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The American University in Cairo

School of Global Affairs and Public Policy

**EGYPT'S POST-COLONIAL APPROACHES TO
INTERNAL SELF-DETERMINATION**

A Thesis submitted to

Department of Law

**in partial fulfilment of the requirements
for the degree of
Master of Arts in International Human Rights Law**

By

Charlotte Kaoppel

February 2012

The American University in Cairo
School of Global Affairs and Public Policy
Department of Law

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INTERNAL SELF-DETERMINATION

Charlotte Kaoppel

Supervised by Professor Gianluca P. Parolin

ABSTRACT

This thesis explores the linkage between the right to self-determination and democracy. In view of the popular uprisings taking place throughout the Middle East and North Africa, it is highly relevant to revisit the concept of self-determination. In particular, considering the undetermined nature of the right to self-determination, this thesis examines the contemporary legal meaning of self-determination. Specifically, it questions the prospects of “the people” to self-determination against the background of undemocratic structures at the global level. Following the introduction, the second part of this thesis deals with a critical overview of the international legal ideology on self-determination. In the third part, the legal content and scope of the right to self-determination regarding its political and economic dimension will be explored. Consequently, an examination of Egypt's approaches to self-determination will not only illustrate the obstacles to democratization, but will primarily serve as a test case for exploring the (in)compatibility of the process of economic liberalization with the right to self-determination.

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"The people want the overthrow of the regime."¹

"The will of the people shall be the basis of the authority of government."²

I. INTRODUCTION

After the revolution in Tunisia that succeeded in overthrowing President Ben Ali, popular demonstrations followed in Egypt on January 25, 2011 to protest not only poverty, unemployment and corruption but particularly, the autocratic regime of President Mubarak.³ These protests, which led to Mubarak's resignation on February 11, were the first on this scale in Egypt since the uprisings over the price of bread in the 1970s.⁴

After decades of authoritarian rule in Egypt, Western states, first and foremost the US and EU, had "neither expected these protests nor, at least at the outset, hoped for them. Mubarak had been a loyal ally;⁵ the speed with which they celebrated his fall as a triumph of democracy was slightly anomalous if not unseemly."⁶ In this regard, the European response to the "overthrow of the regime" echoed for the most part the US administration's call for an "orderly transition" to liberal democracy.⁷

The Western interest in the export of liberal democracy is based on the theory of democratic peace⁸ and the notion that liberal democracy is the only type of legitimate governance.⁹ In the words of Francis Fukuyama, Western liberal democracy is "the end point of mankind's ideological evolution and [...] the final form of human government."¹⁰ Hence, Western liberal democracy¹¹ is considered as

1 Political slogan during Egyptian uprising in January 2011. See ICG, *Popular Protest in North Africa and the Middle East (I): Egypt Victorious?* 9 (2011), <http://www.crisisgroup.org/en/regions/middle-east-north-africa/north-africa/egypt/101-popular-protest-in-north-africa-and-the-middle-east-i-egypt-victorious.aspx>.

2 U.N. UDHR art. 21, para. 3.

3 Craig Kanalley, *Egypt Revolution 2011: A Complete Guide to the Unrest* (2011), http://www.huffingtonpost.com/2011/01/30/egypt-revolution-2011_n_816026.html.

4 Aljazeera, *Fresh Anti-Govt Protests in Egypt* (2011), <http://english.aljazeera.net/news/middleeast/2011/01/201112663450547321.html>.

5 Holger Albrecht, *Authoritarian Opposition and the Politics of Challenge in Egypt*, in *Debating Arab Authoritarianism: Dynamics and Durability in Nondemocratic Regimes* 74 (Oliver Schlumberger ed., 2007).

6 ICG, *supra* note 1, at 4.

7 BBC, *Egypt: EU Calls for 'Orderly Transition'* (2011), <http://www.bbc.co.uk/news/world-europe-12329941>.

8 The theory of democratic peace refers to Immanuel Kant's perpetual peace that may be established if three conditions are met: First, states should have a republican constitution that is widely considered to correspond to today's liberal democratic constitution. Second, states should join together to a pacific federation and third, this federation should be underpinned by a body of cosmopolitan law. According to Michael Doyle, states with liberal democratic constitutions are peaceful among each other, because they commit to citizens' juridical equality and the protection of fundamental civil rights, representative legislatures which base their authority on the consent of the electorate, recognition of private property rights, and a free market economy shaped by forces of supply and demand. However, Doyle also acknowledges that liberal democracies tend to be war prone in their relations with non-liberal societies. See Immanuel Kant, *Perpetual Peace*, in *Kant's Political Writings* 93 (Hans Reiss ed., 1991). Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* 35-6 (OUP 2003). Michael Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 *Phil. & Pub. Affairs* 205, 207-8 (1983).

9 Thomas Franck, *The Emerging Right to Democratic Governance*, 86 *Am. J. Int'l L.* 46 (1992). Gregory Fox, *The Right to Political Participation in International Law*, 17 *Yale J. Int'l L.* 539 (1992).

10 Francis Fukuyama, *The End of History and the Last Man* (Free Press, 1992).

11 In this paper I rely on Anne-Marie Slaughter's definition of liberal democracy. In her article entitled

ideal realization of peoples' right to self-determination against the background of a presupposed "common evolutionary pattern for *all* human societies."¹² However, if self-determination is necessarily linked to Western liberal democracy, it leaves no room for people's own perception of the representative form of the government and therefore, it is in itself contrary to self-determination.¹³

The right to self-determination of peoples is codified in the Articles 1(2) and 55 of the UN Charter (1945) and became just like peace, security and human rights, one of the purposes of the UN.¹⁴ Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) define self-determination as a human right in Article 1. In its first paragraph the Article stipulates: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹⁵

The tendency to Western prescription of liberal democracy is not only contrary to self-determination, but also conflicts with the Westphalian paradigm. According to this paradigm, states determine their own constitutional model on the basis of co-existence and non-interference without pointing to a particular model of governance.¹⁶ In this regard, traditionally, international law is neither related to democracy¹⁷ nor any political model.¹⁸ However, after the end of the Cold War and the collapse of the Soviet Union and state socialism, Western states, above all the US and NATO member states, declared liberal democracy and capitalism as positive endpoints of ideology.¹⁹

The idea of the universal validity of both liberal democracy and capitalism underlies an Eurocentric linear understanding of modernization. Accordingly, "the future of the peripheral [less-developed] countries is supposedly represented by the present modernity of the core countries,"²⁰ basically, the US and Western Europe. In this context, political economic development is principally determined by endogenous factors, whereby economic liberalization is viewed as necessary condition for political

"International Law in a World of Liberal States," she defines liberal democracy as "some form of representative government secured by the separation of powers, constitutional guarantees of civil and political rights, juridical equality, and a functioning judicial system dedicated to the rule of law." See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 Euro. J. Int'l. L. 503 (1994).

12 *Id.* at 48. Marks, *supra* note 8, at 33.

13 David Raic, *Statehood and the Law of Self-Determination* 276-277 (Kluwer Law International, 2002).

14 U.N. Charter art. 1, para. 2. U.N. Charter art. 55. Hans Morten Haugen, *The Right to Self-Determination and Natural Resources: The Case of Western Sahara*, 3/1 LEAD 70, 72 (2007).

15 International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) Annex, U.N. Doc. A/RES/2200(XXI) Annex (Dec. 16, 1966). International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) Annex, U.N. Doc. A/RES/2200(XXI) Annex (Dec. 16, 1966).

16 Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, the European Way of Law)*, 47 Harv. Int'l L.J. 328 (2006).

17 For instance, Jan Wouters argues that the neutrality on democracy of traditional international law is exemplified by the transfer of debts from undemocratic to democratic regimes. Jan Wouters, Bart De Meester & Cedric Ryngaert, *Democracy and International Law* 5 (2004), <http://www.ggs.kuleuven.be/nieuw/publications/working%20papers/archive/wp05.pdf>.

18 *Id.* at 5.

19 Fukuyama, *supra* note 9. Sonia Lucarelli, *Peace and Democracy: The Rediscovered Link: The EU, NATO and the European System of Liberal-Democratic Security Communities* 5 (2002), <http://www.nato.int/acad/fellow/00-02/Lucarelli%27s.pdf>.

20 Barry Gills & Joel Rocamora, *Low Intensity Democracy*, 13 Third World Q. 501, 502-503 (1992).

liberalization.²¹ Hence, democratization and the deconstruction of authoritarianism is assumed to be “the necessary and natural product of submission to the rationality of the worldwide market.”²²

As political equivalent of the free market, proponents of this ideology argue, that liberal democracy is the ideal model of governance and political foundation for legitimacy. Therefore, liberal democracy also constitutes the system that most likely promotes international peace and stability.²³ Following this assumption, the neutrality of traditional international law regarding the internal form of government of states gradually changed.²⁴ For instance, liberal democracy became a condition for state recognition²⁵ as well as a requirement for membership in regional international organizations such as NATO, Council of Europe (COE), EU or Organization for American States (OAS).²⁶

Assuming the universal validity of both the utopian end of “democratic peace” and the liberal means to that end,²⁷ proponents of liberal democracy argue “that the right to [...] self-determination can be realized by means of an emerging right to democratic governance.”²⁸ However, the association of liberal democracy with a supposed state of nature, is ignorant of the way in which the subjugation of nation-states’ sovereignty under the ideological hegemony of the singular, but exemplary liberal nature of the Western world, is in itself illiberal. Against this background, the “natural” linkage between peoples’ right to self-determination and liberal democracy is controversial, not least because there is neither an agreement on the accurate interpretation of democracy,²⁹ nor is there clarity on the extent that the right to self-determination actually requires democracy.

This thesis explores the linkage between the right to self-determination and democracy. In view of the popular uprisings taking place throughout the Middle East and North Africa, it is highly relevant to revisit the concept of self-determination. In particular, considering the undetermined nature of the right to self-determination, this thesis examines the contemporary legal meaning of self-determination. Specifically, it questions the prospects of “the people” to self-determination against the background of undemocratic structures at the global level. Following the introduction, the second part of this thesis deals with a critical overview of the international legal ideology on self-determination. In the third part, the legal content and scope of the right to self-determination regarding its political and economic

21 Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962). Seymour M. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 *Am. Pol. Sci. Rev.* 69-105 (1959). Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Unwin Paperbacks, 1987).

22 Samir Amin, *The Issues of Democracy in the Contemporary Third World*, in *Low Intensity Democracy: Political Power in the New World Order* (Barry Gills, et al. eds., 1993).

23 Christoph Zürcher, *Building Democracy while Building Peace*, 22 *J. Dem.* 81 (2011).

24 Simone van den Driest, *Pro-Democratic Intervention and the Right to Political Self-Determination: The Case of Operation Iraqi Freedom*, NILR 29, 10 (2010). Wouters, De Meester & Ryngaert *supra* note 17, at 4.

25 For example, the European Union made democracy a condition for the recognition of new states in Eastern Europe. See Wouters, De Meester & Ryngaert *supra* note 17, at 17-18.

26 *Id.* at 19-22. Roland Rich, *Bringing Democracy into International Law*, 12 *J. Dem.* 20, 3 (2001).

27 William Rasch, *Sovereignty and its Discontents: On the Primacy of Conflict and the Structure of the Political* 51-52 (Cavendish Publishing, 2004).

28 In this regard, governance is democratic if political authority is awarded through periodic multi-party elections, supported by civil rights and constitutional order committed to the rule of law. See Marks, *supra* note 8, at 2. Fox, *supra* note 9.

29 Frank Cunningham, for instance, refers to four main approaches of democratic governance: the constitutional, procedural, substantive, and process-oriented approach. For a more detailed elaboration of each approach: See Frank Cunningham, *Theories of Democracy: A Critical Introduction* (Routledge, 2002).

dimension will be explored. Consequently, an examination of Egypt's approaches to self-determination will not only illustrate the obstacles to democratization, but will primarily serve as a test case for exploring the (in)compatibility of the process of economic liberalization with the right to self-determination.

II. CRITIQUE OF INTERNATIONAL LEGAL IDEOLOGY ON SELF-DETERMINATION

The right to self-determination is usually referred to in the colonial context as people's right to establish their own sovereign state or to freely associate with or integrate in another state.³⁰ Accordingly, the right to self-determination of people under colonialism did not involve legal obligations for states, rather it was considered to be consumed as soon as the dependent territory achieved independence from its colonial power.³¹

The right to self-determination has been recognized as fundamental legal right³² and expanded in respect of an internal and an external dimension.³³ The external dimension includes the right to self-determination under colonialism. In contrast, the internal dimension entitles all people to "freely determine their political status and freely pursue their economic, social and cultural development."³⁴ Hence, political self-determination is understood as the right to directly or indirectly participate in the political decision-making process and to determine the structure of the state, the form of governance and "persons to be entrusted with political power" without the intervention, manipulation or interference of a third state.³⁵ Accordingly, people have the right to act as *pouvoir constituant* and to constitute their own representative and participatory political system.³⁶ Given that the right to internal self-determination is inalienable and ongoing,³⁷ it "implies that at any moment in time, the people can

30 See Percy Lenhing, *Theories of Secession* (Routledge, 1998). Stephen Maedo & Allen Buchanan, *Secession and Self-Determination* (New York University Press, 2003). Magret Moore, *National Self-Determination and Secession* (Oxford University Press, 1998).

31 van den Driest, *supra* note 24.

32 The right to self-determination has widely been recognized as obligation *erga omnes*. The International Court of Justice (ICJ) stated in the Barcelona Traction case (1970) that there are obligations *erga omnes* in international law that are owed by states "towards the international community as a whole," and that therefore, "all states can be held to have a legal interest in their protection." See Case Concerning the Barcelona Traction, Light and Power Company Limited (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5) (Judgment). In Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ identified the right to self-determination as obligation *erga omnes*. See On the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136. Other documents suggest that the right to self-determination has also the status of *jus cogens* (peremptory norm in times of war or peace). See U.N. C.H.R., 56th Sess., U.N. Doc. E/CN.4/RES/2000/4 (Apr. 7, 2000). Commentary on art. 26 (5), Articles on Responsibility of States for Internationally Wrongful Acts (with commentaries), in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., U.N. Doc. A/56/10 (Aug. 10, 2001), reprinted in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002). Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Rwanda), 2006 I.C.J. 90 (Feb. 3) (separate opinion of Judge ad hoc Dugard).

33 van den Driest, *supra* note 24.

34 International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) Annex, U.N. Doc. A/RES/2200(XXI) Annex (Dec. 16, 1966). International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) Annex, U.N. Doc. A/RES/2200(XXI) Annex (Dec. 16, 1966).

35 Jan Klabbers & Rene Lefeber, *Africa: Lost Between Uti Possidetis and Self-Determination*, in *Peoples and Materials in International Law* 43-44 (Catherine Brölmann et al., 1993).

36 Allan Rosas, *Internal Self-Determination*, in *Modern Law of Self-Determination* 201 (Christian Tomuschat ed., 1993).

37 Human Rights Committee, *General Comment No. 12: Article 1: The Right to Self-Determination of Peoples* (1984), http://www.ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.1%29_%28GC12%29_en.pdf.

change or re-create the manifestation of their system of government and administration."³⁸

According to Rosalyn Higgins, the contemporary concept of internal self-determination is a non-sessionist right of people within an independent state.³⁹ Likewise, Christian Tomuschat and Thomas Franck emphasize the universal applicability of self-determination as international human right and associate it with an emerging "norm of democratic governance" in international law.⁴⁰ Hence, democratic governance is understood as political foundation for legitimacy and therefore, a criterion in the recognition of states.⁴¹

This notion of an international "right to democratic governance"⁴² has been interpreted by some Western states as imperative to "do everything possible to promote [their conception of] democracy in the world," including pro-democratic military interventions.⁴³ Traditionally, international law has not attended to national constitutional issues such as how a constitution is made or whether the internal structures of states are legitimate.⁴⁴ For instance, Article 2(7) of the UN Charter stipulates that neither UN nor UN members have the authority to intervene "in matters which are essentially within the domestic jurisdiction of any state."⁴⁵ In this regard, Jan Wouters and Bart De Meester argue that the definition of a constitutional model is "undoubtedly the *nec plus ultra* of a matter under the national jurisdiction."⁴⁶ However, as the cases of post-conflict constitution-making in Iraq and Afghanistan illustrate, constitution-making has become a shared international effort to promote liberal democracy.⁴⁷

In view of the interpretation of the "right to democratic governance" as right to liberal democracy, Brad Roth and Susan Marks argue that such an interpretation deprives international law "of its indispensable role as an overlapping consensus among societies that otherwise radically differ on fundamental matters."⁴⁸ On the contrary, such an interpretation of the "right to democratic governance," might be exemplary for the democratic deficit of international governance as well as for the consolidation of a Western liberal conception of human rights.

38 Raic, *supra* note 13, at 237-238.

39 A.A. Idowu, *Revisiting the Right to Self-Determination in Modern International Law: Implications for African States* (2008), http://www.eurojournals.com/ejss_6_4_05.pdf.

40 Franck, *supra* note 9. Christian Tomuschat, *Modern Law of Self-Determination* 9 (Martinus Nijhoff Publishers, 1993).

41 Marks, *supra* note 8.

42 Franck, *supra* note 9.

43 An example of pro-democratic intervention is the US-led invasion in Iraq in 2003. See van den Driest, *supra* note 24, at 41. On the prohibition to intervene, see Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations: G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970).

44 Vijayashri Sripati, *Faking or Crafting Genuine Constitutionalism? A Critique of the UN's Constitutional Assistance in Afghanistan* (2008), <http://www.soas.ac.uk/cceil/events/file44082.pdf>.

45 U.N. Charter art. 2, para. 7. In Article 2(4) the UN Charter further emphasizes that states are not authorized to impose democracy by forcible means. U.N. Charter art. 2, para. 4. In the Nicaragua case the International Court of Justice affirms that the principle of non-intervention - the right of every state to conduct its affairs and to choose its own form of government without outside interference - as customary international law. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1989 I.C.J. 14 (June 27).

46 Wouters, De Meester & Ryngaert *supra* note 17, at 3. See International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) Annex, U.N. Doc. A/RES/2200(XXI) Annex (Dec. 16, 1966). International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) Annex, U.N. Doc. A/RES/2200(XXI) Annex (Dec. 16, 1966).

47 Sripati, *supra* note 44, at 12.

48 Marks, *supra* note 8.

With respect to the democratic deficit of international governance, organizations such as the UN, exercise political authority without democratic accountability.⁴⁹ For instance, the Security Council (SC) increasingly creates, *de jure or de facto*,⁵⁰ "legal norms and attach consequences to non-compliance."⁵¹ Although democracy is not a UN membership requirement,⁵² the SC authorized the use of force to restore "democratic governance" in several instances.⁵³ In the context of "democracy consolidation" and "reconstruction," the UN promotes "good governance,"⁵⁴ which "brings to its ultimate consequences liberal approaches to democracy."⁵⁵ In this regard, Laura Zanotti notes that "development" is mainly framed as internal problem. Consequently, "[i]t's causes are not to be researched in the international economic order, capital concentrations or distribution of wealth, but mainly in the inappropriate functioning of the institutions of less-developed states."⁵⁶ However, given that the "fate of national communities is increasingly shaped by decisions taken outside the framework of national political institutions," democracy - which ideally functions as "key indicator of legitimacy for the exercise of political authority" at the national level - must go beyond national institutions to overcome the democratic deficit in international settings including the "'private' domain of global markets."⁵⁷

As a consequence of the democratic deficit of international governance, there is no "global public that defines itself by reference to the exercise of global regulatory functions or that possesses the

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- 49 The democratic deficit of the UN is a consequence of the in-existent separation of powers within the organization. Particularly, the SC, as sole executive power, is characterized by systemic arbitrariness. For instance, the adoption of SC resolutions under Chapter VII, exclusively depends on the interests of the five permanent member states. Hans Köchler, *Security Council Reform: A Requirement of International Democracy* 3-4 (2007), http://www.hanskoechler.com/Koechler-Security_Council-Reform-CSF-TurinV3-25Aug07.pdf. Wouters, De Meester & Ryngaert *supra* note 17, at 1.
- 50 Jost Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and /or Alternative Legitimation Strategies?*, 10 *Ind. J. of Glob. Legal Stud.*, 29, 35 (2003).
- 51 In particular in the field of anti-terrorism and the fight against impunity, "international regulations" of the Security Council directly affect citizens, for instance in the case of "smart sanctions" that are directed against individuals rather than the state. See Jan Wouters & Philip De Man, *International Organizations as Law-Makers* 8 (2009), http://www.ggs.kuleuven.be/nieuw/publications/working%20papers/new_series/wp21.pdf. Steven Wheatley, *The Democratic Legitimacy of International Law: The Role of Non-State Actors* 1 (2007) <http://www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Paper-Wheatley.pdf>.
- 52 U.N. Charter art. 2, para. 7.
- 53 SC authorized the use of force to restore democratic governance, for instance, in Haiti, S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994); Sierra Leone, S.C. Res. 1270, U.N. Doc. S/RES/1270 (October 22, 1999); Liberia, S.C. Res. 866, U.N. Doc. S/RES/866 (October 5, 1993). See Gerry Simpson, *Two Liberalisms*, 21 *Euro. J. Int'l. L.* 537, 558 (2001). David Kennedy, *The International Human Rights Movement: Part of the Problem?* (2002), <http://www.law.harvard.edu/students/orgs/hrj/iss15/kennedy.shtml>. Susan Marks, *What has Become of the Emerging Right to Democratic Governance?*, 22 *Eur. J. Int'l. L.* 507, 522 (2011).
- 54 According to the UN, "good governance" (equity, participation, pluralism, transparency, accountability, rule of law) is put into practice through the "holding of free, fair and frequent elections, representative legislatures that make laws and provide oversight and an independent judiciary." See UN, *Global Issues: Governance* (2011), www.un.org/en/globalissues/governance/.
- 55 Marks, *supra* note 53, at 516, 523. Laura Zanotti, *Governmentalizing the Post-Cold War International Regime: The UN Debate on Democratization and Good Governance*, 30 *Alternatives* 461, 479 (2005).
- 56 Zanotti, *supra* note 55, at 479.
- 57 Peter J. Schraeder, *Exporting Democracy: Rhetoric vs. Reality*, 16 *Euro. J. Int'l. L.* 1001, 1004 (2006) (book review). Susan Marks, *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology*, 16 *Euro. J. Int'l. L.* 1001, 1002 (2006) (book review). Marks, *supra* note 8, at 3. Barry Gills, *Low-Intensity Democracy*, in *Low-Intensity Democracy: Political Power in the New World Order* 30 (Barry Gills eds., 1993).

capacity of (global) opinion- and will-formation (no demos, no democracy).⁵⁸ Accordingly, there is no "basic understanding of the common good" in international law.⁵⁹ Hence, the emergence of so-called "cosmopolitan values of human rights, democracy and concern for the social welfare of 'others',"⁶⁰ is not based on an "overlapping consensus among societies," rather it is a product of a particular moment and place that David Kennedy defines as "post-enlightenment, rationalist, secular, Western, modern, capitalist" or what Gerry Simpson calls "liberal anti-pluralism."⁶¹

However, when "the global expression of emancipatory objectives in human rights terms narrows humanity's appreciation of these objectives to the forms they have taken in the nineteenth- and twentieth-century Western political tradition,⁶² it causes the loss of more diverse and local experiences and conceptions of emancipation."⁶³ For instance, if the "right to democratic governance" is reduced to the "right to liberal democracy," it leaves no room for people's own perception of the representative form of government and therefore, it does not only exclude the expression of local experiences and conceptions, but is also contrary to the right to self-determination.

This is particularly problematic in the context of less-developed states, where the "right to democratic governance" is reduced to the promotion of procedural democracy or "low-intensity democracy."⁶⁴ Even though, low-intensity democracy closely corresponds with the definition of a liberal state,⁶⁵ Barry Gills points out that "low-intensity democracy" is a form of "cosmetic democratisation" that serves "as an euphemism for sophisticated modern form of neo-authoritarianism,"⁶⁶ due to its compatibility with an "unjust and even oppressive, domestic political order."⁶⁷

While "democracy"⁶⁸ is a universal principle within international law,⁶⁹ there is no "right to

58 Steven Wheatley, *The Democratic Legitimacy of International Law* 18 (Hart Publishing, 2010).

59 Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 *Mod. L. Rev.* 1, 16 (2007).

60 Wheatley, *supra* note 51, at 2.

61 Gerry Simpson argues that "liberal anti-pluralism" undermines the inclusive conception of the UN Charter liberalism (sovereign equality of diverse states), because it determines the status of states by their adherence or non-adherence to certain individual rights and international norms. Simpson, *supra* note 53 at 542-543 (2001). Kennedy, *supra* note 53.

62 An example is Joseph Schumpeter's influential definition of democracy as a "political method [...] a certain type of institutional arrangement for arriving at political - legislative and administrative - decisions." He defines the democratic method as "institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." See Schumpeter, *supra* note 21, at 269.

63 Kennedy, *supra* note 53.

64 The concept of "low-intensity democracy," free and fair multi-party elections and rights of political participation, is inspired by Joseph Schumpeter's idea of democracy. See Schumpeter, *supra* note 21. Gills *supra* note 57, at 3. Susan Marks, *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology*, 96 *Am. J. Int'l L.* 264, 265 (2002) (book review). Thomas Carothers, *Empirical Perspectives on the Emerging Norm of Democracy in International Law*, 86 *Pro. Am. Soc'y Int'l L.* 264 (1992).

65 With respect to the liberal state, I refer to Anne-Marie Slaughter's definition. See Slaughter, *supra* note 11. Marks, *supra* note 8, at 63.

66 Gills, *supra* note 57, at 21, 5.

67 Marks, *supra* note 53. Marks, *supra* note 64, at 265.

68 There is no general accepted definition of democracy. For instance, the UN makes no reference to democracy in its Charter. However, the GA broadly referred to democracy as "based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full

democratic governance" in international law,⁷⁰ although, elements of such a right, including political self-determination as well as freedoms of political participation, are stipulated in international human rights law.⁷¹ In this regard, Susan Marks points out that democratic governance is not only about legitimating a government by other states as argued by Christian Tomuschat and others.⁷² Rather it is about self-government, in the sense of political self-determination that people freely determine their political status without the intervention, manipulation or interference of a third state. In other words, democracy entails "an ongoing call to enlarge the opportunities for popular participation in political processes and end social practices that systematically marginalize some citizens while empowering others."⁷³

Similar to David Held, Susan Marks notes that while institutions and procedures of representative government are significant, they are not the exclusive determining feature of democracy.⁷⁴ Accordingly, democracy can not be equated with a particular "institutional structure or constitutional arrangements, not even to any consensus with respect to a wide range of values and beliefs."⁷⁵ Rather democracy refers to "the basic democratic ideas of popular self-government and political equality, ideas which are universal, not in the sense that they will or should be uniformly interpreted and realized, but in the sense that they circulate globally and play a part in political life across the world."⁷⁶

A. Legal Concept of People's Right to Self-Determination

The right to self-determination was merely a political concept until the Second World War.⁷⁷ Despite its codification in the UN Charter, self-determination was subordinated to the right to territorial integrity⁷⁸ and the general commitment to ensuring peace and security in the post war international system.⁷⁹ Thus, the Charter refers in Article 1(2) and 55 only broadly to "self-determination of peoples"⁸⁰ as *principle* and necessary precondition to create "peaceful and friendly relations among nations."⁸¹

In order to complement the Charter provisions, the General Assembly (GA) adopted several

participation in all aspects of their lives." See G.A. Res. 60/1, 2005 World Summit Outcome, U.N. Doc. A/RES/60/1 (September 16, 2005).

69 Schraeder, *supra* note 57, at 1001. Marks, *supra* note 53, at 1001.

70 Wheatley, *supra* note 58, at 219.

71 International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) Annex, U.N. Doc. A/RES/2200(XXI) Annex (Dec. 16, 1966). Wheatley, *supra* note 54, at 220.

72 Marks, *supra* note 64, at 265. Marks, *supra* note 8.

73 Marks, *supra* note 64, at 266.

74 David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press, 1995). Marks, *supra* note 64, at 266.

75 Marks, *supra* note 8, at 4.

76 *Id.* at 4.

77 Jean Salmon, *Internal Aspect of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?*, in *Modern Law of Self-Determination* 253 (Christian Tomuschat ed., 1993).

78 U.N. Charter art. 2, para. 4.

79 U.N. Charter ch. VII. Gerry Simpson, *The Diffusion of Sovereignty: Self-determination in the Post-Colonial Age*, *Stan. J. Int'l. L.* 255, 266 (1996).

80 U.N. Charter art. 1, para. 2.

81 U.N. Charter art. 55.

resolutions as regards self-determination, decolonization and non-self-governing territories.⁸² An important contribution in this regard is Resolution 1514 (XV).⁸³ The Resolution enunciates "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations," and declares that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."⁸⁴ Thus, in the context of decolonization, peoples in territories "which have not yet attained independence"⁸⁵ were allowed the exercise of self-determination through the establishment of an independent state, the free association with or integration to another state.⁸⁶ Accordingly, the right to self-determination of peoples subjected to colonialism was considered to be exhausted "as soon as the dependent territory achieved independence from the colonial power."⁸⁷ It was therefore unclear whether the principle of self-determination had developed to a legal right and therefore, whether it included legal obligations for states beyond the context of decolonization.⁸⁸

Ever since, the legal concept of self-determination has continued to evolve in terms of its status and its scope: First, the right to self-determination has widely been recognized as obligation *erga omnes*.⁸⁹ Second, as to its scope, the right to self-determination has developed with respect to an internal and external dimension. The external dimension refers to peoples' right to "choose their international political status, and applies in the context of colonial and trust territories;⁹⁰ and [...] also in the context of territories subject to belligerent occupation⁹¹." In contrast, the internal dimension "applies in all contexts to uphold the right of peoples to choose their national constitution, and set their national goals, without either outside interference or domestic coercion."⁹³

1. External Right to Self-Determination

In the context of decolonization the right to self-determination is depicted as the right of "colonial

82 van den Driest, *supra* note 24, at 32.

83 Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), at 67, U.N. Doc. A/RES/1514 (Dec. 14, 1960).

84 Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), at 67, U.N. Doc. A/RES/1514 (Dec. 14, 1960). Declaration on Principles of Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625 (Oct. 24, 1970).

85 Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), at 67, U.N. Doc. A/RES/1514 (Dec. 14, 1960).

86 G.A. Res. 1541 (XV), U.N. Doc. A/RES/1541 (Dec. 15, 1960).

87 van den Driest, *supra* note 24, at 32. Helen Quane, *The United Nations and the Evolving Right to Self-Determination*, 47 Int'l. Comp. L. Q. 537, 554 (1998).

88 van den Driest, *supra* note 24 at 32.

89 See *supra* note 32.

90 These include West Irian in 1962-63, South West Africa/Namibia in 1967 and 1989-90, Western Sahara in 1991 and East Timor between 1999 and 2002. Ralph Wilde, *International Territorial Administration: How Trusteeship and Civilizing Mission Never Went Away* 188 (Oxford University Press, 2008).

91 For example, Israel's occupation of the Golan Heights, the Gaza Strip and the West Bank, as well as the US occupation of Afghanistan and Iraq are deemed to belligerent occupations. Nehal Butha, *The Antinomies of Transformative Occupation*, 16 Eur. J. Int'l. L. 721, 722 (2005). Martti Koskeniemi, *Occupied Zone: "A Zone of Reasonableness?"*, 41 Isr. L. Rev. 13, 16 (2008).

92 Marks, *supra* note 8, at 113.

93 Antonio Cassese, *Self-Determination of Peoples, in The International Bill of Rights: The Covenant on Civil and Political Rights* 92 (Louis Henkin ed., 1981). Marks, *supra* note 8, at 113.

peoples"⁹⁴ in non-self governing territories to a particular process:⁹⁵ the right to freely "determine their political status and freely pursue their economic, social and cultural development."⁹⁶ Hence, the right provides for peoples subject to colonial rule to freely choose the international political status of the territory they inhabit within their colonial boundaries (*uti possidetis*),⁹⁷ whether to establish their own sovereign independent state or to freely associate with or integrate in an independent state.⁹⁸

Underlying the "free choice" to self-determination are "forms and procedures" that must ensure a *free* (i.e., without outside intervention, manipulation or interference) and *genuine* (i.e., be the will of the people of the territory)⁹⁹ expression¹⁰⁰ of the will of a people.¹⁰¹ Moreover, in absence of "special circumstances,"¹⁰² "informed and democratic processes,"¹⁰³ for instance, through a referendum or a plebiscite, must ensure the "free choice" of a people.¹⁰⁴ Thus, "what amounts to a 'free choice' is not to be universally predetermined but rather must be judged according to the particular political desires of the particular people."¹⁰⁵

Due to the special status of non-self-governing territories,¹⁰⁶ in contrast to the territory of the states that administer them,¹⁰⁷ the right of a people to define its international political status is consumed as

94 "Colonial peoples" may be defined as a population inhabiting a territory which is geographically separate from the country administering it; is ethnically and/or culturally distinct from the administering country's population; and has not yet attained full self-government. See G.A. Res. 1541 (XV), Principles IV, U.N. Doc. A/RES/1541 (Dec. 15, 1960).

95 Catriona Drew, *The East Timor Story: International Law on Trail*, 12 Eur. J. Int'l. L. 651, 658-659 (2001).

96 Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), at 67, U.N. Doc. A/RES/1514 (Dec. 14, 1960).

97 Likewise, in the Frontier Dispute case the International Court of Justice states that *uti possidetis* is not incompatible with self-determination, because the latter does not pose a challenge to existing state borders. Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 566 (Dec. 22). Jens E. Rytter, *Self-Determination of Colonial Peoples - The Case of Greenland Revisited*, 77 Nordic J. Int'l. L. 365, 367 (2008). Rosalyn Higgins, *Problems and Process: International Law and How We Use it* 122 (Clarendon Press, 1994).

98 Free integration or association with an independent state, however, had to be "the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes." (Principle VII (a) and IX (b). Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), at 67, U.N. Doc. A/RES/1514 (Dec. 14, 1960). Salmon, *supra* note 1, at 255.

99 Gentian Zyberi, *Self-Determination through the Lens of the International Court of Justice*, 56 Neth. Int'l. L. Rev. 429, 438 (2009).

100 Western Sahara, Advisory Opinion, 1975 I.C.J. 55, 59 (Oct. 16). M.A. Shukri, *The Concept of Self-determination in the United Nations* 60, 152, 337 (Al Jadidah Press, 1965).

101 Drew, *supra* note 95, at 661. Rytter, *supra* note 97, at 367.

102 In his separate opinion Vice-President provides an example of "special circumstances," which include the legitimate struggle for liberation from foreign domination. Western Sahara, Advisory Opinion, 1975 I.C.J. 99 (Oct. 16) (separate opinion of Judge Ammoun).

103 G.A. Res. 1541 (XV), U.N. Doc. A/RES/1541 (Dec. 15, 1960).

104 In the context of decolonization, the UN practice has been to organize or supervise self-determination referenda and plebiscites. Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 76-78 (Cambridge University Press, 1999). Drew, *supra* note 95, at 662.

105 Drew, *supra* note 95, at 661, 662.

106 "The territory of a colony or other Non-Self-Governing territory has [...] a status separate and distinct from the territory of the state administering it; and [...] shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination [...]. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations: G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970).

107 Rytter, *supra* note 97, at 368. Cassese, *supra* note 104, at 72-73. Micha Pomerance, *Self-Determination in Law and Practice* 9, 25 (Martinus Nijhoff, 1982).

soon as it is exercised.¹⁰⁸ However, while the right to the process of self-determination is not ongoing, it "does not exhaust the content of the right to self-determination."¹⁰⁹ In other words, there are "additional substantive entitlements beyond the basic right of a people to exercise a free choice" in the decolonization context, for instance, the "right to exist - demographically and territorially - as a people."¹¹⁰ Moreover, GA Resolution 1514 (XV) makes a specific provision to the right to territorial integrity.¹¹¹ Further provisions are made with respect to the right to permanent sovereignty over natural resources,¹¹² the right to cultural integrity and development,¹¹³ and the right to economic and social development.¹¹⁴ In the *South West Africa Decolonization* case the ICJ also linked the right to self-determination with the respect for fundamental human rights, particularly, through its condemnation of the practice of apartheid.¹¹⁵ Self-determination was also applied to the South African apartheid and the Southern Rhodesian crisis.¹¹⁶ Therefore, the colonial definition of self-determination was expanded to include a racial element, because the salt-water definition of colonialism was not applicable: neither the white elite of South Africa nor Rhodesia was connected to an European colonial power.¹¹⁷ Accordingly, the meaning of colonization as "alien subjugation, domination and exploitation"¹¹⁸ is not confined to the colonial context, but "seems to cover all situations where a foreign [= European]¹¹⁹ minority imposes its rule on the majority."¹²⁰

In contrast, the colonial definition of self-determination "was defined as the majority right to external

108 Rytter, *supra* note 97, at 368.

109 Drew, *supra* note 95, at 663.

110 Catriona Drew, *Self-Determination, Population Transfer and the Middle East Peace Accords*, in Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories 133 (Stephen Bowen ed., 1997).

111 Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), at 67, U.N. Doc. A/RES/1514 (Dec. 14, 1960).

112 G.A. Res. 1803 (XVI), U.N. Doc. A/RES/1803 (Dec. 14, 1962). International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 1, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966). International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 1, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

113 Universal Declaration of Rights of Peoples art. 2, 9, 13, 14 and 15 (July 14, 1976).

114 International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 1, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966). International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 1, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

115 The International Court of Justice states that "to establish [...] and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter." See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 57 (June 21). Zyberi, *supra* note 99, at 435 (2009).

116 Simpson, *supra* note 79, at 273.

117 *Id.*

118 Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514 (Dec. 14, 1960).

119 For examples, religious or racially discriminating ruling elites in Eritrea, East Pakistan (now Bangladesh) and Biafra were not considered as colonial regimes although the indigenous peoples regarded them as such. Pomerance, *supra* note 102, at 73-76. Benjamin Neuberger, *National Self-determination in Post-colonial Africa* 85 (Lynne Rienner Publishers, 1986).

120 Beyond the colonial context, the GA applied the notion of colonization, for instance, in respect of Palestine, the South African majoritarian population and the Cambodian people. G.A. Res. ES-7/2, U.N. Doc. A/RES/ES-7/1A (July 29, 1980). G.A. Res. 42/43, U.N. Doc. A/RES/42/43 (Nov. 20, 1987). G.A. Res. 46/18, U.N. Doc. A/RES/46/18 (Nov. 20, 1991). Martti Koskeniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 Int'l. Comp. L. Q. 241, 247 (1994).

independence from colonial domination" by European colonial rule.¹²¹ As such, self-determination was "primarily designed to foster the decolonization process,"¹²² and thereby ending European colonialism.¹²³ Therefore, self-determination was not applicable to "ethnic groups within these territories or to majorities who were being oppressed by indigenous 'alien' elites" nor did it include secession or democratic representation.¹²⁴ Accordingly, self-determination evolved upon the premise that as principle it is "fundamentally subordinated to the principle of state sovereignty, including territorial integrity of the state,"¹²⁵ which was and continues to be the basic pillar of international law" in a state-centered system.¹²⁶

As recent cases such as Kosovo¹²⁷ and Chechnya¹²⁸ have illustrated, it remains controversial whether there is "any legal right to secession under international law - even in situations involving gross human rights abuse."¹²⁹ On the other hand, the notion of internal self-determination that refers to internal entitlements within a state, has contributed to the association of the right to self-determination with democracy in view of the need to accommodate the rights and claims of inhabitants within a territory. In this regard, "the articulation of self-determination as a human right" that has to be in line with other individual human rights, may be explanatory for the development of internal self-determination as an alternative to external self-determination.¹³⁰

2. Internal Dimension of Self-Determination

Both ICCPR and ICESCR define self-determination as "human right" in Article 1. In its first paragraph the Article recognizes this right: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹³¹ However, the Covenants do not clarify who the "peoples" are upon which the right to

121 Simpson, *supra* note 79, at 273.

122 Christian Tomuschat, *Secession and Self-Determination*, in *Secession: International Law Perspectives* 23 (Marcelo G. Kohen ed., 2006).

123 Simpson, *supra* note at 79, at 255.

124 *Id.* at 273-274.

125 Higgins, *supra* note 97, at 121.

126 U.N. Charter art. 2, para. 1. Rytter, *supra* note 97, at 367.

127 The Security Council resolutions on Kosovo called for "substantial autonomy," and meaningful self-administration" rather than secession thereby affirming the territorial integrity of the Federal Republic of Yugoslavia. S.C. Res. 1160, para. 5, U.N. Doc. S/RES/1160 (Mar. 31, 1998). S.C. Res. 1244, U.N. doc. S/RES/1244 (June 10, 1999). However, in 2008 Kosovo declared independence. While 85 UN member states recognize Kosovo's independence, Serbia refuses to recognize Kosovo's unilateral secession.

128 See U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, Report of the Secretary General: The Situation of Human Right in the Republic of Chechnya of the Russian Federation, U.N. Doc. HR/99/104 (Nov. 16, 1999).

129 Drew, *supra* note 95, at 657. Secession as remedy of last resort for gross human rights abuse is discussed, for instance, by Lee C. Buchheit. See Lee C. Buchheit, *Legitimacy of Self-Determination* (Yale University Press, 1978).

130 Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?* Hum. Rts. L. Rev. (forthcoming). S. James Anaya, *Self-Determination as a Collective Human Right under Contemporary International Law*, in *Operationalising the Right of Indigenous Peoples to Self-Determination 12* (Pekka Aikio & Martin Scheinin eds., 2000).

131 G.A. Res. 1803 (XVI), U.N. Doc. A/RES/1803 (Dec. 14, 1962). International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 1, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966). International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 1, U.N. Doc. A/RES/2200(XXI) (Dec. 16,

self-determination is conferred. Particularly, it is unclear "whether 'peoples' is a category distinguishable from 'states' on the one hand or 'individuals' on the other."¹³²

The UN Charter refers with respect to self-determination only to peoples of states¹³³ and peoples of non-self-governing and trust territories.¹³⁴ In compliance with the use of "peoples" in the Charter, the term has generally been limited to the application to entities, which already have "attributes of sovereignty or statehood."¹³⁵ However, this means that the historical European definition of sovereignty as effective control of territory continues to marginalize claims to sovereignty by other groups than the "people" of the state, not least because such claims would pose a challenge to the territorial integrity of the existing state.¹³⁶ Accordingly, minorities are not granted a right to self-determination.

This differentiation between minorities and "peoples" is also reflected in the ICCPR. Article 27 on minorities states the following: "[i]n those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."¹³⁷ Accordingly, the right to self-determination is not conferred upon minorities. The Article only mentions "rights essential to the defense of minority identity in the face of assimilationist pressures: it encapsulates their 'right to an identity'."¹³⁸ Moreover, these rights do not provide a minority for a collective right, rather the Article refers to "persons belonging to such minorities" upon which these rights are conferred.¹³⁹ Accordingly, Article 27 seems to "impose only a duty of toleration on states, a duty of non-interference with the cultural and religious practices" of minorities.¹⁴⁰

Even though the Covenants do not refer to minorities as "peoples" and they are thus not the formal subject of the right to self-determination, this does not mean that self-determination is not relevant to them.¹⁴¹ For instance, the Human Rights Committee (HRC) highlights that "the right of self-determination is of particular importance because its realization is an essential condition for the

1966).

132 Simpson, *supra* note 79, at 268.

133 "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." See U.N. Charter art. 1, para. 2.

134 U.N. Charter ch. XI & ch. XII.

135 Elena Cirkovic, *Self-Determination and Indigenous Peoples in International Law*, 31 Am. Ind. L. Rev. 375, 387 (2007).

136 In this respect, sovereignty was tied to the principle of self-determination, which Woodrow Wilson carried forward to "justify the creation of new nation-states out of the multi-ethnic empires in Europe and the Middle East" following the end of the first World War. Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, *Recht zwischen Umbruch und Bewahrung* 180 (Springer-Verlag, 1995). Cirkovic, *supra* note 135, at 387.

137 G.A. Res. 1803 (XVI), U.N. Doc. A/RES/1803 (Dec. 14, 1962). International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 27, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

138 Patrick Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 Int'l. Comp.L. Q. 867, 880 (1989).

139 *Id.*

140 *Id.* at 881.

141 *Id.* at 883.

effective guarantee and observance of individual human rights."¹⁴² This implies a dialectic relationship between the protection of individual rights that benefit all within a state including minorities on the one hand, and the exercise of self-determination of a people on the other. Consequently, a violation of individual rights is ultimately also a violation of self-determination. Equally, people's right to exercise self-determination is not without limitation, because it is connected with the "effective guarantee and observance of individual rights."

Despite the reference to internal self-determination as human right, self-determination is not an "absolute right" as Article 5(1) of the Covenants illustrates: "nothing in the present Covenant may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein."¹⁴³ Hence the exercise of the right to self-determination "must be balanced with other human rights, such as freedom of expression and freedom of religion."¹⁴⁴ In this respect, it is important to note that the responsibility to balance self-determination and other human rights in the human rights framework is solely allocated to the state.¹⁴⁵ On the one hand, the responsibility to balance rights provides states with a legal device "to evade what might be deemed, from their perspective, non-desirable implications of [the right to self-determination]."¹⁴⁶ On the other hand, this also directs "attention to the organization of the state as a whole and how that organization favors or disfavors human values to the benefit of all within the state, minorities included."¹⁴⁷

a. Political Self-Determination

Both ICCPR and ICESCR make reference to political self-determination in common Article 1 as substantive entitlement to the exercise of the right to self-determination: "[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status."¹⁴⁸ In contrast to external self-determination in the decolonization context, the "free choice" of a people is not concerned with the determination of the international political status of the territory, but with "the system of government and administration, as well as the substantive nature of [the] political regime."¹⁴⁹ More explicitly, political self-determination requires that the "political order reflects the will of the people."¹⁵⁰

As regards the outcome of the free choice of a people, the GA Resolution 2625 linked the exercise of self-determination to the requirement of "a government representing the whole people belonging to

142 Human Rights Committee, *General Comment No. 12: The Right to Self-Determination of Peoples (Art. 1)*, (1984), <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

143 G.A. Res. 1803 (XVI), U.N. Doc. A/RES/1803 (Dec. 14, 1962). International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 5, para. 1, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

144 Saul, *supra* note 130.

145 Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 Int'l. Comp. L. Q. 857, 878 (1994).

146 Saul, *supra* note 130. On mechanisms for enforcement of self-determination under ICCPR see Alex Conte & Scott Davidson, et al., *Defining Civil and Political Rights: The Jurisprudence of the United Nations* 33 (Ashgate Publishing Limited, 2004).

147 Thornberry, *supra* note 138, at 884.

148 G.A. Res. 1803 (XVI), U.N. Doc. A/RES/1803 (Dec. 14, 1962). International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 5, para. 1, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

149 Steven Wheatley, *The Security Council, Democratic Legitimacy and Regime Change in Iraq*, 17 Eur. J. Int'l. L. 531, 540 (2006).

150 S. James Anaya, *Indigenous Peoples in International Law* 81 (Oxford University Press, 1996).

the territory without distinction as to race, creed or color."¹⁵¹ The necessity that the government must be of non-discriminative and representative nature is also reflected in the Universal Declaration of Human Rights (UDHR) that provides in Article 21(3) that "[t]he will of the people shall be the basis of the authority of government."¹⁵²

The exercise of political self-determination therefore postulates that a people is "allowed to exercise those rights and freedoms which permit the expression of the popular will."¹⁵³ Political self-determination is thus a continuous entitlement to the expression of the popular will and therefore, it is to be considered as a "manifestation of the totality of rights embodied in the [ICCPR]."¹⁵⁴

The right to participate in the political decision-making process is decisive for the exercise of political self-determination. In the context of citizenship, Hannah Arendt refers to the right to participate as "right to have rights,"¹⁵⁵ indicating that all other possible rights presuppose membership in a political community.¹⁵⁶ Moreover, for Arendt, equality is an essential attribute of citizenship that individuals "acquire upon entering in the public realm" and which has to be secured by democratic institutions.¹⁵⁷ That means that decisions, which affect particular groups within a state "should be taken, at the very least, with those groups have been consulted."¹⁵⁸ In other words, "it is not enough to have a collection of private individuals voting separately and anonymously according to their [rather] private opinions".¹⁵⁹ Rather private individuals must be able to meet as "subjects of democratic debate" in a public-political space¹⁶⁰ in order to articulate their differences and commonalities.¹⁶¹

Political participation may be considered as procedural entitlement of self-determination. On the one hand, the right to participate empowers a people to take part in the political decision-making process and to decide on who to be entrusted with political power. On the other hand, through political participation a people defines and re-defines its public sphere including the system of government and the nature of the political regime. Hence, the public sphere may be considered as substance of self-determination. As such it is neither universal, nor a "natural predisposition," but artificial and constructed, in the sense that the decision on its content requires the political dispute of people.

Popular participation in the political decision-making process can be directly or indirectly exercised:

151 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations: G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970). Saul *supra* note 130.

152 Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 21, para. 3, U.N. Doc A/810 at 71 (Dec. 10, 1948).

153 Cassese, *supra* note 104, at 53.

154 *Id.*

155 Hannah Arendt, *The Origins of Totalitarianism* 279-97 (Harcourt, 1951).

156 Jan Klabbers, *The Right to be Taken Seriously: Self-Determination in International Law*, 28 Hum. Rts. Q. 186, 203 (2006).

157 Maurizio Passerin, *Hannah Arendt*, (2008), <http://plato.stanford.edu/entries/arendt/>.

158 Klabbers, *supra* note 156, at 203.

159 Passerin, *supra* note 157.

160 "This notion of a common public sphere explains how political opinions can be formed which are neither reducible to private, idiosyncratic preferences, on the one hand, nor to a unanimous collective opinion, on the other." Passerin, *supra* note 157.

161 *Id.*

"The notion of direct participation primarily refers to the right to stand for election for the purpose of creating a representative government, while the notion of indirect participation generally refers to periodic voting processes in order to elect the political representative of the people."¹⁶² In Article 25 on political participation the ICCPR affirms that right:

Every citizen shall have the right and the opportunity:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.¹⁶³

Article 25 on political participation unequivocally implicates the respect for Article 18 on the right to freedom of expression, and Article 19 and 21 of the ICCPR on the right to peaceful assembly and the freedom of association.¹⁶⁴ Freedom of thought and the right to peaceful assembly as well as the freedom of association are possible means of implementing the procedural aspect of political self-determination.¹⁶⁵ Without the guarantee of these rights, the right to participate in the political decision-making process would be meaningless. In addition, the exercise of the right to political self-determination requires that the government represents the authority or will of its population as a whole.¹⁶⁶ Hence, "the implementation of the right to [political] self-determination is inextricably linked to the principle of equal rights of peoples¹⁶⁷ and, more in particular, the principle of non-discrimination."¹⁶⁸

The right to self-determination is often described as inalienable and ongoing.¹⁶⁹ This implies that a people can change and constitute its own system of government and decide on the nature of the political regime.¹⁷⁰ Further, "a representative government should allow its people to participate continuously in the general decision-making process of the state, in this way substantively - not merely formally - determining not only its political, but also economic, social and cultural development."¹⁷¹ In this regard the HRC notes that "[s]tates parties should describe to the constitutional and political

162 Sarah Joseph & Jenny Schultz, et al., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 501-511 (Oxford University Press 2000). van den Driest, *supra* note 24.

163 G.A. Res. 1803 (XVI), U.N. Doc. A/RES/1803 (Dec. 14, 1962). International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 25, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

164 G.A. Res. 1803 (XVI), U.N. Doc. A/RES/1803 (Dec. 14, 1962). International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 19 & 21, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

165 van den Driest, *supra* note 24.

166 David Raic, *supra* note 13 at 273.

167 U.N. Charter art. 1, para. 2.

168 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations: G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970). van den Driest, *supra* note 21.

169 Human Rights Committee, *General Comment No. 12: The Right to Self-Determination of Peoples (Art. 1)*, (1984), <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

170 Referenda or plebiscites may be possible ways for people to act as *pouvoir constituant*. See Raic, *supra* note 13, at 238.

171 van den Driest, *supra* note 24, at 36.

process which in practice allow the exercise of [self-determination]."¹⁷² Therefore, policy outcomes of the government "may function as a continuous measuring instrument for qualifying a political system as participatory and representative, and for checking whether the core meaning of the right to internal self-determination is complied with."¹⁷³ In a nutshell, the right to internal self-determination in the post-colonial context empowers the population of a state to participate on an equal basis in the political decision-making process and to determine "persons to be entrusted with political power", the system of government as well as nature of the political regimes¹⁷⁴ without the intervention of a third state and without the manipulation or the interference of current political authorities.¹⁷⁵

b. Economic, Social and Cultural Development

Common Article 1 the ICCPR and ICESCR stipulates the right of all peoples to: "freely pursue their economic, social and cultural development."¹⁷⁶ Likewise, the UDHR proclaims in Article 22 that "everyone, as a member of society [...] is entitled to realization [...] in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development for his personality."¹⁷⁷ Moreover, common Article 1(2) of the ICCPR and ICESCR provides:

All peoples may, for their own end, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means or subsistence.¹⁷⁸

This provision implies that in order to enable peoples' economic, social and cultural development, the natural wealth and resources of peoples must be used "for their own ends." Therefore, the authority in charge with overseeing peoples' natural wealth must use these resources to benefit the peoples on an equal basis.¹⁷⁹ In addition, for peoples to exercise the right to economic self-determination, peoples need to be able to "freely dispose" of their natural wealth. The right to free disposition is thus an requirement to enforcing the use of resources for peoples' own collective ends.¹⁸⁰ Accordingly, peoples may not be deprived of their own resources, for instance by "forces outside the control of the community."¹⁸¹ Hence, treaties promoting international economic cooperation may not oppose this

172 Human Rights Committee, *General Comment No. 12: The Right to Self-Determination of Peoples (Art. 1)*, (1984), <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

173 Raic, *supra* note 13, at 274. van den Driest, *supra* note 24, at 36.

174 Klabbers & Lefeber, *supra* note 35 at 43-44.

175 van den Driest, *supra* note 24, at 36.

176 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 1, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

177 Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 22, U.N. Doc A/810 at 71 (Dec. 10, 1948).

178 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 1, para. 2, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

179 Cassese, *supra* note 93, at 101, 103.

180 Alice Farmer, *Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries*, 39 Int'l. L. Pol. 417, 431 (2006).

181 Haugen, *supra* note 14, at 73.

right as stipulated in common Article 1(2).¹⁸²

Resources relate in this context to peoples "own means or subsistence" that include "everything which is crucial in order to uphold life, of which food is an essential element."¹⁸³ Given that "[i]n no case may a people be deprived of its own means of substance,"¹⁸⁴ there is an ongoing and inherent right of peoples to mutually benefit from economic development as stated in Article 25 of the ICESCR: "[n]othing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."¹⁸⁵ The GA Resolution 41/128 on development restates this obligation by indicating that the right to development is "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."¹⁸⁶

Self-determination also requires that peoples have the right to participate "in matters touching upon all spheres of life [such as the use of their resources] on a continuous basis."¹⁸⁷ Thus, the authority controlling peoples' resources must enable peoples' participation in the decision-making processes and must be therefore of representative nature.¹⁸⁸ Moreover, self-determination requires that the organization of the state "be one under which people may live and develop freely on a continuous basis."¹⁸⁹ In this regard, Article 28 of the UDHR stipulates that "everyone is entitled to a social and international order in which the rights and freedom set forth in this Declaration can be fully realized."¹⁹⁰ This establishes that the respect for human rights "is not a narrowly focused obligation applying only within strict limits to relations between individuals and their states, but rather is an open-ended obligation applying to all societal relations whether at the local, national or international level."¹⁹¹ To sum up, the organization of the state is not only relevant to the exercise of political self-determination and to "freely pursue their economic, social and cultural development," but also to the guarantee of individual human rights such as the right to adequate food,¹⁹² which benefit all individuals within the state.

182 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 1, para. 2, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

183 Haugen, *supra* note 14, at 73.

184 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 1, para. 2, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

185 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 25, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

186 Declaration on the Right to Development: GA Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986).

187 Anaya, *supra* note 150, at 82.

188 Morton H. Halperin & David J. Schefer et. al, *Self-Determination in the New World Order* 52 (Carnegie Endowment for International Peace, 1992).

189 Anaya, *supra* note 150, at 81.

190 Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 28, U.N. Doc A/810 at 71 (Dec. 10, 1948).

191 Philip Alston, *The Shortcomings of a "Garfield the Cat" Approach to the Right to Development*, 15 Cal. W. Int'l. L. J. 510, 515 (1985).

192 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 11, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

III. EGYPT'S POST-COLONIAL APPROACHES TO INTERNAL SELF-DETERMINATION

The Middle East and North Africa (MENA) have been described as exceptional, due to the fact that following the end of the Cold War, the authoritarian states within this region have been largely unaffected by the "third wave of democratization."¹⁹³ On the contrary Western Europe, Latin America and many former Communist states are considered to constitute democracies.¹⁹⁴ However, the extent to which these regimes are indeed democratic, is debatable,¹⁹⁵ considering that, being rather formally than substantively democratic, they have often failed "to broaden popular political participation."¹⁹⁶ Therefore, it is an "overstated universalism" to proclaim democratic governance as a global norm, given that outside Europe and Latin America perhaps, "there is little evidence of any trend towards democracy."¹⁹⁷ Nevertheless, "democracy" is promoted as "the best of all possible worlds both by the holders of global power and by 'the people,' not least by those struggling for social justice and self-determination."¹⁹⁸

In the "post-Cold War world" the promotion of liberal democracy resembles the foreign policy strategy, which Western states have applied, "albeit unevenly, as early as the 19th century, primarily within the context of colonization."¹⁹⁹ Considering political economic development as being principally determined by endogenous factors, economic liberalization is seen as necessary condition for political liberalization and the deconstruction of authoritarianism.²⁰⁰ As political equivalent of the free market, liberal democracy is assumed to be the "necessary and natural product of submission to the rationality of the worldwide market,"²⁰¹

Egypt constitutes a case in point,²⁰² given that efforts to impose economic policies date back to the 1870s.²⁰³ In this respect, the establishment of the Egyptian Republic in 1953, has not ended the impact of Western economic and political influence. Despite the efforts of economic liberalization in the 1970s, democratization has been rather limited and authoritarianism remarkable enduring. The

193 Samuel P. Huntington, *The Third Wave: Democratization in the Late 20th Century* (University of Oklahoma Press, 1993). Clement Henry and Robert Springborg, *Globalization and the Politics of Development in the Middle East 32* (Cambridge University Press, 2001).

194 Ellen Lust-Okar, *Why the Failure of Democratization? Explaining "Middle East Exceptionalism,"* 3 (2011), <http://www.nyu.edu/gsas/dept/politics/seminars/lust-okar.pdf>.

195 Larry Diamond, *Elections Without Democracy: Thinking About Hybrid Regimes,* 13 J. Dem. 21-35 (2002). Thomas Carothers, *Democracy without Illusions,* 76 Foreign Aff., 85, 86 (1997).

196 For example, in Latin America political life is marked by severe deficiencies including "weak capacity and performance of government institutions, widespread corruption, irregular and often arbitrary rule, [as well as] poorly developed patterns of representation." See Carothers, *supra* note 195, at 89. Gills & Rocamora, *supra* note 20.

197 Marks, *supra* note 8, at 1. Carothers, *supra* note 64, at 262-263.

198 Gills & Rocamora, *supra* note at 20, at 503.

199 Laurence Whitehead, *The International Dimensions of Democratization: Europe and the Americas* (Oxford University Press, Oxford, 1996).

200 Gerasimos Tsourapas, *Deconstructing Democracy Promotion Strategies: Economic Liberalization & Reform in Egypt,* (2011), http://www.ekemprogram.org/euromedo/index.php?option=com_content&view=article&id=246:deconstructing-democracy-promotion-strategies-economic-liberalization-a-reform-in-egypt-1&catid=37:2010-05-05-10-07-53&Itemid=59.

201 Gills & Rocamora, *supra* note at 20, at 503.

202 Timothy Mitchell, *Colonizing Egypt* (University of California Press, 1991).

203 Tsourapas, *supra* note 201.

popular demonstrations that started in 2011 have been particularly directed against the autocratic regime. The political demand of the protesters that “the people want the overthrow of the regime,”²⁰⁴ is thereby not limited to the removal of the autocrats, but likewise entails the desire for the recapture of the political sphere to internal self-determination.

Against this background, the following examines the post-colonial²⁰⁵ approaches taken to political and economic self-determination since the establishment of the Egyptian Republic. In this regard, the following not only illustrates the obstacles to democratization in the context of economic and political domination, but also constitutes a critical response to the conditions of the world system.

A. Political Self-Determination

1. Authoritarianism under Nasser and Sadat

Egypt formally gained independence in 1922, however, continued to remain under British military occupation and influence. In 1952 a group of Egyptian military officers carried out a regime change, which resulted in the overthrow of the monarchy and the ousting of the British military.²⁰⁶ Consequently, the 1923 Constitution was abrogated and Egypt was declared a republic.

The new military regime under President Nasser moved Egypt towards “a secular Pan-Arab nationalist project combined with a Third World import-substitution vision of economic development.”²⁰⁷ Contrary to the monarchy under which multi-partyism and political rights were guaranteed by the 1923 Constitution, political liberalization and democratization were subordinated to the achievement of socio-economic development.²⁰⁸ For Nasser, political pluralism posed a threat to national stability and unity,²⁰⁹ given that under the monarchy, the King and the British had furthered their own interests through arbitrary interventions in the political process.²¹⁰ Therefore, in 1953 all parties were banned and a one-party system established in which the Liberation Rally (LR) represented the only legal political organization. As such, the LR had the mandate to mobilize the masses to support the “revolution” and to de-legitimize the monarchy.²¹¹ The LR was later changed to the National Union (NU) and in 1962, the NU was replaced by the Arab Socialist Union (ASU) which continued to be the only political party until 1976. Like the LR, the NU as well as the ASU were used

204 See *supra* note 1.

205 The post-colonial deals not only with the process of decolonization and the determination of sovereignty, but also with “the realities of nations and peoples emerging into a new imperialistic context of economic and sometimes political domination.” Robert J. C. Young, *Postcolonialism: An Historical Introduction* 57 (Blackwell Publishers, 2001).

206 Michele Dunne, *Evaluating Egyptian Reform*, 6 Carnegie Paper 1, 3-4 (2006), <http://carnegieendowment.org/2006/01/24/evaluating-egyptian-reform/aha>.

207 Amr Shalakany, *I Heard It All Before: Egyptian Tales of Law and Development*, 27 *Third World Q.* 833, 834 (2006).

208 Moheb Zaki, *Civil Society and Democratization in Egypt: 1981-1994* 13 (The Ibn Khladoun Center, 1994).

209 Maha M. Abdelrahman, *Civil Society Exposed: The Politics of NGOs in Egypt* 93 (Tauris Academic Studies, 2004).

210 Hassan Youssef, *The Democratic Experience in Egypt: 1923-1952*, in *Democracy in Egypt: Problems and Prospects* 25 (Ali E. Hillal Dessouki ed., 1978).

211 *Id.*

as instrument for "mass political mobilization and indoctrination."²¹²

In an attempt to consolidate its control, the regime established several exceptional courts such as the Court of Treason in 1952, the Court of the Revolution in 1953, and the People's Court in 1954.²¹³ Because of their far-reaching mandates, limited procedural guidelines and lack of appeals process, these courts served the regime to sidestep the regular court system.²¹⁴ Moreover, in view of the increasing pressure on the part of the Lawyers' Syndicate and the Judges' Association for judicial and political reforms, Nasser issued an executive decree, which prompted the dismissal of several judges of the Court of Cassation and judicial officials as well as the dissolution of the board of Judges' Association.²¹⁵ With the objective to eliminate any further resistance, the Supreme Council of Judicial Organizations was established, which gave the executive power extensive control over appointments, promotions as well as disciplinary actions in the judiciary.²¹⁶

The new Constitution of 1958 provided for some political participation. For instance, it ensured a presidential system in which the President was to be confirmed by referendum.²¹⁷ However, the Constitution also guaranteed the President's monopoly of power. Articles 65, 111 and 131, for example, stipulated that while the National Assembly (NA) "was in charge of the legislative power, the president had the right to dissolve the legislature and issue laws-by-decree."²¹⁸ Furthermore, all candidates who run in the elections for the NA had to receive the approval of the NU, which was chaired by President. Accordingly, the control over the NU and the NA was centralized in the hands of the President,²¹⁹ which meant that "the parliament lost its autonomy and became totally subordinate to the executive power."²²⁰

After the merger between Egypt and Syria into the United Arab Republic (UAR) in 1958, the UAR was dissolved in 1961. In 1964 a new Constitution was established. In addition to reinforcing the commitment to Arab socialism, the Constitution provided the President with excessive power. For instance, the President "retained the power to appoint and dismiss government ministers and to lay down the general policy of the state in all fields and supervise its implementation."²²¹ Although the President's powers in the legislative sphere were confined to periods of the NA's adjournment,²²² such limitations were bypassed by the almost continuous state of emergency.²²³

212 Selim El-Sayed, *The Impact of External Factors on the Prospects for Democratization in Egypt* 76 (April 2011) (unpublished Ph.D. Dissertation, University of Calgary) (on file with PQDT).

213 Tamir Moustafa, *Law versus the State: The Judicialization of Politics in Egypt*, 28 L. & Soc. Inq 883, 888 (2003).

214 Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge University Press, 1997).

215 Moustafa, *supra* note 213, at 889.

216 *Id.*

217 El-Sayed, *supra* note at 212, at 76.

218 *Id.*

219 *Id.* at 77.

220 Tarek Al-Bishri, *The 1952 Revolution and Democracy, in Democracy in Egypt: Problems and Prospects* 35 (Ali E. Dessouki ed., 1978).

221 Mohamed S. El-Awa, *On the Political System of the Islamic State* (American Trust Publications, 1980).

222 *Id.*

223 Nathan J. Brown, *Constitutions in a Non-constitutional World: Arab Basic Laws and the Prospects for Accountable Government* 80 (University of New York Press, 2002).

After president Nasser's death, Sadat became President in 1970. The beginning of his presidency represented a reorientation of Egyptian politics, in the sense that it constituted a "de-Nasserization."²²⁴ In this regard, the introduction of an "open-door policy" including several political and economic measures, facilitated a partial political and economic liberalization. For instance, the new Constitution of 1971 guaranteed protection against arbitrary arrest and seizure of property,²²⁵ and provided for the establishment of an independent Supreme Constitutional Court (SCC) in 1979. Mandated with performing judicial review, the SCC's rulings contributed to the promotion of electoral reform, freedom of expression, and protected civil society, opposition and human rights groups from state domination.²²⁶ Although the SCC allowed the opposition and human rights activists to challenge the regime for the first time since the military coup in 1952, the Court also put constraints on their political activities. For example, the SCC ruled Egypt's Emergency Security Courts constitutional and delayed the issuance of the ruling on the constitutionality of the transfer of civilians to Military Courts.²²⁷ Seeing that Egypt has been ruled under an almost continuous state of emergency since 1967, "the Emergency State Security Courts and, more recently, the Military Courts, have effectively formed a parallel legal system with fewer procedural safeguards, serving as ultimate regime check on challenges to its power."²²⁸

With respect to the protection of political rights and freedoms, the 1971 Constitution guaranteed, for instance, the freedom of press in Article 48 and the freedom of expression in Article 47. The constitution also protected the freedom of peaceful assembly "without the need for prior notice" in Article 54, and the right to form civil societies in Article 56.²²⁹ However, most of these rights and freedoms were still defined by law, for example, public meetings, processions and gatherings were only allowed "within the limits of the law."²³⁰ Additionally, the Emergency Law prohibited the organization of public meetings by parties without the Ministry of Interior's prior permission and further subjected them to the state security forces' supervision.²³¹ The Emergency Law also granted the President a wide range of powers to censor the media, which allowed for the confiscation and the closing of newspapers "on the grounds of public safety and national security."²³² This provided Sadat with measures to undermine the formal legal protection of the people and to remain in ultimate control over its opponents when necessary.

224 Hamied Ansari, *Egypt the Stalled Society* (University of New York, 1986). Raymond Hinnebusch, *Egyptian Politics under Sadat: The Post-Populist Development of an Authoritarian-Modernizing State* (Cambridge University Press, 1985).

225 El-Sayed, *supra* note 212, at 78.

226 Moustafa, *supra* note 213, at 884.

227 These military courts provided "an airtight venue in which the regime could try its opponents: All judges are military officers appointed directly by the minister of defense and the president; there are almost no procedural safeguards, with trials held in secret and no right to appeal." See Moustafa, *supra* note 213, at 903-905.

228 *Id.* at 903

229 El-Sayed, *supra* note 212, at 79.

230 See, for instance, Egyptian Constitution 1971, art. 47.

231 Amr Hamzawy, *The Continued Costs of Political Stagnation in Egypt*, Policy Outlook, 3, (2005), <http://www.carnegieendowment.org/2005/02/11/continued-costs-of-political-stagnation-in-egypt/cip>.

232 International Commission of Jurists, *Submission to the Universal Periodic Review of Egypt*, 2, (2010), <http://www.icj.org/IMG/UPRSubmission-Egypt.pdf>.

The 1971 Constitution also retained many of the features of the previous constitutions. For example, it granted the President enough "powers to overshadow and overrule the NA, renamed as the People's Assembly (PA)."²³³ In this respect, the ability of the legislature to change the government or legislation was severely constrained.²³⁴ The Constitution further provided for the Socialist Prosecutor General "whose actual function was to prosecute Sadat's political opponents outside the main course of the legal system while at the same time looking into corruption cases."²³⁵

Since its establishment in 1962, the ASU continued to be the only political organization until the creation of three political forums within the framework of the ASU in 1976. These forums included the Liberal Socialist Forum (the right), Egypt's Arab Socialist Forum (the centre) and the Nationalist Progressive Unionist Forum (the left).²³⁶ In contrast, other major political forces, such as, the Muslim Brotherhood, the Neutral or the Nasserites were excluded from the ASU.²³⁷ Nevertheless, the recognition of other political trends in the ASU represented a departure from the previous regime under which the ASU was dominated by Nasser's ideology.²³⁸ All three political forums were allowed to participate in the elections of the PA in 1976, which therefore were the first plural parliamentary elections held since the 1952 military coup.²³⁹

Following the issuance of Law 40/1977 that allowed for a multi-party system, five political parties were established. In addition to the forums which were transformed into political parties, in 1978 other parties were formed including the Neutral Party, the National Democratic Party (NDP), which replaced Egypt's ruling ASU, and the Socialist Labour Party.²⁴⁰ Despite these democratic measures that facilitated political participation, Law 40/1977 also introduced restrictions with respect to the formation and operation of political parties. In this regard, the Committee of Political Parties' Affairs was tasked with approving newly established parties. The Committee was empowered to "ban the activities of any political party, if proven that the party or its leaders or members violated the Constitution or did not abide by its declared program."²⁴¹ Between 1977 and 2007, the Committee's approval was limited to four parties, which included the Nation Party in 1983, the National Reconciliation Party in 2000, the Tomorrow Party in 2004 and the Democratic Front Party in 2007.²⁴² Other parties that were rejected by the Committee, for instance, Egypt's Green Party or the Social Justice Party, were established through

233 PA has 454 members: 444 elected by popular vote (400 elected by proportional representation in two-member constituencies and 44 elected in single seated constituencies) and 10 appointed by the president. Maye Kassem, *In the Guise of Democratic Governance in Contemporary Egypt* 36-37 (Garnet Publishing Limited, 1999).

234 Carnegie Endowment for International Peace, *Arab Political Systems: Egypt*, 5 (2008), <http://www.carnegieendowment.org/2008/03/06/arab-political-systems-baseline-information-and-reforms/2nn>.

235 El-Sayed, *supra* note 212, at 79.

236 Hamdy Hassan, *State versus Society in Egypt: Consolidating Democracy or Upgrading Autocracy*, 4 *Afr. J. Pol. Sci.* 319, 321 (2010).

237 *Id.*

238 *Id.*

239 El-Sayed, *supra* note 212, at 81.

240 Hassan, *supra* note 236, at 321

241 El-Sayed, *supra* note 212, at 82.

242 *Id.*

Administrative Court rulings.²⁴³ Law 40/1977 also prohibited the legalization of parties that were based on ethnic or religious identities. This provision undermined moderate Islamist movements, such as the Muslim Brotherhood, to form political parties, in spite of the fact that these movements accounted for the largest constituency.²⁴⁴ Moreover, while political parties were allowed to issue their own newspaper, similar to all radio and television services, these newspapers continued to be controlled by the regime.²⁴⁵ These restrictions on the freedom of press occasionally resulted in the shutting down of opposition newspapers that were viewed as "extremist in their criticisms of the regime."²⁴⁶

In consequence of massive food riots against economic policies in 1977, the regime introduced a series of decrees putting further constraints on political freedoms and rights.²⁴⁷ For instance, Law 33/1978 empowered the Committee of Political Parties' Affairs "to deprive any person from belonging to political parties or practising political rights, if it was proven by the Socialist Prosecutor-General that this person contributed to the corruption of political life in the country, or threatened national unity and social peace."²⁴⁸ Furthermore, Law 95/1980 made any acts punishable, if they were found to be in contradiction with morality. In this regard, the criteria of morality were to be determined by the regime. This provided the government with extraordinary powers "to punish any person or political party that criticized the president, the ruling party or any other government-related institutions."²⁴⁹

In 1979 elections for the PA were held, which resulted in an overwhelming majority for Sadat's NDP with 330 seats, whereas, for instance, only 29 seats went to the Socialist Labour Party, two to the Socialist Liberal Party and ten to independents.²⁵⁰ In 1980 the 1971 Constitution was amended, introducing a clause that changed the re-election of the President from two terms to an indefinite number of terms. The constitutional amendments also replaced the unicameral parliamentary system with a bicameral one through the establishment of the Shura Council (SC)²⁵¹ in order to complement the PA.²⁵² Given its solely advisory competencies, the SC possessed no legislative powers,²⁵³ but served the regime in controlling the media. In this respect, the SC replaced the ASU, which was abolished in 1979.

Despite the restrictions imposed on political rights and freedoms, the presidency of Sadat represented a major shift from the military one-party system under President Nasser. In contrast to Nasser's regime that was directed towards controlling all aspects of political life, Sadat introduced a process of democratic reform in the mid-1970s that permitted to some extent political participation, especially, through the formation of political parties. However, in spite of the establishment of a multi-

243 *Id.* at 83.

244 Hamzawy, *supra* note 231, at 3.

245 El-Sayed, *supra* note 212, at 83.

246 *Id.*

247 Hassan *supra* note 236, at 321.

248 El-Sayed, *supra* note 212, at 84.

249 *Id.*

250 Hassan *supra* note 236, at 322.

251 SC has 264 members (176 elected by popular vote and 88 appointed by the president). At least half of the 176 members must be farmers and workers.

252 Carnegie Endowment for International Peace, *supra* note 234, at 5.

253 Stefan Svec, *Political Culture, Islam and Public Participation in Modern Egypt* 9 (Grin Verlag, 2004).

party system and the limited guarantee of political rights and freedoms, the regime continued to oppress its opposition. For instance, following the resistance against the peace treaty with Israel, the government arrested approximately 1000 opponents from across the entire political spectrum.²⁵⁴ This has also often been viewed as resulting in Sadat's assassination by an Islamist military officer in 1981.²⁵⁵ Overall, while the existence of multi-partyism and elections provided for some measures of participation, these were rather formal than substantive in nature, as they neither allowed the people to participate in the decision-making process of the state, nor in determining the nature of the political system.

2. Mubarak's Democratic Exceptionalism

Mubarak came into power in 1981. Although Mubarak renewed the state of emergency in response to Sadat's assassination, his regime demonstrated relative tolerance towards political parties in the 1980s.²⁵⁶ For example, political prisoners were released and political parties that had been banned or suspended under the Sadat's regime, were allowed to resume their political activities and participation.²⁵⁷ Moreover, moderate Islamist movements, such as the Muslim Brotherhood, were permitted to participate in the PA elections via alliances with legal political parties. Likewise, they were granted the right to publish newspapers and to voice their opposition in the media.²⁵⁸

Following the amendment of the 1972 Electoral Law, a system of proportional representation was established in 1983. Based on this system, political parties had to submit a list of candidates for each of the 48 constituencies.²⁵⁹ In this regard, the representation of political parties in the PA was dependent on whether these parties had succeeded in obtaining at least eight percent of the national vote.²⁶⁰ Consequently, particularly small parties were deprived by the amendment from representation in the PA. In view of their limited resources, small parties were neither able to provide a list of candidates for all constituencies, nor to obtain eight percent of the national vote in the elections. The amendment also banned "independent candidates," which excluded any candidate without party affiliation from competing in the elections.²⁶¹ In spite of these limitations, the elections for the PA in 1984 were more competitive than previous elections "since the re-introduction of political pluralism in 1977."²⁶² For example, the Muslim Brotherhood was permitted to compete via alliance with the Neutral Party. However, given that no other party had passed the eight percent threshold of the national vote, representation in the PA was limited to the ruling NDP with 390 seats and the Neutral Party in alliance with the Muslim Brotherhood with 58 seats.²⁶³

254 Dunne *supra* note 206, at 4.

255 *Id.*

256 *Id.*

257 El-Sayed, *supra* note 212, at 86.

258 John L. Esposito, *The Islamic Factor, in Egypt at the Crossroads: Domestic Stability and Regional Role* 50-51 (Phebe Marr ed., 1999).

259 El-Sayed, *supra* note 212, at 87.

260 Dunne *supra* note 206, at 4.

261 El-Sayed, *supra* note 212, at 87.

262 *Id.*

263 *Id.*

Due to the fact that the banning of independent candidates in the amended Electoral Law of 1983 was considered unconstitutional and in contradiction to individual rights protected in the 1971 Constitution, the SCC declared the PA elections of 1984 invalid. Though, the newly issued amendment left the system of party list-based elections unchanged, it allowed independent candidates to participate in the elections. The new elections resulted once more in an overwhelming majority of the NDP, which won 308 seats. Besides the Neutral Party that won 36 seats, the Labour Party in alliance with the Muslim Brotherhood, became the largest opposition party with 56 seats, in addition to 48 seats won by independent candidates.²⁶⁴

A ruling of the SCC in 1990 finally changed the system of party-list based elections and replaced it with an individual candidacy system "according to which the country was divided into 222 electoral constituencies with each constituency electing two deputies for the PA."²⁶⁵ This ruling constituted a major victory for the opposition parties, even though their participation in the electoral process continued to be restricted by the Emergency Law. Therefore, major opposition parties refused their participation in the 1990 elections in protest of the Emergency Law.²⁶⁶ Consequently, the election resulted in major victory of the NDP with 386 seats. Only five seats were won by the Unionist Party and 57 seats by independent candidates.²⁶⁷

In contrast to the constitutional and political processes in the 1980s that had facilitated people's participation to some extent, a process of "deliberalization"²⁶⁸ increasingly constrained participation and political rights in the 1990s. For instance, in 1992 the amendment to the Law of Political Parties imposed further constraints on the formation of parties. This law barred any political activity on the part of a party's founding members as long as the new party had not received the approval of the Committee of Political Parties' Affairs.²⁶⁹ Moreover, a major obstacle to people's ability to participate in the political process represented the amendment of Law 97/1992 in the Penal Code that widened the definition of terrorism. The law defined terrorism as "any act that entailed the use of force or the threat of use of force in order to undermine public order and threaten social peace and security."²⁷⁰ Additionally, the amendment stipulated harsher penalties, for example, acts of terrorism were referred to the Supreme State Security and the Military Courts whose rulings were not subject to appeal, could entail death penalty or hard labour and could be altered or dismissed by the President.²⁷¹

The government also amended the law governing civil society organizations. "Since Nasser, the mandate and activities of civil society organizations had been regulated by Law 32/1964, which brought all civil societies activities under the control of [...] the Ministry of Social Affairs (MOSA)."²⁷² In accordance with this law, all non-governmental organizations (NGOs) had to register with the MOSA,

264 Zaki, *supra* note 208, at 80.

265 El-Sayed, *supra* note 212, at 89.

266 *Id.*

267 Zaki, *supra* note 208, at 94.

268 Eberhard Kienle, *A Grand Delusions: Democracy and Economic Reform in Egypt* (I. B. Tauris, 2001).

269 Maria Cristina Paciello, *Egypt: changes and Challenges of Political Transition*, 1, (2011), <http://www.ceps.eu/book/egypt-changes-and-challenges-political-transition>.

270 El-Sayed, *supra* note 212, at 90.

271 *Id.*

272 *Id.* at 91.

which was empowered to deny the registration of any NGO “whose objectives were regarded as a threat to the security and social order of the republic.”²⁷³ In 1999, the government issued Law 153 to govern the activities of civil society organizations, which was changed to Law 84 in 2002.²⁷⁴ Generally, the law provided MOSA with more oversight authority over the activities of civil society organizations. For instance, the law “barred NGOs from receiving funding from any foreign donor, collecting donations from the public, or carrying out fund-raising activities without prior permission” from the Ministry.²⁷⁵ Further, the law prohibited NGOs from engaging in any political activity “covered by laws governing political parties or any activity that was political in nature.”²⁷⁶

As a result of the restrictions on political activities and the high level of regime interference in the electoral process through fraud and repression,²⁷⁷ the 1995 elections for the PA resulted in a major victory for the NDP.²⁷⁸ Given that these elections had not been supervised by public sector officials not by judges, the SCC declared the elections invalid. Even though, the following PA elections were conducted under the supervision of judges, this did not prevent the regime from interfering in the electoral process. “The judges were in control inside the polling stations, however outside the stations, security forces harassed opposition candidates and voters and arrested many candidates” belonging to opposition groups such as the Muslim Brotherhood.²⁷⁹ As a consequence, the NDP won the elections with 172 seats and 216 additional seats won by independent candidates that joined the ruling party.²⁸⁰ Only seven seats were won by the Neutral Party and 37 seats went to independent candidates including 17 seats that were obtained by the Muslim Brotherhood.²⁸¹

In 2005 Mubarak's regime introduced additional changes to the Constitution including an amendment to Article 76 allowing for multiple presidential candidates.²⁸² Despite the establishment of a system of competitive presidential elections, the requirements for the candidate eligibility continued to be restricted. In this regard, only parties that had existed for at least five years and had won at least three percent of the seats in PA and SC, were allowed to nominate a presidential candidate.²⁸³ This prevented “any party from nominating a popular figure outside the small circle of mostly elderly, well-known politicians.”²⁸⁴ In addition, Law 76/2005 required that each candidate had to be approved by at least 250 members of the PS, SC and local council.²⁸⁵ Considering that these institution were mainly controlled by the ruling NDP, the amended law deprived independent candidates from competing in

273 International Center for Not-for-Profit Law, *Arab Spring: An Opportunity for Greater Freedom of Association and Assembly in Tunisia and Egypt?*, 3, (2011) <http://www.icnl.org/research/trends/trends3-1.html>.

274 Paciello, *supra* note 269, at 1. Dunne, *supra* note 206.

275 Kienle, *supra* note 268.

276 El-Sayed, *supra* note 212, at 91.

277 *Id.*

278 Abdelrahman, *supra* note 209, at 131-134.

279 Paciello, *supra* note 269, at 2. Dunne, *supra* note 206, at 5.

280 *Id.*

281 The Estimate, *Egypt's Parliamentary Elections: An Assessment of the Results*, 23, (2000), <http://www.theestimate.com/public/111700.html>.

282 Human Rights Watch, *Elections in Egypt: State of Permanent Emergency Incompatible with Free and Fair*, 2, (2010), <http://www.hrw.org/sites/default/files/reports/egypt1110WebforPosting.pdf>.

283 *Id.*

284 Dunne, *supra* note 206, at 8.

285 El-Sayed, *supra* note 212, at 95.

the presidential elections.²⁸⁶

The first multi-candidate presidential elections were held in 2005. Although ten candidates competed in the elections, Mubarak succeeded in winning the election with 88 percent of the vote.²⁸⁷ Likewise, in the PA elections the NDP won with 149 seats, in addition to 167 seats won members of the ruling party who had competed as independent candidates. Further, 88 seats went to the Muslim Brotherhood, which became for the first time the largest opposition in the PA.²⁸⁸ Despite, the regime's continuing interference in the electoral process "through vote buying, fraud and intimidation,"²⁸⁹ the Muslim Brotherhood candidates "were allowed to campaign much more openly than in the past albeit as independents."²⁹⁰

The regime responded to the Muslim Brotherhood electoral success with de-liberalizing measures such as the systematic crack down on political opponents and popular protests.²⁹¹ Moreover, Mubarak extended the state of emergency for another two years.²⁹² In 2007, the government issued 34 constitutional amendments putting further limitations on political rights and competition.²⁹³ For example, the amendment to Article 5 on party pluralism excluded the "conduct of 'any political activity' or the establishment of 'any political parties' within 'any religious frame of reference or on any religious basis or on the basis of gender or origin'."²⁹⁴ Accordingly, the regime could "charge any religious institution or civil organization with involvement in religiously inspired political activities."²⁹⁵ Further, the amendment to Article 179, gave the regime the right to suspend the constitutional Articles 41, 44 and 45 in cases concerning the combat of terrorism.²⁹⁶ These Articles "were dedicated respectively to the prohibition of arbitrary arrest, requirement of a judicial warrant for home visits and the protection of the privacy of communications."²⁹⁷ Additionally, this amendment empowered the president to refer cases related to the "security" of the state including crimes of "terrorism" to exceptional courts including Military Courts.²⁹⁸ Operating within the framework of the state of emergency and the Emergency Law, these exceptional courts undermined the ordinary court system to the extent that the separation between judicial system and the executive branch of the government was bypassed.²⁹⁹

286 *Id.*

287 Paciello, *supra* note 269, at 3.

288 Dunne, *supra* note 206, at 5. Paciello, *supra* note 269, at 3.

289 *Id.*

290 Denis Sullivan, *Will Egypt's Muslim Brotherhood Run in 2010?*, (2009), <http://www.carnegieendowment.org/sada/2009/05/05/will-egypt-s-muslim-brotherhood-run-in-2010/6ctf>.

291 Paciello, *supra* note 269, at 3.

292 Sullivan, *supra* note 290. Mona El-Ghobashy, *The Dynamics of Egypt's Elections*, (2010), <http://www.merip.org/mero/mero092910>. Paciello, *supra* note 269, at 3.

293 Paciello, *supra* note 269, at 3.

294 El-Sayed, *supra* note 212, at 99.

295 *Id.*

296 *Id.*

297 *Id.* at 100.

298 Emergency State Security Courts were established under Article 7 of the 1958 Emergency Law. Article 9 allows the president to refer civilians accused of ordinary crimes to these courts. In this respect, the Egyptian Constitutions of 1971 provides the legal basis for the establishment of the Permanent State Security Courts. Article 171 states that "the law shall regulate the organization of State Security Courts and shall prescribe their competence." Egyptian Constitution 1971, art 171. Emergency Law, No. 162 (1952) (Egypt).

299 International Commission of Jurists, *supra* note 232, at 6.

Following these constitutional amendments, the PA elections in 2010 were marked by widespread violations including mass arbitrary arrests of hundreds of opposition candidates before the vote and restrictions on public campaigning.³⁰⁰ The election resulted in the overwhelming victory of the NDP, which won 420 seats, whereas the opposition parties won only 15 seats including six seats for the Wafd Party, five seats for the Unionist Party as well as one seat for each of the smaller parties such as the Tomorrow Party, the Social Justice, the Generation as well as the Peace Party.³⁰¹ The Muslim Brotherhood was only able to win one seat, as most of the seats won by the independent candidates went to the NDP.³⁰²

In spite of the introduction of measures to democratization, including some limited advances in political rights such as the freedom of press, “democracy” under Mubarak remained restricted to the level of formal electoral participation. Therefore, democratization was confined to the extent that it did not threaten to undermine the monopoly of the regime. For instance, while the number of political parties increased from five to 24,³⁰³ political competition continued to be limited through the repression of the opposition and electoral manipulation. In particular the Emergency Law served the regime to bypass the Constitution and to constrain political rights and freedoms.

The state of emergency was first enforced by Nasser at the beginning of the 1967 War. Since then, Egypt has been almost continuously governed under the Emergency Law.³⁰⁴ After Sadat's assassination in 1981, President Mubarak reinstated the state of emergency state, which was again renewed in 2010.³⁰⁵ The Emergency Law provides the government with far-reaching power, for instance, to arrest anyone who “threatens national security”³⁰⁶ or is suspected of “representing danger to [...] the public order.”³⁰⁷ Furthermore, the law provides the President with the authority “to monitor and seize all publications, advertisements, announcements, or other means of disseminating information.”³⁰⁸

As party to the ICCPR, Egypt has the obligation under Article 25, 18, 19 and 21 to guarantee political participation, the freedom of expression as well as to protect the right to peaceful assembly and the freedom of association.³⁰⁹ However, in a time of public emergency limited derogations to these articles, except for Article 18 on freedom of expression, are allowed.³¹⁰ The UN Human Rights Committee stated with reference to Article 4 on public emergency that “[m]easures derogating from the

300 Human Rights Watch, *Egypt: Systematic Crackdown Days Before Elections*, (2010), <http://www.hrw.org/news/2010/11/24/egypt-systematic-crackdown-days-elections>. Human Rights Watch, *supra* note 282.

301 El-Sayed, *supra* note 212, at 100.

302 Ahram Online, *Egyptian Elections 2010*, (2010), <http://english.ahram.org.eg/Category/1/5/Egypt/Egypt-Elections-.aspx>.

303 Egypt State Information Service, *Political Parties*, (2011), <http://www.sis.gov.eg/En/Story.aspx?sid=480>.

304 Emergency Law, No. 162 (1952) (Egypt).

305 Human Rights Watch, *supra* note 282, at 4.

306 Emergency Law, No. 162, art. 3, para. 1 (1952) (Egypt).

307 *Id.*

308 Emergency Law, No. 162, art. 3, para. 2 (1952) (Egypt).

309 International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) Annex, U.N. Doc. A/RES/2200(XXI) Annex (Dec. 16, 1966).

310 *Id.*

provisions of the Covenant must be of an exceptional and temporary nature" and be "limited to the extent strictly required by the exigencies of the situation."³¹¹ However, these requirements are not met in Egypt, given that the state of emergency has been rather the norm than the exceptionality.³¹² In this respect, the limitations imposed by the state of emergency on political rights and freedoms reduced democratic reforms to cosmetic measures. This "democratic exceptionalism" that limited democracy to the level of formal participation, was imposed by the regime as strategy of "democratization," holding the view that economic reforms must proceed political changes.³¹³

B. Economic Dimension of Self-Determination

1. Integration into the Global Economy

The integration into the global economy began under Sadat's "open-door policy" in 1974. Introducing a program of economic liberalization, this policy aimed at "shifting Egypt away from Nasser's centralized economy and state-led development, towards a model of capitalist economy."³¹⁴ Given that the Egyptian economy was in extreme disrepair,³¹⁵ Sadat turned almost immediately to foreign sources of capital to overcome the domestic shortfall.³¹⁶ However, the fear of being expropriated held foreign investors off entering the Egyptian market,³¹⁷ despite the government's issuance of Law 43/1974 that guaranteed protection against sequestration and nationalization.³¹⁸ Therefore, in 1976, Sadat concluded a stabilization agreement with the International Monetary Fund (IMF).³¹⁹ This agreement included measures such as the liberalization of imports, as well as the "reduction of the deficit by controlling wages and cutting subsidies in the areas of basic staples, energy and government services."³²⁰

The implementation of cutting subsidies, in particular, with respect to food, resulted in the outbreak of riots in 1977. As a consequence of the social unrest, the regime adopted "a limited version of economic liberalization under which it would be committed to opening up the economy for foreign

311 Human Rights Committee, *General Comment No. 29 on Article 4*, para. 3, (2001), <http://www2.ohchr.org/english/bodies/hrc/comments.htm>. Human Rights Watch, *Egypt: Cosmetic Changes Can't Justify Keeping Emergency Law*, (2010), <http://www.hrw.org/news/2010/05/12/egypt-cosmetic-changes-can-t-justify-keeping-emergency-law>.

312 Human Rights Watch, *supra* note 311.

313 Hamzawy, *supra* note 231, at 3.

314 El-Sayed, *supra* note 212, at 104.

315 For instance, the public sector was "acutely inefficient and required constant infusions of capital, the physical infrastructure of the country was crumbling, and military spending consumed a full 20 percent of the gross national product," in view of the 1973 War with Israel. See John Waterbury, *The Egypt of Nasser and Sadat: The Political Economy of Two Regimes* (Princeton University Press, 1983).

316 Moustafa, *supra* note 213, at 889-890.

317 Under President Nasser extensive nationalization programs were initiated between 1960 and 1964, which nationalized the entire private sector, with only small workshops and shopkeepers still in control of their property. See Waterbury, *supra* note 315.

318 Moustafa, *supra* note 213, at 891.

319 El-Sayed, *supra* note 212, at 107.

320 Gouda Abdel-Khalek, *Stabilization and Adjustment in Egypt: Reform or De-Industrialization 2* (Edward Elgar Publishing, 2001).

investment, but without compromising its corporatist role and welfare obligations."³²¹ Throughout the 1970s and 1980s, the government continued to follow a etatist model of development with the objective of avoiding political instability through mass protests. Accordingly, the state remained the main actor in the economy with respect to areas such as basic social services and subsidies, resource allocation and employment.³²²

In contrast in the 1990s, the government under Mubarak gave up on the etatist model of development to foster the integration into the global economy through increased economic liberalization. In this context, the regime committed to the implementation of the Economic Reform and Structural Adjustment Program (ERSAP) under the supervision of the IMF and World Bank (WB). On the one hand, the ERSAP was concerned with "short-term 'stabilization' which lay in the domain of the IMF, and included fiscal and monetary reforms to reduce public consumption, increase public savings, and achieve sustainable economic growth."³²³ On the other hand, ERSAP initiated "long-term 'structural adjustment' which was the responsibility of the WB and included measures such as public-enterprise reform, domestic price liberalization, foreign trade liberalization, and private sector reform."³²⁴

The implementation of the ERSAP resulted in strong economic growth, notably, between 2003 and 2007.³²⁵ However, the promotion of market-oriented reforms primarily benefited the interests of the regime and its supporters, allowing them to reinforce their power, while excluding the rest of the population from sharing in the economic development.³²⁶ Particularly, the deterioration of the socio-economic conditions through the rise of unemployment and poverty that accompanied the retreat of the state from welfare services, contributed to the exclusion of large parts of the population.

In the context of the ERSAP, the state increasingly withdrew from its role as "primary economic actor to a more subservient role in which it became mainly committed to support the private sector and provide a conducive business environment for foreign investment."³²⁷ In order to reduce the state involvement in the economy including the public expenditure, subsidies for social services were increasingly declined.³²⁸ For example, in 2006 the fuel subsidy was reduced, which resulted in a 30 percent increase in the price of fuel.³²⁹ Other subsidy cuts affected, for instance, the prices of electricity and transportation.³³⁰

The withdrawal of the state from the economy also increased the level of unemployment. For

321 El-Sayed, *supra* note 212, at 108.

322 *Id.*

323 *Id.*

324 *Id.* at 113.

325 For instance, in 2007, Egypt experienced strong economic growth of 7,1 percent. Paciello, *supra* note 269, at 7. Ben W. Heineman, *Egypt's Quest for Economic (Not Just Political) Legitimacy*, (2011) http://www.law.harvard.edu/programs/plp/pdf/Egypt's_Quest_for_Legitimacy.pdf.

326 Paciello, *supra* note 269, at 7.

327 El-Sayed, *supra* note 212, at 124.

328 Paciello, *supra* note 269, at 9. Ahmed Galal, Social Expenditure and the Poor in Egypt (Egyptian Center for Economic Studies, 2003). Mustapha K. Al-Said, *Kefaya at a Turning Point, in Political and Social Protest in Egypt* (Nicholas Hopkins ed., 2009).

329 El-Sayed, *supra* note 212, at 125.

330 *Id.*

instance, the state abandoned its commitment to job creation in state-owned enterprises or through public investment. This measure "was not matched with a significant growth in private investment, whether domestic or foreign."³³¹ Moreover, with respect to the restructuring and privatization of the public sector, the regime implemented among other measures "a policy of forced 'early retirement' of public sector employees in order to reduce labour cost in the production process" in state-owned enterprises.³³² As a result of this policy approximately 450,000 public sectors employees had to leave their jobs between 1993 and 2002.³³³

Other measures that were implemented included the liberalization of price controls that raised the prices of basic goods such as sugar, bread and tea.³³⁴ The cost of living was further increased through the devaluations of the Egyptian pound by almost 100 percent in the context of the reform of the exchange rate. The devaluations advanced in particular the prices of energy and imported commodities, including basic food items such as wheat and flour increased. For instance, the price of bread was raised by 36,4 percent, food oils by 60 percent, sugar by 20,8 percent in 2008.³³⁵ However, the increase of the cost of living was not accompanied with higher salaries as the reduction of public expenditure to attract private investment was also directed towards the decrease of the cost of labour.³³⁶

These and other initiatives that were taken under the ERSAP contributed to the deterioration of socio-economic conditions. In this regard, the Committee on Economic, Social and Cultural Rights observed that "structural adjustment programmes and economic liberalization policies [...] impeded the implementation of the [ICESCR]'s provisions, particularly with regard to the most vulnerable groups of Egyptian society."³³⁷ This tendency is evident in the rise of poverty. According to the WB, absolute poverty³³⁸ increased from 16,7 percent in 2000 to 19,6 percent in 2005³³⁹ and 23,4 percent in 2008.³⁴⁰ Given that "participation and influence over decision-making are usually dependent on the degree of access to material resources available," the deterioration of socio-economic conditions also constrained the opportunities of political participation.³⁴¹ Therefore, the retreat of the welfare state not only contributed to the widening of the gap between the rich and the poor, but likewise alienated large

331 Samia Fawzy, *Investment Policies and the Unemployment Problem in Egypt 12* (Egyptian Center for Economic Studies, 2002).

332 El-Sayed, *supra* note 212, at 127.

333 Land Center for Human Rights, *Labor Conditions in Egypt*, (2003), http://www.omct.org/files/interdisciplinary-study/ii_b_2_egypt_general_evaluation.pdf.

334 El-Sayed, *supra* note 212, at 129.

335 Central Bank of Egypt, *Annual Report*, (2008) http://www.cbe.org.eg/public/Annual_2007-2008En.pdf.

336 El-Sayed, *supra* note 212, at 131.

337 Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights : Egypt* (2000), <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/E.C.12.1.Add.44.En?Opendocument>.

338 Absolute poverty is determined by the minimum value of consumption needed to be deemed "not poor" in the world's poorest countries (approximately US\$ 1,25 a day). World Bank, *World Development Indicators 2008*, 2-3 (World Bank Publications, 2008).

339 Heba el-Laithy, *Complete and Partial Analysis of Pro-Poor Growth in Egypt 2000-2008*, (2009), http://www.erf.org.eg/CMS/uploads/pdf/1257862657_PO_09_laithy.pdf.

340 Paciello, *supra* note 269, at 7.

341 El-Sayed, *supra* note 212, at 137.

parts of the population from politics.³⁴² In contrast to the lack of access to resources of the majority of the Egyptian population, other groups, particularly, business groups gained access to resources and political influence.³⁴³

Through the implementation of selective economic reforms, the regime protected the interests of influential groups and regime supporters including the military.³⁴⁴ In this respect, economic liberalization served the regime “to re-distribute privileges to regime supporters and co-opt important segments of the private sectors” in order to reinforce its social basis and guarantee its electoral support.³⁴⁵

2. Economic Liberalization and Democratization

Economic liberalization aimed at integrating Egypt into the global economy contributed to “an environment of added constraints over political participation and pluralism.”³⁴⁶ In particular, the socio-economic impact of the structural adjustment program triggered popular resistance, to which the regime responded with repression.³⁴⁷ In this regard, rather than advancing a process of democratization, the implementation of economic liberalization required the existence of an authoritarian state. While the regime “reduced its developmental role, [it] maintained the monopoly over political power [...] to enforce its political and economic agenda through the use of coercion and repression of political and civil rights.”³⁴⁸

Economic liberalization and democratization are often assumed to be “two mutually-reinforcing processes, arguing that economic growth and liberalization largely depend on open competition and predictability that could only be found in democratic societies.”³⁴⁹ Therefore, democracy is considered as the political equivalent of the free market. In this respect, the competition between individuals in the political sphere is viewed as bearing resemblance to the interaction of the forces in the economic sphere of the free market.³⁵⁰ On the contrary to authoritarian centralization, which extinguishes “entrepreneurial initiatives and stifle informal sector activities, democratic rights are seen to safeguard property and contractual rights, which in turn create the security and incentives necessary for

342 *Id.*

343 Roger Owen, *Socioeconomic Change and Political Mobilization in Egypt*, in *Democracy without Democrats: The Renewal of Politics in the Muslim World* 242 (Ghassan Salame ed., 1994).

344 For example, the Administration of National Service Projects controlled by the military ran 16 factories by 1994, which employed 5000 workers producing everything from agriculture machines to medications to ovens. Hillel Frisch, *Guns and Butter in the Egyptian Army*, 5 *Middle East Rev. Int'l. Aff.* (2001). Steven Heydemann, *Upgrading Authoritarianism in the Arab World*, (2007), <http://www.brookings.edu/~media/Files/rc/papers/2007/10arabworld/10arabworld.pdf>.

345 Sufyan Alissa, *The Political Economy of Reform in Egypt: Understanding the Role of Institutions*, 5 *Carnegie Paper*, (2007), http://carnegieendowment.org/files/cmec5_alissa_egypt_final.pdf. Joel Beinin, *Neo-Liberal Structural Adjustment, Political Demobilization, and Neoauthoritarianism in Egypt*, in *The Arab State and Neo-Liberal Globalization: The Restructuring of State Power in the Middle East* (Laura Guazzone et al. eds., 2009).

346 El-Sayed, *supra* note 212, at 334.

347 *Id.*

348 *Id.* at 335.

349 *Id.* at 151.

350 Rita Abrahamsen, *Disciplining Democracy: Development Discourse and Good Governance in Africa* 115 (Zed Books, 2001).

economic growth.”³⁵¹

As the case of Egypt has illustrated, economic liberalization hindered rather than facilitated democratization. As economic liberalization benefited mainly influential groups with connections to the regime,³⁵² these groups had no interest in contesting the existing power structure.³⁵³ In this context, democratization was perceived as threat to the political status quo as well as the established socio-economic privileges enjoyed by the regime and its supporters, given that democratization raises opportunities for those disadvantaged by economic liberalization to organize and eventually block the implementation of policies that are not directed towards the benefit of the people.³⁵⁴ However, this means that economic liberalization in Egypt has neither empowered nor benefited the people on a general basis, for instance, by making the people the centre of the political decision-making. In this sense, the requirements for the liberalization of the Egyptian economy appeared to be incompatible with “those requirements necessary for the institutionalization of democratic principles and procedures,” such as the guarantee of rights and freedoms that allow for the expression of the popular will.³⁵⁵ In view of the deterioration of socio-economic conditions among the majority of the Egyptian population as a result of economic liberalization,³⁵⁶ the regime responded with authoritarian measures to contain social unrest and political opposition, given that the financial assistance provided by the WB and IMF was considered indispensable to the survival of the Egyptian economy.³⁵⁷ Accordingly, democracy was perceived as irreconcilable with the adjustment to the global economy, in particular, because democratization might open up political space for popular mobilization, “which could in turn undermine the political base of the regime.”³⁵⁸ In this respect, the erosion of political rights occurred simultaneously with the implementation of economic liberalization.³⁵⁹ Therefore, instead of advancing a process of democratization, the implementation of economic liberalization contributed to the stabilization rather than the deconstruction of authoritarianism in Egypt.³⁶⁰

In spite of the diversity of the countries in the MENA and beyond,³⁶¹ in which “democracy has stagnated or been rolled back, most have ended up in a similar state - not with full-fledged dictatorships, but with a particular style of semi-authoritarian regime” or low-intensity democracy.³⁶²

351 *Id.*

352 Heydemann, *supra* note at 344. Ulrich Wurzel, *The Political Economy of Authoritarianism in Egypt: Insufficient Structural Reforms, Limited Outcomes and a Lack of New Actors, in The Arab State and Neo-Liberal Globalisation: The Restructuring of State Power in the Middle East* (Laura Guazzone et al.eds., 2009).

353 Paciello, *supra* note 269, at 5.

354 Bruce K. Rutherford, *Egypt after Mubarak: Liberalism, Islam, & Democracy in the Arab World* 232 (Princeton University Press, 2008). Nadia Ramsis Farah, *Egypt's Political Economy: Power Relations in Development 80-82* (American University in Cairo Press, 2008).

355 El-Sayed, *supra* note 212, at 151.

356 *Id.*

357 Adam Hanieh, *Egypt's Orderly Transition? International Aid and the Rush to Structural Adjustment*, (2011), <http://www.jadaliyya.com/pages/index/1711/egypts-%E2%80%98orderly-transition%E2%80%99-international-aid-and->.

358 Raymond A. Hinnebusch, *The Politics of Economic Reform in Egypt*, 14 *Third World Q.* 168 (1993).

359 El-Sayed, *supra* note 212, at 153.

360 Tsourapas, *supra* note 201.

361 *See supra* note 196.

362 Carothers, *supra* note 195, at 90.

Those critical of the neo-liberal globalization argue that “to free global markets from state control through deregulation,” for instance, by means of the privatisation of public enterprises and the institutionalisation of flexible labour markets, has created a “minimalist state.”³⁶³ Even though, this concept entails an elected government, it constrains peoples' right to political participation, which is central to substantive democracy and popular sovereignty.³⁶⁴

The emergence of global markets “operating as extra-juridical, extra-jurisdictional or supra-national phenomena” challenges the very notion of democracy.³⁶⁵ In this regard, the inability of national governments to impose rules and regulations to control the forces of the global market has undermined democratic accountability and political legitimacy.³⁶⁶ Moreover, the lack of democratic participation of peoples in the global economy,³⁶⁷ “precludes the exercise of real national sovereignty and the implementation of truly democratic decisions” on the national level.³⁶⁸ In this context, particularly, the imposition of structural adjustment programs on governments by international institutions such as the IMF and WB, directly impacts upon peoples' right to determine the nature of their economic and political system. In addition to regulating the labour market, structural adjustment programs also shape the extent to which people can access, for instance, education and pensions. In this respect, they set the policy choices available to governments in pivotal areas of political and constitutional authority.³⁶⁹ Consequently, the failure of international institutions to introduce “mechanisms by which they can be held accountable to local people,”³⁷⁰ compromises the right of peoples to political and economic self-determination.³⁷¹

In order to enhance the interaction between national governments and the global market, the Post-Washington-Consensus³⁷², for instance, stresses the importance of democratic institutions to improve economic performance of nation states.³⁷³ However, this not only reduces the concept of democracy to the political sphere of the nation state, but also takes existing power structures at the global level, for example between powerful and less powerful states, as predetermined.³⁷⁴ In this respect, without

363 Ziya Öniş & Fikret Şenses, *Rethinking the Emerging Post-Washington Consensus*, (2003), http://www.erc.metu.edu.tr/menu/sayfa.php?icerik=03_9&lang=eng&nav=yes. Nqosa L. Mahao, *The Constitutional State in the Developing World in the Age of Globalization: From Limited Government to Minimum Democracy*, 10, (2010), <http://www.ajol.info/index.php/idd/article/viewFile/52890/41491>.

364 Mahao, *supra* note 363, at 2.

365 *Id.* at 11.

366 Öniş & Şenses, *supra* note 363, at 28.

367 Andre G. Frank, *Marketing Democracy in an Undemocratic Market*, in *Low Intensity Democracy: Political Power in the New World Order* (Barry Gills, et al. eds., 1993).

368 *Id.*

369 Anne Orford, *Contesting Globalization: A Feminist Perspective on the Future on Human Rights*, 8 *Transnat'l. L. & Contemp. Probs.*, 171, 176 (1998).

370 *Id.*

371 Gills & Rocamora, *supra* note 20, at 512.

372 The Post-Washington-Consensus constitutes a set of neo-liberal policies propagated by the Bretton Woods institutions like the WB and IMF.

373 Öniş & Şenses, *supra* note 363, at 20.

374 In the global economy the dominance of developed countries is extensive. For example, with respect to production, finance, trade and technology, “90 percent of all patents originate in these countries, and two-thirds of world trade is controlled by only 500 transnational corporations, again originating mostly from developed countries.” Richard Kozul-Wright, *The End of Global Laissez-Faire?*, Address at the Royal Society for the Encouragement of Arts, Manufactures and Commerce (Apr. 30, 2003).

making global institutions of capital accountable, representative institutions at the national level, “no matter how 'democratic' in form,” will simply be a reflection of the undemocratic power relations of society.³⁷⁵

375 Gills & Rocamora, *supra* note 20, at 520.

IV. CONCLUSION

The popular demonstrations in Egypt, which led to the resignation of President Mubarak on February 11, 2011 have not ended, albeit the Supreme Council of the Armed Forces (SCAF), which has assumed the control of the government, declared its intention to introduce a process to democratic transition.³⁷⁶ The principal goal of the protests continues to constitute the demand for the radical change of the system defined by corruption, oppression and a tightly restricted space for political organization and participation.³⁷⁷ In this regard, the protesters' demands for "bread, freedom, and social justice"³⁷⁸ entail the "non-ideological" desire to recapture the political sphere to political and economic self-determination.

Since the establishment of the Egyptian Republic under President Nasser, political self-determination has been state-centred, given that the authoritarian state structures rather allowed for the imposition of reforms from above than the expression of the popular will. Although under President Sadat the existence of multi-partyism and elections provided for some measures of participation, these were rather formal than substantive in nature as they neither allowed the people to participate in the decision-making process, nor to determine the nature of the political system. Likewise, under President Mubarak "democracy" remained restricted to the level of formal electoral participation, despite the introduction of some democratic measures including limited advances in political rights. Politically, self-determination was thus confined to the extent that it did not threaten to undermine the monopoly of the regime.

With respect to the economic sphere, the implementation of market-oriented reforms, which began under Sadat, aimed at the transformation of Nasser's state-led economy into a capitalist model of economy. The economic liberalization and structural adjustment resulted in strong macro economic growth, though this primarily benefited the regime and its supporters, notably the business groups and the military. In this context, the deterioration of the socio-economic conditions contributed to the exclusion of large parts of the population. The increase in poverty also limited the opportunities of the majority of the Egyptians to political participation. In this regard, democratization was perceived as threat to the political status quo and the established socio-economic privileges enjoyed by the regime and its supporters. Accordingly, economic liberalization in Egypt has neither empowered nor benefited the majority of the Egyptians to the extent that it allowed for people's self-determination.

As the decades of market-oriented reforms have illustrated, economic liberalization in Egypt benefited mainly influential groups with connections to the regime, whereas the vast majority of the population suffered under deteriorating living conditions. Therefore, instead of advancing a process of democratization, the implementation of economic liberalization contributed to the consolidation rather

376 The International Center for Not-for-Profit Law, *Arab Spring: An Opportunity for Greater Freedom of Association and Assembly in Tunisia and Egypt?*, (2011), <http://www.icnl.org/research/trends/trends3-1.html>.

377 Cilja Harders, *Neue Proteste, alte Krisen: Ende des autoritären Sozialvertrags*, Das Parlament, Sept. 26, 2011.

378 Solava Ibrahim, *A Tale of Two Egypts: Contrasting State-Reported Macro-Trends with Micro-Voices of the Poor*, 32 Third World Q. 1347, 1348 (2011).

than the deconstruction of authoritarianism. In this regard, the imposition of structural adjustment packages by international institutions has directly impacted upon peoples' right to political and economic self-determination. Hence, the establishment of substantive democracy at the national level is unlikely without making international institutions including the "private" domain of the global markets accountable. In this context, the demonstrations that erupted in Egypt on January 25, 2011, can not be reduced to the question of "democratic transition" as long as the lack of democracy at the global level precludes exercise of real sovereignty and the implementation of truly democratic decisions at the national level.