation towards its citizens, who indirectly manage it, in the past centuries. As a result of the above, we can provide a conclusion according to which the modern democratic state must exist on the principle of "sacredness of the person". It entrusted their basic rights to satisfy the need and to create the preconditions for realization of aspirations without bringing into question the satisfaction of the needs and realization of the aspiration of other citizens who are part of the same community, i.e. country. These conditions, to a large extent, are provided by the democratic state which although is not perfect according the words of Churchill *saying that the human mind did not managed to implement in the practice better form of state organization.*

The state as a subject of the international law in its broadest sense of the word is defined through its four basic characteristics:

- Population;
- Territory;
- Power;
- Sovereignty.

The sum of all citizens who live within a defined territory, divided by other territories, and who are under an authority and have established relations with the state through legal relations of statehood is called population.

The territory is an area separated by other territories by borders where a specific population lives and which has established authorities.

The state borders are end points to where the sovereignty of one country expands.

The authority within one country regulates the relations within that country as well as the character of its international positions.

The highest authority that does not recognize any other higher form of authority is the sovereignty.[1]

The landmarks of a modern state as we know today are defined by the Westphalian Peace Treaty[2] according to which the state is constituted by three main characteristics: territory, population and sovereignty, i.e. absolute power of rule[3]. In order to understand the process of recognition better and the different specification which appeared throughout the history, we will first pay attention to the terms sovereignty and statehood, what sovereignty means and how one state acquires it, and later the manners through which the countries recognize the existence of another country. The state is seen as a primary factor and the citizens expect solution of their problems and social needs. Although this partially is due to the unsolved existential problems of social nature, we cannot help but notice the strong tendency of individuality and social alienation. Also a political culture, which is closely related with the creation of cult of the person, is created among the citizens towards the personality of specific political figures as a result of the remaining of the leftovers of the past. The citizens still largely prefer leaders who will rule with a strong hand than development of democratic society[4].

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[1] WILLIAMS, GOLDSTEIN & SCHFRITZ, CLASSIC READINGS OF INTERNATIONAL RELATIONS 82 (Belmond, California: Wadsworth Publishing Company).

[2] PEACE OF WESTPHALIA, ENCYCLOPEDIA BRITANNICA, www.britannica.com (last visited June 1, 2016).

[3] THE CRISIS OF THE SOVEREIGN STATE AND THE "PRIVATIZATION" OF DEFENSE AND FOREIGN AFFAIRS, HERITAGE FOUNDATION, www.heritage.org (last visited June 1, 2016).

[4] Strasko Stojanovski, Jadranka Denkova & Jovan Ananiev, *Перцепциите на граѓаните за транспарентноста и партиципативноста во процесот на донесување на одлуки во единиците на ликалната самоуправа во Источниот плански регион на Република Македонија*, 5 ANNUAL YEARBOOK OF THE FACULTY OF LAW (ISSN 1857-7229) 287—305 (2016).

I. NOMINAL DEFINITION OF SOVEREIGNTY

The sovereignty means supreme and independent power within a defined territory and its population. This kind of interpretation which is part of a broader definition of a state plays enormous role in every aspect of international relation and international law because it highlights that no one else, meaning another country above all has not got the right to prescribe or implement law on a territory of the sovereign country. Having in mind the above, the use of force for implementation of the law lies in the hands of the entity that holds the power regardless if that entity is the government, president or divided sovereignty between two institutions. Hence, once a country acquired sovereignty and it is recognized by other countries, those countries recognize its power over the defined territory and population and denounce the possibility to interfere in the internal affairs of the country they recognized.

The sovereignty can generally be divided into:

- National;
- Foreign.

The national sovereignty is established by a state body with authority to practice power, while the foreign sovereignty portraits the country as a sole unit in the international community which refers the country as a holder of rights and obligation in terms of other country on international level.

Having in mind the meaning of the term sovereignty, the meaning and role of the decision whether a country will be internationally recognized or not as well as the need every territory and nation that prefer to become a country to provide conditions for acquiring of the sovereignty.

II. ACQUIRING SOVEREIGNTY

Sovereignty is generally acquired on five manners, four of which are recognized by the international law[5].

The first manner is through population of "no one's land", i.e. land with no claimed sovereignty or if that land was under someone's authority and the previous ruler denounces that the rights to lands thus removing the obstacles a new or different country to implement is sovereignty on that territory.

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[5] Aneta Stojanovska, *Process and Methods of Recognition of States* in ANNUAL YEARBOOK OF THE FACULTY OF LAW, GOCE DELCHEV UNIVERSITY—SHTIP (ISSN 1857-7229) 267 (2nd August Printing House—Shtip 2009).

The second manner is related with the first one and envisages acquiring sovereignty through its practicing during longer period of time on the territory and that right not to be challenged by any other country.

The seceding is the third manner for acquiring sovereignty. However, that must be implemented with approval of the country which the newly seceded territory previously belonged to. In this case we have a transfer of rights from one country to another, most often by agreement. The modern trends and the emergence of the idea for self-determination oblige the new country to obtain consent by the population that live on the territory which seeks sovereignty before it may occur. This is the case of the union between East and West Germany where the four occupying countries, USA, France, Great Britain and Soviet Union gave consent for implementation of that process and gave up the right to sovereignty on their part of the German territory. The people also voted positively.

The fourth of the five methods is not considered legal method of acquiring sovereignty today due to the fact it is based on conquering which is considered illegal by the United Nations and it is prescribed as such in their charter which is signed and ratified by every member-country.

The fifth and last type of acquiring sovereignty over a specific territory is if it is formed as an additional part of already existing territory by a way of natural growth such as sedimentation and volcanic activity.

III. DE JURE AND DE FACTO COUNTRIES

Having in mind that the law, especially international law, is a live matter opened for interpretation although the basic features of one country are clear, two types of countries can be established. They are divided to *de jure* countries that exist according the law and *de facto* countries that exist in reality on the basis of whether and what characteristics of statehood they have[6].

De jure countries are those which fulfil some of the conditions for statehood but not all three. For example a country that has a territory and population but not complete sovereignty over them. Also another example is a government in exile, i.e. government which according the international community has a right to sovereignty over a defined territory and population but due to occupation it cannot enjoy that right, such as the case with the Baltic countries during the Second World War when their territories were under Nazi occupation but they were recognized by the countries of the Alliance as their legitimate rulers, a role which they *de facto* take over after

[6] *Ibid*, at 268.

the liberation. One more specific example for recognized sovereignty in absence of territory is the sovereignty managed by the "organization" also known as the Sovereign Military Order of Malta which to a certain extent but not completely is a *de jure* country more than *de jure* government. This "organization" had the power in Malta in the past but after its member was exiled from the island, they continue to exist in Rome. It is interesting that the Order is recognized as sovereign by a large number of countries, a situation that portraits the fact that it has established diplomatic relations with 103 countries and 6 entities subject to international law, among which is the European Union that has answered with reciprocity, meaning that they have established diplomatic relations with the Order. Besides the diplomatic relations, the Sovereign Military Order of Malts owns several buildings in the city of Rome which the Italian government had gave exterritorial statues meaning that within that territory/building the law of the Order is conducted and not of the state of Italy, a status which is exclusively reserved for the embassies of states. Additionally, the United Nations does not register the Order as a "country which is not a member" but as an entity that has received a valid invitation to participate as observer in the organization. Besides these typical state characteristics, the "organization" has its own army within the Italian army but an army that waves the flag and it is under the command of the Order, currency which has more of a collectors and symbolic than other usable purpose as well as it prints stamps that although they are not accepted everywhere, they are accepted by large number of European and world countries.

De facto country is an entity that has a territory, population and sovereignty but lacks recognition to legitimately manage them by a larger number of countries. This is mostly the case due to the fact that the *de facto* country was previously part of another country that oppressed and challenged its sovereignty. Here we find the contact point between the characteristics of the statehood and the need of their recognition as legitimate by others already existing countries. There are many examples for *de facto* countries in the world among which are Taiwan which the People's Republic of China considers part of their territory although it does not have real sovereignty over it and the case of Somaliland and Somalia, then to a certain degree Kosovo and Republic of Serbia and many more.

IV. RECOGNITION OF COUNTRIES IN THE INTERNATIONAL LAW

The institute of "recognition of countries" is common but very important legal institute in the international law mainly due to the political

circumstances that determine it[7]. There is no specific rule to date according to which one country becomes internationally recognized and enjoys the right to statehood and the right to participate as equal to other countries in various international organizations[8]. There were attempts to establish universal criteria for obtaining the said statuses and possibilities but no one managed to affirm itself as relevant and respected by all countries in the world. There are two theories which study this issue[9]. The first one is the *Declarative theory* of statehood adopted at the conference in Montevideo[10] which is best summed up in the following sentence: "The political existence of one country is independent of its recognition by other countries". According this theory for acquiring statehood, thus including the country in the international law as its entity, it is necessary for the country to encompass four elements: territory, population, sovereign authority and ability to manage the previous three. Having a look at the beginning of the text, it can be seen that the biggest part of the definition is taken over from the Westphalian Peace Treaty, meaning that it is not a novelty in the international but an already existing criterion that although recognized, it is not completely accepted and implemented without discrimination.

The international law also encompasses the *Constitutive theory* of statehood. It studies the recognition of a country by other countries as instrumental for obtaining statehood and status of an entity of the international law of a new country. The views encompassed by the theory, which although formally is not widely accepted we can consider as realistic, are nicely captured in a though by L. Oppenheim stating: "The international law does not provide that one country does not exist until it is recognized by others but at the same time does not exist until it is recognized".

It can be concluded that the acquiring independence and international legal subjectivity by one state is formal and depends by its international recognition which is based on the will of other countries.

Subliming the declarative positions of the countries on this topic but also the reality, it can be summed up that the recognition of one country as sovereign and as relevant entity of the international law is opened for interpretation, that there are no game rules in this field and that every existing country recognizes a new country at its own discretion and in

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[7] LJ. D. FRCHKOVSKI, V. TOPURKOVSKI & V. ORTAKOVSKI, INTERNATIONAL PUBLIC LAW 58 (Tabernakul Skopje 1995).
[8] More in: THOMAS D. GRANT, THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION (Praeger Publishers 1999).
[9] More in: H. Lauterpacht, *Recognition of States in International Law*, NEW HAVEN CONN: YALE LAW JOURNAL (1944).
[10] More in: MONTEVIDEO CONVENTION ON RIGHTS AND DUTIES OF STATES (1933).

accordance with its national interest thus not following some custom norms of the international conduct.

V. RULES OF THE INTERNATIONAL ORDER AND RECOGNITION OF COUNTRIES

Since we established that the recognition of countries in the international law is an issue of a political decision, let's review its methods[11]. Just as with the classification of the countries to *de jure* and *de facto*, both models also exist as methods for recognition. *De jure* recognition means adoption of a formal legal act—diplomatic note, law or declaration in the legislation house or by the government or president of state which publishes the recognition of one country by another through an official document[12]. This method is not ambiguous and does not leave any room for interpretation.

The second method, the *de facto* method means establishment of political, economic and other type of relations.

The differences between the first and second method are in the formal legal document which provides the rights and obligations and which is present in the first case but absent in the second.

The *de facto* recognition is often used with a purpose to avoid violation of the bilateral relations with another country but at the same time to actually implement the recognition of the country in question. Types of relations between two countries that can be considered as a step towards recognition are the following: establishing diplomatic relations, visit by the head of state of the existing country to the country requesting recognition, signing of bilateral agreements between both parties and recognition of passports of the unrecognized country by the existing country. If one can take a look through history, there are cases where diplomatic communication between two countries, one of which is not internationally recognized, was necessary such as the case of establishing dialog between USA and the Palestinian movement for independence where in order to avoid informal message for recognition, the existing country explicitly states that its activities does not mean recognition of the country which establishes relations due to specific reasons. We have a similar example of Taiwan's relations with large number of countries in the world. Although officially recognized and has diplomatic relations with 23 countries, unofficially the United States of America, Australia, Great Britain, France

[11] INTERNATIONAL & COMPARATIVE LAW QUARTERLY 35: 975—990 (Cambridge University Press (1986).
[12] EUROPEAN JOURNAL OF INTERNATIONAL LAW 4(1): 66—71 (1993).

and many other countries have its offices under the cover of research and cultural centres and trade associations.

According the doctrine introduced in the 1930s by the Mexican minister of foreign affairs, Genaro Estrada[13], besides the previous two, a method for recognition of countries is also introduced. What is the difference? If the country has a policy to perform legal recognition, it means that it has to give a positive or negative statement regarding the recognition of the new government upon every unconstitutional change of power in one country[14]. The advantage of this policy is the possibility to revise the relations towards other countries upon every unconstitutional change but that mean interfering in its internal affairs by approving or disapproving with the changes made. The policy of secret recognition is a balance between the two doctrines and according to it the state is not obliged to evaluate the new government of another country but can confirm or revoke the recognition if desired. *The third doctrine,* which is used mostly nowadays, discusses recognition of countries instead of governments. According to it, if the first country has recognized the country where unconstitutional change of the government was made, it shall not revise the decision for recognition based exclusively on the change of regime. The advantages of this policy are far less administrative and bureaucratic procedure regarding the political changes in the world. While leaving space for manoeuvring in case of real need to reconsider the cooperation with the country where the change occurred is considered as disadvantage.

We can consider the so called "*collective recognition of countries*" as a separate form of recognition which may occur through joint acceptance of membership of one country in the regional and universal international organization, through joint acceptance of a declaration of international convention or through formal procedure within the bodies of an international organization.

The recognition of one country on international level is reflected through its membership in the Organization of the United Nations (UN)[15]. All dilemmas regarding the independence and sovereignty of any country are removed by becoming a member of this global organization. This is because in order for a country to become a member of this international institution it is necessary to be recognized by the five member-countries of

[13] Genaro Estrada, http://www.biografiasyvidas.com/biografia/e/estrada_genaro.htm (last visited June 2, 2016).
[14] Aneta Stojanovska, *Process and Methods of Recognition of States* in ANNUAL YEARBOOK OF THE FACULTY OF LAW, GOCE DELCHEV UNIVERSITY—SHTIP (ISSN 1857-7229) 267, 272 (2nd August Printing House—Shtip 2009).
[15] More in: Hans Kelsen, *The Law of the United Nations, and on United Nations*, www.un.org.

the Security Council, USA, Russia, China, Great Britain and France without whose decision (resolution) a membership is not possible. But it is important to be emphasized that there is no obligation (in the UN Charter) that obliges the member-countries, after the acceptance of a new country as member of UN, to establish "full political and legal recognition" by establishing bilateral diplomatic relations[16].

VI. PRECEDENT IN THE INTERNATIONAL RECOGNITION OF COUNTRIES: THE CASE OF REPUBLIC OF MACEDONIA

The process of establishment and positioning of Republic of Macedonia on international plan through establishing communication, cooperation and becoming a member of international organization began at the same time with the process for independence of Republic of Macedonia in 1991. Republic of Macedonia became a member of the United Nations on April 7, 1993 and then of all agencies, programmes and funds of the UN system. Two years later, in 1995, Republic of Macedonia became member of the Organization for Security and Co-operation in Europe (OSCE) and the Council of Europe as well as other relevant regional organizations and initiatives. In the following years, Republic of Macedonia became a member of the World Trade Organization (2003), CEFTA (2006) and full member of the Francophonie (2006).

During this period, Republic of Macedonia seeks to promote itself as responsible entity in the international relations, accepting the basic principles and goals from the UN Charter as basic postulates for its foreign policy. Regionally, it seeks to promote good neighbouring relations, cooperation and sustainable development of the region it belongs to.

The case for admission procedure of Republic of Macedonia as a member of the United Nations is a precedent in the history of that organization. This precedent is important not only for the specific circumstances related with Republic of Macedonia but also as a possible negative example in the procedure, namely as mutual dependence between the legal and political evaluations in the bodies of the United Nations. In the admission procedure in UN bodies such as the Security Council, General Assembly of UN, the legal and more general political arguments did not dominate but it was imposed as a topic and an obstacle the political challenging of a member-country (Greece), which called upon the provisions from the Charter for keeping the peace and avoidance of creating

[16] LJ. D. FRCHKOVSKI, V. TOPURKOVSKI & V. ORTAKOVSKI, *INTERNATIONAL PUBLIC LAW* 61 (Tabernakul Skopje 1995).

crises zones in the world, its political views towards Macedonia presented as possible threat to peace (the very existence of Macedonia at its northern borders) which actually arose to a bilateral dispute on a level of "procedural obstacle" in the United Nations.

Bringing back of the issue with the recognition of Republic of Macedonia on collective manner, with the membership in the United Nations, was supplemented with another precedent, i.e. Republic of Macedonia is admitted for membership in the United Nations under the temporary "designation" as "Former Yugoslav Republic of Macedonia" and with temporary removal of its official flag in front of the building and in the bodies of UN. This decision should be effective until final solution of the "dispute" with the procedure of its solution placed by the secretary general of the United Nations.

The precedent is unpleasant for the organization of the United Nations because it refers to illegal and unfounded arising of a bilateral issue to a legal and procedural circumstance—obstacle in realization of the basic rights of one country to become international subject with full capacity[17]. In the case of Republic of Macedonia in the admission in UN, Republic of Macedonia was presented with two additional conditions of no legal character that directly violate the Charter: to descriptive name FYRoM to be accepted and to negotiate with Greece about its constitutional name[18]. The International Court of Justice, as one of the main bodies of the United Nations, in its history of existence had already considered the issue of imposing additional conditions for membership in the United Nations. In its advisory opinion from May 28, 1948 regarding the conditions for admission of a country as a member of the United Nations, the court took legal stand (contained in the ICJ Reports, 1948)[19] that the requests stated in Article 4 Paragraph 1 of the Charter regarding the membership "are exhausting numeration and therefore they are not given as managing principles or an example". That means that if an applicant fulfils the four conditions from Article 4 Paragraph 1 of the Charter, that country should be admitted as a member of UN. According the mentioned court opinion from 1948, a country cannot be conditioned before its admission by previous recognition of elements of the legal entity, i.e. such conditioning imposes additional conditions which are opposite of Article 4 Paragraph 1 of the UN Charter

[17] *Ibid*, at 61—62.
[18] ANETA STOJANOVSKA, CONSTITUTIONAL AND LEGAL AND POLITICAL ASPECTS OF THE FOREIGN POLICY, WITH SPECIAL OVERVIEW OF REPUBLIC OF MACEDONIA, Master Thesis, at 58.
[19] REPORTS OF JUDGEMNETS, ADVISORY OPINIONS AND ORDERS OF NTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/docket/files/3/1821.pdf (last visited October 2015).

and by imposing such conditions is UN Charter is being violated as the court stated.

Through its foreign policy on bilateral and multilateral level—Republic of Macedonia promotes its national values and interest. The European and Transatlantic integration are of vital interest for the long-term stability, security and well-being of Republic of Macedonia, a country as a stable military partner of the Alliance.

The process of recognition of Republic of Macedonia began in 1992. Diplomatic relations with total of 167 countries are established since then. Republic of Macedonia has established full diplomatic relations with the European Union on December 29, 1995[20].

CONCLUSION

With the conclusion of this theoretical overview, which refers to the international recognition of the countries in the international law, it is important to be emphasized that the recognition of the countries in the international law is common and very complex legal institute which is strongly determined by the political circumstances. While considering the recognition of one country by another and how that influences on its existence and operation, one comes to the most inaccurate part of the international law and customs. There is no specific rule to date according to which one country becomes internationally recognized and enjoys the right to statehood and the right to participate as equal to other countries in various international organizations[21]. There were attempts to establish universal criteria for obtaining the said statuses and possibilities but no one managed to affirm itself as relevant and respected by all countries in the world.

The international relations are subject to regulation of the constitutional regulation because the national law depends of the international law.

The best evidence for that are those constitutions that contain provisions for transferring part of the state sovereignty to the international institutions or envisage obligation for harmonization of the national legal order with the commonly accepted rules on international level. The mutual dependence between the national and international law is in the function of acting of the independent countries towards protection and promotion of world peace.

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[20] JUSTICIA, http://justicia.mk/novost.asp?cnd=96 (last visited June 1, 2016).

[21] GRANT THOMAS D., THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION (Praeger Publishers 1999).

The state, in its full meaning is established after the three-year war in Europe and signing of the Westphalian Peace Treaty in 1948 that put the end of it. Since that date onwards, the creation and further development of the state has begun, as a whole that has the following characteristics: (a) constant population; (b) defined territory; (c) authority and (d) ability to establish relations with other countries. The rules that regulate the relations between citizens established with this kind of system, i.e. their rights and obligations towards the country were determined. Different forms of organization of the state authority are established depending on the historic tradition, realities in life, political events and general tendencies in that area. For every democratic country it is equally important to regulate and develop its national and international relations.

The basic sources of international relations are the compulsory norms of the international law (jus cogens) and the legal principles recognized by the civilized nations.

With the help of the compulsory norms of the international public law and the legal principles recognized by the civilized nations, the international relations of the countries become legal relations or value which are developed with the help of the law. In that context, the law appears as a factor for civilized development of the international relations.

The regulations of the international public law are often violated, especially this is noticeable in a case of war when "the strong do what they have a power to do, and the weak do what they must accept".

Therefore, the recognition in the foreign policy is always followed by precedents.

The case for admission procedure of Republic of Macedonia as a member of the United Nations is a precedent in the history of that organization. This precedent is important not only for the specific circumstances related with Republic of Macedonia but also as a possible negative example in the procedure, namely as mutual dependence between the legal and political evaluations in the bodies of the United Nations. In the admission procedure in UN bodies such as the Security Council, General Assembly of UN, the legal and more general political arguments did not dominate but it was imposed as a topic and as obstacle the political challenging of a member-country (Greece), which called upon the provisions from the Charter for keeping the peace and avoidance of creating crises zones in the world, its political views towards Macedonia presented as possible threat to peace (the very existence of Macedonia at its northern borders) which actually arose to a bilateral dispute on a level of "procedural obstacle" in the United Nations.

THE EU IN LIBYA AND THE COLLAPSE OF THE CSDP

Ludovica Marchi[*]

This article aims at exploring the unwillingness of the EU member states to sponsor a Common Security and Defence Policy (CSDP) joint action within the EU framework as a response to the violence against civilians which erupted in Libya in 2011. It investigates the attitudes of Britain, France, Germany and Italy, as representative of the EU/27, toward the developments in Libya and a possible CSDP's crisis-management operation. It discusses the assumption that the CSDP was prey to the member states' wishes. The article avails itself of official documents from the UNSC, the European Union, EU laws, EU officials and prime ministers' speeches, together with several interviews.

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INTRODUCTION

In February 2011, Colonel Gaddafi's use of force against civilians generated a severe crisis in Libya. A collective action was deemed necessary to stop violence. On 31 March, according to UNSC Resolution 1973, a crisis management mission was launched by NATO, the Unified Protector Operation. France, Britain and the US, with the support of American airpower and the Arab and European allies, participated in the collective action. The operation was a coalition of the willing, from which the US military, later, withdrew as agreed within the coalition. This article deals with the EU's non-development of a crisis management intervention via its Common Security and Defence Policy (CSDP) as a response to the emergency situation. The member states could have taken the initiative within the EU framework instead of leaving this to NATO. After a decade

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of rapid development in terms of structure and deployment, the CSDP could have been operational in Libya. This article supports the assumption that the CSDP was prey to the member states' wishes. It aims to offer an insight into the perceived unwillingness of the EU member states, specifically Britain, France, Germany and Italy as representative of the EU/27, to sponsor a joint action within the EU framework, as a reaction to the Libyan crisis in 2011. It avails itself of official documents from the UNSC, the European Union, EU laws, EU officials and prime ministers' speeches, together with several interviews.

I. THE POLITICAL CONTEXT OF THE CRISIS

It is worth remembering that, a few days after the crisis arose in Libya, on 21 February, the 27 EU foreign ministers convened in the Council of the European Union, in Brussels, and requested an end to the violence. Shortly afterwards, France, Germany and The Netherlands proposed sanctions, whereas Malta, Cyprus and Italy were unwilling to endorse the proposal. In late February, the then Britain's Prime Minister Cameron declared that the United Kingdom was preparing to arrange a no fly zone, possibly under NATO's coordination. France expressly stated that it was keen to use NATO's military command to "plan and execute air operations". However it strongly believed that the North Atlantic Alliance should take no political control of the overall military operation. This would have alienated the Arab countries.[1]

At the European Council meeting of 11 March, the EU states were addressed by France to recognise the Benghazi-based Transitional National Council (TNC). The previous day, former France's President Sarkozy made a unilateral recognition of the TNC.[2] Shortly afterwards, on 17 March, the UN Security Council approved the no-fly zone over Libya; it authorised all of the necessary measures to protect civilians.[3] Sarkozy called a summit on Libya, in the French capital on 19 March. The meeting was tasked with organising the political guidance of the operation authorised by the UN. It was agreed with former America's President Obama that the first offensive action would be conducted by the US. With the Operation Odyssey Dawn, the US would nullify Libya's air defence system. Soon after having

[1] "We are not at war", says Prime Minister Fillon (France24, International News, 24 March 2011), available at http://www.france24.com/en/20110322-france-not-war-libya-fillon-prime-minister-gaddafi- military-intervention-un-resolution.
[2] The Politics Behind France's Support for Airstrikes on Libya (EurActiv, 11 March 2011), available at www.euractiv.com/...europe/politics-france-support-airstrik-.
[3] Resolution (1973) Security Council SC/10200 (17 March 2011).

achieved that aim, NATO would replace the American leadership. Such an arrangement was making clear that the direction of the operation was under non-USA authority.[4]

On 20 March, French fighter jets opened fire on Gaddafi's troops. The collective action that ensued, allowed by Resolution 1973, the Unified Protector Operation, was led by NATO. As the US retreated, attacks on ground targets were undertaken by the French, British, Italian, Danish, Belgian, Canadian, Emirati, Qatari and Norwegian armies. The EU's lack of response to Libya is perceived as the result of the eroded influence of the EU structures, which have been affected by the nationalism of the member states. The latter's unwillingness to sponsor a joint action within the EU framework was the emerged outcome.

II. THE EU'S LACK OF A COMMON RESPONSE

Not that a discussion was eluded by the EU states on the matter of whether a military operation could be taken as an initiative of the CSDP within the European structures. However, there was no sign of the "ambition in the field of military crisis management" that some Swedish defence ministers had previously predicted for the EU.[5] Nor any indication surfaced regarding the so-called "tarzan" narrative, which the EU had constructed in the first decade of the twenty-first century.[6]

As late as 12 April, at a meeting of EU foreign ministers in Luxembourg, a debate on whether the CSDP should intervene with armed forces occupied the agenda of the EU states. The meeting was held after the European Council had agreed, on 1 April, to the EUFOR Libya CSDP military mission. This one was anchored to the United Nation's request to intervene in support of humanitarian assistance operations.[7] An operational plan was needed for the military humanitarian intervention. The discussion on that matter, in Luxemburg, unveiled the contrasting positions of the foreign ministers. In particular, the claim emerged that the UN retained access to Misrata, which was under siege by Gaddafi's forces, and an EU military action would have jeopardised the UN endeavours. Also, the

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[4] JOLYON HOWORTH, THE EUROPEAN UNION IN (IN) ACTION: BRUSSELS AND THE ARAB SPRING (2011), available at http://acdis.illinois.edu/assets/docs/615/articles/TheEuropeanUnioninInActionBrussels andtheArabSpring.pdf.

[5] Katarina Engberg, *To Intervene or Not to Intervene? The EU and the Military Option in the Lebanon War of 2006*, 11(4) PERSPECTIVES ON EUROPEAN POLITICS AND SOCIETY 408—428 (2011).

[6] T. Trine Flockhart, "Me Tarzan—you Jane": The EU and NATO and the Reversal of Roles, 12(3) PERSPECTIVES ON EUROPEAN POLITICS AND SOCIETY 263—282 (2011).

[7] *Council Decision 011/210/CFSP, EU Military Operation in Support of Humanitarian Assistance Operations in Libya*, OFFICIAL JOURNAL OF THE EUROPEAN UNION (5 April 2011).

contention was advanced by the Italians that they could not understand the need for a military intervention to deliver humanitarian aid. The argument, outlined by others, that the deployment of forces was driven by a desire to demonstrate that the EU had a military planning capacity, distinct from that of NATO, was also aired. The indication that a military intervention was the only possible way to halt Gaddafi was, definitely, made. Concerned about the time-consuming decision to agree on when and how to end the military mission was also reportedly evident at the meeting. Apparently, disagreement about the EU being divided among the "do-gooders" and the "warriors" was impossible to restrain. In the end, a high level UN aid-and-relief official's letter to the then EU High Representative Ashton finally answered these objections. The letter disclosed the reservations about providing military support for a humanitarian mission.[8] Hence, the military operation prospect vanished.

By contrast, a few days after the EU foreign ministers met in Luxemburg, former France's President Sarkozy and former Britain's Prime Minister Cameron underwrote a letter. The missive was signed also by the former US President Obama and was published in the New York Times. It declared that "Gaddafi must go and go for good".[9]

III. REACTION TO LIBYA AND TO A POSSIBLE CSDP'S OPERATION FROM SOCIETY IN BRITAIN, FRANCE, ITALY AND GERMANY

What was the reaction to the Libyan emergency by the member states and their societies at the time of the crisis? In Britain, society was more prone to repatriate their share of policy from Brussels than to tie in with the CSDP and its military.[10] Concern about becoming embroiled in excessive bureaucracy and, perhaps on occasions, being obliged to depend on the policies and choices made by others[11] did not favour a friendly vision of the CSDP, even with regard to Libya.

In France, society was largely behind Sarkozy's military initiative, with Parliament accepting the notion of a new era in the Mediterranean. Parliament has not rejected Sarkozy's assertive role under the claim of

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[8] Toby Vogel, *Split over Military Mission to Deliver Aid*, EUROPEAN VOICE (14 April 2011), available at http:// www.europeanvoice.com/article/imported/split-over-military-mission-to-deliver-aid/70808.aspx.

[9] *Libya's Pathway to Peace*, THE NEW YORK TIMES (14 April 2011), available at http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html.

[10] *Cameron Rules Out EU Referendum*, FINANCIAL TIMES, (21 May 2012).

[11] Author's Interview with a Senior British official (London, November 2012).

further action in the CSDP.[12] If questioned about the feasibility of a CSDP accomplishment in Libya, the French would respond that, above all, rapidity of action was important.[13]

In Italy, society was, above all, concerned with former Prime Minister Berlusconi's tardy reaction rather than with deserting the CSDP. However, soon after the crisis developed, Italian national broadcasters, such as La7, interviewed political observers. On those occasions, reference to the existence of a process to be put into motion especially in these circumstances, the CSDP, was made. To other political observers, the fact that "European nations" conducted the military intervention under the NATO's lead was, by itself, a synonym for European unity. They rejected any preoccupation for bypassing the CSDP.[14]

In Germany, society questioned the government's non-alignment with its traditional allies rather than its weak connection with the CSDP as a civil-military actor.[15] Yet, the usual emphasis on "non-attachment to the military CSDP" was downplayed as an approach which performed well with a certain electorate. It was expressed in Berlin's Bundestag also concerning the case of Libya.[16]

IV. REACTION TO A POSSIBLE CSDP'S OPERATION FROM EUROPEAN LEADERS: FRANCE, BRITAIN, GERMANY, ITALY AND THE EU

Investigating the national and European leaders' conduct in response to the crisis in terms of supporting a CSDP civil-military operation, further details emerge. In France, former President Sarkozy's personal standing was at stake in view of the relatively soon national contest for the presidency (April 2012). France generally held the initiative within the CSDP, inspired by "Europe de la defence" ideas. On this occasion, it is unthinkable that Sarkozy did not wish to avoid suppressing France's own interests and influence in Africa in the pursuit of a minimal European consensus.[17] On previous occasions, France had already experienced the extent to which the CSDP lacked promptness of action. Regarding Chad, it had to make efforts

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[12] *French Parliament Debates Libya Military Mission*, FRANCE 24 INTERNATIONAL NEWS (22 March 2011), available at www.france24.com/.../20110322-french-parliament-debates-li.
[13] Author's Interview with a French Public Official (Rome and Lyon, May 2011).
[14] Author's Interview with an Italian Political Scientist (Rome, RomaTre University, October 2011).
[15] *Blast from the Past has Merkel on the Defensive, August 26*, DAS SPIEGEL (18 March 2011), available at www.spiegel.de/.../letter-from-berlin-blast-from-the-past-has-merkel-.
[16] Author's Interview with a German Security Analyst (Cardiff and Oxford, March 2013).
[17] Jean-Yves Haine, *CSDP is dead. Long live CSDP!*, XIX(1)THE BULLETIN OF THE PROGRAM IN ARMS CONTROL, DISARMAMENT, AND INTERNATIONAL SECURITY 11—16 (University of Illinois at Urbana-Champaign, 2011).

to convince the other member states to participate in the EU's operation.[18]

The project for an integrated Mediterranean area had been the focus of Sarkozy's attention since 2008, reviving the idea of a Union of the Mediterranean. In March 2011, during the Libyan crisis, the then Prime Minister Fillon claimed, in the French Parliament, that "France want[ed] to see a new era in the Mediterranean region".[19] Sarkozy had already wasted time, and lost the opportunity for initiatives, during the previous challenge of the Tunisian unrest. His failure to respond to that crisis already overloaded his government with the dismissal of the Foreign Minister. He needed rapidity of action, and the CSDP was not congenial towards Sarkozy's decision to oppose violence in Libya.

In Britain, former Prime Minister Cameron's decreasing domestic consensus on the uneasy handling of his coalition government challenged his position and reputation. Much of Cameron's efforts were aimed at raising his standing by reinforcing his party. Perhaps Blair, the previous British Prime Minister, would have sought an initiative by his country in Europe, leading the CSDP to calm the violence in Libya, believing it to be a positive asset. Through his attempts to broaden his political basis, however, Cameron reignited Britain's European political controversies.

The promise of an in-out referendum on Europe, in 2017, if the Conservatives win the next general election had been aired as manifesto. Cameron could inconceivably be the promoter of a security operation in Libya within the CSDP. Yet, he was ready to intervene in Libya even without a UN resolution. The then European Security and Defence Policy was never mentioned in Britain's 2010 national security strategy document. Soon after his election in May 2010, Cameron signed with Sarkozy a British defensive treaty with France, in November 2010. On that occasion, Cameron indicated that, through that agreement, the two leaders could "do more things alone as well as together".[20] By using the management of the Libyan crisis as an occasion for the joint operational and political leadership of these two states,[21] instead of passing it to the EU, Cameron aimed to increase his reputation at home.

In Germany, not very differently from the European counterparts, Chancellor Merkel was concerned about not jeopardising her position within

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[18] Jean-Yves Haine, *The Failure of a European Strategic Culture—EUFOR Chad: The Last of Its Kind?*, 32(3) CONTEMPORARY SECURITY POLICY 582—603 (2011).
[19] "We are not at war", says Prime Minister Fillon, *Op. Cit*.
[20] *Britain and France Sign Landmark 50-Year Defence Deal*, THE GUARDIAN, (2 November 2010), available at www.theguardian.com›News›Politics›Defence policy.
[21] Jorge Benitez, *Europe Needs a Military Avant-Garde*, ATLANTIC COUNCIL, (3 April 201), available at www.acus.org/ natosource/europe-needs-miliary-avant-garde.

the party. Becoming involved in any process backing deployment was raising the question of how the electorate would react to it, in the upcoming elections in some states (18 September 2011). The Chancellor also faced parliamentarian opposition to her plans for the European Financial Stability Facility.[22] Her party's power was expected to be eroded. Merkel could not sponsor the CSDP to play a role in Libya. Apparently, the German "ontological" problems with security countered the "military connection".

This position was, however, paradoxical. As an opinion poll conducted on 22 June 2011 in EU countries and the US revealed, Germany was the first after the primacy of France to underwrite the military operation which actually took place outside the EU framework.[23] A paradox was also the much-talked abstention, on 17 March, from UNSC Resolution 1973 imposing the no-fly zone, which the EU also supported. Convinced human rights champion Chancellor Merkel aligned Germany with Russia and China, unquestionably no great human rights supporters. These paradoxes and the inability to compromise show that concessions, including championing the CSDP, were endangering Merkel's domestic position.

In Italy, former Prime Minister Berlusconi focused on avoiding, as far as possible, the disastrous personal impact that the situation in Libya was threatening to generate. His party and government had several consequences of the crisis to face. The development of an EU/CSDP operation was not the focus. In 2008, Berlusconi had agreed with Tripoli a friendship and cooperation treaty. The commitment that Italy would not consent to the use of its territory for any "hostile act" (or engage in "direct or indirect" military action) against Libya was made.

The former prime minister feared that this conflict would have a negative impact on many Italian companies, which were partly owned by the Libyan government (e.g. FIAT SpA and UniCredit SpA). The Italian national energy corporation, Eni SpA, had been active for more than fifty years in Libya. More than 1,300 Italian workers had to be rescued from that country prior to any military action being taken.[24] Berlusconi was concerned about the flow of Libyan migrants into Italy that, together with other problems, would damage his political party's foundation. In addition, a quarter of Italy's crude oil requirements where being supplied by Libya. This was a further motive confirming that any reference to military CSDP

[22] Blast from the Past has Merkel on the Defensive, *Op. Cit*.
[23] Roberto Menotti, *Verso i 100 giorni della NATO in Libia* (Aspenia, 22 June 2011), available at http://www.aspeninstitute.it/aspenia-online/article/verso-i-100-giorni-della-nato-libia.
[24] COMUNICAZIONI DEL GOVERNO SULLA CRISI LIBICA 20 (Italian Government, Frattini, March 24, 2011).

activity in Libya was far from what Berlusconi wanted.

At the EU institutional level, also former EU High Representative Ashton appeared making no effort to enhance the reputation of the CSDP to challenge authoritarian Libya. Ashton's attitude had not helped to generate support and make the EU/CSDP more influential. Ashton's assertion, at the Corvinus University (February 2011), that the strength of the EU lay (paradoxically) in its inability to throw its weight around was a sign that Ashton wished to distance herself from a CSDP military mission.[25]

Ashton was apparently obsessed with the problem of the "reality of 27 member states who are sovereign, who believe passionately in their own right to determine what they do, particularly in the area of defence".[26] At the European Council emergency meeting of 11 March 2011, Ashton's views prevailed when the EU leaders signed a communiqué that omitted any mention of the no-fly zone that was keenly sponsored by France and Britain. The communiqué sparked a furious debate. In London, "should [Baroness Ashton] not serve the member states of the European Union rather than pretending to lead them?" was the prevalent MPs' accusation, which engaged former Prime Minister Cameron in a defensive debate in the Commons.[27] Ashton was influenced, if not taken hostage, by the politics of Britain and France, with Cameron and Sarkozy covertly instructing her not to interfere in the military decision-making.[28]

V. A MISSED OPPORTUNITY

Taking the political control and strategic direction of the NATO military operation if the Berlin-Plus mechanisms had been used instead of leaving it to NATO was a missed opportunity. Not possessing the necessary military capabilities was watched with "anxiety" on the other side of the Atlantic. Also, it was branded by some as "the European culture of demilitarization".[29] This hurdle was, nonetheless, lowered by the US granting assistance. In fact, the US support was important in the light of the

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[25] CATHERINE ASHTON, A WORLD BUILT ON CO-OPERATION, SOVEREIGNTY, DEMOCRACY AND STABILITY (Corvinus University, Budapest, 25 February 2011), available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/ 126.

[26] EUROPE'S FOREIGN POLICY IN LINE OF FIRE OVER LIBYA (24 March 2011), available at down.com/.../europes- foreign-policy-in-line-of-fire-over-lib.

[27] *David Cameron Mocks Cathy Ashton after "Rogue Briefing"*, THE GUARDIAN (15 March 2011), available at www.theguardian.com›News›Politics›Wintour and Watt blog.

[28] Author's Interview with an EEAS Official (Brussels, November 2012).

[29] *US Secretary of Defence, Robert Gates, speech "NATO Strategic Concept Seminar"* (National Defense University, Washington D.C., 23 February 2010), available at www.defense.gov/speeches/speech.aspx? speechid=1423.

lack of aircraft carriers, smart munitions and enablers of modern warfare, surveillance and air tanking.[30]

The kind of setting of a Europe-led NATO command configuration was not new. It was defined, in the 1990s, as the European Security and Defence Identity, namely a NATO mission, conducted by the Europeans operating through US military resources. It was surpassed, in 2002, by the Berlin Plus arrangement, which allowed the CSDP to use NATO (i.e. US) assets to handle an operation without the involvement of US forces.[31] The Berlin Plus mechanisms were successfully used in Operation Concordia in Macedonia, in 2003.[32] They were indeed offering a more "European" option to mark the operation in Libya. Specifically, even though the military action was implemented under NATO command, the member states' choice to resort to the Berlin-Plus procedures would have allowed the CSDP to undertake strategic control of the military action.

CONCLUSION

This article aimed to investigate the reluctance of the EU member states to promote a Common Security and Defence Policy joint action within the EU framework to stop the violence against civilians in Libya in 2011. Its outline of the political context of the crisis showed how the action evolved along a course that differed from the use of the mechanisms foreseen by the European Union laws. This allowed the formation of a crisis management intervention by the EU/Common Security and Defence Policy that contributed toward calming down violence such as that which developed at Europe's southern boundary. The article's discussion of the way in which the EU member states debated the options on the table, while at the European Council, made clear their several excuses for opposing an intervention with armed forces from the CSDP. Also, the overview of the reactions to Libya's developments both from societies and the member states' leaders in Britain, France, Germany and Italy, as representative of the EU/27, highlighted the evidence that the CSDP raised no interests on that occasion. Refusing to follow the policy choices made by others, paying excessive importance to the rapidity of action, attempting to broaden their political basis, harboring preoccupations regarding the upcoming political elections, and, not last being overcome by the fear of a negative impact on

[30] Nick Witney, *How to Stop the Demilitarisation of Europe*, ECFR POLICY BRIEF (2011), available at www.ecfr.eu/page/-/ECFR40_DEMILITARISATION_BRIEF_AW.pdf.
[31] Jolyon Howorth, *The European Union in (in)action*, *Op. Cit*.
[32] Catriona Mace, *Operation Concordia: Developing a "European Approach to Crisis Management"*, 11(3) INTERNATIONAL PEACEKEEPING 474—490 (2004).

the flourishing commercial activities with Libya, were testified, by this article, as multiple causes which militated against the CSDP's action. Also, the role played by the former EU High Representative emerged, from the analysis, as submissive to the member states' policy, particularly that of Britain and France. The article's discussion of the member states' unexplored opportunity to employ the Berlin-Plus arrangement that would have allowed the CSDP, supplemented by US assets, to take strategic control of the military action, confirmed their apparent low inclination toward developing the CSDP's policy. The article proved the truth of the assumption that the CSDP was being prey to the member states and their wishes regarding the specific circumstance of responding to the troubles that arose in Libya. It demonstrated that the lack of a common response via the CSDP was mainly influenced by the EU states' domestic affairs. Ultimately, national preoccupations, concerns and interests gained the upper hand, expressed their disinterest in a common action within the EU framework and conveyed a sense of a collapsed CSDP.

THE RULE OF LAW AND JUDICIAL INDEPENDENCE IN EGYPT DURING THE TRANSITION TO DEMOCRACY AFTER THE ARAB SPRING

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This research traces the rule of law, and judicial independence in Egypt during the transition to democracy after the Arab Spring in light of the complicated realities of nation's centralized system over the past seven thousand years where the discretion of the ruler and the interests of the ruling elites prevailed. In this article, the author asserts that Egypt's law has long been recognized not only as a reflection of the prevailing forces in the society, but also as a strong instrument of the authoritarian ruler who presides over a centralized government structured to regulate and protect Egypt's Nile river resources from outside enemies. This trend has been followed after 1952 revolution's military rulers to date. The five authoritarian Presidents with military background (Naguib-1952 to 1954, Nasser-1954 to 1970, Sadat-1970 to 1981, Mubarak-1981 to 2011 and currently, Al-Sisi-2013 to date) operate in a legalistic environment which allowed them to use legal tools and shift tactics in their efforts to use the law to enhance their executive privileges by satisfying the military corporate interests. This tendency has compromised judicial independence and empowering judges to use law as an instrument of change and tool for progressive economic and social development. The author argues that the Egyptian constitutional context under the five military rulers ruled does not translate into principles of law-abiding governmental powers, independent courts, transparency of legislation, and judicial review of the constitutionality of laws, but the wishes of the ruler and his power base-the military. The period following the two revolutionary waves of January 25, 2011, and June 30, 2013 witnessed an increasing development toward respecting the rule of law in the form of an efficient enforcement of judicial decisions, trying the two former Presidents-Mubarak and Mursi and their entourage before courts of law rather than special courts, and increased promotion of freedom of expression.

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INTRODUCTION: LAW & PROGRESSIVE CHANGE

Absence of rule of law was a central reason for the Egyptian revolution on January 25, 2011. Egypt's law has long been recognized not only as a reflection of the prevailing forces in a given society but also as a potential instrument of change and progressive development. These two attributes, Ibrahim Shehata (1997) argued, enabled it to play seemingly contradictory roles in society: that of a keeper and interpreter of the status quo and, simultaneously, that of a catalyst for its change and the mechanism through which such a change may be brought about in an orderly manner.[1] Rules, however, are seldom self-executing and even when they are, they need appropriate institutions to ensure their correct application and enforcement and to settle disputes which inevitably arise in the course of their application.[2] The Egyptian legal system like all legal systems consists not only of applicable *rules* but also of the *processes* through which these rule are to be applied and of the *institutions* in charge of these processes.[3] Without such processes and institutions, rules may remain abstract concepts which do not always reflect the law in force.[4]

The Egyptian revolutionary waves of January 25, 2011 and June 30, 2013 provided an opportunity to introduce the most appropriate and liberal changes toward the rule of law and judicial independence under the current circumstances of the Egyptian society. Liberalism according to Nathan Brown (1997) has played a role in Egyptian legal history, and the Egyptian judiciary has at times emerged as a force for liberal legality and it served to support existing political authority.[5] The changes must also include such *legislative, administrative* and *judicial* reforms as may be needed to insure that the rules will be changed to serve the Egyptian people public interest,

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[1] IBRAHIM SHIHATA, COMPLEMENTARY REFORM, ESSAYS ON LEGAL, JUDICIAL AND OTHER INSTITUTIONAL REFORMS SUPPORTED BY THE WORLD BANK 55 (London/Boston: Kluwer Law International 1997).
[2] *Ibid*.
[3] *Ibid*, at 56.
[4] *Ibid*.
[5] NATHAN BROWN, THE RULE OF LAW IN THE ARAB WORLD 236 (Cambridge: Cambridge University Press 1997).

will be applied by an *independent judiciary* in a correct and fair manner so that they may continue to serve this purpose, will be complemented by the necessary regulations and interpretations which facilitate their application and will be subject to future reviews to ensure their continued relevance and usefulness.[6]

The purpose of this research is to investigate the following two research questions:

(a) How did Egypt's authoritarian Presidents, with military background since 1952 revolution to date, operate in a legalistic environment which allowed them to use legal tools and shift tactics in their efforts to use the law to advance their military corporate interests without empowering independent judges?

(b) What are the challenges confronting judicial independence and the rule of law during the transition to democracy in Egypt after the two revolutionary waves of January, 25, 2011 and June 30, 2013?

I. THE NASSER, SADAT, MUBARAK REGIMES & THE RULE OF LAW

The "*Rule of Law*" according to Otis Stephens, John Scheb and Colin Glennon (2015) is the idea that law, not the discretion of officials should govern public affairs[7]. The "*Rule of Law*", sometimes called the "*Supremacy of Law*," has been understood by some to generally indicate that decisions should be made by the application of known principles or laws without the intervention of the ruler's discretion in their application[8]. The "*Rule of Law*" in terms of constitutional law was invoked by English writers as early as the 12th and 13th centuries to restrain the powers of monarchs, and was articulated in the Massachusetts Constitution (Part the First, Article XX of 1780) which spelled out the principles of separation of powers "*to the end [the government] may be a government of laws, and not of men*"[9]. In modern constitutional law, the *"rule of law*" translates into the principles of law-abiding governmental powers, independent courts, transparency of legislation, and judicial review of the constitutionality of laws and other

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[6] IBRAHIM SHIHATA, COMPLEMENTARY REFORM, ESSAYS ON LEGAL, JUDICIAL AND OTHER INSTITUTIONAL REFORMS SUPPORTED BY THE WORLD BANK 56 (London/Boston: Kluwer Law International 1997).

[7] Otis H. Stephens, Jr., John M. Scheb II & Collin Glennon, *American Constitutional Law*, *Volume II Civil Rights and Liberties D*-21 (Stamford: Cengage Learning 2015).

[8] IBRAHIM SHIHATA, COMPLEMENTARY REFORM, ESSAYS ON LEGAL, JUDICIAL AND OTHER INSTITUTIONAL REFORMS SUPPORTED BY THE WORLD BANK 5 (London/Boston: Kluwer Law International 1997).

[9] *Ibid*.

norms of lower order[10].

Generally, there are two main schools of thought: the instrumental interpretation school and the substantive interpretation school, according to Ahmed Eldakak (2012).[11] The instrumental interpretation school, rule of law basically refers to *the existence of a legal system in which there are rules, and these rules are followed.* In other words, rule of law means "*how to do things with rules*".[12] The actual content of the rules is less important than the actual existence of the rules themselves. Rule of law in this context is about the "*formal and structural components, rather than the substantive content of the laws*". Such rules need to be public, understandable, non-contradictory, and non-retroactive. Accordingly, such rules are not necessarily fair ordemocratic. Therefore, a legal system that does not recognize the most basic human rights can still claim to be governed by rule of law.[13] The substantive interpretation approach also requires the existence of a set of rules that are followed. However, under the substantive approach, such rules must have essential goals that represent the desired end-state of the society[14]. The goals under this view are "*making the state abide by law, ensuring equality before the law, supplying law and order, providing efficient and impartial justice, and upholding human rights.*" [15] Consequently, a legal system that does not respect basic human rights, suchas freedom of speech, cannot claim to be governed by rule of law. Notably, the United Nations adopted a substantive approach in its rule of law definition:

> Rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.[16]

The United Nations' adoption of the substantive interpretation

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[10] *Ibid*.
[11] Ahmed Eldakak, *Approaching Rule of Law in Post-Revolution Egypt*, 18(2) U.C. DAVIS JOURNAL OF INTERNATIONAL LAW AND POLICY 261—307 (2012).
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid*.
[15] *Ibid*.
[16] *Ibid*.

approach signifies an international agreement that substantive interpretation is superior to instrumental interpretation. Accordingly, this article adopts the substantive interpretation of rule of law.[17]

II. EGYPT'S GEOGRAPGHY & ITS IMPACT ON JUDICIARY INDEPENDENCE

Egypt's geographic location dictated the establishment of an authoritarian regime to rule rather than to govern via the rule of Law. Archaeologists have dated signs of organized human habitation in the fertile Nile Valley that forms the heart of Egypt to over 6,000 years ago, and the signs of fabled Land of the Egyptian Pharaohs go back over 7,000 years[18]. The heart of Egypt has been the Nile river valley, which early in human history made Egypt an agricultural supplier to many of the world's surrounding and competing powers and formed the basis of the Pharaoh's empire that prospered into biblical times. These geographic circumstances required the development of authoritarian centralized institutions to govern the creation, maintenance and policing of a sophisticated irrigation system. However, the aforementioned bases of Egyptian ascendancies have simultaneously and perplexingly been a blessing and a curse. While the abundance of the Nile allowed Egypt to flourish, it also meant outsiders cast a frequently resentful and greedy eye on Egypt. When the rulers and their central institutions policing the state weakened due to internal power struggle among the ruling elite or when the central authority's exercise of policing power over its population, geographical territories and borders relaxed—the result was invasion and conquest that disturbed the country well into the 19th and 20th century with a British occupation for seventy two years, from 1882 to 1954[19].

The aforementioned mix of geography and Egypt's historical circumstances has its profound impact on the rule of law, and Judiciary represented by the Ministry of Justice (MOJ) which administers justice, judicial independence, and the judge's ability to apply and interpret the law. Both the MOJ and the judges presiding at the judiciary benches are at the mercy of the executive branch's powerful arm- the Ministry of Interior (MOI) which administers the state's police power, enforcing judicial decisions/verdicts and provides personal protection to Judges. Hence, the Egyptian Judiciary since the dawn of history is heavily centralized, heavily

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[17] *Ibid*.
[18] ELLEN LUST (ED.), THE MIDDLE EAST, 14TH EDITION 424—453(Thousand Oaks, Sage-CQ Press 2017).
[19] *Ibid*.

controlled by the executive branch of government and submits to the ruler-King or President who represents the will of the state.

III. RULE OF LAW DURING NASSER'S REGIME

The 1952 revolution led by the charismatic leader Gamal Abdel Nasser left the judicial system intact, and enabled their top leadership of the judiciary to double their income by allowing them to held teaching positions at the only Police Academy in the country under the Ministry of Interior (MOI) the most powerful arm of the executive branch. Nathan Brown (1997) argued that historical development of these era from 1954 to 1970 (the end of Nasser's regime) indicates that there were several major confrontations with one important component of the Egyptian judiciary branch that is *Majlis al-Dawla*, or *Council of State*[20]. It is this judicialbody which championed the institutionalization of liberal legality in Egypt during the 1940s under the leadership of Abdul Razak al-Sanhuri- gifted Jurist[21]. *Majlis al-Dawla* is a judicial body responsible for reviewing any new legislation prior to enacting it by the parliament. Also, responsible of adjudicating disputes between the government and individuals, or between two government agencies[22]. It is equivalent to the administrative courts in the United States.

In 1954 according to Enid Hill, the *Majlis al-Dawla* was attacked and its Chief Justice (al-Sanhuri) forced to retirement from public life[23]. Nathan J. Brown in his seminal work on "*The Rule of Law in the Arab World, Courts in Egypt and the Gulf",* noted that *Majlis al-Dawla* initially assisted the Free Officers took power in July 1952. When the officers formed a Regency Council to take the place of the ousted King Faruq, the *Majilis al-Dawla* provided a legal formula that obviated the need to present the measure to the disbanded parliament (as was constitutionally required)[24]. The *Majilis al-Dawla* thus worked out a relationship with the ruling military officers (members of the Revolutionary Command Council (RCC)—the *de facto* legislative body), based on the assumption that the authoritarian measures taken by the new regime were emergency measures and that full constitutional and parliamentary life would soon be restored[25].

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[20] The Rule of Law in the Arab World, 73—76.
[21] *Ibid*.
[22] *Ibid*.
[23] IBRAHIM OWEISS (ED.), THE POLITICAL ECONOMY OF CONTEMPORARY EGYPT 240—259 (Washington DC*:* Center for Contemporary Arab Studies, Georgetown University 1990).
[24] The Rule of Law in the Arab World, 73—76.
[25] *Ibid*.

The years of 1953 and early 1954 witnessed also, another attempt to increase the institutionalization of liberal legality championed by *Majlis al-Dawla's* Chief Justice al-Sanhuri took place in the drafting of a new republican constitution[26]. However, the RCC which was composed of military officers decided to move beyond forcing the abdication of King Faruq to abolishing the monarchy altogether, it appointed a body of legal and political experts to draft a new constitution[27]. Al-Sanhuri proved to be among the most influential members of the committee which nearly completed a very liberal and democratic document.[28]

The draft would granted women the right to vote and established a supreme constitutional court to protect the constitution (over the objection of Makram Ubayd, a powerful Wafdest politician—another member of the committee who argued that this would infringe the prerogatives of the legislature)[29]. A parliament was to be established with al-Sanhuri arguing for a strong measure of popular participation in electing its members. Work proceeded fairly quickly at first, and by August of 1953 al-Sanhuri promised that the draft would be completed within months, making an extension of Military rule via the RCC[30].

When the faction led by Khalid Mohi Aldeen and Naguib within the RCC which supported and favored the return to constitutional life, were defeated in the March 1954 crisis, the fate of the new constitution was sealed[31]. While the *Majilis al-Dawala* was not an active participant in the conflict between who favored the return to parliamentary life and those supported the continuation of the RCC (which controls both legislative and executive authorities), it was clear where its sympathies lay. At the end of March 1954, a demonstration organized by supporters of the military's rule turned violent when al-Sanhuri's office was stormed and al-Sanhuri was assaulted by members of the military police[32]. Nasser's faction won, al-Sanhuri was removed from his position as Chief Justice of *Majlis al-Dawla*. Followed by sending, Kaled Mohi Al-deen to permanent exile abroad (in Switzerland), and Nagub was placed under house arrest from 1954 to the remainder of Nasser regime, September 1970, without trial[33].

In 1955, another attack against the *Majlis al-Dawla* came to bring it

[26] *Ibid*.
[27] *Ibid*.
[28] *Ibid*.
[29] *Ibid*.
[30] *Ibid*.
[31] *Ibid*.
[32] *Ibid*.
[33] *Ibid*.

more closely within the executive branch supervision, but this effort was frustrated because of the judges resistance, according to Enid Hill[34]. The final assault came in 1969, with the so-called "*Massacre of the Judges*", when a substantial number of the judges were in effect fired. And a new body to supervise judicial appointments, controlled by the Ministry of Justice, was established. And Nasser prevailed. When Nasser wanted to force certain public policies about basic political or socioeconomic changes the judiciary was just bypassed. Special revolutionary courts were set up for special purposes; there were also experimentation with "*popular courts*."[35]

Another means of exercising executive influence on the judiciary was through a comprehensive Emergency Law legislated in 1958 by the first elected parliament since the 1952 revolution. The Parliament's Speaker Abdul Latef al-Bagdady is one of the original Free Officers Corps. When he or any one from the Free Officers Corp ran in his electoral district for election in the parliament—called the People's Assembly, no other person was allowed to run. Under this Emergency Law, various statutory procedural protections for the defendants are not applicable, various acts (otherwise allowed) are designated as crimes, and certain crimes specified in the penal code are subject to harsher penalties[36]. Parallel with the 1958 Emergency Law, State Security Courts staffed by Military judges were established to prosecute "political" crimes committed by civilians[37]. Military prosecutors were given the police power (*al-Dabtia al-Kadaia.)* Likewise the military police and its affiliated the Criminal Military Investigation Administration (*Edaret al-Mabahech al-Gnaaih al-Askaria)*. These measures were directed mainly against the Muslim Brotherhood (MB), the most disciplined, organized, and militant social and political movement existed in Egypt since 1928 to date-2017.

Only in the late 1960s, in the last years of Nasser's presidency, did the regime mount a concerted efforts to bring the judiciary under firm presidential control: A new "Supreme Court" was created by decree and staffed by presidential appointments after thorough background check about their attitude toward the regime by three security agencies. A "*Supreme Council of Judicial Organization*" was given authority over administrative matters as well as appointments and promotions within the judicial ranks and effectively placed under executive oversight.[38]

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[34] The Political Economy of Contemporary Egypt, 242.
[35] *Ibid*.
[36] *Ibid*.
[37] The Rule of Law in the Arab World, 73—76.
[38] Nathan Brown, *Egypt's Judges in a Revolutionary Age* 1-14 (Washington DC: Carnegie Endowment for International Peace-The Carnegie Papers 2012).

IV. RULE OF LAW DURING SADAT'S AND MUBARAK'S REGIMES

Presidents Sadat and Mubarak both came from the military institution, but lack Nasser's popular charisma relied heavily on the military and security agencies as a source of their power and legitimacy to rule, but not to govern. Yet over the next four decades, Nasser's two successors, Anwar Sadat and Hosni Mubarak, the State Security Courts remained in addition to a new exceptional court was created by Sadat in 1980: the "*Court of Values*"[39]. In addition to another exceptional jurisdiction utilized by Sadat and used by Mubarak which is the "*Socialist Prosecutor*". The Socialist Prosecutor is appointed by the president of the republic and directly responsible to him. His office serves as the executive's arm for investigations and for the preparation of accusations independent of the judicial apparatus. The aforementioned measures built by Nasser, followed and strengthened by Sadat and cemented by Mubarak long reign of 30 years totalitarian role resulted in the continuation of legal and judicial system in Egypt with the purpose of providing support for the political-heavily centralized hierarchal structure build by Nasser. And to be an integral part of an effort to build a stronger, more effective, more centralized, and more intrusive police state. The result was an absent of the Rule of Law known to civil societies, and led Egypt to become close to a failing state.

Tamir Moustafa (2012) work on the Egyptian judiciary proffers that, "under the credible commitment thesis, authoritarian regimes with longertime horizons (like the Nasser, Sadat, and Mubarak regimes) are morelikely to provide the judiciary some independence to provide assurancesto much needed domestic and international investments" [40]. Moustafa argues that the Sadat and Mubarak regime were compelled to allow more political liberalization, including rule of law and limited judicial independence, as a source of legitimacy to offset their regime's failure to sustain the high levels of public benefits provided by the Nasserregime. To survive economically, the state had no choice but tosubstitute political rights for welfare rights due to its inability to provide employment, health service, and food subsidies. The regime used judicial mechanisms to absorb the public's anger over increasing political corruption from the ruling elite. By having courts issuerulings striking down certain laws as a means to privatize the economy and shrink subsidies, the executive redirected the public's

[39] The Political Economy of Contemporary Egypt, 242.

[40] TAMIR MOUSTAFA, DRAFTING EGYPT'S CONSTITUTION: CAN A NEW LEGAL FRAMEWORK REVIVE A FLAWED TRANSITION? 1—11 (Washington DC: Brookings Doha Center-Stanford Project on Arab Transitions 2012).

anger toward the judiciary. As more judges were motivated by both self-preservation and a conviction to do the government's political bidding, the judiciary itself became politicized. The result is the judicialization of politics.[41] The author believe that there are four conditions that incentivize long term authoritarian regimes such as Egypt to show to the outside world some tolerance to judicial independence, first, lack of traditional legitimacy or charismatic sources of legitimacy; second, inability to provide welfare goods such as economic and social services that have been provided in the past; third, a weak international or regional role; and fourth, popular support of the judiciary based on perceptions of judges as professionals, independent, and concerned political actors. The absence of the aforementioned conditions under Mubarak compelled his regime to allow for some restrained judicial independence. For instance, Mubarak was notoriously uncharismatic and his incremental removal of subsidies due to pressures by international lenders incentivized him to judicialize politics by shifting some of the political backlash onto a quasi-independent judiciary. When the judiciary leveraged its limited independence to issue rulings that preserved civil liberties and the electoral process, popular support for the judiciary arose. This made it more costly for Mubarak to overtly eliminate judges' independence. Finally, the disreputable emergency law is one common tool used by the former regimes of Nasser, Sadat and Mubarak that disregarded the rule of law by amending the constitution to promote the rule of the president, issuing laws that served the interests of the president's entourage-the military, not enforcing judicial decisions, restricting freedom of speech, and concentrating power in the hands of the executive branch over the legislative branch and the Judiciary.

V. RULE OF LAW AND JUDICIAL INDEPENDANCE AFTER THE JANUARY 25, 2011 REVOULTION

The period following the two revolutionary waves of January 25, 2011, and June 30, 2013, witnessed an increasing trend toward respecting the rule of law, through changes such as enforcement of judicial decisions to remove private properties build on public land, trying the two former Presidents (Mubarak, and Mursi) and their entourage before courts of law (rather than special courts), and increased promotion of freedom of expression. However, several serious obstacles to promoting rule of law remain after the two revolutionary waves. One of the *Deep State's* tools is still fully penetrating the judiciary branches as a result of allowing Ex-police officers to join the

[41] *Ibid*.

judicial bench due to their equal legal education with judges. Ex-police officers constitute approximately 1/5 of the current judges according to a former General in the Egyptian police who asked not to be identified by name. Also according to one of the world's leading experts on Egyptian and international law UN war crimes specialist and Nobel Peace Prize nominee, Mahmoud Cherif Bassiouni. Dr. Bassiouni tells the International Bar Association (IBA) Global Insight, that:

> the unprecedented sentencing to death of 529 Muslim Brotherhood supporters on 24 March, 2014 has prompted much-needed scrutiny of the Egyptian judiciary. It has been undermined by poorly trained former police officers' and is in urgent need of reform, over the past two decades; around a fifth of judges may have passed through the ranks of the police force, compromising their independence and integrity. This is an anomaly in any legal system that you create a career path opening by going to the police academy. The Police Academy has become a path for people who did not have good enough grades to get into law school or because of some relations their parents might have had with the authorities. You might call it an infiltration of the judiciary. The deteriorating professionalstandard of the police has had a direct impact on the quality of the judiciary.[42]

Bassiouni explains further by arguing that:

> Many have accepted the higher standards of the judiciary, but many have remained with the original police culture. For a large number, their training and standards leave much to be desired. The shock ruling—on charges including murdering a policeman and violent attacks on people and property—was made after just two hearings, in which the defendants' lawyers complained they had no chance to examine the evidence.[43]

Santiago A. Canton, Director of Robert Kennedy's Center of Partners for Human Rights, criticized the aforementioned court ruling. He calls for the annulment of the death sentences handed down to over 500 individuals in Egypt and for the need to safeguard due process of law protections during trials and Last Monday, after a mass two-day trial, a judge in the Minya criminal court sentenced 529 people to death for crimes related to violence against the Matay police station and the death of its deputy police chief, Colonel Mustafa Ragab[44]. According to media and NGO sources, the defendants face charges including the murder of a police officer and attempt to kill two others, vandalism, seizing weapons, unlawful public gathering,

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[42] Rebecca Lowe, *Egypt: Judiciary Undermined by Badly Trained Ex-Police*, INTERNATIONAL BAR ASSOCIATION'S GLOBAL INSIGHT (April 2, 2014).
[43] *Ibid*.
[44] Santigo A. Canton, *Director of Robert F. Kennedy's Center of Partners for Human Rights* (June 21, 2014).

and belonging to an illegal organization. The last charge is in reference to the Muslim Brotherhood, which was designated as an unlawful organization in December 2013, four months after the incident took place.[45] The scale of these death sentences is unique and unparalleled; furthermore, it sets a dangerous precedent in Egypt's application of law. The proceedings violated a range of Egypt's international human rights obligations with respect to a fair trial, in particular articles 6 and 14 of the International Covenant on Civil and Political Rights and articles 4 and 7 of the African Charter on Human and Peoples' Rights. The trial proceedings also violated several provisions of Egypt's new constitution, including articles 95, 96, and 98. According to civil society and news reports, the procedural irregularities included the absence of most of the defendants from the trial, the defense lawyers' denied access to the court, the lack of witnesses called to stand, the lack of relevant evidence presented that implicates any individual defendant, and the potential application of an ex post facto law[46].

Human Rights Watch reported on June 21, 2012 and December3, 2014 that "*Five hundred people have been sentenced to Capital Punchment. The Grand Mufti must annul this judgment immediately*".[47] The cases are sent to the *GrandMufti* who will decide whether the death sentences will be confirmed, as per Egyptian law. That same day, the Minya criminal court will render the verdict in another mass trial against 683 people, including the MB's Supreme Guide Mohammed Badie, for similar charges in connection with an attack on a separate police station. Additionally, two other trials have been ordered for 919 suspected MB supporters for charges that include murder for some of the accused for using force used during the sit-in dispersals on August 14, 2013, when over 600 people died, have not been prosecuted. In addition, only four police officers have been convicted for the deaths of 37 detainees, who died of asphyxiation while being transported to a prison on August, 18, 2014. One of the police officers was given a 10-year sentence while the other three were given one-year suspended sentences. This implementation of mass trials is being targeted at perceived critics and opponents of the government, and speaks to a larger, worrying trend of the backsliding of the rule of law in Egypt.[48] The Egyptian court system is overwhelmed with a back log of cases due to the vast number of arrests. Many of those arrested are supporters of the MB, but the detained also include secular activists and journalists. According to

[45] Human Rights Watch (June 21, 2014).
[46] *Ibid*.
[47] *Ibid*.
[48] *Ibid*.

senior interior ministry officials, 16,000 people have been arrested in recent months.

Santiago A. Canton reported that "The use of mass trials does not bode well for the thousands of others who await their day in court". "Dissidents from various affiliations and journalists have been rounded up in droves since last summer. With so many in prison, it begs the question of whether Egypt is truly moving forward in democratic and inclusive manner", or moving toward a Failing State or a Soft State?[49]

VI. THE NEED TO REALIZE THE RULE OF LAW, AND JUDICIAL INDEPENDENCE DURING THETRANSITION TO DEMOCRACY

Undoubtedly, the two revolutionary waves of January 25, 2011 and June 30, 2013 had a great impact on the promotion of rule of law as a concept, and that Egypt's political system is moving forward toward some sort of democracy suitable for the Egyptian culture and the country's complicated economic and social development realities[50]. The Egyptian new form of democracy may not be squared with or to be identical to other well known Western democracies, but hopefully will preserve the Egyptian State from collapsing as what happened in other countries of the Arab spring such as Libya, Syria or Yemen. The following can be seen as a positive development according to Ahmed Eldakak (2012):

First: The trying of the two former Presidents Mubarak and Mursi and their associates before courts of law rather than a special court is a positive sign of progress toward the *rule of law*. As Montesquieu once stated, "[*l]aw should be like death, which spares no one."* Mubarak's trial particularly is a positive development for the rule of law in Egypt. Despite several developments that had cast serious doubts on the success of the trial, it marked the first time in Egyptian history that a former ruler was brought before courts of law. This pursuit of legal justice is what differentiates the 2011 Egyptian Revolution from the 1952 revolution where members of the former regime were tried before special court composed of all military officers without fairtrials. Giving a trial to a dictator who caused the death of hundreds of heroic innocents during the Revolution is one of the most effective first steps towards establishing full rule of law the essence of democracy.

Second: An important development that echoed the evolution of rule oflaw is when Field Marshal Mohamed Hussein Tantawi, the head of the

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[49] *Ibid*.

[50] Approaching Rule of Law in Post-Revolution Egypt, 296—297.

Supreme Council of the Armed Forces (SCAF), received subpoena to testify during Mubarak's trial. Before the Revolution, it was hard to imagine that senior members in the regime would appear before a court to testify. In Mubarak's trial, senior members of the new regime were required to testify, including: the Army Field Marshal, the Chief of the Intelligence Organization, and the Minister of Interior. These subpoenas indicated the first time in the history of the Egyptian judiciary that people in such high positions of executive power could be obliged to testify before a court of law. Mubarak's trial sends a clear message that the rule of man has ended and the rule of law has rematerialized. The remaining challenge is how to establish a full rule of law that will fulfill the expectations of Egyptian society today after the great human sacrifices during the first revolutionary wave of January 25, 2011.

Third: After the revolution, judges set to work drafting a law that would likely have support of all political forces. They worked to legitimate a more powerful Supreme Judicial Council, rendering it freer of executive oversight and transferring to the council functions that currently belong to the Ministry of Justice. Even the indirect ways of influencing judges, such as doling out attractive secondments, would be placed in judicial rather than executive branch hands. The effect would be to make the judiciary as a body far more self-directed in terms of administration, budgeting, and personnel.

This is a goal that not one person would question in the post-revolutionary atmosphere.

Fourth: After the overthrow of Mubarak in 2011, the Supreme Constitutional Court (SCC) attempted to regain its control over judicial appointments. While the details of its interactions with the SCAF are unknown, it won an important concession from SCAF with the decree law on SCC appointments, which gives SCC judges an important role in appointments decisions and limits the President's choices regarding candidates. During the last constitution-drafting process, the SCC indicated its displeasure with proposed articles on the judiciary by calling a press conference. A press conference by the leadership of the judiciary is not known in the Egyptian history since the military came to power after the 1952 revolution.

Fifth: The resumption of broadcasting *al-Qahira al-Youm* ("Cairo Today") is the optimal example of progress of freedom of expression and mass media following the Revolution. The "Cairo Today" program is one of the most popular television shows in Egypt. Its main presenter is Amr Adeeb, who is famous for opposing the presidential inheritance project. Following an episode sharply criticizing the government media supporting

Gamal Mubarak, the channel was shut down. The official reason for the shutdown was that the channel administration owed several million pounds in debt. Although the channel was truly in debt, the true reason for silencing the channel was Adeeb's criticism of the presidential inheritance project. Adeeb resumed broadcasting his show immediately after the ousting of Mubarak. As for the state media, the government's strict censorship policy has relaxed. However, this relaxation does not mean that the state media now enjoys the same freedom as in other democracies. The state media still suffers from limited censorship. The independent media now enjoys more autonomy as well if they do not cross the red line of criticizing the military under the current regime of Abdel Fatah al-Sisy.

Sixth: Despite an uneasy transition due to internal and external forces operating in the geopolitics of the Middle East, Egypt completed its road map toward democracy, by electing a new president in July 1, 2014, drafting and popularly legitimating through referendum a new constitution in January 2014, and finally electing a new parliament in December 2015. The country survived an imminent civil war as what happened in Libya, Syria and Yemen.

Seventh: It is imperative to note that after the Revolution, the new government enforced two important judicial decisions ignored by the former regimes. The government banned the Ministry of Interior police forces on university campuses, and it also showed its intention to implement a national minimum wage. Due to the economic crisis facing the nation, the enforcement of the latter may be delayed or implemented in two stages. What is significant is that the government announced its responsibility to enforce judicial decisions. By doing so, the government is acknowledging that it is bound by rule of law in post-revolution Egypt, rather than the discretion of the ruler and the ruling elite[51].

Despite the aforementioned positive development reported by Ahmed Eldakak in 2012, Amr Hamzawy the distinguished scholar of the Middle East with a first hand knowledge of Egypt's politics observed that:

> Recently (September, 2016), Egypt's parliament has approved—without revision—almost all of the 342 presidential-decree laws issued by then-Interim President Adly Mansour and by President Abdel Fatah al-Sisi. Despite the clear autocratic nature and the violations of basic human rights prevalent in many of them, the parliament passed almost all of these laws with very little discussion—a testimony to how submissive the legislative branch is to executive power in

[51] AMR HAMZAWY, EGYPT PARLIAMENT OPENS THE DOOR FOR MORE REPRESSION (Washington DC: Carnegie Endowment for International Peace, and published by the Washington Post on September 22, 2016).

Egypt and of the growing despotism of Sisi.

The "Organization of Lists of Terrorist Entities and Terrorists" law is particularly troubling. It defines acts of terrorism in an extremely broad manner that can be easily manipulated to pursue peaceful dissidents and to punish independent nongovernmental organizations. The legislation uses elusive phrases such as "preventing and impeding public authorities, disturbing public order, harming social peace, endangering the safety and interests of the community, and harming national unity and security." It does not even relate acts of terrorism exclusively to the use of violent means or armed force. Rather, it refers to "any means".

The new law practically enables the government to curtail basic rights and freedoms under the banner of counterterrorism efforts. Peaceful assembly, expression of dissenting opinions and the formation of opposition political parties and independent NGOs are constitutionally guaranteed rights and freedoms that can be undermined once the government classifies practicing them as acts of terrorism.

The law doesn't necessitate a judicially proven connection with terrorist activities for a charge to be filed, and the procedures for inclusion on the list are done through what seems to be an opaque procedure between the public prosecution and the criminal court. The law doesn't define the necessary documents to submit a request for placement on the list, and leaves all things "administrative" to the office of the public prosecutor and the Criminal Court of Appeals in Cairo. Affected parties cannot interfere with the question of placement on the list before it is executed, and this strips them of their constitutional legal right to defend themselves from the charges.

Furthermore, the law initiates a wide variety of draconian consequences without waiting for the outcome of an appeal. They include the banning of listed groups, halting of all organizational activities, closing of all locations, criminalization of meetings and freezing of assets and funds. Individuals placed on the terrorist list may be placed under a travel ban and can expect a cancellation of their passports, freezing of their funds and revocation of their constitutional right to run for and occupy public office.

Sisi's government does not hide its distaste for opposition parties, independent NGOs and voices of dissent. It sees them as hostile entities and individuals conspiring to impose chaos on Egypt. Demands for the protection of human rights and freedoms are, according to Egyptian generals, Trojan horses pushed forward to make the country ungovernable. Since Sisi's ascendancy to power following the 2013 military coup, his government has outlawed hundreds of NGOs, banned activists from travel and confiscated their assets, and ordered investigations and court proceedings against leading human rights organizations—most notably the Cairo Institute for Human Rights Studies and the Egyptian Initiative for Personal Rights.

Regrettably, according to Amr Hamzawy 2016, Western silence on Egypt's despotism continues. Western officials and politicians met with Sissi during the United Nations General Assembly in New York, including U.S. presidential nominees Hillary Clinton and Donald Trump <https://www.washingtonpost.com/

news/worldviews/wp/2016/09/20/trump-met-his-favorite-middle-east-strongman-what-happened-next-will-not-surprise-you/>. Sissi unambiguously thinks that his repression of civil society is tolerated—if not outright accepted—by the United States and Europe. They have yet to prove him wrong.[52]

CONCLUSION

Since the dawn of history, Egypt's geography and its dependence on the water resources of Nile River have led to the institutionalization of a centralized government. Rulers'- Pharaohs', Kings' and Presidents'- personal discretion and the ruling elite interests are the canvas for ruling rather than the rule of law. The absence of rule of law was a central reason for the first and second Egyptian revolutionary waves of January 25, 2011, and June 30, 2013. These two revolutionary waves provide a golden opportunity to establish full rule of law in Egypt. This Article analyzes the features of absence of rule of law before the Revolution, and after the 1952 revolution where five Presidents with a military background disregarded the rule of law by amending the constitution to promote the rule of the president, issuing laws that served the interests of the president's entourage the military, not enforcing judicial decisions, restricting freedom of speech, and concentrating the power in the hands of the president through the notorious emergency law. The period following the two revolutionary waves witnessed an increasing tendency toward respecting the rule of law, through changes such as enforcement of judicial decisions, trying the former two presidents Mubarak and Mursi, and their associates before courts of law, increased promotion of freedom of expression, and judges are giving the opportunity to work on drafting laws that would likely have support of all political forces. They worked to legislate a more powerful Supreme Judicial Council, making it unrestricted of executive oversight and reassigning to the council functions that currently belong to the Ministry of Justice. However, several serious obstacles to promoting rule of law remain after the two revolutionary waves such as the absence of transitional justice, the continuation of the state of emergency, and the military trials for civilians. Despite an uneasy transition due to internal and external forces operating in the geopolitics of the Middle East, Egypt completed its road map toward democracy, by electing a new president in July 1, 2014, drafting and popularly legitimating through referendum a new constitution in Jan. 2014, and finally electing a new parliament in Dec. 2015. The country survived an imminent civil war as what happened in Libya, Syria and Yemen.

[52] *Ibid.*

INFLUENCE OF THE POLITICS ON FREEDOM OF THE MEDIA

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In this article the authors provide theoretical overview of terms media, politics, international politics, of the state as a subject of international law, the freedom of information, as well as the impact of the politics over the state. The state is the supreme organization of humanity today. In every country, the creation of a public opinion occupies a significant place. Function-bearers, depending on the degree of democracy, also depending on the political system and constitutional order, in their own way tend to ensure the favour of the public opinion in order to rule over a longer period and in a safer manner. The public opinion is a complex social and political phenomenon. Rights and freedoms on the one hand are basic criteria and a measure of the position and the role of the people and citizens in the society, and democratic regime (the system) on the other. They are an instrument to limit the power and disable its arbitrariness and abuse. Knowing that the public opinion creates courts for modus operandi of the community and appreciation for the actions of the government, it is expected that the political rulers seek to impose their influence on the creation of public opinion in order to retain or maintain the power. Public opinion as a form of political consciousness is associated with the political system as an institutional base of the political process.

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INTRODUCTION

The freedom of expression and the freedom of the media represent the

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cornerstone of every democratic society. The role of the media is to inform. Everyone has the right to receive and communicate information without interference by the authorities. This right is guaranteed by all relevant international documents ratified by Republic of Macedonia, such as the United Nations Universal Declaration of Human Rights from 1948, International Covenant on Civil and Political Rights from 1994 and European Convention for the Protection of Human Rights and Fundamental Freedoms from 1997.

Another important role of the media is the control which is accomplished by requesting a report by the authorities on the manner of governance. The essential function of the media is the obligation to encourage adebate in the society about important issues of public interest. Moreover, they play a representative role, by giving a voice to those who are powerless in the society.

The Constitution of Republic of Macedonia guarantees the civil rights and liberties and the rule of law. Also Article 16 guarantees the freedom of expression and the freedom of the media. "The freedom of belief, conscience, thought and public expression of thoughtis guaranteed. The freedom of speech, public address, public informing and the establishment of institutions for public informing is guaranteed. The free access of information and the freedom to receive and communicate information are guaranteed."[1] The same article from the Constitution guarantees the right to reply and correction as well as protection of sources of information. According to the last provision of this article the censorship is expressly prohibited. This liberal concept in the constitution that guarantees freedom of the media is operationalized in the media's legislation. Article No. 3 of the Law on Media[2], along with other matters, guarantees the freedom of information transferfor informing of the public as well as the pluralism and diversity of media. In Republic of Macedonia, similar guarantees for freedom of the mediaare provided with the Law of Audio and Audio-visual Media Services, which was adopted in 2013[3] which wasadjusted with the EU Directives. It also incorporates the standards of EU member-states. Article 3 of the law insists that the public broadcasting service, the Macedonian Radio Television and the regulating body of media are to be transparent, independent, and efficient and accountable. High professional

[1] CONSTITUTION OF REPUBLIC OF MACEDONIA, http://www.sobranie.mk/ustav-na-rm.nspx (last visited July 2, 2016).
[2] LAW ON MEDIA, http://bit.ly/1KCyZK1 (last visited July 2, 2016).
[3] LAW ON AUDIO AND AUDIOVISUAL MEDIA SERVICES, http://bit.ly/1Vg6Pg5 (last visited July 12, 2016).

standards and principles for journalists in the public service are established. Article 111[4] of the aforementioned Law processes the standards of the Council of Europe in details, referring that journalists and editors of public service in the production of programs should be guided by the principle of truthfulness, impartiality and comprehensiveness of information. The same article incorporates the principle of political independence and autonomy of journalists, making a clear distinction between information and attitude, political balance and pluralism of views[5]. In this sense, the International Federation of Journalists and the Code of Journalists of Macedonia (Articles 14, 15, 16) are warning that the journalists should avoid external interests and connections that might harm their reputation for impartiality, fairness and integrity. Prominent journalists such as leading columnists in newspapers and popular presenters of TV programs, should particularly take into account their impartiality and balanced reporting, to provide professional distance from the political subject, to nurture the culture of speech, to preserve the dignity of their profession, to avoid using their medium for confronting people, including their own colleagues and refuse the task if it is contrary to the principles of the journalistic profession and the Code.

I. ABOUT THE MEDIA, PUBLIC AND PUBLIC OPINION

In every country, creating public opinion takes significant place. The function-bearers depending on the degree of democracy, the political system and constitutional order, all on their own manner tend towards providing affection on the public opinion in order to rule for a longer period and in a safer manner.

Media's freedom is a liberal value that comes from the philosophy of freedom and equality of citizens that is enshrined since liberalism. Back then it was discussed about the freedom of the press, because other media appeared later. It is an expression of the democratic aspirations of the citizens for greater political rights and establishing political control over political power. There is no absolute freedom of the media, as there is no absolute free human activity. Freedom of the press (media) does not mean absolute freedom of the media to provide and publish any type of information. Even the most democratic societies do not allow the media to

[4] *Ibid*, at 31.
[5] Source: ASSOCIATION OF JOURNALISTS OF MACEDONIA (AJM), http://www.znm.org.mk/drupal-7.7/sites/default/files/Analiza%20mediumski%20sektor%20MK%20septemvri%202015_0.pdf (last visited July 10, 2016).

publish sensitive information that endanger state security or child pornography. The philosophy of freedom of the media is to determine the boundaries of that freedom or to establish a balance between media freedom and freedom of expression. In real life there are situations when it is in the public interest to limit the principle of maximum speaking the truth due to higher social interests[6].

The public opinion is a complex social and political phenomenon. According to Habermas, the public opinion as a concept was firstly created by the physiocrat Louis-Sebastien Mercier with meaning of enlightened result of a common and public reflection on the foundations of social organization[7].

According to other authors the term *public opinion* is of Anglo-Saxon origin and was firstly used in England when the public opinion as a support to the Parliament was mentioned by the famous English statesman and author John Salisbury in 1159. Later Shakespeare mentions the Henry's IV statement: "Opinion, which did help me to the crown"[8]. Machiavelli also emphasizes that the constant concern of the ruler should be winning the favour of public opinion, if it wants to preserve power and personal security[9].

When defining the term *public opinion,* the conceptual determination of the terms mass, publicity, public and political public are to be put on mind.

The *public* is a social and political space, in which public opinionarises and acts. It is a benefit and requirement of political democracy. Public exists where the audience is.

The *audience* consists of large number of people with common interests or share a common position on an issue. Thus, readers of a newspaper, students, members of a club, etc. can serve as an example for the public. What keeps the public linked is intellect, and what connects the mass of people is emotion. The mass of people gathers in one place, and the crowd is dispersed[10].

The *mass* of people is a latent social force, and the audience is more capable factor for social events. The audience can survive like structure only if there are so-called own creative centres such as the editorial staff of the mass media, theatres, sports clubs and so on. The connection between the

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[6] MAJHOSHEV A., FREEDOM OF THE MEDIA, YEARBOOK OF THE FACULTY OF LAW AT THE UNIVERSITY "GOCE DELCHEV"—STIP (5): 1—7 (2015).
[7] Habermas Jirgen, Javno Mnenje, Belgrade, 124 (1969).
[8] Djordjevic Jovan, Public Opinion, Belgrade, 9 (1957).
[9] More in: Niccolo Machiavelli, The Prince, Gjurgja Skopje (2009).
[10] PERRY A. JOHN & PERRY K. ERNA, THE SOCIAL WEB 279 (New York 1958).

audience and the individual is of psychological origin and is constituted by the activity of one of these centres, and by their actions they establish the connection between people close to affinity, taste or interest, due to which the types of audience differentiate[11].

II. FREEDOM OF INFORMATION AS CONSTITUTIONAL ORIENTATION

Rights and freedoms are basic criteria and a measure of the position and role of people and citizens in society on one hand, and democracy of the regime (the system) on the other. They are an instrument to limit the power and disable its arbitrariness and abuse. Why discussing *fundamental freedoms*? Because they crawl out of the very nature of man, not the will of the state government. "People are born free and equal", was said by Rousseau, and repeated by the Declaration of Independence of the United States in 1776.

The rights are acts of a certain degree of development of civilization, the fruit of the new age understanding of the world and life. The theoretical dimension of rights and freedoms is closely linked with the theory of natural law with the rise of the constitution as a written document and the construction of a single international order[12].

According to Siljanovska-Davkova (2001: 24), "the theory of natural law connects the freedoms and rights of justice as a value, while the theory of positive law of the rights and freedoms is seen as a product of the sovereign state power."

The theory of natural law in 17th and 18th Centuries will be represented by John Locke[13] and Thomas Jefferson. According to both everyone is, by nature free and equal and possess inalienable rights and inviolable rights that state government can only protect but not limit or repeal. Whilst the representatives of the theory of Positive Law believe that freedoms and rights are direct creation of the state authority. Therefore freedoms and rights are not natural human capacity, but category of the state order.

The idea of human rights and freedoms was established in ancient Greece, ancient Rome and medieval period known after numerous charters for privileges of certain classes and groups.

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[11] Djordjevic Thomas, Political Public Opinion, Novi Sad, 88 (1975).
[12] SILJANOVSKA DAVKOVA G., T. TRENDAFILOVA & TRENESKA R., HANDBOOK FOR PASSING INTERMEDIATE EXAMINATION, 24 (Foundation Open Society Institute 2001).
[13] More in: John Locke (1632-1704), English Philosopher , "*Two Treatises of Government*".

Great Charter of Freedoms (Magna Carta Libertatum) of 1215 in certain determinations is still a valid document of common law jurisdictions with which the English feudal lords adopted certain privileges for themselves and King John Lackland. Article 40 reads as follows: "The right and justice shall not be sold, abridged or delayed to anyone." In the 12th Century in England Petition of Rights of 1628 and the Bill of Rights of 1689 are adopted and especially the famous Habeas Corpus Act (1679) as the basis and inspiration for all future documents of such nature. It highlighted that no one without authorization can get arrested, be jailed without a proper court order, and the right to life, liberty and property rights became positive rights. Here are two particularly important declarations. Declaration of Independence of the United States from 1776, by which 13 British colonies bid farewell to the British king invoking to the political rights of the people elaborating the reasons for rejecting the colonial yoke.

The Bill of Rights of 1776 is the first systematic document on Human Rights, proclaimed in 1776 in the state of Virginia. It declared "the rights and freedoms of the individual" as an introduction to the Constitution of Virginia. However, the Declaration of the Rights of Men and of the Citizens from August 28, 1789 is ideological and political platform and program of all major revolutionary movements. Article 1 of the Declaration reads as follows: "People are born and live free and equal in their rights." Freedom is the ability to do anything that does not harm the other[14].

After World War II, when the attempts at discrimination and destruction of man were exposed, the United Nations (UN) was created in 1945 in San Francisco and the General Assembly adopted the Universal Declaration of Human Rights. In Republic of Macedonia, fundamental freedoms and rights of man and citizen are constitutional. Pursuant Article 8 indent 1 of the Constitution, freedoms and rights are fundamental to the constitutional order of the Republic of Macedonia.

In the corps of political rights and freedoms, the Constitution of R. Macedonia lists freedom of public speech, freedom of information, freedom of political association, the right to vote, the right to peaceful gathering.

Freedom of public speech and public performance refers to right of people to express their thoughts, not only with words but also with other means of expression.

Freedom of informing includes free access to information, freedom to receive and communicate information. The Constitution guarantees freedom of establishment of institutions for public information, the right to reply in

[14] SILJANOVSKA DAVKOVA G., T. TRENDAFILOVA & TRENESKA R., HANDBOOK FOR PASSING INTERMEDIATE EXAMINATION 25 (Foundation Open Society Institute 2001).

the means of public informing, the right to protect a source of information in means for public informing and prohibit censorship[15].

However, freedom of expression in democratic societies cannot be absolute. For example what happens when two individuals in the name of the right to freedom of expression inadequate and unverifiable tell lies about each other, express offensive words? Or, sticking posters on each other during the election campaign of the political parties? By limiting the freedom of expression it is necessary to enable to exercise other rights and freedoms: freedom of movement, right to privacy, the right to association, etc[16].

III. THE INFLUENCE OF POLITICS ON THE MEDIA ACCORDING TO THE POLITICAL SYSTEMS

For centuries, politicians devoted much of their time trying to "hear" a thing called *VoxPopuli*. Well-known is the story about Harun al-Rashid, the caliphate from "Thousand and One Nights" dressed as a beggar walked through their caliphate Baghdad hearing to listen to the conversations on the streets, to learn about the real opinion of the people he ruled and perceive the conditions from a certain angle, which gave the opportunity their more authentic presentation. This is a romantic version of what nowadays is a real practice in every country. Today, even more, politicians are trying to follow the dictates of public opinion, but at the same time, they try to shape and manipulate with it. No government can afford the "luxury" to ignore public opinion, which at the same time is a subject of interest as well as a product of practice.

Politics is somehow a skill of winning over the social community or neutralizing its resistance. The relationship between public opinion and authority figures is a two-way: public opinion is shaping politics and politicians are shaping public opinion[17].

Knowing that public opinion creates judgments about manner of action of the community and assessmentof the actions of the government, it is expected that political rulers should try to impose their influence on the public opinion in order to retain or maintain power.

Public opinion as a form of political consciousness is associated with the political system as an institutional base of the political process.

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[15] *Ibid*, at 29.
[16] Majhoshev A., *Professional Standards of the Journalistic Profession*, *Yearbook 2013/2014*, 4 FACULTY OF LAW 208 (2014).
[17] Klimovski S., *Constitutional and Political System*, PROSVETNO DELO AD 995—996 (2001).

The *democratic political system* as a totality of forms of organization through which the political life is happening, consciously directed activity becomes the most important condition for the formation of a free public opinion. Democracy exists when there are channels to achieve constantly freely and legally recognized influence of social forces of public authority.Democratic decision-making would not be possible without free formed and informed public opinion, which has the ability to freely impose their critical attitude for work on any of those in power[18].

Hence features of public opinion in democracy are: independent decision-making, critical judgment on how to perform general work and evaluation or indication of the pros and cons of conducting of authority or this critical view of society determines the nature of public opinion. Yet this determination of public opinion in a democracy is an ideal-approval of type design. In reality, public opinion appears with all its virtues and flaws[19].

Public opinion has had its reflection in liberal democratic systems, while *the totalitarian systems* are characterised by "*an organized lying*", which most clearly portrayed Hannah Arendt.

Totalitarianism rejects discussion as "landmark of flabby liberalism" (Schmidt) and his parliamentarismopposes the dictatorial decision which is absolute[20].

The totalitarian system centrally manages the public opinion. The dictator and his party through party decrees determine in advance what and how to think. An authority which relies on cheers and acclamation stands behind this opinion that contains uncultivated and principled superior knowledge. Noisy propaganda and the so-called "plebiscitary confirmation" of the decisions of the leader serve as a substitute for the public and legitimize the usurping government[21]. Totalitarian systems despite the propaganda and manipulation do not exclude torture and violence as a way to come to reason the plebiscite.

Unlike them, in democratically organized societiesone basic assumption is the presence of active, free, creative public opinion. Public opinion becomes an indispensable tool to immediate democratic control of power by the public. However, public opinion from one side conducts the daily activity of the holders of public authority, but on the other hand does not give blank authority to rule i.e. manage as they wish.

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[18] *Ibid*, at 996.
[19] Vladimir Milic, *The Social Character of Political Public Opinion* in BIRTH PUBLIC OPINION AND POLITICAL PARTIES 100 (Belgrade 1992).
[20] LJUBOMIR TADIC, PUBLIC OPINION, ENCYCLOPEDIA OF POLITICAL CULTURE 463 (Belgrade 1993).
[21] *Ibid*.

Different "models" of public opinion are shaping the preferences of those in power. Two basic elements of these models are: the percentage of the population that have opinions and the direction and intensity of the opinion.

CONCLUSION

The findings in this paper suggest that the creation of the public opinion takes a significant place in every country. The rulers depending on the degree of democracy, political system and constitutional order, historical circumstances, all tend towards securing the favour of public opinion in order to rule longer and safer. Public opinion is a complex social and political phenomenon. Rights and freedoms are basic criteria and a measure of the position and role of man and citizen in society on the one hand, and democratic regime (the system) on the other. They are an instrument to limit the power and disable its arbitrariness and abuse. Knowing that public opinion creates judgments about mode of action of community and appreciation for the actions of the government, political rulers are expected to try to impose their influence on the public opinion in order to retain or maintain power. Public opinion as a form of political consciousness is associated with the political system as an institutional base of the political process. Machiavelli also emphasizes that the constant concern of the ruler should be winning the favour of public opinion, if preservation of power and personal security is desired.

When defining the public opinion conceptual determination of the terms mass, publicity, public and political public should be taken into consideration. Rights are acts of a certain degree since the development of civilization, the fruit of New Age understanding of the world and life. The theoretical dimension of rights and freedoms is closely linked with the theory of natural law, the emergence of the constitution as written document. In the core of the political rights and freedoms, the Constitution lists freedom of public speech, freedom of information, freedom of political association, the right to vote, the right to peaceful gathering.

Freedom of public speech and public performance refers to the right of people to express their thoughts, not only in words but also with other means of expression. Freedom of informing includes free access to information, freedom to receive and communicate information. The Constitution guarantees freedom of establishment of institutions for public information, the right to reply in the public informing means, the right to protect a source of information in the media and prohibit censorship.

Knowing that public opinion creates judgments about manner of action of community and appreciation for the actions of the government, political rulers are expected to try to impose their influence on the public opinion in order to retain or maintain power. Four known theories of mass media with its features have provided a clearer picture of historical development, as well as the impact that the state government or the business community can have on media freedom. Public opinion as a form of political consciousness is associated with the political system as an institutional base of the political process. The democratic political system as a totality of forms of organization through which the political life is happening, and as consciously directed activity becomes the most important condition for the formation of a free public opinion. Unlike them, the totalitarian systems centrally manage public opinion. The dictator and his party through party decrees determine in advance what and how to think. An authority which relies on cheers and acclamation stands behind this opinion that contains uncultivated and principled superior knowledge. Noisy propaganda and so-called "Plebiscitary confirmation" of the decisions of the leader serves as a substitute for the public and legitimizes the usurping power. Hence the conclusion is that the type of political system and the level of democracy of authority undoubtedly influence the development of media's freedom. In terms of democratic development the media should provide openness to different opinions and political views, unbiased reporting on political parties and political actors, and to refrain from hate speech and discrimination on any grounds, particularly on the basis of political affiliation. Impartiality, apropos indicates that the media, especially electronic media, in news reports may not express views for or against a political party, nor to act as representatives of particular political views in the current political debate.

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